

**State of Iowa**  
**1950**

---

**TWENTY-EIGHTH BIENNIAL REPORT**

OF THE

**ATTORNEY GENERAL**

FOR THE

**BIENNIAL PERIOD ENDING DECEMBER 31, 1950**

---

**ROBERT L. LARSON**  
Attorney General

---

Published by  
**THE STATE OF IOWA**  
Des Moines



**PERSONNEL**  
**DEPARTMENT OF JUSTICE**

ROBERT L. LARSON.....	Attorney General
DON HISE.....	First Assistant Attorney General
OSCAR STRAUSS.....	Assistant Attorney General
CLARENCE A. KADING.....	Assistant Attorney General
KENT EMERY.....	Assistant Attorney General
HENRY W. WORMLEY.....	Special Assistant Attorney General
	—State Tax Commission
FOLSOM EVEREST.....	Special Assistant Attorney General
	—State Highway Commission
CHARLES F. O'CONNOR.....	Special Assistant Attorney General
	—State Board of Social Welfare
EARL R. SHOSTROM.....	Special Assistant Attorney General
	—Claims
IRA A. BUCKLES.....	Administrative Assistant
DOTTIE M. CUMMINGS.....	Secretary
WINIFRED FOLEY.....	Secretary
BETTE LUE HOLBROOK.....	Secretary
BURDENA MUNGER.....	Secretary

## ATTORNEY GENERALS OF IOWA

1853 - 1951

NAME	HOME COUNTY	YEARS SERVED
David C. Cloud.....	Muscatine .....	1853-1856
Samuel A. Rice.....	Mahaska .....	1856-1861
Charles C. Nourse.....	Polk .....	1861-1865
Isaac L. Allen.....	Tama .....	1865-1866
Frederick E. Bissell.....	Dubuque .....	1866-1867
Henry O'Connor.....	Muscatine .....	1867-1872
Marsena E. Cutts.....	Mahaska .....	1872-1877
John F. McJunkin.....	Washington .....	1877-1881
Smith McPherson.....	Montgomery .....	1881-1885
A. J. Baker.....	Appanoose .....	1885-1889
John Y. Stone.....	Mills .....	1889-1895
Milton Remley.....	Johnson .....	1895-1901
Charles W. Mullan.....	Black Hawk .....	1901-1907
Howard W. Byers.....	Shelby .....	1907-1911
George Cosson.....	Audubon .....	1911-1917
Horace M. Havner.....	Iowa .....	1917-1921
Ben J. Gibson.....	Adams .....	1921-1927
John Fletcher.....	Polk .....	1927-1933
Edward L. O'Connor.....	Johnson .....	1933-1937
John H. Mitchell.....	Webster .....	1937-1939
Fred D. Everett.....	Monroe .....	1939-1940
John M. Rankin.....	Lee .....	1940-1947
Robert L. Larson.....	Johnson .....	1947-

# REPORT OF THE ATTORNEY GENERAL

December 31, 1950

HONORABLE WILLIAM S. BEARDSLEY  
*Governor of Iowa*

Dear Governor:

In compliance with Section 17.6 of the 1950 Code of Iowa, I herewith submit the biennial report of the Attorney General covering the period of his regular term beginning January 1, 1949 and ending December 31, 1950.

Chapter 13 of the 1950 Code of Iowa provides:

“It shall be the duty of the attorney general, except as otherwise provided by law to:

1. Prosecute and defend all causes in the supreme court in which the state is a party or interested.

2. Prosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in his judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly.

3. Prosecute and defend all actions and proceedings brought by or against any state officer in his official capacity.

4. Give his opinion in writing, when requested, upon all questions of law submitted to him by the general assembly or by either house thereof, or by any state officer, elective or appointive. Questions submitted by state officers must be of a public nature and relate to the duties of such officer.

5. Prepare drafts for contracts, forms, and other writings which may be required for the use of the state.

6. Report to the governor, at the time provided by law, the condition of his office, opinions rendered, and business transacted of public interest.

7. Supervise county attorneys in all matters pertaining to the duties of their office, and from time to time to require of them reports as to the conditions of public business intrusted to their charge.

8. Promptly account, to the treasurer of state, for all state funds received by him.

9. Keep in proper books a record of all official opinions, and a register of all actions prosecuted and defended by him, and of all proceedings had in relation thereto, which books shall be delivered to his successor.

10. Perform all other duties required by law."

During the biennium this Department has participated in 62 criminal cases which were appeals from the various District and Municipal Courts of the State. Written briefs and arguments were prepared in the majority of cases and oral arguments were made before the Supreme Court. Of all the cases submitted as above stated, the defendant-appellants were successful in only five cases. In addition to criminal appeals there were filed six petitions for writs of Habeas Corpus by inmates of state institutions, and in which this department has taken an active part. In no case was the petitioner successful in obtaining his release on a writ of habeas corpus.

In connection with the anti-gambling campaign this department took an active part in the seizure of certain alleged gambling devices, and a test case to determine whether or not such devices are gambling devices per se is pending before the Supreme Court.

There are at the present time twenty-one criminal cases in which an appeal has been perfected to the Supreme Court and in which this department is taking an active part but which have not as yet been submitted.

Under the statutes by which this department is charged with the duty of supervision of admissions to the Bar there have been conducted five bar examinations in Iowa City and three in Des Moines. A total number of 464 candidates for admission to the bar have been examined and, in accordance with the Rules of the Supreme Court, this department has moved the admission, without examination, of five applicants.

This department has called two schools of instructions each year of the biennium for County Attorneys of the State and has conducted the same.

It has also worked very closely with the Legislative committee of the County Attorney's Association in developing and presenting proposed legislation of interest to the County Attorneys and designed to further the proper administration of justice.

This department has screened many applications for requisitions addressed to the Governor by the various County Attorneys of the State, and has approved or rejected the numerous applications for requisitions addressed to the Governor

by the Governors of the various demanding states where an alleged fugitive has taken refuge in the State of Iowa.

The Department has had occasion to litigate the question of the power of the Superintendent of Public Instruction over appeals to the Superintendent from orders of local boards and county boards in fixing transportation routes and designations. This power was litigated in the case of *Bremer County Board of Education vs. Jessie M. Parker, et al.*, determined by the Supreme Court and reported in 45 N.W. 2d, 567. The orders of the Superintendent on such appeals were held to be final and not subject to review by the courts.

There was also litigated the power of the county superintendent to revoke a teacher's certificate in the case of *Chester McKim vs. Walter Petty, County Superintendent*, and Jessie M. Parker, State Superintendent of Public Instruction, decided by the Supreme Court, whose opinion is reported in 45 N.W. 2d, 157. On the fact and jurisdictional situation presented, revocation of the McKim certificate by the county superintendent was confirmed by the Superintendent of Public Instruction, and was likewise confirmed by the Supreme Court.

The Department was also engaged in litigation arising out of the Estate of Sylvester C. Williams, deceased, on behalf of the State Board of Education. This litigation consisted of two cases and the interest of the State Board of Education involved the share of the estate that would descend to the State Board as the residuary legatee. The two cases were *Hamborg, Executor vs. Jessie Wilcox, Guardian*, which case was decided by the Supreme Court and appears in 45 N.W. 2d .... The other case is *Jessie Wilcox, Guardian vs. Hamborg, Executor of the Estate of Sylvester C. Williams, deceased*, which case is pending before the Supreme Court.

The Department also on showing made to the Department by the Auditor of State instituted action in the Story County Court against the Home Savings and Loan Association of Ames, Iowa, as a result of which the Association was placed in the hands of a receiver and an orderly liquidation of such Association is being conducted.

Considerable time was spent by the Department in the preparation and presentation of resistance to the attack made on the constitutionality of the World War II Soldiers' Bonus Act as passed by the 52nd General Assembly and subsequently amended by the 53rd General Assembly. Prior to the offer of the first group of bonds authorized under the Act as amended, an action was started by a taxpayer to enjoin the state officials from proceeding with the sale of the bonds in

groups as authorized by the amended Act. The constitutionality of the Act was upheld by the Supreme Court in its decision in the case of *Knorr vs. Beardsley*, 240 Iowa 828, decided in June, 1949. The decision is an important future guide as it deals with the scope of the limitations contained in our constitution regarding State indebtedness. It established the rule that the final decision as to the policy and plan regarding the sale of general obligation bonds rests in the legislative body and is subject to certain changes even after the authorization for indebtedness has been affirmatively voted by the people.

During the biennium the Department participated in eight actions at the request of the State Department of Health. Three of these were in the form of injunction proceedings in various district courts against women found to be practicing cosmetology without a license; two were for the purpose of revoking licenses to practice medicine and surgery on the ground that the holder of the license was guilty of unprofessional conduct in the procurement of a criminal abortion; one was the revocation of the license of a registered nurse on the grounds that she had become addicted to the use of drugs. Also during the period an unusual action resulted in the obtaining of a permanent injunction against a woman licensed as a registered nurse, restraining her from holding herself out to the public as one engaged generally in the healing arts and from practicing medicine. The other action was in successfully defending the Commissioner of Public Health in a mandamus action in which there was an attempt to force the issuance of a barbershop license in a case where the shop construction and arrangement did not meet the standards prescribed by the State Department of Health.

In the Supreme Court decision in the case of *Hiatt vs. Soucek*, 240 Iowa 300, decided in March, 1949, the constitutionality of the statutes authorizing the Board of Control to transfer inmates of the insane ward at the Men's Reformatory to the State mental hospitals upon the termination of their criminal sentence was upheld. The court recognized the specific provision for a hearing on a writ of habeas corpus as a prompt subsequent judicial review so as to satisfy the due process clause of the constitution.

As has always been the case the Department participated in the final disposition of several workmen's compensation cases involving injury to State employees and also in many cases involving controversies over the legal settlement of institutional patients between various counties with final disposition being made as to all pending court actions prior to the close of the biennium.

The Department has handled approximately thirty lawsuits involving the department of public safety, the banking department, insurance department, and the conservation commission. Two of the cases handled were determined adversely to the State and one case was pending in the Supreme Court at the close of the biennium. The pending case involved questions of constitutionality of the Financial Responsibility Act. It arose in Clinton county and its constitutionality has been sustained on all counts in the District Court. Approximately one hundred opinions were written on questions relating to insurance, securities, corporations, banking, conservation and public safety. Numerous articles of incorporation, amendments to insurance articles and several merger arrangements were examined. The office assisted the Iowa Highway Safety Patrol and the State Conservation Commission in conduct of schools of instruction on matters of law pertaining to the duties of members of these organizations and explaining the laws which they enforce.

Since the last biennial period, the Attorney General's office has represented the State Tax Commission in considerable litigation.

The office successfully represented the Inheritance Tax Division of the Tax Commission in the Fannie Wickham case wherein it was established that property was to be valued as of the date of the death of the life tenant for the purpose of establishing the base on which to collect an inheritance tax from the remaindermen. Several cases have been tried relative to sustaining the appraisal of the inheritance tax appraisers; in the majority of these cases the Attorney General was successful. These cases involved only the question of the correct determination of value.

The Supreme Court reversed the Trial Court in the Morrison-Knudson case and held that property used by a foreign contractor must have been purchased primarily for use in the state of Iowa in order to be subject to the Iowa Use Tax.

There is pending, at the present time, considerable litigation relative to the taxability of Diesel power plant units under the "readily obtainable" clause contained in the Use Tax Act. This litigation is pending in the Courts and awaiting trial and will, undoubtedly, be presented to the Supreme Court by either this department or the plaintiffs.

Many opinions were given relative to the County Assessor Law which is comparatively new and, likewise, difficulty still attends the administration of the soldier's credit and homestead exemption act. The principal question involved

in the foregoing was whether or not the applicants could qualify under the law. The law sets up certain standards and a recheck of the applications by field auditors resulted in considerable controversy as to whether or not such exemptions should be allowed.

Some questions have arisen as to the taxability of joint property, but on the whole this question has not proven troublesome.

Considerable money has been collected in instances where taxable property has been overlooked in the Inheritance Tax Division and which taxes come to light because of the present abundant exchange of properties during the past two years.

This department has advised the Liquor Commission as to leases and routine matters, none of which are of any particular import and relate only to the ordinary operation of the business. The County Assessor Law requires a great deal of attention inasmuch as it is comparatively new, and the adjustment of values throughout the state, to promote general uniformity, has caused a great amount of work and the writing of opinions by the Attorney General's office.

The duty of sustaining the constitutionality of the Cigarette Fair Sales Act fell upon this department because an action was commenced against the Tax Commission and state officers. The case was prosecuted to a successful conclusion in the Supreme Court and it was unanimously decided that the Act, as passed by the Legislature, was constitutional.

There are probably twenty-five appeals on soldier's credit, ten on homestead credit and some twenty-five on the question of the taxability of Diesel powered generators now pending in the Courts which must be tried and, undoubtedly, some of which will have to be followed through to the Supreme Court.

The work of the Special Assistant Attorney General for the State Department of Social Welfare consists in handling the legal problems arising in the administration of the State program for old age assistance, blind assistance, aid to dependent children, child welfare, and writing requested opinions on problems relating to these fields.

The old age assistance program gives rise to the greatest amount of legal work for the Assistant Attorney General assigned to the Welfare Department. At all times, there are approximately 1,500 estates of deceased old age assistance recipients being probated or administered, in which the State Department has filed a claim.

During the past biennium, claims to recover amounts granted for old age assistance have been filed at the rate of approximately 85 a month. In those estates in which real property was left, it was necessary that the Attorney General's office file Answers to the Applications of the Administrators to sell the real property to pay debts. Because additional claims were filed by other creditors of the deceased, a good deal of the time of the Special Assistant Attorney General was devoted to establishing and defending the priority of the claims of the State Department of Social Welfare. In order to properly do this, it has been necessary to check the final reports of administrators and executors in all of the estates of deceased old age assistance recipients. In those cases where there was disagreement as to the priority of claims, it was necessary to appear at the hearing on the final report to assert and defend the status of the State Department as a claimant in the estate. Copies of Court Orders authorizing the sale of the real estate had to be obtained and checked.

In those instances where the old age assistance lien could not be liquidated through the administration of the estate of the decedent, this office has had to foreclose the lien or obtain the necessary quit claim deeds. The existence of the lien has also made it necessary to file answers asserting the lien in a great many foreclosures, partition and quiet title actions. Contested trials have been had in a number of cases, and in all cases, the decree had to be checked and approved.

The case of *Gillie Thomas vs. State Board of Social Welfare* was appealed from a ruling in favor of the plaintiff by the District Court of Lee County, to the Supreme Court. A reversal of the lower court's decision was obtained and the Supreme Court's decision in the case is now authority for the proposition that Section 249.20 impressing a lien upon the property of a non-recipient spouse, for old age assistance rendered the other spouse, is constitutional. At the present time, there is pending in the Supreme Court, the case of the Estate of Mary Kupka. When this case is decided, there will be authority on the construction of Section 249.18, which authority has been lacking up to the present time.

A large number of promissory notes belonging to the State Department of Social Welfare have been collected by correspondence. Judgments have been obtained on other notes.

The participation of the Child Welfare Department as an investigating agency in adoption proceedings, has resulted in legal advice from this office. Many letters have been written to attorneys handling these adoption matters with suggestions as to curing defects in the proceedings.

The State Board of Social Welfare, from time to time, has had to call for opinions relating to personnel and jurisdictional problems. Additionally, the State Board has been represented on all appeals to the District Court from decisions of the State Board on applications for old age assistance.

The foregoing is only a small part of the civil litigation which has occupied this department. One further matter should be mentioned: During the session of the 53rd General Assembly the services of this department were made available to the legislature and its members for counsel in connection with the legislative session.

Immediately following this report is a summary of the work handled by the special assistant to the State Highway Commission.

In submitting this report, I want to express my appreciation to all public officials of the state for the splendid cooperation with this Department.

Respectfully submitted,

ROBERT L. LARSON

*Attorney General of Iowa*

## REPORT OF SPECIAL ASSISTANT ATTORNEY GENERAL AND COUNSEL TO THE IOWA STATE HIGHWAY COMMISSION

January 1, 1949 to December 31, 1950, inclusive

### Appeals from Condemnation

Appeals pending January 1, 1949.....	18
Appeals instituted during above period .....	36
Old appeals tried or settled during above period.....	12
New appeals tried or settled during above period.....	26
Condemnation appeals pending December 31, 1950.....	16

### Miscellaneous Cases

(Garnishment, Prosecution on Motor Vehicle Violations, Partition,  
Damage, Mandamus, Injunction, Quiet Title and Drainage.)

Miscellaneous cases pending January 1, 1949.....	8
Miscellaneous cases instituted during above period .....	13
Old miscellaneous cases disposed of during above period.....	8
New miscellaneous cases disposed of during above period.....	8
Miscellaneous cases pending December 31, 1950.....	5

### Retained Percentage Cases

(On contractors' contracts)

Percentage cases pending January 1, 1949 .....	1
Instituted during above period .....	8
Old cases disposed of during above period .....	1
New Cases disposed of during above period.....	5
Percentage cases pending December 31, 1950 .....	3
Total Number of all Cases Tried or Disposed of during period.....	60
Total Number of All cases pending December 31, 1950 .....	24
Supreme Court Appeals disposed of during period.....	4
Official Attorney General Opinions written.....	15

## DEPARTMENTS AND OFFICERS REQUESTING OPINIONS

### Departments

Department	Page in Report	Department	Page in Report
Auditor, State.....	56, 94, 100, 115, 118, 154, 172, 187	Mahaska County .....	24
Bonus Board.....	30, 32, 83, 93, 97	Marion County .....	158
	109, 110, 119, 121, 124, 152, 164, 165, 186	Marshall County .....	55
Comptroller, State.....	4, 7, 28, 48, 68, 107, 113, 169, 180	Page County .....	144
District Court .....	77	Polk County.....	25, 89, 126, 135, 141
County Attorneys		Pottawattamie County .....	148
Adair County .....	173	Poweshiek County .....	33
Adams County .....	173	Ringgold County .....	85, 152
Calhoun County .....	17, 44	Sioux County .....	66
Cass County .....	8	Washington County .....	60
Cedar County .....	105	Webster County .....	37, 155
Cerro Gordo County.....	185	Winnebago County .....	176
Clarke County .....	133	Executive Council .....	63
Davis County .....	145	Governor .....	3, 79
Decatur County .....	70, 72	Health Department .....	182
Dickinson County .....	178	Highway Commission .....	11, 137, 174
Dubuque County .....	190	House of Representatives.....	78, 102, 192
Hancock County .....	41	Merit System Council.....	189
Harrison County .....	197	Natural Resources Council.....	151
Henry County .....	122	Public Safety	
Jefferson County .....	131	Department.....	74, 127, 166, 194
Keokuk County .....	82	Secretary of State.....	34, 87
Linn County .....	111, 170, 196, 201	Senate .....	13, 19, 61
		Tax Commission .....	51, 79
		Superintendent of Banking.....	38

### Officers

Officer	Page in Report	Officer	Page in Report
Adams, E. W.....	55	Jordan, Scott .....	131
Akers, Chet B.....	56, 94, 100, 115, 118, 154, 172, 187	Kahl, Alfred .....	74, 127, 166
Bainter, W. H.....	122	Kallemyn, Edward J.....	30, 32, 83, 93, 97, 124
Barnes, John W.....	51	McFarland, R. Everett .....	144
Bastian, Ralph .....	37, 155	McMurry, Pearl W.....	194
Beardsley, William S.....	79	Martin, J. Leo.....	82
Becker, F. H.....	190	Murray, Michael.....	197
Bierring, Walter L.....	182	Namtvedt, Paul I.....	178
Black, Newton P.....	38	Nelson, Harold F.....	102, 192
Blue, Robert D.....	3	Paul, George L.....	78
Branstad, Nels .....	176	Pederson, Lawrence B.....	33
Brown, James R.....	185	Pettit, Charles N.....	145
Budd, John E.....	8	Riehm, Curtis G.....	41
Burdette, Robert W.....	70, 72	Rismiller, Walter F.....	105
Carson, L. R.....	24	Shearer, Paul V.....	60
Cottrell, D. R.....	189	Smith, Donald E.....	111, 170, 196, 201
Curry, F. R.....	133	Stanley, Byron B.....	173
Curtis, Edwin H.....	109, 110, 119, 121, 152, 164, 165, 186	Stillman, G. W.....	77
Don Carlos, W. E.....	173	Synhorst, Melvin D.....	34, 87
Faul, George .....	13, 19, 161	TePaske, Henry J.....	66
Hardin, William W.....	158	Thayer, Edwin S.....	25, 89, 126, 135, 141
Hayes, Grant L.....	85, 152	Truax, L. I.....	100, 154, 187
Hendricks, L. S.....	17, 44	Wells, Warren .....	79
Jackson, Don H.....	148	White, F. R.....	11, 174
Johnson, Ray E.....	4, 7, 28, 48, 68, 107, 113, 169, 180	Wichman, Henry .....	63
		Ziegler, Sanford .....	137
		Ziemer, G. L.....	151

**State of Iowa**  
**1950**

---

**TWENTY-EIGHTH BIENNIAL REPORT**

OF THE

**ATTORNEY GENERAL**

FOR THE

**BIENNIAL PERIOD ENDING DECEMBER 31, 1950**

---

**ROBERT L. LARSON**  
Attorney General

---

Published by  
**THE STATE OF IOWA**  
Des Moines

**PERSONNEL**  
**DEPARTMENT OF JUSTICE**

ROBERT L. LARSON.....	Attorney General
DON HISE.....	First Assistant Attorney General
OSCAR STRAUSS.....	Assistant Attorney General
CLARENCE A. KADING.....	Assistant Attorney General
KENT EMERY.....	Assistant Attorney General
HENRY W. WORMLEY.....	Special Assistant Attorney General
	—State Tax Commission
FOLSOM EVEREST.....	Special Assistant Attorney General
	—State Highway Commission
CHARLES F. O'CONNOR.....	Special Assistant Attorney General
	—State Board of Social Welfare
EARL R. SHOSTROM.....	Special Assistant Attorney General
	—Claims
IRA A. BUCKLES.....	Administrative Assistant
DOTTIE M. CUMMINGS.....	Secretary
WINIFRED FOLEY.....	Secretary
BETTE LUE HOLBROOK.....	Secretary
BURDEN M. MUNGER.....	Secretary

## ATTORNEY GENERALS OF IOWA

1853 - 1951

NAME	HOME COUNTY	YEARS SERVED
David C. Cloud.....	Muscatine .....	1853-1856
Samuel A. Rice.....	Mahaska .....	1856-1861
Charles C. Nourse.....	Polk .....	1861-1865
Isaac L. Allen.....	Tama .....	1865-1866
Frederick E. Bissell.....	Dubuque .....	1866-1867
Henry O'Connor.....	Muscatine .....	1867-1872
Marsena E. Cutts.....	Mahaska .....	1872-1877
John F. McJunkin.....	Washington .....	1877-1881
Smith McPherson.....	Montgomery .....	1881-1885
A. J. Baker.....	Appanoose .....	1885-1889
John Y. Stone.....	Mills .....	1889-1895
Milton Remley.....	Johnson .....	1895-1901
Charles W. Mullan.....	Black Hawk .....	1901-1907
Howard W. Byers.....	Shelby .....	1907-1911
George Cosson.....	Audubon .....	1911-1917
Horace M. Havner.....	Iowa .....	1917-1921
Ben J. Gibson.....	Adams .....	1921-1927
John Fletcher.....	Polk .....	1927-1933
Edward L. O'Connor.....	Johnson .....	1933-1937
John H. Mitchell.....	Webster .....	1937-1939
Fred D. Everett.....	Monroe .....	1939-1940
John M. Rankin.....	Lee .....	1940-1947
Robert L. Larson.....	Johnson .....	1947-

---

---

**THE  
OFFICIAL OPINIONS  
OF THE  
ATTORNEY GENERAL  
FOR  
BIENNIAL PERIOD  
1949 - 1950**

---

---



## OFFICIAL OPINIONS OF THE ATTORNEY GENERAL

December 28, 1948

### GOVERNOR: Centennial of statehood—Memorial Foundation authorized.

The Governor has plenary power, within the terms of the Act of Congress authorizing coins to commemorate the Iowa Centennial anniversary, to use the proceeds of the sale of said coins to establish an eleemosynary corporation to be named the "Iowa Centennial Memorial Foundation."

*Honorable Robert D. Blue, Governor of Iowa:* Your letter of December 22, 1948 submits the following facts:

Public Law 612, Acts of the 79th Congress, authorized the coinage of a fifty-cent piece to commemorate the one hundredth anniversary of the admission of Iowa into the Union as one of the United States. The Act provided that the coins "may be disposed of at par or at a premium, and the net proceeds shall be used for the observation of the centennial, as directed by the governor of Iowa."

In pursuance of the provisions of the aforementioned Act, 99,999 silver fifty-cent pieces were minted at the United States Mint in Philadelphia. The fifty cent pieces were not received until in December 1946, at which time the festivities of the celebration of the centennial were approximately at an end. By authorization and direction of the governor the coins were sold in a manner which insured a reasonable, fair and equal opportunity for all of the citizens of the state to obtain a memorial coin. Distribution was highly successful and a profit resulted after payment of the expenses of the design and dies amounting to the sum of \$197,585.64.

It is proposed at this time to direct by executive order the formation of an eleemosynary corporation to be named "Iowa Centennial Memorial Foundation". The purpose of the corporation is to commemorate the one hundredth anniversary of the state of Iowa. It is intended that the net proceeds received from the sale of the memorial coins, together with the coins remaining unsold, shall be transferred and vested in the Memorial Foundation to be appropriately used as a perpetual recognition of the Centennial anniversary by fostering the ideals and the character of the citizenry of Iowa that has been responsible for her growth, her greatness, and her strength. More expressly the income from the fund so placed in trust with the memorial foundation shall be used to encourage and recognize achievement, outstanding service by Iowa citizens in the fields of science, medicine, law, religion, social welfare, education, agriculture, industry, government, and other public service of outstanding and of state-wide importance and merit. It shall be within the purpose and the authority of the foundation "to provide awards, medals, scholarships or loans to encourage individuals and organizations to make a maximum contribution of service to the community, state and nation in which they live."

An opinion is requested of this office with reference to the propriety and legality of such Executive Order and the procedure contemplated.

It is to be noted that the power of disposition conferred upon the Governor of the state of Iowa under the provisions of the said Public Law 612 is without limitation other than that funds realized through the sale of the centennial memorial pieces "shall be used for the observation of the centennial". The funds did not become a gift to the state of Iowa, but rather were identified funds made available for use in fur-

therance of the observation of the anniversary according to the judgment of the governor as to suitability and propriety of use. It would seem that were the funds available at an appropriate time, the governor, had he so elected, could have directed the expenditure of all or any part of the funds in such manner as he in his sole discretion deemed proper, subject only to the requirement that they be used for the observation of the centennial. Likewise it would appear beyond question that the governor could direct the establishment of a permanent memorial as altogether fitting and proper in the true significance of the centennial anniversary.

The broad power of disposition of funds vested in the governor clearly indicates that the power is held by, and is personal to, that governor in office at the time disposition is made. Disposition once having been accomplished, the act becomes complete and final and could thereafter be questioned only by the federal government, and then solely on the basis of whether the funds were "used for the observation of the centennial". In this regard the creation of a Memorial Foundation in recognition of the dignity of the state and its achievements through its first one hundred years of statehood would seem not only proper and entirely consistent with the intent of the Congress, but would indeed nobly express realization of the true and genuine values of the occasion.

You are therefore advised that it is the opinion of this office that the proposed action by executive order, the establishment of a Centennial Memorial Foundation under the corporation laws of the state of Iowa and the intended disposition of funds are legal and of the highest order of propriety.

---

January 3, 1949

**TAXATION: Supplemental estimates after levy meeting of board.** Supplemental tax estimates, limited to particular funds, are authorized by Section 24.7 of the Code and may be considered and levy made at any time after the September levy meeting of the board of supervisors upon giving the notice required by section 24.9. However general tax estimates and levies may not be the subject of supplemental estimates.

*Mr. Ray E. Johnson, State Comptroller:* We have yours of the 10th inst. in which you have submitted to us the following respecting supplemental estimates:

"Another question concerns section 24.7—Supplemental estimates. This section is generally considered the means for certifying a tax for the payment of interest and principal on bonds issued any time during the year. The question arises how late can the county auditor be required to enter in the tax lists a tax of this nature which the local board did not include in the original budget, but decided to issue bonds at a later date to finance the cost of a street improvement or similar project requiring a tax for the ensuing year as well as future years. It has come to the attention of this office that some local boards are issuing bonds and certifying supplemental estimates as late as December 1. The county auditor was not aware of the proceedings and has completed and certified all local budgets as required by law and the county treasurer has his tax receipts printed showing the schedule of millage levies for each taxing district of the county.

What effect does section 24.9 have upon supplemental levies where it refers to section 76.2 of the Code?"

In reply thereto, we call your attention to the provisions of section 24.7, which authorizes the levy for supplemental estimates. This section is as follows:

"24.7 Supplemental estimates for particular funds may be made for levies of taxes for future years when the same are authorized by law. Such estimates may be considered, and levies made therefor at any time by filing the same, and upon giving notice in the manner required in section 24.9. Such estimates and levies shall not be considered as within the provisions of section 24.8."

We are impressed by the provisions of the foregoing statute to the effect that such estimates may be considered and levies made therefor "at any time" by filing the same, and upon giving notice in the manner required in section 24.9. This necessarily follows from the fact that an estimate required to be made to meet the obligations of principal and interest upon a bond issued at any time prior to the time of filing the estimate for the September meeting of the levying body, must be included in such estimate. These may not in any sense be termed supplemental estimates. In other words, such estimate may be made "at any time" after the September levy, provided that the notice required by section 24.9, is given. Such notice, according to section 24.9, is "a notice of the time when and the place where such hearing shall be held at least ten days before the hearing". We are of the opinion, therefore, that such supplemental estimate may be considered and the levy made therefor at any time after the September levy meeting, upon giving the foregoing ten-day notice of hearing, and provided there is sufficient time remaining to allow the auditor to prepare his tax books in accordance with the provisions of the statute. See, in this connection, Report of the Attorney General for 1925 and 1926 at Page 468. In this view we see no pertinency of the reference, made in section 24.9 to section 76.2, except that such levies shall be included in the annual levies of all subdivisions.

The foregoing conclusion is reached notwithstanding the contradictory provisions of section 24.9, which are as follows:

"24.9. Each municipality shall file with the secretary or clerk thereof the estimates required to be made in sections 24.3 to 24.8, inclusive, 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 and any annual levies previously authorized as provided in section 76.2, with a notice of the time when and the place where such hearing shall be held at least ten days before the hearing. Provided that in rural independent districts, school townships, and municipalities of less than two hundred population such estimates and the notice of hearing thereon shall be posted in three public places in the district in lieu of publication.

For a county, such publication shall be in the official newspapers thereof.

For any other municipality such publication shall be in a newspaper published therein, if any, if not, then in a newspaper of general circulation therein."

By its terms, that section controls the time of filing and certifying a supplemental estimate to the levying board according to law. Such levies, according to section 444.9, are made by the board of supervisors at its September session. Applied literally, a supplemental estimate made under section 24.7 is required to be certified twenty days before the September levy meeting of the board of supervisors. On the other hand, according to section 24.7, estimates and levies may be made at any time. This conflict and contradiction cannot be resolved. It is elementary that the legislative intent must be given effect if possible. The intent to provide a means of collecting a tax, based upon a supplemental estimate, is clear. To effectuate that intent, it is necessary to exclude section 24.7 from the limitation of section 24.9, requiring the filing of the estimate twenty days before the September levying session of the board of supervisors. Or, stated otherwise, it requires the elimination from section 24.9 of the requirement that would include the filing of supplemental estimates twenty days before the September session. Such elimination is justified by statutory rule. In Sutherland Statutory Construction, 3rd Edition, Paragraph 4926, the rule is stated as follows:

"4926. A majority of the cases permit the elimination or disregarding of words in a statute in order to carry out the legislative intent.

As in all other cases, words may be eliminated only when such action is consistent with the legislative intent. Courts permit the elimination of words for one or more of the following reasons: where the word is found in the statute due to the inadvertence of the legislature or reviser, or where it is necessary to give the act meaning, effect, or intelligibility, or where it is apparent from the context of the act that the word is surplusage, or where the maintenance of the word would lead to an absurdity or irrationality, or where the use of the word was a mere inaccuracy, or clearly apparent mishap, or was obviously erroneously inserted, or where the use of the word is the result of a typographical or clerical error, or where it is necessary to avoid inconsistencies and to make the provisions of the act harmonize, or where the words of the statute fail to have any useful purpose or are entirely foreign to the subject matter of the enactment, or where it is apparent from the caption of the act or body of the bill that the word is surplusage."

It is to be noted in connection with the foregoing:

(1) That the general statutory tax estimates and tax levies may not be the subject of supplemental estimates. Section 24.8, Code of 1946.

(2) Provisions for hearing on supplemental estimates and time therefor, are not applicable to levies authorized by vote of the electorate, after the September levy. See sections 24.15 and 24.20, Code of 1946. Such levies so authorized are legally imposed after the September levying meeting.

---

January 3, 1949 .

**TAXATION: Amending local budget after September levy.** Levies and estimates by local taxing bodies may not be increased after the September session of the levying board. New funds, omitted from the original estimate, may be made available by amending the budget before the November session.

*Mr. Ray E. Johnson, State Comptroller:* Respecting yours of November 10th in which you submit the following:

"We are asking your opinion regarding certain provisions of the Local Budget Law known as chapter 24, Code of 1946.

Under section 24.17, a local board should certify its budget to the county auditor by August 15 each year. It is the general practice, however, for local boards to certify their budget any time prior to the September meeting of the board of supervisors. In any event, a budget cannot be certified until after a notice has been published and a public hearing held upon the proposed budget and tax levies.

The question we want answered is can a local board amend its budget by increasing expenditures and tax levies over those submitted at the original hearing or add new funds which may have been omitted in original publication. Can this be legally done during the time the board of supervisors are in recess from the regular September session and before the November session? What would be the last date at which time a local budget can be legally amended in the manner stated above?"

In answer to the foregoing, we are of the opinion that statutory directions with respect to taxation upon public officials are directory and not mandatory, unless accompanied by negative words importing that the act shall not be done in any other manner or time than that designated. *Lumber Company vs. Board of Review*, 161 Iowa 504. In that aspect we advise that a local board may not amend its budget by increasing its expenditures and its levies over those submitted at the original hearing because of the following negating statutes, to-wit: Sections 24.14, 24.15 and 24.20, Code of 1946, each of which we exhibit as follows:

"24.14. No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in sections 24.6, 24.15 and subsection 4 of section 343.11."

"24.15. No tax shall be levied by any municipality in excess of the estimates published, 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."

"24.20. The several tax rates and levies of the municipalities thus determined and certified in the manner provided in the preceding sections, except such as are authorized by a vote of the people, shall stand as the tax rates and levies of said municipality for the ensuing year for the purposes set out in the budget."

In other words, unless by vote of the electorate so directing, levies and expenditures may not be increased after the levy made at the September session of the levying board. And therefore, there is no occasion for amending the budget in that respect.

However, new funds which may have been omitted from the original estimate, may by an amended budget, after the statutory budget, in due time be made available for expenditures. Such amended budget may be made after the September session of the levying body and during

the recess between the termination of the September session and the beginning of the November session.

The last date at which time a local budget may be legally amended would be a date which would require full compliance with the statutory provisions of the budget law, chapter 24, 1946 Code of Iowa, and allow the auditor time to prepare his tax books in accordance with the statutory requirements. The foregoing matter is discussed in the opinion of the attorney general, appearing in the Report of the Attorney General for 1925 and 1926 at page 468.

---

**January 6, 1949**

**HIGHWAYS: Secondary road improvement by voluntary donations—** Chapter 163, Acts 52 G. A. Chapter 163, Acts 52 G. A. relating to improvement and maintenance of secondary roads by voluntary donations confers no discretion on the board of supervisors and said board (1) cannot reject the project when the conditions have been met, (2) must keep up the repairs, or (3) has no discretion to determine the length, character, or continuity of the project. (But see Chapter 129, Acts 53 G. A.)

*Mr. John E. Budd, County Attorney, Atlantic, Iowa:* You have inquired as to the construction to be given section 5, chapter 163, Acts of the 52nd G. A., relating to the improvement and maintenance of certain county roads out of voluntary donations. Your specific questions are as follows:

“(1) Whether the board of supervisors can reject any project or whether they are compelled to abide by the wishes of the owner or owners of land adjoining such road.

(2) Whether or not the board of supervisors would be compelled to keep the road surfaced after the original surfacing was paid by the owner or owners of the land adjoining the road.

(3) Whether the road to be surfaced would have to be a connecting road between two other surfaced highways or whether it could be for only a mile or so and then stop.”

You point out that if in many instances advantage is taken of this statutory provision the funds available for maintenance may readily become exhausted and any plan which may have been adopted for the orderly development of the county road program will be circumvented if the statute is given literal effect. You say that the board of supervisors of Cass County have already had several such requests. You point out that particularly in counties in the southern portion of the state a gravel surfaced road does not stand up for more than four years, and under conditions of heavy traffic will break down and require re-surfacing within a period of two years.

Section 5 of chapter 163, Acts of the 52nd G. A. must be read in connection with section 4 thereof and we set those sections out as follows:

“Sec. 4. Section three hundred nine point eight (309.8), Code 1946, is hereby amended by adding to said section as subsection (5):

“5. All funds which may be *voluntary donated* or provided by individuals desiring to pay for the improvement of any portion of the secondary road system from their own *contributions*.”

"Sec. 5. Chapter three hundred nine (309), Code 1946, is hereby amended by inserting the following provisions:

"When any owner or group of owners of lands adjacent to or abutting upon any secondary road or roads shall *subscribe* sufficient funds to provide for the surfacing, graveling, oiling or other suitable surfacing of such roads, the board of supervisors shall *require* the county engineer to make an estimate of the cost of carrying out of the proposed project and upon deposit of the amount estimated, the board of supervisors shall *proceed* with the completion of the project proposed, under the same procedure as prescribed generally for the improvement of secondary roads. The board may also expend in connection with such project such amount of the secondary road construction funds or the farm-to-market road fund as may be available for such project under existing provisions of law. At the completion of the project and the satisfaction of all claims, any balance remaining of the funds made available by the sponsors of the project shall be returned to the original guarantors providing all guarantees made by the sponsors have been fulfilled. Any project constructed under the provisions of this section shall *be maintained* by the county from the secondary road maintenance fund." So far as the language of the statute is concerned, it is mandatory in character and does not confer discretion on the board of supervisors.

This leads to the inquiry whether this legislation is in violation of any established concept of law or statute.

Sec. 306.1 of the 1946 Code provides as follows:

"The board of supervisors has the general supervision of the secondary roads in the county with power to establish, vacate, and change them as herein provided, and to see that the laws in relation to them are carried into effect."

Sec. 309.1 confers upon the board of supervisors the duty of construction, repair, and maintenance in the following language:

"The duty to construct, repair, and maintain the secondary road and bridge systems of a county is hereby imposed on the board of supervisors."

In the exercise of these powers and duties the boards of supervisors are required to adopt a comprehensive road construction program the detailed consideration for which are embodied in sections 309.22 to 309.33, inclusive. It will be observed that section 5, supra., likewise seeks to make available for these purposes farm-to-market road funds in addition to secondary road construction funds. As to the farm-to-market road funds it will be recalled that numerous restrictions and conditions as to their use are imposed by chapter 310 of the Code, in view of the fact that the fund includes federal aid money as well as state funds. The state highway commission exercises certain discretionary power in connection with the expenditures of these funds in addition to those exercised by the board of supervisors. The character of the language employed in sections 4 and 5, to-wit: "voluntarily donated", "contributions" and "shall subscribe" all indicate that these funds are in the nature of a gift.

We find the following under the subject of "Gifts" in Sec. 40 of 24 Am. Jurisprudence 753:

"An acceptance by the donee is generally held to be an essential element of a gift \* \* \*. Where a gift causa mortis is beneficial to the

donee and *imposes no burden* upon him, acceptance by him is presumed \* \* \* \*”

Among other, the case of *Manning vs. U. S. Nat. Bank*, 148 Pac. (2nd) 255, A.L.R. 922, holds that there must be acceptance by the donee.

The converse of this rule ought likewise to be true, and where, as in this instance, burdens are imposed, the recipient of the gift ought to be left in a position to reject. Unfortunately, the language of the statute itself rebuts this position and provides that when the subscribing of the funds has been accomplished “the board of supervisors *shall require* the county engineer to make an estimate of the cost of carrying out of the proposed project and upon deposit of the amount estimated, the board of supervisors *shall proceed* with the completion of the project proposed. \* \* \* \*” The language employed being mandatory in character rules out the possibility of the exercise of discretion by the board of supervisors in connection with the acceptance of a gift for this purpose.

When the language of the act is given this construction the next inquiry is whether an act which in this fashion makes the development of a road contingent upon the action of private individuals rather than upon the duly elected members of the board of supervisors is an unconstitutional delegation of legislative power to individuals. The cases on this subject are assembled under the subject “Constitutional Law” Key No. 64, N. W. and Dec. Digests.

The difficulty of the problem posed by this contention is very much diminished by the pronouncement of the Iowa supreme court in the case of *Blume vs. Crawford County*, 217 Ia. 545, 250 N. W. 733, 92 A.L.R. 757, which was an opinion by Judge Kintzinger handed down in 1933. This case was an action by taxpayers to enjoin the county from paying to the farm bureau an appropriation made to it under the provisions of section 2930, Code 1931 (now section 176.8, Code 1946), which provides that:

“When articles of incorporation have been filed as provided in this chapter and the secretary and treasurer of the corporation have certified to the board of supervisors of such county that the organization has at least two hundred bona fide members, whose aggregate yearly membership dues and pledges to such organization, amount to not less than one thousand dollars, the board of supervisors *shall appropriate* to such organization from the general fund of the county a sum \* \* \* \*” etc.

It was contended that the legislature had no power to vest the making of an appropriation in any body not directly responsible to the people. It was said that this was an invalid delegation of a discretionary legislative power to an individual. These contentions were rejected on the theory that in this statute “the legislature itself declared the limits within which the levy must be kept and the conditions precedent to and under which a levy shall be made. Nothing is left to the discretion of the board, and nothing is delegated to the board, in the way of legislative discretion; that having been fully exercised by the law-making power in the first instance.” If that was true in the case of *Blume vs.*

Crawford County, *supra.*, in connection with the making of an appropriation, it must be equally true in the instant case where we are concerned merely with the expenditure of funds already appropriated. We conclude that there is no invalid delegation of legislative power and that the act is constitutional.

Having concluded that this act does not confer discretion on the board of supervisors we have no difficulty with the answer to your specific questions and conclude as follows:

1. That the board of supervisors cannot reject such a project when the conditions precedent have been met.
2. That the board of supervisors is compelled to keep the road surfaced after the original surfacing was paid for by the donors, (as a part of but not however to the exclusion of other improved secondary roads), and
3. That there is no discretion to determine the length, character, or continuity of such a project.

We recognize the hardships and the extravagances which may result from this construction of the law and we likewise recognize that such a construction may completely thwart a carefully thought out plan and program for the development of the county road system, but the language of the act does not admit of any other construction.

---

January 14, 1949

**HIGHWAYS: Viaduct along city street—damages to abutting property.**  
The eminent domain procedure contained in Chapters 471 and 472 of the Code has no application to the determination of damages to abutting property contemplated by section 389.22 where a city proposes to construct a viaduct along an established city street. (But see Chapter 165, Acts 53 G. A.)

*Mr. F. R. White, Chief Engineer, Iowa State Highway Commission:*

You have called attention to the proposal to construct a viaduct over the Northwestern and Illinois Central tracks on West Broadway in the city of Council Bluffs, and you inquire whether the city is vested with the power of eminent domain with reference to the acquisition of access, light, air, and view, with reference to properties abutting on Broadway in the area of the street that will be occupied by the proposed viaduct. I regret to advise that it is the opinion of the attorney general's office that the power of eminent domain as embodied in chapters 471 and 472, Code of 1946, is not applicable.

The case of *Liddick vs. Council Bluffs*, 232 Ia. 197, 5 N. W. (2nd) 361, while it may be difficult of interpretation in some particulars, is without question authority for the holding that under what is now section 389.20, Code of Iowa 1946, cities and towns have the power to establish grades for city streets, that the city of Council Bluffs exercised that power along Broadway in the area where it is proposed to build this viaduct, that under section 389.22, Code of Iowa, 1946, when such grade has been established and is thereafter altered by the city in such fashion as to damage, injury or diminish the value of the property abutting thereon, the city shall pay to the owner of such property the

amount of such damage or injury, and that the construction of a viaduct such as was proposed in the Liddick case and is now proposed, amounts to a change in the established grade of the street. These points are covered on pages 368 and 369 of the Northwestern Reporter at the very beginning of the opinion.

It is significant in this connection that in applying section 389.22 the appraisers provided for are required to take into consideration benefits as offsetting damages. Meyer vs. Burlington, 52 Ia. 560, 3 N. W. 558; Stewart vs. Council Bluffs, 84 Ia. 61, 50 N. W. 219; Meardon vs. Iowa City, 148 Ia. 12, 126 N. W. 939, Western N. W. vs. Des Moines, 157 Ia. 685, 149 N. W. 367;—whereas, section 18, Article I, Constitution of the State of Iowa, with reference to eminent domain 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.”*

It seems rather obvious therefore that chapters 471 and 472 which specifically relate to eminent domain were not designed to take care of the damages contemplated by section 389.22.

And that is made very plain when we proceed to examine the provisions of the subsequent sections of the Code, 389.23 to 389.30, inclusive, since they relate to the appointment of appraisers, the giving of notice, the method of appraisal, confirmation and annulment, appeal, etc.

It is unfortunate that the method provided by statute for the determination of these questions is awkward, to say the least. It was devised a long time ago and has been on the statute books almost certainly since 1880. Section 389.23 provides for three appraisers, one selected by the mayor, one by the owner of the property, and one by agreement between the other two, provided that if there is a disagreement the council may appoint the third. This means the selection of a separate appraisal board for each piece of property affected by the change in grade. It is further unfortunate that the statute does not provide for an appeal from the appraisal by the city itself. Section 389.26 says:

*“The council may, in its discretion, confirm or annul the appraisal, and, if annulled, all proceedings shall be void and of no effect; but, if confirmed, an order of confirmation shall be entered by the clerk in the record of the proceedings of the council.”*

This puts the appraisal on the “take it or leave it” basis so far as the city is concerned, whereas, the property owner under subsequent provisions of the statute is given the right of appeal. This is a highly and unsatisfactory procedure from the standpoint of the city, and the application of this statutory provision by other cities has in the past resulted in extremely difficult situations.

The alternative is to go ahead with the construction and let the abutting property owners claim their damages by appropriate action against the city, a procedure that has sometimes been followed. The unfor-

fortunate part of such a course is that no one can tell in advance what the aggregate of the damages is going to be. Such proceedings are triable as jury cases, and it may not be improper to suggest that juries in district courts are as a rule quite liberal with public money in favor of individual claimants. This, at least, has been the experience of this office in the trial of condemnation cases.

Alternatively it would appear not too difficult to secure the repeal of the statutes in question and the enactment of a substitute. Such a statute need not be elaborate in character. It could provide very simply for the application of the procedure under the power of eminent domain as outlined in chapters 471 and 472 to the determination of the damages to be assessed under section 389.22. No attempt is made here to set out the detail of such an act.

---

January 27, 1949

**CITIES AND TOWNS: Civil service unaffected by change in form of government.** The status of civil service employees in commission plan cities is retained upon conversion of such cities to the manager plan or any other change in form of government.

*Senator George Faul, Senate Chamber:* We acknowledge receipt of yours of the 19th inst. in which you request an opinion with respect to the situation therein set forth. You state:

"A movement is currently under way to permit the citizens of Des Moines to vote on the question of changing the city government to the city manager form under chapter 419, Code of Iowa, 1946. A great deal of confusion is present on the question of the status of employees now under civil service should this change in form of government take place.

"Sections 419.15, 419.16 and 419.17 provide broad powers to the council or manager to remove employees whom they are authorized to appoint. Subsections 7 and 8 of section 419.55 gives the manager power 'to employ and discharge from time to time, as occasion requires, all employees of the city' and 'to discharge summarily and without cause any officer, appointee, or employee that he has power to appoint or employ.'

"At the present time most employees of the city of Des Moines possess certain rights by virtue of chapter 365, Code of Iowa, 1946. Certain sections of that chapter, including sections 365.13, 365.15 and 365.19 refer to the power to appoint, suspend, demote or discharge employees in cities under the city manager plan.

"The question at issue is whether the provisions of chapter 365 continue to operate with regard to municipal employees when the city is governed by the provisions of chapter 419.

"I respectfully request that you give me your opinion on this question as soon as you can conveniently do so."

We advise you as follows:

Appointive officers and employees of cities organized under the city manager plan of government by election are not covered by civil service directly by the terms of chapter 419, Code of 1946, providing for the adoption of such form by any city. The chapter is not, however, separate or unaffected by other provisions of the laws of the state. Section 419.64, Code 1946, and section 419.65, do no more than define or limit

the powers granted such city government. The civil service statute is the law of this state covering all cities without distinction of organization and became a part of chapter 419 by direct reference in the amendment of the 47th General Assembly, and the powers granted a city under manager form of government are limited to that extent. The city manager by the provisions of section 419.55, Code 1946, possesses the following powers over employees of such city manager administered cities, to-wit:

"7. He shall have power to employ and discharge from time to time, as occasion requires, all employees of the city or town, and to fix the compensation to be paid to such employees, except as otherwise herein provided."

"8. He shall have power to discharge summarily and without cause any officer, appointee, or employee that he has power to appoint or employ."

"18. He shall have power to appoint or employ persons to fill all places for which no other mode of appointment is provided, and shall have power to administer oaths."

These powers, therefore, to an extent are inconsistent with the civil service laws set out in chapter 365, Code 1946, and to that extent must yield to the civil service law specifically made applicable to manager plan cities.

Civil service by the provisions of chapter 365, Code 1946, was made applicable to cities under "any form of government" having a population of more than 15,000 which certainly included the manager plan. Section 365.6, subsection 1, Code of 1946, making civil service so applicable provides as follows:

"The provisions of this chapter shall apply to all appointive officers and employees, including deputy clerks and deputy bailiffs of the municipal court *in cities under any form of government* having a population of more than fifteen thousand except:

- a. City clerk, city solicitor, assistant solicitor, assessor, treasurer auditor, civil engineer, health physician, chief of police, market master.
- b. Laborers whose occupation requires no special skill or fitness.
- c. Election officials.
- d. Secretary to the mayor or to any commissioner.
- e. Commissioners of any kind.
- f. Casual employees."

These powers remain subject to the restrictions of civil service. What the legislature grants it can rescind, repeal, or modify as it chooses, for all forms of municipalities are creatures of the state.

Clearly, therefore, by the terms of the foregoing statute civil service was made by the legislature to apply to cities operating under the city manager plan of government, by election, and its terms became a part of chapter 419, Code of 1946. This conclusion is confirmed by the provisions of section 12 of the same act which made civil service applicable

to cities under any form of government, by the following specific provision with respect to appointments or promotions to positions within the scope of that chapter, being chapter 156 of the Laws of the 47th General Assembly, in terms as follows:

"That chapter two hundred eighty-nine (289), code, 1935, is hereby amended by adding thereto the following sections:

'5699-h1. Appointment powers. All appointments or promotions to positions within the scope of this chapter other than those of chief of police and chief of fire department shall be made:

"In cities under the commission form of government, by the superintendents of the respective departments, with the approval of the city council; *in cities under the city manager plan, by the city manager*; in all other cities with the approval of the city council, and in the police and fire departments; and in the case of deputy clerks or deputy bailiffs of the municipal court, such appointments shall be made by the clerk or bailiff thereof, respectively.

"All such appointments or promotions shall promptly be reported to the clerk of the commission by the appointing officer."

This section is now section 365.15, code of 1946. These provisions clearly evidence an intent on the part of the legislature to repeal the powers imposed upon the city manager over employees of city manager cities exhibited previously herein as section 419.55. This evidences a legislative intent to retain in the city manager the power of appointment and promotion of employees of such managed cities, subject, however, to the operation of the civil service laws controlling such appointments and promotions generally. It did more: It was a plain direction of the legislature that manager plan cities were controlled by civil service statute. It is true that as a rule of statutory interpretation implied repeal is not favored and will be avoided unless there is a plain contradiction between statutes. It will not be disputed that there is a contradiction between control by the city manager over employees of those cities, and control of such employees by civil service, and when such contradiction in the statute appears, as it does in the matter under consideration, the later in point of time will prevail. Even so, and in addition such rules must yield to the further rule that

"where the subsequent enactment of a statute which treats of a phase of the same general subject matter in a more minute way consequently repeals pro tanto the provisions of the general statute with which it conflicts."

(Sutherland Statutory Construction, 3rd Ed. Par. 2022.)

It follows that the statutes providing for the organization and administration of city managed cities by election must yield its contradictory provisions respecting the powers of the city manager over employees to the civil service statutes.

However, another question is presented as to whether the civil service status of appointive officers and employees under a city operating under a commission plan, is retained when such city abandons its commission plan of government and assumes the city manager plan. The foregoing statute, section 365.6, making civil service applicable to cities under

any form of government, was enacted by the 47th General Assembly, Chapter 156, which became effective on April 16th, 1937. Prior to that time civil service was limited to cities organized under the commission plan of government subject only to some previous statutory provisions for civil service applicable to firemen and policemen in all cities over 60,000. The commission plan of government was established as an optional plan in 1907 and civil service continued from then to 1924 as optional in some cases and mandatory in others. At the time chapter 156 of the 47th General Assembly became effective, April 16th, 1937, provision was made by the legislature preserving the civil service status of those persons that were covered by civil service. Such provision is section 6 of chapter 156 of the 47th General Assembly and appears now as section 365.7 of the Code of 1946. The terms of that statute preserving the civil service status of such employees, are these:

"365.7. Any person regularly serving in or holding any position in the police or fire department, or a nonsupervisory position in any other department, which is within the scope of this chapter on the date this act becomes effective in any city, who has then five years of service in a position or positions within the scope of this chapter, shall retain his position and have full civil service rights therein.

Persons in nonsupervisory positions, appointed without competitive examination, who have served less than five years in such position or positions on said date, shall submit to examination by the commission and if successful in passing such examination they shall retain their positions in preference to all other applicants and shall have full civil service rights therein, but if they fail to pass such examination they shall be replaced by successful applicants.

Provided, that persons who have heretofore been certified by the commission as eligible for appointment to any position in which they are regularly serving on said date, and persons regularly serving on said date in any position with civil service rights by reason of long and efficient service rendered prior to October, 1924, shall retain such position and shall have full civil service rights therein without further examination. Other persons regularly serving in supervisory positions in departments other than police or fire on the date this act becomes effective shall be eligible for appointment to said positions after qualifying in competitive examination.

Provided, further, however, that nothing in this section shall apply to any person temporarily acting in a position regularly held by another, or in a vacancy, except to establish his rights in his own regular position."

While the 47th General Assembly did not expressly provide for the continuing civil service status over employees under commission plan cities after April 16, 1937, by plain implication, it did so provide. Chapter 156 of the Acts of the 47th General Assembly is a comprehensive revamping of Civil Service statutes. It amended chapter 289 of the 1935 Code by striking 15 sections thereof and enacting a substitute therefor. And made additions to six other sections together with other changes of words and phrases. It recognized and stabilized the status of those employees having civil service status on the date the act became effective, to-wit: April 16, 1937. Prior to that time, beginning with April, 1907, appointive officers and employees, with some exceptions, other than policemen and firemen, civil service was mandatory in com-

mission plan cities over 25,000 population and optional in those of a smaller population. And it so continued until 1915 when it was made mandatory in commission plan cities over 15,000 population and optional in cities of 2,000 to 15,000 population. From 1924 to 1937 civil service was mandatory in all commission plan cities over 100,000 population. Insofar as the status of policemen and firemen is concerned civil service was mandatory from 1924 to 1937 with varying application to all cities including special charter cities according to population and limited to those having a paid fire or police department. Thereafter by chapter 156 of the 47th General Assembly, policemen and firemen had mandatory civil service status in all cities over 8,000 in population having a paid fire or police department including special charter cities. In view of the public purpose civil service statutes

"to secure efficiency in the public service and prevent discrimination in appointments to it based on any other consideration than fitness to perform its duties",

and the comprehensive character of the provisions of chapter 156 of the 47th General Assembly, we are not disposed to hold a legislative intent to exclude from its terms employees of commission plan cities possessing civil service rights, when such cities convert themselves to city manager plan of government. In an opinion of this department, appearing in the Report of the Attorney General for 1938 at page 313, there was in question whether chapter 156 Acts of the 47th General Assembly embraced special charter cities. It was stated in holding that such cities were included:

"To hold contra to this opinion would be to say that the legislature repealed the existing civil service laws as they pertain to special charter cities, and enacted nothing in lieu thereof. There can be no question but what this was not the intent of the Legislature, and especially is that true in light of the fact that the civil service amendments widen the scope of civil service instead of narrowing the same."

Applicability of the foregoing quotation to the situation presented now is plain. We are of the opinion that the status of civil employees in commission plan cities is retained upon the conversion of such cities to the manager plan by election, or in any other change of city form of government.

---

January 28, 1949

**TAXATION: Exemption of veterans of World War II.** The exemption from taxation accorded to veterans of World War II is limited to those who served between December 7, 1941 and September 2, 1945, inclusive.

*Mr. L. S. Hendricks, County Attorney, Rockwell City, Iowa:* We have yours of the 24th instant in which you have submitted the following:

"The Calhoun County auditor has presented to me the following question:

What date of entry into military service and what date of discharge from military service shall be considered when determining whether or not an honorary discharged soldier, sailor, marine or nurse of the Second World War is entitled to the exemption from taxation allowed under section 427.3 (4) of the 1946 Code of Iowa?"

In reply thereto we advise you as follows:

The statute under which the claim of exemption is made for service in the Second World War is as follows:

"Section 427.3, subsection 4, 1946 Code. The property, not to exceed five hundred dollars in taxable value of any honorably discharged soldier, sailor, marine, or nurse of the second World War."

A statute of like terms, to-wit: Section 6944, Code of 1939, respecting the exemption of property from taxation of an honorably discharged soldier, sailor, etc., of the first World War, provided:

"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."

This statute was interpreted by the department by opinion issued December 5, 1940, appearing in the Report of the Attorney General for 1940 at page 606, holding that the foregoing property tax exemption accorded to honorably discharged soldiers, sailors, etc., of the first World War, extended only to those showing service in the military forces of the United States during the period from the declaration of war on April 5, 1917 to November 11, 1918. This conclusion is supported by the following argument contained therein, to-wit:

"It appears that there have been conflicting opinions on this in the reports of the Iowa Attorney General's Office and up until 1933 soldiers who enlisted after November 11, 1918, were entitled to certain benefits given by the laws of the United States to veterans of the World War if their service was before June of 1921. In 1933 Congress amended the various veteran acts and by a definition statute defined World War veteran to be one whose service was during the period from April 5, 1917 to November 11, 1918. Of course this is not at all binding upon the state of Iowa, but it is significant that those who enlisted after November 11, 1918 were excluded from the World War Veteran Acts passed by the United States Government.

We also find that this paragraph 3 of section 6946 was first passed by the 39th General Assembly where it appears as section 3 in chapter 144. This first became a law on April 8, 1921, and it will be noted the language of the act is such as to give the exemption to those who have received such honorable discharge for service in the war with Germany. If the date of the formal conclusion of peace, or June of 1921, be taken then the exemption could be obtained by a soldier who enlisted after the passage of the act and before June of 1921. Quite clearly this was not the intent of the legislature. The legislative intent must have been to grant this exemption for war veterans, not for peacetime service in the military forces of the United States. This is shown by the other sections of the act which were all reenacted in this same chapter or in the 39th General Assembly, and each one of them spoke of some war where actual service is made the basis of the exemption.

In view of the foregoing, we are of the opinion that the exemption is contingent upon an honorable discharge showing service in the military forces of the United States during the period from the declaration of war on April 5, 1917 to November 11, 1918."

The foregoing holding and the argument in support thereof is analogy sufficient upon which to base a confirmation of its applicability to the statute now under examination. It results, therefore, that to sustain

exemption under that statute, 427.3 (4), an honorably discharged soldier, sailor, marine or nurse must show active military service in the military forces of the United States during the period from the declaration of war on December 7th, 1941, to the 2nd day of September, 1945. It is interesting to note in this connection that the Service Compensation Act for soldiers of the United States serving in the second World War, being chapter 59, Acts of the 52nd General Assembly, limits its benefits by its terms to those "who served on active duty in the armed forces of the United States at any time between September 16, 1940 and September 2, 1945, both dates inclusive."

---

February 2, 1949

**COUNTIES: Janitor in courthouse—employed by supervisors..** The board of supervisors has the power and authority under section 332.3 of the Code to employ a janitor for the courthouse as well as other personnel therein and section 333.1 cannot be held to be a provision divesting the board of this authority.

*Senator George Faul, Senate Chamber:* We acknowledge receipt of yours of the 27th ult., in which you submit for opinion the following:

"Does the board of supervisors under section 332.3 of the 1946 Code of Iowa, have the power and authority to appoint a building superintendent and such assistants and janitors as the board may deem necessary and proper, or are such appointments required to be made under section 333.1, paragraph 8, by the county auditor? In the event that the answer to this question shall be that said persons shall be appointed by the county auditor, then the undersigned desires further explicit information and instructions as to whether or not any other functions, such as heating, lighting, furnishing of other utilities and the like, are included within section 333.1, paragraph 8.

"While this question has specifically arisen recently in Polk County, Iowa, and I am informed that the county attorney has refused to seek your opinion, although requested to do so by the board of supervisors, it appears from a reading of the statutes to be one of the state-wide public importance, indeed, it is without question of extreme importance to everyone of the ninety-nine counties. The construction of the statutes on your part will provide valuable guidance for all of the county governments of the state.

"I desire your opinion for the reason that it may be necessary for the general assembly to enact legislation to clarify the statutes relative to this situation."

We are glad to answer you regarding this matter as a present member of the 53rd. General Assembly, although we fail to understand why a county attorney would refuse to request such an opinion upon the good faith request of county officers. In view of the fact that any interpretation of this law affects all 99 counties in the state, and that the legislature is in session, we feel that it is proper for you to obtain an opinion so that it may be considered by the legislature should a different result be desired by our duly elected and qualified lawmakers.

We should hasten to explain, Senator, that opinions of county attorneys, as well as our own opinions, are not laws and do not have the finality of court decisions. Any officer may refuse to follow them, and to do so is not

illegal per se. However, an official who refuses to follow an attorney general's opinion does so at his peril.

The official opinions of the attorney general may be dignified as law by the legislature and the courts only in the following manner: When there is a question such as is raised in this request, and an official opinion is handed down by the attorney general, the legislature is either presumed to have knowledge of its holding, or as in this case, gets the opinion through one of its members direct, and if the legislature does nothing to change or alter that interpretation of the statutes involved, the courts across the country uniformly hold it to be the proper meaning of the law. Under no circumstances does a county attorney's opinion obtain this judicial result or authority. Therefore, we are rendering you this opinion with this admonishment—that unless changed by the legislature, or by a court of record, this opinion will be presumed to be correct, and will supersede all opinions to the contrary.

We advise you further as follows:

The legislative history of the duty imposed upon the county auditor by section 333.1, paragraph 8, in terms as follows:

“\* \* \* Have the general custody and control of the courthouse in each county, respectively, subject to the direction of the board of supervisors.”

discloses that this duty was in the first instance imposed by the Eighth Extra-Session upon the clerk of the district court; chapter 2 thereof provides as follows:

“Section 1. That the clerks of the district courts of their respective counties shall under the direction of the board of supervisors of the proper county, have the custody and control of the courthouse therein, and the sheriff may have and keep an office in the court house, provided there is a room therein unoccupied by such officers as are now entitled thereto by law.”

This statute so conferring the duty upon the clerk remained until the Fourteenth General Assembly, adjourned session, and after the Code of 1873 in that session of the legislature transferred this duty to the county auditor, such statute was re-enacted in codification of the Laws of 1897, and re-enacted in the codification of 1924, and through the subsequent codifications to and including the Code of 1946, and such statutory duty has remained from 1873 to the present in the form it now exists as section 333.1, paragraph 8. This statute, whether it embraced the duty of the clerk or the auditor does not appear to have been the subject of interpretation in respect to the appointment of the janitor of the courthouse, either by the opinion of this department or by judicial pronouncement. Clearly it confers no specific power upon the county auditor to employ or appoint a janitor or janitors for the county courthouse. If the foregoing statute does imply such powers vested in the county auditor it must be by administrative construction of such statute in that it lacks either a departmental opinion or a court decision.

The following statutes conferring general powers upon the board of supervisors over property of the county have been existent for many

years, and have been re-enacted by several codes down to and including the Code of 1946 on their exact terms, to-wit, section 332.3, subsection 4, and subsection 6, both in terms as follows:

“\* \* \* To make such orders concerning the corporate property of the county as it may deem expedient, and not inconsistent with law.

“To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made.”

The power of the board of supervisors to appoint and employ janitors for courthouses is likewise not specific. However, under these general statutes the boards of supervisors of the several counties have for many years exercised the power of appointing janitors for courthouses. Such administrative construction of this power has been confirmed by three separate pronouncements by the Supreme Court. In 1907, such administrative action of the board of supervisors of Wapello county, was confirmed in the case of Kitterman v. Board of Supervisors, 137 Iowa 275. There it appears that the appellant Kitterman had been appointed janitor of the courthouse in Wapello county by the board of supervisors, and so continued. In January of 1907, one Dorothy, the defendant in this case, applied to the board to be employed as janitor. Both appeared to have been honorably discharged veterans of the Civil War. The appellant likewise applied for reappointment. However, Dorothy was appointed in January for the year ending March 1, 1908, and the board entered into a contract with him to perform the duties of janitor of the courthouse at an agreed compensation for one year, commencing March 1, 1907. The appellant Kitterman thereupon filed a petition asking for a writ of certiorari and a writ of mandamus for the protection and enforcement of his right to be continued in office as janitor of the courthouse by reason of his soldier's preference.

