State of Iowa
1958

THIRTY-SECOND BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1958

NORMAN A. ERBE
Attorney General

Published by
THE STATE OF IOWA
Des Moines

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1853-1958

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Samuel A. Rice	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
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MARTHA DAHLSTROM ..... Secretary
MARY BARKER ..... Secretary
DUANE DuBOIS ..... Clerk

*As of December 31, 1958.

REPORT OF THE ATTORNEY GENERAL

December 31, 1958

HONORABLE HERSCHEL LOVELESS
Governor of Iowa

Dear Governor Loveless:

In compliance with section 17.6 of the 1958 Code of Iowa I hereby submit the biennial report of the Attorney General covering the period beginning January 1, 1957 and ending December 31, 1958.

The staff opinions published in full in this report represent only a minor part of the work of the office during the biennial period. In addition, many advisory opinions were issued in the form of letters, the gist of which is summarized in annotations following the staff opinions in each chapter of this report. The strictly chronological arrangement of prior reports has been abandoned in favor of topical treatment by chapter which will facilitate use of the report for reference purposes.

One of the duties of this office is representation of the state in all criminal appeals in the Supreme Court. During the year 1957 there were 56 criminal appeals resulting in 42 affirmances, five reversals and nine dismissals. During the year 1958 there were 37 criminal appeals resulting in 28 affirmances, one reversal and eight dismissals. In addition, the Assistant Attorney General handling the criminal assignment appeared for the state in 21 Habeas Corpus appeals and succeeded in obtaining denial of the writ in 14 of them. The remaining seven are still pending.

A further duty of the office is that of representing the various state offices and departments in civil cases. During the biennium there were 31 school cases in which the office defended the State Department of Public Instruction. There were 21 cases involving the Commissioner of Public Health. Of them, five were actions to revoke a license to practice a profession, and one involved the defense of the commissioner in a declaratory judgment action brought by certain chiropractors. One license revocation has been successfully prosecuted at the instance of the Board of Nurse Examiners. There have been three cases involving the Board of Pharmacy Examiners. Intervention on behalf of the State has also been joined in in two cases pending in the Federal courts of interest to the Insurance Department. Two cases have been tried involving the Department of Agriculture and one involving the Liquor Commission. There have been ten cases involving the Conservation Commission, one involving the Industrial Com-

missioner, one case in which the Natural Resources Council was party, and one in which the State Appeal Board was party.

In a case involving the Labor Commission, the statutory power of that department to require reports of accidents in railroad shops was upheld. Also pending is an important case relating to the term of imprisonment of narcotics violators in which the State Board of Control is defended by this office. Actions to collect accounts owed to Iowa State (Prison) Industries have been filed in four cases.

This office has represented the Department of Public Safety in 21 cases and the Gasoline Tax Division in five cases.

During the biennium 95 condemnation appeals were processed under the supervision of the special assistant attorney general assigned to the Highway Commission. Of these 30 were tried, 27 settled, and 13 otherwise disposed of. In addition 44 miscellaneous highway cases were filed, 19 tried, and 22 of which other disposition was made. As of the beginning of the fiscal biennium there were pending 85 condemnation appeals, 19 miscellaneous highway cases and ten highway cases on appeal to the Supreme Court. This, of course, represents but a fraction of the total work of the special assistant attorney general assigned to the highway commission and personnel under his supervision. The said special assistant attorney general also participated in four hearings on interstate highways, 48 hearings on federal-aid highways and ten hearings on affected secondary roads.

The special assistant assigned to the State Tax Commission and personnel supervised by him appeared in 131 cases in which the state was a party or interested during the biennium.

The special assistant attorney general assigned to the State Board of Social Welfare participated in the following cases during the biennium: Foreclosure actions, 15; partition actions, 21; quiet title actions, one; petition for accounting and removal of administrator, seven; objections to final reports, seven; determination of priority of claim, one; hearing to allow claims, four; collection of note, one; excess allowance, one; resistance to claim, three; application for widow's allowance, one; petition for judgment, one; petition to cancel life estate, one; application for appointment of administrator de bonis non, one; total 68. In addition, answers were filed in 458 cases involving applications to sell real estate in 1957, and in 519 such cases in 1958. Two cases were argued before the Supreme Court. During the biennium 1,354 estates were opened; 1,565 estates were closed, and 1,029 estates in which the welfare department is interested remain pending for a

net reduction of 311 cases in accumulated backlog from prior biennia.

During the biennium a total of 7,606 letters were written and more than 8,395 personal consultations were held by the Attorney General and his staff at the offices in the State Capitol Building. These totals do not include telephone consultations nor do they include consultations held outside the office or at places other than the seat of government.

Some 285 claims against the state were investigated, processed, and recommendations thereon made to the State Appeal Board preparatory to consideration by the Claims Committee of the General Assembly.

Members of the staff also participated in the numerous administrative hearings conducted by the various state departments and agencies; examined drafts of the proposed departmental rules and regulations, savings and loan association articles and insurance company articles; assisted the various departments in preparation of bills for consideration by the 57th and 58th General Assemblies; examined abstracts, pertaining to the title to land acquired by the state; prepared or examined contracts, conveyances, agreements and other documents relating to the state's business; and in general performed the routine legal work inhering in the position of lawyer for the state.

Respectfully submitted,

NORMAN A. ERBE

Attorney General of Iowa

State of Iowa
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*As of December 31, 1958.

THE

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

FOR

BIENNIAL PERIOD

1957-1958

CONTENTS

CHAPTER 1

AGRICULTURE

STAFF OPINIONS

LETTER OPINIONS

1.1 October 25, 1957

FERTILIZER-PESTICIDE MIXTURES: Language contained in §7, Chapter 103, Acts of the 57th G. A., relating to bulk sales of fertilizer-pesticide mixtures, is an exception to the general rule (§206.2, 1954 Code) restricting sale of all pesticides to package units and requiring certain labeling. As such it stands as demonstrating legislative intent to approve of such sales.

Mr. Clyde Spry, Secretary of Agriculture: Your recent letter is set out as follows:

"Prior to the passage of Chapter 103 by the 57th General Assembly, we in the Department of Agriculture, as a regulatory agency, have prohibited the shipping, in bulk, of commercial fertilizer containing insecticides and fungicides. The procedure was based on two things, namely:

"First: The fact that Chapter 206, Code of Iowa, 1954, requires that each package must be labeled properly as required in Section 189.9 to 189.11, Code 1954, and special requirements contained in Chapter 206.

"Second: We have an opinion from the Attorney General under date of January 26, 1954, which states in substance there is no statutory authority for selling insecticides and fungicides in bulk form. The last paragraph of the opinion indicates, however, that some action should be taken by legislature to permit a manufacturer to make available to users, commercial fertilizer mixed with insecticides and fungicides in bulk form.

"Since the passage of Chapter 103 by the 57th General Assembly, the Department of Agriculture has again been asked permission to sell and transport fertilizer, with insecticides and fungicides added, in bulk form. Does Section seven (7) of Chapter 103 of the 57th General Assembly give statutory authority for this practice?"

Presumably the section to which you refer in Chapter 206 is Section 206.2, which reads:

"*Labeling.* All insecticides and fungicides offered or exposed for sale, or sold in package or wrapped form, shall be labeled on each package or container as provided in sections 189.9 to 189.11, inclusive."

Apparently opposed to this is the following language from Chapter 103, Acts of the 57th General Assembly (Chapter 200, Code 1958):

"Sec. 3. *Definitions of Words and Terms.* When used in this Act:

" * * * * *

"6. The term 'bulk fertilizer' shall mean commercial fertilizer delivered to the purchaser in the solid, liquid, or gaseous state, *in a non-packaged form to which a label cannot be attached.*

"Sec. 5. *Labeling.*

" * * * * *

"2. *If distributed in bulk,* a written or printed statement of the weight and the information required by paragraphs *a., b., c.,* and *d.*; or *a., b., c.,* and *e.* of subsection one (1) of Section four (4) shall accompany delivery and be supplied to the purchaser.

and, finally,

"Sec. 7.

" * * * * *

"In addition to the information required for registration as a commercial fertilizer, such mixtures shall comply with the provisions of Section four (4) of this Act, as well as the insecticide and fungicide act, chapter two hundred six (206) Code 1954, and the label *or invoice if sold in bulk* further shall state the common name and the pounds of active ingredients of pesticides per ton of fertilizer mixture and adequate directions for its use." (Emphasis ours)

While Section 206.2 indicates that all insecticides offered or exposed for sale must be labeled in accordance with Sections 189.9 to 189.11 on the package or container, yet the new statutes set out above (Chapter 103, Acts of the 57th General Assembly) appear to negative the requirement for sale of insecticides in a labeled package or container, stating that bulk fertilizer is fertilizer in a non-packaged condition to which a label cannot be attached; that if delivered in "bulk", a statement in writing containing certain required information is to accompany delivery to the purchaser; and, *that where such bulk fertilizer is a fertilizer-pesticide mixture* the invoice is to contain a statement of the active ingredients and directions for use of such product.

It is the opinion of this office that in view of the newly manifested intent of the Legislature in enacting Chapter 103, Acts of the 57th General Assembly, that the rule set out in *Yarn v. City of Des Moines* (243 Iowa 991, 54 N. W. 2d 439) applies. There the Court said,

"A fundamental rule applicable here is that where a general statute, if standing alone, would include the same matter as a special act and thus conflict with it, the special act will be considered an exception to the general statute, whether it was passed before or after the general enactment. * * * * "

Iowa Mutual Tornado Insurance Association v. Fischer, (245 Iowa Iowa 951, 65 N. W. 2d 162) held that in order to accord a special statute preference over a general one, inconsistency must be present. Under the instant facts such an inconsistency exists. Section 206.2 requires a certain kind of labeling on any package or container of insecticide in accordance with Section 189.9. Under the applicable definition, shown at Section 189.1 (4), "container" includes anything that is capable of

"containing". This implies that insecticides must be in properly labeled packages or containers in order to be legally sold or offered for sale. This would exclude making "bulk" sales of insecticides. However, the langauge of the Legislature in the new laws (Chapter 103, Acts of the 57th General Assembly, above) leaves little room for doubt that it intended that such sales were to be legal in Iowa since they provide the way in which the same are to be consummated. Hence, the rule of giving precedent to the special statute applies.

The rule of *pari materia* also applies here. In line with *Daily Record Company v. Armel,* 243 Iowa 913, 55 N. W. 2d 251, statutes dealing with the same subject matter have been construed to fit a new fragmentary enactment in the existing tenor of the general law, giving force to both, and avoiding any suggestion of an implied repeal.

Continuing the analogy to the *Yarn* case, we think that the new statutes do not repeal or supersede the requirements of Section 206.2 but rather, as an exception to the general statute, are in line with other decisions of the Iowa court abhorring repeal by implication. (See *Liberty Consolidated School District v. Schindler,* 246 Iowa 1060, 70 N. W. 2d 544.)

Reviewing the "Explanation of H. F. 163," Acts of the 57th G. A., at pages 15, 16 (from which Chapter 103, Acts of the 57th G. A., evolved) the intent therein expressed comprehends a similar result.

Quoting from it in part:

"The present Iowa fertilizer law was enacted prior to the research and development of the many new processes, new fertilizers and fertilizer materials now in common use in Iowa. As a result, the present Iowa law does not provide for anhydrous ammonia, nitrogen solutions, bulk blending, etc.

" * * * * *

"Anhydrous ammonia, liquid fertilizers, nitrogen solutions, etc., not clearly regulated under the old law, would also be controlled. In addition, the bill would regulate those who 'bulk blend' or 'cold mix' to assure analysis and weight as purchased and a well blended mixture of the materials included in the mix.

" * * * * * "

The language here clearly envisages the type of advanced agricultural method referred to in the new statutes as "fertilizer-pesticide mixture", and its sale in bulk.

Finally, additional authority for the conclusion that fertilizer-pesticide mixtures may be sold in bulk can be found in the familiar proposition that in event of statutory conflict the later intent of the Legislature will prevail. See *State v. Blackburn,* 237 Iowa 1019, 22 N. W. 2d 821.

For the above reasons it is our opinion that Chapter 103, Acts of the 57th General Assembly, gives authority for sales of fertilizer-pesticide mixtures in bulk.

1.2 April 7, 1958

FERTILIZER: Registration by foreign manufacturers or distributors.

Honorable Clyde Spry, Secretary of Agriculture: By letter dated March 11, 1958, you request an opinion of this office as follows:

"I am requesting your opinion with regard to potash as described in the fertilizer law, Chapter 103, Acts of the Fifty-seventh General Assembly (Chapter 200, Code 1958).

"There are about one-half dozen potash companies in the United States that ship bagged or bulk potash, a fertilizer ingredient, into the State of Iowa that advertize it as 'FOB the Mine', or other source, the companies claiming that the title passes to the purchaser outside the State of Iowa. Although we find on investigation that the bill of lading gives a sight draft which appears to us that the title does not pass outside of the State. The potash companies also claim that the purchaser in Iowa can divert the shipment to some other state before it actually arrives at original destination and, therefore, they actually have no control after the loading at the point of origin.

"Most of these companies have salesmen in the State of Iowa and therefore whether they have salesmen in the State of Iowa or not my question is: Does not Section four of the Chapter apply to these companies or is the purchaser in Iowa going to be required to make the registration and obtain the license as required in Section six of the same Chapter? In case you rule the manufacturer outside of the State of Iowa is exempt from the registration and license, will the distributor in the State of Iowa be required to register and license the potash as supplied him from each individual company?"

This opinion is supplementary to the letter from this office to the addressee dated January 15, 1958, in which the manufacturer's registration requirement of Section 4, Chapter 103, Acts of the 57th General Assembly (Section 200.4, Code 1958), was discussed with relation to the sale of commercial fertilizers *in Iowa.* Herein, we are asked to consider whether f. o. b. sales to Iowa buyers are out of state sales, and, if so, what their effect is on such registration requirement.

It is a characteristic of the law of sales that title customarily passes upon delivery of the goods bargained for. This presumption can, however, be rebutted by a showing of a contrary intent by the parties. (Sec. 554.19, 1958 Code of Iowa)

In the case of a sale f. o. b. the buyer habitually assumes all further expense with respect to the subject of the sale once it is placed "free on board" by the seller. Thus, under the general law of sales, set out above, the presumption necessarily arises that it is here (where control over the goods and the risks attendant thereto pass from the vendor to the vendee) that title passes, since delivery has been accomplished. (2 *Williston on Sales,* §280b; see also, *Rudy-Patrick v. Roseman,* 234 Iowa 597, 602-603, 13 N. W. 2d 347) However, your letter indicates that the bill of lading on the shipments is sometimes accompanied by a sight draft which, you suggest, may show an intent by the parties that title shall not pass until the same is executed (presumably in Iowa) and for this reason the sale is made "in Iowa", and the registration requirement therefore applies to the manufacturer. There is case support for this

position. However, continuing from *Williston,* cited above, we find the following language:

" * * * It is common where sales are made f. o. b. the point of shipment for the seller to take the bill of lading to his own order and send it forward with his endorsement accompanied with a draft for the price. Under mercantile usage, confirmed by the sales act and by statutes governing bills of lading, the property in the goods is thus reserved by the seller until the payment of the price. But other cases hold that in spite of the form of the bill of lading the presumption of transfer of ownership at the f. o. b. point prevails. The source of the confusion is the failure to recognize the double interest of the parties. If the shipment is in accordance with the terms of the contract, *the seller's retention of ownership is merely for the purpose of security,* and the beneficial interest as well as the risk of loss is upon the buyer. This is well settled in England and section 22 of the sales act should remove any doubt where that statute has been enacted that the rule is the same in America." (Emphasis ours)

Iowa has adopted the uniform sales act including section 22 thereof. (Chapter 554, 1958 Code of Iowa)

As you will appreciate from even this brief discussion, the decision as to when title passes in an f. o. b. transaction is not only highly dependent upon the facts of the individual transaction, but also upon conflicting rules of law.

The Iowa Court has not had occasion to pass on the matter in any great detail, and in its only consideration (*Rudy-Patrick v. Roseman,* cited supra) of the matter simply pointed out the "rule in practically all the states" is that title generally passes at the time of delivery of the goods for shipment, in the absence of a contrary intention by the parties.

Since your letter refers to no particular transaction, because of the rules we have referred to we cannot do other than to cite them for your use in evaluating individual transactions as they come to your attention.

Turning to your main inquiry then, the question arises as to whether or not a manufacturer of fertilizer material shipping f. o. b. to Iowa buyers must register under Section 4(1), Chapter 103, Acts of the 57th General Assembly (Sec. 200.4, Code 1958), before such product is "offered for sale, sold or distributed in this state."

The section referred to reads in part as follows:

"Sec. 4. *Registration.* 1. Each brand and grade of commercial fertilizer and each soil amendment *shall be registered by the manufacturer* before being offered for sale, sold, or distributed in this state.***" (Emphasis ours)

The necessary conclusion from a reading of the statute is that irrespective of where passage of title takes place the subsequent sale, *in Iowa,* of a foreign corporation's fertilizer product requires registry by such manufacturer, and that failing this (while it may be brought into Iowa) it cannot be sold, offered for sale or distributed here.

However, the jurisdiction of a state is generally coextensive with its boundaries (81 C. J. S. 860) and obviously this statute cannot constitutionally reach beyond Iowa borders to require that foreign corporations so register.

And since familiar rules of statutory construction require that interpretations sustain the validity of a statute if possible, it is our further opinion that if title to such fertilizer materials does not pass outside Iowa to an Iowa buyer who in turn utilizes such goods (even though it be a fertilizer or fertilizer material in its present form) as an ingredient in the manufacture of some different brand or grade of fertilizer, that the original manufacturer is then relieved of the responsibility to register under the act, since the manufacturer for sale in Iowa then contemplated by the registration statute would be the second manufacturer whose product would be the one sold or offered for sale in Iowa.

Therefore, in reply to your question we advise as follows: Any manufacturer of fertilizer or fertilizer materials must register under the act irrespective of where title passes, to one selling, offering for sale or distributing the same in Iowa. However, where title to such products passes outside this state and the subsequent purchaser uses them in the manufacture of a new fertilizer which is marketed in Iowa, only the latter is required to register.

1.3

BANG'S DISEASE — *Expenses of inspection and testing of cattle at Iowa State College — Liability for* — (Forrest to Nelson, Story Co. Atty., 3/13/57).

County is not obligated for the expenses of testing cattle owned by the State of Iowa at Iowa State College for Bang's disease. Under Sec. 164.4, Code 1954, the burden of inspection and testing expense shall be borne by either or both the United States or Iowa State departments of agriculture.