In reaching a conclusion that the Soldiers' Preference Law does not impose duties upon a board where both proposed appointees are honorably discharged veterans, the court observed with respect to the power of the board to appoint a janitor, the following:

“The position of janitor in the courthouse is not recognized by any statute, and the defendant board no doubt had the right to provide for the filling of such position for a definite term or to let the work by contract, and as to anyone accepting the position under such an arrangement all rights would be terminated on the termination of the employment or contract, so that the board might proceed to appoint or employ another without regard to the provisions of the statute with reference to removal.”

The appointment of a janitor of a courthouse in Wapello county was again the subject of adjudication by the Supreme Court in the case of Arnold v. Wapello County, 154 Iowa 111. There the controversy before the court was the power of the board of supervisors to fill the vacancy as between an honorably discharged soldier and one who was not a soldier, and while therein the question of whether the board possessed this specific power was not determined, the plain implication of

such power was presumed to rest in the board of supervisors to appoint a janitor. Such inference may be drawn from the following language of the court:

"It is said that there was an abuse of discretion; but this cannot be if the appointment was sustained by substantial evidence. The appointment was made by majority vote. The two Democrats of the board voted for Brady, while the Republican member voted for Arnold, who is also a Democrat. Brady is a second cousin of one of the Democratic members. It is urged, therefore, that the two Democratic members had predetermined the whole question and were partisans of Brady, and that the plaintiff therefore had no chance. The law, however, does not reach these questions. It is undoubtedly true that a friendly board could have appointed Arnold as an old soldier, even though he did not possess equal qualifications with Brady. It is undoubtedly true, also, that a friendly board could have found the qualifications of Arnold equal to those of Brady upon the evidence in the record before us. But those are matters quite beyond the reach of a writ of mandamus. The duty of appointment involves the exercise of judgment and discretion which the court cannot forbid."

And the appointment of a janitor was again before the supreme court in the case of *Sorenson v. Andrews*, 221 Iowa 44. There likewise the controversy involved the appointment of a janitor of the courthouse in Monona county between two honorably discharged soldiers. In reaching a conclusion therein as to which was entitled to the position of janitor of the courthouse by appointment of the board of supervisors, the court uses the following language respecting the power of the board of supervisors under the general statutory powers hereinbefore set forth to appoint a janitor of the courthouse, and the court said:

"So viewing the situation, we are enabled at this time to take into consideration other statutes as well as the Soldiers' Preference Law and some other matters of public import. These do not appear to have been more than incidentally referred to in the Kitterman opinions, and quite naturally so, because the outweighing thought in that case was the fact that the soldier was depending upon a prior indefinite or general appointment. These other statutes already referred to are those which impose on the board of supervisors definite duties with reference to the care and preservation of public property and buildings, the providing a place for holding the district court, the furnishing of a place for the various county officers in which to perform their duties, and fuel, lights, and other incidentals necessary for their proper functioning.

Code section 5130 confers upon the board of supervisors the power to make such orders concerning the corporate property of the county as it may deem expedient, not inconsistent with law. This power the board should exercise with care commensurate with the responsibility, and with efficiency and economy, and the legislature has properly clothed the board with a large discretion. If the exercise of this discretion leads the board to conclude that the public interests and the safety of the public property will be better conserved by the appointment of a janitor for a specific period of time, we find nothing in the Soldier's Preference Law interdicting such exercise of the board's group of men and women who as discharged soldiers and nurses are recognized by the legislature as being entitled to preferment in certain public offices and services."

The administrative construction of their powers under these foregoing statutes by these several boards of supervisors is accepted by

our supreme court as presumptively the correct interpretation that such powers rest in the board of supervisors. Text-book confirmation of the foregoing exists in Sutherland on Statutory Construction, 3rd Ed., section 5109, where it is stated:

“ Where a statute has received a contemporaneous and practical interpretation and the statute as interpreted is re-enacted, the practical interpretation is accorded the greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law. The rule here is based upon the theory that the legislature is acquainted with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing the law, and therefore impliedly adopts the interpretation upon re-enactment. The United States Supreme Court has held that an administrative interpretation upon re-enactment has the force and effect of law. But the doctrine subsequently has been limited to the extent that a later administrative interpretation will be permitted to alter a former re-enacted construction, though not retroactively. There is justification in giving a re-enacted administrative regulation presumptive weight in the construction of a statute. This is especially true where evidence is available that the administrative interpretation was made known to the legislative body or its committees. But it is going too far to hold that contemporaneous interpretation was adopted as law upon re-enactment unless the administrative interpretation is expressly adopted.

A number of decisions have held that the acquiescence of the legislature is evidence that the legislature intends to adopt the contemporaneous interpretation. While the acquiescence of the legislature seems to be of small matter where there is no evidence to the effect that the statute or contemporaneous interpretation was called to the legislature's attention, it is believed that when action has been taken upon a statute by the legislature, and where a practical and contemporaneous interpretation was called to its attention, the failure of the legislature to change its interpretation should be regarded as presumptive evidence of its correctness. Likewise, legislative action by amendment or appropriations with respect to a law which has received a contemporaneous construction may indicate approval of interpretations given the unchanged parts of the law.”

Certainly, therefore, the statutory provision making the auditor the custodian, without specific power to hire or discharge employees, cannot be held to be a provision of the law divesting the board's broad power set out in chapter 332, Code 1946. We therefore hold that the board of supervisors of each county not only have the power and authority to determine whether or not a janitor shall be provided, but also have the discretion to determine the number, as well as the personnel to be employed therein.

---

February 8, 1949

**ILLEGITIMATE CHILDREN: County attorney on appeal—printing costs borne by county.** It is the duty of the county attorney under Chapter 675 of the Code, to represent the complainant in a paternity proceeding in all stages from the preparation of the complaint through an appeal to the supreme court if such be the conclusion of the case. The costs of printing on behalf of the complainant-appellee are chargeable to the county.

*Mr. L. R. Carson, County Attorney, Oskaloosa, Iowa:* We have your letter dated February 2, 1949 in which you request an opinion on the following questions:

1. Is it the duty of the county attorney to represent a complainant in a paternity proceedings as an appellee in the supreme court?
2. If the defendant against whom judgment has been entered in a paternity proceedings perfects an appeal, what provisions are there for the payment of the printing bill for the brief and argument on behalf of the complainant-appellee?

Regarding your first inquiry, section 675.19, Code 1946, provides as follows:

“The county attorney, on being notified of the facts justifying a complaint as provided in this chapter, or of the filing of such complaint, shall prosecute the matter in behalf of the complainant.”

The absence of any expressed provision regarding such proceedings in the supreme court compels us to conclude that it was the intent of the legislature, in enacting chapter 675, Code of 1946, to make it the duty of the county attorney to represent the complainant in all stages from the preparation of the complaint through an appeal to the supreme court if such be the conclusion of the case. It being one of his statutory duties, he is not entitled to charge the complainant or those responsible for her support for his services at any stage of a paternity proceedings.

Your second inquiry as to cost of printing the brief and argument on behalf of the complainant-appellee, required under the Rules of Civil Procedure, is one which cannot be determined from the express provisions of chapter 675, Code 1946. The obvious intent of the legislature in enacting the provisions of this chapter was to establish liability for the support of illegitimate children, thus preventing them from becoming public charges. To obtain this objective and to encourage the mothers of such children to institute proceedings establishing the father's obligations, the legislature not only provided that the services of the county attorney were available without cost but did, in section 675.23, Code 1946, provide that the court costs of an unsuccessful action should be paid by the county rather than the complainant.

It would appear, therefore, that the legislature did not intend that the rights established in a proceedings under chapter 675, Code 1946, should be jeopardized because of the financial inability of the complainant to bear the cost of printing the required brief and argument on appeal. It is well established that in the interpretation of statutes some degree of implication or inference may be called in to aid the discovery of the intention of the legislature as expressed in the statute under consideration and where a statute merely imposes a duty it must then be said to also confer by implication every reasonable means necessary for the performance of that duty. 50 Am. Jur. Statutes, section 242, page 236. Applying this rule to the question you submitted it is our opinion that the cost of printing the brief and argument on behalf of a complainant-appellee in a paternity proceeding is chargeable to the

county in the same manner as though the county itself were the appellee in a civil case on appeal.

We would direct your attention to an amendment to Rule 345, Rules of Civil Procedure, effective June 18, 1948 contained in an order of the supreme court which now permits all records and briefs filed in the supreme court to be multigraphed, mimeographed or duplicated as well as printed by the established methods. This change directly relates to the question you submit in that it makes possible a very small expense for printing records and brief on appeal.

---

February 17, 1949

**MOTOR VEHICLES: Trailers not motor vehicles—assessable as personalty.** Trailer houses and commercial trailers in possession of a dealer or manufacturer are assessable as personal property even though the dealer or manufacturer has a license covering motor vehicles in his possession. Such vehicles are not classed as motor vehicles within the purview of section 321.130 of the Code. (38 A.G.O. 703 withdrawn.)

**MOTOR VEHICLES: Special mobile equipment—cement mixers, etc., subject to personal tax—gas and oil tanks subject to registration fees.** Cement mixers operated by auxiliary motors and similar machines except cornshellers and feed grinders, are “special mobile equipment” and exempt from registration fees but subject to personal tax. Gas and oil delivery tanks are analogous to truck bodies and when used with a truck are subject to registration fees and exempt from personal tax.

*Mr. Edwin S. Thayer, County Attorney, Des Moines, Iowa:* This will acknowledge your inquiry in which you propose the following questions:

“1. Are trailer houses in the hands of a dealer and/or manufacturer assessable as personal property even though the dealer and/or manufacturer is in possession of a dealer license issued by the motor vehicle department of the state of Iowa?

2. Are commercial trailers with the identical conditions existing as in question No. 1 assessable?

3. Is special equipment mounted on trucks assessable as personal property, such as cement mixers operated by auxiliary power, gas and oil delivery tanks, and all other special equipment except cornshellers and feed grinders which are specifically exempted under section 321-118?”

To answer your inquiry it is necessary to consider the following statutes:

Code section 427.1 provides, “that certain property shall not be taxed”, and

Section 427.13 provides, “All other property, real or personal, is subject to taxation in the manner prescribed.”

In interpreting the foregoing statutes our courts have adopted the rule that all property is taxable unless there is a specific exemption in the law.

The pertinent sections under the Motor Vehicle Law are as follows:

"321.1 (1) 'Vehicle' means every device, in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks."

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

"321.130. *Fees in lieu of taxes.* The registration fees imposed by this chapter upon private passenger motor vehicles shall be in lieu of all taxes, general or local, to which motor vehicles may be subject, and if a motor vehicle shall have been registered at any time under this chapter it shall not thereafter be subject to a personal property tax unless such motor vehicle shall have been in storage continuously as an unregistered motor vehicle during the preceding registration year."

The foregoing definitions under Code section 321.1 are quite important in determining whether or not trailers are motor vehicles within the meaning of the law. It is our conclusion that trailers, house trailers and commercial trailers, are not motor vehicles under the statutory definition herein before quoted. There is no specific provision in the law exempting trailer houses or commercial trailers from taxation, unless they fall within the class referred to in section 321.130, and under the definitions herein before referred to. House trailers and commercial trailers are not motor vehicles and, therefore, are not within the exemption statute 321.130.

Under an opinion appearing in the 1942 Attorney General Opinions at page 50, it was decided that all automobiles owned by a dealer were exempt from taxation as personal property because the dealer's license covered all of the automobiles and, therefore, the dealer's license brought them within the exemption of section 321.130.

If trailer houses and commercial trailers are not motor vehicles, then there is no express statutes which would relieve them from the imposition of a personal property tax. It is our conclusion that trailers and commercial trailers in the hands of a dealer are subject to an assessment for personal property taxes.

On April 11, 1938, the attorney general's office issued an opinion appearing in 38 A. G. O. at page 703, to the effect that commercial trailers were exempt from personal property tax. We have reviewed the opinion carefully and are unable to ascertain any valid legal reason for the opinion. The writer of that opinion stated that it was based on his belief as to what the legislature intended, and the opinion is without any authoritative legal support, and should be and is hereby withdrawn.

Your question number three relates to special mobile equipment which has been defined in section 321.1, Paragraph 17, as follows:

"'Special mobile equipment' means every vehicle not designed or used primarily for the transportation of persons or property and incidentally

operated or moved over the highways, including road construction or maintenance machinery and ditch-digging apparatus. The foregoing enumeration shall be deemed partial and shall not operate to exclude other such vehicles which are within the general terms of this subsection; provided that nothing contained in this section shall be construed to include portable mills or cornshellers mounted upon a motor vehicle or semitrailer."

Under the express provisions of section 321.18 special mobile equipment is exempted from registration and the payment of registration fees so that so far as the special mobile equipment is concerned there is no registration fee which could serve to exempt such property from taxation as personal property.

The supreme court in *State v. Griswold*, 225 Iowa 237, at page 239, used the following language in defining mobile equipment:

"We are inclined to think, however, that the picture to be envisioned from the definition is that of a vehicle that is specially equipped in such manner and with such permanency that the vehicle and the equipment is in reason to be looked upon as constituting an integral whole. After the vehicle and the special equipment have been thus incorporated into one apparatus possessing the characteristics mentioned, we have what the legislature mentions, that is, a special equipment that is mobile."

In view of the foregoing statutes we are of the opinion that cement mixers operated by auxiliary power and mounted on trucks so as to be readily transported from one job site to another, and which are used without removal from such truck, are within the definition of special mobile equipment and are subject to a personal property tax.

Section 321.118, Code 1946, provides:

*"Cornshellers and feed grinders.* For trucks on which a cornsheller is mounted the annual registration fee shall be fifteen dollars. For trucks on which a portable mill is mounted the annual registration fee shall be twenty-five dollars. The payment of the registration fee herein shall exempt the truck from property tax."

The foregoing statute is limited to cornshellers and feed grinders, and does not extend to any special mobile equipment, so that the property referred to in your question number three would be subject to personal property tax, unless the legislature sees fit to provide an exemption of special mobile equipment from taxation. Gas and oil delivery tanks are analogous to the dump body, stock rack, grain body or any other piece of equipment fastened to and used with a truck for the transportation of property. When so equipped a license fee is collected for such truck and such fee exempts them from personal property tax under the express provisions of section 321.130.

---

March 4, 1949

**CITIES AND TOWNS: Revenue bonds of municipal utility plant—state appeal board has no jurisdiction.** The issuance of revenue bonds payable from earnings of a city-owned electric plant is not within the purview of the local budget law and the state appeal board has no

jurisdiction where objections are made to such issuance. The obligation of such bonds is not payable from any funds of the city.

*Mr. Ray E. Johnson, State Comptroller:* This will acknowledge receipt of yours of the 25th ult. in which you have submitted for opinion the following:

“There has been submitted to the state appeal board a matter involving the issuance of a large amount of revenue bonds under the provisions of sections 397.9 to 397.14, inclusive.

The question arises as to whether the appeal board has jurisdiction where the indebtedness is not a general obligation but an obligation of the city owned electric plant. Taxpayers are objecting to the issuance of the bonds under the provisions of chapter 23 of the Code. (Sections 23.12 to 23.16.) Is it possible that a proposition of this kind can be classified as stated in chapter 394 of the code, and will the exceptions in section 394.4 apply?

Your early reply will be appreciated inasmuch as an appeal is pending and if the appeal board has jurisdiction a date for a hearing must be fixed.”

In reply thereto we would advise you that we are of the view that the appeal board is without jurisdiction to entertain this appeal. It can be said of this proposed contract what was said in the case of *Schumacher v. City of Clear Lake*, 214 Iowa 34, 37, concerning a contract before the court, to-wit:

“That the contract in this case is entirely outside the purview and purpose of the budget law, which, so far as this case is concerned, ‘is to secure economy in and fair prices, for building or other construction work to be paid for out of the funds of the municipality’ and ‘is directed to the promotion of economy in the letting of public contracts.’ See *Carlson v. Marshalltown*, 212 Iowa 373.”

In that case a contract for curbing and paving authorized by chapter 308, Code of 1927 amounting to more than \$5,000.00 was to be paid for out of special assessments, and by reason of deficits in the special assessments a portion of the improvement was paid from the general fund of the city. The provisions of the budget law were not observed in the undertaking of the improvement. However, the court found the provisions of chapter 308 of the Code of 1927, now chapter 391 of the Code of 1946 ample to accomplish the purposes of the budget law. These provisions included a resolution of necessity ‘stating the kinds of material proposed to be used and method of construction,’ etc., must be proposed, and before the resolution is introduced, there must be filed ‘a plat and schedule showing: \* \* \* 4. Each lot proposed to be assessed together with a valuation fixed by the council. 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.’ (Sections 5991, 5993.) Notice to the owners of property subject to assessment is required and they are permitted to make objections. The contract is required to be made by the council and no work can be done until the contract or certified copy has been filed and the contract is required

to be let on competitive bids. No appeal from the order of establishment is provided for, but appeal from the assessment is allowed. Therefore, the Court concluded:

“That to superimpose the provisions of the budget law would be to hamper and obstruct the municipality and the property owners in their right to make public improvements and to introduce confusion, incongruity, and uncertainty into definitely prescribed procedure therefor.”

The safeguards provided for cities insofar as paying for public improvements by special assessments are concerned, appear in the statutory provisions authorizing the improvement here under discussion. By section 397.9 payment for the cost of the plant may be made out of past or future earnings of the plant, and in the event revenue bonds are issued to pay the cost of such plant, the bonds shall not constitute a general obligation of such city or town or be enforceable in any manner by taxation. The contract for the construction thereof shall not constitute a general obligation or be payable in any manner by taxation. And under no circumstances shall the city be liable by reason of the failure of the net earnings being sufficient to make the payments provided in the contract. (Section 397.14.) According to sections 397.16, 397.17, and 397.18, before a contract may be entered into whereby payment of cost is made from the earnings, and where the improvement is to cost \$5,000.00 or more, the governing body proposing the contract, is required to give thirty days notice of its intention to adopt proposed plans and specifications and the proposed form of contract by publication once each week for two consecutive weeks in some newspaper of general circulation in the municipality and also in some newspaper of general circulation in the state of Iowa; the notice shall state as nearly as practicable the extent of the work, the kind of materials for which bids will be received; when the work shall be done; the time when the proposals will be acted upon, and shall also provide for competitive bids for the furnishing of electrical energy, gas, water or heat. It is further the provision that at the time and place fixed in the notice, the governing body shall consider the plans and specifications, form of contract, and offers and propositions submitted in connection therewith, also any bids for the furnishing of electrical energy, gas, water, or heat, together with any objections thereto by an interested party, and at such hearing or any adjournment thereof, shall have the power to adopt such offer or offers, propositions, or bids, and enter into such contract or contracts as they shall deem to be to the best interest of the municipality.

The parallel here exhibited is pertinent and controlling. An obligation to pay the contract price out of earnings of the plant is no more a payment out of the funds of the municipality than is payment for paving and curbing by special assessment a payment out of such fund. The provisions for notice, objections, hearing, etc., of chapter 397, Code of 1946, parallel the provisions of chapter 308, Code of 1927, now chapter 391, Code of 1946, to the extent that the purposes of the budget law are satisfied. In view of this legal situation, the fact that section

394.4 expressly excepts the jurisdiction of the appeal board in self-liquidating projects there authorized, has no bearing upon the conclusion here reached. The appeal board is without jurisdiction of this appeal.

---

March 15, 1949

**VETERANS: Bonus law effective on date of election—status of applicants determined on that date.** The bonus law of the 52nd G. A. being effective "immediately upon its adoption and approval" by the electors took effect on the date of election not on the date the state canvassing board met and canvassed the vote. It follows that the status of priority of those entitled to a deceased veteran's bonus is determined as of that date in the order named in the act.

*Mr. Edward J. Kallemyn, Executive Secretary, World War II Service Compensation Board:* We have your letter of March 11th wherein you ask our opinion on the following question:

"The World War II Service Compensation Board would like to have the opinion of the attorney general as to the controlling dates of 'The surviving unremarried widow or widower, child or children, stepchild or stepchildren, mother, father, or person standing in loco parentis, in the order named and none other, of any deceased person, shall be paid the compensation that such deceased person would be entitled to under this act, if living;' as set forth in lines 26, 27, 28, 29 and 30, chapter 59, Senate File 492, Page 79, Laws of the 52nd General Assembly.

For example, the deceased veteran meets requirements as set forth in section 4, of chapter 59, Laws of the 52nd General Assembly. Widow of the deceased veteran remarried November 23, 1949.

Would the above mentioned remarried widow be entitled to be paid compensation under the provisions of the act, or would she have forfeited her rights to such claim by remarrying?"

Section 14 of chapter 59, Acts of the 52nd General Assembly provides that the bonus law shall be submitted to the people of the state at the general election to be held in November, 1948.

Section 15 of said act reads as follows:

"This act shall take effect immediately upon its adoption and approval at such election."

Section 5 of Article VII of the Constitution of the state of Iowa provides in part:

" \* \* \* but no such law shall take effect until at a general election it shall have been submitted to the people, and have received a majority of all the votes cast for and against it at such election; \* \* \* "

Under section 15 and that part of section 4 of the act, as quoted in your letter, there are three possible dates which would determine the status of the individuals eligible to receive the bonus. They are:

1. Date of payment of the bonus;

2. Date of return of the state board of canvassers declaring that the bonus carried, which was November 22, 1948; and

3. Date of the general election which was November 2, 1948.

We have no difficulty in deciding that the date of payment of the bonus is not controlling, for if that date were taken, all individuals in the same class would not necessarily be treated in the same manner. It is our opinion that it was the intent of the legislature to fix a time certain at which the status of all those eligible to receive the bonus would definitely be fixed.

Section 4 of the bonus act provides that the order of priority of those entitled to be paid the bonus on behalf of a deceased veteran is as follows:

1. The unmarried widow.
2. The children.
3. The step-children.
4. The mother.
5. The father.
6. Those standing in loco parentis.

By the terms of the act, "none other" than those listed is eligible to receive payment. It therefore becomes your duty to ascertain as of the time of application for the bonus that there is no living person in any of the above named classes in the order named, with a prior and superior right to that of the applicant.

With reference to whether or not such time certain would be November 2 or November 22, 1948, we wish to call to your attention sections 13 and 14, Chapter 332, Acts of the 39th General Assembly which dealt with the soldiers' bonus for the first World War. Section 13 provides that the law should be submitted to the people at the general election to be held in November of 1922, and section 14 reads as follows:

"Effective date. This act shall take effect immediately on its adoption and approval at such election."

It should be noted that the wording of section 14 is exactly the same as section 15 of chapter 59, Acts of the 52nd General Assembly. While the effective date of the first bonus act was not in question, it is significant to note that in the case of *Grout v. Kendall*, 195 Iowa 467, 192 N. W. 529, our supreme court said:

"The ground of plaintiff's prayer for relief is predicated upon the alleged unconstitutionality of the act in question. The act is too lengthy to be incorporated herein. Sufficient to say that it consists of 14 sections, and was passed in due form by the legislature and duly approved by the executive on March 23, 1921, and *duly ratified by vote of the electors as provided by section 13 thereof at the general election held November 7, 1922.*"

Also it is significant to note that section 50.38 Code of Iowa 1946, provides that the state canvassing board shall meet on the 20th day after an election and canvass all the returns. It further provides that if all the returns are not received from the counties, the board may

adjourn not exceeding twenty days for the purpose of obtaining them, and when received shall proceed with the canvass.

While the state canvassing board did in fact meet and make its returns twenty days after the general election held on November 2, 1948, we do not feel that it was the intention of the legislature to provide that the status of one who was eligible to receive the bonus could be made subject to the state canvassing board receiving all the returns within twenty days after the election. The function of the board is ministerial in nature and its action in declaring on November 22, 1948, that the bonus law carried, necessarily relates back to the date of the general election.

It follows that it is our opinion that the effective date of chapter 59, Acts of the 52nd General Assembly was November 2, 1948, and that the status of those eligible to receive said bonus was fixed and determined as of that date.

For the sake of clarity we submit the following two examples:

1. The unremarried widow of a deceased veteran remains unremarried on November 2, 1948 but subsequently remarried on January 1, 1949. Her rights to the bonus were fixed and determined as of November 2, 1948, and it is our opinion that her application for the bonus should be approved.

2. The unremarried widow of a deceased veteran remains unremarried on November 2, 1948 but subsequently dies on January 1, 1949 before applying for the bonus. Assuming that there are no children or step-children, it is our opinion that the application of the mother of the deceased veteran should be approved.

---

March 24, 1949

**VETERANS: Bonus law—terminal leave included with active duty for enlisted veterans.** An enlisted veteran of World War II can, for the purpose of qualifying for an Iowa bonus, compute the time for which he was paid terminal leave in addition to the time spent on active duty.

*Mr. Edward J. Kallemyn, Executive Secretary, World War II Service Compensation Board:* This will acknowledge receipt of your letter of March 5th wherein you ask the following question:

“The World War II Service Compensation Board would like to request an opinion from the attorney general as to whether a veteran of World War II, who meets the requirements under section 4, chapter 59, Acts of the 52nd General Assembly, would be entitled to receive from the service compensation fund time granted him under Federal Statute 60 L, Armed Forces Leave Act of 1946.

For example, a soldier entered the armed forces of the United States October 14, 1943 and was separated from such service October 14, 1945. The soldier did not receive any terminal leave while he was in the service. Upon his separation from service he was paid only for such time as he had spent on active duty, which in this case would be from October 14, 1943 to October 14, 1945.

Under the Armed Forces Act of 1946, soldier was granted 30 days terminal leave pay per year for each year he had served on active duty with the armed forces of the United States.

Would this soldier be entitled to include this time for compensation under the Iowa Bonus Law?"

The first part of section 5, chapter 59, Acts of the 52nd General Assembly, reads as follows:

"Active duty in the armed forces of the United States shall include all time for which credit is received in the computation of terminal leave, including such leave time as provided for by federal statutes, including Armed Forces Leave Act of 1946. \* \* \* \*"

The Armed Forces Leave Act of 1946 was passed to equalize the terminal leave pay which officers and enlisted men received. Prior to the passage of said act, officers in the armed forces received terminal leave pay and their separation certificates showed that the officers were on active duty until the end of their terminal leave. Also prior to the passage of said act enlisted men did not receive any terminal leave pay, and even as of the present date their discharge or separation certificates only show the date when they left active duty with the armed forces as such active duty is defined by the armed forces. Said act merely provided for terminal leave pay for enlisted men after they were separated from the service.

Section 5 of chapter 59, Acts of the 52nd General Assembly, above quoted, in effect says that for the purposes of the Iowa bonus an enlisted man's active duty "shall include the time for which he was paid a terminal leave." Obviously it is within the power of our legislature to define what is meant by "active duty" for the purposes of receiving a bonus under the Iowa law.

It is our opinion, therefore, that the answer to your specific question is that an enlisted man can, for the purpose of qualifying for the bonus, compute the time for which he was paid terminal leave in addition to the time which he spent on active duty with the armed forces.

---

March 24, 1949

**COUNTIES:** County home as nursing home—license required. A County Home coming within the definition of a "nursing home" contained in chapter 92, Acts 52nd G. A., must be licensed by the state department of health before it can be operated as such nursing home.

*Mr. Lawrence B. Pedersen, County Attorney, Grinnell, Iowa:* We have your request for an opinion as to the applicability of the nursing home law contained in chapter 92, Acts of the 52nd General Assembly to a county home established and maintained pursuant to the provisions of chapter 253, Code 1946.

Section 2 of chapter 92, Acts of the 52nd General Assembly is as follows:

"After July 4, 1947, *no person, persons, or governmental unit shall establish, conduct or maintain a nursing home in this state without a license.*" (Italics supplied)

The nursing home law makes no reference to either a county home or to chapter 253, Code 1946, providing for the establishment and maintenance of such homes, but it is a law of general application and being subsequently enacted must be held applicable to such county homes falling within the definition of a nursing home unless the legislature provided exemption therefor. Examination of the nursing home law does not reveal such an exemption but rather in section 2 quoted above we find evidence of legislative intent to include those county homes which by their functional operation fall within the definition contained in chapter 92, Acts of the 52nd General Assembly.

It is our opinion, therefore, that a county home is not exempt from the provisions of chapter 92, Acts of the 52nd General Assembly solely by virtue of its being established and maintained under the provisions of chapter 253, Code 1946.

The controlling factor as to whether a county home is subject to the provisions of the nursing home law so as to require the county to obtain a license under the provisions of chapter 92, Acts of the 52nd General Assembly is whether the manner and method of its operation is within the definition contained in section 1 of said chapter which is as follows:

"As used in this act 'Nursing Home' is any institution, place, building or agency in which any accommodation is primarily maintained, furnished, or offered for the care over a period exceeding twenty-four hours of two or more nonrelated aged or infirm persons requiring or receiving chronic or convalescent care, and shall include sanatoriums, rest homes, boarding homes, or other related institutions within the meaning of this act. Nothing in this act shall apply to hotels or other similar places that furnish only food and lodging, or either, to their guests."

This is a question of fact to be determined in each individual county and cannot, therefore, be made the basis of an opinion from this office except in case of a dispute between the county officials and the state department of health when all of the facts might be submitted to us for opinion.

---

March 28, 1949

**CORPORATIONS: Renewal of articles before expiration.** A corporation may renew its corporate existence prior to the expiration of its charter and such renewal dates from the time of filing, with the secretary of state, the certificates and articles required by section 491.27 of the Code.

*Honorable Melvin D. Synhorst, Secretary of State:* An opinion is requested as to whether a corporation may renew its corporate existence prior to the expiration of its present charter and if it may, on what date the renewal begins.

Section 491.25, Code of 1946, provides in part:

"Corporations existing for a period of years may be renewed from time to time for the same or shorter periods, or may be renewed to exist perpetually, if a majority of the votes cast at any regular election, or special election called for that purpose, at any time during the corporate life or within three months after the termination thereof \* \* \* "

The foregoing quoted statutory provisions expressly provide that corporations existing for a period of years may at any time during the corporate life be renewed for a period of years or to exist perpetually.

Section 491.26, Code 1946, provides:

"Such renewals shall date from the expiration of the corporate period which it succeeds."

The corporate period mentioned in section 491.26 is the period of life enjoyed by the corporation under its charter prior to renewal. At the time of renewal a new corporate period commences. The purpose of the provision is to insure the continuity of the corporation as a matter of law. To construe the corporate period referred to as the corporate period previously authorized would nullify the particular effect of section 491.25 which permits renewal at any time during the corporate life, and would result in many anomalous situations producing no beneficial results, section 491.25 first having granted unto a corporation existing for a period of years the right to renew for a term of years or perpetually and at any time during the corporate life, as hereinbefore noted.

Section 491.27 sets forth the requirements to effectuate such renewals.

"491.27. Within ten days after the said action of the stockholders for the renewal of any corporation, a certificate, showing the proceedings resulting in such renewal, sworn to by the president and secretary of the corporation, or by such other officers as may be designated by the stockholders, together with the articles of incorporation, which may be the original articles of incorporation or amended and substituted articles, shall be filed with the secretary of state and be by him recorded in a book kept for that purpose. The secretary of state shall then forward said renewal articles to the recorder of deeds of the county where the principal place of business is located, and the recorder shall record said renewal articles and indorse thereon the book and page where the record will be found."

It is then provided by section 491.32, Code 1946:

"Notice of renewal-publication. Within three months after the filing of the certificate and articles of incorporation with the secretary of state, the corporation so renewed shall publish a notice of renewal. Said notice shall be published once each week for four weeks in succession in a newspaper as convenient as practicable to the principal place of business of the corporation, and proof of publication filed in the office of the secretary of state, and shall contain the matters and things required to be published by section 491.17, relating to original incorporations."

It is clear that these provisions become operative immediately upon the renewal action taken by the stockholders rather than some date in the distant future. Further evidence of such intent appears in the

provisions of section 491.20, Code of 1946. An analysis of this section indicates that the first paragraph thereof substantively is properly divisible into three parts: (a) Amendments generally, (b) amendments increasing capital stock, and (c) amendments providing for perpetual existence. With relation to division (a) supra, it is provided:

“Amendments to articles of incorporation making changes in any of the provisions of the articles may be made at any annual meeting of the stockholders or special meeting called for that purpose, and they shall be valid only when recorded, approved and published as the original articles are required to be. If no increase is made in the amount of capital stock, a certificate fee of one dollar and a recording fee of twenty-five cents per page must be paid.”

That part of the said section 491.20 above quoted requires no examination for the purpose of this opinion, but is set forth in demonstration of the substantive divisibility of the paragraph, and thereby to clarify the discussion hereafter occurring herein.

Relative to division (b) supra, the said section continues:

“Where capital stock is increased the certificate fee shall be omitted but there shall be paid a recording fee of twenty-five cents per page and in addition a filing fee which in case of corporations existing for a period of years shall be one dollar per thousand of such increase and in case of corporations empowered to exist perpetually shall be one dollar and ten cents per thousand of such increase.”

The immediately foregoing quotation provides for the fees required upon the filing of amendments relating only to increase of capital stock.

With regard to division (c) supra, the first paragraph of section 491.20 concludes:

“Corporations providing for perpetual existence by amendment of its articles shall, at the time of filing such amendment, pay to the secretary of state a fee of one hundred dollars together with a recording fee of twenty-five cents per page, and, for all authorized capital stock in excess of ten thousand dollars, an additional fee of one dollar ten cents per thousand.”

Provisions relating to an amendment for perpetual existence expressly require payment of the entire corporate fee at the time of filing such amendment. The language “\* \* \* and, for all authorized capital stock in excess of ten thousand dollars, an additional fee of one dollar ten cents per thousand” must be given significance. This language does not relate only to increases in capital stock, nor does it relate solely to capital stock authorized prior to amendment to perpetual existence, but rather includes capital stock authorized prior to the amendment, with any further authorizations filed at the time.

The provisions of section 491.20, read with the right granted to corporations under section 491.25 and the provisions of section 491.27 and 491.28 relating to effectuating a renewal would seem to leave no doubt that renewal becomes effective on the date of filing the renewal articles with the secretary of state.

You are therefore advised that it is the opinion of this office (1) that corporations may be renewed at any time during the corporate life, or within three months after the termination thereof. (2) That such renewal dates from the time of filing with the secretary of state the certificate and articles required in section 491.27, Code 1946. (3) That the fee to be charged in the case of corporations for a period of years shall be twenty-five dollars for the first ten thousand dollars of authorized stock, and one dollar per thousand for all authorized stock in excess of ten thousand dollars, and a recording fee of twenty-five cents per page. In the case of corporations renewed to exist perpetually, the fee shall be one hundred dollars for the first ten thousand dollars of authorized capital stock, and one dollar ten cents per thousand for all authorized capital stock in excess of ten thousand dollars, and a recording fee of twenty-five cents per page.

---

April 13, 1949

**BEER: Class "B" permits by county supervisors—limitations.** The board of supervisors is restricted by statute in the issuance of class "B" beer permits, outside of cities and towns for use in any establishment, to golf and country clubs and hotels in villages platted before January 1, 1934.

*Mr. Ralph Bastian, County Attorney, Fort Dodge, Iowa:* Your letter of April 7th has been received by this office in which you ask our opinion on the following question:

"We have a large tourist camp known as 'Savage Tourist Cabins' which is located outside the city limits of Fort Dodge, Iowa, and the same is not in a platted area. This tourist camp consists of a number of cabins, and in conjunction therewith is a restaurant. The restaurant is a distinct and separate building from that of the cabins. Mr. Savage, who operates the tourist camp, has a request to the board of supervisors for a class B hotel or motel beer permit.

Would you please advise as to the authority of the board to issue such permit."

Section 124.5, Code of 1946, reads in part as follows:

"Power is hereby granted to boards of supervisors to issue, at their discretion, class "B" and "C" permits in their respective counties in villages platted prior to January 1, 1934, and to clubs as defined in section 124.16 and to revoke same for causes herein provided, or in the event the place of business of the permit holder is conducted in a disorderly manner."

Section 124.16, Code of 1946, reads in part as follows:

"No club shall be granted a class "B" permit under this chapter:

1. If the buildings occupied by such club are not wholly within the territorial limits of the city, town or special charter city to which such application is made; provided, however, that a golf or country club whose buildings are located outside the territorial limits of the city, town or special charter city, may be issued a class "B" permit by the local board of supervisors, and further provided that all of the permit fees authorized under this subsection shall be collected and retained by the county in which such golf or country club is located and credited to the general

fund of said county and provided, further, that such golf or country club shall comply with the restrictions contained in the succeeding subsections of this section."

Sections 124.9 and 124.24 provides that "hotels" shall have class "B" beer permits. There is no provision in our law for a so-called "motel" beer permit.

Without going into the question as to whether or not a "tourist camp" or a "motel" can properly be classified as a "hotel", it is our opinion that your question may be disposed of on another ground. Under the provisions of section 124.5 of the Code, above quoted, it is apparent that your board of supervisors has full discretion whether or not it will issue a class "B" permit to anyone for use in any establishment located outside a city or town, except as specifically prohibited by statute.

Said section prohibits your board of supervisors from issuing any class "B" beer permit outside a city or town for use in any establishment, with the exception of clubs as provided in section 124.16, unless the establishment for which it is issued is located in a village platted prior to January 1, 1934.

Subsection 1 of section 124.16, above quoted, provides that the board of supervisors may issue a class "B" beer permit to a golf or country club located outside a city or town and which is not located in a platted village. No such provision is made which would allow the board of supervisors to issue a class "B" beer permit to a hotel not located in a village platted prior to January 1, 1934.

From the above discussion it is our opinion that your board of supervisors does not have the power or authority to issue a class "B" beer permit to the establishment mentioned in your letter.

---

April 28, 1949

**BANKS AND BANKING: F. D. I. C. ratio of capital to deposits—no basis for requirement.** The Federal Deposit Insurance Corporation has no power to require an insured bank to maintain its capital in any fixed ratio to deposits as a condition to being and continuing such insured bank.

*Mr. Newton P. Black, Superintendent of Banking:* By letter dated April 21, 1949, you request an opinion of this office as follows:

"May the Federal Deposit Insurance Corporation require a 'State non-member bank' as a condition of continuing or becoming an 'insured bank' to increase the amount of capital stock issued and outstanding in a sum which would make the total of issued and outstanding capital stock equivalent to 2½ per cent of the total deposits of the bank."

Section 12B of the Federal Reserve Act as amended sets forth the following definitions:

"(c) As used in this section—

(1) The term 'state bank' means any bank, banking association, trust company, savings bank, or other banking institution which is engaged in the business of receiving deposits and which is incorporated under the laws of any state, Hawaii, Alaska, Puerto Rica, or the Virgin Islands, or which is operating under the Code of Law for the District of Columbia (except a national bank), and includes any unincorporated bank the deposits of which are insured on the effective date under the provisions of this section.

(2) \* \* \* and the term 'state nonmember bank' means any state bank which is not a member of the Federal Reserve System.

(3) The term 'insured bank' means any bank the deposits of which are insured in accordance with the provisions of this section; and the term 'noninsured bank' means any bank the deposits of which are not so insured."

The act provides that certain banks shall be insured banks without application or approval. Examination of these provisions is not required for the purposes of this opinion. Conditions under which state nonmember banks may become insured banks pertinent to this discussion are set forth in section 12B, hereinbefore mentioned as follows:

"(f) \* \* \*

(2) Subject to the provisions of this section any national nonmember bank, upon application by the bank and certification by the Comptroller of the Currency in the manner prescribed in subsection (e) of this section, and any State nonmember bank, upon application to and examination by the corporation and approval by the board of directors, may become an insured bank. Before approving the application of any such state nonmember bank, the board of directors shall give consideration to the factors enumerated in subsection (g) of this section and shall determine, upon the basis of a thorough examination of such bank, that its assets in excess of its capital requirements are adequate to enable it to meet all its liabilities to depositors and other creditors as shown by the books of the bank.

(g) The factors to be enumerated in the certificate required under subsection (e) and to be considered by the board of directors under subsection (f) shall be the following: The financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this section."

Particular attention is invited to the direction of the factor "the adequacy of its capital structure". The capital structure of a corporation is composed of all assets and does not relate solely to the amount of capital stock of a company. That it was not the intention of the Congress that eligibility for insurance should be determined on some ratio of capital stock to deposits is manifest in the following subsection of said section 12B:

"(y) It is not the purpose of this section to discriminate in any manner, against state nonmember, and in favor of national or member banks; but the purpose is to provide all banks with the same opportunity to obtain and enjoy the benefits of this section. No bank shall be discriminated against because its capital stock is less than

the amount required for eligibility for admission into the Federal Reserve System.”

Powers granted to the Federal Deposit Insurance Corporation include the following:

“(j)

Seventh. To exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this section and such incidental powers as shall be necessary to carry out the powers so granted.

Tenth. To prescribe by its board of directors such rules and regulations as it may deem necessary to carry out the provisions of this section.”

It is to be noted that no powers were granted to the corporation to enlarge upon the specific provisions of the section and in fact it is clear that the powers of the corporation acting through its board of directors, officers or agents were specifically limited to those expressly granted under the act and incidental powers necessarily implied by the express powers granted.

The tenth power provides for the making of rules and regulations. This grant, however, is a grant of purely administrative power which is adjective and not substantive. For example, administrative procedures may be adopted as a rule or regulation.

The standard to be followed by the corporation with particular relation to termination on the basis of unsoundness and lack of safety is found in subsection (1) which provides in pertinent part that the board of directors upon finding that an insured bank or its directors or trustees have continued unsafe or unsound practices in conducting the business of the bank or have knowingly or negligently permitted any of its officers or agents to violate any provision of any law or regulation to which the insured bank is subject, shall give to the authority having supervision of the state bank a statement with respect to such practices or violations for the purpose of securing the correction thereof. Procedure is set forth in the said subsection for termination of insurance upon proper grounds. We do not believe that reference to “unsafe or unsound practices” in conducting the business is directed to the amount of capital stock of the banking institution. Had it been the intent of the Congress that a particular ratio of capital stock to deposits should be maintained it was for the Congress to expressly so provide and to fix the ratio.

The amount of capital stock required of Iowa banks and trust companies is set forth in section 528.1, Code of Iowa, 1946, and is predicated upon a population basis. It is not for the Federal Deposit Insurance Corporation through any of its directors, officers or agents to pronounce that incorporation in accordance and compliance with the provisions of section 528.1 of the Iowa code constitutes an unsafe and unsound practice and to superimpose by legislative act of the government agency additional requirements for eligibility for insurance.

It is not clear whether your question was intended to refer to a requirement applicable only to state nonmember banks, or whether the requirement was intended to be one of general application to all banking institutions. If the requirement were to be applicable only to state nonmember banks, it would not only be objectionable for the reasons hereinbefore discussed, but would be further objectionable as a direct violation of subsection (y) of said section 12B supra, as discrimination which by the terms of the said subsection is expressly prohibited.

You are therefore advised that it is the opinion of this office that the Federal Deposit Insurance Corporation is without power to fix a ratio in any amount of basic capital to deposits as a condition to being and continuing as an insured bank.

You are further advised, however, that in the event of litigation between a state bank and the Federal Deposit Insurance Corporation involving the issues herein discussed, it is not within the province of this office to represent such bank.

---

April 28, 1949

**COUNTIES: Use of secondary road fund for construction of maintenance building.** The county board of supervisors may, under section 309.13 of the Code, use the secondary road fund for the construction of garages and sheds for storage, repair and servicing of county equipment, however the proposal for such construction must first be approved by the electors pursuant to section 345.1.

*Mr. Curtis G. Riehm, County Attorney, Garner, Iowa:* We have yours of the 18th inst. in which you submit the following:

"In March of 1948, the board of supervisors of Hancock county were contemplating building a maintenance building for the storage of maintenance equipment and at that time, after research on the problem, we were both in agreement that the opinion I wrote March 8, 1948 to the board of supervisors was sufficient to allow the board of supervisors to build a maintenance building with the use of the maintenance fund. The maintenance building was not built and it is contemplated at this time by the board to erect a maintenance building at the cost of approximately \$7,500.00 to \$10,000.00. According to the board of supervisors, through contacts with other boards, it is learned that this opinion of March 8, 1948 has been changed. Enclosed herewith is a copy of the original opinion together with your approval thereof. This specific problem that I wish answered is as follows:

1. May the board of supervisors erect a maintenance building using the maintenance fund in accordance with the opinion of March 8, 1948?
2. If the answer to the above proposition is 'no', under what authority can the board of supervisors erect a maintenance building at the cost of \$7,500.00 to \$10,000.00, and is a special county election necessary?"

In reply thereto I would advise you as follows:

(1) With respect to your question No. 1, we would advise you that since the issuance of the latter opinion to which reference has been made, considerable discussion has been aroused as to the correctness of the conclusion reached therein, and now by reason of the following cir-

cumstances the designated written opinion is now withdrawn. It will be considered now, as it was then, that there was no express authorization for the use of the secondary road maintenance fund in the erection of a maintenance building. Power to use the fund for that purpose was inferred from the authorization for its use in the payment of bridge repairs, machinery, tools and other equipment as a necessary conclusion from the authority to make the foregoing purchases. The basis for drawing such inference has now been removed and the legislative intent clarified by the legislative history of the following acts submitted to the Fifty-third General Assembly. House File 41, being an act to amend, revise and codify chapter 309, Code of 1946 and chapter 163 of the Laws of the Fifty-second General Assembly, among other provisions contained this:

“Sec. 4 provided the secondary road fund is hereby appropriated for and shall be used in the payment of (here follows five payment authorizations not pertinent to this discussion)”

However, No. 6 of the said foregoing section 4 provided as follows:

“Secondary road equipment, materials, supplies, and garages or sheds for the storage, repair and servicing thereof without regard to section three hundred forty-five point one (345.1), Code of 1946.”

This bill containing the foregoing section was filed and referred, but was not acted upon by the House or a committee thereof. The same bill designated as Senate File 41, containing the foregoing subsection 6 of section 4 passed the Senate, but did not reach a vote in the House. House File 318 was a bill to amend section 309.13 relating to the pledge of maintenance funds for secondary roads, and provided the foregoing section 309.13, Code of 1946 be amended by adding the following new section:

“To the payment of the cost of secondary road equipment, materials, supplies and garages or sheds for storage, repairs and servicing of said equipment. The provisions of section three hundred forty-five point one (345.1), Code 1946, shall not apply to this section.”

However the committee on roads and highways filed an amendment, which amendment consisted of striking the foregoing last sentence, to-wit:

“The provisions of section three hundred forty-five point one (345.1), Code 1946, shall not apply to this section.”

This amendment was adopted by the House and as amended, the bill was passed by the House. It did not reach a vote in the Senate.

This legislative history therefore shows that insofar as the Senate was concerned, it passed and adopted the bill authorizing the use of the secondary road fund for garages and sheds for the storage, repair and servicing of equipment without submission of the matter to the electors. The House is recorded as authorizing the use of the foregoing fund for the construction of garages and sheds for the foregoing use but with the added implied intent that such use should not be made of such fund

without submission of the matter to the electors. In this confused legislative situation resort may be had to extrinsic aids in reaching a conclusion of the legislative intent. Sutherland Statutory Construction, 3rd Ed., Vol. 2, section 5015, states this rule as follows:

“One of the most available extrinsic aids to the interpretation of statutes is the action of the legislature on amendments proposed to a bill. Both the state and federal courts will refer to proposed changes in a bill in order to interpret the statute into which it was finally enacted. The journals of the legislature are the usual source for this information. Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment. However, such rejection may occur because the bill in substance already includes those provisions. Other interpretive aids may indicate that this is the case.

Adoption of an amendment is evidence that the legislature intends to change the provisions of the original bill. Again, however, the amendment may have been adopted only because it better expressed a provision already embodied in the original bill. Thus caution must be exercised in using the action of the legislature on proposed amendments as an interpretive aid. Other interpretive aids should be considered in order to determine the legislative intent.

Resort to aid of this kind is seemingly in conflict with the enrolled bill rule which provides that the courts cannot look behind the bill as enrolled and filed with the Secretary of State. Actually it is not, since the enrolled bill rule refers only to the formal procedure of passage. Resort to the journals for the purpose of interpretation is far different; resort to the legislative journals in this case is to discover the meaning of the act.”

Application thereof to this situation then results in the following conclusion:

(1) That section 309.13, Code of 1946, as considered by each House of the 53rd General Assembly evinces an intent that the secondary road fund may be used for the construction of garages and sheds for storage, repair and servicing of county equipment.

(2) That such fund may not be used for the foregoing purpose without submission of the matter first to the electors pursuant to the provisions of section 345.1, Code of 1946. Such section provides as follows:

“345.1. The board of supervisors shall not order the erection of, or the building of an addition or extension to, or the remodeling or reconstruction of a courthouse, jail, county hospital, or county home when the probable cost will exceed ten thousand dollars, or any other building, except as otherwise provided, when the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding ten thousand dollars 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.”

This conclusion removes the necessity of answering your question number two.

May 10, 1949

**TAXATION: Veterans' exemption to widow—status upon remarriage.**

The widow of a World War II veteran, owning property in her own name, may claim tax exemption through her deceased husband so long as she remains unmarried. When she remarries her exemption status immediately changes and she is no longer entitled to exemption through her former husband. If her second husband is also a veteran she may claim exemption through him provided he does not claim it himself on his own property.

*Mr. L. S. Hendricks, County Attorney, Rockwell City, Iowa:* "We have yours of the 21st inst. in which you submit the following:

"This letter is written in connection with my letter to you dated March 7, 1949. That letter contained the following facts and questions:

1. "A" was the widow of a World War II veteran until March, 1948 at which time she remarried. "A" owns property situated in Rockwell City, Iowa. "A" claimed an exemption before July 1, 1947 under section 427.4, 1946 Code of Iowa. The title to the real property remains in "A". Is "A" entitled to the exemption provided in sections 427.3 and 427.4 of the Code of Iowa for the 1948 tax year?

It is requested that the following additional facts and questions be considered when you give your opinion on the above matter:

2. "A" remarried a veteran of World War II in March, 1948. Iowa Official Form 316a, was filed by "A" before July 1, 1947 and said form showed "A" to be an unmarried widow of a veteran of World War II.

a. Under the circumstances in question two is "A" required to file another Iowa Official Form 316a, showing her to be the wife of a veteran instead of a widow of a veteran, to qualify for the tax exemption for the year 1948?

b. Does "A's" status as of January 1, 1948, as far as the tax exemption is concerned, continue for the rest of the year 1948 even though "A" remarries in March following said January 1?"

In reply to the foregoing we would advise you as to question 1.

"A" was the widow of a World War II veteran until March, 1948, and made proper application before July 1, 1947, and was entitled as such widow to the exemption, which was allowed and placed on the tax records on January 1, 1948. Upon her remarriage she was no longer the widow of a veteran *remaining unmarried* and was therefore disqualified.

Section 427.3 classifies those entitled to an exemption, and section 427.4 provides,

"In case any person in the foregoing classifications does not claim any such exemption from taxation, it shall be allowed in the *name of such person* to the same extent on the property of any one of the following persons in the order named:

1. The wife, or widow remaining unmarried, of any such soldier, sailor, marine, or nurse, where they are living together or were living together at the time of the death of such person."

"A" was within the statutory classification and was entitled to claim an exemption in the name of her first husband, who was deceased,

while she was his widow remaining unmarried, but when she married a second World War veteran, she disqualified herself from claiming in the first veteran's name, for the reason that she was no longer *his widow remaining unmarried*, but she was thereafter qualified to claim in the name of her second husband.

In response to division *a* of question 2, you are advised that when "A" remarried a veteran of World War II in March, 1948, she could claim an exemption as his wife on her property, if he claimed none, and it would be granted to her *in his name*. Under the circumstances therein stated, "A" would be required to file before July 1, 1948, Iowa Official Form 316a, showing her to be the wife of a veteran of World War II in order to qualify for the tax exemption for the year 1948 in his name.

Under Question 2 in division *b*, you inquire as to whether "A's" status as of January 1, 1948, so far as the tax exemption is concerned, continues for the rest of the year 1948 even though she remarries in March of 1948, and you are advised that "A's" status as of January 1, 1948 is not controlling as is hereinafter set out.

Section 427.6 provides,

"Said claim for exemption, if filed on or before July 1 of any year and allowed by the board of supervisors, shall be effective to secure an exemption for the year in which such exemption is filed, and *when a claim has once been made and allowed, it shall be effective thereafter during the period of ownership of the property designated or of the homestead, as the case may be, or until the death of all the persons named in section 427.3 who remain equitable and legal owners of said property.*"

The above section relates to procedure and not to substance. When once filed the claim remains until the contingencies therein stated arise. These contingencies are (1) a change in the ownership of the property upon which a claim is made or the homestead, or (2) the death of all the persons who *are entitled to claim exemptions* remain either equitable or legal owners of the property upon which the claim is made. See opinion of the attorney general in the Report of the Attorney General for 1946 at page 32.

In construing military service exemptions one must take into consideration all of the sections of the Code relating thereto, consisting of Sections 427.3 to 427.7, and the amendments to section 427.6 contained in Chapter 231, Acts of the 52nd G. A. An examination of these sections will disclose that in order to obtain a soldier's credit the claimant must file a claim and qualify by showing himself to be within the terms of the statute. It is the general rule that exemptions are strictly construed and those claiming an exemption must show that they come within the provisions of the statute. A military service exemption is granted soldiers, sailors, marines or nurses, who come within the express provisions of the statute, and in the event that any of the parties defined in Code section 427.3 do not claim the exemption, it is allowed in the

name of such person to the same extent on the property of any one of the following persons *in the order named*:

1. The wife, or widow remaining unmarried, of any such soldier, sailor, marine, or nurse, where they are living together or were living together at the time of the death of such person.
2. The widowed mother, remaining unmarried, of any soldier, sailor, marine, or nurse, whether living or deceased, where such widowed mother is, or was at the time of death of the soldier, sailor, marine, or nurse, dependent on such person for support.
3. The minor child, or children owning property as tenants in common, of any such deceased soldier, sailor, marine, or nurse.

No more than one tax exemption shall be allowed under this section or section 427.3 in the name of any honorably discharged soldier, sailor, marine, or nurse.

The exemption is granted to the wife or widow remaining unmarried in the name of the soldier because he does not claim such exemption, and if the filing of the claim were the sole, controlling factor, then the qualifications necessary to receive the exemption could be wholly ignored. However, the sections relating to military service exemption must be construed as a whole in order to give effect and meaning to all of the provisions. The provisions of 427.6 providing that when a claim was filed it should continue, was enacted to waive the necessity of filing a claim annually in order to receive the benefits of the statute. However, the provisions of 427.6 did not remove the necessity for the claimant to qualify and show himself within the terms of the exemption.

If the filing of the claim alone was the controlling factor, then the rights granted to the widowed mother and the minor children under paragraphs two (2) and three (3) of section 427.4 above quoted would be meaningless, because the widow, who would have the first right to qualify under section 427.4, could continue by virtue of said claim to obtain an exemption even though she had remarried and removed herself from the classes denominated in paragraph one (1) of section 427.4. Such a result would deprive the parties named under paragraphs two (2) and three (3) of their right to claim an exemption in the soldier's name in the event that the parties named in paragraph one (1) were removed from that class and disqualified from claiming such credit.

An example of the necessity for an annual qualification can be illustrated as follows:

Under the express provisions of section 427.5 it is provided,

"Any person named in section 427.3, provided he is a resident of and domiciled in the state of Iowa, shall receive a reduction equal to his exemption. In order to be *eligible* to receive said exemption or reduction the person claiming the same shall have recorded his discharge in the office of the county recorder of the county in which he shall claim exemption or reduction. Said person shall file with the county auditor

his claim for exemption or reduction in taxes under oath, which claim shall set out the fact that he is a resident of and domiciled in the state of Iowa, and a person within the terms of section 427.3, and give the volume and page where his honorable discharge is recorded."

If a claim were filed and allowed and the claimant was a resident of and domiciled in the state of Iowa and the claim thereafter was to be continued without regard to his qualifications or his eligibility, then such claimant could retain ownership of his property and remove his domicile and residence to the state of Missouri while continuing to receive the benefit of a military service exemption for all of the years thereafter that he resided in the state of Missouri. Such a result as is herein illustrated was never within the contemplation or the intent of the legislature, and to hold that a claim once filed continues without regard to qualifications, would be to interpret the statute in a light beyond the intention of the legislature. In view of the fact that the military service exemptions are paid out of the military service tax credit fund of the state such a result is not to be desired and was never contemplated.

In setting up the military service tax credit fund, the 52nd G. A. in Chapter 231, section 6 amended section 427.6, Code 1946, and provided for an appeal where the claim was denied by the board of supervisors, and provided that the state tax commission could disallow any claim which was not justified under the law and not substantiated by proper facts. This provision and the right to appeal can relate only to one thing, and that is the qualification of the claimant.

Section 3 of chapter 231, Acts of the 52nd G. A., provides that on or before August 1st of each year the county auditor shall certify to the county treasurer all claims for military service tax exemptions which have been allowed by the board of supervisors, and the list as certified is the one upon which the credit is given. Under the law the board of supervisors on or before August 1st of each year examines the claims and would have the right to refuse to allow any claim which was tendered by a person not qualified to receive the credit. The claim is merely one of the steps in procuring a credit, and the qualification of the claimant is the controlling factor in determining whether or not an applicant is entitled to military service credit.

The widow "A" disqualified herself for claiming credit under the law by removing herself from the classification "widow remaining unmarried" and, therefore, could not make a claim for soldier's credit in the name of her first husband. She would have a right, however, under the second question as heretofore indicated to make a claim in the name of her second husband, providing she did so before July 1, 1948. To hold otherwise would be granting credit to someone who could not qualify under the statute, and we are not disposed to do so in view of Code section 427.7 which provides,

"Any person making a false affidavit for the purpose of obtaining the exemption provided for in sections 427.3 to 427.6 inclusive, Code,

1946, or who knowingly receives such exemption without being legally entitled thereto, or who makes claim for exemption in more than one county in the state shall be guilty of a misdemeanor and upon conviction thereof, fined not more than \$100.00 or imprisoned in the county jail for not more than thirty days or be both so fined and imprisoned."

It is to be noted that the above penalty section relates to a person making a false affidavit for the purpose of obtaining the exemption provided for in sections 427.3 to 427.6 inclusive, or who knowingly receive such exemption *without being legally entitled thereto*. The legislature in providing the penalty viewed all of the statutes collectively and "A", who was disqualified, would knowingly receive an exemption without being legally entitled thereto.

---

May 12, 1949

**SCHOOLS AND SCHOOL DISTRICTS: General state aid—section 5 of chapter 117, Acts 53rd G. A. interpreted.** The phrase "school levy of the preceding year" used in section 5 of chapter 117, Acts of 53rd G. A., providing general school aid from the state, means the amount in dollars and not the levy in mills and includes only those general appropriations that affect school districts in like manner such as general aid, supplemental aid and transportation aid.

**SCHOOLS AND SCHOOL DISTRICTS: Levy for collection in 1950 and 1951 limited by state aid act.** The increased state aid to school districts provided by section 5 of chapter 117, Acts 53rd G. A., is confined to general school aid. Said section freezes the tax levy collected in 1950 and 1951 at the amount of levy collected in 1949 plus any increase or less any decrease in the items enumerated therein less the further decrease in an amount equal to the increase in state aid.

*Mr. Ray E. Johnson, State Comptroller:* We have yours of the 29th ult. together with supplement thereto dated April 30th, both of which we set out as follows:

"The 52nd General Assembly provided for additional state aid to schools. Chapter 152 Acts of the 52nd G. A. creates a new aid defined as 'General School Aid' and provides the basis for distribution thereof. Section 7, following paragraph 'C', provides:

"The board of directors of each school district shall prepare a budget as required by law setting out the amount of money proposed to be expended from the general fund and from the special courses fund. The board shall include all state funds distributed to the district under the provisions of this act in the anticipated income to be received by the general fund, and the amount to be raised by taxation for general fund purposes shall be fixed after deducting the amount to be received from the appropriations in this act and any other funds received from the state of Iowa, from the budget requirements. The board shall include in its budget as a separate item any proposed expenditures from the special courses fund and the amount to be raised by taxation for such purposes shall be separate and distinct from the levy for general fund purposes."

This provision would include all items set out in the section 9 and the \$5,000,000.00 appropriation provided in chapter 40 Acts of the 52nd G. A.

A literal interpretation would require a deduction on the budget of each district's share of the \$7,500,000 appropriated by Chapter 152

Acts of the 52nd G. A. plus the \$5,000,000.00 appropriated by chapter 40 Acts of the 52nd G. A. However, the item of \$1,500,000 appropriated for Agricultural Land Credits by Chapter 152 Acts of the 52nd G. A. will not be distributed to the various school districts, neither will several of the other items contained in the said appropriation.

The 53rd General Assembly enacted House File 224, Chapter 117, which provides for an appropriation of \$12,000,000 for 'General School Aid'. Section 5 of this Act provides as follows:

'Sec. 5. The school levy in each year of the ensuing biennium shall be based upon the school levy of the preceding year reduced by an amount equivalent to the increased state aid to that district provided by this act over and above the amount appropriated by the Fifty-second (52nd) General Assembly after reflecting any increase or decrease in cost of operation caused by: (1) change in enrollment, (2) tuition, (3) number of persons employed, (4) normal repairs, (5) cost of fuel, (6) salary schedule, (7) rents and new items of expenditure.'

We respectfully ask for an interpretation of section 5 as to the meaning of the words 'school levy of the preceding year' after taking into consideration the provisions of section 7, Chapter 152 Acts of the 52nd G. A. Also does the term 'school levy' in section 5, House File 224 Acts of the 53rd G. A. refer to the mill levy or does it refer to the dollars to be raised by taxation?

Assuming that section 7 Chapter 152 Acts of the 52nd G. A. includes all aids to a given school district, does section 5 of House File 224 Acts of the 53rd G. A. confine the increased state aid to a school district to only the general school aid?

We are preparing forms for the use of the school districts in making their annual budgets and in view of this fact we will appreciate a reply at your early convenience." and the supplement:

"I wish to supplement my letter of April 29, asking for an opinion as to the operation of House File 224, Chapter 117, Acts of the 53rd G. A. which amends chapter 152 Acts of the 52nd G. A. by asking for an opinion on the following:

'Does section 5 of House File 224, Acts of the 53rd G. A. freeze the tax levy to be collected in 1950 and 1951 at the amount of the levy being collected in 1949 plus any increase or less any decrease in the items enumerated in said section 5 less the further decrease in an amount equal to the increase of state aid.

If the tax levied is limited to the foregoing, are the provisions of sections 298.1 as amended and 298.2, Code 1946 nullified for the next biennium.'"

In reply thereto we would advise you:

(1) The term "school levy" in section 5 of House File 224, Acts of the 53rd General Assembly refers to the levy in dollars and not in mills. This conclusion follows from the provisions of the remainder of the foregoing section 5, which provides for an exhibit of the increase or decrease in the cost of operation caused by the several items therein set forth. These items necessarily must be reduced to dollars in making the computation provided by the foregoing section 5. These being exhibited in terms of dollars, the sum from which the increase or decrease is made must also necessarily be computed in terms of dollars.

(2) We define the phrase "school levy of the preceding year" as used in the foregoing section 5 of House File 224, Acts of the 53rd General Assembly, after taking into consideration the provisions of section 7, chapter 152, Acts of the 52nd General Assembly. Such portion of the foregoing section 7 as is applicable here is this:

"The board of directors of each school district shall prepare a budget as required by law setting out the amount of money proposed to be expended from the general fund and from the special courses fund. The board shall include all state funds distributed to the district under the provisions of this act in the anticipated income to be received by the general fund, and the amount to be raised by taxation for general fund purposes shall be fixed after deducting the amount to be received from the appropriations in this act and any other funds received from the state of Iowa, from the budget requirements. The board shall include in its budget as a separate item any proposed expenditures from the special courses fund and the amount to be raised by taxation for such purposes shall be separate and distinct from the levy for general fund purposes."

and the following portion of the foregoing section is particularly considered here, to-wit:

"and the amount to be raised by taxation for general fund purposes shall be fixed after deducting the amount to be received from the appropriations in this Act and any other funds received from the state of Iowa from the budget requirements."

It will be considered that the amount to be received from appropriations in the foregoing Act is not to be included in the budget for the years 1949 and 1950, because the appropriations provided for in chapter 152, Acts of the 52nd General Assembly, lapse and expire on June 30, 1949 so that insofar as chapter 152 is concerned the funds to be accounted for as income from the state of Iowa are those general appropriations that affect school districts throughout the state in a substantially like manner. This would include general aid, supplemental aid and transportation aid. This definition of the foregoing phrase "school levy for the preceding year" would therefore not confine any of the increase state aid to general school aid, but would include general aid, supplemental aid and transportation aid.

(3) In answer to your query, "Assuming that section 7, chapter 152, Acts of the 52nd G. A. includes all aids to a given school district, does section 5 of House File 224, Acts of the 53rd G. A. confine the increased state aid to a school district to only the general school aid", we would advise you that the foregoing section by its terms confines the increased state aid to the general school aid.

(4) Your query as to whether section 5 of House File 224 "freezes the tax levy to be collected in 1950 and 1951 at the amount of the levy being collected in 1949 plus any increase or less any decrease in the items enumerated in said section 5 less the further decrease in an amount equal to the increase of state aid," requires answer in the affirmative. This conclusion is inevitable in the view that the foregoing section 5 of House File 224 affects the levy and not the budget

and for this reason the provisions of section 298.1 as amended and section 298.2, Code of 1946, providing as follows:

"298.1. The board of each school corporation shall at its regular meeting in July, or at a special meeting called between the time for the regular meeting and the twenty-fifth day of July, estimate the amount required for the general fund. The amount so estimated shall not exceed the following sum for each person of school age:

1. All school corporations having a school enumeration of twelve hundred (1,200) or more, one hundred ten dollars (\$110).

2. All school corporations having a school enumeration of less than twelve hundred (1,200) and exceeding two hundred fifty (250), one hundred twenty-five dollars (\$125).

3. All other school corporations, one hundred forty dollars (\$140)."

"298.2. In all school districts where the maximum statutory allowances provided in section 298.1 are not sufficient to meet the budget requirements, upon proper showing by any such school district the state comptroller may authorize such district to levy an additional amount above the said maximum statutory allowance for each person of school age in the district, up to but not in excess of thirty-five per cent."

are not nullified but are preserved as guides in the making of the budget. In other words, all of the statutes existant affecting the making of the school budget must be observed in the preparation of the 1949 and 1950 budget. However, in its relation to the money needs of the school district, the amount of the tax levy in dollars is limited in its maximum amount by the provisions of section 5, House File 224, Acts of the 53rd General Assembly, as explained and defined hereinbefore in this opinion.

---

May 18, 1949

**TAXATION: Moneys and credits exemption—not retrospective.** The exemption in the moneys and credits taxation statute provided by chapter 197, Acts 53rd G. A., to the extent of 5,000 dollars, is prospective and not retrospective and said exemption has no application to assessments made in 1949.

*Mr. John W. Barnes, Director, Property Tax Division, State Tax Commission:* You have made inquiry concerning Senate File 201, chapter 197, relating to exemption of moneys and credits and corporation securities, which was passed by the 53rd G. A., and will take effect July 4, 1949. You state that you would like to know whether or not the exemptions provided for in Senate File 201 will affect 1949 assessments made against individual owners of moneys and credits.

It is to be noted that the statute does not carry a publication clause and, hence, will become effective under the Constitution as of July 4, 1949.

The pertinent section is as follows:

"Section 1. Section four hundred twenty-nine point four (429.4), Code 1946, is repealed and the following substituted in lieu thereof:

'In making up the amount of moneys and credits, corporation shares of stocks which any person is required to list, to have listed or assessed, including actual value of building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him, and in addition thereto an amount of five thousand dollars (\$5,000.00).'

A reading of the foregoing statute discloses that under the provisions of section 429.4, a party in making up the amount of moneys and credits, corporation shares of stock which any person is required to list or have listed or assessed, including actual value of building and loan shares, is entitled to deduct from the actual value all debts in good faith owing by him. These debts are required to be listed in the manner provided by law, namely, sections 429.5 to 429.10 inclusive, and these statutes must be followed in order to obtain the deduction. The statute further provides that in addition to the foregoing a taxpayer shall be entitled to deduct \$5,000.00. This deduction of \$5,000.00 is allowed as a flat deduction and without regard as to whether or not it is a debt. In other words, it is a flat exemption in the amount of \$5,000.00. The taxpayer is entitled under the statute to both of the foregoing deductions.

Personal property is assessed under the provisions of Code section 428.4 which provides in part, "property shall be taxed each year and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January." This statute is clear and provides for the assessment of personal property in the state of Iowa on January 1st of each year.

The question here is whether or not Senate File 201, Acts of the 53rd G. A. is retroactive rather than a prospective statute.

Under the Iowa Constitution an act of the legislature becomes a law immediately upon receiving the approval of the governor. It does not go into effect until the 4th day of July after its passage, but it is nevertheless a law after it receives the approval of the governor. The existence of a law and the time when it shall take effect are two separate and distinct things. The law exists from the date of approval, but its operation is postponed to a future date. See *Schaffner v. Shaw*, 191 Iowa 1047.

Established principles of construction compel us to say that acts of the lawmaking body unless otherwise plainly expressed, are aimed for the government of the future rather than the past. Another well settled canon of construction is that statutes should be construed prospectively and not retrospectively; and this is true although there be no constitutional impediment for the authority. *State ex rel Shaver v. Iowa Telephone Company*, 175 Iowa 607; *Foster v. Bellows*, 204 Iowa 1052; *In re Estate of Culbritson*, 204 Iowa 473; *Andrew v. Bevington Savings Bank*, 206 Iowa 869.

The accepted rule of construction above announced would tend to refute any claim that the statute did not operate prospectively. There

is nothing in the statute which indicates that the legislature intended the act to apply to an assessment of personal property made previous to July 4, 1949. In fact the original Senate File 201 had no provision in it referring to the assessment for the year 1949. It is to be noted that an amendment was filed April 12, 1949 in the House which contained a clause, "the provisions of this act shall be applicable to assessments for the year 1949." This amendment was withdrawn on April 18, 1949, and the bill as it now stands was passed by the House on April 20, 1949 with no provision therein that the act should relate to assessments for the year 1949. The act as it now stands was the result of a conference report, and the fact that the legislature did not consider the amendment designed to make the act apply to assessments in 1949 is of some assistance in determining that the legislature viewed the act as prospective legislation only. Tax statutes may be retroactive if the legislature so clearly intends. *Reinecke v. Smith*, 289 U. S. 172; *Diamond Match Company v. State Tax Commission*, 200 Atlantic 365; *People v. Graves*, 265 N. Y. 431; 193 N. E. 259; *Sutherland Statutory Construction*, Vol. 2, page 131—see section 2211; *Gilbertson v. Ballard*, 125 Iowa 420; 50 Am. Jurisprudence, Sec. 478. There is nothing to indicate the legislature intended this statute to be retroactive.

Code Section 428.4 clearly provides for the taxation of personal property on January 1st of each year and we think that the reason for the rule is best expressed by quoting from *Jaggard on Iowa Taxation*, Vol. 1, page 264, as follows:

"The statutory provision does not authorize the taxation of personal property to one who does not own, possess, or control it. The theory of the law is that all property not exempt therefrom shall be subject to taxation; and in order to accomplish this result, and at the same time avoid the imposition of this burden more than once, a specific date must be fixed when the property shall be assessed, because of the many changes of ownership constantly occurring. The assessment accordingly refers to the owner at this date so fixed by statute, rather than when the assessment is actually made.

Personal property not in the state on the statutory day is not taxable. If property is assessed to one who owned it during the assessment, but not on such date, the tax is void.

Every man must pay taxes on what he then owns at its then value, no matter how short a time he may have owned it, or how soon thereafter it is lost. All property, if in being as taxable property at that date, is liable to taxation for that year at its then value, although it may only have come into being the day before, and may be, in whole or in part, destroyed the day after."

The foregoing view is substantiated by the following language found in *re Estate of Coffman v. Anna O. Coffman*, administratrix, 104 Iowa 639 at page 641:

"The theory of the law is that all property not exempt therefrom shall be subject to taxation; and in order to accomplish this result, and at the same time avoid the imposition of this burden more than once, a specific date must be fixed when property shall be assessed, because of the many changes of ownership constantly occurring. For this reason

the assessments of personal property in this state relate back to the first of January previous, under the provision of section 812 of the Code 1873, that 'all taxable property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. \* \* \* \*'

Our courts have recognized that where property has been listed and a value fixed by the proper officers, their action, in the absence of an appeal to the district court is final and the assessment as made becomes a finality. See *German Savings Bank v. Trowbridge*, 124 Iowa 514; *Savings Bank v. Carroll*, 128 Iowa 230; *Snell v. Fort Dodge*, 45 Iowa 564; *Galusha v. Wendt*, 114 Iowa 597; *Beresheim v. Arnd*, 117 Iowa 83; *Judy v. National Bank*, 133 Iowa 252.

It has been held in numerous courts of last resort that the revisions of the revenue laws does not affect prior valid assessments. *Alliance Trust Company v. Multnamah County*, 63 Pac. (Ore.) 498; *City of Hartford v. Champion*, 20 Atl. (Conn.) 471.

In view of the fact that personal property is assessed in the state of Iowa as of January 1st, and that the assessments relate back to January 1st when properly made and that such assessments are made, passed upon by the board of review and under ordinary circumstances become a finality as of July 1, 1949, we do not believe in view of the language of the statute and its legislative history that it was within the contemplation of the legislature to provide a different means of taxing moneys and credits during the year 1949, and subsequent to the date Senate File 201 became effective. Such a procedure would result in the loss of a large amount of revenue properly taken into consideration by the municipalities of this state in making up their budget without any warning or notice to them that they were deprived of this revenue. It would require a retrospective interpretation of a statute that can only be given a prospective meaning. It would require local boards of reviews that have not adjourned to in effect make a new assessment and to assess property not as the assessor should have done, but on an entirely different basis and one not authorized at the time the assessment was made. It would disregard the fact that the taxing statutes of this state must be considered and construed as a whole. The assessment is as much a part of the taxation of property as any other step up until the final payment of the tax due. Under the authorities we have referred to and the rules of statutory construction herein announced, we are clearly of the opinion that the provisions of Senate File 201, Laws of the 53rd G. A., do not affect the taxation of moneys and credits for the year 1949.

---

May 26, 1949

**INSANE PERSONS: State mental aid fund—basis of payments to counties.** Payments from the state mental aid fund, created by chapter 99, Acts 53rd G. A., to counties for care of insane patients transferred from state hospitals and new patients committed directly to the County Home after July 4, 1949, are not conditioned on the

costs of such care or whether they are pay patients or indigent patients. Said payments become a part of the county fund for the insane.

*Mr. E. W. Adams, County Attorney, Marshalltown, Iowa:* We have yours of the 21st inst. in which you state:

"The 53rd General Assembly passed Senate File No. 348, Chapter 99, which among things provides under section 2 the county shall receive \$3.00 per week for each person transferred from a state hospital for the insane. As you know, there are some patients in the institutions that do pay their own way. Section 3 of Senate File 348 provides that the county shall credit the same to the county fund for the insane.

The costs per patient for care in the Marshall County Home is approximately \$63.00 per quarter. Will the amount received be credited as against the account of the individual for whom it is received, thereby reducing his cost, and in case of a pay patient, the costs to be paid by the patient or relatives or will the amount received be credited and result in a reduction of the costs per patient for all patients. I note that section 230.24 provides that the money from the county fund for insane shall be used only for their care and for additions and improvements in care for them. Could Marshall county use the money that was received from the state mental aid fund to finance a building at the County Home or to build an addition onto the present facilities? If this could be done, could the money received be earmarked in the county fund for the insane for that purpose without effecting the cost per patient?

Deeming this to be of universal importance to all counties who will be receiving transfer patients, I have been requested to ask for an official opinion of your office on the matters set out herein."

In reply thereto we would advise you that in our opinion the foregoing statute is not concerned with costs per patient for care in the Home nor is it a concern of whether the patients are pay patients or indigent patients. The aid is provided according to the terms of the foregoing Senate File 348 upon verified claim being filed quarterly with the board of control "setting forth the total of weekly patient care furnished to transferees in county or private institutions from the county fund for the insane." In our view, the meaning of the foregoing is that the claim should state:

(1) The number of transferee patients cared for in terms of weeks during the preceding quarter.

(2) In addition the claim should include a list of patients committed directly to the County Home subsequent to the effective date of Senate File 348, to-wit: July 4, 1949. Upon such verified claim being approved by the board of control, the state comptroller will issue his warrant at the rate of \$3.00 per week for each patient shown by the verified claim to have received care in a county or private institution from the county insane fund. The amount received from the state mental aid fund thereupon becomes a part of the county fund for the insane. This is the provision of section 3 of Senate File 348, in terms as follows:

"The state aid herein provided for shall be paid to the claimant county upon a verified claim being filed quarterly with the board of control

setting forth the total of weekly patient care furnished to transferees in county or private institutions from the county fund for the insane. Approval of said verified claim by the board of control shall be authority for the state comptroller to issue a warrant upon the state mental aid fund payable to the claimant county which shall be credited by that county to the county fund for the insane levied under the provisions of section 230.24."

Thereupon this money can be used for the purposes set forth in section 230.24, Code of 1946, which provides in terms as follows:

"The board of supervisors shall, annually, levy a tax of three-eighths mill or less, as may be necessary, for the purpose of raising a fund for the support of such insane persons as are cared for and supported by the county in the insane ward of the county home, or elsewhere outside of any state hospital for the insane, which shall be known as the county fund for the insane, and shall be used for no other purpose than the support of such insane persons and for the purpose of making such additions and improvements as may be necessary to properly care for such patients as are ordered committed to the county home."

As part of the foregoing fund created by section 230.24 it may be used in the same manner and to the same extent as the money derived from the tax levy authorized by the foregoing numbered section.

---

June 1, 1949

**COURTS: Municipal court judges—salary increase during term.** The legislative increase in salaries of municipal court judges granted by chapter 232, Acts 53rd G. A., is available on the effective date of said act. Such judges are not barred from any increase during their terms by the constitution nor by statute (section 363.46, Code 1946) not being city officers.

*Honorable C. B. Akers, State Auditor:* Reference is herein made to your request for opinion as to whether the increase in compensation authorized be paid to judges of the municipal courts of Iowa is available immediately upon the effective date of the Act or its operation suspended until the beginning of a new term of such judges. The legislative authorization is contained in Senate File 83, chapter 222, Acts of the 53rd General Assembly and in terms is as follows:

"Section 1. Section six hundred two point forty-nine (602.49), Code 1946, is amended by striking therefrom lines one (1) to seven (7), both inclusive, and that part of line eight (8) up to and including the period, and substituting in lieu thereof the following:

"The annual salary of each municipal judge shall be four thousand three hundred seventy-five dollars in cities of less than thirty thousand population; five thousand dollars in cities of thirty thousand and less than seventy-five thousand population; and five thousand two hundred and fifty dollars in cities of seventy-five thousand or more population."

Sec. 2. Chapter two hundred eighty-six (286), Acts of the Fifty-second General Assembly, is hereby amended by striking from line four (4) the words 'forty-seven hundred fifty dollars' and inserting in lieu thereof 'five thousand dollars'."

Insofar as supreme and district judges are concerned, any increase in their salary is not effective during the term for which they shall have

been elected. This is a constitutional prohibition. Section 9, Article V of the Constitution of Iowa. However, the salary of municipal judges is not included within the foregoing constitutional prohibition. Therefore, if the municipal judges are barred from receiving this increased compensation during the term which they are now serving, it is by reason of statutory prohibition. No statutory prohibition exists in the municipal court, Chapter 602, Code of 1946, under which the municipal judges are elected and now serving. And therefore, if they are barred from receiving the increase, it is by reason of the provisions of section 363.46, Code of 1946, effecting city or town officers, which provision is in terms as follows:

“363.46. 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. No person who shall resign or vacate any office shall be eligible to the same during the time for which he was elected or appointed, when, during the time, the emoluments of the office have been increased.”

Whether a municipal judge is a city officer, within the terms of the foregoing statute, can be determined by the legislative history of the foregoing section. This section appeared as section 677, Code of 1897, in terms as follows:

“Sec. 677. The fees, salary, compensation or emoluments of any officer whose election or appointment is required or authorized by this chapter, shall not be increased or diminished during the term for which he shall have been elected or appointed; nor shall any change of compensation affect any officer whose office shall be created under the authority of this chapter during his existing term, unless the office be abolished. No person who shall have resigned or vacated any office shall be eligible to the same during the time for which he was elected or appointed when, during the same time the emoluments have been increased.”

Note that by the expressed terms thereof the increase or decrease of the compensation of such officers is limited to such officers whose election or appointment is required or authorized by this chapter. Clearly this section could not include municipal judges because such judges did not come into statutory existence until 1915. Such section 677, in the foregoing form, remained as the statutory law of Iowa until the Code session of the 40th Extra General Assembly, covering a period of almost 25 years. The foregoing section 677 appears in the same terms as section 3550 of the Compiled Code. The change made by that assembly was a result of a codification of sections 3508, 3509, 3511 to 3518, inclusive, 3521, 3522, 3530 to 3533, inclusive, 3535, 3536, 3541, 3550, 3551, 3553, 3554, 3640, 3766 of the Compiled Code. All of the foregoing numbered sections except 3640 and 3766 are contained in chapter 2 of Title 13 of the Compiled Code which title treats of “City and Town Government”, and chapter 2 thereof treats of “The Organizations of Municipal Corporations” and the qualification and duties of city officers, and

such chapter 2 is the chapter designated by section 3550 of the Compiled Code under the authority or direction of which an officer appointed or elected cannot receive increased salary during the term for which he was elected or appointed. City or town officers named in that chapter do not include municipal judges. The salary of municipal judges on the other hand, is fixed by section 6888 of the Compiled Code, appearing in chapter 1 of Title 28, entitled, "Courts of Record of Original Jurisdiction," such section 6888 of the Compiled Code in terms is as follows:

"The salary of each municipal judge, in cities of thirty thousand or more inhabitants, shall be two thousand five hundred dollars per annum, and in cities of less than thirty thousand inhabitants two thousand dollars per annum.

The clerk and the bailiff shall receive a salary of one thousand dollars per annum, each in cities of less than thirty thousand inhabitants, and one thousand two hundred dollars each, per annum, in cities having from thirty thousand to fifty thousand population; one thousand three hundred dollars in cities having from fifty thousand to seventy-five thousand population; one thousand five hundred dollars in cities having from seventy-five thousand to one hundred thousand population and one thousand seven hundred fifty dollars in cities having a population of over one hundred thousand. The deputy clerks and deputy bailiffs shall receive such compensation as the city council may allow.

The salaries of municipal judges, clerks and all deputies shall be paid monthly on the first Monday of each month. For the first month such salary shall be paid from the city treasury and the second month such salary shall be paid from the county treasury. Each month thereafter such payments shall alternate from the city to the county treasury in like manner."

That while the foregoing section 677 of the Code of 1897 continued to be in full force and effect and restricting its application to the officers whose election or appointment is required or authorized by the chapter in which the section appears, the 39th General Assembly in 1921 by chapter 61 of the laws of that assembly repealed section 6888 of the Compiled Code composed of section 694-c47 Supplemental Supplement to the 1915 Code and chapter 152 Acts of the 37th General Assembly. Such chapter is in terms as follows:

"Chapter 61, Municipal Courts, H. F. 437, An Act to repeal section six hundred ninety-four -c forty-seven (694-c47), supplemental supplement to the code, 1915, and chapter 152 acts of the thirty-seventh General Assembly, (C. C. Sec. 6888), relating to salaries of judges and officers of municipal courts, and to enact a substitute therefor.

Be it enacted by the General Assembly of the state of Iowa:

Section 1. Salaries. That section six hundred ninety-four-c forty-seven (694-c47), supplemental supplement to the code, 1915 and chapter one hundred fifty-two (152), acts of the thirty-seventh General Assembly, (C. C. Sec. 6888), be and the same is hereby repealed and the following enacted in lieu thereof:

The annual salary of each municipal judge shall be \$3,000.00 in cities of less than 30,000 inhabitants; \$3,400.00 in cities of 30,000 and less than 75,000 inhabitants; and \$3,600.00 in cities of 75,000 or more inhabitants.

Each clerk shall receive an annual salary of \$1,800.00 in cities of less than 30,000 inhabitants; \$2,200.00 in cities of 30,000 and less than 75,000 inhabitants; and \$2,600.00 in cities of 75,000 or more inhabitants.

Each bailiff shall receive an annual salary of fifteen hundred dollars (\$1,500.00) in cities of less than thirty thousand (30,000) inhabitants; seventeen hundred fifty dollars (\$1,750) in cities of thirty thousand (30,000) and less than seventy-five thousand (75,000) inhabitants and two thousand dollars (\$2,000) in cities of seventy-five thousand (75,000) inhabitants or over.

The deputy clerks and deputy bailiffs shall receive such compensation as the city council may allow.

The salaries of municipal judges, clerk, bailiff and all deputies shall be paid monthly on the first Monday of each month. For the first month such salary shall be paid from the city treasury and the second month such salary shall be paid from the county treasury. Each month thereafter such payment shall alternate from the city to the county treasury in like manner.

Sec. 2. Publication clause. This act being deemed of immediate importance, shall be in full force and effect from and after its publication in the Des Moines Register and the Des Moines Capital, newspapers published in Des Moines, Iowa.

Approved March 23, A. D., 1921."

The foregoing history of section 363.46 leads to the conclusion that the legislature did not deem municipal judges to be city officers whose salaries could not be increased or diminished during the term for which they were elected or appointed.

Viewing this situation in another aspect, we reach the same conclusion. The legislative intent, that the municipal judges are creatures of the legislature and not of any city council or city is evidenced by continued control of the salaries of such judges from the enactment of the municipal court Act down to and including the 53rd General Assembly. The salaries of municipal judges were fixed by section 694-c47 of the Supplemental Supplement of 1915; they were fixed again by section 6888 of the Compiled Code; they were fixed again by chapter 61 of the 39th General Assembly; they were fixed again by the 40th Extra General Assembly by House File 220; the 51st General Assembly, chapter 218; and the 53rd General Assembly by Senate File 83. These evidences of legislative intent that municipal judges are not city officers confirms the conclusion previously announced herein, that municipal judges are not city officers within the terms of section 363.46; that the legislature has the power to increase their salaries effective during the term for which the municipal judges are elected or appointed; and that Senate File 83 of the 53rd General Assembly is effective to increase the salaries of municipal judges on July 4, 1949.

---

June 2, 1949

**SCHOOLS AND SCHOOL DISTRICTS: Diminishing attendance—effect on renewal of teacher's contract.** On April 10 of each school year the school board, acting as reasonably prudent persons, should determine the apparent facts as to probable attendance for the next year before renewing a teacher's contract or permitting an automatic renewal

under the statute. If apparent at that time that not enough pupils were available a continuing contract would be void. If such fact is not apparent at that time but develops later the contract would be valid. Said statute has no effect on a teacher's contract valid when made.

*Mr. Paul V. Shearer, County Attorney, Washington, Iowa:* We have yours of the 19th ult. in which you submit the following:

"I have been requested by the county superintendent of schools to obtain an opinion from your office in regard to the following factual situation:

There is a country school in Washington county, Iowa, which last year had an average daily attendance exceeding the minimum requirement of five. No written resignation by the teacher was received on or before April 15, 1949, and no written notification of termination was mailed to the teacher on or before April 10, 1949, by the board. Under the automatic continuation statute, the teacher's contract was sent to her and duly signed. At the time the contract was signed, there were six pupils available for attendance at this particular school. Some talk was voiced around that certain parents would withdraw their children and send them to town, and some conversations of this type were had with the teacher herself by one of the parents. The board, however, was not duly informed of any such intentions, at least prior to April 10, 1949. After the contract was signed, the possibility arose of there being less than six enrolled pupils in the school.

1. Does section 279.15 have any effect on a teacher's contract, apparently valid when entered into?

2. To whom does it have to be apparent that the average daily attendance will be less than five or the enrollment less than six?

3. What would be the result if no notice was given as provided in section 279.13, but not enough pupils were available and such was apparent?

4. What is the result if on April 10, 1949, no notice was given and it was not apparent that there would not be enough pupils, but subsequent thereto—a week, month or several months—it does become apparent that there will be insufficient pupils?

5. What is the effect where there were sufficient pupils at the time of the automatic continuation of the contract and no notice of termination was given, but subsequent thereto no pupils are available to attend school the next year? What would be the respective rights of the teacher and school boards?

I would appreciate your sending a copy of your opinion to Mr. R. A. Griffin, department of public instruction."

In reply thereto we would advise you as follows:

(1) While the foregoing situation seems not previously to have been before the department, statutes of like character to sections 279.13 and 279.15, Code of 1946, have had the consideration of the courts. According to those decisions these statutes are in *pari materia*. Illustrative of these cases is the case of *De Hart v. School District*, 263 S. W. 242, where it appeared that a statute of Missouri provided that "where in any school district fifteen or more colored children of school age, as shown by the last enumeration, reside, the board of directors of such school district shall be and they are hereby authorized and required to establish and

maintain within such school district a separate free school for said colored children; \* \* \* provided, that in case the average daily attendance of colored children for any one school month shall be less than eight, then said board of directors may discontinue such school for a period not to exceed six months at any one time", and with respect to contracts of teachers, it was provided by separate statute as follows:

"The contract required in the preceding section shall be construed under the general law of contracts, each party thereto being equally bound thereby. Neither party shall suspend or dismiss a school under said contract without the consent of the other party. The board shall have no power to dismiss a teacher; but should the teacher's certificate be revoked, said contract is thereby annulled. \* \* \* Should the schoolhouse be destroyed, the contract becomes void."

and it was there stated:

"The contract involved here must be deemed to have been made with reference to the provisions of this section. Such provisions must be read into the contract, and the parties thereto must be held to contract with a view to such provisions. *Gregg School Township v. Hinshaw*, 76 Ind. App. 503, 132 N. E. 586, 17 A. L. R. 1222; *Henry County v. Salmon*, 201 Mo. 136, loc. cit. 162, 100 S. W. 20; *Zellars v. Surety Co.*, 210 Mo. 86, loc. cit. 92, 108 S. W. 548; *Webb-Kunze Const. Co. v. Gilsonite Const. Co.*, 281 Mo. 629, loc. cit. 634, 220 S. W. 857.

The discontinuance of the school by the school board was expressly authorized by this section, and, since its provisions must be read into the contract, such discontinuance of the school was, in legal effect, authorized by the contract."

There was a like holding in the case of *Moses v. School District*, 86 Pac. 2nd, 407.

(2) In view of the foregoing, the continuance of the teacher's contract as related to the power to close schools will be determined by the provisions of section 279.15. This is the rule by the foregoing case of *Moses v. School District* where an automatic continuation of the teacher's contract was before the Court, and it was there stated:

"The reelection under section 1075 means reemployment under the same terms and conditions as the preceding year's employment. If this were not so, then it is impossible to know what the terms of employment would be, except as to salary. One of the terms of the preceding year's employment was that the board reserved the right to close the school for lack of attendance, which, when done, would make void the contract of employment. Sections 1044 and 1075 must be read together (*De Hart v. School District*, 214 Mo. App. 651, 263 S. W. 242), and, when so read together with the specific provisions in the contract of employment for the year 1936, it is clear that the trustees had the right to close the school and thus to make void the contract of employment."

The continuation provided by section 279.13, therefore, is a contract of re-employment.

(3) Section 279.15 is a restriction upon the powers of the board of directors of the school district. Such section provides as follows:

"No contract shall be entered into with any teacher to teach an elementary school when the average daily attendance of elementary pupils

in such school the last preceding term therein was less than five such pupils of school age, resident of the district or subdistrict, as the case may be, nor shall any contract be entered into with any teacher to teach an elementary school for the next ensuing term when it is apparent that the average daily attendance of elementary pupils in such school will be less than five or the enrollment less than six such pupils of school age, resident of the district or subdistrict, as the case may be, regardless of the average daily attendance in such school during the last preceding term, unless the parents or guardians of seven or more such elementary children subscribe to a written statement sworn to before the county superintendent or a notary public certifying that such children will enroll in and will attend such elementary school if opened and secure from the county superintendent written permission authorizing the board to contract with a teacher for such school for a stated period of time not to exceed three months.

When natural obstacles to transportation of pupils to another school in the same or in another corporation or other conditions make it clearly inadvisable that such elementary school be closed, the county superintendent may authorize the board in writing to contract with a teacher for such school for a stated period of time not to exceed three months.

Any contract with any teacher which is made in violation of the provisions of this section shall be null and void from its inception and no compensation shall be due or paid to any teacher who enters into a contract in violation of the provisions of this section."

It will be noted that the restrictions of the foregoing section are that no contract shall *"be entered into with any teacher of an elementary school when it is apparent that the average daily attendance of elementary pupils in such school will be less than five or the enrollment less than six such pupils of school age."*

That these restrictions are upon the board, was held in an opinion appearing in the Report of the Attorney General for 1938 at Page 309. There it was said:

*"It is our opinion that the statute contemplates that the board make the determination as to whether these requirements are fulfilled. (being the requirements of section 279.15) The purpose of the statute is to guard against the employment of a teacher for a full year term in a district in which a very few children may attend the school.*

Where there is doubt that the number of children who will attend, or that the average daily attendance of such children will not be in number sufficient to comply with the statute, it is our opinion that the board ought to apply to the county superintendent for authority to contract with the teacher upon a three months' basis. In the present case where it appears that only six children will attend the school, it would seem doubtful that the average daily attendance would be five. However, under the statute, if it is clearly inadvisable that such school should be closed, the county superintendent may authorize the board to contract with the teacher for a period not exceeding three months."

The restriction, according to its terms, is against the entering into a contract with a teacher. The validity of such contract is not effected by facts appearing subsequent to the making thereof. To avoid a claim of invalidity of such contract as directed by the following portion of section 279.15:

"Any contract with any teacher which is made in violation of the provisions of this section shall be null and void from its inception and no compensation shall be due or paid to any teacher who enters into a contract in violation of the provisions of this section."

the board, acting as reasonably prudent persons, should determine on or before April 10th of each year what the apparent facts are before entering into a contract or permitting an automatic renewal of the teacher's existing contract, and we recommend that such determination be made a matter of record. Failure to do so makes validity of the contract dependent upon a fact question as to whether or not the board, acting as reasonably prudent persons, should have so determined the question on or before April 10th of that year.

Therefore, we would answer your questions as follows:

(1) In answer to your question number one, we would advise you that section 279.15 does not affect a teacher's contract valid when entered into.

(2) In answer to your question number two, we would advise you that it is the board of the district to whom it must be apparent that the average daily attendance will be less than five or the enrollment less than six.

(3) If no notice was given pursuant to the terms of section 279.13 and not enough pupils were available and such was apparent, the continuing contract, being a new contract of employment made pursuant to the terms of 279.13, would be void.

(4 & 5) Where no notice was given within the statutory time, and at such time it was apparent that there were sufficient pupils to justify the continuing of the school under the statute, the fact that subsequent thereto there were either fewer than five pupils or no pupils available to attend the school still leave the teacher's contract a valid contract.

---

June 3, 1949

**BANKS AND BANKING: Stock dividend issued against property—appraisal required.** A state or savings bank desiring to declare a stock dividend against property must have an appraisal of its assets by the executive council under chapter 492 of the Code. Acceptance of a valuation of the superintendent of banking made by him under rule of the council is a substantial compliance with said chapter.

*Mr. Henry Wichman, Secretary, Executive Council:* You request an opinion as to whether a state or savings bank desiring to declare a stock dividend must have an appraisal of its assets by the executive council before the issuance of such stock.

In an opinion of this office dated June 5, 1948, it was held that a stock dividend declared by a bank against surplus cash did not require an appraisal. Your request further projects the question to include stock dividends issued against property.

It is to be noted that all corporations have the right and the power to declare stock dividends. It is, however, provided by section 492.6, Code of Iowa 1946:

"Payment in property other than cash. 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."

This statute is not to be construed as vesting the executive council with the authority to grant or withhold the power to issue stock to be paid for in property, but rather as a prerequisite to issuance to determine and fix the value which the corporation is permitted to pay for the property when payment is to be made in stock. To accomplish this evaluation the executive council makes an investigation under such rules and regulations as it may prescribe.

Section 492.7 provides:

"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."

Chapter 492, Code of Iowa 1946, is a chapter of general application to corporations organized under the laws of the state of Iowa. There is no authority for an inference that it relates solely to corporations for pecuniary profit incorporated under the provisions of Chapter 491 of the code. As a matter of fact it is clear from the plain language of the various provisions of the said chapter 492 that it relates to all corporations not expressly excepted therefrom. The first section of the chapter, that is section 492.1, provides in part:

"No certificate or shares of stock shall be issued, delivered, or transferred by *any* corporation \* \* \*".

Section 492.4 of the code excepts certain corporations from the operation of sections 492.1 to 492.3, inclusive, as follows:

"Section 492.1 to 492.3, inclusive, shall not apply to railway or quasi-public corporations organized before October 1, 1897."

It is also to be noted that section 492.2 provides that any certificate of stock issued in violation of section 492.1, when the corporation has not received payment therefor at par in money or *property at a valuation approved by the executive council* shall be void.

It is difficult to conceive how there can be an implied exception to the provisions of section 492.1 which expressly relates to *all* corporations, and section 492.2 which relates to *any* certificate issued in violation of section 492.1, other than those which the code expressly excepts. An express exception having been made with relation to certain corporations under the provisions of section 492.4 and 492.5 would seem to leave no doubt that all other corporations were included.

With relation to savings banks certain prohibitions exist against the use of surplus except for stock dividends. This is a prohibition and merely permits use of the surplus for stock dividends, but does not obviate requirements relative to determining the value of the assets before issuance of a stock dividend.

With reference to section 528.57 banking institutions generally which are organized under the laws of this state are prohibited from declaring dividends, with certain exceptions until it has first established a surplus of at least 20 per cent of its capital.

It must be noted that the provisions of the said section are in the nature of prohibitions and do not have to do with the requirements of determining the value of property before stock is issued in payment therefor.

For a number of years past it has been the practice and rule of the executive council to accept the valuation of property by the superintendent of banking before stock is issued in payment therefor. This practice and rule is approved under their power, and is most sound, for it would be hard to determine who would be more qualified to properly determine this value than the superintendent of banking and his specially trained staff of examiners with their close contact with our banking institutions. The superintendent of banking has complete control over the banking practices and though that power has not been extended to its corporate structure, it is sufficient that the executive council accept his valuation, unless for some special reason they desire to interfere to protect the corporate investor.

In view of the close relationship between the superintendent of banking and banks organized under the laws of this state, the affairs of banks as such are not matters of concern to the executive council. However, as to control of its corporate structure, it was for the legislature to determine, and the legislature did not exclude banking institutions from the provisions of chapter 492 of the Code. We must then presume it a safeguard placed in the executive council.

Though the function of the executive council with relation to the appraisal of bank assets is no different than its function with relation to the appraisal of the assets of other corporations, we feel it proper to adopt the rule of accepting the value placed upon property by the appraisal of the banking superintendent. It is a matter of determining the real value of real and personal property and the executive council may by rule determine the manner in which the appraisal is to be made. This we understand is the rule adopted by the executive council and has been of long standing practice.

You are advised that it is the opinion of this office that chapter 492, Code of Iowa 1946, applies to all corporations organized under the laws of the state of Iowa, excepting only those corporations expressly granted exceptions in the said chapter.

You are further advised that the acceptance of the valuation of the superintendent of banking made pursuant to an appraisal by him under a rule by the executive council that the superintendent of banking should make the appraisal of the property or thing other than money which the banking corporation is to receive for stock, is substantial compliance with the provisions of the said chapter. Therefore applications for appraisal should be submitted to the executive council, with appropriate fee who will make the final determination based on the appraisal of the superintendent of banking.

---

June 9, 1949

**INSANE PERSONS: County commission hearings—no fees to clerk.**

There is no statutory provision authorizing the taxation of any fees for the clerk of the county commission of insanity or for the clerk of the district court with regard to any proceedings had before the county commission.

*Mr. Henry J. Te Paske, County Attorney, Orange City, Iowa:* This is in reply to your recent letter which was as follows:

“Chapter 127 of the 52nd G. A. struck all of subsections 1 and 2 of section 228.9 of the Code of Iowa, 1946. In lieu thereof the said chapter 127 provides only for compensation to the physician and the attorney serving as members of the commission of insanity. No new enactment seems to provide for the taxing of any costs in favor of the clerk as a member of the commission nor even for the usual clerk's fees for making the usual entries, docketing the case and the fees charged by the clerk's office in practically every other type of case.

In discussing this with the clerk of courts of this county, we concluded that in the absence of statutory authorization, the clerk would not be permitted to tax any costs in such cases except the compensation of the doctor and the attorney, the fee for the attorney appointed to represent the person charged under chapter 127 of the 52nd G. A., and the fees, if any, of the officer or person transporting the person to the hospital and the witness fee.

However, the clerk says that the taxing of ordinary costs in his office is so much a fixed procedure in all other cases, that he does not like to omit it if there is a provision under which he should tax some clerks costs in these cases.

The question is not one of very great consequence. It may well be that the legislature concluded that in a large number of cases the county ultimately pays the bill anyway and therefore, it is needless to tax any costs in favor of the clerk. On the other hand, there may be some cases where the patient or his estate can be charged with these costs and if it is proper to do so, the clerk would want to do it, of course.”

For a proper understanding of the situation which you present it is necessary to recognize the dual capacity of the clerk of the district court in performing his regular statutory duties set forth in chapter 606, Code 1946, and those imposed upon him as clerk of the county commission of insanity by the provisions of chapter 229, Code 1946.

Section 228.2 provides that the clerk of the district court in each county is ex-officio one of the three members of the county commission of insanity, and section 228.5 requires that in his absence the deputy clerk act as a member of that commission. In the organization of the commission, provided for in section 228.4, it is required that the clerk

of the district court or his deputy "be Clerk of the Commission". The duties of the clerk of the commission are distinctly specified in section 228.6, as follows:

1. Issue all processes required to be given by the commission, and affix thereto his seal as clerk of the court.
2. File and preserve in his office all papers and records connected with any inquest by the commission.
3. Keep separate books of the proceedings of the commission with entries sufficiently full to show, with the papers filed, a complete record of its findings, orders, and proceedings."

Under the foregoing subsection 3 we note a requirement that all proceedings and complete record thereof are to be kept in books separate from the regular records of proceedings had in the district court, as required by the provisions of chapter 606, Code 1946.

Under subsection 2 of section 228.9, Code 1946, the clerk of the commission of insanity was required to tax and collect as a fee compensation for himself as a member of the commission, one-half as much more for making the required record entries in all cases of inquest and of meetings of the commission, and twenty-five cents for each process issued under seal. In the case of *Baldwin vs. Stewart*, 207 Iowa 1135, decided in 1929, the supreme court held that the clerk of the district court was accountable to the county for all fees collected by him for acting as a commissioner of insanity. The result of this decision was that until subsection 2 of section 228.9, Code 1946, was repealed by section 2 of chapter 127, Acts of the 52nd General Assembly, the clerk of the commission of insanity taxed such fees for himself and included them as an item of legal costs attending the commitment chargeable to and payable by the county of commitment pursuant to the provisions of section 230.10, Code 1946. It then became his duty in accordance with the decision in the *Baldwin* case, *supra*, to account for those fees taxed in his behalf to the same county. When viewed in light of this situation it is apparent that the legislative intent in repealing subsection 2 of section 228.9, Code 1946, was to eliminate this useless procedure and the unnecessary bookkeeping with regard to the fees allowed the clerk of the commission of insanity.

By the provisions of section 7 of chapter 129, Acts of the 52nd General Assembly, it was provided that the district court should assign counsel to any person before the county commission of insanity without counsel. This section was interpreted in an official opinion issued by this office, dated August 8, 1947, 1948 Report of the Attorney General, page 67, to the effect that the power to assign counsel was vested in the judge and not the court as such, and that the judge might make an oral assignment, or might in writing assign a resident attorney to appear and represent each person before the commission of insanity without counsel. In view of that opinion there will be no order of court regarding the assignment of counsel to be entered in the records required by chapter 606 so as to justify the fee allowed by subsection 15 of section 606.5, Code 1946.

In view of the foregoing conclusions it is our opinion that there is now no provision in the statutes of Iowa authorizing the taxation of any fees for the clerk of the county commission of insanity or for the clerk of the district court with regard to any proceedings had before the county commission of insanity.

In the concluding part of your letter you mention the possibility of recovering the costs of commitment from the patient or his estate. We call your attention to an official opinion issued by this department dated May 6, 1948, 1948 Report of the Attorney General, page 189, which holds that the costs involved in the investigation and commitment of an insane person are obligations of the county solely, and are not recoverable except by the committing county from the county of the patient's legal settlement, as provided for in section 230.10, Code 1946, or from the state if the matter is one falling within the provisions of section 230.11, Code 1946.

---

June 9, 1949

**COURTS: Municipal court employees—salary increase during term.**

The legislative increase in salaries of municipal court employees granted by chapter 233, Acts 53rd G. A., is available on the effective date of said act. Such employees are not barred from any increase during their terms by the constitution nor by statute (section 363.46, Code 1946) not being city officers.

*Mr. Ray E. Johnson, State Comptroller:* Reference is herein made to your request for opinion as to whether increases in compensation authorized to be paid to employees of the municipal court of Iowa are available immediately upon the effective date of the Act or its operation suspended until the beginning of a new term of such employees. The legislative authorization is contained in Senate File 81, chapter 233, Acts of the 53rd General Assembly and in terms is as follows.

“Section 1. Chapter two hundred eighty-five (285), Acts of the Fifty-second General Assembly, is hereby amended as follows:

By striking from section one (1), line four (4), the words ‘twenty-two’, and inserting in lieu thereof the words ‘twenty-seven’.

By striking from section one (1), line six (6), the words ‘twenty-seven’ and inserting in lieu thereof the words ‘thirty-two’.

By striking from section one (1), line eight (8), the words ‘thirty two’, and inserting in lieu thereof the words ‘thirty-seven’.

By striking from section one (1), line ten (10), the words ‘two thousand’, and inserting in lieu thereof the words ‘twenty-five hundred’.

By striking from section one (1), line twelve (12), the words ‘twenty-two’, and inserting in lieu thereof the words ‘twenty-seven’.

By striking from section one (1), line fourteen (14), the words ‘twenty-five hundred’, and inserting in lieu thereof the words ‘three thousand’.

Sec. 2. This Act being of immediate importance, shall be in full force and effect from and after its publication in the Tripoli Leader, a newspaper published at Tripoli, Iowa, and in the Winnebago-Hancock Summit, a newspaper published at Forest City, Iowa.”

Chapter 285 of the Acts of the 52nd General Assembly was authorization for an increase made by the 52nd General Assembly, in terms as follows:

"An Act to amend section six hundred two point forty-nine (602.49), code 1946, relating to salaries of municipal court employees.

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. Amend section six hundred two point forty-nine (602.49), Code 1946, as follows:

1. Strike from line two (2) of paragraph two (2), the word 'eighteen' and insert the word 'twenty-two'.
2. Strike from line three (3) of paragraph two (2), the word 'twenty-two' and insert the word 'twenty-seven'.
3. Strike from line six (6) of paragraph two (2), the word 'twenty-six' and insert the word 'thirty-two'.
4. Strike from line two (2) of paragraph three (3), the words 'fifteen hundred' and insert the words 'two thousand'.
5. Strike from line three (3) of paragraph three (3), the word 'seventeen' and insert the word 'twenty-two'.
6. Strike from line six (6) of paragraph three (3), the words 'two thousand' and insert the words 'twenty-five hundred'.

Sec. 2. This act being deemed of immediate importance shall be in full force and effect from and after its passage and publication in the Clinton Herald, a newspaper published at Clinton, Iowa, and the Sioux City Journal-Tribune, a newspaper published at Sioux City, Iowa."

Section 602.49 of the Code of 1946, which the foregoing chapter 285 of the 52nd General Assembly amended, after making provision for the salary of the municipal judge provided as to the compensation of the municipal clerk, municipal bailiff and their respective deputies the following:

"Each clerk shall receive an annual salary of eighteen hundred dollars in cities of less than thirty thousand inhabitants; twenty-two hundred dollars in cities of thirty thousand and less than seventy-five thousand inhabitants; and twenty-six hundred dollars in cities of seventy-five thousand or more inhabitants.

Each bailiff shall receive an annual salary of fifteen hundred dollars in cities of less than thirty thousand inhabitants; seventeen hundred fifty dollars in cities of thirty thousand and less than seventy-five thousand inhabitants; and two thousand dollars in cities of seventy-five thousand or more inhabitants.

The deputy clerks and deputy bailiffs shall receive such compensation as the city council may allow.

The salaries of municipal judges, clerk, bailiff, and all deputies shall be paid monthly on the first Monday of each month. For the first month such salary shall be paid from the city treasury and the second month such salary shall be paid from the court expense fund of the county. Each month thereafter such payments shall alternate from the city to the court expense fund of the county in like manner."

An opinion of this department issued June 1st addressed to the question as to whether the judges of municipal court were city officers and by reason thereof barred from receiving the increase of compensation during their existing terms. It was the holding in that opinion that Senate File 83, chapter 232, of the 53rd General Assembly operated to increase the salaries of the judges on July 4, 1949, being the effective date of that Act.

The above referred to opinion is authority for concluding that the compensation authorized to be paid bailiffs and clerks of the municipal courts of Iowa elected under the provisions of section 602.10, is operative upon the effective date of Senate File 81 of the 53rd General Assembly. This Act became effective upon publication.

---

June 9, 1949

**SEARCHES AND SEIZURES: Motor vehicles—search without warrant.**

Where the driver of a motor vehicle has been lawfully arrested the officer may, in certain circumstances, search without a warrant, the interior of the vehicle. Where no arrest has been made no such search should be made unless the officer has strong and definite "probable cause" for such search. In all questionable cases the better practice is to obtain a search warrant.

*Mr. Robert W. Burdette, County Attorney, Leon, Iowa:* This will acknowledge receipt of your letter of June 2nd wherein you ask the following question:

"Is it necessary for a peace officer to secure a search warrant for the purpose of searching the interior of a motor vehicle in situations which would be analogous to those in which a search warrant is needed for searching a building or dwelling?"

Chapter 751, Code of 1946, dealing with the issuance of search warrants in general, makes no specific mention of a search warrant being issued for a motor vehicle although a search warrant may undoubtedly be issued for such purpose under the general provisions of the Chapter.

In considering your question we must assume two possible situations in which an officer might wish to search a motor vehicle:

First, where the driver of the vehicle has been lawfully arrested and the officer seeks to search the vehicle as being in the immediate place or immediate control of or in the immediate surroundings of the defendant. Second, where there has been no arrest made of the driver of the vehicle and the officer wishes to search the vehicle.

In the first situation if the arrest has been made it is well settled that the right of search and seizure, which is incidental to lawful arrest, is not limited to a right to search the person of the one arrested and seize articles found thereon. The extent to which the search and seizure may go cannot be clearly defined from an abstract point of view, depending as it does on the courts interpretation of such phrases as "immediate present", "immediate control" or "immediate surroundings" of the person arrested as applied to the facts of the particular case. See 74 A.L.R. 1395; 51 A.L.R. 434; 32 A.L.R. 967. Many cases are cited in the above annotations approving of a search of a motor vehicle after the driver thereof has been lawfully arrested. One of the cases cited is that of *March v. U. S.* (1928) C.C.A. 2nd 29 Fed. 2d 172, certiorari denied, 279 U. S. 849, 73 L. Ed. 992, 49 S. Ct. 346. In that case a state trooper of New York stopped a car for a traffic violation and then proceeded to search the car for liquor violation. The court stated:

"Assuming, however, that the trooper stopped the car for the violation of a local ordinance, and either saw the liquors or was told of them by the defendant, we have yet to determine whether his seizure of them was lawful. This, as we view it, is a question only of state law, unless we have recourse to some common law of federal criminal procedure, if any there be. *Logan v. U. S.* 144 U. S. 363, 12 S. Ct. 617, 36 L. Ed. 429; *Rosen v. U. S.* 245 U. S. 467, 469, 470, 38 S. Ct. 148, 62 L. Ed. 406. We think that the state law authorized what he did, and find it unnecessary to consider the alternative. The search may be regarded as an incident to a lawful arrest, or as having an independent justification. Under the law of New York the person of an arrested offender may be searched, *People v. Chiagles*, 237 N. W. 193, 142 N. E. 583, 32 A. L. R. 676; and we see no reason to suppose that the power would not extend to chattels found within his immediate control, as it has been under the fourth amendment, *Angello v. U. S.*, 269 U. S. 20, 30, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409; *Marron v. U. S.*, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231."

The second situation above stated, where there has been no arrest made and the officer seeks to search the vehicle, presents more difficulty. Section 321.95, Code 1946, provides as follows:

"Peace officers and examiners employed in the department are hereby given authority to inspect any motor vehicle found upon the public highway or in any public garage or inclosure in which motor vehicles are kept for storage, hire or repair and for that purpose may enter any such public garage or inclosure."

It may well be doubted whether said section gives a peace officer the right to search the interior of a motor vehicle. Said section was enacted into law as part of a special anti-theft statute and its major purpose is to permit peace officers to determine whether or not a vehicle is a stolen vehicle.

The general rule is stated to be that mere suspicion of a violation of law is not enough to warrant a search without a warrant. There must be such circumstances as to show to the mind of an ordinarily prudent person that there is probable cause for such search. As is stated in the case of *Husty v. U. S.*, 282 U. S. 694, 75 L. Ed. 629, 51 S. Ct. 240:

"The 4th Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search. *Carroll v. United States*, 267 U. S. 132, 69 L. Ed. 543, 39 A.L.R. 790, 45 S. Ct. 280. We think the testimony which we have summarized is ample to establish the lawfulness of the present search. To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. *Dumbra v. United States*, 268 U. S. 435, 441, 69 L. Ed. 1032, 1036, 45 S. Ct. 546; *Carroll v. United States*, supra. It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. See *Dumbra v. United States*, supra; *Stacey v. Emery*, 97 U. S. 642, 645, 24 L. Ed. 1035, 1036.

Here the information, reasonably believed by the officer to be reliable, that *Husty*, known to him to have been engaged in the illegal traffic, possessed liquor in an automobile of particular description and location;

the subsequent discovery of the automobile at the point indicated, in the control of Husty; and the prompt attempt of his two companions to escape while hailed by the officers were reasonable grounds for his belief that liquor illegally possessed would be found in the car. The search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car or how soon it would be removed. In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant. The search was, therefore, on probable cause, and not unreasonable; and the motion to suppress the evidence was rightly denied. *Carroll v. United States*, 267 U. S. 132, 69 L. Ed. 543, 39 A.L.R. 790, 45 S. Ct. 280, *supra*."

See also Annotations in 74 A.L.R. p. 1457, 39 A.L.R. p. 829, 27 A.L.R. p. 733. Many cases are cited in the above annotations and they have held both that the search was reasonable under the circumstances and that it was unreasonable under the circumstances. In other words, each case has been decided upon its own peculiar facts. It is thus apparent that unless an officer, not having made an arrest and wishing to make a search of a vehicle, has strong and definite "probable cause" he should not make such search without first obtaining a search warrant. On the other hand, if a lawful arrest has been made, the officer probably would be protected in searching the vehicle because it is in the immediate presence or control of the person arrested.

This opinion is not intended to put a stamp of approval on promiscuous search. In all questionable cases the better practice is to obtain a search warrant.

---

June 9, 1949

**ARREST: Service of warrant in foreign county.** Section 745.7 of the Code is not specific enough in its terms to authorize the sheriff of one county to serve a warrant of arrest in another county, except where a person escapes or is rescued after being arrested, the sheriff, under section 755.13, may pursue and retake such person in any county of the state.

*Mr. Robert W. Burdette, County Attorney, Leon, Iowa:* This will acknowledge receipt of your letter of June 2nd wherein you ask the following question:

"Is it legal for the sheriff of any given county to serve a warrant of arrest in another county?"

Chapter 754 of the 1946 Code provides for the issuance of a warrant of arrest; section 754.5 states that the warrant must be directed to any peace officer in the state; section 754.7 reads as follows:

"The warrant may be delivered to any peace officer for execution and served in any county in the state."

There is no question but what a warrant issued in any one county may be executed under the terms of the above quoted statute in any county of the state. The real question is by whom it may be executed. Professor Perkins, of the University of Iowa, has written:

"In considering the place where an arrest may lawfully be made under a warrant, it is convenient to speak in terms of 'jurisdiction' and 'bailiwick.' The word 'jurisdiction' (to speak the law) has reference to the authority of a judge or court. It is sometimes used to refer to territory recognized for other purposes and it is not improper to speak of the 'jurisdiction' or a peace officer; but there is a better word for the latter purpose, the use of which tends to avoid confusion. This word is 'bailiwick' (bailiff's village) which, although it once had a narrower meaning, now refers to the special district or territory of a peace officer. Thus bailiwick of a state agent may be the state, the bailiwick of a sheriff, his county, and the bailiwick of a policeman, his town or city. It must not be assumed that an officer may never act in an official capacity outside of his bailiwick, because this may be authorized in certain situations, but it is nevertheless important to know what is his district proper. \* \* \*"

In this country it is necessary to examine the statutes of each particular state. Some of those statutes are very similar to the English common law, some require the warrant to be directed to a peace officer of the county in which the prosecution is brought but authorize him to execute it in any county in the state, some authorize the direction to be to officers of the state generally so that the warrant may be executed in any county in the state, but limit each officer to his own bailiwick as far as execution by him is concerned, still others have the sweeping provision that a warrant of arrest may be executed in any part of the state by any peace officer of the state."

(25 Iowa Law Review, pages 221-223).

In commenting upon section 754.7, above quoted, Professor Perkins states:

"This might be construed to mean that any officer can execute it within his own bailiwick and that there is no part of the state in which it may not be executed—but not that a particular officer can serve it outside of his bailiwick. Because of this doubt, the American Law Institute rejected such wording in favor of: 'It shall be executed only by a peace officer and may be executed in any county by any peace officer of the state.' A.L.I., Code Crm. Proc. (1930) Sec. 4". (25 Iowa Law Review, page 223).

The question has been the subject of an extensive annotation in 61 A.L.R., p. 378, wherein the general rule is stated to be:

"In the absence of statute the power of a sheriff or officer is limited to his own county; he is to be adjudged a sheriff in his own county, and not elsewhere; He cannot, therefore, execute a writ out of his own county, and if he actually does so he becomes a trespasser."

(4 Am. Juris. Arrest, Sec. 18, p. 14, and 6 C.J.S., Arrest, Sec. 12-b, (2) p. 610).

In view of the above discussion it is our opinion that section 745.7, above quoted, is not specific enough in its terms to authorize the sheriff of one county to make an arrest in another county of the state, with the following exception. Section 755.13 permits a sheriff to pursue and retake in any county of the state, a person who escapes or is rescued after being arrested.

We are not unmindful of the provisions of section 757.1, 757.2, and 757.3 of the Code which provide that an officer making an arrest in obedience to a warrant shall, if the warrant be for a felony, take the

defendant before the magistrate who issued the warrant, while if the offense be a misdemeanor the officer making the arrest shall take the defendant before a magistrate or the clerk of the district court of the county in which he was arrested. Nothing is contained in said sections which specifically authorizes the sheriff in one county to make an arrest in another county. Said sections are general and apply to any officer making the arrest rather than to the specific officer of the county wherein the warrant originated.

June 17, 1949

**MOTOR VEHICLES: Registration of foreign truck tractors leased by resident of Iowa.** A resident owner of truck trailers may, after registering such vehicles in Iowa, lease foreign registered truck tractors to pull said trailers in interstate commerce without being considered the owner of the tractors for registration purposes. Said truck tractors would not be subject to registration in Iowa and may be operated in combination with Iowa registered trailers.

*Mr. Alfred W. Kahl, Commissioner, Department of Public Safety:* By letter dated June 13, 1949 you request an opinion as follows:

"An Iowa trucking concern wishes to engage in interstate commerce operations involving several states, including his home state, Iowa. He wishes to register the trailers with Iowa registration plates and he intends to purchase these trailers in his own name. However, he desires to lease the truck tractors which will pull these trailers. The owners of the truck tractors live in other states and wish to register the tractors in the state where they reside. The terms of the leases are for a reasonable period of time.

1. Under the above set of facts, is the lessee of the truck tractors considered the owner for the purpose of registration under chapter 321, Code of Iowa, 1946, as amended by the last general assembly?

2. Under the above set of facts, would the leased truck tractors be subject to registration in Iowa, as long as they are engaged in interstate commerce?

3. If the leased truck tractors need not be licensed in Iowa, may they be operated in combination with Iowa registered trailers under our existing registration laws?

4. If the lessee is not considered the owner under (1) above, would the lessor be engaged in remunerative employment or carrying on business within the state under the provisions of Code section 321.55?"

Section 321.20, Code of Iowa 1946, requires registration of motor vehicles by the owners thereof. "Owner" is defined in subparagraph 36 of section 321.1 of the Code as follows:

"'Owner' means a person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this chapter."

Subparagraph 37 of the said section sets forth the following definition:

“Nonresident” means every person who is not a resident of this state.”

Pertinent to this discussion are sections 321.53 to 321.56, inclusive:

321.53. “A nonresident owner, except as otherwise provided in sections 321.54 and 321.55, owning any foreign vehicle of a type otherwise subject to registration may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration card and registration plate or plates issued for such vehicle in the place of residence of such owner.”

321.54. “Nonresident owners of foreign vehicles operated within this state for the intrastate transportation of persons or property for compensation or for the intrastate transportation of merchandise, shall register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residents of this state.”

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

321.56. “The provisions of section 321.53 shall be operative as to a vehicle owned by a nonresident of this state to the extent that under the laws of the foreign country, state, territory, or federal district of his residence like exemptions and privileges are granted to vehicles duly registered under the laws, and owned by the residents of this state.

Non-resident cars shall be listed within ten days after entering the state, with the county treasurer or department, on forms provided by the department. The department will issue a permit for the period of exemption.”

Section 321.53, supra, was amended by the 53rd General Assembly by adding thereto the following:

“A nonresident who leases a vehicle from a resident owner shall not be considered a nonresident owner of such vehicle for the purpose of exemption under this section.”

The department of public safety has required owners of leased vehicles to register the vehicles with certain exceptions, *including a lessee with option to purchase*. In the absence of a *purchase option* the proposition has been followed that registration must be made by the owner-lessor. In *State of Iowa vs. Roy C. Doherty* in the municipal court of the city of Clinton, Iowa, the defendant Doherty was charged with the operation of a motor vehicle not properly registered in Iowa. Doherty was the owner of the vehicle and had leased it to an Illinois corporation which had registered the vehicle in Illinois. It was the contention of the state that inasmuch as the lease did not contain a purchase option provision it was incumbent upon the Iowa owner-lessor to register the vehicle in Iowa in the event it was to be operated within the state of Iowa. This contention was predicated upon subparagraph 36 of section 321.1, supra.

The defendant was found guilty and sentence imposed on December 10, 1948. The amendment of the 53rd General Assembly, *supra*, did not change the position which had been taken by the state, but rather emphasizes the construction already adopted and may even abrogate the effect of subparagraph 36 as to a lessee with option to purchase if such lessee were a nonresident. The question herein presented is the converse of the Doherty case. Under the present facts the owner-lessee is the nonresident registering a vehicle in the state of his residence, the lessee being a resident of Iowa. Under the reciprocity provisions of section 321.56 *supra*, a nonresident owner is entitled to the same privileges in Iowa as an Iowa resident receives in the state of the nonresident. Our courts have held that reciprocity will be presumed in the absence of court decisions to the contrary in the foreign state. *State of Iowa vs. Keith J. Menking*, No. 3594, in the district court of the state of Iowa, for Dallas county; *State of Iowa vs. Cumbert W. McCampbell*, No. 21322, in the district court of the state of Iowa for Cedar county. Iowa would expect other jurisdictions to recognize the Iowa registration of an Iowa owner in such a case as the Doherty case and such reciprocity would be presumed. It therefore would be incumbent upon the state of Iowa as a matter of law to recognize the nonresident owner registration in the state of his residence.

Your question is confined to a strict lease arrangement. For the purpose of this opinion it is assumed that no business arrangement is involved which would construe "carrying on business within this state" as contemplated under the provisions of section 321.55. The mere leasing of tractors would not remove the exemption set forth in section 321.53 *supra*.

You present the further question as to whether a tractor and trailer must necessarily bear the same licenses. A trailer may properly be registered in a foreign jurisdiction, cross Iowa in interstate commerce, and be drawn by a tractor registered in Iowa. The mere fact that the trailer is drawn by an Iowa registered tractor does not alter the character or propriety of the registration of the trailer.

You are therefore advised:

- (1) Under the facts presented the lessee is not considered the owner for the purpose of registration.
- (2) The leased truck tractors would not be subject to registration in Iowa.
- (3) The leased truck tractors may be operated in combination with Iowa registered trailers.

---

June 28, 1949

**COUNTIES: Probation officer to serve in several counties—compensation.** The judge of two or more counties of a judicial district may appoint the same probation officer and pay his salary at the respective rate allowed by statute for the population bracket of each county in direct proportion to the time spent in duties performed in that county. (Opinion on page 147 of Report of Attorney General 1948 modified to the extent of conflict herewith.)

*Honorable G. W. Stillman, Judge of the Fourteenth Judicial District, Algona, Iowa:* Your letter of the 14th inst. at hand. You state the following:

"The judges of the Fourteenth Judicial District made up of eight counties are desirous of appointing one probation officer to service the district. Chapter 131 of the Acts of the Regular Session of the Fifty-second General Assembly seem to make provision for such an appointment. However, it has been our understanding that your office has given an opinion to the effect that the salary of such a probation officer could not be prorated between the respective counties in the district. It would seem to us that subsection 6 of chapter 131 could be construed as giving authority to prorate the salary of the probation officer as part of the expense of said probation office.

We would appreciate very much your reviewing this matter and advising us."

In reply thereto we would advise you that it is true that the department has issued an opinion to the effect that the compensation of a probation officer under the provisions of the foregoing designated Act could not be prorated among several counties which he served unless it be on a per diem or hourly basis. This opinion was issued January 30, 1948 and appears in the Report of the Attorney General for 1948 at page 147. Your letter has occasioned a review and reconsideration of the foregoing opinion and the foregoing designated chapter. We now are disposed to modify the holding thereof to the extent that it would permit counties to appoint a probation officer to serve more than one county and to prorate the salary of such officer among the several counties which he is appointed to serve in proportion to the time spent in said county. While the Act itself is not as clear in the authorization in this respect as might be desired, it exhibits sufficiently the intention of the legislature that the foregoing authority exists, due to the fact that no specific prohibition to this division is expressed. The Act is not clear or expressive as to the amount of compensation to be paid such a probation officer who serves several counties. However, authority to divide a reasonable compensation among the several counties to such officer, is expressed in section 1, subsection 6 and is implied in the balance of the Act.

We are therefore of the opinion that two or more counties may appoint the same probation officer and pay at the respective rate of compensation to the officer allowed to the size county specified in the Act in direct proportion to the time spent in duties performed in that county. Thus, if three counties appoint an officer and he spends one-third of his time in each county, the rate of compensation would be as follows:

One county less than 30,000—not to exceed \$833.33.

One county over 30,000 but less than 50,000—not to exceed \$1,000.00.

One county over 50,000—not to exceed \$1,166.66.

Or a total salary per year—not to exceed \$2,999.99.

Insofar as this opinion conflicts with any portion of the opinion appearing in the Report of the Attorney General for 1948, that portion is now withdrawn.

July 6, 1949

**HIGHWAYS: Vacation and sick leave for county employees.** County boards of supervisors may grant paid vacation and sick leaves to regular highway workers under similar rules as provided in section 79.1 of the Code, for state highway employees and pay the same from the secondary road maintenance fund.

*Honorable George L. Paul, State Representative, Brooklyn, Iowa:* Your letter of the 14th ult. at hand. You advise of the desire of your board of supervisors to allow their county maintenance employees vacations with pay depending on length of service, and you are desirous of knowing whether they have authority to grant such vacations without a specific statutory authorization.

While we find no specific authority for boards of supervisors to allow their highway maintenance employees vacations with pay, and while it is true authority must be found to authorize the expenditure of tax funds by the boards, we do not feel that the allowance of paid vacations is to be classified as a gift or reward, but rather as a benefit to the employer who obtains from the employee better services due to his restored vigor and stamina. This is the modern theory of granting vacations with pay and with its philosophy we agree. It does not, of course, apply to the occasional or casual worker.

The boards of supervisors are expected to obtain the best services and the most value from its expenditures of the taxpayer's money. To this end they are authorized to expend secondary road maintenance funds under section 309.13, Code 1946. Section 309.13 as amended by the 52nd General Assembly provides:

"The secondary road maintenance fund is hereby pledged:

1. To the payment of the cost of maintaining the secondary roads according to their needs.
2. To the payment of the cost of bridge repairs, culvert material, machinery, tools and other equipment.
3. To the payment of all or any part of special drainage assessments which may have been, or which may hereafter be, levied on account of benefits to secondary roads.
4. To the payment of all cost of maintenance of secondary roads improved under the provisions of chapter 311 of the Code 1946, after such secondary road has been improved by oiling, graveling or other suitable surfacing."

In this regard the state itself has established a suitable standard for vacations and sick leave and specifically provided its conditions. This should be the limit of the expenditure of tax moneys for this purpose. See section 79.1, Code 1946.

The fact that county maintenance workers do not receive salaries as such is not a serious objection for we find the same situation in the state highway employees who are paid on an hourly or daily basis. It is important that they be regular employees on a more or less permanent basis, and that the equivalent of one year's work for the county be considered the basis of a week's vacation.

In so holding, we are well aware that a bill has been introduced in the Iowa legislature, such as House File 390 in the past legislature, to grant this added authority specifically, but we fail to find any serious debate on such a proposed law. It is, of course, then a matter of surmise whether it was not considered because the authority was already granted or because it was not meritorious, or because it had no special sponsors. We prefer the former. There is precedent for the use of tax money for the foregoing purpose, and without specific statutory authorization in the case of *Wood v. City of Haverhill*, 55 N. E. 381, where the Supreme Court of Massachusetts observed.

"A reasonable vacation, without thereby subjecting the city to additional expense, might well have been regarded by the city council as calculated to promote the health and efficiency of the police force, and, if so, we think that it was within the power of the city council to adopt the order which it did. It would come fairly within the authority conferred on cities and towns to make such reasonable provisions, as they should deem conducive to their welfare, 'for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police thereof.' Pub. St. c. 27, Sec. 15; Id. c. 28, Sec. 2. It would also come within the power conferred on the mayor and aldermen of Haverhill to make such regulations for the government of the police department, not inconsistent with law, as they may deem proper. St. 1894, c 480; *Malcolm v. City of Boston*, 173 Mass. 312, 53 N. E. 812. Bill dismissed."