1.4

BANG'S DISEASE — SENATE FILE 65, ACTS 57th G. A. — *Cooperative measures with Federal Government for the control and eradication of brucellosis — Petitions for area testing — Herds composed entirely of "Official Vaccinates" excepted.* (Dvorak to Spry, St. Secretary of Agriculture, 6/20/57) #57-6-36

Herds composed entirely of "official vaccinates" are, under the provisions of §164.17, Code 1954, as amended by Senate File 65, Acts 57th G. A., exempt from statutory provisions relating to area testing had on petition by owners residing in a designated area; hence, petition asking that brucellosis test be conducted in a certain county should contain wording to the effect that such herds are not to be considered as being included therein.

1.5

Bang's Disease — Violation of Chap. 99, Sec. 1, 57th G. A., is punishable

as a misdemeanor. (Forrest to Sundberg, Chief, Div. of Animal Industry, State Department of Agriculture, 10/14/57) #57-10-24

1.6

Brucellosis Quarantine — Authority of Agriculture Department to regulate contained in Code Section 164.16. (Forrest to Sundberg, Div. An. Ind., Ag. Dept., 4/10/58) #58-4-4

1.7

Contingent fund. Allocation for control of Japanese beetles. (Strauss to Sarsfield, St. Comp. 9/27/57) #57-9-48

1.8

Corn detasseling machine — Not subject to registration as to length, width or safety requirements for motor vehicle. (Swanson & Faulkner to Mather, Sac Co. Atty., 9/30/57) #57-11-28; #57-9-59

1.9

Departmental Divisions — Under Code Section 150.2 (1) (2), the power of the secretary of agriculture to create departmental divisions is confined to such divisions as are necessary for law enforcement. (Forrest to Lloyd Van Patten, Asst. Secretary of Agriculture, 1/30/58) #58-1-32

1.10

Egg Law — Produce buyer cannot buy eggs from a producer for resale unless he candles and grades them or causes them to be candled and graded. (Forrest to Halling, St. Rep., 5/8/58) #58-5-8

1.11

Extension Council — Budget Certification deals only with money to be raised by taxation. (Strauss to Scholz, Mahaska Co. Atty., 7/29/58) #58-7-20

1.12

Extension District — Has no power to purchase real estate to provide quarters for itself. (Forrest to Soults, Ass't Ext. Dir., I.S.C., 6/4/58) #58-6-14

1.13

Feed, Commercial — "Custom" mixing as manufacture. (Forrest to Spry, Secretary of Agriculture, 11/22/57) #57-11-28

1.14

Feeds, Commercial — Supplies of feed ingredient for sale in Iowa, commonly referred to as "feeding limestone" must comply with registration requirements of Code Section 198.7. (Forrest to Spry, Secty. of Agriculture, 3/21/58) #58-3-16

1.15

Feed grinder — Mounted on truck registration. (Faulkner to Wilson, Muscatine Co. Atty., 9/5/57) #57-9-12

1.16

Fertilizer — Sec. 20, Chap. 103, Acts 57th G. A., does not exempt from registry with the Department of Agriculture a manufacturer who sells commercial fertilizer materials in Iowa for use entirely by manufacturers of fertilizers, and (2) may, but is not required to, pay the tonnage fees referred to in Sec. 8 (1) of the Act. (Forrest to Hon. Clyde Spry, Secretary of Agriculture, 1/15/58) #58-1-16

1.17

FERTILIZERS — HOUSE FILE 163, ACTS 57th G. A. — *Terms "Intimate" and "Uniform" mixtures defined — Registration of fertilizer mixtures — Grade lists.* (Gritton to Van Patten, Asst. St. Secy. of Agriculture, 6/12/57) #57-6-18

The term "intimate mixture" as used in H. F. 163, Acts 57th G. A., means a mixture that is "closely united; very close or thorough in connection"; a "uniform mixture" is one that is at all times "unvariable". The grade list referred to in §10 of the Act is for the guidance of manufacturers, distributors and users and provisions of §10 can not be read in conjunction with the registration provisions of §4 of the Act, hence, advice and recommendation of Director of Iowa Agricultural Experiment Station need not be sought and obtained prior to approval of fertilizer mixtures for registration.

1.18

Horses — Registration of stallions as prerequisite for offering for public service. (Abels to Spry, Secretary of Agriculture, 8/21/57) #57-8-28

1.19

Hotels, Restaurants, Food Establishments — School lunch programs, hospital snack bars, churches, clubs. When license required. (Erbe and Faulkner to Spry, Secy. of Agriculture 9/6/57) #57-9-14

1.20

Rendering Works Trucks — Operator must be operator or employee of licensed disposal plant. Non-diseased animal carcasses may be transferred at a reloading point. (Forrest to Sundberg, Chief, Div. An. Ind., 7/23/58) #58-7-13

1.21

Trade Formulas — Word "proprietary" as set out in Sec. 189.12 of the 1958 Code of Iowa means one which is secret and which formula is owned by a legitimate possessor of such secret. (Forrest to Spry, Secy. of Agr., 11/25/58) #58-12-9

1.22

Weeds — Duties of Secretary of Agriculture. Musk thistle not new weed. (Dvorak to Branco, Ida Co. Atty., 7/5/57) #57-7-3

1.23

Weights and measures — Bulk commodity weight ticket must show gross, tare and net figures. (Forrest to Spry, Secretary of Agriculture, 11/13/57) #57-11-19

1.24

Weights and measures — Failure to display gasoline pump license. (Faulkner to Johnson, Clinton Co. Atty., 7/22/57) #57-7-27

CHAPTER 2

BANKS AND BANKING

STAFF OPINIONS

LETTER OPINIONS

2.1 November 18, 1958

The provisions of Sec. 534.40, 1958 Code, authorizing building and loan association to invest a portion of its capital in unencumbered real estate for its business office includes the use of such real estate for rental purposes.

Hon. C. B. Akers, Auditor of State: This will acknowledge receipt of yours of the 5th inst. in which you ask whether Section 534.40, Code 1958, which provides as follows:

"*Investment — office building.* Any such association may invest an amount not to exceed five percent of its paid-in capital stock in unencumbered real estate for use wholly or partly as its business office."
is authority for a building and loan association to include space for renting purposes where investment of its capital in real estate is made for its own business.

In reference thereto I advise as follows. Section 534.40, Code of Iowa, the section under examination provides with respect to the acquisition of real estate by building and loan associations for operating purposes the following:

"*Investment — office building.* Any such association may invest an amount not to exceed five percent of its paid-in capital stock in unencumbered real estate for use wholly or partly as its business office."

Clearly the foregoing statute makes no provision for a building and loan operating premises to include as part of the building space for rental purposes, and were it not for the following we would be disposed to the view that no such power is vested in building and loan associations, this particularly being true in view of the fact that the same power vested in insurance companies contains express power to include room for rent. In that respect Section 511.8(10), Code 1958, provides:

"a. Any such real estate in this state as is necessary for the accommodation of the company or association as a home office or in the transaction of its business. In the erection of any buildings for such purposes, there may be added thereto rooms for rent. * * * * ."

A like power vested in banks, being Section 526.34, Code 1958, providing as follows:

"*Real estate holdings.* A savings bank, state bank or trust company, subject to the approval of the superintendent of banking, may purchase, hold, and convey real estate only as follows:

"1. Such as shall be necessary for its accommodation in the transaction of its business.

"2. Such as shall have been purchased at sales upon foreclosure of mortgages owned by it, or upon judgments or decrees obtained or rendered for debts due it, or such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or such as it may obtain by redemption as junior mortgages or judgment creditor, and which shall be sold by said bank within ten years after the title shall be vested in it."

is in its terms quite as restrictive as the power vested in building and loan associations. However, such restricted express power in substantially similar terms has been held to include power to build for its own accommodations as well as rental accommodations for others. Insofar as national banks are concerned where vested by Section 5137 of the revised statutes with the power to purchase and hold real estate as shall be necessary for its immediate accommodation in the transaction of its business, the court in *Brown v. Schleier*, 118 F. 981, stated:

"We entertain no doubt that the power conferred on national banks by section 5137 of the Revised Statutes to purchase such real estate as is needed for their accommodation in the transaction of their business includes the power to lease property whereon to erect buildings suitable to their wants. The power to purchase land is larger than the power to lease by as much as a fee simple estate is larger than a term for years, and the greater power includes the less. In the larger towns and cities of the United States, national banks usually find it necessary to locate themselves in the business centers, where property is most in demand and likewise most valuable. In the large cities it will doubtless sometimes happen that a bank cannot locate itself in a quarter where its business interests demand that it should be located, unless it leases property for a term of years and agrees with the owner to erect a building thereon suitable to its wants. That a national bank may purchase a lot of land and erect such a building thereon as it needs for the accommodation of its business admits of no controversy under the language of the statute, and we perceive no reason why it may not likewise lease property for a term of years and agree with the lessor to construct such a building as it desires, provided, always, that it acts in good faith, solely with a view of obtaining an eligible location, and not with a view of investing its funds in real property or embarking them in speculations in real estate. Nor do we preceive any reason why a national bank, when it purchases or leases property for the erection of a banking house, should be compelled to use it exclusively for banking purposes. If the land which it purchases or leases for the accommodation of its business is very valuable, it should be accorded the same rights that belong to other landowners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive. There is nothing, we think, in the national bank act, when rightly construed, which precludes national banks, so long as they act in good faith, from pursuing the policy above outlined. The act was framed with a view of preventing such associations from investing their funds in real property, except when it becomes necessary to do so, either for the purpose of securing an eligible business location, or to secure debts previously contracted, or to prevent a loss at execution sales under judgments or decrees that have been rendered in their favor. When as occasion arises for an investment in real property for either of the purposes specified in the statute, the national bank act permits banking associations to act as any prudent person would act in making in investment in real estate, and to exercise the same measure of judgment and discretion. The act ought not to be construed in such a way as to compel

a national bank, when it acquires real property for a legitimate purpose, to deal with it otherwise than a prudent landowner would ordinarily deal with such property."

And to the same effect is the case of *Wingert v. First National Bank*, 175 F. 739, where, in interpreting the same statute, it was said:

"'The other ground urged by the complainant is that the proposed action is violative of the restriction which permits a national bank to hold only such real estate as shall be necessary for its immediate accommodation in the transaction of its business, and that, therefore, the erection of a building which will contain offices not necessary for the business of the bank is not permitted by the law, although that method of improving the lot may be the most beneficial use that can be made of it. It is matter of common knowledge that the actual practice of national banks is to the contrary. Where ground is valuable, it may probably be truly said that the majority of national bank buildings are built with accommodations in excess of the needs of the bank for the purpose of lessening the bank's expense by renting out the unused portion. If that were not allowable, many smaller banks in cities would be driven to become tenants as the great cost of the lot would be prohibitive of using it exclusively for the banking accommodation of a single bank. As indicative of the interpretation of the law commonly received and acted upon, reference may be made to the reply of the Comptroller of the Currency to the inquiry by the bank in this case asking whether the law forbids the bank constructing such a building as was contemplated.

"'The reply was as follows: "Your letter of the 9th instant received, stating that the directors contemplate making improvements in the bank building and inquiring if there is anything in the national banking laws prohibiting the construction of a building which will contain floors for offices to be rented out by the bank as well as the banking room. Your attention is called to the case of Brown v. Schleier, 118 Fed. 981 (55 C. C. A. 475), in which the court held that: 'If the land which a national bank purchases or leases for the accommodation of its business is very valuable it may exercise the same rights that belong to other landowners of improving it in a way that will yield the largest income, lessen its own rent, and render that part of its funds which are invested in realty most productive.'" This seems to be the common sense interpretation of the act of Congress and is the one which prevails.'"

And the Supreme Court of Wisconsin in the case of *Catholic Knights of Wisconsin v. Levy*, 53 N. W. 2d 1, in settling this question with respect to a home office for a fraternal benefit society, stated:

"'(1) There are two statutes applicable to home office buildings for fraternal benefit societies, sec. 208.12, Stats., directly applicable to this type of society, and sec. 201.24(2), Stats. Neither section imposes a quantitative restriction on that part of the building which the Society must occupy. Sec. 208.12, Stats., requires only that the society not invest more than 20% of its assets in a "building". Sec. 201.24, Stats., requires only that those parcels of real estate necessary to the convenient transaction of business may be acquired and repeats the same percentage of asset limitation. *The clause "necessary to the convenient transaction of its business" does not create a limitation on the size of the structure devoted to the purpose since it is followed by the express permission to have included with its office space, other apartments to rent.* Therefore, it is obvious that the fact that the society would occupy only 25% of the space in the building does not preclude the premises from being necessary to the convenient transaction of its business. The latter clause is clearly only a limitation on the number of parcels and the kind or character of real estate which may be owned by an insurance corporation.

" 'This conclusion was reached in Brown v. Schleier, (8 Cir., 1902) 118 F. 981 where a more restrictive statute involving federal banks was construed as authorizing the acquisition. See also Volunteer State Life Insurance Co. v. Dunbar, (1915, 133 Tenn. 331) 181 S. W. 159 and Farmers Deposit National Bank of Pittsburg v. West Pennsylvania Fuel Co., (1906, 215 Pa. 115) 64 A. 374."

The reasoning and holding of the foregoing authorities gives meaning to the provisions of Section 534.40 heretofore quoted. Obviously, the legislative intent expressed therein bestows power upon a building and loan association to use its capital to the extent of 5% thereof in unencumbered real estate, wholly or partly for its own business office with the implication that the unused part of such real estate may be used for rental purposes.

2.2 September 9, 1957

Conditional sales contract making a debt payable "at the office of ..... " and preserving to the holder of the contract the right to make the unpaid debt forthwith due and payable if he considers the indebtedness to be insecure is non-negotiable.

Mr. Lee Chandler, Superintendent, Department of Banking: This will acknowledge receipt of yours in which you have submitted the following:

"I hate to bother your office for an opinion so soon after assuming duties of this office, but I find it is necessary at this time.

"I submit herewith copy of the Iowa Retail Instalment Contract, being Form 311 prepared by attorneys for the Iowa Automobile Dealers Association and which was intended to meet the requirements of House File 311 which became effective July 4, 1957.

"We have been informed that the national banking examiners have ruled that this contract is non-negotiable. Mr. Frank Warner, Secretary of the Iowa Bankers Association, has therefore submitted it to us for our opinion on this question.

"Will you please give us your opinion so that a bulletin can be prepared for distribution to our banks."

In reply thereto we advise as follows. In our opinion the form of instalment contract submitted, designated as the Iowa Retail Instalment Contract, is non-negotiable because (1) it violates the following provision of Section 541.1, Code 1954, to-wit:

"*Form of negotiable instrument.* An instrument to be negotiable must conform to the following requirements:

"(4) Must be payable to the order of a specified person or to bearer."

Under the form submitted the amount payable to the dealer is neither payable to the order of a specified person or to bearer. This provision for payment is item 8 of the contract and makes the amount due payable at the office of an unnamed seller. Specifically the provision follows:

"8. TIME BALANCE OWED TO DEALER (Sum of items 6 and 7) . . . . $..... which amount Buyer promises to pay at the office of.....in....., Iowa, in.....equal

instalments of $ ..... each and one final instalment of $ ..... , all payable on the same day of each successive month beginning on the ..... day of ....., 19....., or as indicated below in the Details of Unequal or Irregular Payments."

(2) The contract provides the following:

"* * * if holder ever considers the indebtedness hereunder insecure, * * * then in any such cases the entire unpaid time balance of the purchase price shall, without notice to the Buyer forthwith become immediately due and payable and the holder may, without previous demand or notice, take immediate possession of said car wherever found, with or without any process of law, * * *."

With respect to time of payment Section 541.4, Code 1954, provides as follows:

"*Determinable future time — what constitutes.* An instrument is payable at a determinable future time, within the meaning of this chapter, which is expressed to be payable:

"1. At a fixed period after date or sight; or

"2. On or before a fixed or determinable future time specified therein; or

"3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

"An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

The foregoing quoted provision in my opinion is violative of this statute and renders the note non-negotiable. Reserving to the holder of a note an uncontrolled power to determine the existence of a default of security on which an acceleration of maturity is provided for, the time of payment is rendered uncertain. That is the language of 10 C. J. S., paragraph 98, subsection 3, title "Bills and Notes".

In the case of *First National Bank v. McCartan*, 206 Iowa 1036, 220 N. W. 364, where a note contained the following provision:

"It is also agreed that should the holders of this note at any time deem themselves insecure, they may demand such additional security as may seem to them necessary, a failure to comply with such demand causing this note to become due and payable at once."

addressing itself to this contention, the Court said:

"Attempt at reconciliation between conflicting views of the judicial decisions on this point in the various states is not necessary, for the reason that this court has previously taken a definite stand. *Iowa Nat. Bank v. Carter*, 144 Iowa 715; *Quinn v. Bane*, 182 Iowa 843. *Iowa Nat. Bank v. Carter*, supra, contains the ensuing appropriate discussion:

" 'It is fundamental, of course, that to make a note negotiable it must be certain both as to time and amount of payment. * * * "An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect." Before the adoption of the Negotiable Instruments Law, we had held that these provisions (acceleration clauses) in a note and mortgage rendered it nonnegotiable. * * * Since the general adoption of the Negotiable Instruments Act, the courts have held to the same doctrine. * * *' "

"* * *

"The criterion is, Does the election of the payee or holder to declare the paper due and payable independent of any fault and beyond the control of the maker render the contract nonnegotiable? *Des Moines Sav. Bank v. Arthur,* supra, aptly explains:

" '* * * but the chattle mortgage securing the note there (*Iowa Nat. Bank v. Carter,* supra) held nonnegotiable provided that the note should become due and payable at the election of the payee or holder. This, being independent of any default of the maker, left him without protection, and such a clause is generally held to render the note, when construed in connection with the mortgage nonnegotiable, as was decided in the above case.'

"Reference in the *Arthur* case was made to the following clause contained in the instrument in *Iowa Nat. Bank v. Carter,* supra:

" '* * * or if at any time the said party of the second part * * * shall deem themselves insecure, then the whole amount of said sum of money in said notes mentioned which shall not have been paid, * * * shall be immediately due and payable."

"Inspecting now the phraseology of the paragraph involved in the case at bar, it is found that the undertaking was:

" 'It is also agreed that should the holder of this note at any time deem themselves insecure,' etc.

"Basis for this attitude is not the default of the maker, for he has no control over the 'holder's' feeling in this regard, but rather, the option contemplated may arise at any time the whim or caprice of the 'holder' so elects. Then, after the exercise of that option, 'they (the holders) may demand such additional security as may seem to them necessary, a failure to comply with such demand causing this note to become due and payable at once.' In other words, the 'maker' is not in default in the first instance, and only becomes in that predicament through an election by the 'holder' over which no one has any control except the elector himself. Presented here is a different situation from that which arises, causing acceleration' because the 'maker' fails to perform some duty, and for that reason is in default. Under the illustration, the 'due date' is 'advanced' because of the 'maker's' failure; while in the actual case before us, the 'advancement' was attempted, not because of the 'maker's' omission, but due to the mere volition of the 'holder.' Applying the general principles to the facts here, it is found that the clause contained in the 'note' puts it in the power of the 'holder,' if he so desires, to render it due at any time, regardless of anything the 'maker' may do. Therefore, the maturity date is uncertain, and nonnegotiability results. *Iowa Nat. Bank v. Carter,* supra, and *Des Moines Sav. Bank v. Arthur,* supra."