It is therefore our opinion that county boards of supervisors may grant paid vacations and sick leaves to their regular highway workers under similar rules as provided in the case of state highway employees in section 79.1, Code 1946, and may use the secondary road maintenance fund for that purpose.

---

July 14, 1949

**TAXATION: Sealed corn not subject to personal property tax.** Chapter 236, Acts 52nd G. A., was intended to include corn sealed on the farm or corn held under a purchase agreement with the federal government so that such corn would be taxed on the basis of  $\frac{1}{4}$  mill per bushel and not subject to personal property tax.

*Honorable William S. Beardsley, Governor of Iowa:*

*Honorable Warren Wells, Chairman, Iowa State Tax Commission:*

This will acknowledge your letter of July 12 in which you make inquiry as to the effect of chapter 236, Laws of the 52nd General Assembly, and whether or not corn which was sealed and under loan or held under a purchase agreement with the federal government or other third party was covered by chapter 236, Laws of the 52nd General Assembly, which provides for an excise tax of one-fourth ( $\frac{1}{4}$ ) mill per bushel upon all such corn and exempts it, when thus taxed, from all property tax. In order to explain our reasoning it is necessary to set out sections one (1) and two (2) of the Act, which are as follows:

"'Person' as used herein means individuals, corporations, firms and associations of whatever form. 'Handling or handled' as used herein means the receiving of grain at or in each elevator, warehouse, mill, processing plant or other facility in this state in which it is received

for storage, accumulation, sale, processing or for any purpose whatsoever. 'Grain' as used herein means wheat, corn, barley, oats, rye, flaxseed, field peas, soybeans, grain sorghums, spelts, and such other products as are usually stored in grain elevators. Such term excludes such seeds after being processed and the products of such processing when packaged or sacked. The term 'processing' shall not include hulling, cleaning, drying, grading or polishing.

"An annual excise tax is hereby levied on such handling of grain in the amount hereinafter provided. All grain so handled shall be exempt from all taxation as property under the laws of this state. The amount of such excise tax shall be a sum equal to one-fourth ( $\frac{1}{4}$ ) mill per bushel upon all grain as herein defined so handled."

It is to be noted that all grain handled under the provisions of this Act shall be exempt from all taxation as property under the laws of the state.

Section seven (7) of the Acts amends the general section 427.1, Code 1946, relating to exemptions by adding a new subsection as follows: "Grain handled as defined under chapter 428".

Under the definitions, "handling or handled" as used in the Act, means the receiving of grain at or in such elevator, warehouse, mill, processing plant of *other facility* in this state in which it is received for *storage, accumulation, sale, processing or for any purpose whatsoever*.

The commodity credit corporation, an agency of the United States, has made many loans upon corn produced in 1948 and held on the farms in Iowa. In addition to the foregoing loans, the commodity credit corporation has likewise entered into purchase agreements agreeing to purchase the corn produced in 1948 at a fixed price, providing the producer and party entering into the purchase agreement would retain such corn upon the farm or furnish a warehouse receipt showing the corn was stored in an eligible warehouse.

Corn was either stored or sold under a purchase agreement under the provisions of 56 Stat. 767; section 5(A) Public Law 806, 80th Congress; 50 U.S.C. App. 968. Under section 8 of this Act, rules and regulations were promulgated and are contained in sections 248.201 to 248.223, which appeared in C.C.C. corn bulletin I issued under date of September 14, 1948, and published in Federal Register September 17, 1948.

Section 248.202 above referred to was as follows:

"Loans shall be available on eligible ear and shelled corn stored on farms in the states and counties for which loan rates will be established in supplement I to this bulletin. Loans will not be available on warehouse stored corn."

It is to be noted that under the provisions for making corn loans and sealing corn that the corn was to be stored in proper facilities on the farm and loans were not available on warehouse stored corn. It was, therefore, necessary for the farmers of Iowa, who wanted to seal their corn, to furnish the necessary facilities for storing the same.

The farmers of Iowa furnished the facilities and handled their grain for the United States government in order to comply with the program

which the government deemed expedient and of vital interest to the general economy of the United States.

There is little doubt but what most of the millions of bushels of corn now sealed or under purchase agreements on Iowa farms will be delivered to the commodity credit corporation. There is little doubt but what this corn would be delivered this year excepting some arrangement be made to delay it. As far as the farmer is concerned in the state of Iowa it appears to be surplus. Most farmers have other crops to meet their visible needs for this year, and have wonderful prospects for a record crop this fall. For the first time since the program was established there appears to be no need for the sealed corn for use on our farms, and the government is not prepared to take delivery. The commodity credit corporation is therefore attempting to rent storage facilities on the farms. To do this it offers the farmer only ten cents per bushel for this facility and apparently failed to consider the tax and other expense that it would cost the farmer to hold the corn for it. These services of the farmer in fact would make the farmer a lessor of storage facilities under chapter 236, Acts of the 52nd General Assembly of Iowa. Were it not for chapter 236, the government would be asking the farmer to hold this grain at a loss to himself in many instances. Iowa, the farmers' home state has been and is ready to help him meet his needs, and does help him accommodate the governmental agency in its dilemma.

At the present time much of the corn is being resealed and the loans extended on farm stored corn, provided adequate storage space is furnished in accordance with the rules of the commodity credit corporation, and purchase agreements are being made by the government if the corn is stored in the manner required by the rules and regulations of the commodity credit corporation.

There is no question but this is grain which is stored or accumulated for the purpose of retaining the corn on the farm in order to promote an economic plan which will guarantee a fair price for the commodity when sold. It is without question a plan to store grain for a purpose which is of economic interest to the people of the state of Iowa, and we believe that it comes within the express language of the grain handling Act. The corn held under purchase agreements or sealed, is handled for the commodity credit corporation and, therefore, should be taxed under the grain handling Act. It is our opinion that corn sealed on the farm or held under a purchase agreement is within the specific terms of chapter 236, Laws of the 52nd General Assembly. The intent and purpose of this specific Act was to place a fair tax on grain handled and removed it from the field of property taxation, and if the Act were necessary to protect the elevator, warehouse, mill or processing plant from a high tax, it certainly would be inconsistent to say that the Act was not intended to cover stored corn and corn kept in storage on farms when the very purpose of the storage of such corn in either event is to promote the general economy of the state and of the nation, and such grain is handled for the commodity credit corporation.

To hold that the Act was limited in its scope and applied only to elevators, warehouses, mills and processing plants would do violence to the express language of the Act. Such a construction would discriminate against the farmer and place an unjust burden on the producer who raises and stores in the bin on the farm. We think the bin on the farm is "the other facility" referred to in the Act.

We believe that the language "or other facility" used in the Act has particular significance, and when the legislature employed the terms "the receiving of grain at or in each elevator, warehouse, *or other facility* in this state in which it is received for storage, accumulation, or *for any purpose whatsoever*", they did so understandingly and with the express intention that chapter 236, Laws of the 52nd General Assembly was to include sealed corn or corn held under a purchase agreement, so that such corn would be taxed on the basis of one-fourth ( $\frac{1}{4}$ ) mill per bushel and would not be subject to property tax.

---

July 28, 1949

**TAXATION: Board of review—number of members.** The county conference board selects the county board of review and determines the number of members consisting of from 3 to 5. Having once fixed the number they have no power to increase or reduce the membership.

*Mr. J. Leo Martin, County Attorney, Sigourney, Iowa:* We have yours of the 16th inst. in which you submit the following:

"Section three of chapter 240, Acts of the 53rd General Assembly, provides that the conference board shall consist of not more than five or less than three members.

Under the old provisions our board of review consisted of five members, and the question now is whether or not the conference board will have the power to reduce the number of members from five to three."

In reply thereto we would advise you that, in our opinion, once the conference has fixed the number of members of the board of review, its power over the number thereof is exhausted. This conclusion is confirmed by the plain terms of the statute authorizing the fixing of the number. This statute is contained in section 3 of Chapter 240, Acts of the 52nd General Assembly in these words:

"On or before the first day of December, 1947, the board of supervisors in each county shall call a conference which shall include the mayors of all incorporated cities and towns in the county whose property is assessed by the county assessor, members of the county boards of education as now or hereafter constituted, and members of the board of supervisors. Such conference shall organize for the purpose of selecting a county board of review of not less than three (3) members or more than five (5) as may be deemed desirable by the conference. The members of the conference when organized shall constitute the appointive board."

This clearly is authority for fixing the number of members of the county boards of review at the organization meeting, but provides no express authority to change the number of such members thereafter. This conclusion is further confirmed by the provisions of the foregoing section 3 fixing the terms of the members of the board of review. The portion of section 3 provides as follows:

"The terms of members of the boards of review shall be for four (4) years, beginning with January 1st of the year following their selection but in the case of boards chosen for the first time under this act, the term of one (1) member shall be for one (1) year, one member for two (2) years, and a third member for three (3) years and additional members for four (4) years each, the length of the term of each member to be determined by lot, and successors of members whose terms expire each year shall be selected in similar manner at future conferences to be called by the board of supervisors."

By the direction of the foregoing provision successors to members of the board of review whose terms expire each year, shall be selected in a similar manner at future conferences. Plainly, succession of membership follows the expiration of the respective terms.

Power to change the number of members, therefore, is not expressly bestowed and by reason of the foregoing may not reasonably be implied.

---

July 28, 1949

**VETERANS: Service compensation to minor beneficiary—guardianship required.** Before payment of World War II service compensation can be made to a minor beneficiary of a deceased veteran, a guardian must be appointed or satisfactory evidence furnished that the state having jurisdiction of any such minor does not require guardianship.

*Mr. Edward J. Kallemyrn, Executive Secretary, World War II Service Compensation Board:* Your letter of June 24, 1949 has been received and is as follows:

"This department is receiving a very substantial number of applications for World War II service compensation provided for by chapter 59, Acts of the 52nd General Assembly of Iowa, from or in behalf of minor children of deceased veterans. Such minors are eligible beneficiaries of deceased veterans under the terms and provisions of the above quoted chapter.

"Your opinion is respectfully requested as to whether or not:

1. It is necessary that a guardian of the property of such eligible minor beneficiary be appointed by the District Court of Iowa before payment, and to whom payment of compensation as provided for by the above stated act may be made?

"If your answer to the above is negative,

2. What class or classes of persons may legally act in all respects for and in behalf of such minors, including endorsement of warrant in payment of such compensation?"

Section 1 of chapter 59, Acts of the 52nd General Assembly of Iowa, reads as follows:

"Section 1. The state of Iowa is hereby authorized to become indebted in the amount of eighty-five million dollars (\$85,000,000) and in evidence thereof there shall be issued and sold negotiable coupon bonds of said state as hereinafter provided, and the proceeds thereof shall be paid into the treasury of the state to be expended for the payment of service compensation to the persons defined in section four (4) of this act, or for the benefit of such persons as prescribed by section four (4) and ten (10) of this act (italics supplied) and for expenses incurred in carrying out the provisions of this act."

Section 4 of said Act provides in part as follows:

"Sec. 4. \* \* \* The surviving \* \* \* child or children, stepchild or step children, \* \* \* of any deceased person, shall be paid the compensation that such deceased person would be entitled to under this act, \* \* \*

Section 10 of said Act has reference to payment of additional compensation for the amelioration of the condition of residents of this state within the classes defined in section 4 of the Act who suffer from disability. Such additional compensation is over and above the so-called regular bonus or compensation as provided for in section 4.

Section 668.3 of the 1946 Code of Iowa provides as follows:

"668.3. Guardian of Property. If a minor owns property, a guardian must be appointed to manage the same."

There have been several cases decided by our supreme court which indicate clearly that section 668.3 of the Code is a mandatory provision and must be followed. In the case of Ringstead vs. Hanson, 150 Iowa, page 324, the action was one to quiet title to real estate in which the father and natural guardian of the defendant had purchased said land for his minor son. The case involved the question as to whether a guardian was necessary where the property had been acquired for the minor son from funds not derived from either parent. The court in that case said:

"Hans D. Hanson was never appointed guardian by order of court and independent of statute had no authority to assume possession or exercise control over his son's property. \* \* \* Section 2241 of the Code of 1873 declared parents the natural guardian of their children, and section 2243 (same as 668.3, 1946 Code) provided that 'if the minor has property not derived from either parent, a guardian must be appointed to manage such property.'"

In the case of Hopkins vs. Lee, 162 Iowa, 165, at page 168 our court stated:

"It is true that plaintiff was a minor during this entire period, and that he had no guardian, save perhaps a natural one—his father—but of course the father, as such, had no legal authority over his son's property, not acquired from either parent."

In the case of In Re Guardianship of Skinner, 230 Iowa, page 1016, the question was one as to the right of an Iowa court to appoint a guardian where a question of domicile of the child was involved. In the discussion, the court said:

"The trustee could not pay to this minor what is the minor's share under this trust fund so long as he remains a minor. He could only pay it over to a guardian."

It would be highly desirable to make conditions concerning the payment of World War II compensation to minor beneficiaries as convenient and easy as possible. However, in view of section 668.3 of the Code and the cases cited and in view of the apparent total lack of authority to the contrary, it is our opinion that a guardian of the property of eligible minor beneficiaries must be appointed by a court of competent jurisdiction before checks in payment of World War II

service compensation as provided by Chapter 59, Acts of the 52nd General Assembly of Iowa can be honored, or satisfactory evidence is furnished to the board, that the states having jurisdiction of such minors do not require guardianships. Such checks must be endorsed by the duly appointed guardian for such eligible minor beneficiaries.

It will be noted that in section 1 of said Act it is provided that the compensation is to be paid to the persons defined in section 4 or for the benefit of such persons. For that reason, we are of the opinion that where guardianships are instituted for minor beneficiaries, payment to the duly appointed guardian of such minors is payment for the benefit of such eligible minors.

---

July 29, 1949

**HIGHWAYS: Secondary road improvements—assessment of benefits.**

The assessments for improvements to secondary roads, made under chapter 129, Acts 53rd G. A., should be spread on the basis of benefits, in the determination of which effect may be given to the area rule and the frontage rule as well as other considerations which benefit the property assessed.

*Mr. Grant L. Hayes, County Attorney, Mount Ayr, Iowa:* In your recent letter you inquire in effect whether after the establishment of a secondary road assessment district, under chapter 129 Laws 53rd G. A., the assessment for the improvement constructed thereunder should be made on an area basis or on a frontage basis.

This office finds no justification for the exclusive application of either standard. It is true that the establishment of the district by the board of supervisors is made to depend on the filing of a petition signed by 35% of the owners of the lands within the proposed district under section 8 of the Act and it further appears that when

“the owners of not less than 75% of the lands, adjacent to, or abutting upon any secondary road or roads shall, on or before December 1st of any year petition the board of supervisors of their county for the improving by graveling or suitable surfacing of any road or roads, and for the assessment of not less than 50% (or such greater portion as may be provided in said petition) for the cost of such improving, by gravel or other suitable surfacing to the lands adjacent to, or abutting upon said road or roads, the board of supervisors shall, in the order in which such petitions were filed with it, include and give preference to said project or projects in the secondary road construction program \* \* \* ”

These provisions, however, have no specific application to the spreading of the assessment.

Section 10 of the Act provides for an engineer's report which must include “an approximately equitable apportionment of not less than 25% of the estimated cost of said improvement among the tracts and parcels of real estate included in such proposed district.”

Under section 13 the notice of hearing on the proposal for the establishment of such a district must contain a statement of the amount apportioned in the engineer's report. The language employed seems to require the spreading of the assessment upon the basis of *benefits*

rather than according to any arbitrarily adopted yardstick on either an area or frontage basis. Each of these might be among a number of factors to be taken into consideration in arriving at an equitable apportionment of benefits.

It is possible to conceive a situation where land not actually abutting or adjoining the highway might be properly included in the district (if within one-half mile of the road) on the theory that the owner by easement had access to the improvement and sustained some benefit therefrom. That this may be the rule in Iowa is indicated by the case of *Frymek vs. Washington County* 229 Iowa 1249, 296 NW 467, where in an action for the recovery of damages sustained by the reason of a vacation of the highway, it was considered that the owner of property which did not actually abut thereon but who had an easement across the land of a third party to the land in question might still recover.

There do not appear to be many Iowa cases directly on this subject but under the heading of special or local assessments and the establishment of the improvement or assessment district or area, there is some help to be found in 48 American Jurisprudence section 119 at Page 667 where it is said:

“Ordinarily, land included in an improvement district or area is that which abuts on the improvement or is in proximity to it, at least where the improvement is of such character that special benefit to property depends upon its abutting or being close to the improvement”. *Paulsen v. Portland*, 149 US 30, 37 L. Ed. 637, 13 S. Ct. 750; *Illinois C. R. Co. v. Decatur*, 147 US 190, 37 L. Ed. 132, 13 S. Ct. 293; *Harlan v. Bel Air*, 178 Md. 360, 13 A. (2d) 370, citing RCL; *Barber Asphalt Pav. Co. v. French*, 158 Mo. 534, 58 SW 934, 54 LRA 492, affirmed in 181 US 324, 45 L. Ed. 879, 21 S. Ct. 625.”

Again, on page 668 of the same section it is said:

“on the one hand, under a statute authorizing an assessment on abutting property apportioned according to the number of front feet, it has been ruled that an assessment can validly be made only on lots which actually abut on the improvement. *Harlan v. Bel Air*, 178 Md. 260, 13 A. (2d) 370, citing RCL”.

This rule is scarcely applicable to the instant situation for there is no statute authorizing an assessment apportioned according to the number of front feet but on the other hand, on page 669 of the same note the following appears:

“an assessment of the entire costs of a highway upon land within one mile on either side, whether the cost exceeds the benefits or not, has been held vicious and unconstitutional. *Murray v. Smith*, 117 Minn. 490, 176 NW 5, 40 LRA (NS) 173, Ann. Cas. 191 3D 548; *Sperry v. Flygare*, 80 Minn. 325, 83 NW 177, 49 LRA 757, 81 Am. St. Rep. 261.”

And again in section 70 of the same subject matter at page 626 there is found the following:

“But since the front-foot rule is merely an approximate method of measuring benefits, it logically follows that it ought not to be employed in any case where it is obvious that it is not and cannot possibly be a standard by which to measure such benefits, and the courts are virtually agreed that this is the case in respect of assessments upon rural lands

for certain improvements. To apply it to the country and to farm lands would lead in some instances to such inequality and injustice as to deprive it of all soundness as a rule, or as a substitute for a fair and impartial valuation of benefits in pursuance of law, so that, at the very first blush, everyone would pronounce it to be palpably unreasonable and unjust. Thus, it has been held that an assessment for the opening and improvement of a highway through a rural district, apportioned according to frontage of the abutting lands, is so manifestly out of relation and correspondence to any possible benefits conferred as to be palpably unreasonable and unjust and in contravention of constitutional provisions forbidding the imposition of unequal and ununiform taxation for public purposes upon selected individuals. *Weed v. Boston*, 172 Mass. 28, 51 NE 204, 42 LRA 642; *Seely v. Pittsburgh*, 82 Pa. 360, 22 Am. Rep. 760; *Re Washington Ave.* 69 Pa. 352, 8 Am. Rep. 255".

In the absence of specific Iowa authority and in the light of the general rules suggested above, there should be little hesitancy in rejecting both the frontage and the acreage rule as exclusive yardsticks for the spreading of the assessment. The conclusion is that the assessment should be spread in accordance with benefits in the determination of which effect may be given to both of the yardsticks suggested as well as to other considerations too numerous to mention here. Under section 18 of the Act in question the determination of this apportionment is the duty of the board of supervisors. From this determination an appeal is provided under section 26 of the Act.

---

August 11, 1949

**CORPORATIONS: Requalification of foreign corporation—fee.** Foreign corporations having perpetual existence are required to pay a requalification fee of \$1.10 per \$1,000 of property increase subsequent to the effective date of chapter 227, Acts 50th G. A. (Section 495.5, Code 1946.)

*Honorable Melvin D. Synhorst, Secretary of State:* Your letter of July 26, 1949, requests an opinion of this office as follows:

"Pursuant to the opinion dated August 13, 1948, prepared by Mr. Kent Emery of your office, a problem has arisen as to the application of said opinion relative to the proper fee on property increase as set forth in the annual reports of foreign perpetual corporations. We have in our office approximately 1,000 foreign corporations who have increased their property since the opinion was rendered and who have made payment on the basis of \$1.10 per \$1,000 on said property increase.

We respectfully request your opinion as to what rate should be charged on the property increase shown in the annual report of foreign corporations having perpetual existence who have been qualified to do business in Iowa prior to the enactment of chapter 227, Acts of the 50th General Assembly. Should it be computed on the basis of \$1.10 or on the basis of \$1.00 per \$1,000.00?"

The opinion dated August 13, 1948, to which you refer was in reply to an inquiry of your office as to the fee to be paid upon requalification of a foreign corporation having perpetual existence, which corporation held a permit to do business in Iowa prior to enactment of chapter 227, Acts of the 50th General Assembly. The said chapter 227, Acts of the 50th General Assembly in part provides as follows:

"A foreign corporation which has a permit under this chapter may requalify or renew its permit hereunder by fully completing the proceedings therefore at any time within three months before or after the date upon which its permit expires by proceeding in the same manner as in obtaining a permit in the first instance under the then existing provisions of this chapter relating to obtaining a permit, including the payment of fees."

The opinion held that under the foregoing provision a corporation having a permit prior to the enactment of the said provisions should, upon requalification, pay the fees in accordance with fees imposed on the date of original qualification. The result was the imposition of a fee in the sum of \$1.00 per \$1,000 of property in use or held as an investment in Iowa rather than a fee of \$1.10 per \$1,000 of such property, the latter fee being imposed upon corporations having perpetual existence obtaining an original permit after passage of the said act.

Your present question is predicated upon the provisions of section 494.5, Code of Iowa 1946, which provides in pertinent part:

"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 if such corporation has a permit to transact business within the state for a period of years; if said corporation has a perpetual permit to transact business within the state, said filing fee thereon shall be one dollar and ten cents for each one thousand dollars or fraction thereof of such increase."

The foregoing provisions, in so far as they relate to foreign corporations having a perpetual permit, became law as a part of chapter 227, Acts of the 50th General Assembly hereinbefore mentioned. It is to be noted that while the legislature included a grandfather provision relating to fees to be paid *upon requalification* by foreign corporations which held a permit prior to the effective date of the act, no grandfather provision was enacted with respect to fees to be paid by such corporations *as to increases of property* used or held as an investment in Iowa. Therefore no exception having been made relating to increases, the fee provided in the sum of \$1.10 per \$1,000 of increase of such property is to be paid.

The total effect of the two provisions is to bring about the result that such foreign corporations, upon requalification will pay a fee of \$1.00 per \$1,000 of property to the extent of the property held on the effective date of the Act, and will pay a fee of \$1.10 per \$1,000 of property increase after the effective date of the act. The fee of \$1.10 per \$1,000 of increase is to be paid regardless of whether the increase is reported at time of increase, in the annual report, or upon requalification.

You are therefore advised that foreign corporations having perpetual existence are required to pay a fee of \$1.10 per \$1,000 of property increase subsequent to the effective date of chapter 227, Acts of the 50th General Assembly.

September 12, 1949

**COUNTIES: Coroner's autopsy duties—Fee claims audited by supervisors.** The question as to whether the autopsy services of the coroner are necessary in each case of death involving suspicious circumstances is one largely within the sound discretion of the coroner. However, before payment of the coroner's claims for fees the board of supervisors has the duty to determine in each instance whether the coroner acted in good faith and may require a more or less complete explanation of each claim.

*Mr. Edwin S. Thayer, County Attorney, Des Moines, Iowa:* We have yours of the 23rd ult. together with a supplement thereto of date August 24th. These letters in terms are as follows:

"On June 21 of this year I wrote your office a letter requesting an opinion in respect to certain questions asked of me by the county coroner and which I feel unable to answer. I am of the opinion that my letter of June 21 did not leave my office and for that reason no reply was received, and I respectfully ask for your permission to repeat the question.

In brief, the question is as follows:

'Can the board of supervisors exercise any discretion in the allowance of claims filed by the coroner for the performance of autopsies upon dead bodies owing to a feeling of the board that such autopsies were unnecessary and needless expense upon the county?'

A number of such claims are now pending before the board of supervisors and I may advise you that the present county coroner is a physician and qualified to perform autopsies of any nature.

None of the claims pending are for autopsies performed while a coroner's inquest was in progress or later took place, nor were they performed on the suggestion of the county attorney, sheriff, or city detective department, and none of the persons were killed in mines.

However, there is a feeling on the part of the board that some of the autopsies performed did not serve any good purpose and that the cause of death in such instances were clearly apparent without the performance of an autopsy.

It is possible that some of the following citations may be of value: Section 339.22, Code of 1946, section 340.19, Code of 1946, AGR, March 7, 1934, page 119, *Finarty v. Marion County*, 127 Iowa 544, 13 Am. Jur., page 114."

"Under date of August 23 I wrote a letter addressed to your office requesting your opinion as to the discretion of the board of supervisors in the allowance of claims for autopsies performed by the Polk county coroner, who is also a physician.

I attached to my letter a short memorandum of citations but neglected to include an attorney general's opinion appearing at page 196 of the Report of the Attorney General for 1938. This was an inadvertency on my part."

In reply to the foregoing, initially we call attention to the general statutory powers vested in the board of supervisors over claims of the character here in question. This power is set forth in section 331.21, Code of 1946, in terms as follows:

"All unliquidated claims against counties and all claims for fees or compensation, except salaries fixed by statute, shall, before being

audited or paid, be so itemized as to clearly show the basis of any such claim and whether for property sold or furnished the county, or for services rendered it, or upon some other account, and shall be duly verified by the affidavit of the claimant, filed with the county auditor for presentation to the board of supervisors; and no action shall be brought against any county upon any such claim until the same has been so filed and payment thereof refused or neglected."

According to the case of *Escher vs. Carroll County*, 146 Iowa, 738 "the purpose of the statute is to give the board of supervisors an opportunity for investigation and for determining whether the claim shall be paid or litigated", and this statute defines the power and duty of the board of supervisors over the claims of the coroner for fees. And according to section 332.3, subsection 5, Code 1946, the board of supervisors has the further duty and power with respect to claims in terms as follows:

"To examine and settle all accounts, receipts and expenditures of the county and to examine, settle and allow all claims against the county unless otherwise provided by law."

The applicability of the foregoing section 332.3 to the claim of the coroner was interpreted by the supreme court in the case of *Moser vs. Boone County*, 91 Iowa 360, an action to recover from the county for services rendered by the plaintiff, a physician, at the request of the coroner of the county. The examination was made and the value of the services of the physician-plaintiff was certified by the coroner to the board of supervisors in the amount of \$50.00. The board allowed \$25.00, and thereupon action was brought to recover the sum of \$50.00. The court in deciding under the statute then in force, to-wit:

"In the above inquisition by a coroner, when he or the jury deem it requisite, he may summon one or more physicians or surgeons to make a scientific examination, who, instead of witness fees, shall receive such reasonable compensation as may be allowed by the county board of supervisors."

addressed itself to the question as to "whether in case a physician makes a post mortem examination of a body by the direction of the coroner, he is bound by the allowance for his services which the board of supervisors makes as reasonable, or whether he may recover more by showing his services were of greater value than the amount so allowed." In holding that the claimant was not bound by the reasonableness of the compensation allowed by the board of supervisors but retained a cause of action against the county for the recovery of a reasonable compensation, the court said this:

"The claim for services rendered under the section as amended is not liquidated when it is presented to the board of supervisors for allowance, that board has power 'to examine, settle and allow all just claims against the county unless otherwise provided by law.'

Code section 303. '(4) No action can be brought against a county on any unliquidated demand until it has been presented to the board and payment demanded.' Code, section 2610. Ordinarily, the action of the board on an unliquidated claim is not final, but suit may be brought thereon after it has been presented to the board as required by the statute. *Armstrong v. Tama Co.*, 34 Iowa, 309; *Curtis v. Cass Co.*, 49, Iowa, 421. Section 4 of chapter 73 of the Acts of the Twenty-first General Assembly provides that 'with the approval of the district court

he (county attorney) may procure such assistance in the trial of a person charged with the crime of felony as he shall deem necessary, and such assistant, upon presenting to the board of supervisors a certificate of the district judge before whom said cause was tried, certifying to the service rendered, shall be allowed a reasonable compensation therefor, to be fixed by the board of supervisors.' That statute was considered in the case of *Stone v. Marion Co.*, 78 Iowa 15, 42 N. W. Rep. 570, and held to require the board to fix a reasonable compensation. It was further held that, if the amount fixed was not reasonable, the plaintiff was under no obligation to accept it, but had a right to resort to the courts for a determination of the amount to which, he was entitled. The legal effect of the provision considered in that case is so nearly identical with the one which we are now required to construe that the same rule applies to both. Following the rule announced in the *Stone* case, we hold that it was the duty of the board of supervisors to allow a reasonable compensation for the services in question, and that, if it did not, the plaintiff had a right to collect such compensation by an action against the county. The judgment of the district court is reversed."

On the other hand the power and the duty of the coroner in the performance of autopsies is contained in section 339.22, Code 1946, which is as follows:

"In the inquisition by a coroner or by an acting coroner, when he or the jury deem it requisite, he may summon one or more physicians or surgeons to make a scientific examination, who, instead of witness fees, shall receive a reasonable compensation to be allowed by the board of supervisors. If the coroner is also a physician he may make such scientific examination, and shall receive therefor the same compensation as that paid other physicians, but in no such case shall he receive any witness fee."

This section in its present form, excepting only the following: "the coroner shall receive therefor the same compensation as that paid other physicians but in no such case shall he receive any witness fee", added by the 44th General Assembly, Chapter 27, was interpreted in respect to the power and duties of the coroner in the case of *Finarty v. Marion County*, 127 Iowa, 543. There it appeared the coroner summoned the plaintiff to make a scientific investigation of a dead body, and that in response thereto Finarty performed the services and thereafter filed a claim with the board of supervisors, which claim was denied. Thereupon, Finarty instituted action against the county to recover for such services. To a claim of the county that the coroner had no authority to hold an inquest or to summon Finarty to hold an autopsy and to charge the county with the expense thereof, and after citing the statute, "that the coroner shall hold an inquest upon the dead bodies of such persons only as are supposed to have died by unlawful means", and the further provision, "that the coroner or the jury, when he deems it requisite, shall summon one or more physicians or surgeons to make a scientific examination, who shall receive a reasonable compensation to be allowed by the board of supervisors", the court said:

"From the simple reading thereof it seems clear enough that the supposition upon which jurisdiction to act is made to rest must be one which arises—and for that matter exclusively so—in the mind of the coroner. He certainly could not justify himself for acting in any given

case if the facts presented to him were such as that his own mind rejected the supposition that death had been caused by unlawful means. So far, counsel for appellant do not stop to question. The contention is that inasmuch as the answer asserts that no supposition or suspicion of death by unlawful means in fact existed, and as the demurrer admitted the allegations of the answer, a case of no jurisdiction was established on the face of the pleadings. To this contention are two answers, either one of which is sufficient. In the first place, the demurrer admitted no more than the facts well pleaded. *It will be observed that the answer does not charge that the mind of the coroner was devoid of suspicion. It does not charge him with bad faith, which here would amount to official corruption. It is not even suggested that he was ignorant or stupid. The allegation of the answer amounts to nothing more than an assertion that the county, from the information gathered by it, had reached the conclusion that there was no room to suppose or suspect that death had resulted from unlawful means. The allegation then was of a conclusion; not only that, but it must be apparent that the subject-matter thereof was wholly immaterial. In the second place, the coroner was acting within the forms of law, and in the apparent exercise of his lawful jurisdiction. In such cases it is not for a witness, whether he be subpoenaed or summoned, to stand upon the order of his going until a satisfactory showing is made to him that jurisdiction in the tribunal which demands his attendance is so far perfect as that he may be certain of his compensation in case he obeys. It is for him to answer, and, in cases where it is so provided by statute, it is for the county, upon proper demand, to pay. We do not think our conclusion requires a citation of authorities in its support.*" (Italics supplied)

And in consideration of this matter this department, in the Report of the Attorney General for 1932 at Page 263, 264, differentiated between the powers and duties of the coroner and the board of supervisors in words as follows:

"The question as to whether these services and duties are necessary is one resting largely within the sound discretion of the coroner. His duties call for immediate action. There can be no equivocating or drawing of fine points to determining just where the coroner's duties begin and end. An emergency practically always exists whenever a death occurs under such circumstances as might involve a criminal act or involve suspicious circumstances. In order to determine the cause of death and to fix responsibilities, the coroner must necessarily make some investigation of every case of this character. The investigation may show that the death was not such a one as to require the services of the coroner, but at the inception of the investigation such a situation may not be apparent. Therefore, the whole field calls for the utmost good faith on the part of the coroner. It also requires tolerance on the part of the board of supervisors in passing upon and allowing claims for services rendered, and reasonableness must be the rules. It is not for the board of supervisors to quibble over or to determine whether or not this or that case is such a one as the coroner should have attended."

We are in accord with this statement. However, it must not be concluded that the approval of such claims is merely a ministerial act of the board. It is their function in passing upon these claims to determine whether or not the services were rendered in good faith. This means that to the coroner acting as a reasonably prudent man of his training, it must not be apparent that there were no circumstances to justify him in making the autopsy. The board, in order to pass on his good

faith or reasonable judgment; is within its power in requiring a more or less complete explanation with each claim. This then should be the basis upon which, with other relevant facts brought to their attention, they will allow the claim in whole or in part, or reject it. It is well to call the board's attention to the fact that it would be their burden in a court proceeding to prove that the coroner acted without good faith or without reasonable justification.

---

**September 13, 1949**

**SOLDIERS: Bonus—W.A.A.C. not eligible.** The time spent on active duty by a member of the Women's Army Auxiliary Corps is not compensable under the World War II Service Compensation Act. (Chapter 59, Acts 52nd G. A.)

*Mr. Edward J. Kallemyn, Executive Secretary, World War II Service Compensation Board:* We acknowledge receipt of your letter of August 12, 1949 in which you ask the following question:

“Is time spent on active duty by a member of the Women's Army Auxiliary Corps compensable under the World War II Service Compensation Act (Chapter 59, Acts of the 52nd General Assembly)?”

Section 4 of the act defines those persons eligible to receive such compensation and is as follows:

“Sec. 4. Every person, male or female, who served on active duty, in the armed forces of the United States, at any time between September 16, 1940, and September 2, 1945, both dates inclusive, and who at the time of entering into such service was a legal resident of the state of Iowa, and who had maintained such residence for a period of at least six (6) months immediately prior thereto, and was honorably separated or discharged from such service, or is still in active service in an honorable status, or has been retired, or has been furloughed to a reserve, or has been placed on inactive status, shall be entitled to receive from the service compensation fund ten dollars (\$10.00) for each month that such person was in active domestic service and twelve and one-half dollars (\$12.50) for each month that such person was in active foreign service, all prior to December 31, 1946, not to exceed a total sum of five hundred dollars (\$500.00), provided that such person served for a period of not less than one hundred twenty (120) days prior to December 31, 1946.”

It will be noted that females who served *on active duty in the armed forces of the United States* are included among those eligible to receive the compensation providing they meet all other requirements. That then, for the purposes of this opinion, requires an answer as to whether the Women's Army Auxiliary Corps was a part of the armed forces of the United States. For that answer we must turn to the language of the acts creating the Women's Army Auxiliary Corps and the Women's Army Corps.

The act of Congress creating the Women's Army Auxiliary Corps is found in 56 United States Statutes at Large, page 278, Chapter 312. That law reads in part as follows:

“That, the President is hereby authorized to establish and organize in such units as he may from time to time determine to be necessary, a Women's Army Auxiliary Corps for noncombatant service *with* the

Army of the United States \* \* \* *The Corps shall not be a part of the Army but it shall be the only womens organization authorized to serve with the Army exclusive of the Army Nurse Corps.* (Italics supplied) The act provides for directors, designates members as "first leader, second leader and auxiliaries." Such descriptive language coupled with the plain language above quoted can leave no doubt that service in the Women's Army Auxiliary Corps is not service "*in the armed forces of the United States.*" (Italics supplied.)

However, the Congress enacted the law known as the Women's Army Corps Act on July 1, 1943. It is found in 57 United States Statutes at Large, page 371. That law reads in part as follows:

"There is hereby established in the Army of the United States, for the period of the present war and for six months thereafter or for such shorter period as the Congress by concurrent resolution or the President by proclamation shall prescribe, a component to be known as the 'Women's Army Corps.'"

That language when read in connection with the act establishing the Women's Army Auxiliary Corps leads to the conclusion and it is our opinion that service in the Women's Army Auxiliary Corps is not compensable for the reason that such service was not in the armed forces of the United States but that service in the Women's Army Corps is compensable under the act because it was service in the armed forces of the United States.

You are also referred to our opinion dated April 25, 1946, in the Report of the Attorney General for the year 1946, page 179. In that instance we held that members of the Women's Army Auxiliary Corps were not honorably discharged women who served in the military or naval forces of the United States and were not entitled to soldier's relief as provided for by chapter 189.2, Code, 1939. The same reasoning was used there as in this case and the language of 56 United States Statutes at Large, page 278, Chapter 312 was cited.

It may be noted in passing that the World War II Service Compensation Act is susceptible to amendment at any future session of the legislature.

---

#### September 28, 1949

**COURTS: Mileage fees of petit jurors.** Petit jurors are allowed by statute (section 607.5, Code 1946, as amended by chapter 239, Acts 53rd G. A.) ten cents for each mile traveled from the residence of the juror to the place of trial and this only for the first day of attendance.

**COURTS: Mileage fees of grand jurors.** Grand jurors are allowed by statute (section 607.5, Code 1946, as amended by chapter 239, Acts 53rd G. A.) seven cents for each mile traveled in performance of official duties; however, travel from his place of residence by a grand juror and the county seat, there to perform his duties, is not the performance of official duty and no mileage is allowable.

*Honorable C. B. Akers, Auditor of State: Attention L. I. Truax:* This will acknowledge receipt of your request for opinion on chapter 239 of the 53rd General Assembly as respects allowances for the mileage of petit jurors and grand jurors insofar as mileage allowance is to be made, if

any, for travel between the place of residence of the petit and grand juror and the place of trial, insofar as petit jurors are concerned, and the place of performance of official duties, insofar as grand jurors are concerned. The foregoing chapter 239 provides as follows:

“An Act to amend section six hundred seven point five (607.5), Code 1946, relating to fees of jurors.

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. Section six hundred seven point five (607.5) Code 1946, is amended by striking from line one (1) thereof the word ‘jurors’ and substituting therefor the words ‘petit jurors’.

Sec. 2. Section six hundred seven point five (607.5), Code 1946, is further amended by adding thereto the following new paragraph:

‘Grand jurors shall receive for each day’s service or attendance, seven dollars (\$7.00), and for each mile traveled in the performance of their duties, seven cents (7c).’”

Section 607.5, Code 1946, as amended by the foregoing chapter 239, reads as follows:

“Petit 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.

4. Grand jurors shall receive for each day’s service or attendance, seven dollars (\$7.00), and for each mile traveled in the performance of their duties, seven cents (7c).”

(1) Insofar, therefore, as the mileage allowance of petit jurors is concerned, the statute, as it is set forth in the Code of 1946, remains unchanged except that the statute as it exists in the Code of 1946 has been limited by the 53rd General Assembly to allowance for petit jurors. That statute has been interpreted in the case of *Park v. Polk County*, 220 Iowa 120, to mean an allowance of ten cents for each mile traveled from the residence of the petit juror to the county seat and this allowance is made only for the first day of attendance.

(2) Insofar as the mileage allowance for grand jurors is concerned according to the case of *Park v. Polk County*, section 607.5 of the Code 1946 controlled the allowance for grand jurors as well as petit jurors. And as the foregoing statute existed prior to the amendment of the 53rd General Assembly according to the same case, a grand juror was entitled to ten cents per mile for each mile traveled from his residence to the place where the district court is held, but this is for the first day attendance only. Chapter 239, therefore, having limited the applicability of section 607.5 to mileage of petit jurors, the mileage of grand jurors is therefore controlled by section 2 of chapter 239, to-wit:

“Grand jurors shall receive for each day’s service or attendance, seven dollars (\$7.00), and for each mile traveled in the performance of their duties, seven cents (7c).”

Clearly, a grand juror is no longer by specific statutory provisions entitled to mileage between the place of his residence and the place where the district court is held. If he be entitled now under chapter 239 for such mileage, it is by reason of the fact that travel between the place of his residence and the county seat is the performance of official duties.

In view of the fact that no specific provision was made for mileage to or from the place of performing the duty of grand juror, as is provided for petit jurors, we must conclude that the increase per day of attendance to more than double the old rate included that expense.

Prior opinions of this department upon travel allowance in the foregoing circumstances have bearing upon the conclusion to be reached herein. By opinion appearing in the Report of the Attorney General for 1940 at page 179, it was the conclusion of the department under a statute which provided:

“The county attorney shall also receive his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat, \* \* \*”

that the county attorney would not be entitled to traveling or other expenses when in attendance upon his official duties at either Malvern or Glenwood, when he resided at Malvern and performed official duties at Glenwood. And in the Report of the Attorney General for 1940 at page 463, under the same statute quoted in the foregoing opinion, the county attorney resided at Perry but attended official business at Adel, it was the conclusion that when the county attorney travels upon official business from either Perry or Adel to some other place within or without the county, he was entitled to his actual mileage. By opinion of the department appearing in the Report of the Attorney General for 1938 at page 55, under the same statute heretofore quoted, it was the conclusion that the county attorney was not entitled to his traveling expense in traveling between his residence at Belle Plaine and the county seat at Vinton. Appearing in the Report of the Attorney General for 1923 and 1924 at page 129, there was a holding that the county attorney of Lee County was not in attendance upon his official duties, at a place other than his residence and the county seat, in traveling between the two county seats of Lee County and mileage was not allowable.

As a matter of sound reasoning and with the foregoing precedents of this department, we are of the view that traveling by the grand juror between the place of his residence and the county seat, there to perform official duties as a grand juror, is not the performance of official duty within the terms of section 2, chapter 239, and therefore, mileage allowance is not authorized for such travel.

September 29, 1949

**VETERANS: Bonus warrant becomes property when received and endorsed.** The service compensation authorized to Iowa veterans or their beneficiaries is not a vested right but rather added compensation for services, and such compensation becomes the property of the veteran or the beneficiary when he receives and endorses the warrant.

*Mr. Edward J. Kallemyn, Executive Secretary, World War II Service Compensation Board:* Your letter of August 1, 1949 is acknowledged and you ask the opinion of this office as to the following:

"Whether or not in the case of the death of a veteran, the beneficiary, in the order prescribed in chapter 59, Acts of the 52nd General Assembly, or an administrator or executive of a veteran's or beneficiary's estate becomes entitled to receive the compensation payable in connection with the veterans service. In other words, does the right to receive compensation become vested in a veteran or a veteran's beneficiary as (to) some given or stated time or is the right to such compensation a contingent right to become vested when and only when the veteran or his beneficiary receives and endorses his compensation warrant?"

On page 259 of the Report of the Attorney General of Iowa for the years 1923 and 1924 there appears an opinion bearing on the eligibility of certain persons to receive World War I compensation. Chapter 59, Acts of the 52nd General Assembly of Iowa, was patterned after chapter 332, Acts of the 39th General Assembly. For the purpose of this opinion, the substance of both acts is the same. The opinion above referred to reads in part as follows:

"The fourth question submitted by you involves the payment of the bonus where the person primarily entitled to the same is deceased. Section 4 of chapter 332 of the Acts of the Thirty-ninth General Assembly (The Bonus Law), among other things, provides:

"\* \* \* The husband or wife, child or children, mother, father, sisters or brothers, in the order named and none other, of any person as defined in this section, who dies while in the service or who has deceased before receiving the benefits of this act, shall be paid the sum that such deceased person would be entitled to hereunder if such person had lived."

Section 7 of said chapter 332 provides among other things as follows:

"\* \* \* No assignment of any right or claim to benefits hereunder made prior to the issuance of the state auditor's warrant herein provided for, shall be valid, and any transfer or attempt to transfer any such right or claim or any part thereof by any beneficiary prior to the issuance of such warrant and the acquiring of or attempting to acquire by any other person of any interest in or title to such claim prior to the issuance of such warrant, shall be a misdemeanor and punishable as such."

"It will be observed that the bonus does not vest until it is actually received by the person entitled to it. If the soldier dies prior to the actual receipt of the money, then, the personal representative of such soldier will not be entitled to receive the bonus. Under such circumstances, the right to receive passes directly to the husband or wife, child or children, mother, father, sisters or brothers, in the order named and none other. The right to receive is a personal right and dies with the person. The exact status, then, at the very time the bonus is to be paid, governs."

The date determining eligibility of a widow to receive compensation has been heretofore decided in our opinion dated March 15, 1949.

Your question is partially answered in the above cited opinion. We reaffirm the above quoted portion of the opinion of 1923 and hold that the right to receive compensation does not become vested in the veteran or his beneficiary, but rather is added compensation for services which the people of Iowa have expressed a desire to bestow upon those persons specified in the act as beneficiaries and none others.

We turn now to that part of your question as to the "time" that the compensation becomes "vested" or is reduced to the "possession" of the intended beneficiary.

The mechanics of paying compensation under the Iowa act is as follows: When the "board" has determined that an application is in proper order and the claim is a compensable one, it forwards the claim to the state comptroller who issues a "warrant" or "check" drawn on the Treasurer of the state of Iowa for the proper amount, payable to the beneficiary who has made application. The comptroller then returns the "warrants" to the board. They, in turn, place the "warrant" in an envelope, addressed to the beneficiary, and after placing the proper postage on it, deposit it in the regular United States mail.

The act specifically provides that compensation is payable *only* to certain named persons and none others. After specifying the conditions under which the veteran may qualify to receive the compensation, the act says: "The surviving unremarried widow or widower, child or children, stepchild or stepchildren, mother, father or persons standing in loco parentis, in the order named and *none other* (italics supplied) of any deceased person, shall be paid the compensation that such deceased person would be entitled to under this act."

We call your attention to this language because it has definite bearing on *when* the compensation money becomes the property of the beneficiary. Ordinarily, it would be when the warrant is deposited in the mails. However, the act specifically provides that it goes only to certain named classes and none other. In the case where a warrant is deposited in the mails addressed to an eligible mother of a deceased veteran and upon delivery of the warrant by the postman the mother is deceased, it clearly was not the intention that the compensation should go to her estate. The legislature in such case directed that it should go to the father or person standing in loco parentis in the order named and none other. If the father and the person standing in loco parentis were not living, it would not be a compensable claim at all in our opinion. Therefore, it cannot be said that the compensation becomes the property of the intended beneficiary when the warrant is deposited in the mail because the legislature did not intend (as we interpret the statute) that it should become the property of the heirs or legatees of the beneficiary but only that it should go to a named class and *none other*.

The question then is: At what time does the compensation become the property of the beneficiary? We think it is when the recipient "*receives and endorses*" the warrant.

The attorney general of North Dakota ruled on this question in an opinion dated August 16, 1949. He said: "Where the veteran has not endorsed the warrant so that its proceeds have not become an integral part of his estate, the warrant should be returned and the beneficiary named next in order should make application."

The state of Ohio has published complete and exhaustive regulations governing the payment of World War II compensation. Regulation 21, sections f and g reads in part as follows:

"(f) \* \* \* If a veteran or the kin of any deceased veteran, to whom a check is made payable shall die before personally endorsing his check, the check must be returned to the director of the World War II Compensation Fund. If the ward of a legally appointed guardian, or the beneficiary of an award ordered paid under the provisions of section 10507-5 of the General Code of Ohio, shall die before endorsement by the guardian or other person to whom the check is made payable, the check must be returned to the Director of the World War II Compensation Fund. Compensation from the World War II Compensation Fund is payable only to living veterans, or to living kin of deceased veterans, or to guardians acting for living veterans or for living kin of deceased veterans, or to other persons designated by probate court as provided for in section 10507-5 of the General Code of Ohio, to act for living veterans or for living kin of deceased veterans.

"(g) Compensation from the World War II Compensation Fund shall not be payable to an executor or administrator of a deceased person. If a check issued in payment of compensation is not cashed because the person to whom it is payable or for whose benefit it is issued shall die before proper endorsement of the check is made, the Director of the World War II Compensation Fund will take appropriate action to the end that the amount of money represented by such unpaid check is paid to the living next of kin of the deceased veteran who may be entitled thereto."

We believe the reasoning followed in the North Dakota and Ohio opinions is sound, and that the great weight of authority established our position. It does not matter that a beneficiary may not present the warrant for cash or bank credit. We do not think that delivery is necessary if the endorsement is once made. That act of endorsement is the act of possession necessary to make the warrant the property of the beneficiary. To draw a finer distinction would tend to the absurd. We believe that it was not the intention of the legislature or of the people of the state who voted for the compensation for veterans that the warrants issued should be in the nature of instruments presented to Iowa banks for collection.

For the foregoing reasons, we are of the opinion that the compensation paid to eligible beneficiaries under the act is not a vested right but rather added compensation for services, and that such compensation becomes the property of the beneficiary when he receives and endorses the warrant.

---

October 20, 1949

**COUNTIES: Assessor—audit and payment of claims.** The county assessor is the proper officer to audit all claims against his office, and upon approval by him and certification by the board of supervisors

the said board shall thereupon authorize the county auditor to issue warrants against the county assessor fund.

*Honorable C. B. Akers, Auditor of State: Attention L. I. Truax, Supervisor:* This will acknowledge receipt of yours of the 12th inst. in which you have submitted the following:

"Chapter 198 of the Acts of the 53rd General Assembly amends chapter 240, Laws of the 52nd General Assembly, and among other things provides for a tax levy to defray the expense of the county assessor's office.

Section 11.22 of the 1946 Code provides that it is the duty of the state auditor to establish uniform systems of accounting in all county, city, and town offices.

In order to prescribe forms for the county assessor's office it is necessary that the state auditor has an understanding of the method for the disbursement of the funds for the county assessor's office. Section 405.18 of the 1946 Code provides in the case of city assessor's expense that the same shall be paid by the warrant of the county auditor on the requisition of the city assessor.

There appears to be no such provision in the statute with respect to the expense of the county assessor's office.

Are the funds of the county assessor's office to be disbursed by county auditor's warrant? If so, on whose order or by what authority shall this be done?"

In reply thereto we would advise you as follows:

Chapter 240, Section 7 of the Laws of the 52nd General Assembly provided for the payment of expenditures of the county assessor in terms as follows:

"The county board of supervisors shall set up an annual budget for the office of county assessor covering expenditures for each year, during the year beginning January 1, 1948, as provided by chapter 344 of the Code. All provisions of chapter 344 shall apply to the office of county assessor. All expenditures made prior to January 1, 1948, under the provisions of this act, for the office of county assessor shall be paid from the county general fund and thereafter from the proceeds of the tax to be levied for the operation of the county assessor's office."

Section 8 of the foregoing chapter is a direction to the board of supervisors to levy a tax to defray the expenses of the county assessor. This section follows:

"The county board of supervisors is hereby directed to levy a sufficient annual tax to defray expenses of the county assessor and his office. Such tax shall be levied upon taxing districts of the county which are assessed by the county assessor. The amount of tax levied in 1947 for collection in 1948 and each year thereafter, shall be fixed by the board of supervisors."

Both of these sections were repealed by the provisions of section 7 of chapter 198 of the Laws of the 53rd General Assembly, and such section enacted a substitute thereof in terms as follows:

"Section seven (7) of chapter two hundred forty (240), Laws of the 52nd General Assembly, is hereby repealed and the following enacted in lieu thereof:

Sec. 7. The provisions of chapter twenty-four (24), Code of Iowa, 1946, shall apply to the preparation of budgets and the certifying of taxes for the maintenance of the county assessor's office, of the county boards of review and of the conference board. The county assessors shall prepare a proposed budget for the county assessor's office, and submit same to the county conference board which shall approve, disapprove, or adjust said budget. The county conference shall certify the tax levy required for operation of the office as provided by chapter twenty-four (24), Code 1946, and the conference as created by the provisions of section three (3), chapter two hundred forty (240), Laws of the 52nd General Assembly, as amended, is hereby declared the certifying board as defined by section twenty-four point two (24.2) of the Code. Any tax for the maintenance of the office of the county assessor and other assessment procedure, shall be levied only upon taxing districts of the county which are assessed by the county assessor, except that in any county now or hereafter having a population of more than one hundred ninety-thousand (190,000) whose board of supervisors has contracted or may contract for the employment of expert appraisers to assist the county assessor in determining the value of property for taxation, the board of supervisors may levy a special tax against all the taxable property in the county and appropriate and expend the same for the purpose of paying the cost of such services, or return the same to funds from which transfers were made for such purpose. Section eight (8) of chapter two hundred forty (240), Laws of the 52nd General Assembly, is hereby repealed, effective as to taxes levied for collection in 1950 and each year thereafter."

Section 8 of chapter 198 Laws of the 53rd General Assembly repealed section 10 of chapter 240 of the Laws of the 52nd General Assembly and provided the following with respect to the compensation of deputies and assistants of the county assessor.

"Section ten (10) of chapter two hundred forty (240), Laws of the 52nd General Assembly, is hereby repealed and the following enacted in lieu thereof:

Section 10. Compensation of deputies and assistants shall be fixed by the county conference and such deputies and assistants shall receive actual necessary expenditures as approved by the county assessor and their appointment shall be subject to the approval of the county conference."

And section 9 of the same chapter provided for the payment of cost of equipment in terms as follows:

"The county board of supervisors shall provide adequate office space for the office of county assessor, including such services as are ordinarily afforded in any county office. The cost of equipment and supplies shall be included in the budget prepared by the county conference."

The foregoing statutory provisions have by their terms created a new fund in the auditor's office, known and designated as the county assessor fund. Such provisions provide in general that the expense of the county assessor's office should be paid from that fund. The duty of the auditor with respect to the issuance of warrants from any fund in his possession is set forth in section 333.2, in terms as follows:

"Except as otherwise provided, the auditor shall not sign or issue any county warrant, unless the board of supervisors by recorded vote or resolution shall have authorized the same, and every such warrant shall be numbered and the date, amount, and the number of the same, and

the name of the person to whom issued, shall be entered in a book to be kept in his office for that purpose."

In accordance with the foregoing section, it not being otherwise provided, warrants in payment of the expenses of the county assessor's office are included within the directions of the foregoing section and require a recorded vote of the board of supervisors or a resolution of an authorization of the several warrants required to pay the expenses of the county assessor before the auditor is authorized to sign and issue a county warrant therefor. Insofar as the compensation of deputies and assistants of the assessors are concerned and their expenditures, the county conference fixes the compensation and their expenditures are approved by the county assessor. The members of the county board of review receive compensation and expenses according to the provisions of chapter 198 Laws of the 53rd General Assembly paid after January 1st, 1950 from the county assessor fund. The county assessor being the officer who administers the county assessor law as set up by the 52nd General Assembly, chapter 240, and the 53rd General Assembly, chapter 198, by plain implication the legislature has included in such administrative responsibility the responsibility of putting into effect the salaries as fixed; approval of expenditures and personnel operating the county assessor's system, and, therefore, properly by further plain implication he is the proper officer to audit all bills and claims, and upon approval of them by him, upon proper certification to the board of supervisors, said board of supervisors shall thereupon authorize the county auditor to pay such salaries and expenditures by warrants to be issued by the county auditor out of the county assessor fund.

---

October 24, 1949

**CITIES AND TOWNS: Widows of firemen and policemen—pension increase retroactive.** It was the legislative intention in the passage of chapter 182, Acts 53rd G. A. increasing the pensions of widows of firemen and policemen, that the act would be retroactive from its effective date.

*Honorable Harold F. Nelson, State Representative, Sioux City, Iowa:*  
This will acknowledge receipt of yours of the 12th inst. in which you have submitted the following:

"There appears to be differences of opinion relative to the interpretation given to the above named chapter. (Chapter 182, Acts of the 53rd General Assembly).

This chapter has to do with increases, the amount of pension of firemen and police widows from \$30 to \$50 a month.

Our city attorney has recently held that the increase did neither affect nor apply to those presently receiving a pension or, more specifically, those widows receiving a pension on July 4, 1949. It is further thought that the pension increase applies only to widows of firemen and policemen making application for pension after July 4, 1949.

This is creating considerable confusion in the administration of this act, and I understand the same confusion has been created at Davenport, Iowa.

As a member of the Cities and Towns Committee of the House of Representatives, I was one of those that took a personal interest in this bit of legislation. I am personally satisfied that it was not only mine but the opinion of the entire committee that in recommending House File 133 out of Cities and Towns Committee to the House with the recommendation of "do pass", that we sincerely believed that the bill provided for and intended to increase the pension of all persons presently receiving pensions and for all widows making application after July 4, 1949.

I believe I can safely state that it was the legislative intention of raising the pension rates for all widows receiving pensions in the state of Iowa. And this increase from \$30 to \$50 would apply to all of those widows receiving pensions on July 4, 1949, as well as any and all widows making application after that date.

It becomes necessary in order to bring a reasonable understanding out of the present confusion that I request your office to render an attorney general's opinion upon chapter 102 of the Acts of the 53rd General Assembly."

In reply thereto we would advise you that chapter 182 of the 53rd General Assembly provides as follows:

"Police and Firemen Retirement Systems—H. F. 133. An Act to amend sections four hundred ten point ten (410.10) and four hundred eleven point six (411.6), Code 1946, relating to retirement systems for policemen and firemen and benefits thereunder.

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. Subsection one (1) of section four hundred ten point ten (410.10), Code 1946, is hereby amended by striking from line three (3) thereof the word 'thirty' and by inserting in lieu thereof the word 'fifty'.

Sec. 2. Paragraph (b) of subsection eight (8) of section four hundred eleven point six (411.6), Code 1946, is hereby amended by striking from line fourteen (14) thereof the word 'thirty' and by inserting in lieu thereof the word 'fifty'.

Sec. 3. Paragraph (a) of subsection thirteen (13) of section four hundred eleven point six (411.6), Code 1946, is hereby amended by striking from line four (4) thereof the word 'thirty' and by inserting in lieu thereof the word 'fifty'."

And sections 410.10 and 411.6 as they are amended by the foregoing chapter 182 now appear as follows:

"Upon the death of any acting or retired member of such departments, leaving a widow or minor children, or dependent father or mother surviving him there shall be paid out of said fund as follows:

1. To the surviving widow, so long as she remains unmarried and of good moral character, fifty dollars per month.

2. If there be no surviving widow, or upon the death or remarriage of such widow, then to his dependent father and mother, if both survive, or to either dependent parent, if one survives, thirty dollars per month.

3. To the guardian of each surviving child under eighteen years of age, ten dollars per month.

The aggregate of all such payments shall not exceed one-half of the amount of the salary of such member at the time of his death or retirement. Provided, however, that the benefits provided by this section shall be subject to the following definitions: The term 'widow' shall

mean only such surviving spouse of a marriage contracted prior to retirement of the deceased member from active service, or of a marriage of a retired member contracted prior to the date this act takes effect. The terms 'child' and 'children' shall mean only the surviving issue of a deceased active or retired member, or the child or children legally adopted by a deceased member prior to his retirement from active service, or by a member now retired prior to the date this act takes effect."

"411.6. (8) Upon the receipt of proper proofs of the death of a member in service, there shall be paid to such person having an insurable interest in his life as he shall have nominated by written designation duly executed and filed with the respective board of trustees: (b) An amount equal to fifty per cent of the compensation earnable by him during the year immediately preceding his death; or

If there be no such nomination of beneficiary, the benefits provided in paragraphs (a) and (b) shall be paid to his estate or in lieu thereof, at the option of the following beneficiaries, respectively, even though nominated as such, there shall be paid a pension which, together with the actuarial equivalent of his accumulated contributions, shall be equal to one-fourth of the average final compensation of such member, but in no instance less than fifty dollars per month;"

"411.6. (13) In the event of the death of any member receiving a retirement allowance under the provisions of subsections 2, 4, and/or 6 of this section there shall be paid a pension:

(a) To his widow to continue during her widowhood, equal to one-half the amount received by such deceased beneficiary, but in no instance less than fifty dollars per month, and in addition thereto the sum of ten dollars per month for each child under eighteen years of age;"

The effect of the foregoing chapter 182 is to increase the benefits accorded to surviving widows of policemen and firemen, who in their lifetime were members of policemen or firemen retirement funds created and existing under the foregoing statutory provisions. Insofar as both of the retirement funds are concerned, that is, the one created by chapter 411, Code 1946, and the one created under chapter 410, Code 1946, the question presented is whether the Acts of the 53rd General Assembly operates prospectively only or retroactively as a matter of statutory construction. Chapter 182 of the 53rd General Assembly does not expressly state that it shall operate retroactively.

The Supreme Court of Iowa does not appear to have determined this question nor to have laid down principles by which determination could be made as to whether this act operates not only prospectively but also retroactively. And insofar as it has reached other appellate courts no uniform rule appears to have been adopted. Several have concluded such acts to be retroactive while several others have excluded that legislative intention. See Annotations, 118 A.L.R. 992. However, in view of the character of the legislation, the beneficent purpose to be accomplished, and the facts set forth in your letter respecting the intention of the committee in recommending the passage of the act, we are disposed to the view that the foregoing chapter 182 should be interpreted to operate retroactively, and thereby to increase the benefits of widows receiving benefits under policeman and fireman retirement at the time of the effective date of the foregoing chapter 182 of the

53rd General Assembly. In connection with this conclusion, we would suggest that the matter be presented to the 54th General Assembly for the purpose of clarifying the act itself by providing expressly that it should operate retroactively.

---

October 26, 1949

**HIGHWAYS: Secondary road improvement—petitions from landowners.**

Chapter 129, Acts 53rd G. A., pertains solely to surfacing secondary roads. Counties that have set up their program on the basis of more than one year need not change to a yearly program upon the filing of a petition as provided in the act but need only modify the program to that extent for the succeeding year or years. Projects should be included in the program in the order received regardless of township limitations.

*Mr. Walter F. Rismiller, County Attorney, Tipton, Iowa:* In a recent letter you inquire as to the secondary road assessment district law enacted by the last General Assembly as chapter 129 Acts of the 53rd G. A. You ask the following specific questions.

“1. Does this chapter pertain only to surfacing secondary roads or could the procedure outlined be used for grading and widening roads?”

2. The Cedar county secondary road construction program is set up on the basis of a three-year period. Do the provisions of this chapter make it necessary for them to change their program to yearly programs, or would it be possible to merely modify it to include surfacing with any additional funds they might have each year?”

3. Do the petitions have to be given preference by the board of supervisors in the order they are filed without regard to the township in which each petition is filed, or can the board of supervisors make provisions for so many petitions in each township and thus allocate the surfacing in each township?”

It is the opinion of this office that the operation of the act is limited to surfacing secondary roads and does not include grading and widening. Section 3 of the act relates to the power to establish such districts and says:

“In order to provide for the *graveling, oiling, or other suitable surfacing* of secondary roads, the board of supervisors shall have power on petition to establish secondary road assessment districts.”

No mention is made in this section of grading and widening. Subsequent sections of the act confirm the thought and describe the type of work to be done for the accomplishment of which the assessment district may be established. In sections 5, 6, 7, 8, 9, 10 a. and 13-3. it is described as “surfacing”, “graveling, oiling or other suitable surfacing”, “cost of surfacing”. In none of these instances is there any reference to the cost of grading, draining or widening, nor is there in fact any reference to grading or draining to be found in the act except in section 24, which says:

“*Road graded and drained.* Any such secondary road shall be built to permanent grade and drained in a manner approved by the county engineer *before being surfaced*, as provided in this Act.”

Here the language employed deliberately distinguishes the act of “being surfaced” from the act of being “built to permanent grade and drained”. It must be assumed that the choice of language by the legislative drafts-

men was precise and that reference to "surface" elsewhere in the act has the same connotation in which it is employed in section 24. Since the references to grading and draining are here used by way of contract to the reference to surfacing it must be concluded that the one excludes the other.

In a recent unofficial opinion predicated on the same reasoning this office held that the "cost" which is required to be assessed against the lands included in a secondary road assessment district does not include the cost of bringing the road to permanent grade or the cost of draining it.

In connection with your second question, section 309.22 provides as follows:

"Construction program or project. Before proceeding with any construction work on the secondary road system for any year or years, the board of supervisors shall, subject to the approval of the state highway commission, adopt a comprehensive program or project based upon the construction funds estimated to be available for such year or years, not exceeding three years."

That section does not require the adoption of a three-year program but permits such a program and there is no apparent impediment to the modification of the program after the first year. In that connection it may be well to point out the difference between the operation under section 8 and 9 of the Act. Section 8 of the Act read in connection with section 3 enables the board of supervisors to establish a secondary road assessment district on the filing of a petition signed by 35% of the owners of the lands within the proposed district. Under section 5 of the Act only 25% of the cost need be assessed against the district. A petition filed under section 8 is entitled to no preference and might well be programmed by the board for such time as it saw fit. Section 9 of the Act read in connection with section 3 provides that when a petition is filed by the owners of 75% of adjacent and abutting lands, which petition provides for the assessment of at least 50% of the cost against the district, the board of supervisors is required to include such district in the secondary road construction program for the ensuing year. It likewise provides that preference shall be given to such petitions in the order in which they are filed. The language would seem to be self-explanatory and if a three-year program had been adopted, only the first or current year of which had been carried out, the remaining year or years of the program would have to be modified so as to include the work covered by a petition filed under this section of the Act. The answer to question No. 2 is that while it is not necessary for the county to change from a three-year to a yearly program the county would have to modify the remaining year or years of the program to include the work covered by such petition.

As to question No. 3, the language of section 9 of the Act is simple and unambiguous and provides that,

"The board of supervisors shall, *in the order in which such petitions were filed with it*, include and give preference to said project or projects \* \* \*."

There does not seem to be anything in the Act that would empower the board of supervisors to limit the number of petitions that might be granted preference in a given township so long as funds for the doing of the work are available.

---

**October 27, 1949**

**SCHOOLS AND SCHOOL DISTRICTS: Standard school aid.** The statute providing for state aid to standard schools (chapter 293, Code 1946) depends for effectiveness on biennial appropriations of the legislature. The 53rd G. A. failing to make such appropriations indicates an intent to discontinue said aid for the ensuing biennium.

*Mr. Ray E. Johnson, State Comptroller:* This will acknowledge receipt of yours of the 21st inst. in which you have submitted the following:

“Senate File 282 Acts of the 38th General Assembly (Chapter 364) provided for standardization of rural schools and providing state aid therefor.

Section 8 of the Act provides a standing appropriation in the amount of \$100,000.00 per annum which is not revertible, the unused portion to be carried forward from year to year.

For no apparent reason section 8 did not appear in the Code published after the enactment of the law, however, appropriations have been made by each General Assembly beginning with the 41st G. A. (Section 40 chapter 218) and continuing up to and including the 52nd G. A.

The law relating to standard schools is found in chapter 293, Code 1946. The language used in section 293.7 could be construed as a standing unlimited appropriation and used in payment of the aid as no other appropriation is available.

In view of the fact that appropriations have been made for the last 24 years, and discontinued this year, I ask for an official opinion, as to whether or not the failure to appropriate is in fact an implied repeal of section 293.7 above referred to.”

In reply thereto we would advise you as follows:

The foregoing chapter 364 of the Acts of the 38th General Assembly, insofar as it is pertinent to this question, is exhibited as follows:

“Sec. 7. Upon receiving from the county superintendent a satisfactory report showing that any rural school has fulfilled the requirements of a standard school, the superintendent of public instruction shall issue a requisition upon the auditor of state for the amount due any rural school district entitled to state aid for the school year just past; whereupon the auditor of state shall draw a warrant on the treasurer of state payable to the secretary of the school corporation entitled thereto and forward to the secretary of said school corporation who shall cause the same to be deposited with the other funds of the district. The money shall be expended in the district or districts maintaining standard schools in amounts proportionate to the number of pupils upon which state aid was granted. The secretary shall issue a warrant in favor of the teacher to the amount of one-half the subsidy due each such school and the school board shall, with the assistance of the county superintendent, expend the remainder in improvements and necessary apparatus. If more than one teacher is employed in a school the amount shall be apportioned between them according to the time of their employment.

Sec. 8. For the purpose of carrying out the provisions of this act there is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of one hundred thousand dollars (\$100,000.00) annually, which fund if not all used shall be allowed to accumulate, and shall not be turned back into the state treasury nor used for any purpose other than herein provided."

The foregoing section 8 of chapter 364 of the 38th General Assembly appeared as section 2618 of the compiled code. Its disappearance from the Code after its enactment by the 38th General Assembly is explained by the action of the 40th General Assembly in Extra Session. That Assembly, by section 102 of Chapter 4 of the laws of that Assembly provides as follows:

"That section twenty-six hundred eighteen (2618) of the compiled code of Iowa is amended, revised, and codified to read as follows:

Sec. 102. Appropriation. For the purpose of carrying out the provisions of this chapter there is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of one hundred thousand dollars (\$100,000) annually.

This section shall be deemed repealed on and after June thirtieth, nineteen hundred twenty-five (1925)."

The foregoing chapter 364 of the 38th General Assembly as it may have been amended now appears in the Code 1946 as chapter 293. Section 293.7 of the Code 1946 provides as follows:

"Upon receiving from the county superintendent a satisfactory report showing that any rural school has fulfilled the requirements of a standard school, the superintendent of public instruction shall issue a requisition upon the state comptroller for the amount due any rural school district entitled to state aid for the school year just past; whereupon the comptroller shall draw a warrant on the treasurer of state payable to the secretary of the school corporation entitled thereto and forward to the secretary of said school corporation, who shall cause the same to be deposited with the other funds of the district. The money shall be expended in the district or districts maintaining standard schools in amounts proportionate to the number of pupils upon which state aid was granted. The money shall be expended with the approval of the county superintendent in making improvements and in purchasing necessary apparatus, but no part thereof shall be paid to any teacher for compensation."

In lieu of the standing appropriation provided by section 8 of Chapter 364, Acts of the 38th General Assembly, repealed as hereinbefore set forth, the several legislatures subsequent thereto, from the 41st to and including the 52nd General Assembly, have made specific appropriations to pay the expense incident to the carrying out of the authority provided by the foregoing chapter 364. However, the 53rd General Assembly made no such appropriation. That fact discloses a legislative intent that no state aid should be granted under chapter 293, Code 1946, and while not constituting an implied repeal in law of the foregoing section, there are no funds available with which to carry out the expressed intention of the foregoing chapter 293 of establishing standard schools in rural districts.

November 10, 1949

**VETERANS: Orphans educational aid—termination of World War II.**

The Congress of the United States has not as yet made official declaration of termination of World War II and expenditure of funds provided by chapter 58, Acts 52nd G. A., (War Orphans Educational Fund) is authorized until such termination is declared.

*Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board:* We have yours of October 11th, 1949 in which you have submitted the following:

"On July 17, 1946 you rendered an unofficial opinion on the dates to consider World War II veterans for soldiers' relief. This opinion was summarized as follows:

'I am of the opinion, therefore, that until either World War II is declared terminated or the legislature has made specific provisions fixing limits to those who may be entitled to relief, it is available to qualified men and women serving either before or after cessation of hostilities of World War II.'

The Orphans Educational Act providing state aid to war orphans was amended in the 52nd General Assembly and it provided aid to orphans of World War II veterans who died while in the service between the dates of September 16, 1940 and the date which shall be officially designated by the government of the United States as the termination of World War II. I am attaching hereto, a copy of this law and also a copy of the opinion rendered in 1946.

I have been questioned as to the date of July 25, 1947 as termination to World War II. However, I have been informed from other sources of a military nature that the war has not, as yet, been terminated. I am attaching hereto, a letter regarding the date of July 25, 1947.

I am desirous of knowing whether the administration of County Soldiers' Relief funds and the War Orphans Educational fund should consider the date of July 25, 1947 or continue the date until Congress officially declares the war over."

In reply thereto we advise you as follows:

The specific provision which will control the conclusion herein is contained in section 35.7, Code 1946, as amended by section 3 of chapter 58 of the Acts of the 52nd General Assembly, which provides:

"Said bonus board is authorized to expend not to exceed three hundred dollars per year for any one child who shall have lived in the state of Iowa for two years preceding application for aid hereunder, and who is the child of a man or woman who died during World War I between the dates of April 6, 1917 and June 2, 1921, or during World War II between the dates of September 16, 1940 and the date which shall be officially designated by the government of the United States as the termination of World War II, while serving in the military or naval forces of the United States, or as a result of such service, to defray the expenses of tuition, matriculation, laboratory and similar fees, books and supplies, board, lodging, and any other reasonably necessary expense for such child or children incident to attendance at any educational or training institution of college grade, or in any business or vocational training school of standards approved by said bonus board, said educational institutions to be located within the state of Iowa."

The clear language of the foregoing statute justifies the expenditure of the money provided for the purposes set forth in the foregoing section until the World War II has been terminated by an official desig-

nation of termination by the government of the United States. We find no such official designation has been made by the government and expenditure of the fund is authorized until such termination is declared. Action of the government on July 25, 1947 is not a termination of World War II within the provisions of the foregoing chapter 58 of the 52nd General Assembly.

It is interesting to note in connection with the foregoing that without the express legislative direction with respect to the limit of time when public funds may be used within the limits of World War II, that in addition to the quotation from the opinion issued July 17, 1946 respecting the use of money for soldiers' relief, the department has held to the same rule in respect to the issuance of licenses to hunt or fish in Iowa to members of the United States military or naval forces. See Report of the Attorney General for 1946 at page 106.

---

**November 10, 1949**

**VETERANS: Soldiers' orphans educational aid—available for summer school.** The soldiers' orphans aid provided by chapter 58, Acts 52nd G. A., is available to any qualified child of a deceased veteran each year that such child attends an educational institution during the period in which said institution is open and operates as such within the year. However, said aid shall not exceed \$300 in any calendar year.

*Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board:* This will acknowledge receipt of yours in which you have submitted the following:

"I am desirous of a clarifying opinion on chapter 58, soldiers' orphans aid of the 52nd General Assembly. This chapter provides for state assistance in the amount of \$300.00 for war orphans in their higher education.

I am desirous of knowing whether this \$300.00 is applied for the calendar year of the school year. The school year is considered nine months and we have an orphan who is now in school who is desirous of going through the summer months and questions as to whether he will receive any assistance for the three months summer course.

In my opinion, this law provides for the nine months and if the orphan wishes to continue through the other three months and thereby shortening the time for his degree, I think that he should have some consideration given him for that quarter, and as I read the law nothing is said as to specific time.

I wish you would render us an official opinion on this that we may use it as a guide in the administration of this fund."

In reply we advise you as follows:

The specific terms of the statute which is concerned with the foregoing situation is section 3 of chapter 58 of the Acts of the 52nd General Assembly, and is set forth as follows:

"Sec. 3. Section thirty-five point nine (35.9), Code 1946, is repealed, and the following enacted in lieu thereof:

Said bonus board is authorized to expend not to exceed three hundred dollars per year for any one child who shall have lived in the state of

Iowa for two years preceding application for aid hereunder, and who is the child of a man or woman who died during World War I between the dates of April 6, 1917 and June 2, 1921, or during World War II between the dates of September 16, 1940 and the date which shall be officially designated by the government of the United States as the termination of World War II, while serving in the military or naval forces of the United States, or as a result of such service, to defray the expenses of tuition, matriculation, laboratory and similar fees, books and supplies, board, lodging, and any other reasonably necessary expense for such child or children incident to attendance at any educational or training institution of college grade, or in any business or vocational training school of standards approved by said bonus board, said educational institutions to be located within the state of Iowa."

The act is an appropriation for use by the bonus board to aid a child or children of deceased personnel of World War I and World War II in securing an education afforded by colleges or business or vocational training school. The money so allocated, according to the act, is to be expended by the bonus board in the amount of "\$300.00 per year." While ordinarily an expression of that type is regarded as a unit in its entirety, in connection with its use in the foregoing statute, however, we are of the opinion it is not a measure of time required of the child or children benefitted to be in attendance at colleges or business or vocational training schools, but as descriptive of the amount of the allocation and the time when it shall be allocated. In that view the child or children aided, within the authority of the foregoing act, would not be required to attend a college or business or vocational training school for an entire year but would be entitled to the allocation each year that such child or children attends an educational institution or business or vocational training school during the period in which the college or educational or training institution is open and operates as a college or business or vocational training school within the year. However, this aid is in a sum of not exceeding \$300.00 for education in any calendar year.

---

**November 10, 1949**

**COUNTIES: Working hours of county employees.** County officers, both elective and appointed, autonomous in organization, engaged in the performance of specific statutory duties are entitled to determine the hours their offices shall be open to the public. The board of supervisors do not have power to determine working hours of employees in various county offices even though appointed and compensation fixed by the board. Overtime pay is not allowable to county employees.

*Mr. Donald E. Smith, Assistant County Attorney, Cedar Rapids, Iowa:*

This will acknowledge receipt of yours of the 3rd inst. in which you submit for opinion the following:

"The board of supervisors of Linn county is desirous of obtaining an official opinion of your office on a matter now confronting them and concerning which we have been unable to find any decisions of our supreme court or the attorney general which throw any light thereon. The board has prescribed the opening and closing hours of the courthouse to be 8 a. m. to 5 p. m. five days per week, and 8 a. m. to noon on Saturdays. Four county offices in the courthouse, to-wit: auditor, treasurer, recorder and clerk have set 8 a. m. to 4:30 p. m. as the hours their offices would be open for the transaction of business five days a

week, and from 8 a. m. until noon on Saturdays. The matter has resulted in some confusion as the board feels that it is their duty to keep the courthouse open during such reasonable hours as will afford the greatest service and opportunity to the public and for this reason that all offices in the courthouse should remain open for business during the hours the courthouse is open, as determined by the board.

With the foregoing preliminary statement, the questions for determination are as follows:

1. Does the county board of supervisors or the elective officers whose offices are in the county courthouse, have the right to determine the hours such county offices will be open for business?

2. What right have the following public offices in the courthouse, being in the nature of autonomous offices, to determine the hours their offices shall be open to the public:

- a. The county board of social welfare.
- b. The county assessor.
- c. The county superintendent of schools.
- d. The soldiers' relief commission.

3. Does the county board of supervisors have the power to determine the hours of work of the employees in the various county offices that are appointed with the approval of the board and for whom the board fixes their salary?

4. What right, if any, does an employee of a county office have to overtime pay for work in excess of 40, 41½ or 44 hours per week?

For the reasons above mentioned we would appreciate your official opinion on these questions as soon as possible."

In reply thereto we advise you as follows:

(1) In answer to your query number 1 we refer you to opinion appearing in the Report of the Attorney General for 1940 at Page 381 in which it was the opinion of the department that the elective officers have the right to determine the hours that each county office will be open for business. This opinion is now confirmed. However, it is to be noted that the power to determine the opening and closing of the courthouse itself is the prerogative of the board of supervisors. See section 332.2, subsection 19, Code 1946.

(2) In answer to your question number 2, we are of the opinion that the county board of social welfare, county assessor, county superintendent of schools and soldiers' relief commission are, as you say, autonomous in their organization and administration engaged in the performance of specific statutory duties and, therefore, are likewise entitled to determine the hours that their office shall be open to the public.

(3) In answer to your question number 3 we are of the opinion that the board of supervisors does not have the power to determine the hours of working of employees in the various county offices, even though their appointment is approved by the board and the board may fix their compensation. The county officer such as the county recorder, the county auditor, etc., are obligated to perform the duties imposed upon them by statute, and in fulfilling that obligation their power over their employees in the performance of these duties is exclusive.

(4) In answer to your question number 4 we are of the opinion that there is no statutory authority for the payment of employees of a county officer for overtime pay for work in excess of 40, 41½ or 44 hours a week.

---

November 16, 1949

**TAXATION: Homestead credit versus agricultural land credit.** An owner of real estate may not designate any portion of a forty-acre tract for homestead tax credit (chapter 425, Code 1946) and claim an agricultural tax credit (section 426.3, Code 1946) on the remaining portion of the forty-acre tract.

*Mr. Ray E. Johnson, State Comptroller:* This will acknowledge receipt of your letter containing the following inquiry:

“The question has arisen in the administration of the law providing for agricultural land credit as to what portion of a homestead forty acres is entitled to a homestead credit and what portion to agricultural land credit.

Section 428.7, Code 1946, provides the method of assessing farm lands. Section 425.11, subsection 1, paragraph e refers to forty-acre tracts and subsection 3 of section 425.11 provides that chapter 561 has control when not in conflict with 425.11. Section 426.3, Code 1946, provides that agricultural tax credit shall not apply to any land on which the homestead tax credit has been allowed.

Taking into consideration the foregoing provisions of law I would like to have an opinion as to whether or not an owner of real estate may designate any portion of a forty-acre tract for homestead tax credit and claim an agricultural tax credit on the remaining portion of the forty-acre tract.”

In order to answer your question it is necessary to give consideration to the several statutes referred to in your inquiry. The question has arisen because of the fact that those who have heretofore received a homestead credit now desire to change their position in the hope that they may thereby gain additional credit denominated as agricultural land credit. The two credits above referred to are statutory and anyone claiming to be entitled to such credits must of necessity bring themselves within the statute and the legislative intent.

Code section 4.1, paragraph two (2) provides:

“Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such meaning.”

The pertinent inquiry is whether or not the word “homestead” has been used by the legislature in the pertinent statute in the sense of its peculiar and appropriate meaning in law.

Section 426.3 of the agricultural land tax credit act provides:

“The agricultural land credit as provided herein shall not be made to any taxpayer on any portion of his property upon which a homestead credit as provided in chapter 425 has been allowed for the year in which the agricultural credit is claimed.”

At the start it is fundamental that all homestead credits heretofore claimed are controlling and at this late date could not be changed so as to gain some advantage under the agricultural land tax credit act.

We wish to make it clear at this point that the taxpayer is without right to ask and the auditor is without power to grant any change of the credits heretofore allowed and established up to and including those applicable to the taxes collectible as of January 1, 1950. The legislature in passing the agricultural land tax credit act referred specifically to a homestead credit as provided by chapter 425 as is shown by the statute heretofore quoted. An examination of chapter 425 and section 425.11 relating to definitions in paragraph one (1) under Division e discloses the following language:

"It must not embrace more than one dwelling house, but where a homestead outside of a city or town has more than one dwelling house situated thereon, the millage credit provided for in this chapter, shall apply to forty acres, the home and buildings used by the owner, but shall not apply to any other dwelling house and buildings appurtenant thereto situated upon said forty acres."

This is the homestead described and referred to by the legislature in the agricultural land tax credit act.

A previous legislature in section 428.7 had provided as follows:

"No one description shall comprise more than one town lot, or more than the sixteenth part of a section or other smallest subdivision of the land according to the government surveys, except in cases where the boundaries are so irregular that it cannot be described in the usual manner in accordance therewith. This section shall apply to known owners and unknown owners, alike."

Land was therefore required to be taxed in forty-acre tracts under the foregoing statute.

Section 561.2 gives a statutory definition of homestead:

"If within a city or town plat, it must not exceed one-half acre in extent, otherwise it must not contain in the aggregate more than forty acres, but if, in either case, its value is less than five hundred dollars, it may be enlarged until it reaches that amount."

The foregoing statute refers again to the forty acres and in numerous other statutes, namely, sections 561.4, 561.5—12, 561.16, 588.2, 636.7, 636.33, 673.1, 673.5, 249.19, and 683.1, the extent of the homestead is referred to as defined in section 561.2.

The legislature in drafting the homestead tax credit act referred to the forty acres in division e of section 425.11, so that we do not have to seek for the legislative interpretation of what they consider to be a homestead. The agricultural land act when drafted by the legislature referred specifically to chapter 425 or the homestead credit act, so that it logically follows that in each and every instance the legislature was viewing the extent of the homestead in the sense they knew it had been recognized under the above quoted statutes which was in harmony with its peculiar and appropriate meaning in law.

The exemption contemplated by the act is to the homestead rather than to the owner. *Eysink v. Board*, 229 Iowa 1240; 296 N. W. 376.

The buildings and the land situated on the forty acres while listed separately are taxed as a whole when placed on the assessment roll and this property has been assessed and placed on the roll on that basis

for a period of four years. To permit a juggling of the homestead tax credit for the purpose of gaining agricultural land tax credit was not contemplated under the express provisions of the agricultural land tax credit act and would be giving a construction to the act which clearly was not contemplated by the legislature.

The Attorney General's Opinion appearing in the 1940 book at page 435 was rendered under the old agricultural land credit act which was declared unconstitutional, and insofar as the same is in conflict herewith, it is withdrawn.

---

November 17, 1949

**TAXATION: Agricultural land credit—taxpayer entitled to refund.**

Where agricultural land has been sold after taxes have been paid and before refund under the Agricultural Land Tax Credit Act, the taxpayer who paid the tax is entitled to the refund in the amount of this credit.

*Honorable C. B. Akers, Auditor of State; Attention L. I. Truax:* This will acknowledge receipt of yours of the 4th inst. in which you submit the following:

"Chapter 192, Acts of the 51st General Assembly, was an Act creating in the office of the treasurer of state a permanent fund to be known as the agricultural land credit fund, and making appropriation thereto, providing for the apportionment of said fund as a credit against the tax on agricultural lands in school districts in which the millage for the general school fund exceeds 15 mills, and providing the procedure for effecting said credits. However, due to litigation in the courts over the legality of the Act this credit was not allowed against the tax on agricultural lands for the years 1946, 1947 and 1948. This litigation in the courts, we are advised, has now been concluded and the Act has been declared to be constitutional.

The funds provided for this credit will soon be in the hands of the county treasurers of the state. The question now arises as to whether the present owner of the real estate would be entitled to receive this cash credit or whether the cash credit should be paid to the party who paid the tax for the years mentioned, in those cases where this real estate has changed hands."

The foregoing chapter 192, Acts of the 51st General Assembly appears in the Code as chapter 426 of the Code of 1946 and was amended by both the 52nd and 53rd General Assemblies. The provision for the foregoing credit is set forth in section 426.3, Code 1946, which in terms is as follows:

"The agricultural land credit fund shall be apportioned each year in the manner hereinafter provided so as to give a credit against the tax on each tract of agricultural lands within the several school districts of the state in which the millage for the general school fund exceeds fifteen mills; the amount of such credit on each tract of such lands shall be the amount the tax levied for the general school fund exceeds the amount of tax which would be levied on said tract of such lands were the levy for the general school fund fifteen mills, except in the case of a deficiency in the agricultural land credits fund to pay said credits in full, in which case the credit on each eligible tract of such lands in the state shall be proportionate and shall be applied as hereinafter provided. The agricultural land credit as provided herein shall not be made to any taxpayer on any portion of his property upon which

a homestead credit, as provided by chapter 425, has been allowed for the year in which the agricultural credit is claimed."

It will be noted from the foregoing that the legislature has made no provision for the allowance of this credit after the expiration of the tax year in which the apportionment of the credit fund is directed to be made, and, therefore, address is made to the problem as to how and to whom the credit upon the tax shall be made for the respective years of 1946, 1947 and 1948. The litigation to which reference is made is the case of *Dickinson v. Porter*, appearing in 35 N. W. 2nd at page 66. This credit like the homestead tax credit is attached to the property upon which the tax is levied and not to the owner of such tract. However, insofar as the question of the credit is concerned in the situation presented, the question of constitutional apportionment is not present and cannot determine to whom the credit or refund should be made. The statute does not by its terms designate the particular taxpayer to whom the credit shall be allowed but, by fair inference, the taxpayer mentioned in the foregoing statute to whom the credit is allowed is the taxpayer of the taxes during the current tax year. That inference is supported by a rule, equity has provided, by which this refund can be made to the person equitably entitled thereto. "Unjust Enrichment" is defined by the Restatement, Restitution paragraph 1A, "a person is unjustly enriched if the retention of a benefit would be unjust" and has also been defined as the doctrine that a person shall not be allowed to profit or enrich himself inequitably at another's expense. *American University v. Forbes*, 183 Atlantic 860 862, and in *Hummel v. Hummel*, 14 NE 2nd 923 it is said, "Unjust enrichment of a person appears when he has or retains money or benefits which in justice and equity belong to another." And see Words and Phrases, title "Unjust Enrichment", Vol. 43 page 272 and the 1949 Cumulative Annual Pocket Part, page 75 for numerous and various cases in which the doctrine has been applied. It has been applied to the recovery of taxes insofar as private parties are concerned. In *Brookfield v. Rock Island Improvement Co.*, 196 SW 2nd, 662, it appeared that the Improvement Company had for many years paid taxes on lands owned by Brookfield. Recovery was granted "on the basis of the right to recovery is that the defendant has been unjustly enriched at the expense of the plaintiff and that plaintiff is entitled to restitution therefor". And recovery was granted upon the same principle from a municipal corporation in the case of *Binder Realty Corporation v. City of Newark*, 22 Atlantic 2nd 360 where it appeared the taxpayer had paid the first quarter of the 1939 taxes levied against certain realty and thereafter sold the realty to the purchaser which paid the balance of the taxes for that year. Subsequently the state board, upon appeal, reduced the assessed valuation of the property resulting in the reduction of \$286.65 in the amount of taxes. The selling taxpayer brought suit against the city of Newark to recover the whole of this sum of taxes which the Supreme Court of New Jersey denied, using this language, "I therefore reach the conclusion that on a theory of unjust enrichment the plaintiff should have a summary judgment for \$69.58, being its pro rata share

of said sum of \$286.65 based on the first quarterly installment of the 1939 taxes paid by it on March 14, 1939, admitted by the fourth separate defense of the answer; and that as to the balance of \$217.07 sought to be recovered by the plaintiff, the complaint should be stricken." As applied to the situation outlined in your letter where the tax has been paid and before the credit is given, a sale of the property has been completed, to grant this credit now to the purchaser of such land would be an unjust enrichment, and, therefore, denounced by equity. It would follow, therefore, that the taxpayer who has paid the tax is entitled to the refund of the amount of this credit.

Unlike the homestead credit, no provision is made in the Agricultural Land Credit Act for the method of procuring such refund. However, the taxpayer who has disposed of his property, in our judgment, is not without remedy. Section 445.60, Code 1946 provides as follows:

"The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

By several opinions of the department, the failure to allow a tax exemption may be made the basis for recovery under the foregoing statute. See opinion of the Attorney General in the Report for 1922, page 195, and the opinion of the Attorney General in the Report for 1923-24, page 405. The court in the case of *Dickinson v. Porter*, supra, has treated the agricultural land credit as a tax exemption. A taxpayer, therefore, who has paid the tax upon which agricultural credit has not been allowed in order to secure this refund is required to make claim therefor under the terms and provisions of section 445.60 to the board of supervisors.

The money to be returned to the taxpayer under the foregoing statute "is to be taken from the particular fund or funds into which the illegal tax went when it was collected. The section clearly does not impose on the county the burden of paying any portion of such taxes out of its general funds, except the amount thereof which has gone into that fund. The county is not made liable for any portion of the tax illegally or erroneously collected, except the amount which is collected for its use. But the duty imposed on the board of supervisors is to order the treasurer to refund to the taxpayer, from each of the separate funds for the benefit of which the tax was collected, the amount thereof which is found to have been illegally or erroneously exacted from him. And any judgment rendered against the county on account of the collection of such tax should be satisfied by moneys taken in proper proportion from the several funds into which the tax went when collected." (*The Iowa Railroad Land Co. v. Woodbury County*, 64 Iowa 212, 215) Pursuant to the foregoing, the agricultural tax credit attaching by statute to the school general fund of each district, is the fund from which this refund shall be made.

November 30, 1949

**TAXATION: Agricultural land credit—refund to taxpayer after expiration of tax year.** The agricultural land tax credit act makes no provision for allowance of credit after the expiration of the tax year in which the credit is directed to be made. In such case the amount may be refunded to the taxpayer as provided by statute for taxes erroneously or illegally exacted or paid. The procedure to obtain this refund is reviewed.

*Honorable C. B. Akers, Auditor of State: Attention L. I. Truax, Supervisor:* This will acknowledge receipt of yours of the 23rd inst. in which you submit the following:

"Your opinion of November 17, 1949, addressed to the auditor of state answers our question of who shall receive the refund for agricultural land credit tax in those cases where the real estate has changed hands and the opinion also provides the method to be followed in securing the same.

Another question now arises as to how credit shall be obtained by the taxpayer where the ownership of the land has not changed hands but where ownership has been constant during the years 1946, 1947 and 1948."

In reply to the foregoing we would advise you that the legislature made no provision in the agricultural land credit Act for the allowance of the land credit after the expiration of the tax year in which the apportionment of the credit or refund is directed to be made, and no method for procuring the refund or credit after the expiration of the tax year is provided. In that situation the advice given respecting the method of procuring such refund or credit set forth in our opinion issued November 17, 1949 is pertinent. We there said:

"However, the taxpayer, in our judgment, is not without remedy. Section 445.60 Code 1946 provides as follows:

'The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with interest and costs actually paid thereon.'

By several opinions of the department, the failure to allow a tax exemption may be made the basis for recovery under the foregoing statute. See opinion of the Attorney General in the Report for 1922, page 195, and the opinion of the Attorney General in the Report for 1923-24; page 405. The court in the case of Dickinson v. Porter, *Supra*, has treated the agricultural land credit as a tax exemption.

The money to be returned to the taxpayer under the foregoing statute 'is to be taken from the particular fund or funds into which the illegal tax went when it was collected. The section clearly does not impose on the county the burden of paying any portion of such taxes out of its general funds, except the amount thereof which has gone into that fund. The county is not made liable for any portion of the tax illegally or erroneously collected, except the amount which is collected for its use. But the duty imposed on the board of supervisors is to order the treasurer to refund to the taxpayer, from each of the separate funds for the benefit of which the tax was collected, the amount thereof which is found to have been illegally or erroneously exacted from him. And any judgment rendered against the county on account of the collection of such tax should be satisfied by moneys taken in proper proportion from the several funds into which the tax went when collected.' (The Iowa Railroad Land Co. v. Woodbury County, 64 Iowa 212, 215). Pursuant to the foregoing, the agricultural tax credit attaching by

statute to the school general fund of each district, is the fund from which this refund shall be made."

The administrative process involved in making this refund consists of the following: county officers have been provided with forms upon which to report by school districts valuations, general fund millage, the excess over 15 mills and the amount necessary to pay claims in full. One copy of such completed form shall be filed with the state comptroller, one with the county auditor and one with the county treasurer. In addition to the above, each county has been supplied with forms upon which to list each individual landowner eligible for the credit, showing a description of his land, usually by forty acre tracts and by school districts. The amount of dollars shown is the full amount to which each landowner is entitled. The prorated amount due each landowner after receiving a warrant from the comptroller should be shown in the appropriate column by the county auditor. The total of the individual claims in each school district must agree with the amount shown by the report by each school district filed with the state comptroller. The county auditor should present to the board of supervisors his list of individual landowners in each school district, showing the prorated amount due each one, and such list when approved by the board of supervisors and certified by the county auditor to the treasurer will be the authority for the county treasurer to issue a refund warrant or check to the individual entitled thereto without each such individual filing a separate claim for said refund. This method of refund will likewise control the refunds authorized by our opinion of November 17, 1949, heretofore referred to, and that opinion is modified to that extent.

---

**November 30, 1949**

**VETERANS: War orphans education fund—remarriage of surviving parent.** Children of a veteran of either World War I or II who died while in the service or later from causes attributed to such service are eligible under the war orphans educational act and it matters not if the surviving parent remarries.

*Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board:* This will acknowledge receipt of yours of the 22nd inst. in which you have submitted the following:

"I am desirous of an official opinion clarifying two points of the war orphans educational Act which is, section 35.7 of the 1946 Code and amended by the 52nd General Assembly.

1. Do children of a veteran who died while in the service within the dates specified in the law lose their eligibility to this aid if the mother remarries and they are adopted by the step-father?

2. Section 3 of the amendment by the 52nd General Assembly reads as follows:

'While serving in the Military or Naval forces of the United States, or as a result of such service.'

Does this mean that a person who died, whether in the service or not, between the dates specified by the law and of causes attributed to the service and leaves behind children, do they become eligible for the aid specified in this law?"

In reply thereto we would advise you as follows:

1. The particular statute under which this aid is bestowed is contained in section 3 of chapter 58, Acts of the 52nd General Assembly, and is as follows:

“Sec. 3. Section thirty-five point nine (35.9), Code 1946, is repealed, and the following enacted in lieu thereof:

‘Said bonus board is authorized to expend not to exceed three hundred dollars per year for any one child who shall have lived in the state of Iowa for two years preceding application for aid hereunder, and who is the child of a man or woman who died during World War I between dates of April 6, 1917 and June 2, 1921, or during World War II between the dates of September 16, 1940 and the date which shall be officially designated by the government of the United States as the termination of World War II, while serving in the military or naval forces of the United States, or as a result of such services, to defray the expenses of tuition, matriculation, laboratory and similar fees, books and supplies, board, lodging, and any other reasonably necessary expense for such child or children incident to attendance at any educational or training institution of college grade, or in any business or vocational training school of standards approved by said bonus board, said educational institutions to be located within the state of Iowa.’”

By the plain terms of the foregoing statute the child of a man or woman who died during World War I, between the dates of April 6, 1917 and June 2, 1921, or during World War II between the dates of September 16, 1940 and the date which shall be officially designated by the government of the United States as the termination of World War II, is entitled to this aid. To hold now that if the mother of such child of a deceased veteran remarries, the child adopted by the stepfather, would lose this benefit, would be incorporating into the Act provisions that were not included therein by the legislature. In our view, the legislative intent is, therefore, not to exclude such child or children from the benefits of this aid.

2. In answer to your question number 2, we are of the opinion that the portion of the statute quoted by you, to-wit:

“while serving in the Military or Naval forces of the United States, or as a result of such service.”

is to be read as within the time limit set forth in the foregoing section. In other words, the child, in order to be entitled to this aid, must be the child of a man or woman who died during World War I between the dates specified in the foregoing Act; or who died during World War II, between the dates specified therein, or who died as a result of the service within such dates, even though death occurs after the date set out.

---

December 13, 1949

**ROADS AND HIGHWAYS: Secondary roads improvement—use of farm-to-market road funds.** A secondary road assessment district under chapter 129, Acts 53rd General Assembly, may be set up with assessments made on land within a limitation of less than one-half mile on each side. Also the cost of improvement of such roads may be paid partly from farm-to-market road funds including the cost of grading.

*Mr. Grant L. Hayes, County Attorney, Mount Ayr, Iowa:* In a recent letter you make the following inquiries relating to the construction and operation of chapter 129, Acts of the 53rd G. A.

1. Is there any objection to setting up a secondary road assessment district with less than one-half mile on each side of the road under section 4 of the Act?

Answer: None. Section 4 contains words of maximum rather than minimum limitation.

2. If the petition is filed under section 8 or section 9 of the Act and the road is a farm-to-market road may the other half of the cost be paid out of farm-to-market funds?

Answer: Yes, provided all other provisions of the farm-to-market law are met. It must be borne in mind that two other agencies, the Iowa state highway commission, and where federal funds are involved, the bureau of public roads, department of public works, must concur before certain of these expenditures are authorized.

3. If a road has been incorporated in the farm-to-market system but has not yet been brought to grade, may the cost of grading and one-half of the surfacing be paid out of the farm-to-market road fund?

Answer: Yes, and the same considerations control as in the answer to question No. 2.

Your fourth question appears to be repetition. If it is not, please rephrase and clarify. You will note that your questions have been rather carefully restated so as to eliminate the objectionable "can" or "will". There is no compulsion on either the Iowa state highway commission or on the bureau of public roads as there is with respect to the board of supervisors under this legislation.

---

December 15, 1949

**VETERANS: War orphans educational fund not available to step-children.** Stepchildren of a veteran are not included in those eligible for assistance from the war orphans educational fund.

*Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board:* This will acknowledge receipt of yours of the 12th inst. in which you submit the following:

"I am desirous of an official opinion clarifying section 35.9 of the 1946 Code.

'John Doe' before entering service married 'Mary Roe' who had one child. The child lived in 'John and Mary Doe's' home until John entered service. The child was not adopted but was a dependent of 'John and Mary Doe'".

"Would the step-child be eligible to assistance from the war orphans educational fund as provided by the amendment of the 52nd General Assembly? If so, would the child still be eligible after the mother remarried,"

In reply thereto we would advise you as follows:

Section 35.9, Code of 1946, was amended by chapter 58 of the 52nd General Assembly, and insofar as pertinent is exhibited as follows:

“Sec. 2. Section thirty-five point eight (35.8), Code 1946, is repealed and the following enacted in lieu thereof:

‘Any money hereafter appropriated for the purpose of aiding in the education of children of honorable discharged men or women who served in the military or naval forces of the United States in World War I or World War II, as provided by this act, shall be known as the war orphans’ educational aid fund.’”

Sec. 3. Section thirty-five point nine (35.9), Code 1946, is repealed and the following enacted in lieu thereof:

‘Said bonus board is authorized to expend not to exceed three hundred dollars per year for any one child who shall have lived in the state of Iowa for two years preceding application for aid hereunder, and who is the child of a man or woman who died during World War I between the dates of April 6, 1917 and June 2, 1921, or during World War II between the dates of September 16, 1940 and the date which shall be officially designated by the government of the United States as the termination of World War II, while serving in the military or naval forces of the United States, or as a result of such service, to defray the expenses of tuition, matriculation, laboratory and similar fees, books and supplies, board, lodging, and any other reasonably necessary expense of such child or children incident to attendance at any educational or training institution of college grade, or in any business or vocational training school of standards approved by said bonus board, said educational institutions to be located within the state of Iowa.’”

We are of the opinion that a step-child is not included in the term “child” as used in the foregoing statute, and, therefore, a step-child, even though a dependent, would not be eligible to the assistance from the soldiers orphans educational fund provided by the foregoing designated statute. This view is supported by the following from the case of *Tepper v. Supreme Council of Royal Arcanum*, 45 Atlantic 111, 115, where the court of chancery of New Jersey stated, “the primary sense of ‘children’ is off-spring, and that is the sense in which it is ordinarily used when the question of relationship is involved. It is, indeed, often applied by an elderly person as a word of endearment or affection to one younger, when no relationship whatever exists, but it cannot be properly held, when found in a statute or contract, to include step-children.” In view of this conclusion, no opinion is required to your question as to whether the child would still be eligible after the mother remarries.

---

#### December 15, 1949

**MARRIAGE: Cousins by adoption only may marry.** The rights, duties and relationships resulting from legal adoption are limited to the child and adopting parents. It follows therefore the statute prohibiting marriage between cousins relates to those persons having not only a common relation to an ancestor but also to each other.

*Mr. W. H. Bainter, County Attorney, Mount Pleasant, Iowa:* This will acknowledge receipt of your letter dated November 17, 1949 which is as follows:

“The clerk of our district court has asked this office to obtain an opinion on the following matter.

Under section 595.19 Subsection 3 of the 1946 Code of Iowa, marriages between first cousins are void. The question is whether under the

above section the marriage between an individual and his adopted cousin would be void."

Section 595.19 Code 1946 provides as follows:

"Marriages between the following persons shall be void:

1. \* \* \*
2. \* \* \*
3. Between first cousins.
4. \* \* \*

Webster's New International Dictionary, Second Edition defines cousin as follows:

"A son or daughter of one's uncle or aunt (called more fully *own*, *first*, or *full*, *cousin*, or *cousin-german*); in a wider sense (usually with *second*, *third* or like, prefixed), a relative descended the same number of steps by a different line from a common ancestor."

See also "Cousin" and "Cousin-german", Volume 10, Words and Phrases. From these definitions it is apparent that in case of first cousins as used in the legal sense, it denotes not only a common relationship to the ancestor but also as to each other. The question then presents itself as to whether a similar situation exists in case of a legal adoption.

Section 600.6 Code 1946 provides as follows:

"Upon the entering of such decree, the *rights, duties, and relationships between the child and parent by adoption shall be the same that exist between parents and child by lawful birth* and the right of inheritance from each other shall be the same as between parent and children born in lawful wedlock." (Italics supplied.)

From the italic portion of the foregoing section it is apparent that the rights, duties, and relationships resulting from legal adoption are limited to the child and parents by adoption. Such was the holding of our Supreme Court in the case of Cook vs. Underwood 209 Iowa 641; 228 N. W. 629, wherein at page 645 of the Iowa Reports it was said:

"By section 3253, Code Supplement, 1913, in force at the execution of the will and at the date of testator's death, upon the execution, etc., of articles of adoption, 'the rights, duties and relations between the parent and child by adoption shall be the same that exist by law between parent and child by lawful birth, and the right of inheritance from each other shall be the same as between parents and children born in lawful wedlock.' Section 10501-b6, Code, 1927. This statute affects only the 'duties and relations between the parents and child by adoption,' and 'the right of inheritance from each other.' It does not determine the status of the adopted child as to the ancestor or other relative of the adopting parent. Estate of Sunderland, 60 Iowa 732; Hockaday v. Lynn, 200 Mo. 456 (98 S. W. 585); Van Derlyn v. Mack, 137 Mich. 146 (100 N. W. 278)."

It is our opinion, therefore, that the provisions of Subsection 3 of section 595.19 Code 1946 relate only to natural sons or daughters of brothers or sisters of one's father or mother which not only have a common relationship to the ancestor but also to each other. Consequently, a marriage between an individual and his adopted cousin is permitted under the laws of the state of Iowa.

December 15, 1949

July 27, 1950

**VETERANS: Bonus law—status of stepchild as claimant.** Where the relationship of stepparent and stepchild existed at the death of a veteran, remarriage by the natural parent prior to November 2, 1948 terminates the right of said natural parent to the service compensation of the deceased veteran but the stepchild would be next in line and be entitled to the award.

*Mr. Edward J. Kallemyn, Executive Secretary, World War II Service Compensation Board:* In your letter of recent date you have asked the opinion of this office as to the following:

“The question as to the continuity of status of stepchild or stepchildren beneficiaries of deceased veterans, in that a number of cases the natural parent of veterans’ stepchild or stepchildren has remarried this giving the child a new stepparent and presumably creating an entirely new environment and perhaps a status for such child or children.”

“Does remarriage of natural parent with or without adoption by the stepparent and with or without adoption by the succeeding stepparent terminate the relationship of stepchild as contemplated in chapter 59, Acts of the 52nd General Assembly of Iowa.”

1. We must first note the distinction between a stepchild and an adopted child. A stepchild has been defined as the son or daughter of one’s wife by a former marriage, or of one’s husband by a former wife. (Baldwins Century Edition of *Bowvian’s Law Dictionary* (1926).) Chapter 600 of the 1946 Code of Iowa provides for the method of adoption of a child “not his own.” Upon compliance with the laws of this state relative to adoption, and the signing and entering of a decree of adoption, section 600.6 of the Code provides as follows:

“600.6. Status of the adopted child. Upon the entering of such decree the rights, duties, and relationships between the child and parent by adoption shall be the same that exists between parents and child by lawful birth and the right of inheritance from each other shall be the same as by the parent and child born in lawful wedlock.”

As for decrees of adoption from jurisdictions other than Iowa, the relationship between the deceased veteran and the adopted child is governed by the domicile of the parties and the laws of that jurisdiction. (Shick vs. Howe, 137 Iowa 249.)

2. We first turn to your inquiry as to the continuity of the status of a stepchild beneficiary of a deceased veteran where the natural parent of such child has since remarried, thus giving to the child a new stepparent. In this paragraph, we assume that there was no legal adoption but only the former status of stepchild and stepparent with the deceased veteran.

The Iowa bonus was set up as a reward for services rendered by the veteran. In the event of his death, certain others were designated as those entitled to the bonus in the place of the veteran.

Dealing first with the death of the veteran prior to enactment of the “Bonus Act”, we find the widow being first in line to receive this

award, but the legislature saw fit to provide that she could remove herself from those entitled by remarriage prior to November 2, 1948. This option was not extended to any other person or class of persons, so that only death prior to payment could affect their rights to the award.

In the case, then, of a veteran killed in action, who at that time was married and had a stepchild, that relationship continued to exist thereafter. In case the widow remarried prior to November 2, 1948, the effective date of the act, then the stepchild would be next in line and be entitled to the award. The stepchild may obtain another stepparent but the affinity remains with the veteran stepfather and since the legislature did not see fit to take the child out of line in the event of a new stepparent relationship as it did in the case of a remarried widow, we believe they intended the stepchild to receive this benefit.

We would hold differently in case the veteran returned and the relationship terminated by a divorce and a loss of custody to the veteran of the child by court action prior to the death of the veteran. In such case, the relationship of a stepchild and stepfather would not be existent at the time of the veteran's death, and the ex-wife and child would not be in the list designated in the statute.

3. We are of the further opinion that where the deceased veteran had legally adopted the stepchild or stepchildren then, either under the laws of Iowa or the state where the adoption was consummated, the relationship is that of parent and child and by virtue of section 4 of chapter 59, Acts of the 52nd General Assembly of Iowa, such child or children would be entitled to the compensation as "child or children" and not as "stepchild or stepchildren."

---

#### December 29, 1949

**TAXATION: Moneys and credits deduction—husband and wife.** A wife owning separate moneys and credits must file a return and claim the \$5,000 deduction allowed by law in her own behalf. Where husband and wife are joint owners of moneys and credits they may file a joint return and each claim the deduction but neither may claim in excess of 50 per cent of the joint holding. If the amount so held is in excess of \$10,000 each must file a separate return.

**TAXATION: Moneys and credits deduction—partnership.** Moneys and credits owned by a partnership are taxed against the partnership and only one deduction of the \$5,000 permitted by law is allowable.

**TAXATION: Moneys and credits deduction—corporations, credit unions, savings and loan associations.** A corporation is entitled to the same deduction from moneys and credits for taxation purposes as an individual, unless it is an Iowa corporation the capital stock of which is assessed specially for taxation.

**TAXATION: Moneys and credits deduction—estates.** The moneys and credits deduction of \$5,000 allowed by law applies to returns made by estates.

*Mr. Edwin S. Thayer, County Attorney, Des Moines, Iowa:* In your communication of December 12th you ask for rulings of the attorney

general's office upon several points in relation to the new moneys and credits deduction authorized by the provisions of chapter 197, Laws of the 53d General Assembly, which enacted a substitute for section 429.4, Code 1946.

Section 429.4, Code 1946, now reads as follows:

"In making up the amount of moneys and credits, corporation shares of stocks which any person is required to list, to have listed or assessed, including actual value of building and loan shares, he will be entitled to deduct from the actual value thereof the gross amount of all debts in good faith owing by him and in addition thereto an amount of five thousand dollars (\$5,000.00)."

You ask, "1. If a husband files a return which includes moneys and credits belonging to his wife in addition to the moneys and credits belonging to him, can the assessor allow a \$5,000.00 reduction against moneys and credits of each?"

The reply to this is that the husband can not do so. If his wife has separate moneys and credits, she must also file a return listing her moneys and credits or other taxable intangibles and claiming in her own behalf the deduction. We are holding also that where a husband and wife have a joint account in a bank or are jointly the owners of certain intangibles subject to taxation, that each may claim a deduction up to \$5,000.00 from their taxable moneys and credits, but that neither may claim more than 50 per cent of the joint account or holding, unless the entire amount so held is in excess of \$10,000.00 and in such cases separate returns must be made by the husband and wife.

In your second question you ask: "If a partnership files a return which includes moneys and credits, can the assessor allow a deduction against such moneys and credits of \$5,000.00 for each of the partners?"

Partnerships under the law are required to list their property under the provisions of subsection 5 of section 428.1, Code 1946. This provision of the law reads as follows:

"5." The property of a body corporate, company, society or partnership, by its principal accountant, officer, agent or partner, as the assessor may demand."

Section 428.15 also reads: "Any individual of a partnership is liable for the taxes due from the firm."

This office is of the opinion that in the case of a return made by a partnership only one \$5,000.00 deduction may be claimed. There is no provision in the law relating to partnerships which permits the individual partner to list his assets in the partnership for taxation separately. Both partners are jointly held liable for property taxes levied against the partnership. It is the ruling of this office that a partnership has no different status as to the deduction permitted than a body corporate, company or society, all of which list their property in the same manner as a partnership and under the same provision of the Code.

In your third question you ask, "Does the \$5,000.00 deduction permitted by said statute apply to the moneys and credits of corporations?"

The answer to this question is that a corporation is entitled to the same deduction as an individual, unless it is an Iowa corporation, the capital stock of which is subject to assessment to the corporation and which makes a special return to the assessor under which its capital stock is assessed.

In question number four you ask, "Does it apply to moneys and credits returned by estates?" The answer is that it does.

In your fifth question you ask, "Does the \$5,000.00 deduction in question apply to the following? (a) banks (b) credit unions (c) savings and loan companies.

In reply to this question the \$5,000.00 deduction does not apply to the assessment of bank stock, stock of insurance companies or stock of financial corporations which are subject to taxation upon their capital stock as already explained in your answer to question number three. In regard to credit unions apparently a credit union is entitled to this deduction. Assessment of a credit union is not based upon a valuation of the stock of shareholders, but is purely a moneys and credits assessment. It is the opinion of this office that this deduction does apply to credit unions.

In regard to savings and loan companies it is the holding of this office that they are taxable under existing laws which are not altered by the new provision of the law and are not entitled to claim as an organization the \$5,000.00 additional credit.

---

January 3, 1950

**MOTOR VEHICLES: Reciprocity on registration fees of motor vehicle carriers.** The compensation tax exacted from certificated carriers has no relation to the registration of the vehicles used by such carriers and therefore is not a proper matter to be considered in reaching a mutual understanding with other states on reciprocity waiving registration requirements.

*Mr. Alfred W. Kahl, Commissioner of Public Safety:* You have requested an opinion of this office as follows:

"A question has arisen relating to the operation of the Iowa motor vehicle reciprocity statutes. By the terms of the code provisions imposing a compensation tax on motor carriers operating between fixed termini, this tax is not affected by the reciprocity statute and therefore must be exacted of all such carriers. A sister state (Minnesota) under its reciprocity laws cannot extend reciprocity on motor vehicle registrations where full reciprocity is not granted residents of that state. It therefore becomes necessary to determine the legal nature of the Iowa compensation tax and its relationship, if any, to Iowa motor vehicle registration provisions.

Your opinion is respectfully requested."

Under chapter 321, Code of Iowa 1946, (Motor Vehicles and Law of Road) are found the provisions relating to the registration of motor vehicles. It is provided in section 321.3 that the commissioner of public safety is

"vested with the power and is charged with the duty of observing, administering and enforcing the provisions of this chapter".

The sections of chapter 321 include the provisions relating to applications for registration of motor vehicles, registration thereof, payment of fees therefor, registration certificates and plates, as well as exceptions to registration requirements, reciprocity provisions and the statutory law of the road.

The source of chapter 321 of the present code is found in chapter 53, Acts of the 30th General Assembly (1904), entitled:

"AN ACT requiring registration of motor vehicles and regulating their use or operation upon highways or streets."

The compensation tax is imposed by section 326.2 of chapter 326, Code of Iowa 1946:

"In addition to the regular registration fees or taxes imposed upon motor vehicles, there shall be assessed against and collected from every motor carrier the following tax as compensation for the use of the highways to carry on business and for the repair and maintenance of the highways.

For each motor vehicle or combination of tractor and semitrailer or trailer with a gross weight in excess of sixteen tons, two hundred fifty dollars.

For each motor vehicle or combination of tractor and semitrailer or trailer with a gross weight in excess of twelve tons and not to exceed sixteen tons, two hundred dollars.

For each motor vehicle or combination of tractor and semitrailer or trailer with a gross weight in excess of eight tons and not to exceed twelve tons, one hundred fifty dollars.

For each motor vehicle or combination of tractor and semitrailer or trailer with a gross weight of eight tons or less, seventy-five dollars.

'Gross weight' shall mean the registered weight of a motor vehicle, including any combination of tractor and semitrailer, and any trailer when propelled by other motor vehicles; except in the case of motor vehicles not registered in this state, the gross weight shall mean the empty weight of the motor vehicle plus the actual weight of the load carried thereon."

As is clearly indicated by the chapter title, (Taxation of Motor Vehicle Certificated Carriers), it is neither a taxation against motor vehicles, nor a registration or licensing fee. The source of the said chapter is found in chapter 97, Acts of the 40th General Assembly (1923) entitled:

"An Act providing for the supervision and regulation of persons either natural or artificial engaged in the transportation of persons or property for hire over the public highways of the state by motor vehicles and conferring certain jurisdiction over such persons and such vehicles upon the board of railroad commissioners of the state; also providing for the enforcement of this act and for the punishment of violation thereof."

It is to be noted that enforcement of the provisions of chapter 326 is within the jurisdiction of the board of railroad commissioners (now known as commerce commission).

The original act in arriving at the amount of tax imposed against certificated carriers adopted a ton-mile formula. The registration provisions set forth in chapter 321 constitute an exercise by the state of its police power. Registrations require as a condition precedent to the operation of a specific vehicle upon the highways. On the other hand the compensation tax being taxed against the carrier, and not a fee imposed as a condition precedent to the operation of a particular vehicle, any vehicle of the carrier may be seized unless the tax has been paid in full according to the statutory formula. In other words if it is presumed that a carrier has paid compensation tax on the basis of operation of one vehicle, and has received plates to be displayed on the vehicle, that vehicle may be seized if in fact the carrier is operating two or more vehicles.

It is provided in section 326.7, Code of Iowa 1946:

"Taxes and penalties imposed by this chapter shall be a first lien upon all property of the motor carrier."

With relation to registration fees it is provided in section 321.131 of the Code:

"All registration or other fees provided for in this chapter shall be and continue a lien against the vehicle for which said fees are payable until such time as they are paid as provided by law, with any accrued penalties."

The provision of the code stating the purpose of the tax is not for the *mere use* of the highways, but is expressly stated to be "*for the use of the highways to carry on business.*"

Some confusion may result as a matter of first impression in reading the statute, but upon close analysis it is apparent that actually there is involved the imposition of a tax for the privilege of using special facilities provided by the state in the conduct of business. A use for profit is an extraordinary use, and in permitting it the state exacts a compensation for the privilege.

In *Iowa Motor Vehicle Association vs. Board of RR Commissioners*, 207 Iowa 462, The Supreme Court of Iowa recognized the ton-mile tax as a privilege tax saying:

"The legislative intent is primarily the creation of a privilege tax for road use under the classification as defined and limited by the

statute. The authorities generally affirm that the power to tax, in a strict and proper sense, for the purpose of creating revenue, is not included within the police power of the state. (Citing cases). True, part of the funds so levied and collected is devoted to the administration and enforcement of the provisions of the chapter and the regulation of motor carriers."

Observing that it may be conceded that there must be some other reason for the classification than the use of the vehicle unless the use itself afforded substantial grounds for a distinction, the court held that even though there was a distinction between registration under the police power and the imposition of a revenue measure under the governmental power of the state, such as the privilege tax, the distinction was irrelevant as concerning constitutionality.

The court in effect held that the legislature had created a class for tax purposes and a class for mere registration purposes.

The formula for determining the amount of the tax was changed by chapter 135, Laws of the 48th General Assembly at which time the formula now in effect was adopted. The said chapter was entitled:

"An Act to amend section one (1), one hundred sixty-four (164), and one hundred ninety-seven (197), and to amend, revise and codify sections one hundred fifty (150), one hundred fifty-one (151), and one hundred fifty-two (152), one hundred fifty-three (153), and one hundred fifty-four (154) and four hundred ninety (490) of chapter 134 of the acts of the Forty-seventh General Assembly relating to the registration fees for motor trucks, truck tractors, road tractors, semi-trailers and trailers, providing for the registration of such vehicles on a gross weight basis, fixing the maximum gross weight with which such vehicles may be operated, providing for the semi-annual payment of registration fees, and providing specifications for number plates, and to amend chapter 252-A2 of the code, 1935, relating to the taxation of motor carriers operating motor vehicles between fixed termini and over a regular route, fixing penalties for delinquency in payment of such tax, providing for the issuance of distinguishing plates for such motor vehicles, providing for the collection and enforcement of such tax and providing for the distribution of the proceeds thereof."

Thus it is to be noted that the intent of the Iowa legislature to create a tax against carriers as distinguished from motor vehicle registrations has been consistent and persistent. Recognition of the tax as a privilege tax by the Supreme Court of the United States is found in an opinion by Mr. Justice Brandeis in *Clark v. Poor*, 71 Lawyers Edition, 1199. The case arose under an Ohio statute providing that a motor transportation company desiring to operate within the state must, among other things, pay at the time of the issuance of the certificate and annually thereafter a tax graduated according to the number and capacity of the vehicles used. The appellants operated as common carriers a motor truck line between Aurora, Indiana and Cincinnati, Ohio, exclusively in interstate commerce. They ignored the provisions of the act and operated without applying for a certificate or paying the tax. It was contended that the state of Ohio could not require such an operator to obtain a certificate or impose the tax in addition to the annual license fees required of motor vehicles generally. The court clearly construed

the provision as a tax unrelated to registration or licensing, in saying:

"It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the commission in the administration or enforcement of the act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

It must be concluded that the compensation tax is a *tax imposed on the carrier* under the governmental taxing power of the state for the privilege of using special facilities provided by the state (specified highways) in the conduct of the business of a regulated carrier as distinguished from motor vehicle registration laws enacted under the police power of the state, as a *license for motor vehicles* to operate on any highway of the state.

Therefore only the Iowa motor vehicle registration fees are proper subject matter to be considered in reaching a mutual understanding with other states on reciprocity waiving registration requirements.

---

January 10 and 28, 1950

**ROADS AND HIGHWAYS: Secondary road improvement under chapter 129, Acts 53rd General Assembly.** Petitions for resurfacing secondary roads must be given preference by the board of supervisors in either of two situations, (1) where the owners of 75 per cent of the land sign the petition and ask for assessment of not less than 50 per cent of the cost to lands in the proposed district and (2) where a like per cent of the owners sign and 50 per cent of the cost is subscribed or donated.

**ROADS AND HIGHWAYS: Secondary road improvement—selection of roads.** The preference in improvement of secondary roads outlined in section 9, chapter 129, Acts 53rd General Assembly applies to that 35 per cent of the construction fund which is supervised by the board of approval insofar as the selection of the roads to be improved is concerned.

*Mr. Scott Jordan, County Attorney, Fairfield, Iowa:* You have referred to this office for answer to the following questions relative to the 1950 road construction program in Jefferson county.

1. Do road improvements petitioned for under section 9, chapter 129, Acts of the 53rd G. A., receive preference over roads included in a construction program adopted and approved prior to the enactment of that chapter?
2. In case the landowners share of the cost of the improvement is to be financed by subscription and donation, do owners of all the lands need to sign the petition?
3. Does the preference outlined in section 9, chapter 129, 53rd G. A., apply to that 35 per cent of the construction fund which is controlled by the township trustees, insofar as selection of roads to be improved is concerned?

These questions are answered in the paragraphs below bearing the corresponding Roman numerals.

I. This question was answered in point No. 2 in an opinion of the Attorney General dated October 26, 1949.

II. Section 9, chapter 129, Acts of the 53rd G. A., outlines two situations under which a petition for resurfacing *must* be given preference by the board of supervisors.

1. Where the owners of 75 per cent of adjacent or abutting lands
  - a. Petitions for resurfacing,
  - b. And for the assessment of not less than 50 per cent of the cost to lands in the proposed district.
2. Where the owners of 75 per cent of adjacent or abutting lands
  - a. Petition for resurfacing,  
*All* subscribe and deposit (donate) not less than 50 per cent of cost.

This is the effect of section 9 notwithstanding the fact that the section first talks about establishing the district and giving a preference to the project or projects on the petition of the owners of 75 per cent of adjacent or abutting lands. This is true because in the last two paragraphs of the section which deal with what may be called the "donation method" it is provided that under such circumstances

"the board of supervisors shall *not* establish such special assessment district."

Under "1" above an assessment district must be established. Under "2" above it shall *not* be established. In either "1" or "2" preference must be given to the project or projects.

In the first instance it is plain that the owners of 75 per cent of the land must *sign* the petition, and the reason why the legislature imposed such a requirement seems to be apparent since the assessment will be taxed in some amount against "all" the land in the district. The legislature probably felt that at least the owners of 75 per cent of the land should *consent* in order to *compel* the remaining 25 per cent to pay.

In the second instance the Act sets up no machinery for determining the proportions in which contributions shall be made to the 50 per cent required to be subscribed, deposited, or donated. Of necessity, therefore, these proportions would have to be determined by mutual agreement between the landowners concerned. Since priority in projects depends solely on the date of filing the petition and no means is set up by which the board of supervisors may review the agreement (whether written or oral) a requirement that "all" must subscribe and deposit or donate is an empty gesture. If the owners of 75 per cent of adjacent or abutting lands sign the petition and so secure priority the board of supervisors may not inquire as to the source of or the proportions in which the contribution may have been made, but shall accept the said donation in lieu of an assessment. This provision of section 9 of the Act is mandatory and the payment of the required donation bars the establishment of an assessment district by the board of supervisors in such a case.

III. The categorical answer to this question is that the preference outlined in section 9, chapter 129, Acts of the 53rd G. A., applies to that 35 per cent of the construction fund which is supervised by the board of approval insofar as the selection of the roads to be improved is concerned. See sections 309.22 to 309.32, inclusive. A similar ques-

tion was raised in the case of *Robinson v. Board of Supervisors of Davis County*, 222 Iowa 663, 269 N. W., 129 with reference to the construction of a bridge over a drainage ditch across a public highway which belonged in the category mentioned. That case was an action for mandamus to compel the board of supervisors to construct a bridge as the statute, section 455.118, Code of Iowa 1946, provides. The objection was that the board of supervisors could not obey the order because the board of approval was charged with the determination of the manner of the expenditures of funds on local county roads. The court said, however, that section 309.22 to 309.32 have reference to expenditures the making of which is discretionary and have no application to an expenditure from such fund which has been made mandatory by the legislature. The court said further that the legislature had placed the matter beyond the discretion of either the board of supervisors or the board of approval and the statute directed that the improvement be built and paid for out of the fund specified. Similar reasoning can be applied to chapter 129 Acts of the 53rd G. A., for the statute requires that the preference be given and specifies the funds out of which it must be paid.

---

January 25, 1950

**SCHOOLS AND SCHOOL DISTRICTS: Substitute teacher—salary payments.** Illness of a school teacher will entitle the teacher to sick leave in conformance to chapter 112, Acts 53rd General Assembly. (Section 279.40, Code 1950). Subject to said payments no additional compensation is due or payable to the teacher during his disability. The power to appoint and fix the compensation of a substitute teacher rests in the school board.

*Mr. F. R. Curry, County Attorney, Osceola, Iowa:* We have yours of the 19th ult. in which you have submitted the following:

"I would like to have an opinion on the following statement of facts.

A school teacher has a teacher's contract, fixing his salary at one hundred eighty (\$180.00) dollars per month. Now, on account of illness, this teacher was off two weeks, and a substitute teacher taught his classes and did his work during this two-week period, which the regular teacher was off. The school board paid the substitute teacher four-fifths of the regular teacher's salary, based upon the \$180.00 per month, during the two weeks that the substitute teacher taught.

The regular teacher was advised at first that the substitute teacher was to be paid three-fourths of the regular salary, but later the board changed it to four-fifths.

The regular teacher only drew pay in proportion to the time that he taught, for this month.

1. Now, the question is, whether the school board has authority to fix the amount paid the substitute teacher at three-fourths, or four-fifths, or any other amount less than what the regular teacher would be paid under this contract.

2. If the school board has authority to retain, as in the above statement of facts, the one-fifth difference in what is paid the substitute teacher, and what is due the regular teacher, being paid upon the basis of \$180.00 a month, and if they do not have the authority to keep this one-fifth difference, who is entitled to the one-fifth.

This question has been in the mind of various individuals in connection with school work, and I felt that these questions were important enough to the general profession of teaching that they should be settled once and for all. I realize that the above instances amount to very little in money, but all parties interested would like to have an opinion, so that it will settle future questions."

The relationship between a school district and a teacher is that of employer and employee and is created by contract. Section 279.12, Code 1946. However, teacher's employment contracts are, subject to statutory modifications, qualifications and prohibitions, controlled by the same principles as other employment contracts. Mutual assent and a meeting of minds is necessary. *Krutsmyer v. School District*, 257 N. W. 797, 219 Iowa 291. Upon failure to perform a teaching contract, the rule of ordinary contracts, insofar as the measure of damage is concerned, is applicable. *Byrne v. School District*, 139 Iowa 618. And being a contract for personal services for a fixed period of time, it is an entire contract and one under which the district could not be compelled nor required to accept a substitute. As a general rule, contracts to perform personal acts are considered as made on the implied condition that the party shall be alive and shall be capable of performing a contract, so that death or disability will operate as a discharge. 13 C. J. 644, paragraph 719; *Hong v. School District* 232 N. W. 329.

In this connection attention is called to the provisions of chapter 112, Acts of the 53rd General Assembly granting sick leave to school employees in terms as follows:

"An Act to allow sick leave for all public school employees, to specify a definite minimum allowance and to provide for an accumulation of unused time within a school district.

Be It Enacted By The General Assembly of the State of Iowa:

Section 1. Public School employees are granted leave of absence for personal illness or injury with full pay in the following minimum amounts:

1. The first year of employment ..... 5 days
2. The second year of employment ..... 6 days
3. The third year of employment ..... 7 days
4. The fourth year of employment ..... 8 days
5. The fifth and subsequent years of employment .....9 days

The above amounts shall apply only to consecutive years of employment in the same school district and unused portions shall be cumulative to a maximum of thirty-five days. The school board shall, in each instance, require such reasonable evidence as it may desire confirming the necessity for such leave of absence."

It should follow,

1. That illness of the teacher will entitle the teacher to sick leave in conformance with the provisions of chapter 112, Acts of the 53rd General Assembly. In the application of the foregoing chapter, time served prior to the effective date of that Act shall be deemed to be time within the Act.

2. Subject to the payments provided by the foregoing chapter 112 of the 53rd General Assembly no additional compensation is due and payable to the teacher during his partial disability.

3. The power to appoint and fix the compensation of the substitute teacher rests in the board.

---

January 25, 1950

**INSANE PERSON: Lien for care by county—not extended to future care.** Counties have no statutory lien on the real estate of insane persons or their spouses for future maintenance by the state or county. It follows that where a husband has a valid divorce with award of his insane wife's real estate, the statutory lien attaches to said real estate only for past care furnished the wife prior to the divorce.

*Mr. Edwin S. Thayer, County Attorney, Des Moines, Iowa:* This is to acknowledge receipt of your recent letter which is as follows:

"The board of supervisors have requested that I obtain your opinion on the following matter. Some years ago a woman who is a resident of Des Moines was committed, by the insane commission, to one of the state hospitals. Up to the time of the commitment, she had lived with her husband and child in Des Moines in a residence property which had been conveyed to herself and husband by warranty deed. As there was nothing in the deed indicating a joint tenancy, I assume that they were tenants in common and each owned a one-half interest in the property. The insane person above referred to has been in the state institutions for several years, but her husband has paid all claims for her support up to date. However, there seems to be no hope of her recovery, and as she is still a young person, future claims will accumulate in considerable amounts.