And the following is the view of the annotation of the holding of the foregoing case as it appears in 72 A. L. R., page 273:

"2. *Exercisable whenever holder deems himself insecure.*

"(Supplementing annotation in 34 A. L. R. 888.)

"The case of Iowa Nat. Bank v. Carter (1909), 144 Iowa 715, 123 N. W. 237 (set out on pages 888 and 889 of the original annotation), was followed, the court declaring that its doctrine had not been modified or abridged in any of the later cases involving somewhat different circumstances), in First Nat. Bank v. McCartan (1928) 206 Iowa 1036, 220 N. W. 364 (superseding (1927) ..... Iowa ....., 213 N. W. 408). In the latter case a note provided that its holders might demand additional security at any time they should deem themselves insecure, 'a failure to comply with such demand causing this note to become due and

payable at once.' The conclusion that the maturity date was uncertain, and that non-negotiability resulted, was reached after pointing out that this was not a case of a default upon the maker's part, since he had no control over the holder's attitude, but was a case of the exercise of an option or election by the holder."

And with respect to the *McCartan* case, Volume 13, *Iowa Law Review*, at page 98 states:

"This was an action on a promissory note containing the following acceleration provision: 'should the holders of this note at any time deem themselves insecure they may demand additional security; a failure to comply with this demand causing this note to become due and payable at once.' *Held*, that the provision rendered the note uncertain as to time and that it was therefore non-negotiable. *First. Nat. Bank of Ft. Dodge v. McCartan*, 213 N. W. 408, (Iowa, 1927).

Reserving opinion as to non-negotiability in other respects,

2.3

Bonds — Blanket fidelity bonds covering two or more banks with interlocking management and personnel. (Erbe and Swanson to Supt. of Banking, 9/6/57) #57-9-16

2.4

Bonds — Blanket fidelity bonds. Required amount of coverage for two or more banks. (Erbe and Swanson to Supt. of Banking, 12/20/57) #57-12-10

2.5

Branch banking — Expansion of bank to include drive-in facilities. (Swanson to Black, St. Supt. of Banking, 6/28/57) #57-6-49

Where expanded drive-in facilities are operated as an integral unit with existing bank and no separate or distinct banking activities are carried on in the expanded portion of the bank, §528.51, Code 1954, prohibiting branch banking, does not apply.

2.6

Branch banking — Messenger service. (Erbe and Swanson to Supt. of Banking, 9/6/57) #57-9-15

2.7

Credit Unions — Power to purchase and dispose of real estate. (Erbe and Swanson to Supt. of Banking, 10/18/57) #57-10-28

2.8

School Deposits — Interest may be paid on proceeds of bond issue voted by electors when invested in certificates of deposit. (Strauss to Gronstal, Supt. of Banking, 6/23/58) #58-6-18

2.9

Taxation of bank stock — Right to inspect tax lists. (Iverson to Johnson, Vice-Chm. State Tax Comm., 5/2/57) #57-5-4

No necessity to obtain prior approval of State Tax Commission in order to examine assessor's records relative to obtaining names and holdings of stockholders of a particular bank. Applicant for right of inspection must have some public or private beneficial interest as opposed to mere curiosity or unlawful or political purpose, and inspection must be made during office hours. Permission to inspect must be obtained from those officers having custody of such records under §622.46, Code 1954.

2.10

Time Deposits — Governmental subdivisions. (Strauss to Supt. of Banking, 11/18/57) #57-11-19

CHAPTER 3

BEER AND CIGARETTES

STAFF OPINIONS

LETTER OPINIONS

*Contra: State v. Garman, 93 N.W. 2d 105

3.1 December 2, 1957

BEER PERMITS: The three classes of beer permits in Iowa are separate and distinct. Beer brought into Iowa must be warehoused by an "A" permit holder. "B" and "C" permit holders have no authority to warehouse or distribute beer. Permit holders cannot be interested in more than one class of permit under Sec. 124.7.

Mr. Tom Keleher, Supt., Cigarette & Beer Revenue Dept., Re: Class A, B and C Beer Permits: Reference is made to your recent inquiry concerning the distribution and the sale of beer in Iowa in which you ask the following four questions:

"1. Must the holder of a class 'A' Beer Permit dock or warehouse beer purchased from an out-of-state brewery on the premises of the location of his class 'A' permit before this beer can be delivered to the holder of class 'B' or 'C' permits?

"2. May a class 'B' or 'C' permit holder warehouse beer apart from the premises and location of his beer permit?

"3. May a chain of class 'C' permit holders purchase beer from class 'A' permit holders, store the beer purchased in a central warehouse, and then have the individual class 'C' permit holders making up the chain withdraw or purchase beer, as they need it in their local store, from the *central warehouse*?

"4. Does the Iowa law authorize the issuance of a class 'C' permit for the premises of a central warehouse which is ordinarily used for storage but not being regularly used as a retail food outlet?"

The answers to these questions call for an analysis of the entire chapter of the Code of Iowa dealing with this subject, this being Chapter 124 of the 1954 Code of Iowa. When this legislation was first passed by the Iowa Legislature in 1933 to permit the sale of beer and malt liquors in this state, the right to operate such a business was very closely regulated in view of the need for stringent controls.

In connection with this legislation, the State Legislature divided the various business operations into three distinct classifications: the Class A permit covered manufacturers, wholesalers and distributors, the Class B permit covered retail sales for consumption on or off the premises, and the Class C permit was confined to grocery stores and pharmacies for off-premises consumption.

These various types of permits were carefully defined by statute. See Sections 124.8, 124.9 and 124.10, 1954 Code of Iowa. They were to be completely separated and there was to be no overlapping or indirect interests by the various permit holders of different classes. Section 124.7 of the 1954 Code of Iowa states: "It shall be unlawful for any person or persons to be either directly or indirectly interested in more than one class of permit."

In the statutes describing the applications for the various types of permits, great emphasis was placed upon the location and the building in which the permit holder was to operate. From the reading of the various Code sections it would appear that the Legislature was interested not only in health and fire regulations, but was also very much interested in seeing that beer and malt liquors were stored in specific locations named by the respective permit holders so that sale and distribution could be carefully supervised.

The tax features of this legislation must also be considered. The responsibility for the payment of the tax was placed upon the Class A beer permit holders and the entire responsibility was placed upon the manufacturer or the wholesaler holding a Class A permit. From reading the legislation it is the opinion of this office that the Legislature also closely defined the locations and premises required of various permit holders so that the payment of the required tax could be closely supervised.

Other Code sections which relate to this problem are Sections 124.28 and 124.29, which point out that a separate license must be held by each permit holder for each separate place of business or location.

The statute also prohibits any person not holding a Class A permit from importing beer into this state for the purpose of sale or re-sale. See Section 124.32.

With regard to your first question, it would appear that a Class A beer permit holder importing beer into the State of Iowa must definitely dock or warehouse this beer at the location as specified in his Class A permit prior to making deliveries to other B or C permit holders. The proper supervision of the tax laws and the proper policing of the provisions of Chapter 124 make it necessary that such be done. The Legislature clearly required that if one saw fit to be a wholesaler of beer or malt liquors under the provisions of Chapter 124 he must dock or warehouse the beer or malt liquor prior to re-sale and distribution to his various customers.

With regard to your question #2, it is the opinion of this office that Class B and C permit holders cannot warehouse or store beer apart from the premises and location specified in their beer permit unless they have a separate and distinct permit for each location to be so used as provided by Section 124.29. Clearly, under this statute the law does not permit either B or C permit holders to be wholesalers or warehousemen but contemplates only that they shall be retailers under the provisions of the statute.

Concerning your question #3, it would appear that the central warehouse to which you refer is more than just a storage point, but also

serves as a wholesaler or distributor to individual Class C permit holders. Such would be definitely contrary to the terms of the statute unless the central warehouse or central distribution center was a Class A permit holder and entirely divorced from the Class C permit holders. Although chain grocery stores holding Class C permits may have several permits of this nature covering specific addresses the law prohibits the possession of beer by them at any point other than the address or addresses covered in the permits. The law does not permit persons or corporations owning several stores to purchase beer, warehouse it in a central location, and from this point make distribution to its various stores as required. Such would be a violation of Sections 124.7, 124.8 and 124.29 of the 1954 Code of Iowa.

Your fourth question relates to the problem of a central warehouse operating as a storage point or a distribution center holding a Class C permit. The Iowa statute limits Class C and Class B permit holders solely to retail business. The statute as it is presently written permits warehousing and distribution only by Class A permit holders. It is therefore contrary to the statutes of this state for a Class C permit to be used for the warehousing and distribution of beer and malt liquor.

3.2 October 3, 1957

CIGARETTES: License for nonresident distributor.

Mr. Thomas J. Keleher, Director, Cigarette and Beer Revenue Department: This is to acknowledge receipt of your letter dated September 24, 1957.

In your letter you request an opinion as to whether the State of Iowa can legally grant to a resident of South Dakota a distributor's cigarette permit, where the rsident of South Dakota maintains in the State of Iowa a place of business. This question arose because of a recent amendment to the South Dakota Code of 193?, specifically section 57.3909, wherein the South Dakota legislature provided that cigarette distributor's permits by that state will be granted only to nonresidents of the state where such nonresidents are residents of a state which authorizes the licensing of nonresidents as cigarette distributors.

As stated in your letter, Mr. Olin Thompson, Assistant Attorney General of South Dakota, submitted this question.

"If a bonafide South Dakota resident, corporation, or individual applies to the Iowa State Tax Commission for an Iowa wholesaler's or distributor's cigarette permit is such resident eligible to receive a cigarette permit. Such applicant intending to maintain his South Dakota residency during the permit period."

Our discussion must begin with ch. 98, Code of Iowa, 1954. Section 98.1, entitled "Definition of words, terms, and phrases," provides as follows:

"The following words, terms and phrases, when used in this chapter, shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

" * * * .

"3. 'Person' shall mean and include every individual, firm, association, joint stock company, syndicate, copartnership, corporation, trustee, agency or receiver, or respective legal representative.

" * * * .

"8. 'First sale' shall mean and include the first sale or distribution of cigarettes in intrastate commerce, or the first use or consumption of cigarettes within this state.

" * * * .

"12. 'Distributor' shall mean and include every person in this state who manufactures or produces cigarettes or who ships, transports, or imports into this state or in any manner acquires or possesses cigarettes without stamps affixed for the purpose of making a 'first sale' of the same within the state.

"13. 'Wholesaler' shall mean and include every person other than a distributor or distributing agent who engages in the business of selling or distributing ciragettes within the state, for the purpose of resale.

" * * * .

"17. 'State permit' shall mean and include permits issued by the commission to distributors, wholesalers, and retailers within the state."

Section 98.13, entitled "Distributor's, wholesaler's, and retailer's permits", provides:

"Permits required. Every distributor, wholesaler, and retailer in this state, now engaged or who desires to become engaged in the sale or use of cigarettes, upon which a tax is required to be paid, shall obtain a state and/or retail cigarette permit as a distributor, wholesaler, or retailer, as the case may be.

" * * * .

"2. Issuance. The Commission shall issue state permits to distributors, wholesalers, and retailers subject to the conditions hereinafter provided.

* * * .

" * * * .

"5. Application — bond. Said permits shall be issued only upon applications accompanied by the fee indicated above, and by an adequate bond as provided in section 98.14, and upon forms furnished by the commission upon written request. The failure to furnish such forms shall be no excuse for the failure to file the same unless absolute refusal is shown. Said forms shall set forth:

"a. The manner under which such distributor, wholesaler, or retailer, transacts or intends to transact such business as distributor, wholesaler, or retailer.

"b. The principal office, residence, and place of business in Iowa, for which the permit is to apply.

"c. If the applicant is not an individual, the principal officer or members thereof, not to exceed three, and their addresses.

"d. Such other information as the commission shall by rules and regulations prescribe.

" * * * * . "

The application form which was submitted by you is in the name of an individual applicant whose address is given as a place in Sioux City, Iowa. Although the application form does not show the residence of the applicant, we assume that the applicant is in fact a nonresident of the State of Iowa.

On June 16, 1953, there was written an opinion by the Attorney General of Iowa which pertained to this question. This opinion is on page 62 of the Opinions of the Attorney General, 1954. Therein, the author stated, "A reading of the foregoing sections indicates that permits were to be issued only to Iowa residents, and we find no provisions in the law which would authorize the issuance of a wholesaler's permit to a nonresident of the State of Iowa."

It seems that the author's conclusion was reached from the definitions "distributor" and "wholesaler" set out above. In each of said definitions the person is referred to as being "in this state" or "within the state". The same is true of the definition of "state permit", where again the code refers to persons "within the State".

As set out above, subsection 5 of section 98.13 is concerned with the information which must be contained in an application for one of the permits provided for in said section. Subsection 5 of section 98.13, requires that an applicant set forth in the application "the principal office, residence, and place of business in Iowa, for which the permit is to apply." In the above quoted paragraph the words "in Iowa" refer only to "place of business", and it would have been very convenient for the legislature to have designated "Iowa residence" rather than just "residence", had the legislature been so inclined.

From a review of these sections, we find that there is no express statutory mandate that the recipient of a permit be a resident of the state of Iowa. However, it can hardly be doubted that these permits may be issued only to persons who maintain a "place of business" in Iowa. This conclusion, that is, that there must be a place of business in Iowa was reached by the author in the above referred to Attorney General's opinion.

Since there is no express provision limiting these permits to residents of Iowa, it must be determined whether the legislature intended by the language used that permits be limited to residents. The purpose of the statute must be interpreted in the light of normal business practices. Certainly, it is true that corporations and individuals are wont to carry on business operations from more than one business location even in different states. Also, it is a part of our constitutional and economic history that free commerce should be permitted consistent with safeguards for collection of the revenue. Certainly, a construction of our statutes should not be imposed restricting free enterprise where no such construction is required by the language of the statutes. In the case of

Governmental Research Bureau, Inc. v. Borgen, 224 Minn. 313, 319, 28 N.W.2d 760, 764, the Supreme Court of Minnesota enunciated the rule which is applicable in matters such as this. At page 764 of the Northwestern Reporter, the Court stated:

"The better rule, and the one we adopt, is that statutes imposing taxes and providing means for the collection of the same should be construed strictly in so far as they may operate to deprive the citizen of his property by summary proceedings or to impose penalties or forfeitures upon him; but otherwise tax laws ought to be given a reasonable construction, without bias or prejudice against either the taxpayer or the State, in order to carry out the intention of the legislature and further the important public interests which such statutes subserve."

Insofar as the above referred to Attorney General's Opinion, that is, Opinion of the Attorney General, 1954, page 62, holds that a distributor's or wholesaler's permit may be issued only to a resident of Iowa, it is hereby withdrawn. Insofar as said opinion holds that it is necessary for the holder of a distributor's or wholesaler's permit to have a place of business in Iowa, it is deemed a correct statement of the law.

Therefore, it is the opinion of this office that, in the circumstances set forth in your letter, the application of the nonresident submitted with your letter should be approved and a cigarette distributor's permit should be issued provided the application in all other respects complies with the laws of this state.

3.3 August 13, 1958

CIGARETTE SALES ACT: COMBINATION SALES: The practice of manufacturers providing through wholesale channels a gift item to all retailers, which retailers will deliver same to consumers upon the purchase of a carton of cigarettes, is not violation of Section 551A.4, Code of Iowa (1958).

Mr. Leon N. Miller, Chairman, Iowa State Tax Commission: This is to acknowledge receipt of your letter wherein you ask our opinion regarding the legality of making combination sales of cigarettes outlined in your letter as follows:

"Would the following formula be workable and not in conflict with our existing Cigarette Law. For example, with the purchase of a carton the manufacturer will provide complimentary a gift for the purchaser of the carton of cigarettes. The carton of cigarettes will not be sold below the minimum price. The gift item will be provided by the manufacturer to be received by the consumer at the time of sale."

As we understand the question, the sale of a carton of cigarettes will be made for a price which will not be below the minimum cost of the cigarettes to the retailer. The gift item will be provided by the manufacturer through wholesale channels to all retailers at no cost to the retailer and the retailer will deliver the gift to the customer at the time of the sale of the cigarettes. No additional charge will be made to the customer for the gift item.

Chapter 551A, Code of Iowa (1958), as amended, governs cigarette sales by retailers and wholesalers in Iowa.

Section 551A.2, entitled "Definitions", provides:

"When used in any part of this chapter, the following words, terms and phrases shall have the meaning ascribed to them except where the context clearly indicates a different meaning:

" * * * .

"8. 'Basic cost of cigarettes' shall mean whichever of the two following amounts is lower, namely, (a) the true invoice cost of cigarettes to the *wholesaler or retailer*, as the case may be, or (b) the lowest replacement cost of cigarettes to the *wholesaler or retailer* in the quantity last purchased, less, in either case, all trade discounts and customary discounts for cash, plus the full face value of any stamps which may be required by any cigarette tax act of this state, unless included by the manufacturer in his list price." (Underscoring added)

Section 551A.3, provides:

"1. It shall be unlawful for any wholesaler or retailer to offer to sell, or sell, at wholesale or retail, cigarettes at less than cost to such wholesaler or retailer, as the case may be, as defined in this chapter. Any wholesaler or retailer who violates the provisions of this section shall be guilty of a misdemeanor and be punishable by fine of not less than one hundred dollars, nor more than five hundred dollars.

"2. Evidence of advertisement, offering to sell, or sale of cigarettes by any wholesaler or retailer at less than cost to him as defined by this chapter shall be evidence of a violation of this chapter."

Section 551A.4, provides:

"In all offers for sale or sales involving cigarettes and any other item at a combined price, and in all offers for sale, or sales, involving the giving of any gift or concession of any kind whatsoever, (whether it be coupons or otherwise) *the wholesaler's or retailer's* combined selling price shall not be below the cost to *the wholesaler* or the cost to *the retailer*, respectively, of the total of all articles, products, commodities, gifts and concessions included in such transactions; if any such articles, products, commodities, gifts or concessions, shall not be cigarettes, the basic cost thereof shall be determined in like manner as provided in subsection 8 of section 551A.2." (Underscoring added)

It is a well settled principle of statutory construction that statutes creating criminal offenses must be construed strictly against the state. In this connection 14 Am. Jur., Criminal Law, Section 20, states:

"Construction, Operation, and Repeal of Criminal Statutes. — Ordinarily, the legislature speaks only in general terms, and for that reason it often becomes the duty of the court to construe and interpret a statute in a particular case for the purpose of arriving at the legislative intent and of determining whether a particular act done or omitted falls within the intended inhibition or commandment of such statute. The rule was long ago adopted that all such statutes must be construed strictly against the state and favorably to the liberty of the citizen. * * * ."