Some time ago, the husband brought suit for divorce, on grounds claimed to have arisen prior to his wife's insanity and obtained, in the district court of Polk county, a decree. By the terms of the decree, the husband was given the homestead to which reference is above made and a commissioner was appointed to convey title of the property to the husband, and such a deed was executed and approved by the court.

The two questions upon which the board desires answers are as follows:

1. Under the provisions of section 230.25 of the Code, a lien is created on any real estate owned by the person committed to an insane hospital, or owned by either the husband or wife of such person, for any care and support furnished. Under section 230.25, does such lien on her property and that of her husband secure the payment of claims for care and support of the insane person as long as she may be confined to the state institution? To put the matter briefly, does section 230.25 of the Code secure the payment of future claims for assistance to the insane, as well as claims for past assistance?

2. Can the husband, by instituting an action for divorce to which the county cannot appear as a party, obtain such provisions in a decree as will have the effect of releasing the property of the insane wife, or the husband, from the lien for future assistance furnished the insane former wife, if a lien for such future assistance exists?"

The two provisions of our law which are material to the first question you ask appear as sections 230.25 and 230.26, Code of 1946, which respectively provide as follows:

"230.25 LIEN OF ASSISTANCE. Any assistance *furnished* under this chapter shall be and constitute a lien on any real estate owned by the person committed to such institution or owned by either the husband or the wife of such person." (Italics supplied)

"230.26 AUDITOR TO KEEP RECORD. The auditor of each county shall keep an accurate account of the cost of the maintenance of any patient kept in any institution as provided for in this chapter and keep an index of the names of the persons committed from such county and *the indexing and record of the account of such patient in the office of the county auditor shall constitute notice of such lien.*" (Italics supplied)

These provisions first appeared in section 4 of H. F. 540, chapter 98, Acts of the Forty-eighth General Assembly and became effective on publication June 1, 1939. Prior to that time the chapter entitled "Support of Insane" contained no provision for a lien even on the patient's real estate either before suit was commenced or afterwards. It is apparent, therefore, that the statutory lien in question is one which creates a right where no such right existed at common law. Such statutes are required to be strictly construed and a lien created thereby is limited in operation and extent by the terms of the statute. It can arise and be enforced only in the event and under the facts provided for in the statute. See 33 Am. Jur. p. 432, Sec. 26, *Frost v. Atwood*, 73 Mich. 67, 41 N. W. 96 and *Howard v. Burke* 176 Iowa 123, 157 N. W. 744.

By applying the foregoing rule of construction to the expressed provisions of section 230.25, quoted above, it is apparent that the lien existing at any given time on any real estate owned by the person committed to the designated institutions or owned by either the husband or the wife of such person would be to the extent of assistance already *furnished*. This raises the question as to when has a given county *furnished* assistance to a person who was committed to a state hospital for the insane for which they were liable for the support because said person had legal settlement in that county? It cannot be said that the county has furnished any assistance until they have in fact paid out funds for such maintenance. In our opinion this payment would be made when the county treasurer entered a transfer of the amount from the county state institution fund to the general state revenue pursuant to the provisions contained in section 230.21, Code 1946. The amount thus authorized to be transferred is based on notice from the county auditor who, pursuant to the provisions of the same section, has entered the same to the credit of the state in his ledger of state accounts and has also entered an accurate account of the cost of maintenance of the patient and indexed the same as required by the provisions of section 230.26, Code 1946. It is our opinion that at this time the statutory lien comes into being. This conclusion is consistent with the concluding part of section 230.26 which has been italicized in the foregoing quotation of that section. In further support of this conclusion we refer you to the supplemental opinion by our supreme court in the case of *Thode, guardian v. Spofford, et al*, 65 Iowa 294 at 302 and the case of *Harrison Co. v. Dunn*, 84 Iowa 328 at 330. In effect the decisions in these cases hold that the counties are authorized to collect from those

liable and from the property of the patient or spouse only such sums as have already been paid by the county in behalf of the insane patient.

It is our conclusion, therefore, in answer to your first question that the statutory lien provided for by the provisions of section 230.25, Code 1946, does not in any way protect the county with regard to probable or possible future expenditures for maintenance of insane patients who have legal settlement in that county.

In answer to your second inquiry, it is our opinion that the answer to the first question has in effect disposed of this question. In other words, it can be determined at any given time from an examination of the abstract on a particular piece of property whether the county has advanced funds for maintenance of an insane owner or spouse which it has not yet recovered from those persons personally liable for the support of the insane as designated in section 230.15 Code 1946. If there be no such debt then a lien does not exist and it is immaterial whether the title to the real estate passes to others by regular conveyance or whether the relationship of husband and wife is terminated by a valid divorce decree.

---

February 21, 1950

**ROADS AND HIGHWAYS: Patent rights on paving machine developed with state funds.** The state highway commission has plenary power to execute a contract with the inventor of a paving machine (said inventor being an employee and state funds having been used to develop the machine) whereby the state releases all claims to royalties from the sales of such machines in exchange for a grant of license to the use thereof on all public works in Iowa without royalty payments.

*Mr. Sanford Zeigler, Chairman, Iowa State Highway Commission:* You have submitted a proposed patent agreement between James W. Johnson and Blaw-Knox Company accompanied by a release and license running from the state of Iowa and the Iowa state highway commission to Blaw-Knox Company, the gist of which agreement is that Iowa releases to Blaw-Knox Company any possible interest it may have in the Johnson paving machine patents in exchange for a grant by Blaw-Knox Company of a license to use the methods and apparatus embodied in the Johnson patents (if, when and as secured) on public works in Iowa without royalty payments. You are not concerned with the validity of possible patent infringements mentioned in the agreement or with the legal merits of any claim you may have on the Johnson patents on account of the fact that primary road funds were used in the development and testing of the Johnson paving machine. Such claims do exist whether they have merit or not.

The question is whether the highway commission has the power to settle any possible future controversies arising therefrom and bind the state of Iowa by such an agreement through the execution of a contract disposing of such possible claims. If that question should be answered in the negative you may be concerned with the question of whether anyone has that power, and if so, who.

Such questions must have been frequently raised by literal minded individuals and strict constructionists whenever it has been necessary to examine the sections of the Code of Iowa which enumerate the powers and duties of the highway commission. Most of them are to be found in section 307.5, Iowa Code, and the cross references assembled thereunder. By usage and custom the powers exerted and duties performed by the highway commission go far beyond anything there enumerated and justification might be found in that alone, but in the present instance it is the opinion of this office that something more than usage or custom can be found to justify the execution of this contract.

"The construction, improvement and maintenance of highways are embraced within the police power of the state, and are generally regarded as involving, in most respects, the execution of a governmental function, whether done by the state directly or by a subordinate agency. \* \* \* ." 25 Am. Juris. 369, Sec. 54.

"The improvement, maintenance and care of highways are matters under the control of the state in its sovereign capacity, as represented by the legislature, and it is the state's duty to provide for their construction and maintenance, in municipalities as well as in rural sections or communities. Subject to constitutional limitations, the state has full power to construct and maintain highways, or to provide for their construction and maintenance, to choose the means and methods it will employ to accomplish these purposes, and to control the work necessary to their accomplishment, whatsoever the agency employed in carrying out such work. It may either exercise the power directly or delegate it to \* \* \* any properly constituted body. \* \* \* ." 25 Am. Juris. 369 and 370, Sec. 55.

The legislature of Iowa began dealing with the subject of highways almost with the inception of the state and its power in that respect has always been delegated to some subordinate agency or agencies, and this was true long prior to the creation of the Iowa state highway commission as an agency of state government. Under the Code of 1897, which is as far back as the subject need be pursued, we find in the language of section 1482 (section 306.1, Code of 1946) that:

"The board of supervisors has the general supervision of the roads in the county, with power to establish, vacate and change them as herein provided, and to see that the laws in relation to them are carried into effect."

The township trustees were given certain specific duties under section 1582 et seq., of that Code, but the broad power remained in the board of supervisors. No agency other than these two existed at that time with respect to the construction, improvement or maintenance of highways.

As to the powers of the county and the board of supervisors in general we find in section 5128, Code of 1924, that:

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

The section remains unchanged and now appears as section 332.1, Code of Iowa 1946.

Section 5130, Code of 1924, deals with the power of the board of supervisors and in so far as the material hereinafter quoted is concerned it remains unchanged and presently appears in section 332.3, Code of Iowa 1946. It provides:

“The board of supervisors at any regular meeting shall have power:  
\*\*\*\*\*

4. To make such orders concerning the corporate property of the county as it may deem expedient, and not inconsistent with law.

\*\*\*\*\*

6. To represent its county and have the care and management of the property and business thereof in all cases where no other provision is made.”

In the light of these statutory provisions it seems plain that the county board of supervisors had the power to do all things necessary and proper in connection with the construction and maintenance of the highways within the county (except insofar as the power may have been specifically conferred on the township trustees). This certainly included the power to contract with reference thereto. Road machinery at that time may have been simple and primitive as contrasted with more modern types but no one could have successfully challenged the power of the county to buy such machinery, build it, or contract with reference to it.

Such was the situation at the time of the creation of the embryonic highway commission by the 35th G. A., in 1913. That it was then a creature of limited powers cannot be doubted. It was supervisory, investigative, and advisory only, and although additional and specific power was conferred by the legislature from time to time the residue of power with reference to roads remained in the county board of supervisors, and it was not until after the distinction between primary and secondary roads had been made in 1919, by chapter 237 of the 38th G. A., that section 8 of chapter 101 of the 42nd G. A., in 1927, provided as follows:

“The powers and duties of the board of supervisors with respect to the construction and operation of primary roads are hereby transferred to the state highway commission.”

Originally this section immediately preceded what is now section 313.8, Code of Iowa 1946, which section directed the highway commission to proceed with the development of the primary road system, and it is by no means plain what trick of codification now places it in a seemingly unimportant position some thirty-four sections later in the chapter on primary roads. (See section 313.42 Code of 1946). However, the section is still there and on more than one occasion it has been brought forth to justify the broader powers exercised by the highway commission with reference to primary roads.

If there was ever any doubt about the power to purchase or contract highway equipment it should have been removed by the enactment of section 40, Chapter 237 of the 38th G. A., the essential elements of which are still found in sections 307.6 and 313.37, Code of 1946. The latter reads as follows:

"The state highway commission is authorized to purchase road material or road machinery required in the improvement or maintenance of the primary roads, after receiving competitive bids, and to pay for the same out of the primary road funds, and is directed to purchase, rent or lease any machinery or other articles necessary for the use and most economical operation of the field engineering work, the testing of materials, the preparation of plans, and *for all allied purposes, in order to enable the commission to carry out the provisions of this chapter.*"

The primary rule of construction is to determine the legislative intent (50 Am. Juris. 200, Sec. 223). Other rules in connection with statutory interpretation are: (1) When the meaning of a statute cannot be determined with certainty it is proper to take into consideration the object or purpose of the act. (*Truck Lines vs. Iowa Employ.* Sec. Comm. 239 Ia. 752, 32 N. W. (2d) 792); (2) A liberal construction is generally given to statutes having for their end the promotion of important and beneficial public objects, and should receive such construction as will effect their object. (50 Am. Juris. 420, Sec. 395).

The above quoted statute meets all the foregoing tests. The legislative intent is clearly expressed in the title of chapter 313, Iowa Code, 1946, which is "Improvement of Public Roads" and many manifestations of the legislative intent to improve the roads are found in the sections embodied in this chapter and the quoted section directs the commission to do certain things and others which may be for "all allied purposes in order to enable the commission to carry out the provisions of this chapter."

There is some confusion in the quoted statute when taken by itself, for the purchase of road machinery seems to be limited to purchase by public bid, but the license in question is in fact the acquisition of the right to use road machinery.

That chapter 313, Iowa Code, 1946, is for the promotion of important and beneficial public objects is not now open to argument. No one today seriously argues the necessity or desirability of good roads. Since the quoted statute falls within the last category it is entitled to a liberal construction and it would then appear that the securing of the licenses for the machine in question would fall within the "allied purpose" clause of the statute. To deny to the commission the right to use these machines into which it has contributed time, skill and money, and which will add materially to the improvement of the highway system of this state, would be to make the statute a nullity and impair the very purpose of the commission's existence.

The right of the sovereign state of Iowa to contract away a doubtful right to participate in the earnings of one of its employees through possible patent royalties in exchange for a right to use the machine and the methods in the construction of its own highways without the payment of royalties to the patentee ought not to be seriously challenged. It was not reserved by the legislature and the exercise of the power is in no sense against the public interest. The power should be found somewhere and with respect to primary highways it would seem that the highway commission must be the appropriate agency for its exercise.

This office is not unmindful of the provisions of section 7.5 and 307.5 (6), Code of Iowa 1946. The former was enacted in 1913 as chapter 4, Acts of the 35th G. A., and prior to establishment of the highway commission. The latter section was enacted in 1915 as subsection 8 of section 3, chapter 339, Acts of the 36th G. A., and long before the transfer of the powers and duties of the board of supervisors to the state highway commission in 1927. (Sec. 313.42 Code of Iowa 1946). Neither has subsection 10 of section 262.9 Code of Iowa 1946 been ignored. The latter section specifically authorized the state board of education to secure letters patent on the inventions of students, instructors and officials in their employ and provided that such letters patent when secured should be the property of the state. This opinion is not concerned with the right of the highway commission to expend its funds in the acquisition of a patent, or in the employment of counsel for that purpose. That subject is discussed as to the state board of education in 1936 Ops. Atty. Gen. pp. 377 and 389. Such money as has been spent by the highway commission in connection with the Johnson paving machine has been spent in the acquisition of road machinery under the provisions of the statute. Neither the power conferred upon the governor by section 7.5 to direct the attorney general to appear in patent litigation on behalf of a municipality, nor the direction to the highway commission to assist in patent litigation of that character, nor the specific powers conferred on the board of education with reference to the acquisition of patents should be construed as limitations upon the broad powers of the highway commission, formerly exercised by the board of supervisors, to settle a potential controversy by the conveyance of possible future patent rights in exchange for a license to use the machinery and methods of such patent on all highways of and within the state of Iowa. It is a small price to pay for the right to such use.

It is the opinion of this office that the highway commission has the power to execute the contract in question on behalf of the state, but since the office of chairman of the highway commission is not statutory in character the contract should either be signed by all the members of the highway commission or a resolution should be shown authorizing its execution on behalf of the commission by the chairman.

---

**February 23, 1950**

**TAXATION: Agricultural land credit—cemeteries and golf courses not included.** Cemeteries and golf courses are not "agricultural lands" within the meaning of the provisions of the agricultural land tax credit act.

*Mr. Edwin S. Thayer, County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter in which you have submitted the following:

"The county auditor has requested me to obtain your opinion as to the meaning of the provisions of chapter 192 of the acts of the 51st General Assembly, as amended by chapter 152, acts of the 53rd General Assembly, in respect to the following matters.

1. Are persons and corporations owning and operating cemeteries which are not exempt from taxation entitled to credit upon the taxes

levied against such real estate when the property is within a school district in which the millage levy for the general school funds exceeds 15 mills?

2. Are owners of golf courses not located on public property, and therefore subject to taxation, entitled to the tax credit provided for by the foregoing act?

I might say that I have little doubt as to the probable answer to these two questions. However, the auditor thinks, and I agree with him, that it is properly a matter to be settled by your office since the foregoing questions have probably arisen in other counties of the state."

In reply thereto we advise as follows:

"Agricultural lands" as used in the agricultural land credit Act, being chapter 426 of the 1946 Code as amended, is defined in section 426.2, amended by section 10, chapter 152 of the Acts of the 52nd General Assembly as follows:

"'Agricultural lands' as used in this chapter shall mean and include all tracts of land of ten acres or more, and not laid off into lots of less than ten acres or divided by streets and alleys into parcels of less than ten acres, lying within any school corporation in this state and in good faith used for agricultural or horticultural purposes. Any land laid off or platted into lots of less than ten acres belonging to and a part of other lands of more than ten acres and in good faith used for agricultural or horticultural purposes shall be entitled to the benefits of this chapter."

In our approach to this problem we find that in the case of *Laura Dickinson v. C. Fred Porter*, 35 N. W. 2d 66, 73, the agricultural land tax credit is determined to be an exemption statute, or, stated otherwise, that the credit to which eligible persons may be entitled is in law an exemption. Taxation is the rule and exemption is the exception, and consequently, by rule of strict construction, one claiming an exemption from taxation must show himself clearly entitled thereto. See *Ahrwerly v. The Board*, 226 Iowa 229, *Readlyn Hospital v. Hoth*, 223 Iowa 341, *Theta Xi v. Board of Review*, 217 Iowa 1181. With those principles in mind we are posed with the question as to whether persons and corporations owning and operating cemeteries or persons owning golf courses, otherwise subject to taxation, may be entitled to this exemption. In our view the answer to this question revolves around the meaning of the following language in the definition of "agricultural lands" hereinbefore set forth, "and in good faith used for agricultural or horticultural purposes." It is quite apparent that the initial and essential purpose of ownership and operation of cemeteries and golf courses is not agricultural or horticultural. The purpose plainly is the owning and operating of cemeteries in one case and the owning and operating of golf courses in the other case. Concededly, the foregoing purposes may include as an incident thereto a horticultural aspect but we are disposed to the view that a corporation or person devoting lands to a cemetery purpose or a golf course purpose is not good faith use of the land for horticultural purposes within the meaning of the foregoing statute. Stating it otherwise, bearing in mind the burden which must be sustained by a person or corporation to entitle it to the benefit of the agricultural land credit, the use of land for cemetery or golf course

purposes excludes such land from classification as agricultural or horticultural land. That incidental use does not prevail over the dominant purpose, has comparable justification in *Walling v. Rocklin*, 132 Fed. 2d 3, 6, wherein under the federal wage and hour Act there was a claim made that the defendants were wholly exempt therefrom because the employees were employed in agriculture and to a claim there made by the government that this exemption was lost because of the operation of a retail store which handled flowers purchased by the defendants instead of produced by them, the court, after defining agriculture and horticulture as follows:

"The trial court embodied in its conclusions of law certain definitions quoted from Webster's New International Dictionary as follows: 'agriculture. n. The art of science of cultivating the ground, and raising and harvesting crops, often including also feeding, breeding, and management of livestock; tillage, husbandry; farming; in a broader sense, the science and art of production of plants and animals useful to man, including to a variable extent the preparation of these products for man's use and their disposal by marketing or otherwise. In this broad use it includes farming, horticulture, forestry, dairying, sugar making, etc. 'Horticulture n. The cultivation of a garden or orchard; the science and art of growing fruits, vegetables, and flowers or ornamental plants. Horticulture is one of the main divisions of agriculture.' *Walling v. Rocklin*, D. C., 44 F. Supp. 355, 356."

said this:

"It is, however, strenuously argued that defendants have placed themselves beyond the protection of this exemption because they handle flowers purchased by them from other greenhouses. The court found, and the evidence shows, that about 90 per cent to 95 per cent of all sales by defendants is there own production. These purchases are made necessary because of emergencies and are not otherwise made nor do they tend in any manner to produce directly any income to the defendants. The purchases are made for the purpose of serving the requirements of their trade and holding their business. The extent to which this is done is negligible and this practice cannot, we think, convert the business transacted at 507 Pierce Street into an independent business. The business there transacted being an incidental and not an independent business, the occasional purchase and sale of products necessitated by reason of storms, frost, and other emergencies, caused by the natural elements as shown by the record is, we think, quite consistent with the theory that defendants are primarily and exclusively 'engaged in agriculture in the production of flowers, plants, flowering shrubs, ornamental grasses, etc., necessary to meet the wants of purchasers of flowers and floral designs and tributes'. Being so engaged the employees at 507 Pierce Street are likewise so engaged and hence are within the exemption as employees employed in agriculture."

As further justification for this view of the meaning of these terms the supreme court in preserving constitutionality of the agricultural land tax Act in the case of *Dickinson v. Porter*, 35 N. W. 2d 66, 73, said this:

"It is true of course there are common characteristics between agricultural land and other realty in the matter of taxation for school purposes. But we cannot say there are not characteristics which differentiate it from other realty in relation to school taxes. We are not convinced the legislature could not with reason conclude that agricultural land derives less benefit, in enhanced value or otherwise, from

the money raised by school taxes than other real estate. City or town residence property or real estate used for business purposes may well be affected by our school system in quite a different way than land used for agriculture purposes which consists of comparatively large tracts. The legislature could reasonably have concluded that agricultural lands are taxed excessively for school purposes as compared with property devoted to other uses and that such taxes should be equalized in accordance with benefits received."

Evidently the supreme court did not envision agricultural or horticultural land as land devoted to other main uses though they may have some incidental horticultural or agricultural aspects.

---

February 25, 1950

**ROADS AND HIGHWAYS: Secondary road improvement on county line—petition of landowners—payment by both counties.** A county line secondary road may be improved by one county under sections 311.4 and 311.7 of the Code 1950 upon petition of the abutting landowners who have pledged or donated 50 per cent of the cost. The other county may thereupon legally pay its share of the cost not borne by said landowners.

*Mr. R. Everett McFarland, County Attorney, Clarinda, Iowa:* In a recent letter you asked four questions with reference to the secondary road assessment district law, chapter 129, Acts of the 53rd G. A. You speak of having received a copy of the attorney general's opinion dated January 10, 1950, and there are now enclosed to you copies of opinions dated July 29, 1949, October 26, 1949, December 13, 1949 and January 28, 1950. Your question No. I is as follows:

"Abutting property owners on both sides of the county line between Page county and Taylor county have under this new law agreed to deposit 50 per cent of the surfacing cost in a petition filed with the Taylor county board of supervisors, November 27, 1949. This matter was brought to the Page county board's attention February 4th, 1950. The petitioners want the Taylor county board to do this work this year and ask that Page county pay half of Taylor county's construction costs. No petition was filed with Page county.

"The question is, under these circumstances, can Page county legally pay half of the share of the cost of construction not borne by the abutting owners."

The categorical answer to your question is that Page county can legally pay one-half of the share of the cost of construction not borne by the abutting owners.

Section 6 of chapter 129, Acts of the 53rd G. A., which is section 311.4 of the Code 1950, deals with county line roads and reads as follows:

"Whenever it is desired to surface a secondary road on a county line, as a secondary road assessment district project, the board of supervisors of any county concerned may establish an assessment district in its county, and levy and collect special assessments for the payment of that portion of the estimated cost of such project assessable against lands in that county. Each county shall pay its share of the cost of said project as provided in this act, *in the same manner as though the project were wholly within that county.*"

That this is an enforceable provision of the act would seem apparent from the provisions of sections 309.68, 309.69, 309.70 and 309.71, Code of Iowa 1946. These sections of the Code are not abrogated by chapter 129 and they contemplate that boards of supervisors shall "adopt plans and specifications for road \* \* \* \* construction \* \* \* \* upon highways along \* \* \* county boundary lines, and make an equitable division between said counties of the cost and work attending the execution of such plans and specifications." If these boards fail to perform this duty and to agree the state highway commission may on its own motion or upon the appeal of one of the boards fix a time for hearing and investigate all questions pertaining thereto, after which their decision shall be certified to the boards. If the boards then fail for a period of sixty days to comply with the decision the commission may proceed with the improvement, make an apportionment of the costs, audit the bills, send the same to the auditors of the respective counties who are required to draw warrants for such amounts. The foregoing is paraphrased from the language of the statutes to which reference is made.

Your question No. II is hypothetical in character. The problem is not before you because in the instance that you have the 50 per cent of the fund has been subscribed by the abutting owners. There is no occasion for the establishment of an assessment district under these circumstances. This legislation, chapter 129 has proved so controversial that this office declines to answer hypothetical questions with reference to it, but must insist that the precise facts in each case be presented.

This likewise appears to be true as to your question No. III. If in fact, you have been confronted with it the facts should be stated.

Your question No. IV is as follows:

"Does the new surfacing law involving 35 per cent of local construction funds allocated to secondary road construction, pertain to the 35 per cent of the county as a whole or is it limited in each township to that township's proportionate share of the county funds; and in case there are more petitions in one township than can be financed from that township's proportionate share of the local construction fund; will the county as a whole be obligated to that township to the extent that one township could use all of the county's local construction money?"

This question was answered in point No. 3 in the attorney general's opinion of October 26, 1949, a copy of which is transmitted to you.

---

March 1, 1950

**ROADS AND HIGHWAYS: Secondary road improvement upon petition—grading mandatory.** Upon the filing of a petition signed by the owners of 75 per cent of lands adjacent to or abutting upon a secondary road the board of supervisors must proceed to bring such road to permanent grade before surfacing in order to comply with section 9 of chapter 129, Acts 53rd General Assembly. (Section 311.7 Code 1950).

*Mr. Charles N. Pettit, County Attorney, Bloomfield, Iowa:* In a recent letter you point out that in Davis county several petitions were filed prior to Dec. 1, 1949, under chapter 129, Acts of the 53rd G. A., for the improving by graveling or other suitable surfacing of secondary

roads that have not been built to permanent grade. Predicated on that set of facts you ask:

"If a petition is filed under section 9, chapter 129, Acts of the 53rd G. A., to surface a road that has not been built to permanent grade, must the board of supervisors proceed to build said road to permanent grade, in order to comply with section 9 of chapter 129, Acts of the 53rd G. A.?"

In thinking about what may or may not be done by the board of supervisors with reference to a petition for a secondary road assessment district it is essential to distinguish between the situation presented in a petition "signed by 35 per cent of the owners of the lands within such proposed district" under section 8, chapter 129, Acts of the 53rd G. A., (section 311.6 Code 1950) and that propounded "when any owner or group of owners of not less than 75 per cent of the lands \* \* \* \* petition \* \* \* \* for \* \* \* \* the surfacing" under section 9, chapter 129 Acts of the 53rd G. A., (section 311.7 Code 1950). Under the former the board of supervisors may exercise discretion as to the establishment of the district. "It may reject, approve, or modify and approve said proposal." (Section 17, chapter 129 Acts of the 53rd G. A., section 311.15 Code 1950.) Under the latter it is required to extend a preference to the project (section 9, chapter 129, Acts of the 53rd G. A.; section 311.7 Code 1950) and to "proceed during the ensuing year with the construction and completion of said project under the same procedure as is prescribed generally for the improvement of secondary roads. \* \* \* \*"

Section 24, chapter 129, Acts of the 53rd G. A., (section 311.22 Code 1950) provides that:

"Any such secondary road shall be built to permanent grade and drained in a manner approved by the county engineer before being surfaced as provided in this act."

In the event the district is established in accordance with the prayer of the petition the above requirement affects the first situation, arising under section 8, chapter 129, Acts of the 53rd G. A. (section 311.6 Code 1950) and it is apparently the reason why the engineer is required to advise the board of supervisors on that subject in the report that he has to make as contemplated by section 10 (d) chapter 129, Acts of the 53rd G. A. (section 311.8 Code 1950). It likewise affects project required to be given preference under section 9, chapter 129, Acts of the 53rd G. A. (section 311.7 Code 1950). This office has heretofore held that: "The cost which is required to be assessed against the lands included in a secondary road assessment district does not include the cost of bringing the road to permanent grade or the cost of draining it. (O. A. G. Oct. 26, 1949).

The controversy between the proponents of chapter 129, Acts of the 53rd G. A., and numerous of the several county boards of supervisors did not stop with the enactment of this legislation. Its continuance is evidenced by the numerous demands on this office for interpretation and clarification. In the opinions it has rendered heretofore, as in this instance, effort has been made to ascertain the intent of the legislature.

Much has been made by opponents of the measure of the over-riding and in some instances the virtual destruction of the secondary road program established by the board of approval or by the board of supervisors as the duly elected officials of the county. The same argument is again urged in this instance and it is pointed out by the objectors that requiring the board to grade and drain before surfacing will the sooner exhaust the secondary road fund and the quicker destroy the possibility of carrying out the program adopted under existing law. However persuasive that argument might otherwise be it would not ordinarily be contended, and certainly not successfully asserted that the legislature did not have the power to interfere with or withdraw the discretion previously conferred on the board of supervisors. The effect of some of the decisions heretofore rendered by this office has been to hold that this discretion was interfered with by the enactment of chapter 129, Acts of the 53rd G. A., (Point III, O. A. G. Jan. 10, 1950). On the reasonableness of such interference it is respectfully submitted that the preference is made contingent on the petitioners substantially augmenting the amount of money otherwise available in the county for secondary road improvement.

It is the opinion of this office that upon the filing of a petition signed by the owners of 75 per cent of lands adjacent to or abutting upon any secondary road or roads the board of supervisors must proceed to bring such road to permanent grade before surfacing it in order to comply with section 9 of chapter 129, Acts of the 53rd G. A.

You likewise inquire as to the standard of grade and drainage to which a road must be brought before being surfaced under the provisions of chapter 129, Acts of the 53rd G. A. This would depend on the type of road with which you are concerned. Under section 310.13, Code of 1946, plans for a farm-to-market road project must be approved by the highway commission, and it follows that the commission may prescribe the standard according to which the road must be graded and drained.

With reference to county roads section 309.35, Code of 1946, as amended by section 1, chapter 160, Acts of the 52d G. A. and section 1, chapter 124, Acts of the 53rd G. A. requires that:

“Before proceeding to the construction of any road or roads included in said program (county road program) where the grading, exclusive of bridges and culverts, is estimated to cost over three thousand dollars per mile, the county engineer shall cause detailed surveys and plans for said road or roads to be prepared.”

Section 309.36, Code of 1946, provides as follows:

“The engineer’s survey shall be on the basis of the permanent improvement of said roads, as to bridge, culvert, tile, and road work.”

We extract section 309.37, Code of 1946 as follows:

“Said survey shall show:

\*\*\*\*

2. An accurate plan and profile of the roads surveyed, showing (a) cuts and fills, (b) outline of grades, (c) all existing permanent bridges,

culverts and grades, and (d) proper bench marks on each bridge and culvert.

3. The drainage, both surface and subdrainage, necessary to prepare said roads for complete construction.

4. The location of all lines of tile and size thereof.

5. All necessary bridges and culverts, their length, height, and width and foundation soundings.

\*\*\*\*”

If a road comes within the foregoing classification and the survey has been made then whatever the plan or profile referred to in the last quoted section indicates is the standard to which the road must be graded and drained. As to roads not falling into the foregoing category the engineer and the board of supervisors have wide latitude in prescribing the standard in accordance with which the road must be graded and drained before being surfaced as required by chapter 129, Acts of the 53rd G. A. It would not seem necessary to apply the same standard to grading and draining a little traveled stub or an accommodate road as is applied to a heavily traveled farm-to-market road or to a county trunk road.

---

March 3, 1950

**CITIES AND TOWNS: Manager plan—appointive officers.** The offices of city engineer, city treasurer and city auditor under the city manager plan of organization under chapter 419, Code 1946, are filled by appointment by the city manager.

*Mr. Don H. Jackson, County Attorney, Council Bluffs, Iowa:* We acknowledge receipt of yours of the 22nd inst. in which you have attached thereto letter of the city treasurer, city engineer and city auditor of the city of Council Bluffs respecting their status under a city manager plan of government by election. Their letter to you follows:

“We are respectively city treasurer, city engineer and city auditor of the city of Council Bluffs, holding office by virtue of an election.

Our term of office will expire the first Monday of April, 1950.

In view of the fact that the city of Council Bluffs, Iowa, has already held an election under the provisions of chapter 419, Code of Iowa 1946, and at such election adopted a city manager plan of government, a question has arisen as to our status.

A new city council will be elected on March 27, 1950, at which time five new councilmen will be elected, and on the first Monday of April, they will organize as a council and elect one of their number as chairman and presiding officer, who shall be designated as mayor of the city of Council Bluffs, Iowa.

Thereafter, the mayor and council will appoint a city manager who will be the administrative head of the municipal government. (Section 419.51 Code of Iowa 1946).

Section 419.15, Code of Iowa 1946, provides for the ‘termination of minor positions’ and provides that the terms of office of all other officers \* \* \* whether elected or appointed, and of all employees of such city \* \* \*, shall be subject to the action of the council or manager.

### CITY TREASURER

As city treasurer, in view of the adoption of the city manager plan of government, I am in a quandary as to whether or not I am required to run for the office of city treasurer. As city treasurer, under the statute, I post a bond and have possession of all city funds, including funds of the park board, water board, library board and pension board. These funds are required to be kept in the treasurer's hands by statute.

Section 419.65, Code of Iowa 1946, relating to 'statutes made applicable' provides 'all laws governing cities of the first class \* \* \* not inconsistent with the provisions of this chapter, shall apply to and be in force of every city of the first class organized hereunder \* \* \*.'

I respectfully request that you obtain from the attorney general an opinion as to whether or not I am required to be elected by popular vote if I am to remain as city treasurer of the city of Council Bluffs, Iowa.

### CITY ENGINEER

The city manager has certain duties prescribed in section 419.55. Under subsection 7, he has power to employ and discharge all employees of the city and fix their compensation. Under subsection 9 thereof, he is given power to supervise and manage all public improvements, sewers, etc. Under subsection 11 thereof, he is placed in charge of the making and preservation of all surveys, maps, plans, etc. Under subsection 15, it is provided that he 'shall take active control of \* \* \* engineering departments of the city and employ such assistants \* \* \* as \* \* \* deemed advisable.

As city engineer, do I have to be elected by popular vote?

### CITY AUDITOR

Under section 419.55, relating to the duties of city manager as it affects the office of city auditor, in addition to the above applicable sections, it is provided in subsection 17 thereof that 'he shall keep the council fully advised of the financial and other conditions of the city \* \* \* and of its future needs.'

Under subsection 18 thereof, it is provided that a city manager 'shall have power to appoint or employ persons to fill all places for which no other mode of appointment is provided.' Will I, as city auditor, have to be elected by popular vote?"

In reply to the foregoing we refer you to the following statutes which are pertinent to a conclusion of the questions submitted. Section 419.37, being a section contained in chapter 419, prescribing the organization and administrative and appointive features of the city manager plan by election, provides as follows:

"The council shall, at the first meeting after its members are elected, appoint a clerk, and at such meeting, or as soon thereafter as practicable, appoint a police judge or magistrate, a solicitor, and the members of the library board as the terms of office of the members of said board shall expire. It may also appoint a corporation counsel and assistant solicitors, if deemed advisable."

According to the terms of that section the city council under the manager plan is directed to appoint a clerk, a police judge or magistrate, a solicitor, and members of the library board, and may appoint a corporation counsel and assistant solicitors. The specification by the foregoing statute of the officers authorized and directed to be appointed

by the council would, unless otherwise provided, exclude from the appointing power of the council, an engineer, a city auditor and a city treasurer. Insofar as the power of the city manager is concerned to appoint persons to fill such offices the statute bestows no express authority. We are of the opinion, however, that such power and authority is necessarily implied. Section 419.55, prescribing the duties of the manager does provide under subsection 5 thereof that he shall

“supervise and direct the official conduct of all appointive officers of the city or town, except the clerk, police judge or magistrate, solicitor, corporation counsel, board of review, and members of the library board.” By the terms of the foregoing statute the city manager’s supervision and direction of appointive officers of the city would exclude from such field the clerk, police judge or magistrate, solicitor, corporation counsel and members of the library board, who are by section 419.37 appointees of the city council. However, in that connection, reference is made to section 419.55, subsection 18, which endows the manager with the power “to appoint or employ persons to fill all places for which no other mode of appointment is provided.” In our view section 419.55, subsection 15, which provides as follows:

“The duties of the manager shall be as follows: \* \* \* (15) He shall take active control of the police, fire, and engineering departments of the city or town, and employ such assistants and employees therein as by him shall be deemed advisable.”

and of section 419.58 which imposes upon the manager the following duties:

“He shall make to the council an itemized monthly report in writing, showing in detail the receipts and disbursements for the preceding month, and such report shall be made by him not later than the tenth day of each month. The reports so made, after having been passed upon by the council, shall be published each month in the official newspapers of the city or town.”

confer upon the manager both duty and authority. And such authority necessarily includes implied power in the manager, in order to effectuate the duties conferred upon him, to appoint an engineer, city auditor and city treasurer. Nor is this power negated by any provisions of law governing the powers effecting the organization and administration of cities under the general laws of the state. The legislature has made provision in the event of any conflict between the statutes controlling the organization and administration of city manager cities by election and statutes controlling cities governed by the general laws of the state. This statute is section 419.65 and provides as follows:

“All laws governing cities of the first class, organized under the general laws of the state, not inconsistent with the provisions of this chapter, shall apply to and be in force in every city of the first class organized hereunder; all laws governing cities of the second class organized under the general laws of the state, not inconsistent with the provisions of this chapter, shall apply to and be in force in every city of the second class organized hereunder; and all laws governing incorporated towns, not inconsistent with the provisions of this chapter, shall apply to and be in force in every such town organized hereunder.”

Clearly the "laws governing cities of the first class", etc., relates to powers granted municipalities in the fields of police power, taxation and eminent domain and not to administrative officers of the corporation. As to these officers chapter 419 controls.

By reason of the foregoing we are of the opinion therefore that the offices of city engineer, city treasurer and city auditor under a city manager plan organized under chapter 419, Code 1946 are filled by appointment by the city manager.

---

March 14, 1950

**STATE OFFICERS AND DEPARTMENTS: Resources council—vacancies do not change majority requirements.** The statute creating the Iowa natural resources council provides that a majority of the council shall constitute a quorum and a majority concurrence shall be required to determine any question. Therefore, the council consisting of seven members, the majority in each instance consists of four and it matters not that there may be vacancies in the membership.

*Mr. G. L. Ziemer, Director, Iowa Natural Resources Council:* This will acknowledge receipt of yours of the 8th inst. in which you have submitted the following:

"Chapter 203, Acts of the 53rd General Assembly provides, in section 4, that the Iowa natural resources council shall consist of seven members. Two vacancies in the council membership by resignations have not yet been filled by the governor leaving a council of five members. The number of these five members necessary to constitute a quorum and a majority is in question.

The Iowa natural resources council has directed me to request an official opinion on section 8 of the cited Act as relates to (1) the number of members necessary to constitute a quorum, and, (2) the number of members necessary to constitute a majority, both opinions pertaining to our present situation of a council composed of five members."

In reply thereto we would advise you as follows:

It is the rule that unless definition is made by the statute or constitution creating a representative body, of what number shall constitute a quorum and what number shall constitute a majority for the transaction of business, a majority of the members shall constitute a quorum and a majority of such quorum may act. See Words and Phrases, Permanent Edition, Vol. 35, Page 672.

Application of the foregoing rule to the Iowa natural resources council finds that the legislature, by chapter 203, Acts of the 53rd General Assembly which created the council, has defined in plain language what number of members of the council shall constitute a quorum and what number of members shall constitute a majority for the transaction of business. Section 8 of the foregoing chapter 203 provides as follows:

"The majority of the council shall constitute a quorum and the concurrence of a majority of the council in any manner within their duties shall be required for its determination."

The foregoing statutory definition accords with the general rule of what constitutes a quorum and majority of any board or like governmental organizations even though there may be a vacancy on the board brought about by death, resignation, failure to qualify, or other cause. *West v. Stephenson*, 151 S. E. 853, 855 (West Virginia).

Accordingly, in answer to your questions, we would advise you

(1) That the number of members necessary to constitute a quorum is a majority of the council of seven members, and such majority therefore is four.

(2) In answer to your query number 2, we would advise you that the concurrence of a majority of the council requires the concurrence of four members of the council of seven members. The fact that there are two vacancies in the membership does not vary the foregoing conclusion.

---

**March 16, 1950**

**VETERANS: Educational aid to orphans—residence requirements.** The two years residence requirement for educational aid to orphans of veterans means the two years immediately preceding the application.

*Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board:* This will acknowledge receipt of yours of the 24th ult. in which you have submitted the following:

“This office is desirous of an official opinion clarifying chapter 35, section 35.9 of the 1946 Code of Iowa and amended by the 52nd General Assembly.

“Said bonus board is authorized to expend not to exceed three hundred dollars per year for any one child who shall have lived in the state of Iowa for two years preceding application for aid hereunder. \* \* \*”

Does this refer to any two years or the two years immediately preceding application?”

In reply to the foregoing we would advise you that under the foregoing statute two years residence in the state of Iowa prerequisite to the receipt of the benefits is restricted to the two years immediately preceding the application.

---

**March 16, 1950**

**ROADS AND HIGHWAYS: Secondary roads—assessment districts—bridges—interest charges.** A petition for surfacing of a secondary road, filed under the provisions of chapter 311, Code 1950, which road includes bridges not in service when the petition was filed, would not be entitled to a preference.

When an assessment district is established under said Act the six per cent interest charge starts 20 days after the adoption of the resolution ordering the levy of assessments.

*Mr. Grant L. Hayes, County Attorney, Mount Ayr, Iowa:*

## I.

In your letter dated March 3rd, 1950, you say:

"Ringgold county has on file a petition signed by 75 per cent of the adjacent or abutting landowners for three miles of road. On this road there are two river bridges, one approximately 150 feet in length, and the other approximately 250 feet in length. Neither bridge is in service at the present time, due to excessive flood damage. The county would not have sufficient funds to construct these bridges and, under such circumstances, does the county have the right, on final hearing, to reject this petition on grounds and for reasons that there would be insufficient funds to construct the two bridges."

It is the opinion of this office that the application of chapter 129, Acts of the 53rd G. A., must be predicated on the existence of a usable road, that is, a road requiring only grading, draining and surfacing to take it "out of the mud."

A petition for the surfacing of a road, filed under the provisions of chapter 129, Acts of the 53rd G. A., which includes bridges not in service when said petition was filed, would not be entitled to a preference. It is therefore necessary to secure the action of the board of supervisors to put such bridges in a usable condition prior to the filing of a petition by 75 per cent of the adjacent or abutting landowners before such petition receives the preference and priority provided by this act.

## II.

In your letter you likewise say:

"The board of supervisors require that 1000 cubic yards of surfacing material per mile shall apply to petition roads. A two-mile road, embraced in petition now on file under the above chapter, was surfaced by the adjacent and abutting landowners under the 1947 statute. Can the board of supervisors permit or allow a credit for the surfacing done under the former law to these landowners so petitioning, and use less than the above 1000 yards per mile of surfacing material?"

It is not apparent why this inquiry should be made the subject of an attorney general's opinion. In so far as your statement of the facts goes the requirement as to the number of cubic yards of surfacing material per mile is imposed by the board of supervisors and it would seem that there is no particular reason why the board may not be permitted to modify its own requirement.

## III.

It is assumed that you are actually confronted with a situation which would present the question that you propound in the following language:

"When an assessment district is established does the 6 per cent interest charge start 20 days after the final hearing by the board of supervisors, and if not, when does it start?"

The matter is covered by section 18, chapter 129, Acts of the 53rd G. A. (section 311.16, Code 1950) the sense of which is that on final hearing the board of supervisors is required to do three things:

1. To hear and determine all objections filed.
2. To establish the district.
3. To levy the assessments.

It is apparent that the determination of these several things might not be immediately accomplished, but it is likewise apparent that when the decision is made it will take the form of a resolution adopted by the board of supervisors announcing the conclusions of the board and levying the assessments. The running of interest in the language of the statute commences "twenty days from the date of said levy". This would be the date of the adoption of the resolution levying the assessments whether they occurred at the final hearing or at an adjourned, a regular, or even a special meeting of the board of supervisors.

---

**March 23, 1950**

**ELECTIONS: Compensation of primary election boards.** The Act increasing the compensation of judges and clerks at general elections did not change such compensation of election boards at primary elections.

*Honorable C. B. Akers, Auditor of State, Attention Mr. L. I. Truax, Supervisor:* This will acknowledge receipt of your letter of March 20th in which you have submitted the following:

"We are in receipt of the following inquiry from the county auditor of Page county:

"The 53rd General Assembly amended section 49.20 of the Code so that members of the election boards in general elections will receive 75c per hour; there is a specific section governing primary elections, (section 43.32) which was not changed. The question is would members of the election boards in primary elections receive 75c per hour or would they continue to receive the old compensation of 50c per hour."

In reply to the foregoing we advise you as follows:

Chapter 53, Acts of the 53rd General Assembly, amended section 49.20, Code 1946, in terms as follows:

"An Act to amend section forty-nine point twenty (49.20), Code 1946, relating to the compensation paid to members of election boards.

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. Section forty-nine point twenty (49.20), Code 1946, is hereby amended by striking from line two (2) the following: 'fifty cents', and inserting in lieu thereof the following: 'seventy-five cents'." and section 49.20 as amended by the foregoing now provides as follows:

"The members of election boards shall receive seventy-five cents per hour while engaged in the discharge of their duties. Compensation shall be paid to members of election boards only after the vote has been canvassed and it has been determined in the course of such canvass that the pollbook jurat has been properly executed by the election board."

In connection with the foregoing statute with respect to the expenses of primary elections, section 43.32, Code 1946, provides as follows:

"The expenses of primary elections shall be paid in the same manner as expenses of general elections. The compensation of judges and clerks shall be fifty cents per hour."

From the foregoing it is clear that in so far as judges and clerks of election boards at any general or city election are concerned, they are entitled to receive seventy-five cents per hour while engaged in the discharge of their duties.

The legislature did not amend the foregoing section 43.32 and its previous direction contained therein, "the expenses of primary elections shall be paid in the same manner as expenses of general elections" merely prescribes the procedure for their payment. Such direction does not carry with it fixing the amount of compensation of judges and clerks. This is specifically fixed by the statute at fifty cents per hour and remains unchanged by the legislature.

---

**March 23, 1950**

**SCHOOLS AND SCHOOL DISTRICTS: Adjoining districts exchanging pupils.** Two adjacent consolidated schools each maintaining a grade school and a high school may contract with each other so that the first may close its school facilities in certain grades and send the pupils in these grades to the second school and the second close its high school and send said pupils to the first district.

*Mr. Ralph Bastian, County Attorney, Fort Dodge, Iowa:* This will acknowledge receipt of yours of the 6th inst. with accompanying letter of J. Clare Robinson, county superintendent, both of which are exhibited as follows:

"The county superintendent of schools would like an opinion with reference to two neighboring schools cooperating in the education of different grades.

I am enclosing a letter to me which is self-explanatory, and I would appreciate it if you could give me an official opinion on this matter."

"We respectfully request an official opinion to the questions listed in this letter.

Two adjacent consolidated schools in Webster county, Harcourt and Lanyon, each maintaining a 12-year high school, wish to each close part of their school facilities and send the pupils in the closed grades to the other school. Tentative plans are for Harcourt to close its lower six grades and transport the pupils to Lanyon, and for Lanyon to close grades 7—12 and transport these pupils to Harcourt.

May each district if the board of education is willing pay the other district the actual per pupil cost of tuition for its resident pupils being educated in the other district's school?

Reference is made to chapter 114, Acts of the 53rd General Assembly of Iowa. If the high school is closed under the authority given in section 274.15, Code of Iowa, 1946, would the resident district be relieved of the responsibility of paying tuition for any high school student who attended an approved high school other than the one with which a contract for school facilities was made?"

There appear to be two statutes by which school facilities are furnished to residents of a district where the board of directors of such district have by record action discontinued any or all of its school facilities. The term, educational facilities, as used in consideration of this matter includes all expenses for education rather than narrowly construing to mean only necessary equipment of a furnished school building. See Board of Education of Woodward v. Board of Education 94 SW 2d 687.

Section 274.15 prescribes one method and in terms that section provides:

"Any school district by record action taken by its board of directors and approved by the county board of education may discontinue *any or all* of its educational facilities and contract with any school district maintaining approved schools to furnish such facilities, provided it is determined by the district and the county board of education that the per pupil cost of tuition and transportation to be contracted for does not exceed the per pupil cost of maintaining its own educational facilities. In the event the total per pupil cost of tuition and transportation proposed to be contracted for exceeds the total per pupil cost of maintaining like facilities in its own schools, the district may nevertheless contract with another district, maintaining approved schools, to furnish such facilities provided the parents or the persons standing in loco parentis to the pupils involved will agree to share the pro rata amount of such excess cost. Contracts made under the provisions hereof shall not be made for a period to exceed one school year."

and section 13 of chapter 116 Acts of the 53rd General Assembly prescribes the other method and in terms provides as follows:

"Section two hundred eighty-two point seven (282.7), Code 1946, is hereby repealed and the following enacted in lieu thereof:

"The board of directors in any school district may by record action discontinue *any or all* of its school facilities. When such action has been taken, the board shall designate an appropriate approved public school or schools for attendance. Tuition shall be paid by the resident district as required in section two hundred seventy-nine point eighteen (279.18) and section two hundred eighty-two point twenty (282.20), Code 1946, for all pupils attending designated school, except that high school pupils may attend school of choice and be entitled to tuition, but must attend school designated for attendance to qualify for transportation. Designations shall be made as provided in chapter two hundred eighty-five (285)."

Under the foregoing section 274.15, a board of directors of a school district with the approval of the county board of education may discontinue any or all of its educational facilities which would include the discontinuance of *any or all* of its elementary school or of its high school and may contract with any other school district that maintains an approved elementary school or high school to furnish to the discontinuing district its school facilities provided that the discontinuing district and the county board of education determine that the per pupil cost of tuition and transportation to the receiving school does not exceed the per pupil cost of maintaining the educational facilities of the discontinuing district, and even if there should be an excess per pupil cost, the discontinuance of the school facilities by the one and the furnishing of like facilities by the other could be effectuated if the parents

or the persons standing in loco parentis to the pupils residing in the discontinuing district agree to share the pro rata amount of such excess cost. The tuition cost under the foregoing section will be measured by the provisions of chapter 114 Acts of the 53rd General Assembly, in terms as follows:

"An Act providing that the superintendent of public instruction shall determine the maximum tuition rate to be charged for students, elementary or high school residing within another school district or corporation; and to amend certain existing Code sections pertaining to tuitions.

*Be It Enacted by the General Assembly of the State of Iowa:*

Section 1. The superintendent of public instruction shall determine a maximum tuition rate to be charged for students, elementary or high school, residing within another school district or corporation. This maximum tuition rate shall be determined in the following manner: Classify all schools, elementary and secondary, located in school districts or corporations with populations of one thousand (1,000) to fourteen thousand nine hundred ninety-nine (14,999), inclusive, according to monthly per pupil costs. In such classification the school that falls within the seventy-fifth (75th) percentile of the monthly per pupil cost shall form the basis. Using this figure the elementary and high school tuition rates for the succeeding year shall be determined so that the rate for the high school students is one and seventy-five hundredths (1.75) times the rate for the elementary student.

The superintendent of public instruction shall, after July 1st but before September 1st of each year, notify every school in the state, affected by this section, what the computed maximum tuition rate shall be for the ensuing year.

Nothing in this section shall prevent the corporation or district in which the student resides from paying a tuition in excess of the maximum computed tuition rates, if the actual per pupil cost so warrants, but in no case may the receiving district or corporation demand more than the maximum rate.

Sec. 2. Amend section two hundred seventy-nine point eighteen (279.18) by striking in line ten (10) 'ten dollars per month,' and inserting in lieu thereof: 'the maximum tuition rate as determined by the superintendent of public instruction, as provided in this Act.'

Sec. 3. Amend section two hundred eighty-two point twenty (282.20) by striking in lines twelve (12) and thirteen (13) the words 'seventeen dollars per month,' and inserting in lieu thereof the following: 'the maximum tuition rate as determined by the superintendent of public instruction as provided in this Act.'"

We are of the opinion under the foregoing section 274.15 a contract made under its terms would operate mandatorily upon the resident elementary school children of the discontinuing district with the result that failure upon their part to attend the school for their attendance under the contract, would relieve the discontinuing district of its obligation to provide educational facilities and transportation, or in other words, a child or children in elementary grades electing to attend another school than the one contracted for, must pay his own tuition and his own transportation charges. A high school student failing to attend the school contracted with would still be entitled to payment of his

tuition under the provisions of section 282.17, Code 1946, without qualification of the high school he may elect to attend. Section 282.17 provides as follows:

“Any person of school age who is a resident of a school corporation which does not offer a four-year high school course, and who has completed the course as approved by the department of public instruction for such corporation shall be permitted to attend any public high school in the state approved in like manner that will receive him, or may attend any public high school of equivalent standing in an adjoining state, if said school in the adjoining state be nearer to the pupil’s residence than any approved public high school in the state of Iowa, but no board shall pay tuition to a high school outside the state for pupils whose actual residence is nearer to an approved high school in Iowa when measured by the nearest traveled public road.”

It is to be noted also that a contract made thereunder shall exist for only one school year and is not a continuing contract.

In so far as the other method of providing facilities is concerned under the authority of section 13, chapter 116, we would advise you that the board of directors may by record action likewise discontinue any or all of its elementary or high school grades and designate an appropriate public school for attendance of its elementary students or for attendance of its high school students.

Tuition to be paid by the sending district is reckoned pursuant to the term of chapter 114, Acts of the 53rd General Assembly heretofore exhibited in this opinion. Discontinuance under this section and a failure of the children in the elementary grades to attend the designated school will result in the sending district being relieved of the payment of either tuition or transportation for such children so failing to attend the designated school. In so far as high school pupils failing to attend the designated high school, we are of the opinion that failure of such pupils to attend the designated school results in relieving the sending school from providing or paying for transportation, but such high school student would still be entitled to the payment of his tuition at the rate fixed by law.

---

April 20, 1950

**MINES AND MINING: Strip mining—replacement of top soil.** A county board of supervisors may establish a soil conservation district where strip mining is in operation and by its resolution require the top soil to be replaced by the mine operator but such requirement cannot be retroactive.

*Mr. William W. Hardin, County Attorney, Knoxville, Iowa:* We have your recent request for an official opinion which is as follows:

“I have been requested by the board of supervisors for Marion county, Iowa, to obtain an official opinion from you concerning chapter 204, Acts of the 53rd General Assembly.

The provisions of section 2, chapter 204, Acts of the 53rd General Assembly vest power and authority in the board of supervisors of any county to establish districts within the county having for its purpose

soil conservation in mining areas. It is further provided therein that the board of supervisors in establishing any such district, has authority to 'provide that anyone engaged in removing the surface soil over any bed or strata of coal in such district for the purpose of obtaining such coal shall replace the surface soil as nearly as practicable to its original position, and provide that, upon abandonment of such removal operation, all surface soil shall be so replaced.' It is then provided that the provisions of said section 2 shall apply only to surface soil so removed after the effective date of the act, and then only if it is essential for the accomplishment of the purpose of soil conservation and flood control within the purview of the act. The act having no publication clause apparently became effective by operation of law July 4, 1949. My inquiry is whether the provisions of said section grant to the board of supervisors power and authority to enact a retroactive resolution so as to impose a duty or liability upon one engaged in such mining operation with regard to surface soil removed prior to the effective date of the resolution adopted by the board."

The portion of section 2, chapter 204, Acts of the 53rd General Assembly to which you refer is as follows:

"\* \* \*. Such board shall also have jurisdiction, power and authority at any regular, special or adjourned session to establish, in the same manner that the districts hereinabove referred to are established, districts having for their purpose soil conservation in mining areas within the county, and provide that anyone engaged in removing the surface soil over any bed or strata of coal in such district for the purpose of obtaining such coal shall replace the surface soil as nearly as practicable to its original position, and provide that, upon abandonment of such removal operation, all surface soil shall be so replaced. This section shall apply only to surface soil so removed after the effective date of this act, and then only if it is essential for the accomplishment of the purpose of soil conservation and flood control within the purview of this act."

It is universally held that the board of supervisors of a county has only such powers as are expressly conferred by statute, or necessarily implied from the power so conferred. See *Hilgers v. Woodbury County*, 200 Iowa 1318. An examination of the provisions of section 332.3, Code 1946, which defines various general powers of boards of supervisors, as well as all other provisions of existing statutes to which our attention has been directed reveals that they do not touch on the subject matter contained in chapter 204, Acts of the 53rd General Assembly. Therefore, the answer to your inquiry must come from an interpretation of the provisions of that part of section 2 of chapter 204 quoted above. Does the language therein contained justify a construction to the effect that the board of supervisors in any county is thereby authorized to adopt a resolution retroactive in its effect so as to impose duties or obligations with regard to the replacement of soil removed prior to the establishment of a given district and the adoption of a resolution by the board as contemplated in the act?

There are no expressed words in the act granting any such authority. Can it then be said that such must necessarily be implied from the power and authority which is conferred on the board by the act? Through necessity the words of the act itself look to the future. The act contemplates first, that the board of supervisors will determine

the necessity and advisability of establishing a district having for its purpose soil conservation in a given mining area and, secondly, that as a means of carrying out the expressed purpose of the act the board will adopt an appropriate resolution imposing the duty or obligation to replace the soil. The language of the act in designating the power and authority vested in the board of supervisors is in the present tense. This is particularly true in that portion which authorizes the board of supervisors to provide that *anyone engaged* in removing the surface soil shall replace the same, etc. If the board of supervisors could impose the duty or obligation only on those operators *then engaged* in such method of mining it would be powerless with regard to acting as to any operator who had since ceased to be engaged in the removal of surface soil over a bed of coal. Yet, in the latter instance it is conceivable that an operator might have carried on considerable activity subsequent to July 4, 1949, the effective date of the act but had discontinued operation prior to the establishment of the district.

The only remaining language in the above quoted portion of section 2 which might be contended as a basis for implying the existence of authority in the board of supervisors to pass a resolution retroactive in its effect as to soil removed prior thereto would be that portion of the sentence providing as follows:

“This section shall apply only to surface soil so removed after the effective date of this act, \* \* \*”

In our opinion these are not words which can be properly classified as a grant of power or authority but rather are words of limitation. The true effect of the limitation is that regardless of how soon after the effective date of chapter 204, Acts of the 53rd General Assembly a given board of supervisors might have taken action to establish a district and adopt a resolution it could not therein effect any soil removed by a strip mining operation prior to the effective date of the act. In this sense the words are merely surplusage as such would be the situation had they been completely omitted from the act.

It is our opinion, therefore, that the provisions of section 2, chapter 204, Acts of the 53rd General Assembly, do not vest power or authority in the board of supervisors to adopt a resolution in connection with the establishment of a soil conservation district within a mining area which imposes duties or obligations with regard to the replacement of soil except as to that soil removed subsequent to the establishment of the district and the adoption of a resolution by the board requiring such replacement.

---

April 20, 1950

**CITIES AND TOWNS: Manager plan—status of permanent park board.** The status of the park board of the city of Des Moines, operating under chapter 371 of the Code, is not in any manner affected by the transition of the city of Des Moines from the commission plan of government to the manager plan.

**STATUTES: Omnibus repealing clauses of no legal effect.** An express general repeal clause to the effect that all inconsistent enactments are repealed is in legal contemplation a nullity.

*Senator George Faul, Des Moines, Iowa:* This will acknowledge receipt of yours of March 24, 1950, in which you advise that considerable confusion exists concerning the status of certain boards and commissions of the city of Des Moines when the city manager plan of government becomes effective. You further advise that in order to assure transition to the new form of city government with the minimum of uncertainty, clarification of the legal status of the board of waterworks trustees and park board are desirable. In so far as the status of the park board is concerned, you submit the following question for answer:

"Is the status of the park board of the city of Des Moines, now operating under chapter 371, Code 1946, in any manner affected by the transition to the city manager plan of government in the city of Des Moines, or does the authority of the said park board continue unchanged when the city makes the change to the manager plan under chapter 419, Code 1946?"

and you observe with respect to the park board situation the following:

"Subsection 12 of section 419.55, Code 1946, states that the manager 'shall manage, supervise, and control the use, construction, improvement, repair and maintenance of all recreational facilities of the city or town, including parks, playgrounds, public gymnasiums, and public bathhouses.' This is the same language contained in the original city manager statute of 1915, found in chapter 180, Acts of the 36th General Assembly.

The park board law under which Des Moines has been operating appears in the 1931 Code as section 5813-D1, now chapter 371, Code 1946, section 1 of which reads: 'This chapter shall apply only to cities now or hereafter having a population of 125,000 or more according to the last or subsequent federal census.' Section 371.6 states that 'It shall be the duty of such board to plan the city's parks and cemeteries and to administer, improve, develop, conduct, and supervise the cemeteries and parks of the city. It shall control the expenditure of all funds appropriated by the city council for cemetery and park purposes and none of the funds appropriated by the city council for said purposes shall be expended except pursuant to a resolution regularly adopted by said board. In the expenditure of funds said board shall be governed by the ordinances of the city applicable thereto.'"

With respect to the foregoing we advise as follows:

Chapter 371 was enacted by the 44th General Assembly and appears as chapter 149, Acts of that Assembly. According to section 371.1 the chapter shall apply only to cities now or hereafter having a population of one hundred twenty-five thousand or more according to the last or subsequent federal census. While the foregoing section makes the operation of the chapter uniform, the supreme court in *State v. Darling*, 216 Iowa 553, 88 Am. Law Reports 218, observed, "This section, it must be confessed, clearly recognizes that the present operation of the act is necessarily limited to the city of Des Moines. This is true, however, only because it alone possesses the requisite population." Section 371.2 of the Code 1946, authorized the establishment of permanent board of park commissioners in terms as follows:

"Within sixty days after the taking effect of this chapter, in all cities now having a population of one hundred twenty-five thousand or more according to the last federal census, there shall be established in accordance with the terms of this chapter, a permanent park board for such city."

Pursuant to the power vested by the foregoing section the city of Des Moines established in accordance with the terms of the chapter a permanent park board. The independent character of the board, as well as its relation to the city of Des Moines as a commission plan city was explained in the case of *State v. Darling*, supra as follows:

"No fundamental power of the commission plan of government is, in any direct sense at least, involved. Manifestly, the theory upon which the park board system was created by the legislature was the better improvement, maintenance, and availability of the park system in cities of the prescribed population. The park board has nothing to do with the levy or collection of revenue. This is all left to the same officers who performed the duties in relation thereto prior to the enactment of the chapter involved. The disbursement of the park fund is confided to the park commissioners who are required to make an annual report to the city council which shall contain an accurate statement of the board's activities during the year. The board may, however, make such recommendation as it sees fit. The method provided for the selection and appointment of members of the board was obviously intended to attain the highest skill and efficiency in the administration of the system. As we shall presently point out, the powers and duties of the board are governmental and not proprietary in character. Many authorities touching the question of local self-government are cited by realtors from other jurisdictions, a few of which are as follows: *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *State v. Denny*, 118 Ind. 449, 21 N.E. 274, 4 L.R.A. 65; *McQuillin on Mun. Corps*, vol. 1 (1st Ed.) sections 70 and 167; *People v. Albertson*, 55 N. Y. 50; *McQuillin on Mun. Corps*, vol. 1 (2d Ed.) section 353. The above cited cases will be found illuminating and profoundly interesting on the subject of local self-government.

The limitation which relators would place upon the power of the legislature to legislate for and in behalf of cities under the commission form of government is too strict, and over-emphasizes the power of local self-government as applied to municipalities. The act does not encroach upon the fundamentals of the commission form of government nor does it interfere with the right or power of proper local self-government. The park board has no power to levy or collect taxes. Its authority so far as the revenues of the city are involved is to expend the appropriation for that purpose in the proper management and control of the public parks of the city. The head of the department of parks elected by the city continues as a member of the commission, and none of his powers or rights is impaired except as above stated. Numerically he is, of course, in the minority, but that is of no necessary significance. Whether the creation of a park board was desirable or for the best interest of the park system or the people of the cities designated was for the legislature to say and not for this court. With this wisdom or lack thereof in the creation of such board, courts have no part."

This independence of the park board created under the foregoing chapter 371 is, in our opinion, preserved in the transition of the city of Des Moines to the manager plan government by two specific declarations of the legislature. Conclusive evidence of this intention is the following provision of chapter 371. Section 371.9 provides as follows:

"All laws or parts of laws inconsistent with the provisions of this chapter are hereby repealed, but nothing herein shall be deemed to be inconsistent with chapters 373 and 377."

If the following, to-wit: "All laws inconsistent with the provisions of this chapter are hereby repealed", was all that was contained in section 371.9, we would be disposed not to give effect to this section as a repeal because Sutherland Statutory Construction, 3rd Ed., Vol. 1, Page 466, has stated the rule to be "an express general repeal clause to the effect that all inconsistent enactments are repealed is in legal contemplation a nullity. Repeals must either be expressed or result by implication. A general repealing clause cannot be deemed an express repeal because it fails to identify or designate any act to be repealed. It cannot be determinative of an implied repeal for it does not declare any inconsistency but conversely, merely predicates a repeal upon the condition that a substantial conflict is found under application of the rules of implied repeals. If its inclusion is more than mere mechanical verbiage, it is more often a detriment than an aid to the establishment of a repeal, for such a clause is construed as an express limitation of the repeal to inconsistent acts." However, the fact that the section contains other language, to-wit: "but nothing herein shall be deemed to be inconsistent with chapters 373 and 377," excepts the foregoing section from control by the foregoing principles. The express mention by the legislature that the omnibus repeal did not effect chapters 373 and 377 is a recognition by the legislature that there are specific acts in conflict with the provisions of chapter 371 and evidence the legislative intention that such specific acts be repealed under the omnibus provisions of the foregoing section 371.9. This is also a textbook rule stated by Sutherland Statutory Construction, 3rd Ed., Vol. 1, Page 466, in words as follows:

"This clause has in some instances been held to be an express recognition that there are acts in conflict with the act in which it is included, and as indicative of the legislative intent to repeal such acts. Board of Water Com'rs of Springfield v. People, 137 Ill. 660, 27 N. E. 698 (1891); State v. Schaumburg, 149 La. 470, 89 So. 536 (1921); Commonwealth v. Central Passenger Ry. Co., 62 Pa. 506 (1866); State v. Mangiaracina, 344 Mo. 99, 125 S. W. (2d) 58 (1939); Causey v. Guilford County, 192 N.C. 298, 135 S. E. 40 (1926); Commonwealth v. Sanderson, 170 Va. 33, 195 S. E. 516 (1938). The value of such a clause is nugatory even though it is expressive of such an intent for the reason that its function of notice is completed when an adjudication arises, and any repeal must still result from an irreconcilable conflict. State v. Standard Oil Co. of Louisiana, 179 Ark. 280, 16 S.W. (2d) 581 (1929); Nettles v. Carson, 77 Okla. 219, 187 Pac. 799 (1920). See Blanket Repeals (1931) 45 Harv. L. Rev. 364."