It is equally well settled that a statute may not be extended beyond that which its terms require. In this connection 50 Am. Jur., Statutes, Section 229, states:

"Extension of Statute. — The general rule is that nothing may be read into a statute which is not within the manifest intention of the legislature as gathered from the act itself, and that a statute should not be construed any more broadly or given any greater effect than its terms require. Where the language of the statute is clear in limiting its application to a particular class of cases and leaves no room for doubt as to the intention of the legislature, there is no authority to transcend or add to the statute which may not be enlarged, stretched, or expanded, or extended to cognate or related cases not falling within its provisions."

As Section 551A.4, supra, is silent with respect to below cost combination sales by manufacturers, it is evident that under the foregoing rules of statutory construction it could not be construed to include such sales within its prohibitions. Even if the definition of "wholesaler" contained in Section 551A.2 (3), Code of Iowa (1958), could be construed to be broad enough to encompass manufacturers, the manufacturer is still not included within the prohibition of the chapter if the sale is made to a wholesaler, since cost is not required to be included in sales from one wholesaler to another, Section 551A.5, Code of Iowa (1958).

However, may wholesalers and retailers take part in such transactions? It will be noted that Section 551A.4, supra, is explicit in its terms and prohibits only those combination sales which are below the total combined cost of the goods to the wholesaler or retailer. As the complimentary gifts are supplied at no cost to the retailer, it is clear that his combined cost is the cost of the cigarettes only.

In defining "basic cost of cigarettes" in Section 551A.2 (8), Code of Iowa (1958), the legislature stated that the cost shall be the lower of the invoice cost of the cigarettes or the replacement cost of the cigarettes. Since there is no invoice cost to the retailer of the gift item, then it would seem that the invoice cost of the cigarettes is lower than the replacement cost of the cigarettes and the gift item.

The intent of the legislature in enacting what is now Chapter 551A, Code of Iowa (1958), is, of course, always a primary consideration. The preamble to the Act, as passed, recites certain evils existing within the "wholesale and retail trades", the prohibition of which is declared to be the policy of the State of Iowa.

In view of the foregoing, it is our opinion that the practice of the manufacturer providing a gift item through wholesale channels to all retailers, which gift will be delivered to the customer at the time of the sale of the cigarettes, does not violate Section 551A.4, Code of Iowa (1958), as a combination sale below cost.

3.4

Beer Permits — Class "B". County board of supervisors has no authority to prorate fee. (Gritton to Jensen, Taylor Co. Atty., 8/15/57) #57-8-26

3.5

Beer Permits — State Permit Board. Collection and remittance of fees. (Strauss to Kuehl, Spcl. Agt. St. Beer Bd., 9/11/57) #57-9-17

3.6

Beer Law: Minors — Effect of marriage on right to purchase beer under code sections 124.20 and 599.1. Cites *City of Des Moines v. Reisman,* 248 Iowa 821. (Swanson to Hendrickson, Asst. Linn Co. Atty., 3/6/58) #58-3-2

3.7

Buildings — Determination of standards for building for Class A beer permit must be made from reading of Sections 124.8, 124.27 and 124.28, 1958 Code. (Swanson to McCleary, St. Tax Comm., 11/24/58) #58-11-4

3.8

Cigarette Vending machines — What constitutes vending machines. Where machine is so constructed as to require the seller or clerk to do some material act thereby keeping control of the dispensing process the machines do not violate Section 98.36 (6), of the Code of Iowa (1958). (Brinkman to Keleher, Cig. Div. Tax Comm., 8/19/58) #58-8-17

3.9

Cigarette Tax — Permits — Persons acting in dual capacity of distributor and distributing agent. A person acting in capacity as distributor and distributing agent must purchase both a distributor's permit and a distributing agent's permit as those permits are required in Chapter 98 of the Code of Iowa (1958). (Brinkman to Keleher, Dir., Cig. & Beer Rev. Div., 7/30/58) #58-7-9

3.10

Combination sale: Cigarettes with other items. (Pruss to Keleher, Cig. R. Dept., St. Tax Comm., 8/13/57) #57-8-22

3.11

Private Club — Revocation of beer permit for violation of Chap. 125, Code 1954. (Erbe and Swanson to Hoover, Clay Co. Atty., 4/12/57) #57-4-17

If a club, the holder of a beer permit, is found guilty under the provisions of §125.13, Code 1954, on a charge of "aiding, assisting and abetting in keeping a club room in which intoxicating liquors are kept for use and sale", a revocation of its permit is optional rather than mandatory. (Reference being made to §124.31, Code 1954).

3.12

Sale of cigarettes to county home by wholesaler prohibited unless county home holds retail cigarette permit. (Pruss to Lagomarcino-Grupe Co. 11/15/57) #57-11-18

CHAPTER 4

CITIES AND TOWNS

STAFF OPINIONS

LETTER OPINIONS

4.1 December 31, 1957

1. Employment by city council of certified or registered accountant to make annual audit authorized by Sec. 11.18, Code 1954, is the exercise of a governmental or a legislative function and not binding upon successors of such city council.

2. The provision for notice to be filed with the Auditor of State of a city council's election to employ a registered or certified public accountant within sixty days after the close of the fiscal year to be examined is mandatory and a notice given prior to close of the fiscal year is not binding upon the Auditor of State.

Honorable Chet B. Akers, Auditor of State; Attention: Mr. C. W. Ward: This will acknowledge receipt of yours of the 10th inst. in which you have submitted the following:

"I would appreciate an official opinion to clarify Chapter 11, particularly Section 11.18, regarding the following:

"(1) May a city council employ certified or registered public accountants to make the annual audit before the end of the fiscal year to be audited.

"(2) May the auditor of state accept a notification of a resolution or contract from a city clerk stating that they have employed a registered or certified public accountant before the end of the fiscal year to be examined."

In reply thereto we advise as follows. The section which you desire to have clarified is Section 11.18, Code 1954, which provides as follows:

"Examination of cities, townships, and schools. The financial condition and transactions of all cities and city offices, and all school offices, other than those in rural and village independent districts and school townships and all consolidated school district and independent school districts in cities and towns of less than five thousand population, shall be examined at least once each year and such examination may be made by the auditor of state, or in lieu of the examination by state accountants the local governing body whose accounts are to be examined, in case it elects so to do, may contract with, or employ, certified or registered public accountants, certified and registered in the state of Iowa, and pay the same from the proper public funds. If the city or school district elect to have the audit made by certified or registered public accountants, they must so notify the auditor of state within sixty days after the close of the fiscal year to be examined. If any city or school district does not file such notification with the auditor of state within the required period, the auditor of state is authorized to make the examination and cover any period which has not been previously examined.

" * * * * * * * "

The fiscal year therein provided for, according to Section 363.29, Code 1954, corresponds with the calendar year beginning the first day of January of each year and ending December 31 following.

We advise as follows:

1. While no express provision in the foregoing statute authorizes the employment of a certified or registered accountant to make the annual audit before the end of the fiscal year to be examind, it is to be remarked that such an election to employ such certified or registered accountant and an employment contract made before the end of the fiscal year is subject to the rule that a contract executed in pursuance of the city council's governmental or legislative powers cannot bind successors in office. The rule thus stated has support in Volume 37, American Jurisprudence, pages 679 and 680, Section 66, as follows:

"Under this distinction, it is generally held that a municipal council may contract for water supply, street lighting, gas supply, etc., and bind subsequent boards, such contracts being made in the exercise of the city's business or proprietary powers. A contract of this kind, however, must be reasonable in the length of time for which it is to extend. . .

"As a general rule, the appointment and removal of public officers is a governmental function, and a municipal council cannot engage a public officer by contract for a term extending beyond that of its own members, so as to impair the right of their successors to remove such officer and to appoint another in his place. In a few jurisdictions, however it is held that contracts of employment and appointment of officers may extend beyond the term of the council. The foregoing majority rule ordinarily has no application to persons holding a mere employment, such as school teachers, and with them a contract may be made extending beyond the term of the members of the council who make it, although there is authority for the contrary view. Moreover, it has been held in such cases

that where the period for which the contract is made lies wholly within the term of the succeeding council, the contract is invalid."

And the same rule is stated in 63 *C.J.S.*, Title *Municipal Corporations*, paragraph 987 in the following language:

"Power of Council or Officers to Bind Successors. The governing body of a municipal corporation, or a municipal board or officer having authority to contract, may bind successors in office by a contract made in the exercise of proprietary or business powers, but may not by contract prevent or impair the exercise by successors of legislative functions or governmental discretionary powers.

"While the question of whether a municipal council, board, or officer may bind successors by contract is generally determined according to the nature of the power exercised in making the contract, a doubt has been expressed as to whether a simple classification of contracts as involving or not involving only the proprietary or business powers of the municipal corporation is an accurate test of power to make a contract binding on successors, and it has been held, without reference to this classification, that a contract made by the council or other governing body of a municipal corporation is neither void nor voidable merely because some of its executory features may extend beyond the term of office of the members of the governing body where, at the time of its execution, it is apparently fair, just, and reasonable and is prompted by the necessities of the situation or in its nature is advantageous to the municipality.