Added evidence of this intention is the enactment of section 419.70, being the manager plan chapter, preserving the integrity of the park board created and existing under the provisions of chapter 370, Code 1946. Such section 419.70 provides as follows:

"The provisions of Chapter 370, relating to parks and park commissioners, shall be applicable to and be in force in cities and towns organized under the provisions of this chapter, to the same extent and effect

that such provisions are applicable to and in force in cities and towns of the same class organized under the general laws of the state, except as changed or modified by this chapter. The board of park commissioners shall have and may exercise all powers conferred upon them by the provisions of said chapter, except as herein changed or modified." The specification by the legislature of the foregoing chapter 370 evidences the intention of the legislature that the provisions of the chapter respecting the powers of the manager plan over park board was not exclusive.

We, therefore, are of the opinion that the status of the park board of the city of Des Moines, operating under chapter 371, Code 1946, is not in any manner effected by the transition of the city of Des Moines from the commission plan of government to the manager plan. That, therefore, the authority of the park board under the foregoing chapter 371 over parks and cemeteries, continues and remains unchanged notwithstanding the change in the form of government of the city of Des Moines. However, the manager, under the provisions of section 419.55 (13) retains and possesses management, supervision and control of playgrounds, public gymnasiums and public bathhouses.

---

April 20, 1950

**STATE INSTITUTIONS: Cost of care for children of veterans.** Children of veterans originally committed to the Iowa Annie Wittenmeyer Home are cared for without expense to the county from which committed. However, counties committing children to the Glenwood state school or the hospital for epileptics and feeble minded at Woodward are liable for their support.

*Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board:* We have yours of the 13th inst. in which you have submitted the following:

"I would like an official opinion on the following question:

Children who are veterans' children, when placed in the Davenport soldiers' orphans home, are placed there at no cost to the county. If a veteran's child, because of physical defects, must be placed in the institution at Glenwood or Woodward, are these children placed there without cost to the county?"

In reply thereto we would advise you as follows:

In so far as the soldiers' orphans home, now known as the Iowa Annie Wittenmeyer Home, is concerned, the legislature, by section 244.14, has expressly excepted the counties' liability for the cost of the support and maintenance therein of children of soldiers. The foregoing section 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 of the net cost of the support and maintenance of its children. 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 from the state institution fund at the same time state taxes are paid."

However, no such provision has been made by the legislature for exempting the counties' liability for the support and maintenance of a veteran's child in either the Glenwood state school or the hospital for epileptics and feeble minded at Woodward. Section 223.4, Code 1946, as amended by chapter 122, section 4 of the 52nd General Assembly provides with respect to admissions of children, the following:

"All adults afflicted with epilepsy who have been residents of Iowa for at least one year preceding the application for admission, and all children so afflicted whose parents or guardians have been residents of Iowa for a like period, shall be eligible for admission, to the hospital for epileptics at Woodward."

According to the foregoing, children are admitted therein without distinction of whether they are children of veterans or not, and the cost of their support and care is provided to be paid by the provisions of section 223.14, as amended by chapter 122, section 7 of the 52nd General Assembly as follows:

"Each county shall be liable to the state for the support of all patients from that county in the hospital and schools. The amounts due shall be certified by the superintendent to the state comptroller who shall collect the same from the counties liable, at the times and in the manner required by the certification and collection of money from counties for the support of inmates of hospitals for the insane."

The legislature not having excepted from the liability of the county the cost of support and care of children of veterans resident in either the Glenwood state school or the hospital for epileptics and feeble minded at Woodward, the county is liable for such cost. This opinion is limited to original commitments to any one of these institutions.

---

April 20, 1950

**TAXATION: Soldiers' exemption applicable to several pieces of property.** A veteran claiming his statutory exemption from taxation, in order to realize the full amount to which entitled, must designate one or more pieces of property which will aggregate in value the amount of the exemption. All of such property must be in one county.

*Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board:* We have yours of the 13th inst. in which you have submitted the following:

"I would like an official opinion on veterans tax exemption. The state of Iowa allows \$1800.00 for a Spanish War veteran, \$750.00 for a World War I veteran and \$500.00 for a World War II veteran. Must this exemption be placed on one designated piece of property or may it be divided between other pieces of property until the amount allowed is used?"

In reply thereto I would advise you as follows:

The statute under which the foregoing exemption is allowed is 427.5, Code 1946, as amended by chapter 196, section 2 of the 53rd General Assembly, and is as follows:

"Any person named in section 427.3, provided he is a resident of and domiciled in the state of Iowa, shall receive a reduction equal to his exemption, to be made from any property owned by such person and

designated by him by proceeding as hereafter provided. In order to be eligible to receive said exemption or reduction the person claiming same shall have had recorded in the office of the county recorder of the county in which he shall claim exemption or reduction, the military certificate of satisfactory service, order transferring to inactive status, reserve, retirement, or order of separation from service, or honorable discharge of the person claiming or through whom is claimed said exemption; in the event said evidence of satisfactory service, separation, retirement, furlough to reserve, inactive status, or honorable discharge is lost he may record in lieu of the same, a certified copy thereof. Said person shall file with the county auditor his claim for exemption or reduction in taxes under oath, which claim shall set out the fact that he is a resident of and domiciled in the state of Iowa, and a person within the terms of section 427.3, and give the volume and page on which the certificate of satisfactory service, order of separation, retirement, furlough to reserve, inactive status, or honorable discharge or certified copy thereof is recorded in the office of the county recorder, and may include the designation of the property from which he desires said exemption or reduction to be made, and shall further state that he is the equitable and legal owner of the property designated therein. No person may claim a reduction or exemption in more than one county of the state, and if no designation is made the exemption shall apply to the homestead, if any."

While the foregoing statute makes no express provision for the situation you outline, it is quite clear, however, that the right to the exemption includes as one of its conditions a designation of property from which the exemption shall be allowed. In this view, while the veteran is entitled to the full amount of the statutory exemption, whether it is \$1800.00, \$750.00 or \$500.00, he is entitled to such full exemption only if he has designated one or more pieces of property which will aggregate in value either \$1800.00, \$750.00 or \$500.00. The exemption, however, is allowable only upon property owned by the veteran in one county. See opinion of the attorney general, appearing in the Report of Attorney General for 1946 at Page 222. Failure to designate sufficient property in value from which the exemption may be allowed is a bar to its allowance from other property owned by the veteran but not designated to bear the exemption, unless the same be a homestead.

---

April 26, 1950

**MOTOR VEHICLES.** Registration of leased vehicles with option to purchase. It was not the intent of the legislature to exempt from registration motor vehicles owned by Iowa residents leased to non-residents and operated in Iowa even though such leases contain options of the lessees to purchase, except in those instances in which the lease option arrangement is a sales financing device.

*Mr. Alfred W. Kahl, Commissioner, Department of Public Safety:*  
You have requested an opinion of this office as follows:

"Attention is invited to the provisions of subsection 36 of section 321.1, Code of Iowa 1946, as follows:

'Owner' means a person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of

possession vested in the conditional vendee or lessee or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this chapter.

"This department requests an opinion as to whether all lease arrangements containing a purchase option are included within the language 'lease thereof with the right of purchase upon performance of the conditions stated in the agreement,' in the foregoing cited code section."

The intent of the legislature must be ascertained taking into consideration the various provisions pertaining to resident owned vehicles, vehicles leased by residents from non-residents, and reciprocity provisions, as well as the provision relating to vehicles leased by a resident to a non-resident.

With regard to reciprocity provisions it is only necessary to note that when reciprocity is granted to a sister state by operation of the statutes the privileges thereby extended are for the benefit of residents of the sister state and apply to vehicles owned by them. The question then becomes whether a vehicle may be owned by a resident of Iowa and be exempt from the registration requirements of this state if the vehicle is brought within the state of Iowa, and if a resident owned vehicle brought within the state may be exempted from registration, under what circumstances would the exemption be found. In *State of Iowa v. Roy C. Doherty*, in the municipal court of the city of Clinton it was held on December 10, 1948, that the Iowa owner-lessor of a vehicle leased to a nonresident of Iowa was required to register the leased vehicle in Iowa in event the said vehicle was operated within the state of Iowa. Subsequent to this holding the legislature of the state of Iowa removed any doubt, if any existed, as to the requirement when section 321.53 (reciprocity) was amended by the 53rd General Assembly by adding thereto the following:

"A nonresident who leases a vehicle of a resident owner shall not be considered a nonresident owner of such vehicle for the purpose of exemption under this section."

This act leaves no question that the legislature intended that instruments which are substantially leases are to be given effect as creating the bailee-bailor status and not as placing the parties in the status of a vendor and vendee where the vendee becomes the owner of the beneficial interests and is therefore treated as the owner.

It is to be noted that in an opinion of this office dated June 17, 1949, you were advised that registration of a vehicle owned by a resident of a state enjoying reciprocity with Iowa which vehicle was leased to a resident of Iowa, was not subject to registration merely upon being brought into this state. This result of the operation of the Iowa statutes is consistent with the provision requiring the registration of Iowa-owned foreign leased vehicles operated in this state. The two operations simply follow the rule that vehicles registered by the owner in the state of his residence will not be required to be registered in recip-

roating states. It was never the intention of the legislature that the mere insertion of a purchase option in a lease arrangement would operate to exempt registration otherwise required.

In the practical business picture many financing devices are used to facilitate sales. A very common device is the conditional sales arrangement. For various reasons commercial institutions frequently vary the conditional sale arrangement by the adoption of a "lease with purchase option". It is fundamental that the conditional vendee of property becomes the owner for practical purposes in many instances under the law. In the event of a civil action for damages for the negligent use of property sold under a conditional bill of sale, the vendee must respond. There is no liability on the part of the vendor. Personal property is taxed in the name of the conditional vendee and licenses are issued in his name. Likewise in many instances the lessee purchaser has similar responsibilities.

We therefore find that lease-option agreements are subject to inquiry in law as to whether the agreement is of the type closely related to the conditional sale where the sale is the primary intent or whether it is the type of agreement which is actually a lease coupled with an option. We find that the courts consistently recognize the noted distinctions. Thus where a transaction is actually a sale but the parties have elected to express the transaction in the form of a lease, and the lessee is by the terms of the agreement to become the owner or has the option of becoming the owner upon full payment as agreed, the courts look through the form to the substance and where the matter is for any reason material, treat such transactions in the manner of conditional sales.

Also in leases with options to purchase for a nominal amount at the expiration of the stipulated rental period, the amount payable being substantially equivalent to the purchase price, it is equally clear that the transactions are in substance conditional sales. On the other hand if the option to buy at the expiration of the rental period can be exercised by payment of a substantial additional amount to complete the payment of the purchase price, the instrument will be given effect as in reality a lease and not substantially a sale. (Vold on Sales, pp 313-314; 47 Amer. Juris. pp 23-26.)

In determining the true nature of the transaction it is also very helpful to consider the business of the parties. If the lessor is not in the business of selling the goods this fact would tend to show a lease rather than a sale. Particularly with relation to the instant question the fact whether the lessor is a licensed motor vehicle dealer should be of considerable importance.

The intent of the legislature to require the registration by the lessor is clearly expressed. It is also clear that the legislature did not intend to require the registration of vehicles by vendors in conditional sales. It logically follows that in deeming lessees with an option to purchase,

the owner rather than their lessor, the legislature was mindful of the business picture, and the analogy between the possession of conditional vendees and lessees with options to purchase in the transaction closely related to the conditional sale.

You are therefore advised that it is the opinion of this office that at no time was it the intent of the legislature to exempt from registration motor vehicles owned by a resident of Iowa leased to a nonresident and operated in Iowa even though such lease contained an option of a lessee to purchase, except in those instances in which the lease option arrangement was a sales financing device.

---

May 4, 1950

**TAXATION: Budget estimates—moneys and credits tax reduction—maximum levy.** It is the duty of the county auditor to deduct the amount of taxes to be derived on moneys and credits from the annual budget estimates. After so doing the maximum authorized levy may be applied in the event it is required to meet the reduced budget estimates.

*Mr. Ray E. Johnson, State Comptroller:* This will acknowledge receipt of yours of the 13th ult. in which you have submitted the following:

“Under the provisions of section 444.3, Code 1946, the tax on moneys and credits must be taken into consideration in computing the tax rate for the funds receiving the tax on moneys and credits.

I respectfully ask for an official opinion as to whether or not the deduction of moneys and credits tax shall be deducted from the authorized maximum mill levy or only to the maximum amount of the budget for which levy is to be made. In other words, may the maximum authorized levy be used in the event it is justified, after deducting the tax on moneys and credits from the proposed budget.”

In reply thereto we advise you as follows:

Section 444.3, Code 1946, in terms is as follows:

“When the valuation for the several taxing districts shall have been adjusted by the several boards for the current year, the county auditor shall thereupon apply such a rate, not exceeding the rate authorized by law, as will raise the amount required for such taxing district, and no larger amount.

Provided that the county auditor shall, in computing the tax rate for any taxing district, deduct from the total budget requirements certified by any such district all of the tax to be derived from the moneys and credits and other moneyed capital taxed at a flat rate as provided in section 429.2 and shall then apply such rate to the adjusted taxable value of the property in the district, necessary to raise the amount required after the deductions herein provided have been made.”

By the plain terms of the foregoing statute the legislature has imposed upon the county auditor the duty of applying such tax rate upon the taxable property as will raise the amount required for the district. Such direction to the county auditor in applying such rate prescribes that the rate shall be computed after deducting from the total budget

requirement the amount of the tax to be derived from moneys and credits and other money capital taxed as provided by section 429.2. After the making of this deduction, the duty of the auditor then is to apply such rate, not exceeding the maximum authorized by law, to the taxable value of the property in the district as will raise the amount of the budget requirements. That the duty of the auditor is clearly prescribed in the foregoing statute and no interpretation thereof necessary is confirmed by the fact that in two cases the supreme court had before it no question of interpretation of the statute but resolve the consequences of the failure on the part of the county auditor to compute the tax rate in accordance with the statute under consideration.

In *Hewitt and Sons v. Keller*, 223 Iowa 1372, it was tacitly, if not expressly, admitted that the provisions of the foregoing statute were ignored and the plaintiff paid in taxes an amount in excess of the amount due if the deduction provided by the foregoing statute had been made. There mandamus against the board of supervisors to recover this excess was sustained.

In *Cook v. Hannah*, 230 Iowa 249, it appeared that in only 13 counties of the 99 did the auditor in computing the tax rate make the deduction of moneys and credits as required by the cited section. In the remaining counties excess amounts of taxes were collected and to alleviate this situation the 48th General Assembly adopted chapter 250 thereof, which provided as follows:

“All taxes levied, assessed, or collected wherein the county auditor in computing the tax rate failed to deduct from the total budget requirements the tax to be derived from moneys and credits and other moneyed capital during the years 1934, 1935, and 1936 and 1937, as defined by section seventy-one hundred sixty-four (7164) of the Code, are hereby declared legal and valid.”

Assault was made against the foregoing legalizing act on the ground of its unconstitutionality which claim was denied by the supreme court.

We are, therefore, of the opinion, and so advising that the maximum authorized levy may be applied in the event it is required to meet the budget estimates after deducting the amount of taxes to be derived on moneys and credits from the budget.

---

May 4, 1950

**SCHOOLS AND SCHOOL DISTRICTS: Teacher's contract—statutory renewal.** A provision inserted in a teacher's contract by the board waiving the renewal provisions of the statute is a nullity.

*Mr. Donald E. Smith, Assistant County Attorney, Cedar Rapids, Iowa:*

Reference is herein made to your request for official opinion with reference to the automatic continuation provision of the written teacher-school board contract authorized under section 279.13, Code 1946, and specifically you query whether “a teacher and school board may enter into a written contract, waiving the above provisions of the Code by inserting therein, at the time of execution of such contract, a provision

as follows: 'It is further agreed that under this contract at the time of expiration as stated herein, that said contract will become void without further notice by either party, and not as stated under section 279.13, Code of Iowa.'

In reply thereto we advise you as follows:

The pertinent part of section 279.13, Code 1946, after stating that contracts with teachers must be in writing, provides that "said contract shall remain in force and effect for the period stated in the contract, and thereafter shall be automatically continued in force and effect for equivalent periods, except as modified or terminated by mutual agreement of the board of directors and the teacher, until terminated as hereinafter provided."

The statutory provision for termination is also contained in section 279.13 and provides as follows: "On or before April 15, of each year the teacher may file his written resignation with the secretary of the board of directors, or the board may by a majority vote of the elected membership of the board, cause said contract to be terminated by written notification of termination, by a registered letter mailed to the teacher not later than the tenth day of April; in event of such termination, it shall take effect at the close of the school year in which the contract is terminated by either of said methods."

Analysis of the foregoing section discloses the legislative intent that a contract in writing with teachers, when once entered into, shall be automatically continuous for like periods of teachings prescribed in the written contract. This view of the legislative intent is confirmed by the specific provision made for its termination by express action either of the teacher under employment or the employer, the board of directors of the school district.

To permit the cited provision to be inserted in the original contract, would, in our opinion, frustrate the intention of the legislature that teachers' contracts should be continuing unless terminated by the provisions made for termination as herein before stated, or, as stated otherwise, providing for termination in the original contract, is a distortion of the legislative intent that written teacher-school board contracts be automatically continuous unless terminated in accordance with the statute in either of two methods, first, by subsequent modification or termination by mutual agreement of the board and the teacher, or, second, by resignation of the teacher or notice of termination by a majority vote of the board of directors.

We are of the opinion, therefore, that a provision inserted in the teacher's contract, waiving the provisions of section 279.13, is in excess of the power of the board and has no force and effect.

---

June 15, 1950

**COUNTIES: Fees of justices and constables.** Justices of the peace and constables in townships of under ten thousand population are authorized to retain their civil fees.

*Honorable Chet B. Akers, Auditor of State, Attention Mr. L. I. Truax:*  
We have yours of the 17th ult. in which Leonard Mogren, examiner, has asked for an opinion on the following situation:

"Thank you for the copy of opinion rendered by Mr. Oscar Strauss, Assistant Attorney General, dated May 12, 1950, relating to the amount of civil fees which may be retained by justices and constables.

The opinion mentioned in the foregoing sets out that section 601.131, subsection 4, Code 1950, provides that 'Justices and constables in all townships having a population of ten thousand and over shall retain such civil fees as may be allowed by the board of supervisors, not to exceed five hundred dollars per annum, and in townships having a population over fifty thousand . . .'

Your examiner desires an opinion as to the amount of civil fees that may be retained by justices and constables in a township having a population of four thousand and under ten thousand; and in a township having a population under four thousand."

In reply thereto we would advise you that according to section 601.128 and section 601.129, Code 1950 "Justices of the peace shall be entitled to charge and receive the following fees", and "Constables shall be entitled to charge and receive the following fees." The foregoing statutory provision is a reiteration of previous code provisions. The charges therein specified embrace those for both civil and criminal actions. However, the amount of these fees that may be retained by justices and constables is determined by the history of the legislative enactments respecting the compensation of such officers. According to 10639, Code of 1939, justices of the peace and constables in townships having a population of under twelve thousand were obligated to pay into the county treasury all fees both civil and criminal collected each year in excess of sums therein stated. Such was their obligation from that time until the change thereof was made by the 53rd General Assembly. That assembly by chapter 229, while repealing the provisions of section 601.131, as it appeared in the 1946 Code, with respect to townships having a population of under *ten thousand*, required that justices of the peace and constables should pay into the county treasury *all criminal fees* in excess of sums set forth therein. In so far as the disposition of civil fees arising in such townships under ten thousand in population the 53rd General Assembly made no provision whatsoever. However, in respect to the civil fees of justices and constables in townships having a population of ten thousand or over section 601.131, subsection 4, Code 1950, made provision as follows:

"Justices and constables in all townships having a population of ten thousand and over shall retain such civil fees as may be allowed by the board of supervisors, not to exceed five hundred dollars per annum, and in townships having a population over fifty thousand, not to exceed one thousand dollars per annum for expenses of their offices actually incurred, and shall pay into the county treasury all the balance of the civil fees collected by them."

Therefore, prior to the action of the 53rd General Assembly justices and constables in townships having a population of less than twelve thousand, which of course would include townships of ten thousand pop-

ulation, were required to account for both civil and criminal fees in excess of sums named in sections 601.128 and 601.129. The 53rd General Assembly, however, imposed only the requirement of accounting in townships of ten thousand population for criminal fees only, and having specifically provided for the accounting of civil fees in townships of over ten thousand population and justices and constables being entitled to receive civil fees in townships of less than ten thousand in population and no provision made for their accounting for such fees in such townships, we are of the opinion that justices of the peace and constables in townships of under ten thousand population are authorized to retain their civil fees.

We are not unmindful of the provisions contained in section 79.7, Code 1950 which provide as follows:

*"All officers required by the provisions of this code to collect and pay over fines and fees shall, except as otherwise provided, on the first Monday in January in each year, make report thereof under oath to the board of supervisors of the proper county, showing the amount of fines assessed, and the amount of fines collected, together with vouchers for the payment of all sums collected to the proper officer."* (italic supplied)

It is apparent from the italicized portion of the provisions of this section in light of the foregoing discussion that the civil fees which are the subject of this opinion are not *required* to be collected and definitely they are not required to be paid over to the board of supervisors. Therefore, it is unnecessary to search for an expressed provision so as to bring the situation under the exception contained in section 79.7, Code 1950.

---

June 29, 1950

**HIGHWAYS: Bridges—approval of county repairs by highway commission.** County expenditures for repairs of bridges destroyed by fire or flood, while excepted from the budget requirements of section 343.10 of the Code, yet the contract therefor must be approved by the highway commission under the requirements of section 309.80 where the amount is more than two thousand dollars.

*Mr. Byron B. Stanley, County Attorney, Corning, Iowa;*

*Mr. W. E. Don Carlos, County Attorney, Greenfield, Iowa:*

Each of you gentlemen has recently made inquiry as to the applicability of section 309.80, Code of Iowa 1950, to expenditure for bridges destroyed by fire or flood within the contemplation of section 343.11, Code of Iowa 1950. Section 309.80 referred to above reads as follows:

*"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."*

Each of you has been confronted with a situation arising out of the making of a contract by the board of supervisors of your respective counties for the purchase and /or construction of a bridge, and in each instance it has been urged upon you by the seller and contractor that the requirements of section 309.80 need not be met under the emergency

conditions referred to above, and you have had cited to you opinions of the attorney general's office dated July 8, 1947, and Dec. 11, 1947, found at pages 47 and 132, respectively, of the 1948 Report of the Attorney General.

In neither instance did the attorney general's office have before it section 309.80, *supra*. In the first opinion it was held that under section 343.11 and chapter 346 of the Code, the board of supervisors had authority to repair bridges destroyed by flood and issue bonds in payment thereof notwithstanding budget limitations. In this opinion the attorney general's office attempted to set out, for the convenience of the county attorney concerned, the step by step procedure required to conform with the emergency requirements, but no reference is made to section 309.80, *supra*.

In the second opinion the holding was reiterated that expenses for construction or repair of bridges destroyed or damaged by flood is an expense uncontrolled by the budget and may be paid from the emergency fund. Again, no mention is made of section 309.80 and there is nothing in the opinion to suggest a line of reasoning that would lead to the conclusion that this section need not be complied with. As a matter of fact, if an adequate plan for such a bridge has been prepared, that is, a plan sufficient to enable taking competitive bids, the additional delay required to secure the approval of the highway commission would be infinitesimal.

It is the opinion of this office that the requirement of section 309.80, Code of Iowa 1950, that the approval of the state highway commission be secured for any proposed contract exceeding the sum of \$2,000.00 for any one bridge or culvert, or repairs thereon, means exactly what it says and compliance therewith is not excused by the existence of a so-called emergency condition. In any event there is nothing in either of the situations that you have called to the attention of this office to indicate the pressure of an emergency grave enough to cause us to try to find excuses for the nonfulfillment of the statutory requirement. It is the opinion of this office that until and unless the approval of the state highway commission of any such proposed contract is secured there is no contract and any payments made under any purported contract are illegal payments for which there may be personal liability within the meaning of section 343.10 Code of 1950.

---

June 29, 1950

**HIGHWAYS: Removal of transmission, telephone or telegraph lines.**

Electric transmission lines and telephone or telegraph lines occupying a highway under a permit or franchise may be ordered moved by the proper highway authority in case of highway reconstruction. However, when located on a private easement outside of the present highway right of way the easement must be purchased or acquired under eminent domain procedure.

*Mr. F. R. White, Chief Engineer, Iowa State Highway Commission, Ames, Iowa:*

You have directed attention to an apparent misapprehension of certain county engineers with respect to the rights of telephone lines, tele-

graph lines, and electric transmission lines in or adjacent to highways outside of cities and towns in Iowa. The confusion apparently arises from an attempt to cause the removal of such a line to a new location on the widened or altered highway right of way by giving the thirty-day notice contemplated by sections 319.3 and 319.4, Code of Iowa 1950.

If such lines are located within an existing highway right of way, under statutory authority in the case of a telephone or telegraph line or under a permit by the commerce commission in the case of an electric transmission line, the use of the highway for this specialized purpose is subordinate to the control of the highway authority having jurisdiction of the particular road. If such highway authority in the exercise of proper discretion saw fit to widen, realign, regrade, or otherwise reconstruct the highway in such fashion that the line or lines became a highway obstruction the statutory notice would be valid and effective to require the removal of such lines to such new location as might be designated by the proper authority.

When, however, as is frequently the case with electric transmission lines, the poles are located on a private easement acquired from abutting owners of property adjacent to the highway, much more is required of the highway authority than a simple notice under the Code section referred to above. An easement so acquired for a valuable consideration is a property right and is subject to the protection afforded by the due process clause of the federal Constitution. *Panhandle & Eastern Pipe Line Co., vs State Highway Commission of Kansas*, 294 U. S. 613, 55 S. Ct. 563, 79 L. Ed. 1090, reversing *State Highway Commission vs. Panhandle Eastern Pipe Line Co.*, 139 Kans. 185, 29 Pac. (2d) 1104; *Prymek vs Washington County*, 229 Ia. 1249, 296 N. W. 467. *Anderlik vs. Iowa State Highway Commission*, 240 Ia. 919, 38 N. W. (2d) 605; *Liddick vs. City of Council Bluffs*, 232 Ia., 197, 5 N. W. (2d) 361.

The rights of the transmission line owner in the easement so acquired must in turn be purchased or acquired under the provisions of chapter 306, Code of Iowa 1950, or by proceedings under eminent domain in accordance with chapters 471 and 472, Code of Iowa 1950. Such proceedings might well prove extremely costly in the case of a heavily constructed transmission line, and the cost of removing the line to a new location and reconstructing it at the site would be considered a part of the measure of damages in connection with the widening of the highway at such a location.

Complaint has likewise been made that in those instances where the statutory notice, pursuant to sections 319.3 and 319.4, Code of Iowa 1950, is the appropriate procedure, substantial delay has ensued even after the expiration of the time prescribed by the notice. The engineer or the contractor sometimes experiences considerable embarrassment on that account. The remedy prescribed by the statute, section 319.4, Code of Iowa 1950, is that "the public authorities may forthwith remove them" (the lines). In the case of a high power transmission line this is an impractical remedy as the only agency that can safely deal with

such a dangerous instrumentality is the owner and operator of the line. The remedy in such event might well be a court action to compel the owner to conform to the valid requirements of the statute.

---

June 29, 1950

**HIGHWAYS: Extensions of secondary roads—duty to repair and maintain.** Where the board of supervisors has, pursuant to section 308A.14, constructed, reconstructed or improved a city or town street which is an extension of a secondary road it has no further duty to repair and maintain such street. The obligation entirely belongs to the city or town.

*Mr. Nels Branstad, County Attorney, Forest City, Iowa:*

The board of supervisors of Winnebago county, over their signatures as such, recently directed a request for an opinion to the attorney general's office. In due course it was referred to me. It is not a part of the duty of the attorney general's office as defined by section 13.2, Code of Iowa 1950, to answer inquiries propounded by boards of supervisors as such. Such inquiries when made by county attorneys are given attention as an incident to the supervision exercised by the attorney general over county attorneys under subsection 7 of the above enumerated section. It is assumed that if your attention had been directed to the matter by the board of supervisors you would have asked for the opinion which they requested, and this response is therefore directed to you for such disposition as you consider appropriate.

The first question submitted was as follows:

"In cities and towns under 2500 or in cities and towns over 2500 where the houses or business houses average more than 200 feet apart, upon request by the city or town for the county to construct, reconstruct, improve, repair, and maintain any road or street which is an extension of a secondary road in the county, is it mandatory upon the board of supervisors to so construct, reconstruct, improve, repair, and maintain such street upon request of the city or town, or is it entirely within the discretion of the board whether they shall do so?"

Reference is made to section 308A.14, Code of Iowa 1950; that section reads as follows:

*"The board or commission in control of any secondary road or any primary road is authorized, subject to approval of the council, to eliminate danger at railroad crossings and to construct, reconstruct, improve, repair, and maintain any road or street which is an extension of such road within any town or city, including cities under special charter. Provided, that this authority shall not apply to the extensions of secondary roads located in cities over twenty-five hundred population, where the houses or business houses average less than two hundred feet apart. (Italics supplied.)"*

The phrase "subject to the approval of the council" as it appears in this section, shall be construed as authorizing the council to consider said proposed improvement only in its relationship to municipal improvements such as sewers, water lines establishing grades, change of established street grades, sidewalks and other public improvements. The location of such road extensions shall be determined by the board or commission in control of such road or road system. Acts 1949 (53 G.A.) ch. 125, sec. 6."

This section was enacted as a substitute for sections 309.45, Code of

Iowa 1946, and 310.21, Code of Iowa 1946; the first of which sections reads as follows:

*"The board of supervisors may, subject to the approval of the council of any city or town, purchase or condemn right of way therefor or eliminate danger at railroad crossings, and shall grade, drain, bridge, gravel or maintain any road or street which is a continuation of the county trunk highway system, or a continuation of a county local road which is built to grade and surfaced or about to be built and surfaced, and which is (1) within, or partly within and located along the corporate limits of, any town, or (2) within or partly within and located along the corporate limits of, any city, including cities 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 location of such extensions shall be determined by the board of supervisors. The council's approval shall extend only to the consideration of such improvements in their relationship to municipal improvements such as sewers, water lines, change of established street grades, sidewalks or other municipal improvements."*

And the second of which sections reads as follows:

*"A farm-to-market road project under this chapter may, subject to the approval of the council, include the purchase or condemnation of right of way therefor, and grading, draining, bridging, elimination of danger at railroad crossings, the graveling or hard surfacing of any road or street which is a continuation of the farm-to-market road system and which is (1) within any town, or (2) within any city, including cities 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 phrase "subject to the approval of the council" as it appears in this section, shall be construed as authorizing the council to consider said proposed improvement only in its relationship to municipal improvements such as sewers, water lines, establishing grades, change of established street grades, sidewalks and other public improvements. The location of such farm-to-market road extensions shall be determined by the board of supervisors."

In the construction of section 309.45 the Iowa Supreme Court held in 1930 in the case of *Norwalk vs Warren County*, 210 Ia. 1262. 232 N. W. 682, that a city could not recover from a county damages it had been required to pay as a direct result of the county's act in replacing a culvert in a street which was a part of the county road system. The court considered that independent of a contract which existed with the county regarding the improvement of the street as a part of the county road system the city owed a primary duty in relation to the safety of city streets. In the Report of the Attorney General for 1940, at page 163, the mandatory character of the language of section 309.45 was pointed out and it was held that regardless of the fact that highways within cities and towns are not a part of the secondary road system, where as here the language of the statute required that such extensions be improved, they had to be included in the county's construction program. It must be borne in mind that section 309.45 which contains this peculiar language has now been repealed.

Apparently there were no decisions or opinions interpreting section 310.21, Code of 1946, prior to its repeal, but attention is invited to the very similar language found in section 313.21, Code of Iowa 1946, relating to primary highway extensions in cities and towns. The language of that section follows:

"The state highway commission is hereby given authority, subject to the approval of the council, to construct, reconstruct, improve and maintain extensions of the primary road system within any city or town, including cities under special charter, provided that such improvement shall not exceed in width that of the primary road system and the amount of funds expended in any one year shall not exceed twenty-five per cent of the primary road construction fund.

The phrase "subject to approval of the council," as it appears in this section, shall be construed as authorizing the council to consider said proposed improvements in its relationship to municipal improvements (such as sewers, water lines, sidewalks and other public improvements, and the establishment or re-establishment of street grades). The location of said primary road extensions shall be determined by the state highway commission."

In interpreting this very comparable statutory provision the Supreme Court of Iowa in the case of *Smith vs. City of Algona*, (1942) 232 Ia. 362, 5 N. W. (2d) 625, concluded that the existence of a contract relating to the maintenance of primary highway extensions in the city of Algona, under a contract with the highway commission, did not relieve the city of Algona of the duty imposed by the statutes of the state with reference to the maintenance of its own streets, and that the mere fact that a city street was likewise a primary highway extension did not obliterate its character as a city street. It is hornbook law in this state that the title to a city street is in the city. There is, therefore, no difficulty in concluding that the town of Lake Mills has every duty that it ever had with respect to the maintenance of its own streets, and whatever may have been the duty of the county board of supervisors prior to the repeal of section 309.45, Code of Iowa 1946, the obligation to build to grade and surface is no longer mandatory upon the board of supervisors and the language of section 308A.14 is permissive only. It is, therefore, entirely discretionary with the board of supervisors whether or not it shall continue to maintain the secondary highway extension in question. The fact that the board constructed, reconstructed, or improved such street in the first instance has nothing to do with it and the duty to repair and maintain is that of the city. It is of no consequence whether the original construction took place at the instance of the board of supervisors or was done at the petition or request of the city or town council.

July 6, 1950

**BEER.** Sales prohibited after 1:00 A. M. The state law prohibits the sale of beer on week days between 1:00 A. M. and 6:00 A. M. in cities and towns regardless of any city or town ordinance or lack thereof.

*Mr. Paul I. Namtvedt, County Attorney, Spirit Lake, Iowa:*

This will acknowledge receipt of your letter of June 27th wherein you ask whether or not the law prohibits beer sales in a city or town

by a class B permit holder on week days between 1:00 o'clock A. M. and 6:00 o'clock A. M. in the absence of a city ordinance prohibiting same.

Your attention is first directed to an opinion of this office under date of April 22, 1948, which appears in the 1948 Report of the Attorney General at page 184.

The answer to your question depends upon an interpretation of a part of section 124.34 of the Code which provides as follows:

"and said city and town councils are further empowered to adopt ordinances, subject to the express provisions of section 124.20, for the fixing of the hours during which beer may be sold and consumed in the places of business of class "B" permittees, and further providing that subject to the express provisions of said section 124.20 no sale or consumption of beer shall be allowed on the premises of a class "B" permittee, as above provided, between the hours of one A. M. and six A. M.,"

Chapter 124 taken as a whole, shows a clear legislative intent to prohibit the sale of beer between the hours of one A. M. and six A. M. in the state of Iowa. Section 124.13 prohibits a class C permit holder from selling beer between said hours. Section 124.35 prohibits the sale of beer during said hours by a class B permit holder operating a place of business outside of a city or town. Section 124.20 prohibits all class B permit holders from selling beer between midnight on Saturday and seven o'clock the following Monday morning.

In that portion of section 124.34, above quoted, the first clause permits city and town councils to fix the hours during which beer may be sold, and this office has interpreted that clause to mean that the regulations must be reasonable. Said section then goes on to say "further providing \* \* \* no sale or consumption of beer shall be allowed on the premises of a class B permittee, as above provided, between the hours of one A. M. and six A. M."

Since by the first clause, city or town councils are given the right to fix the hours during which beer may be sold, the second clause would be meaningless unless it be construed as an absolute prohibition against the sale of beer during the hours mentioned, unless specifically excepted as in section 124.35. We realize that the word "providing" as used in the second clause might be interpreted to relate back to the word "ordinances," but we hold that this is not the legislative intent.

It would be a strange interpretation to hold that beer could be dispensed in a city or town all night long if such city or town had no prohibitive ordinance, while at the same time beer could not be dispensed by a class B permit holder operating a place of business outside a city or town. Perhaps the legislative intent would have been more clearly expressed if the word "provided" had been used instead of the word "providing".

It is therefore our opinion that the legislature intended that under no circumstances should beer be sold between one A. M. and six A. M. with the exception of sales by a club under the specific provisions of section 124.35.

July 20, 1950

**COUNTIES: Assessor's salary not subject to change during term.** The county assessor's salary must be fixed at the beginning of his term on a term basis and thereafter the county conference may not increase it at the beginning of any year nor at any time during the year.

*Mr. Ray E. Johnson, State Comptroller:*

We have yours of the 7th inst. in which you have submitted the following:

"I wish an opinion as to whether or not the county conference Board may increase the salary of the county assessor at the beginning of any year or at any time during any year."

In reply thereto we would advise you that the power of appointment of the county assessor is vested in the county conference created by chapter 441, Code 1950. The exercise of such power is prescribed by section 441.2 and section 441.3, Code 1950. No separate section of chapter 441, treating of the county assessor, fixes the term of the county assessor. However, the provisions of sections 441.2 and 441.3 invest the county conference with the power of reappointing the incumbent county assessor for a new term of four years or determining whether or not a new examination shall be held to provide eligibles for such appointment. According to section 441.3 the statute fixes the term of the person chosen from an eligibility list furnished to the county auditor; that the term of any county assessor thus selected shall be four years from the expiration of the term of his predecessor. Section 441.6 bestows upon the county conference the power to fix the salary of the county assessor who is appointed. Specifically the statute provides, "The county conference as established by the provisions of section 442.1 shall fix the salary of the county assessor which shall not be less than that of the salary of the county auditor in each county." Accordingly, the county conference possesses the power and duty to appoint a county assessor for a term of four years and to fix his salary. There is no express clue in these provisions of the legislative intent as to whether this salary should be fixed annually or for shorter periods or fixed for the term. Nor has there been exact interpretation of the language in the foregoing statutes. However, under like statutory authorization for the fixing of salary for county superintendent of schools the meaning thereof may be ascertained. In the case of *Kellogg v. Story County*, 219 Iowa 399, where it appeared a county superintendent elected for a three-year term was voted a salary by the board of supervisors at a regular meeting of \$2100.00 per year for the term, and at a subsequent regular meeting the board of supervisors reduced the foregoing salary of \$2100.00 to \$1800.00 per year under this statute, it being section 5232, Code of 1931, as follows:

"Each county superintendent of schools shall receive an annual salary of not less than \$1800 per year and such additional compensation as may be allowed by the board of supervisors in each particular county, but in no case to exceed \$3,000.00."

The court there said pertinently the following:

"The question is strictly one of statutory construction. It is true that both the words 'salary' and 'compensation' are used in section 5232.

They are, it seems to the court, used without differentiation. The compensation to be awarded to the county superintendent is in the nature of salary, and any amount added by the board to the minimum provided by the statute must be treated as a part of such salary. It is the thought of appellants that the authority conferred upon boards of supervisors by subdivision 10 of section 5130 is plenary and confers specific authority upon such boards to alter, change, and fix the salary of county superintendents at any regular meeting thereof. Such could hardly have been the intention of the legislature. Such authority would introduce confusion and uncertainty in the matter of salaries. The power obviously intended to be conferred by the legislature upon boards of supervisors is to, at any regular meeting of the board, fix the salary of the county superintendent and others, not that it may be fixed at the will of the board at any or at each successive regular meeting thereof. When once fixed for the term, the power of the board of supervisors was at an end. *Holmes v. Lucas County*, 53 Iowa 211, 4 N. W. 918; *Goetzman v. Whitaker*, 81 Iowa 527, 46 N. W. 1058. Having at a prior regular meeting of the board of supervisors fixed the salary of the appellee county superintendent at \$2100 per year, it could not, at any subsequent or on successive regular meetings of such board, alter or change the salary thus fixed during the term of office for which appellee was elected. Such construction of the statute removes doubt and uncertainty as to the salaries of officers referred to in the statute. Section 5130 covers a variety of matters of which subdivision 10 is a small part. The construction adopted would seem best calculated to give effect to the intention of the lawmakers."

Under such statutory authorization, comparable to the authorization conferred by chapter 147 of the 52nd General Assembly respecting the compensation of the county superintendent, the court said that "the power obviously intended to be conferred by the legislature upon boards of supervisors is to, at any regular meeting of the board, fix the salary of the county superintendent and others, not that it may be fixed at the will of the board at any or at each successive regular meeting thereof. When once fixed for the term the power of the board of supervisors was at an end."

A like view of this problem was taken in the case of *Culberson v. Watkins*, 119 S. E. 321, where it is said:

"It is argued for the defendant in error that there is no express inhibition in the Constitution of this state which prevents the judges of the superior court of Fulton county from making an increase in the salary in question. Section 21 of the act of 1915, creating juvenile courts in counties in this state having a population greater than 60,000 (Acts 1915, p. 43) provides that:

'The judge of the superior court of the county shall appoint the judge of said juvenile court for a term of six (6) years, and shall fix the compensation.'

This is a single official act in which all of the constituent elements are to be completed at one and the same time—at the time of the appointment. The term is for six years, and the compensation is to be fixed for the term at the time of the appointment. When the judge of the superior court 'fixes' the salary for the term, his power of 'fixing' is exhausted for that term of six years.

Plainly it could not have been intended by the legislature that the judge of the superior court could, as a mere matter of his volition and for any reason which might appeal to him, diminish the salary fixed at the time of the appointment as a means perhaps of relieving himself

and the county of the services of a judge of the juvenile court whose services might be unsatisfactory; and if there is any power to alter the salary, the judge of the superior court would have as much right to cut the salary down to a mere nominal sum as to increase it. For the very reasons stated in *Clark v. Eve*, supra, and upon the principle that the salary is a fixed charge which the county authorities are obliged to pay, it would never do to hold that the judge of the superior court was authorized to use a sliding scale, operating only at his volition, and by the application of which the salary of the judge of the juvenile court could be \$300 one month and \$600 another, according to ephemeral exigencies due to variable circumstances affecting the amount of business transacted in the juvenile court, etc.”

When it is borne in mind that the county conference’s powers and duties are limited and specific the reasoning of these cases seems peculiarly pertinent.

By reason of the foregoing, we are of the opinion,

(1) That the county conference does not have legal authority to fix the salary of the county assessor on any basis except on a term basis.

(2) By reason of the foregoing conclusion the county conference may not increase the salary of the county assessor at the beginning of any year of his term or at any time during the year.

July 20, 1950

**COSMETOLOGY: Latest rules supersede previous rules—no vested rights.** Rules of the department of health, relating to the practice of cosmetology, adopted under police power conferred by the legislature have the force and effect of law. It follows that the latest rule of the department supercedes all previous rules on a particular subject and extinguishes any exemptions or exceptions of previous rules not repeated in the latest rule.

*Walter L. Bierring, M.D., Commissioner of Public Health, State Department of Health:* We are in receipt of your letter dated July 17, 1950, which is as follows:

“The present cosmetology law first appeared as chapter 49, Acts of the 42nd General Assembly and section 6 thereof is as follows:

“The state department of health shall prescribe such sanitary rules as it may deem necessary, with particular reference to the conditions under which the practice of cosmetology shall be carried on and the precautions necessary to be employed to prevent the creating and spreading of infectious and contagious diseases. Cosmetology may be practiced in the home providing a room, other than the living rooms, be fitted up for that purpose. The department of health shall have power to enforce the provisions of this section and to make all necessary inspections in connection therewith.”

Under the above authority the state department of health adopted certain sanitary rules and regulations effective July 11, 1927. Rule 6 thereof provided:

“A cosmetology establishment in a home or place where food is handled must be in a room separate from the living quarters, or a place where the food is kept.”

On July 7, 1931, the department adopted a set of sanitary rules and regulations effective July 10, 1931. Rule 6 thereof provided:

"Every residential cosmetology shop *established after July 1, 1931*, shall maintain a separate entrance which shall not open off from any living quarters of the house or any part of the house other than the entrance to the building." (Italics supplied.)

In a set of rules and regulations adopted and made effective July 4, 1939, the above rule was retained and the following sentence added thereto:

"Every residential cosmetology shop *established after July 1, 1939*, must have all doors leading to the living quarters closed, and a separate outside entrance must lead directly into the shop." (Italics supplied.)

From that time until the most recent set of rules was adopted and published by the state department of health effective July 1, 1943, there appeared to be two implied exceptions, namely as to those residential shops established *prior* to July 1, 1931, and as to those established *prior* to July 1, 1939, with regard to the respective subject matter covered by that particular part of the rule.

On the 13th day of May, 1943, the department of health adopted a set of rules and regulations relating to sanitary conditions in cosmetology establishments and made them effective as of July 1, 1943. Rule 3(a) thereof is as follows:

"a. RESIDENTIAL SHOPS. No cosmetology establishment shall be maintained in a home, unless a separate room is provided for that purpose. Such shops shall have an outside, separate entrance leading directly to the shop and any inside doors of said shop leading to living quarters must be closed at all times during the business day."

For some time this department has been aware that certain operators of residential beauty shops possess original letters written by the cosmetology division which bear a date prior to July 1, 1943, and in substance approve continued operation of the residential shop without a separate entrance or without complete separation between the shop and living quarters by the closing of inside doors during the business day because of the exceptions contained in the rule or regulation then in effect. This department respectfully requests an official opinion on the following two inquiries:

1. What effect did the adoption and publication of Rule 3(a) quoted above have upon those operators who had established a residential beauty shop in their home prior to July 1, 1931, or July 1, 1939, as explained above and what, if any, credit should now be given to the existence of the aforementioned letters?

2. What is the comparative legal significance of a state department of health rule and regulation regarding sanitary conditions in cosmetology shops and schools as compared to an act of the state legislature?

In my opinion a clarification of the two matters herein inquired about will be highly beneficial both in the administration and enforcement of the cosmetology laws."

In answering your first inquiry, we are confronted with the same question which would exist had the subject matter and provisions contained in the rules and regulations you mention been contained in different acts of the legislature. The readoption of the sanitary rule and regulation in question in each instance superseded the provisions of the

previous rule covering the same subject matter. At the time the letters which you mention were written to the particular shop owners, they expressed the law in effect at that time. The real question which you present is as to the legal effect of the general provision contained in Rule 3(a) of the set of rules and regulations effective July 1, 1943 on the continued operation of residential beauty shops which had theretofore fallen under the implied exceptions contained in the previous rules. It is apparent that Rule 3(a) of the published rules entitled "Residential Shops" contains neither expressed nor implied exceptions but is applicable to all cosmetology shops maintained in a home.

In the adoption of the various rules and regulations referred to in your inquiry, the state department of health acted under the delegation of legislative authority originally appearing in section 6 of chapter 49, Acts of the 42nd General Assembly and currently appearing in section 157.6, Code of 1950, which is as follows:

"157.6 RULES—PRACTICE IN HOME. The state department of health shall prescribe such sanitary rules for shops and schools as it may deem necessary, with particular reference to the conditions under which the practice of cosmetology shall be carried on and the precautions necessary to be employed to prevent the creating and spreading of infectious and contagious diseases. Cosmetology may be practiced in the home providing a room, other than the living rooms, be fitted up for that purpose. The department of health shall have power to enforce the provisions of this section and to make all necessary inspections in connection therewith."

Obviously the function being performed by the department was one of exercising the police power of the state of Iowa because the expressed purpose stated by the legislature was one of authorizing the prescribing and fixing of sanitary rules and regulations for cosmetology shops and schools. It is well established that a person does not acquire a vested right by virtue of having previously operated a place or business falling within an exemption or exception contained in a law which is an exercise of the police power of the state. We must not confuse the situation now being considered with the right of a cosmetology practitioner to be entitled to a license from your department without an examination because of having been in actual practice on April 9, 1927. That right exists under the expressed terms of section 157.7, Code 1950, and has no relationship to the sanitary requirements under which the practitioner's shop is required to be operated.

It is the opinion of this department that by the adoption of Rule 3(a), set forth in your inquiry, and the distribution of certified copies thereof pursuant to the provisions of section 135.30, Code 1950, it became effective on the date fixed therein, namely July 1, 1943, and that immediately all cosmetology shops then being maintained in homes became subject to the requirements and conditions contained therein regardless of their status of compliance with the provisions of any previous rule and regulation.

In answering your second inquiry we deem it necessary only to refer you to the decision of the supreme court of Iowa in the case of *Pierce v. Doolittle*, 130 Iowa 333, where it was held that rules and regulations of the state board of health, which it has legislative power to make, have

the force and effect of a statutory enactment; and a statute prescribing the punishment for a violation of such rules and regulations as may be made by the board of health is not unconstitutional. That the state department of health has been delegated authority to adopt reasonable rules and regulations which relate to sanitary requirements of cosmetology shops and schools, see *Gilchrist v. Bierring*, 234 Iowa 899 at page 907 where it is said:

"In defendants' order refusing to renew plaintiff's license, above quoted, seven grounds are given. The department had authority to make rules as to most of those subjects. Items 3 and 4 relate to sanitary requirements. Section 2585.15 expressly delegates to the department authority to prescribe rules and regulations in regard thereto. Plaintiff does not challenge such delegation of power. Nor do we think it could be successfully challenged. *Pierce v. Doolittle*, 130 Iowa 333, 106 N.W. 751, 6 L.R.A., N.S., 143."

As evidence that the penalty for a violation of your department's rules and regulations covering sanitary conditions in cosmetology shops and schools is the same as for the violation of the statutory provision relative to a matter of public health we refer you to the provisions of section 135.38, Code 1950, which are as follows:

"Any person who knowingly violates any provision of this chapter, or of the rules of the department, or any lawful order, written or oral, of the department or of its officers, or authorized agents, shall be guilty of a misdemeanor. *If said rules relate to the practice of cosmetology or barbering said misdemeanors shall be punished by a fine of not to exceed one hundred dollars or by imprisonment not to exceed thirty days.*" (Italics supplied.)

August 24, 1950

**SCHOOLS AND SCHOOL DISTRICTS: Construction contracts—no deviation from statutory provisions permitted.** The statutory powers vested in a school district to make a contract for construction of a school building contemplates a completed building for which a fixed amount will be paid. No deviation by way of clauses for work stoppage due to national emergency are permitted by law.

*Mr. James R. Brown, County Attorney, Mason City, Iowa:* We have yours of the 9th inst. in which you have submitted the following:

"I am herewith enclosing proposed amendment of Article 23 of the general conditions of the contract for the construction of buildings, standard form of the American Institute of Architects, which I received from Attorney Edward R. Boyle, who is the attorney for the Ventura School District. It is the desire of the architect of the Ventura school job to have this paragraph inserted in the contract, and Mr. Boyle seems to be concerned about the legality of this clause.

The question which Mr. Boyle would like answered is, does this clause violate any statute governing the letting of public contracts and public works?

I would appreciate having you send an opinion on the above question to Attorney Edward R. Boyle, Clear Lake, Iowa, as soon as possible." together with the following amendment to the proposed contract:

*"If the work or construction is stopped under an order of any court, or other public authority, for a period of three months, through no act or fault of the contractor or of anyone employed by him; or, in the event of a national emergency, work or construction is stopped, directly or indirectly, by or as the result of the order or action of any court, or*

federal or state authority, and the circumstances or conditions are such that it is and will be impracticable to proceed with such work or construction; or, *if the architect should fail to issue any certificate for payment within seven days after it is due, or if the owner should fail to pay to the contractor within seven days of its maturity and presentation, any sum certified by the architect or awarded by arbitrators, then the contractor may, upon seven days' written notice to the owner and the architect, stop work or terminate this contract and recover from the owner payment for all work or construction executed and completed at that time, and for any loss sustained upon any plant or materials, and also reasonable profit and/or damages.* If no agreement is reached by the contractor and owner within fifteen days after the written notice has been given as hereinbefore provided, the question or questions in dispute shall be subject to arbitration as hereinafter provided.

(The italicized portion of the document represents the present wording of Article 23; the words not italicized represent the modification of same.)"

In reply thereto we would advise you that the insertion of the foregoing proposed amendment in the public construction contract is in excess of the powers of the school district. The statutory powers vested in the school district in the making of contracts for the construction of school buildings contemplates a construction contract to completion for which a firm and fixed amount will be paid. Any dilution of the powers to make a contract for a complete building must arise from legislative authority. No such authority has been granted. We would advise you in this connection that a bill to vest authority in public bodies to make provision in contracts for stoppage of work on public contracts due to a national emergency was offered in the 53rd General Assembly but failed of adoption. See House File 579 of the 53rd General Assembly. The bill passed the House but failed to pass the Senate.

September 11, 1950

**VETERANS: Relief—names confidential.** Neither the board of supervisors nor the soldiers' relief commission may reveal the names of persons receiving relief under the law.

*Mr. Edwin H. Curtis, Executive Secretary, Iowa Bonus Board:* We have yours of the 28th ult. in which you have submitted the following:

"I am desirous of an official opinion clarifying section 250.12 of the 1950 Code of Iowa.

'250.12. Relief information confidential. It shall be unlawful for the board of supervisors of any county or the soldiers relief commission of any county to place the administration of the duties of the soldiers relief commission under any other relief agency of any county, or to publish the names of the veterans or their families who receive relief under the provisions of this chapter.'

"A Committee from a veterans' organization called on one of the relief offices to check their records as to who in the county was receiving relief. The information was not granted as they held it was confidential. The soldiers' relief commission is required by law to furnish the board of supervisors of their county an annual report on their issuance and in this report they list the names and itemize the expenditures. This same committee states that they will go to the supervisors to examine the

report furnished them. As I interpret this section it is illegal for the county soldiers' relief commission or the board of supervisors to furnish this information to this committee."

In reply thereto we would advise you that in our opinion the foregoing statute is a prohibition upon both the board of supervisors and the soldiers' relief commission against circulating in any manner the names of veterans or their families who receive relief under the soldiers' relief commission. The word "publish" contained in the statute, which both the board of supervisors and the relief commission are prohibited from doing, means to put into general circulation, as distinguished from the mere printing of the list. Under the foregoing the soldiers' relief commission and the board of supervisors are denied the authority to furnish the list of persons receiving relief. See Words and Phrases, Vol. 35, Page 433 "Publish".

September 14, 1950

**COUNTIES—Recovery of losses from other counties—treasurer's bond.**

In case of defalcations by a county treasurer over a period of years only the amount in any year in excess of his statutory bond shall be recovered pro rata from the other counties under the provisions of section 334.13 of the Code.

*Mr. C. B. Akers, Auditor of State, Attention, L. I. Truax:* We have yours of the 23rd ult. in which you have submitted the following:

"On April 3, 1950, this office filed with you a copy of audit reports made by our examiners, Carl Nimrod and R. W. Barber, covering the examination of the office of A. C. Schulmeister, Harrison county treasurer for the period January 1, 1948 to and including March 13, 1950. These reports showed a shortage of funds in the said county treasurer's office of \$16,096.25. Said shortage is set out as follows:

Shortage for the years 1945-1946.....	\$ 4,128.21
Shortage for the years 1947-1948.....	8,069.54
Shortage for the years 1949-1950.....	3,898.50

\$16,096.25

A statement signed by Michael Murray, Harrison county attorney, and Roy E. Havens, associate counsel, was filed in this office in which it is stated that a compromise settlement for the said shortage of \$4,128.21 for the years 1945 and 1946 has been offered by the surety of the said county treasurer, A. C. Schulmeister, whereby the said surety will pay one-half of the amount claimed on bond of said county treasurer for the years 1945-1946 and pay in full the amounts claimed on each of the other bonds covering the years 1947-48-49-50.

However, said statement indicates that an acceptance of this offer by the officials of Harrison county is somewhat contingent upon the construction and interpretation to be placed on section 334.13 in the 1950 Code of Iowa which is as follows:

'All losses of funds in the legal custody of a county treasurer resulting from any act of omission or commission for which the said treasurer is legally responsible, except losses to the amount of the treasurer's bond, \* \* \*, shall be replaced by the several counties of the state as hereinafter directed.'

The section following provides that the Auditor of state shall determine the amount of the loss and that the state comptroller shall

apportion the loss so determined to the other counties of the state and collect from them any pay to the county as reimbursement.

In this connection several questions arise as to the construction or interpretation of section 334.13, above quoted. First. Assuming it has been judicially determined that an action on the first bond is barred by the statute of limitations, is the loss sustained by reason thereof one for reimbursement under Code sections 334.13 and following? Second. Is the amount which the county would concede for the purpose of effecting a compromise and settlement be considered a loss for which it would be entitled to reimbursement? Third. Does the phrase in the statute, 'except losses to the amount of the treasurer's bond,' have the same meaning as a phrase, 'except losses to the amount of the liability of the treasurer and his surety on his bond as determined by adjudication or compromise and settlement, though such amount is less than the face of the bond?'

In reply thereto we would advise you as follows:

The foregoing statute has previously been under consideration by this department and eventuated into the view thereof appearing in the Report of the Attorney General for 1934 at Page 102 in words as follows:

"You also ask how section 5169-a1 should be interpreted with reference to the amount Scott county should be able to recover. It is the opinion of this office that Scott county should recover all of the losses, except the amount of the treasurer's bond. In other words, if the loss was less than the amount of the treasurer's bond, the county would not be entitled to recover anything under the provisions of section 5169-a1 and following. However, if the amount of the loss is more than the amount of the treasurer's bond, the county is entitled to recover all of the loss over and above the amount of the said bond."

We adopt the foregoing view and confirm its correctness. In our view it was the intention of the legislature in the adoption of the foregoing statute that loss occasioned by acts of its county treasurer up to the sum of \$10,000.00, being the statutory amount on the county treasurer's bond, is a loss to be borne by the county, and that any loss in excess of the sum of \$10,000.00 is the sum that should be borne by the remaining 98 counties of the state pro rated pursuant to the terms of the statute. It was its intention that the maximum county liability would be only \$10,000.00 even if there be default on the bond, a sum that would not be too great a local burden. This view is confirmed by statutory construction. The legislative act, being chapter 95, Acts of the 41st General Assembly, sets out in section 3 thereof the following:

"Sec. 3. Amount of bond. The bond of the county treasurer shall be in the sum of ten thousand dollars (\$10,000.00)."

The term "amount of bond" appearing therein also appears in section 4 of the foregoing chapter 95 which is section 334.13, exhibited in your letter. The use of the term "amount of bond" in these two sections by the legislature is proof that they were intended to mean the same thing. In that view the provision of section 3, fixing the amount of the county treasurer's bond at \$10,000.00, is the amount of the bond referred to in the exception appearing in section 4 of the Act. The amount of bond, therefore, being \$10,000.00, determines that part of

the loss that is not required to be replaced by the several counties of the state. We are aided in this construction by the rule "that a proviso or exemption in any statute in derogation of its general enacting clause must be strictly construed." (Palmer v. Board, 226 Iowa 92, 94). Further support for this view is found in the administrative duties required to be performed by other provisions of the foregoing chapter 95, Acts of the 41st General Assembly as amended. The duties there imposed upon the auditor of state and the comptroller can only be performed consistently with this interpretation when and if the amount of the loss within the foregoing exception is a fixed sum at the time of the audit. These duties of the auditor and the comptroller include, first, that the amount of the loss which is to be replaced shall be determined by the auditor of state from a full and detailed examination made by him \* \* \* of the accounts of the treasurer in question, and, second, after such determination by the auditor, the duty of the state comptroller is to apportion the same to each county in the proportion which the taxable portion of each county bears to the total taxable property of all the counties of the state.

September 14, 1950

**SOCIAL WELFARE: Employees—age alone not ground for dismissal.**

Under the Iowa merit system regulations evidence that an employee has attained a certain age is not a ground for dismissal.

*Mr. D. R. Cottrell, Director Iowa Merit System Council:* We have your letter dated September 11, 1950, in which you set out a copy of the resolution recently adopted by the Polk county social welfare board and ask our opinion as to the council's authority to recognize age, irrespective of other factors, as a just cause for dismissal in case action should be taken in accordance with the resolution and an appeal result therefrom to the merit system council. The resolution is in terms as follows:

"That all employees of the Polk county welfare department who are covered by the state merit system and who have already reached their 65th birthday retire as of September 30, 1950, and that all other employees retire at the end of the quarter in which they become 65 years of age, and take advantage of the benefits afforded them under the Iowa old-age and survivors insurance system."

In answering your inquiry we would first direct your attention to the fact that the state of Iowa regulations for the merit system exist only by virtue of their having been adopted through joint action of the departments of state served by the merit council pursuant to the personnel provisions of the respective acts under which each operates. It appears that the state department of social welfare by official action taken December 28, 1939, adopted the regulations for the application of the merit principle of personnel administration in the state department of social welfare and on the staffs of the county boards of social welfare. The final sentence from that official action appearing on the inside cover of the printed regulations is as follows:

*"These regulations shall supersede the previous personnel regulations of the state department and county boards and shall become effective on*

The italicized portion indicates that a county board of social welfare is no longer vested with authority to establish policies of personnel administration with regard to that personnel coming under the merit system.

In answering your specific question the contents of the statement of policy appearing in the forepart of the printed pamphlet containing the regulations for the merit system is pertinent. It is therein provided that the regulations shall apply to all personnel in the state department of social welfare and on the staffs of the county boards of social welfare and the policy is therein stated in the following words:

*"to make possible a career service in the program by granting promotions on the basis of efficient work and by providing tenure of office to those who give satisfactory service."*

More specifically the intent to provide for tenure of office during the period of satisfactory service is set forth in Article XIII, section 6. It is as follows:

*"The tenure of office of every permanent employee shall be during good behavior and the satisfactory performance of his duties as recorded by his service ratings and other measures of performance. This provision, however, shall not be interpreted to prevent the separation of an employee for a cause, or the separation of an employee, because of lack of funds or curtailment of work, when made in accordance with these regulations."*

Section 2 of the same Article of the regulations contains specific grounds for dismissal. Nothing therein contained or nothing in section 6 quoted above indicates that age in itself has any relationship to dismissal from employment of anyone coming under the merit system regulations.

Article XIV of the regulations relates to your council's duty and the procedure on appeal. More specifically, section 4 thereof relates to appeal on dismissal.

It is our opinion that under the specific provisions of the regulations herein referred to, evidence of an employee having attained a certain age has no relationship to the tenure of office and more specifically that it is not a ground for dismissal. Therefore, on an appeal before the merit system council evidence of the dismissed employee having attained the age of 65 years, standing alone, could not be considered as a cause for dismissal.

---

October 31, 1950

**ELECTIONS: Employees' opportunity to vote.** The statutory guarantee of two hours to each employed person to vote means a two-hour period of the working day if such period is reasonably necessary to afford such person opportunity of voting.

*Mr. F. H. Becker, County Attorney, Dubuque, Iowa:* We are in receipt of yours of the 30th inst. in which you submit the following:

*"I have a request for an opinion in relation to section 49.109 of the 1950 Code of Iowa, and believe that under section 49.68 I should forward this request to you for answer.*

Assuming a plant operated by a large employer has a regularly established closing hour, at which time all employees leave their respective jobs; this regularly established closing hour leaving two or more hours intervening before 7 P.M., the hour designated for closing the polls at a general election. In this case is the employer required to allow qualified employees two hours out of the regular working shift or, at the employer's option, may the employer designate a two-hour period in a time intervening between the normal close of his business and the closing of the polls? In either event, under the above question, is the employer required to compensate the employee for his time?

I realize that this question was submitted to me at a late date, but request that your office expedite its answer so that an opinion may be had before November 2nd next, if that is possible."

In reply thereto we advise you as follows:

Section 49.109 of the 1950 Code of Iowa provides as follows:

"49.109. Any person entitled to vote at a general election shall, on the day of such election, be entitled to absent himself from any services in which he is then employed for a period of two hours, between the time of opening and closing the polls, which period may be designated by the employer, and such voter shall not be liable to any penalty, nor shall any deduction be made from his usual salary or wages, on account of such absence, but application for such absence shall be made prior to the day of election."

If the foregoing statute be construed as granting all employed personnel a two-hour period during working hours on election day for the purpose of voting, constitutionality thereof would be in jeopardy. See *People of the State of Illinois v. Chicago, Milwaukee & St. Paul Railway Company*, 306 Ill. 486, 148 N.E. 155, 28 A.L.R. 610. The manner in which a statute is administered and applied may determine whether it be constitutional or unconstitutional. And the statute must be construed, if possible, so as to avoid not only the conclusion that it is unconstitutional, but also to avoid grave doubt upon that score. In that aspect, it is my opinion that the statute must be interpreted as guaranteeing to all employees the right to absent themselves from their employment without deduction from their salaries or wages or be liable to any penalty, if such period of time within a two-hour period of the working day is reasonably necessary to afford such employees the opportunity of voting. Each case must rest upon its own facts. Without intending to exclude other factors, the following factors are entitled to be considered in granting time under the statute: distance of voting place from the place of employment, working hours, reasonable time for meals and making clothing changes. Application, of course, should be made prior to the day of election. In this connection we call your attention to the fact that all polling places shall be closed at 8:00 o'clock in the evening. See section 49.73, Code of 1950.

November 16, 1950

**CITIES AND TOWNS: Retirement pay for policemen—cost-of-living bonus included.** A cost-of-living allowance to a policeman is an increase in salary and should be included in computing his final compensation as a basis for retirement pay.

**CITIES AND TOWNS: Trustees of police retirement system.** Where

a city establishes a police retirement system based upon actuarial tables, the board of trustees of such system shall also constitute the trustees for the management of the funds created by chapter 410 of the Code.

*Honorable Harold F. Nelson, Sioux City, Iowa.* We have yours of the 1st inst. in which you have submitted the following:

"During the year, 1945, members of the fire department and police department of Sioux City were paid a 10 per cent cost-of-living bonus which was over and above the then going salary of their positions of their jobs. The salary was based upon a city ordinance of some years prior and the 10 per cent cost-of-living bonus while an ordinance of the city was placed upon a temporary basis. The cost-of-living bonus on a temporary basis in the year, 1945, and paid to the fire and police officers was made permanent in the year, 1946.

Those fire and police officers taking their pensions in the year, 1945, received a pension of one-half of the monthly salary which, however, did not include one-half of the cost-of-living bonus by them then being received.

A question also has arisen in regard as to whether the board set up in Code section 410.2 designates the board of three including 'The chief officer of each department, with the city treasurer and the city solicitor or attorney of such cities or towns', or whether in consideration of the provision of the last sentence of 410.2, the board would be made up and composed of those members designated and referred to in paragraph A of subsection 1 of Code section 411.5, it being understood that Sioux City is a city of over 8,000 in population, does have a civil service system, and after the enactment of chapter 411 in 1934 did install a fire and police retirement system based upon actuarial tables.

In view of the provisions of the last sentence of 410.2, namely, 'Provided, however, that in any city where contributory fire and/or police retirement systems based upon actuarial tables shall be established by this act for the benefit of policemen and/or firemen appointed to the force after the establishment of same, the board of trustees of each such system, respectively, shall also constitute the board of trustees for the management of each fund under this section as a separate and distinct fund in itself,' a question has been raised and a confusing one at that relative to the intent and meaning of this part of section 410.2.

We are further concerned as to an interpretation of the following: 'and upon retirement shall be paid out of the pension fund of such department a monthly pension equal to one-half the amount of salary received by him monthly at the date he actually retires from said department.'

In the receiving of a cost-of-living bonus by the officer, the amounts received by him monthly during the year, 1945, varied. Under the interpretation of Code section 410.6 and the words in question above quoted, is it possible to determine the overall average total compensation received by the officer or in this respect is it limited specifically to the total received by the officer in the 30 days prior to retirement?"

In reply thereto we would advise you as follows:

(1) In answer to your question number 1 as to whether fire and police officers, taking their pensions in the year 1945, are entitled to the cost-of-living bonus authorized by ordinance of the city and such bonus to be reckoned as included in the salary upon which the amount of his retirement pension should be based, we advise: Section 410.6, Code 1950, being the chapter under which disabled retired firemen and policemen are paid, provides with respect to the conditions under which the pension is paid as follows:

"Any member of said departments who shall have served twenty-two years or more in such department, and shall have reached the age of fifty years; or who shall while a member of such department become mentally or physically permanently disabled from discharging his duties, shall be entitled to be retired, and upon retirement shall be paid out of the pension fund of such department a monthly pension equal to one-half the amount of salary received by him monthly at the date he actually retires from said department. If any member shall have served twenty-two years in said department, but shall not have reached the age of fifty years, he shall be entitled to retirement, but no pension shall be paid while he lives until he reaches the age of fifty years."

The department has not previously had before it this specific question as respects section 410.6. Insofar as section 411.6 is concerned by letter opinion of January 17, 1950 the term "average final compensation" was held to include a cost-of-living allowance for policemen in computing his final compensation as a basis for retirement pay. Whether such cost-of-living bonus should be regarded as part of salary and compensation or merely regarded as a gift or gratuity is determinative of this question. Insofar as public employees are concerned, gifts or gratuities of public monies are not recognized or authorized. It appears in that aspect such cost-of-living bonus should therefore be regarded as part of the salary of policemen and firemen upon which their retirement allowance is based. This view is supported by *Attorney General v. Woburn*, 58 N.E. 2d, 746, 747, where it is stated:

"The only issue presented is whether the vote of the committee is to be interpreted as a grant of additional salaries for 1944 or as a gratuity to the employees of the school department. If the vote means the former, then no one contends that the action taken by the committee was not sufficient to increase the salaries, *Hayes v. Brockton*, 313 Mass. 641, 48 N.E. 2d 683; *O'Brien v. Pittsfield*, 316 Mass. 283, 55 N.E. 2d 440, but if the vote means the latter, then no one contends that it was not invalid. *Whittaker v. Salem*, 216 Mass. 483, 104 N.E. 359, Ann. Cas. 1915 B, 794; *Connor v. Haverhill*, 303 Mass. 42, 20 N.E. 2d 424."

This accords with the view of bonuses granted to employees of private industry. "Bonuses are increased compensation for service already rendered gratuitously or for a prescribed compensation." (*Hurt v. Cotton States Fertilizer Co.*, 159 F. 2d 52, 58) "As between employer and employee, a bonus voted by a corporation to its employees, whether in form of stock or cash, is not a gift or gratuity, but a sum paid for services or on a consideration in addition to or in excess of that which would ordinarily be given. (*Adams v. Mid-West Chevrolet Corp.*, 179 P. 2d 147, 162, 175 A.L.R. 554) See for other cases of like import *Words and Phrases*, Vol. 5, title "Bonus" 1950 cumulative annual pocket part.

(2) In answer to your question number 2 as to whether the board set up in section 410.2, Code 1950, consists of three members or consists of the number designated by section 411.5, in view of the fact that the city of Sioux City did install a police and fire system based upon the actuarial tables in 1934, we advise: Section 410.2, in our opinion, is determinative of this question. Such section provides as follows:

"The chief officer of each department, with the city treasurer and the city solicitor or attorney of such cities or towns shall be ex officio members of and shall constitute separate boards of trustees for the management of each fund. The chief officer of the department shall be presi-

dent and the city treasurer, treasurer of such boards, and the faithful performance of the duties of the treasurer shall be secured by his official bond as city treasurer. Such trustees shall not receive any compensation for their services as members of said boards. Provided, however, that in any city where contributory fire and/or police retirement systems based upon actuarial tables shall be established by this act for the benefit of policemen and/or firemen appointed to the force after the establishment of same, the board of trustees of each such system, respectively, shall also constitute the board of trustees for the management of each fund under this section as a separate and distinct fund in itself."

The foregoing proviso does not require interpretation. It is clear by its terms that where a contributory fire and police retirement system based upon actuarial tables is established, that the board of trustees of such system shall also constitute the board of trustees for the management of the funds created by chapter 410. That this was the express intent of the legislature is proved by the fact that the same act of the 45th General Assembly, Extraordinary Session, chapter 75, that created the pension system now designated as chapter 411, Code 1950, also added by section 13 of the foregoing chapter 75 the proviso now exhibited as a part of section 410.2.

November 16, 1950

**SOLDIERS AND SAILORS: Peace officers retirement system—patrolman as member during service.** A highway patrolman in the armed forces at the effective date of the peace officers retirement system became a member of the system and continues as such until he resumes his patrol duties within six months after discharge from service, and the state will pay contributions in his behalf during such period.

*Mr. Pearl W. McMurry, Chairman Board of Trustees, Iowa Department of Public Safety, Peace Officers' Retirement, Accident and Disability System:* You have requested an opinion of this office as follows:

"A member of the Iowa highway safety patrol, enlisted in the military service of the United States, and was called to active service on or about October 31, 1948, his military leave with the state department of public safety being recorded as commencing on that date. Since that time he has remained in the military service of this nation. He has never contributed to any of the funds of this retirement system nor has he been carried on the state payroll since November 30, 1948. The questions arise: (1) Did he become a member of this retirement system by virtue of the passage of chapter 97A, Code 1950, which became effective on July 4, 1949? (2) What would be his retirement and disability rights under the retirement act (chapter 97A), if any? (3) Should the state pay any contributions to the funds of this system during the period he has been in and during which he remains in the military service of the United States, as contemplated by section 97A.10, Code 1950?"

Section 97A.3, Code of Iowa, 1950, provides:

"1. All members of the division of highway safety and uniformed force and the division of criminal investigation and bureau of identification in the department of public safety, excepting the members of the clerical force, who are employed by the state of Iowa, when this chapter becomes effective, and all persons thereafter employed as a member of such divisions in the department of public safety, except the members of the clerical force, shall be members of this system. Such members shall be required to make contributions under any other pension or

retirement system of the state of Iowa, anything to the contrary notwithstanding.

2. Should any member in any period of five consecutive years after last becoming a member, be absent from service for more than four years, or should he withdraw his accumulated contributions or should he become a beneficiary or die, he shall thereupon cease to be a member of this system."

Section 29.25, Code of Iowa, 1950, provides:

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

The reference to the preservation of the status of the officer in the above quoted code section has the effect of preserving the status quo so that the officer upon his return suffers no prejudice by reason of his absence.

It is provided in section 97A.9, Code of Iowa, 1950:

"Any member who voluntarily or by induction enters the military service and who is serving in any branch of the armed forces of the United States, shall have the period of such military service included as part of his period of service in the department and shall not be required to continue the contributions required of him under section 97A.8 during such period of military service, provided that he shall within six months after he has been granted an honorable discharge from such military service return and resume his duties in the department, and provided further, that such member shall be declared physically capable of resuming such duties upon examination by the medical board."

This section includes as part of the period of service of the department the period of armed service while a member of the system. Thus subsection 2 of section 97A.3 does not relate to the period of time a member of the system is in the armed forces.

It is provided in section 97A.10:

"The state shall create a fund for the purpose of paying the contributions to this system of those members who voluntarily or by induction enter the military service or who are serving in the armed forces. Such fund shall be used for the purpose of paying the contributions which are required of the members under section 97A.9, for a period during which such member is serving in the armed forces and not later than six months after his honorable discharge. Should any member fail to return to service with his division within six months after his honorable discharge from the military service, the amount credited to his account in this fund by the state shall revert back to the state and such member or his representative shall not be entitled to claim any interest in the contribution so made by the state."

It is to be noted that section 97A.9 directs that the period of military service shall be included as part of the period of service in the department of "any member who voluntarily or by induction enters the military

service and who is serving in any branch of the armed forces of the United States." In view of the language in section 97A.10 "the state shall create a fund for the purpose of paying the contributions to the system of those members who voluntarily or by induction enter the military service or who are serving in the armed forces", it is concluded that the language of section 97A.9 does not refer to the time of entry into the service, but rather to the manner of entry. In other words, the legislature has emphasized that the provisions apply to one who voluntarily enters the service, as well as to one who did not seek such service. The phrase in section 97A.10 "or who are serving in the armed forces" evidences the intent that the provisions be applicable to those serving on the effective date of the act, as well as those who later enter the service. The same construction is to be applied to the provisions in section 97A.9.

You are therefore advised that it is the opinion of this office that any person who is in the armed forces and who was in the employ of the state of Iowa as a highway patrolman at the time of his entry into the service became a member of the system and continues as a member provided only that he resumes his duties in the department within six months after receiving an honorable discharge from service in the armed forces, and that contributions will be paid by the state of Iowa on behalf of such member of the system during the period the member serves in the armed forces and until he resumes his duties in the department of public safety.

---

November 29, 1950

**COUNTIES: Zoning law restrictions — "resident property taxpayer" defined.** The term "resident real property taxpayer" in the county zoning law means one who not only owns real estate in the area to be restricted but must also be one living in such area. Mere temporary absence will not affect his status, however.

*Mr. Donald E. Smith, Assistant County Attorney, Cedar Rapids, Iowa:*  
We have yours of the 3rd inst. in which you have submitted the following:

"We should like an official opinion of your office construing chapter 358A, Code of Iowa 1950, county zoning commission. Among other things, section 358A.3 provides:

"\* \* \* provided further that no restriction of industrial or commercial enterprise, buildings or structures in unincorporated areas shall become effective until approved by a majority, in number and amount of assessment, of the resident real property taxpayers owning real property in the area or district in which such restriction is to be imposed, either (1) at an election held for that purpose, or (2) by their signing an appropriate document indicating their approval."

Must the real property taxpayer owning property within the area or district in which restriction is to be imposed, be an actual physical resident thereof under the above quoted provision?"

In reply thereto we advise as follows:

The meaning of the word "resident" in the foregoing statute is determinative of the problem which you submit. "It is a word with a great variety of meanings. The necessary element in its signification is local-

ity of existence. The permanency of a residence indicated, however, depends in a great degree upon the context. The word has been variously construed to mean an occupier of lands, a resident, a permanent resident, one having a domicile, a citizen, or a qualified voter. The construction is generally governed by the connection in which the word is used". In re Town of Hector, 24 N.Y.S. 475, 479. The word "resident" when used as an adjective means "dwelling or having an abode in a place for a continued length of time, abiding, present" and, when used as a noun means "one who resides in a place or who dwells in a place for a period of more or less duration." MacLeod v. Stelle, 249 P. 254, 256. The term "resident freeholder" has been held in re Cohn, 121 N.W. 107, 109, to mean "those living within the subdivision and holding title to real estate." Such term "resident freeholder" has likewise been held in State v. City of Kokomo, 8 N.E. 718, 720, under a statute "authorizing a city incorporated under the general law to subscribe to the stock of any railroad, hydraulic company, or water power running in or through such city, etc., a petition of a majority of the resident freeholders of such city means all persons who reside within the city and who are the owners of an estate in lands within the city amounting to a freehold interest." In Kirkland v. Board of Public Works of City of Indianapolis, 41 N.E. 374, 376, the term "resident freeholders" under a statute, "providing that, on confirmation of an order for street improvement, the same shall become final, unless within 10 days two-thirds of the resident freeholders on such street remonstrate against the improvement, includes only freeholders residing on the street, and not residents within the city owning property upon the street." Thus when applied to the statute in question the rules require of us the opinion that a resident real property taxpayer owning property in the area or district in which the restriction authorized in the statutes is to be imposed means one who not only owns real estate in the area or district and pays taxes thereon but must also be one who is living in such area or district. The status of resident owner is not affected by a mere temporary absence.

---

December 21, 1950

**COUNTIES: Lost Warrants—procedure to secure payment.** The county auditor in the issuance of county warrants acts as a ministerial officer of the board of supervisors and such warrants are nonnegotiable. Therefore, when a warrant requiring authorization by the board of supervisors is lost or unaccounted for the board must first rescind its previous action, and second authorize the issuance of a new warrant in payment of the indebtedness. No indemnifying bond is required of the payee.

*Mr. Michael Murray, County Attorney, Logan, Iowa:* We have yours of recent date in which you submit the following:

"The county auditor of Harrison county has asked that I secure the opinion of your office concerning the matter of issuing duplicate warrants in various cases.

It has been my advise to him in several cases that before issuing a duplicate warrant, where the holder of the warrant claims to have lost the original, he should rely on Code section 541.199 and require the holder to give an indemnifying bond in accordance with said Code section.

It was my feeling that he had no right to waive this statutory protection which I felt to be available to Harrison county in such cases. The only question we have arising out of these cases where the warrant holder admits receiving the warrant but claims to have lost it after receiving it, is as to the amount of the bond which the auditor should require. Should the amount of the bond be the same as the amount of the warrant or should it be more?

Recently we have had several cases arise wherein the auditor's records and warrant stubs show that warrants were issued and apparently mailed to the payee, but the payees claim that they never received the warrants. They deny that section 541.199 should be applied against them because, if the original warrant be lost, its loss is in no way attributable to them. We were recently involved in a dispute of this nature with the state tax commission concerning a warrant issued and sent to the commission in payment of sales and use tax. The sales and use tax division of the tax commission denied that they had ever received the warrant and refused to post bond for a duplicate. Several other similar cases occurred recently when a mail pouch was stolen at Woodbine and we felt certain that the lost warrants were in this stolen mail pouch. We now have another case wherein we know nothing about what happened to the warrant except that the auditor's stub book shows that it was issued and the payee is willing to make affidavit that he never received it. Our principal question is whether or not the auditor should insist upon compliance with section 541.199 before issuing duplicate warrants in cases such as those described immediately above. If not, is there any other protection available to the county before issuing duplicate warrants in such cases?"

In reply thereto we advise you as follows:

Realization of the character of a county warrant and of the duties of the county treasurer with respect to its honor is necessary to an understanding of this situation. Both of the foregoing have been defined in *Harrison County v. Ogden*, 165 Iowa 325, 340, in terms as follows:

"The board of supervisors are the financial agents of the county, charged, under the statute, with general care and management of the county property, funds, and business. The county treasurer, under section 482, is charged with the duty of receiving money payable to the county and disbursing the same on warrants drawn and signed by the county auditor, and not otherwise, and it is his duty to keep a true account of all receipts and disbursements and hold the same at all times ready for the inspection of the board of supervisors. The basis for the warrant is the order of the board. It is but the evidence of indebtedness. It is prima facie evidence that the county is legally indebted to the holder of the warrant, but is not conclusive upon that point. They are not negotiable, but may be assigned under the statute, but, in the hands of the assignee, are subject to all defenses which exist in favor of the county. The money in the hands of the treasurer is subject to the order of the board. He is only a disbursing officer. The warrant is his authority for disbursing, but, before the disbursement has been made, the order for disbursement may be recalled, and, the warrant being based upon an order of the board of supervisors, the board, having control of the funds out of which the warrant may be paid, may prohibit the treasurer from using the funds for that purpose by proper order made upon him. This does not destroy the debt, if any, legitimately existing, but it prohibits the treasurer from disbursing the money upon the order, evidenced by the warrant as originally made; that is, it prohibits the treasurer from using the county's funds in his hands, which are subject to the order of the board, in payment of the warrant.

This becomes more apparent when it is remembered that the warrant is not an indebtedness; that by the issuance of the warrant no new debt

is created; that they are but the evidence of a pre-existing indebtedness, and constitute no final adjudication, as against the county, of the claims which they represent.

The county auditor is but a ministerial officer in the matter of issuing warrants on the county treasury. He acts under the direction of the board in this matter. Without the sanction of the board, he has no authority to issue a warrant upon the treasury for the payment of money for any purpose, and the only authority for the treasurer to pay money out of the treasury is upon the warrant so issued. Of course, our statute makes some exceptions in regard to payment of county money without the action of the board (for instance jury fees), but this is the general rule."

It would seem therefore that a county warrant is not a negotiable instrument and is subject to all defenses existing in the county; that the county auditor acts as a ministerial officer in a matter of issuing county warrants; that the duty and power of the county treasurer is to honor a county warrant, which issuance has been authorized by the board of supervisors or by the statute. According to section 333.2, Code 1950, all warrants, except as otherwise provided, must be authorized by the board of supervisors. That section provides,

"Except as otherwise provided, the auditor shall not sign or issue any county warrant, unless the board of supervisors by recorded vote or resolution shall have authorized the same, and every such warrant shall be numbered and the date, amount, and the number of the same, and the name of the person to whom issued, shall be entered in a book to be kept in his office for that purpose."

Subject to the foregoing general powers the county auditor is authorized without previous approval by the board to issue warrants for jury fees, witness fees and for the grand jury and the district court in criminal cases, the per diem of shorthand reporters and the expenses of the grand jury, and the further exception that a warrant may be issued after authorization of the board of supervisors when the board is not in session for salaries fixed by the board of supervisors, for fixed charges such as freight, express, postage, telephone, etc. Whether a warrant is issued under the authority of the supervisors under section 333.2 or under the authority of the statute, 333.3, makes no difference in the powers of the treasurer with respect to paying, and the auditor with respect to issuing a substitute warrant. Assuming that the law has been complied with, either the board has authorized the issuance of the lost instrument or the auditor has issued it pursuant to the power vested in him by the statute. The warrant so issued is the warrant that the treasurer may lawfully honor. He is a ministerial officer and his power and duty is to honor the warrant so lawfully issued under the foregoing statutes, 333.2, 333.3 and 333.4. Therefore, without further statutory authority the auditor is without power to issue a duplicate or the treasurer without power to honor such duplicate. Insofar as the issuance of warrants that require authorization of the board of supervisors it would follow that action by the board of supervisors is required in the circumstances herein set forth, first, to rescind its action in authorizing issuance of the lost or unaccounted for warrant and second, to authorize the issuance of the new warrant in payment of the indebtedness. Both of the foregoing actions are binding upon the treasurer. The foregoing

discussion and conclusion forecasts the relation of section 541.199 to the situation under examination. That section in terms provides as follows:

“Whenever a note, bond, bill of exchange, certificate of deposit, check, or other evidence of indebtedness shall have been lost, stolen, or destroyed, and the owner thereof desires payment to be made by the person, firm, or corporation issuing the same, he shall execute and deliver, if demanded, to such person, firm, or corporation, a good and sufficient bond agreeing to indemnify and save harmless the payer thereof.”

While a county warrant is technically an evidence of indebtedness, it is not an evidence of an indebtedness within the terms of the foregoing statute. This is concluded by adjudicated cases and text book statement. In *Scott County, Ark. v. Advance-Rumley Thresher Co.*, 288 Federal Reporter 739, 745, the Court of Appeals of the Eighth Circuit said with respect to a county warrant the following:

“The question of innocent purchaser is not involved here. The warrants are only evidence of debt, mere orders from the county treasurer to pay the amount specified, and while they are prima facie recognition of the validity of the claim they represent, and where payable to bearer, are transferable by delivery, and the holder can sue in his own name, they are not negotiable instruments in the sense of the law merchant. The person holding them does not become an innocent holder thereof as in the case of negotiable paper. Any one taking these warrants takes them subject to defenses that might be interposed were they held by the original payee. *Vale v. Buchanan*, 98 Ark. 299, 135 S.W. 848; *Mayor v. Ray*, 19 Wall. 468, 477, 22 L. Ed. 164; *City of Little Rock v. United States*, 103 Fed. 418, 423, 43 C.C.A. 261; *Thompson v. Searcy County*, 57 Fed. 1030, 6 C.C.A. 674; *Board of Commissioners of Hamilton County v. Sherwood*, 64 Fed. 103, 11 C.C.A. 507. When the original warrants were called in and new ones issued the new ones were subject to any defense applicable to the original. *Dillon on Municipal Corporations* (5th Ed.) 861; *Wall v. County of Monroe*, 103 U. S. 74, 26 L. Ed. 430.”

The following text book statement is made in 34 Am. Jr. 617, title “Lost Papers and Records” paragraph 46, as follows:

“While the obligee in a nonnegotiable instrument cannot, as a rule, insist upon payment without producing or surrendering the instrument, or accounting for failure to do so, the obligor cannot insist upon an indemnity bond as a condition to payment, or require one when sued on the instrument. The reason for not requiring indemnity in such cases is that there is not risk of double payment, owing to the nature of the instrument. Statutes requiring indemnity in actions on lost negotiable paper do not apply where the lost instrument is nonnegotiable.”

Our supreme court has adopted the foregoing in principle in the case of *Shalla v. Shalla*, 237 Iowa 752, 763. There in discussing the meaning of section 541.200, Code of 1950, the court stated:

“The statement in 17 R.C.L. 1192 is a general statement of the reasons for requiring indemnity in the event of an action on a lost instrument. It demonstrates why the legislature should provide as it has in section 9660, Code, 1939, section 541.200, Code 1946. The cases of *First Nat. Bk. v. Wilder*, supra, *Sterne v. South Jersey Title & Finance Co.*, supra, *Burrows v. Goodhue*, supra, *In re Guardianship of Bradford*, supra, and *Newton Sav. Bk. v. Howerton*, supra, are illustrative applications of the general rule and the spirit of our statute.

As heretofore pointed out, defendant specifically denied that the note was lost and asked that the plaintiff file a bond solely because the petition asserted that defendant had wrongfully secured possession of

the note and mortgage and had refused to return them to plaintiff. The statute was not intended to apply to such a situation. The trial court was right in ignoring said Division III of the answer." and the Ruling Case Law which was approved by the court is this:

"Where a negotiable instrument has been lost the maker is entitled to protection against the possibility of its turning up in the hands of an innocent holder for value, and against such liability the maker should be indemnified. The filing of a bond of indemnity merely takes the place of the filing in court of the note or other security. Therefore the authorities are unanimous in holding that where the instrument on which recovery is sought is *negotiable*, the defendant can require of the plaintiff that he file a proper bond of indemnity, whether the action be in equity, or at law."

December 21, 1950

**SCHOOLS AND SCHOOL DISTRICTS:** Building permits for school buildings: School districts are quasi municipal corporations of the most limited power known to the law and are subject to the provisions of city ordinances pertaining to building permits and fees.

*Mr. Donald E. Smith, Assistant County Attorney, Cedar Rapids, Iowa:* We have yours of the 25th ult. in which you have submitted the following:

"We have been requested to obtain your official opinion on the following question. The city of Cedar Rapids has informed the Independent School District of Cedar Rapids that it is subject to the ordinance pertaining to the issuance of building permits in connection with its construction of school buildings and must pay the fee prescribed based upon the estimated cost of the work contemplated as provided in said ordinance. The school district maintains that it is a political subdivision of the state and that is not within the purview of the ordinance or any statute authorizing the city to enact the same.

The rule is stated in 59 Corpus Juris 1103, Statutes, Section 653, that the state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest as where they are expressly named therein or included by necessary implication."

In reply thereto we would advise you that in our opinion the Independent School District of Cedar Rapids, Iowa is subject to the provisions of the ordinance of the city of Cedar Rapids pertaining to the issuing of building permits in connection with the construction of school buildings and is required to pay the fees prescribed by the foregoing ordinance. This view is supported by the case of Pasadena City School District v. Pasadena, 134 Pac. 985, 47 L.R.A. N.S. 892, where the claim was made that the school district was exempt from the Pasadena Building Code and it was contended there, as suggested in your letter, that under the general power to control school affairs and particularly the power to plan and erect school buildings, there is implied police power as to all matters pertaining to the erection of such buildings. The court in disagreeing with that contention stated:

"School districts are quasi municipal corporations of the most limited power known to the law. Their trustees have special powers, and cannot exceed the limit. *Denman v. Webster*, 139 Cal. 452, 73 Pac. 139. Power in the school trustees to determine for themselves all matters concerning the school structures to be erected, to the exclusion of the right of the

municipality to impose police regulations, cannot be implied from a grant solely of power to control school affairs of the district and plan and build schoolhouses. The constitutional right of the municipality to impose reasonable police regulations within its territorial limits, while it may be controlled by a general law, still such law must be, as is said in *Ex parte Campbell*, supra, a positive and general law upon that subject. The power conferred on the trustees of the school district to erect schoolhouses is to be taken only as a grant of power to effectually carry out the purpose of their creation. As a public agency of the state the trustees would have no such power unless it was specifically granted. As granted it is no different as a power from what is possessed under the corporation laws of this state by private corporations, as far as controlling corporate property and the right to erect structures thereon is concerned, nor different from the right which the owners of land have to control it and erect buildings upon it. The erection of school buildings necessitates the making of plans therefor just the same as it is necessary for private corporations or individuals to prepare them. These latter, when their structures are to be erected in the city, must prepare their plans therefor according to the building regulations thereof and submit them for inspection to the municipality, so that the regulation which the city imposes may be conformed to. And as we do not think the provisions of the school law invoked by appellant constitute a general law relieving it from compliance with the building regulations of the city of Pasadena, it was required to submit itself to and be governed by them."

The applicability of the foregoing reasoning to the situation presented is plain and we adopt the views therein expressed. See also 62 C.J.S., title "Municipal Corporations", page 320.

## INDEX TO CITATIONS AND OPINIONS ON CODE SECTIONS

Attorney General opinions usually quote or interpret Code sections or acts of the General Assembly. Following in numerical order, the chapters and sections of the Code of Iowa and Acts of the Fifty-second and Fifty-third General Assemblies are indexed where reference is made in the opinions.

### CONSTITUTION OF STATE OF IOWA

Article and Section	Page Cited in Report
Art. VII, Sec. 5.....	30

### CHAPTERS OF CODE OF IOWA

Chapter No.	Page Cited in Report	Chapter No.	Page Cited in Report
24 .....	8	391 .....	28, 29
35A .....	30, 32, 93, 97	397 .....	29
135C .....	33	411 .....	104
229 .....	66	419 .....	13, 148, 151
253 .....	33, 34	426 .....	142
293 .....	107, 108	471 .....	11, 12, 13, 175
306 .....	175	472 .....	11, 12, 13, 175
309 .....	42	491 .....	64
311 .....	152	492 .....	63, 64, 65
313 .....	140	602 .....	57
321 .....	128	606 .....	66, 67
326 .....	128	675 .....	23, 24
332 .....	23	751 .....	70
365 .....	14	754 .....	72
371 .....	160, 161		

### SECTIONS OF CODE OF IOWA

Section No.	Page Cited in Report	Section No.	Page Cited in Report
4.1 .....	113	157.7 .....	184
7.5 .....	141	176.8 .....	10
11.22 .....	100	223.4 .....	165
13.2 .....	176	223.14 .....	165
23.12 .....	28	228.2 .....	66
23.16 .....	28	228.4 .....	66
24.7 .....	4, 5, 6	228.5 .....	66
24.8 .....	6	228.9 .....	67
24.9 .....	4, 5, 6	230.10 .....	67
24.14 .....	7	230.15 .....	137
24.15 .....	6, 7	230.21 .....	136
24.17 .....	7	230.24 .....	56
24.20 .....	6, 7	230.25 .....	135, 136
29.25 .....	195	230.26 .....	135, 136
35.7 .....	109, 119	231.8 .....	77
35.8 .....	122	244.14 .....	164
35.9 .....	110, 120, 121, 122, 152	249.19 .....	114
43.32 .....	155	250.12 .....	186
49.20 .....	154	262.9 .....	141
49.68 .....	190	274.15 .....	155, 156, 157
49.73 .....	191	279.13 .....	60, 61, 63, 170, 171
49.109 .....	190, 191	279.15 .....	60, 61, 62, 63
50.38 .....	31	279.18 .....	157
76.2 .....	5	279.40 .....	133
79.1 .....	78	282.7 .....	156
79.7 .....	173	282.17 .....	158
97A.3 .....	194	282.20 .....	157
97A.9 .....	195, 196	293.7 .....	107
97A.10 .....	195, 196	298.2 .....	51
124.5 .....	37, 38	306.1 .....	9, 138
124.9 .....	38	307.5 .....	138, 141
124.13 .....	179	307.6 .....	139
124.16 .....	37, 38	308A.14 .....	176, 178
124.20 .....	179	309.1 .....	9
124.24 .....	38	309.13 .....	41, 42, 43, 78
124.34 .....	179	309.22 .....	9, 106, 132, 133
124.35 .....	179	309.32 .....	132, 133
135.30 .....	184	309.33 .....	9
135.38 .....	185	309.35 .....	147
157.6 .....	184	309.36 .....	147

## SECTIONS OF CODE OF IOWA—Continued

Section No.	Page Cited in Report	Section No.	Page Cited in Report
309.37	147	419.15	148, 149
309.45	176, 177, 178	419.37	149, 150
309.68	145	419.51	148
309.69	145	419.55	14, 15, 149, 150, 161
309.70	145	419.58	150
309.71	145	419.64	13
309.80	173, 174	419.65	13, 149, 150
310.13	147	419.70	163
310.21	177, 178	425.11	113, 114
311.4	144	426.2	142
311.6	146	426.3	113, 115
311.7	8, 85, 105, 120, 121, 133 131, 132, 144, 145, 146, 153	427.1	25, 80
311.8	146	427.3	18, 19, 44, 45, 48, 166
311.15	146	427.4	44, 46
311.16	153	427.5	46, 165
311.22	146	427.6	45, 46, 48
313.21	178	427.7	45, 47
313.37	139	427.13	25
313.42	139, 141	428.1	126
319.3	175	428.4	52, 53
319.4	175	428.7	113
321.1	26, 74, 166	429.2	169
321.18	27	429.4	52, 126
321.20	74	441.2	150
321.53	75, 167	441.3	180
321.54	75	441.6	180
321.55	75	444.3	169
321.56	75, 76	444.9	6
321.95	71	445.60	117, 118
321.118	27	455.118	133
321.130	26, 27	491.20	36
321.131	129	491.25	35, 36
326.2	128	491.26	35
326.7	129	491.27	34, 35, 36, 37
331.21	89	491.32	35
332.1	139	492.1	64
332.2	112	492.3	64
332.3	90, 139, 159	492.4	64
333.1	19, 20	492.5	64
333.2	101, 199	492.6	63
333.3	199	492.7	64
333.4	199	494.5	88
334.13	187, 188	495.5	87
339.22	89, 91	528.1	40
340.19	89	528.57	65
343.10	173	541.199	197, 200
343.11	174	561.2	114
345.1	41, 42, 43	561.4	114
358A.3	196	561.5	114
363.46	57, 59, 68	561.16	114
365.6	14, 15	588.2	114
365.7	16	595.19	122, 123
365.15	15	600.6	123, 124
371.2	161	601.128	172
371.9	162, 163	601.129	172
389.20	11	601.131	172
389.22	11, 12, 13	602.49	69
389.23	12	606.5	67, 94, 95
389.26	12	636.7	114
389.30	12	636.33	114
394.4	28, 30	668.3	84
397.9	29	673.1	114
397.14	29	673.5	114
397.16	29	675.19	24
397.17	29	675.23	24
397.18	29	683.1	114
405.13	100	754.5	72
410.2	192, 193	754.7	72, 73
410.6	192, 193	755.13	72, 73
410.10	103	757.1	73
411.6	103, 193	757.2	73
		757.3	73

## RULES OF CIVIL PROCEDURE

Rule No.	Page Cited in Report
345 .....	25

## ACTS OF 30TH GENERAL ASSEMBLY

Chapter No.	Page Cited in Report
53 .....	128

## ACTS OF 38TH GENERAL ASSEMBLY

Chapter No.	Page Cited in Report
237 .....	139
364 .....	107, 108

## ACTS OF 39TH GENERAL ASSEMBLY

Chapter No.	Page Cited in Report
332 (14) .....	31

## ACTS OF 42ND GENERAL ASSEMBLY

Chapter No.	Page Cited in Report
101 (8) .....	139

## ACTS OF 47TH GENERAL ASSEMBLY

Chapter No.	Page Cited in Report
156 .....	15, 16, 17

## ACTS OF 48TH GENERAL ASSEMBLY

Chapter No.	Page Cited in Report
98 .....	136
135 .....	130

## ACTS OF 50TH GENERAL ASSEMBLY

Chapter No.	Page Cited in Report
227 .....	87, 88

## ACTS OF 51ST GENERAL ASSEMBLY

Chapter No.	Page Cited in Report
192 .....	115, 141

## ACTS OF 52ND GENERAL ASSEMBLY

Chapter No.	Page Cited in Report	Chapter No.	Page Cited in Report
40 .....	48, 49	129 (7) .....	67
58 .....	110, 152	131 .....	77
58 (3) .....	109, 110, 120	147 .....	181
59 .....	19, 32, 83, 85, 93,	152 .....	48, 49, 50
	97, 124, 125	152 (10) .....	142
59 (4) .....	31, 32	160 (1) .....	147
59 (5) .....	33	163 (5) .....	8
59 (14) .....	30	231 .....	45
59 (15) .....	30	236 .....	79, 81, 82
92 .....	33, 34	240 (7) .....	100, 101
92 (2) .....	33	281 .....	47
122 .....	105	285 .....	68, 69
127 .....	67		

## ACTS OF 53RD GENERAL ASSEMBLY

Chapter No.	Page Cited in Report	Chapter No.	Page Cited in Report
53	154	152	141
99	55	182	102, 103, 104
112	133, 134, 135	196	165
114	157, 158	197	51, 52, 53, 54
116	156	198	100, 101
117	49, 50	203	151
117 (5)	48, 49	204	158, 159, 160
129	85, 105, 120, 121, 144,	229	172
	145, 153	232	56, 59, 69
129 (9)	131, 132, 133, 145, 146	233	68, 70
129 (17)	146	239	94, 95, 96
137	75	240	82

# Index to Opinions

## ADOPTION

See Marriage, 1.

## APPEAL BOARD

See Cities and Towns, 2.

## ARREST

*Service of warrant in foreign county.* Section 745.7 of the Code is not specific enough in its terms to authorize the sheriff of one county to serve a warrant of arrest in another county, except where a person escapes or is rescued after being arrested, the sheriff, under section 755.13, may pursue and re-take such person in any county of the state..... 72

## ASSESSOR

See Counties, 6.

## BANKS AND BANKING

*F. D. I. C. ratio of capital to deposits—no basis for requirement.*  
1. The Federal Deposit Insurance Corporation has no power to require an insured bank to maintain its capital in any fixed ratio to deposits as a condition to being and continuing such insured bank ..... 38

*Stock dividend issued against property—appraisal required.* A  
2. state or savings bank desiring to declare a stock dividend against property must have an appraisal of its assets by the executive council under chapter 492 of the Code. Acceptance of a valuation of the superintendent of banking made by him under rule by the council is a substantial compliance with said chapter ..... 63

## BEER

*Class "B" permits by county supervisors—limitations.* The board  
1. of supervisors is restricted by statute in the issuance of class "B" beer permits, outside of cities and towns for use in any establishment, to golf and country clubs and hotels in villages platted before January 1, 1934..... 37

*Sales prohibited after 1:00 A.M.* The state law prohibits the sale  
2. of beer on week days between 1:00 A.M. and 6:00 A.M. in cities and towns regardless of any city or town ordinance or lack thereof ..... 178

## BONDS

See Cities and Towns, 2.

## BONUS LAW

See Veterans.

## BUDGETS

See Taxation, 2.

**CHILDREN**

See Illegitimate Children.

**CITIES AND TOWNS**

See Courts, 1, 2; Roads and Highways, 2, 15;  
Schools and School Districts, 9;  
Taxation, 2.

*Civil service unaffected by change in form of government.* The

1. status of civil service employees in commission plan cities is retained upon conversion of such cities to the manager plan or any other change in form of government..... 13

*Revenue bonds of municipal utility plant—state appeal board has*

2. *no jurisdiction.* The issuance of revenue bonds payable from earnings of a city-owned electric plant is not within the purview of the local budget law and the state appeal board has no jurisdiction where objections are made to such issuance. The obligation of such bonds is not payable from any funds of the city..... 27

*Widows of firemen and policemen—pension increase retroactive.*

3. It was the legislative intention in the passage of chapter 182, Acts 53rd G.A. increasing the pensions of widows of firemen and policemen, that the act would be retroactive from its effective date ..... 102

*Manager plan—appointive officers.* The offices of city engineer,

4. city treasurer and city auditor under the city manager plan of organization under chapter 419, Code 1946, are filled by appointment by the city manager..... 148

*Manager plan—status of permanent park board.* The status of

5. the park board of the city of Des Moines, operating under chapter 371 of the Code, is not in any manner effected by the transition of the city of Des Moines from the commission plan of government to the manager plan..... 160

*Trustees of police retirement system.* Where a city establishes a

6. a police retirement system based upon actuarial tables, the board of trustees of such system shall also constitute the trustees for the management of the funds created by chapter 410 of the Code..... 191

*Retirement pay for policeman—cost-of-living bonus included.* A

7. cost-of-living allowance to a policeman is an increase in salary and should be included in computing his final compensation as a basis for retirement pay..... 191

**CIVIL SERVICE**

See Cities and Towns, 1.

**CORONER**

See Counties, 5.

**CORPORATIONS**

See Banks and Banking, 2.

*Renewal of articles before expiration.* A corporation may renew

1. its corporate existence prior to the expiration of its charter and such renewal dates from the time of filing, with the secretary of state, the certificates and articles required by section 491.27 of the Code..... 34

- Requalification of foreign corporation—fee.* Foreign corporations  
 2. having perpetual existence are required to pay a requalification fee of \$1.10 per \$1,000 of property increase subsequent to the effective date of chapter 227, Acts 50th G.A. (Section 495.5, Code 1946)..... 87

## COSMETOLOGY

- Latest rules supersede previous rules—no vested rights.* Rules of the department of health, relating to the practice of cosmetology, adopted under police power conferred by the legislature have the force and effect of law. It follows that the latest rule of the department supersedes all previous rules on a particular subject and extinguishes any exemptions or exceptions of previous rules not repeated in the latest rule..... 182

## COUNTIES

- See Beer, 1; Courts, 3, 4; Insane Persons, 1, 2, 3;  
 Roads and Highways, 1, 3, 4, 13, 15;  
 Social Welfare; Taxation, 1, 2, 7.

- Janitor in courthouse—employed by supervisors.* The board of  
 1. supervisors has the power and authority under section 332.3 of the Code to employ a janitor for the courthouse as well as other personnel therein and section 333.1 cannot be held to be a provision divesting the board of this authority..... 19

- County home as nursing home—license required.* A County Home  
 2. coming within the definition of a “nursing home” contained in chapter 92, Acts 52nd G.A., must be licensed by the state department of health before it can be operated as such nursing home ..... 33

- Use of secondary road fund for construction of maintenance building.* The county board of supervisors may, under section  
 3. 309.13 of the Code, use the secondary road fund for the construction of garages and sheds for storage, repair and servicing of county equipment, *however* the proposal for such construction must first be approved by the electors pursuant to section 345.1..... 41

- Probation officer to serve in several counties—compensation.* The  
 4. judge of two or more counties of a judicial district may appoint the same probation officer and pay his salary at the respective rate allowed by statute for the population bracket of each county in direct proportion to the time spent in duties performed in that county. (Opinion on page 147 of Report of Attorney General 1948 modified to the extent of conflict herewith) ..... 76

- Coroner's autopsy duties—Fee claims audited by supervisors.* The  
 5. question as to whether the autopsy services of the coroner are necessary in each case of death involving suspicious circumstances is one largely within the sound discretion of the coroner. However, before payment of the coroner's claims for fees the board of supervisors has the duty to determine in each instance whether the coroner acted in good faith and may require a more or less complete explanation of each claim ..... 89

- Assessor—audit and payment of claims.* The county assessor is the  
 6. proper officer to audit all claims against his office, and upon

- approval by him and certification by the board of supervisors the said board shall thereupon authorize the county auditor to issue warrants against the county assessor fund..... 99
- Working hours of county employees.* County officers, both elective and appointed, autonomous in organization, engaged in the performance of specific statutory duties are entitled to determine the hours their offices shall be open to the public. The board of supervisors do not have power to determine working hours of employees in various county offices even though appointed and compensation fixed by the board. Overtime pay is not allowable to county employees..... 111
- Fees of justices and constables.* Justices of the peace and constables in townships of under ten thousand population are authorized to retain their civil fees..... 171
- Assessor's salary not subject to change during term.* The county assessor's salary must be fixed at the beginning of his term on a term basis and thereafter the county conference may not increase it at the beginning of any year nor at any time during the year..... 180
- Recovery of losses from other counties—treasurer's bond.* In case of defalcations by a county treasurer over a period of years only the amount in any year in excess of his statutory bond shall be recovered pro rata from the other counties under the provisions of section 334.13 of the Code..... 187
- Zoning law restrictions—"resident property taxpayer" defined.* The term "resident real property taxpayer" in the county zoning law means one who not only owns real estate in the area to be restricted but must also be one living in such area. Mere temporary absence will not affect his status, however..... 196
- Lost warrants—procedure to secure payment.* The county auditor in the issuance of county warrants acts as a ministerial officer of the board of supervisors and such warrants are non-negotiable. Therefore, when a warrant requiring authorization by the board of supervisors is lost or unaccounted for the board must first rescind its previous action, and second authorize the issuance of a new warrant in payment of the indebtedness. No indemnifying bond is required of the payee. 197

## COURTS

See Counties, 4.

- Municipal court judges—salary increase during term.* The legislative increase in salaries of municipal court judges granted by chapter 232, Acts 53rd G.A., is available on the effective date of said act. Such judges are not barred from any increase during their terms by the constitution nor by statute (section 363.46, Code 1946) not being city officers..... 56
- Municipal court employees—salary increase during term.* The legislative increase in salaries of municipal court employees granted by chapter 233, Acts 53rd G. A., is available on the effective date of said act. Such employees are not barred from any increase during their terms by the constitution nor by statute (section 363.46, Code 1946) not being city officers.... 68
- Mileage fees of petit jurors.* Petit jurors are allowed by statute 3. (section 607.5, Code 1946, as amended by chapter 239, Acts 53rd G.A.) ten cents for each mile traveled from the resi-

dence of the juror to the place of trial and this only for the first day of attendance..... 94

*Mileage fees of grand jurors.* Grand jurors are allowed by statute 4. (section 607.5, Code 1946, as amended by chapter 239, Acts 53rd G.A.) seven cents for each mile traveled in performance of official duties; however, travel from his place of residence by a grand juror and the county seat, there to perform his duties, is not the performance of official duty and no mileage is allowable..... 94

## ELECTIONS

*Compensation of primary election boards.* The Act increasing the 1. compensation of judges and clerks at general elections did not change such compensation of election boards at primary elections ..... 154

*Employees' opportunity to vote.* The statutory guarantee of two 2. hours to each employed person to vote means a two-hour period of the working day if such period is reasonably necessary to afford such person opportunity of voting..... 190

## ELECTRICITY

See Roads and Highways, 14.

## EMINENT DOMAIN

See Roads and Highways, 2.

## EMPLOYEES

See Elections, 2.

## GOVERNOR

*Centennial of statehood—Memorial Foundation authorized.* The Governor has plenary power, within the terms of the Act of Congress authorizing coins to commemorate the Iowa Centennial anniversary, to use the proceeds of the sale of said coins to establish a eelmosynary corporation to be named the "Iowa Centennial Memorial Foundation"..... 3

## GUARDIANS

See Veterans, 3.

## HEALTH DEPARTMENT

See Cosmetology; Counties, 2.

## HIGHWAYS

See Roads and Highways.

## HOSPITALS, STATE

See Insane Persons, 1.

## ILLEGITIMATE CHILDREN

*County attorney on appeal—printing costs borne by county.* It is the duty of the county attorney under chapter 675 of the Code, to represent the complainant in a paternity proceeding in all stages from the preparation of the complaint through an appeal to the supreme court if such be the conclusion of the case. The costs of printing on behalf of the complainant-appellee are chargeable to the county..... 23

## INSANE PERSONS

- State mental aid fund—basis of payments to counties.* Payments  
 1. from the state mental aid fund, created by chapter 99, Acts 53rd G.A., to counties for care of insane patients transferred from state hospitals and new patients committed directly to the County Home after July 4, 1949, are not conditioned on the costs of such care or whether they are pay patients or indigent patients. Said payments become a part of the county fund for the insane..... 54
- County commission hearings—no fees to clerk.* There is no statutory provision authorizing the taxation of any fees for the clerk of the county commission of insanity or for the clerk of the district court with regard to any proceedings had before the county commission..... 66
- Lien for care by county—not extended to future care.* Counties  
 3. have no statutory lien on the real estate of insane persons or their spouses for future maintenance by the state or county. It follows that where a husband has a valid divorce with award of his insane wife's real estate, the statutory lien attaches to said real estate only for past care furnished the wife prior to the divorce..... 135

## IOWA CENTENNIAL

See Governor.

## MARRIAGE

- Cousins by adoption only may marry.* The rights, duties, and relationships resulting from legal adoptions are limited to the child and adopting parents. It follows therefore the statute prohibiting marriage between cousins relates to those persons having not only a common relation to an ancestor but also to each other ..... 122

## MERIT SYSTEM

See Social Welfare.

## MINES AND MINING

- Strip mining—replacement of top soil.* A county board of supervisors may establish a soil conservation district where strip mining is in operation and by its resolution require the top soil to be replaced by the mine operator but such requirement cannot be retroactive ..... 158

## MOTOR VEHICLES

See Searches and Seizures.

- Trailers not motor vehicles—assessable as personalty.* Trailer  
 1. houses and commercial trailers in possession of a dealer or manufacturer are assessable as personal property even though the dealer or manufacturer has a license covering motor vehicles in his possession. Such vehicles are not classed as motor vehicles within the purview of section 321.130 of the Code. (38 A.G.O. 703 withdrawn)..... 25
- Special mobile equipment—cement mixers, etc., subject to personal  
 2. tax—gas and oil tanks subject to registration fees.* Cement mixers operated by auxiliary motors and similar machines except cornshellers and feed grinders, are "special mobile

equipment" and exempt from registration fees but subject to personal tax. Gas and oil delivery tanks are analogous to truck bodies and when used with a truck are subject to registration fees and exempt from personal tax..... 25

*Registration of foreign truck tractors leased by resident of Iowa.*

3. A resident owner of truck trailers may, after registering such vehicles in Iowa, lease foreign registered truck tractors to pull said trailers in interstate commerce without being considered the owner of the tractors for registration purposes. Said truck tractors would not be subject to registration in Iowa and may be operated in combination with Iowa registered trailers ..... 74

*Reciprocity on registration fees of motor vehicle carriers. The*

4. compensation tax exacted from certificated carriers has no relation to the registration of the vehicles used by such carriers and therefore is not a proper matter to be considered in reaching a mutual understanding with other states on reciprocity waiving registration requirements..... 127

*Registration of leased vehicles with option to purchase. It was*

5. not the intent of the legislature to exempt from registration motor vehicles owned by Iowa residents leased to nonresidents and operated in Iowa even though such leases contain options of the lessees to purchase, except in those instances in which the lease option arrangement is a sales financing device. 166

**NEGOTIABLE INSTRUMENTS**

See Counties, 12.

**NURSING HOMES**

See Counties, 2.

**OFFICERS**

See Courts, 1, 2.

**PENSIONS**

See Cities and Towns, 3.

**RECIPROCITY**

See Motor Vehicles, 4.

**ROADS AND HIGHWAYS**

See Counties, 3.

*Secondary road improvement by voluntary donations—chapter*

1. 163, Acts 52nd G.A. Chapter 163, Acts 52nd G.A. relating to improvement and maintenance of secondary roads by voluntary donations confers no discretion on the board of supervisors and said board (1) cannot reject the project when the conditions have been met, (2) must keep up the repairs, or (3) has no discretion to determine the length, character, or continuity of the project. (But see chapter 129, Acts 53rd G.A.) ..... 8

*Viaduct along city street—damages to abutting property. The*

2. eminent domain procedure contained in chapters 471 and 472 of the Code has no application to the determination of damages to abutting property contemplated by section 389.22 where a city proposes to construct a viaduct along an established city street. (But see chapter 165, Acts 53rd G.A.) ..... 11

- Vacation and sick leave for county employees.* County boards of supervisors may grant paid vacation and sick leaves to regular highway workers under similar rules as provided in section 79.1 of the Code, for state highway employees and pay the same from the secondary road maintenance fund..... 78
- Secondary road improvements—assessment of benefits.* The assessments for improvements to secondary roads, made under chapter 129, Acts 53rd G.A., should be spread on the basis of benefits, in the determination of which effect may be given to the area rule and the frontage rule as well as other considerations which benefit the property assessed..... 85
- Secondary road improvement—petitions from landowners.* Chapter 129, Acts 53rd G.A., pertains solely to surfacing secondary roads. Counties that have set up their program on the basis of more than one year need not change to a yearly program upon the filing of a petition as provided in the act but need only modify the program to the extent for the succeeding year or years. Projects should be included in the program in the order received regardless of township limitations..... 105
- Secondary roads improvement—use of farm to market road funds.* A secondary road assessment district under chapter 129, Acts 53rd General Assembly, may be set up with assessments made on land within a limitation of less than one-half mile on each side. Also the cost of improvement of such roads may be paid partly from farm-to-market road funds including the cost of grading..... 120
- Secondary road improvement under chapter 129, Acts 53rd General Assembly.* Petitions for resurfacing secondary roads must be given preference by the board of supervisors in either of two situations, (1) where the owners of 75 per cent of the land sign the petition and ask for assessment of not less than 50 per cent of the cost to lands in the proposed district and (2) where the owners of a like per cent sign and 50 per cent of the cost is subscribed or donated..... 131
- Secondary road improvement—selection of roads.* The preference in improvement of secondary roads outlined in section 9, chapter 129, Acts 53rd General Assembly applies to that 35 per cent of the construction fund which is supervised by the board of approval insofar as the selection of the roads to be improved is concerned..... 131
- Patent rights on paving machine developed with state funds.* The state highway commission has plenary power to execute a contract with the inventor of a paving machine (said inventor being an employee and state funds having been used to develop the machine) whereby the state releases all claims to royalties from the sales of such machines in exchange for a grant of license to the use thereof on all public works in Iowa without royalty payments..... 137
- Secondary road improvement on county line—petition of land-owners—payment by both counties.* A county line secondary road may be improved by one county under sections 311.4 and 311.7 of the Code 1950 upon petition of the abutting landowners who have pledged or donated 50 per cent of the cost. The other county may thereupon legally pay its share of the cost not borne by said landowners..... 144

*Secondary road improvement upon petition—grading mandatory.*  
 11. Upon the filing of a petition signed by the owners of 75 per cent of lands adjacent to or abutting upon a secondary road the board of supervisors must proceed to bring such road to permanent grade before surfacing in order to comply with section 9 of chapter 129, Acts 53rd General Assembly. (Section 311.7 Code 1950)..... 145

*Secondary roads—assessment districts—bridges—interest charges.*  
 12. A petition for surfacing of a secondary road, filed under the provisions of chapter 311, Code 1950, which road includes bridges not in service when the petition was filed, would not be entitled to a preference. When an assessment district is established under said Act the six percent interest charge starts 20 days after the adoption of the resolution ordering the levy of assessments..... 152

*Bridges—approval of county repairs by highway commission.*  
 13. County expenditures for repairs of bridges destroyed by fire or flood, while excepted from the budget requirements of section 343.10 of the Code, yet the contract therefor must be approved by the highway commission under the requirements of section 309.80 where the amount is more than two thousand dollars ..... 173

*Removal of transmission, telephone or telegraph lines.* Electric  
 14. transmission lines and telephone or telegraph lines occupying a highway under a permit or franchise may be ordered moved by the proper highway authority in case of highway reconstruction. However, when located on a private easement outside of the present highway right of way the easement must be purchased or acquired under eminent domain procedure... 174

*Extensions of secondary roads—duty to repair and maintain.*  
 15. Where the board of supervisors has, pursuant to section 308A.14, constructed, reconstructed or improved a city or town street which is an extension of a secondary road it has no further duty to repair and maintain such street. The obligation entirely belongs to the city or town..... 176

**SCHOOLS AND SCHOOL DISTRICTS**

See Taxation, 2.

*General state aid—section 5 of chapter 117, Acts 53rd G.A. interpreted.* The phrase “school levy of the preceding year” used in section 5 of chapter 117, Acts of 53rd G.A., providing general school aid from the state, means the amount in dollars and not the levy in mills and includes only those general appropriations that affect school districts in like manner such as general aid, supplemental aid and transportation aid.. 48

*Levy for collection in 1950 and 1951 limited by state aid act.* The  
 2. increased state aid to school districts provided by section 5 of chapter 117, Acts 53rd G.A., is confined to general school aid. Said section freezes the tax levy collected in 1950 and 1951 at the amount of levy collected in 1949 plus any increase or less any decrease in the items enumerated therein less the further decrease in an amount equal to the increase in state aid ..... 48

*Diminishing attendance—effect on renewal of teacher’s contract.*  
 3. On April 10 of each school year the school board, acting as reasonably prudent persons, should determine the apparent

facts as to probable attendance for the next year before re- newing a teacher's contract or permitting an automatic re- newal under the statute. If apparent at that time that not enough pupils were available a continuing contract would be void. If such fact is not apparent at that time but develops later the contract would be valid. Said statute has no effect on a teacher's contract valid when made.....	59
<i>Standard school aid.</i> The statute providing for state aid to stand- 4. ard schools (chapter 293, Code 1946) depends for effective- ness on biennial appropriations of the legislature. The 53rd G.A. failing to make such appropriations indicates an intent to discontinue said aid for the ensuing biennium.....	107
<i>Substitute teacher—salary payments.</i> Illness of a school teacher 5. will entitle the teacher to sick leave in conformance to chap- ter 112, Acts 53rd General Assembly. (Section 279.40, Code 1950.) Subject to said payments no additional compensation is due or payable to the teacher during his disability. The power to appoint and fix the compensation of a substitute teacher rests in the school board.....	133
<i>Adjoining districts exchanging pupils.</i> Two adjacent consolidated 6. schools each maintaining a grade school and a high school may contract with each other so that the first may close its school facilities in certain grades and send the pupils in these grades to the second school and the second close its high school and send said pupils to the first district.....	155
<i>Teacher's contract—statutory renewal.</i> A provision inserted in a 7. teacher's contract by the board waiving the renewal provi- sions of the statute is a nullity.....	170
<i>Construction contracts—no deviation from statutory provisions</i> 8. <i>permitted.</i> The statutory powers vested in a school district to make a contract for construction of a school building con- templates a completed building for which a fixed amount will be paid. No deviation by way of clauses for work stop- page due to national emergency are permitted by law.....	185
<i>Building permits for school buildings.</i> School districts are quasi 9. municipal corporations of the most limited power known to the law and are subject to the provisions of city ordinances pertaining to building permits and fees.....	201

## SEARCHES AND SEIZURES

<i>Motor vehicles—search without warrant.</i> Where the driver of a motor vehicle has been lawfully arrested the officer may, in certain circumstances, search without a warrant, the interior of the vehicle. Where no arrest has been made no such search should be made unless the officer has strong and definite "probable cause" for such search. In all questionable cases the better practice is to obtain a search warrant.....	70
--	----

## SECRETARY OF STATE

See Corporations, 1, 2.

## SOCIAL WELFARE

<i>Employees—age alone not ground for dismissal.</i> Under the Iowa merit system regulations evidence that an employee has at- tained a certain age is not a ground for dismissal.....	189
--	-----

**SOLDIERS, SAILORS, MARINES AND NURSES**

See Taxation, 3, 4; Veterans.

**STATE INSTITUTIONS**

*Cost of care for children of veterans.* Children of veterans originally committed to the Iowa Annie Wittenmeyer Home are cared for without expense to the county from which committed. However, counties committing children to the Glenwood state school or the hospital for epileptics and feeble-minded at Woodward are liable for their support..... 164

**STATE OFFICERS AND DEPARTMENTS**

*Resources council—vacancies do not change majority requirements.* The statute creating the Iowa natural resources council provides that a majority of the council shall constitute a quorum and a majority concurrence shall be required to determine any question. Therefore, the council consisting of seven members, the majority in each instance consists of four and it matters not that there may be vacancies in the membership ..... 151

**STATUTES**

*Omnibus repealing clauses of no legal effect.* An express general repeal clause to the effect that all inconsistent enactments are repealed is in legal contemplation a nullity..... 161

**STREETS**

See Roads and Highways.

**TAXATION**

See Counties, 9; Motor Vehicles, 1, 2.

*Supplemental estimates after levy meeting of board.* Supplemental  
1. tax estimates, limited to particular funds, are authorized by section 24.7 of the Code and may be considered and levy made at any time after the September levy meeting of the board of supervisors upon giving the notice required by section 24.9. However general tax estimates and levies may not be the subject of supplemental estimates..... 4

*Amending local budget after September levy.* Levies and estimates by local taxing bodies may not be increased after the September session of the levying board. New funds, omitted from the original estimate, may be made available by amending the budget before the November session..... 6

*Exemption of veterans of World War II.* The exemption from  
3. taxation accorded to veterans of World War II is limited to those who served between December 7, 1941, and September 2, 1945, inclusive ..... 17

*Veterans' exemption to widow—status upon remarriage.* The widow  
4. of a World War II veteran, owning property in her own name, may claim tax exemption through her deceased husband so long as she remains unmarried. When she remarries her exemption status immediately changes and she is no longer entitled to exemption through her former husband. If her second husband is also a veteran she may claim exemption through him provided he does not claim it himself on his own property ..... 44

<i>Moneys and credits exemption—not retrospective.</i> The exemption	
5. in the moneys and credits taxation statute provided by chapter 197, Acts 53rd G.A., to the extent of \$5,000, is prospective and not retrospective and said exemption has no application to assessments made in 1949.....	51
<i>Sealed corn not subject to personal property tax.</i> Chapter 236,	
6. Acts 52nd G.A., was intended to include corn sealed on the farm or corn held under a purchase agreement with the federal government so that such corn would be taxed on the basis of $\frac{1}{4}$ mill per bushel and not subject to personal property tax .....	79
<i>Board of review—number of members.</i> The county conference	
7. board selects the county board of review and determines the number of members consisting of from 3 to 5. Having once fixed the number they have no power to increase or reduce the membership .....	82
<i>Homestead credit versus agricultural land credit.</i> An owner of	
8. real estate may not designate any portion of a forty-acre tract for homestead tax credit (chapter 425, Code 1946) and claim an agricultural tax credit (section 426.3, Code 1946) on the remaining portion of the forty-acre tract.....	113
<i>Agricultural land credit—taxpayer entitled to refund.</i> Where agri-	
9. cultural land has been sold after taxes have been paid and before refund under the agricultural land tax credit act, the taxpayer who paid the tax is entitled to the refund in the amount of this credit.....	115
<i>Agricultural land credit—refund to taxpayer after expiration of</i>	
10. <i>tax year.</i> The agricultural land tax credit act makes no provision for allowance of credit after the expiration of the tax year in which the credit is directed to be made. In such case the amount may be refunded to the taxpayer as provided by statute for taxes erroneously or illegally exacted or paid. The procedure to obtain this refund is reviewed.....	118
<i>Moneys and credits deduction—husband and wife.</i> A wife owning	
11. separate moneys and credits must file a return and claim the \$5,000 deduction allowed by law in her own behalf. Where husband and wife are joint owners of moneys and credits they may file a joint return and each claim the deduction but neither may claim in excess of 50 per cent of the joint holding. If the amount so held is in excess of \$10,000 each must file a separate return .....	126
<i>Moneys and credits deduction—partnership.</i> Moneys and credits	
12. owned by a partnership are taxed against the partnership and only one deduction of the \$5,000 permitted by law is allowable .....	126
<i>Moneys and credits deduction—corporations, credit unions, sav-</i>	
13. <i>ings and loan associations.</i> A corporation is entitled to the same deduction from moneys and credits for taxation purposes as an individual, unless it is an Iowa corporation the capital stock of which is assessed specially for taxation.....	126
<i>Moneys and credits deduction—estates.</i> The moneys and credits	
14. deduction of \$5,000 allowed by law applies to returns made by estates .....	126
<i>Agricultural land credit—cemeteries and golf courses not in-</i>	
15. <i>cluded.</i> Cemeteries and golf courses are not “agricultural lands” within the meaning of the provisions of the agricultural land tax credit act.....	141

*Soldiers exemption applicable to several pieces of property.* A veteran claiming his statutory exemption from taxation, in order to realize the full amount to which entitled, must designate one or more pieces of property which will aggregate in value the amount of the exemption. All of such property must be in one county..... 165

*Budget estimates—moneys and credits tax deduction—maximum levy.* It is the duty of the county auditor to deduct the amount of taxes to be derived on moneys and credits from the annual budget estimates. After so doing the maximum authorized levy may be applied in the event it is required to meet the reduced budget estimates..... 169

## TELEPHONES AND TELEGRAPHS

See Roads and Highways, 14.

## UTILITIES

See Cities and Towns, 2.

## VETERANS

See Taxation, 3.

*Bonus law effective on date of election—status of applicants determined on that date.* The bonus law of the 52nd G.A. being effective "immediately upon its adoption and approval" by the electors took effect on the date of election not on the date the state canvassing board met and canvassed the vote. It follows that the status of priority of those entitled to a deceased veteran's bonus is determined as of that date in the order named in the act..... 30

*Bonus law—terminal leave included with active duty for enlisted veterans.* An enlisted veteran of World War II can, for the purpose of qualifying for an Iowa bonus, compute the time for which he was paid terminal leave in addition to the time spent on active duty..... 32

*Service compensation to minor beneficiary—guardianship required.* Before payment of World War II service compensation can be made to a minor beneficiary of a deceased veteran, a guardian must be appointed or satisfactory evidence furnished that the state having jurisdiction of any such minor does not require guardianship ..... 83

*Bonus—W.A.A.C. not eligible.* The time spent on active duty by a member of the Women's Army Auxiliary Corps is not compensable under the World War II service compensation act. (Chapter 59, Acts 52nd G.A.)..... 93

*Bonus warrant becomes property when received and endorsed.* The service compensation authorized to Iowa veterans or their beneficiaries is not a vested right but rather added compensation for services, and such compensation becomes the property of the veteran or the beneficiary when he receives and endorses the warrant..... 97

*Orphans educational aid—termination of World War II.* The Congress of the United States has not as yet made official declaration of termination of World War II and expenditure of funds provided by chapter 58, Acts 52nd G.A. (war orphans educational fund) is authorized until such termination is declared ..... 109

- Soldiers' orphans educational aid—available for summer school.*  
 7. The soldiers' orphans aid provided by chapter 58, Acts 52nd G.A., is available to any qualified child of a deceased veteran each year that such child attends an educational institution during the period in which said institution is open and operates as such within the year. However, said aid shall not exceed \$300 in any calendar year..... 110
- War orphans education fund—remarriage of surviving parent.*  
 8. Children of a veteran of either World War I or II who died while in the service or later from causes attributed to such service are eligible under the war orphans educational act and it matters not if the surviving parent remarries..... 119
- War orphans educational fund not available to stepchildren.* Step-  
 9. children of a veteran are not included in those eligible for assistance from the war orphans educational fund..... 121
- Bonus law—status of stepchild as claimant.* Where the relation-  
 10. ship of stepparent and stepchild existed at the death of a veteran, remarriage by the natural parent prior to November 2, 1948, terminates the right of said natural parent to the service compensation of the deceased veteran but the stepchild would be next in line and be entitled to the award..... 124
- Educational aid to orphans—residence requirements.* The two years  
 11. residence requirement for educational aid to orphans of veterans means the two years immediately preceding the application ..... 152
- Relief—names confidential.* Neither the board of supervisors nor  
 12. the soldiers' relief commission may reveal the names of persons receiving relief under the law..... 186
- Peace officers retirement system—patrolman as member during  
 13. service.* A highway patrolman in the armed forces at the effective date of the peace officers retirement system became a member of the system and continues as such until he resumes his patrol duties within six months after discharge from service, and the state will pay contributions in his behalf during such period..... 194

## WORLD WAR II

See Taxation, 4; Veterans.