"The council or other governing body of a municipal corporation may bind its successors in office by a contract for a term of years where such contract is made in the exercise of its proprietary or business powers. The same power attaches to any city officer whose has the requisite authority to make the contract and who makes it for a period extending beyond his term. The rule applies to the making of a lease of city property, to an arrangement with a neighboring county for the care of the city's contagious disease patients at the county hospital, and to a contract for services with respect to the construction of a public building."

And with respect to this rule the Supreme Court in the case of *City of Des Moines v. the City of West Des Moines*, 239 Iowa 1, 30 N.W. 2d 507, said the following:

"Plaintiff contends that its city council had no authority to bind its successors in office. The cases it cites all involved exercise of legislative powers. Even powers of that character may be exercised to bind future councils if the statute permits. Iowa-Nebraska Light & Power Co. v. City of Villisca, 220 Iowa 238, 247, 261 N.W. 423.

"But the discussion is not pertinent here since we hold this a business contract. In such matters the rule contended for does not apply. 44 C.J., Municipal Corporations, section 2168; 37 Am. Jur., Muncipal Corporations, section 66."

And, in respect to what constitutes governmental functions, Volume 37, *American Jurisprudence* at page 729 states:

"The governmental functions of a municipal corporation are those conferred or imposed upon it as a local agency, to be exercised not only in the interest of its inhabitants, but also in the advancement of public good or welfare as affecting the public generally. They include the promotion of public peace, health, safety, and morals, as well as the expenditures of money, particularly relating to public improvements, the expense of which ultimately is borne by the property owners. The distinction between acts in the performance of a governmental function and those in the performance of a corporate or proprietary function is that

the case of the former, the municipal corporation is executing the legislative mandate with respect to a public duty generally, while in the other, it is exercising its private rights as a corporate body."

Assuming, without determining whether there is authority to make a contract by employment of certified or registered accountant prior to the end of the fiscal year for which audit is to be made, according to the authorities cited such contract so made in pursuance of its governmental powers is subject to cancellation by the successors in office of those who made the contract.

In this connection and pertinent is the fact of which notice is taken that cities and towns operating under any form of government elected successors to incumbent offices in November, 1957, who will be qualified to act on and after the second secular day of January, 1958.

2. Insofar as your question #2 is concerned, we are of the opinion that filing the notice described in Section 11.18 is mandatory. It is true that at times the word "must" may mean "may". However, it is ordinarily used in a mandatory or obligatory sense and when used by the legislature when imposing a duty to be performed this general rule applies. Plainly it is so used in the statute under examination. See 27 *Words and Phrases*, title *Must*, page 884, 1957 Cumulative Supplement thereto. The provision, therefore, of the statute is that the notice so required to be made by the local governing body of its election to contract with or employ certified or registered public accountants must be filed with the Auditor within sixty days *after* the close of the fiscal year to be examined. Notice of such election so filed prior to the first day of January of the year following the fiscal year to be examined is not a statutory notice binding upon the Auditor of State. In such case the Auditor is authorized to proceed in accordance with the statute.

4.2 July 21, 1958

MAYOR: The power of the mayor to vote in case of tie in councils of municipal corporations authorized by Sec. 368A.2(6) cannot be exercised insofar as a tie exists in a vote on ordinances and resolutions of such municipal corporations except as otherwise specifically provided by law.

Hon. Chet B. Akers, Auditor of State: We acknowledge receipt of yours of the 2nd inst. in which you submitted the following:

"I would appreciate receiving an official opinion to be used by municipal examiners in conducting an audit of municipal accounts on the following: Section 366.4 and Section 368A.2 — The casting vote of a mayor. May the mayor vote on all resolutions and ordinances in case of a tie unless otherwise specifically stated by statute?"

In reference thereto we advise as follows. Prior to the recodification of the municipal statutes by the 51st General Assembly, adjudication of the question submitted existed. At that time Section 366.4, Code 1958, appeared as Section 5717 of the Code of 1935 and provided the following:

"*Majority vote.* No resolution or ordinance for any of the purposes hereinafter set forth, except as specifically provided by law, shall be adopted without a concurrence of a majority of the whole number of members elected to the council, by call of the yeas and nays which shall be recorded:

"1. To pass or adopt any by-law or ordinance.

"2. To pass or adopt any resolution or order to enter into a contract.

"3. To pass or adopt any ordinance or resolution for the appropriation or payment of money. In cities all money shall be appropriated by ordinances, but in towns it may be appropriated by resolution.

"4. To direct the opening, straightening, or widening of any street, avenue, highway, or alley.

"5. To direct the making of any improvement which will require proceedings to condemn private property.

"6. To direct the repair of any street improvement or sewer, the cost of which is to be assessed upon property or against the owners thereof."

Section 368A.2(6), 1958 Code, providing as follows:

"*The mayor.* In all municipal corporations, the mayor shall have the following powers and perform the following duties except when otherwise provided by laws relating to specific forms of municipal government.

" * * *

"6. *Presiding officer — vote.* He shall be the presiding officer of the council with the right to vote only in case of a tie."

was in its same terms and existent at that time as subsection 5 of Section 5639, Code 1935. The relationship between that section and Section 5717, both as here quoted, was considered and decided in the case of *Doonan v. City of Winterset*, 224 Iowa 365. There, in addressing itself to the question as to whether the mayor has the right to vote upon the passage of an ordinance or resolution to make a contract, the Court stated:

" * * * What is the meaning of the language, 'A concurrence of a majority of the whole number of members elected to the council'? The mayor is not a member of the council. The section provides that 'no resolution or ordinance for any of the purposes hereinafter set forth, except as specifically provided by law, shall be adopted without a concurrence of a majority of the whole number of members elected to the council.' Only four men were elected to that council, in one sense of the word. The mayor was simply the presiding officer; he is not a member of the council.

"Then the question arises, Can an ordinance be adopted, or can a contract be entered into, when the council vote is two and two, and the mayor votes for the passage? Is there a majority of the whole number of the members elected to the council?

"This has never received any construction in this state, that we know of. The mayor's power to vote leaves it somewhat uncertain. He shall be the presiding officer of the council. It does not say on what he shall vote. We are confronted here by the provisions of section 5717, with the requirement of a 'majority of the whole number elected to the council'. The legislature has made it somewhat in doubt as to just what should be said upon this subject. If he were a member of the council there would be no question; he is not a member of the council, however, but the presiding officer of the council, and this is the record and the statutes upon which we have to decide this question.

"A majority of the council can pass a resolution. Can one not a member of the council, not elected to the council, vote on this question then, if there be a tie? Is it reasonable to say that a vote on any of the resolutions or matters coming within the province of section 5717, can be made by the mayor to break a tie vote? Can he do so in face of the language of the statute requiring a 'concurrence of a majority of the whole number of members elected to the council'?

"It will be observed that the wording of the statute is made to fit just such a case as this. What is meant by 'No resolution or ordinance for any of the purposes hereinafter set forth, except as *specifically* provided by law, shall be adopted without a concurrence of the majority of the whole number of members elected to the council. (Italics ours.)

"True, subsection 5 of section 5639 of the Code says, as to the mayor, 'He shall be the presiding office of the council with the right to vote only in case of a tie.' Is that a specific provision such as is required to authorize him to vote on the passage of an ordinance or resolution entering into a contract, when the language of the statute providing therefor requires that it shall be by the 'concurrence of the majority of the number of members elected to the council'? We think the answer to this proposition must be 'No', and we therefore think the mayor in this case had no right to vote with the two members of the council who voted 'Yes', and thus enter into the contract."

Thus as to the fact situation there presented, the holding was that the vote of the mayor, not being a member of the council, was not available to break a tie vote in a matter concerning the entering into of a contract by the city. Subsequent thereto the 54th General Assembly by Chapter 148, Section 2 thereof, amended Section 366.4 as it existed at the time of the decision of the *Doonan* case as follows:

"Sec. 2. Section three hundred sixty-six point four (366.4), Code 1950, is amended by striking from lines two (2) and three (3) the following words: 'for any of the purposes hereinafter set forth'.

"Further amend said section by striking the colon (:) from line seven (7), inserting a period (.) in lieu thereof, and striking the balance of the section."

with the result that Section 366.4, Code 1958, exists now as follows:

"*Majority vote.* No resolution or ordinance, except as specifically provided by law, shall be adopted without a concurrence of a majority of the whole number of members elected to the council, by call of the yeas and nays which shall be recorded."

As it so exists the Section requires a majority vote of the whole number of elected members of the council to adopt resolutions or ordinances except as specifically provided by law. This view of the amendment to Section 366.4 heretofore exhibited is confirmed by the following from a special pamphlet treating of the municipal code bills of 1951 by Leonard C. Abels where on page 31 thereof it is stated:

"Section 2 amends section 366.4 so as to require a majority vote of the whole number of members of the council for all resolutions and ordinances of the council. * * *"

As a result of the foregoing situation we are of the opinion Section 368A.2, Code 1958, heretofore quoted, has no bearing upon the votes of members of the city council insofar as ordinances and resolutions are

concerned in all municipal corporations except those under Council-Manager Plan by Election. Section 363.27, Code 1958, provides:

"*Officers elected at large.* In all municipal corporations, except those under the council-manager plan by popular election, the mayor shall be elected by the entire electorate. Members of the council may be elected by wards, or by the entire electorate, as hereinafter provided."

and "*A Handbook for Iowa Mayors*", a publication of the State University of Iowa, Institute of Public Affairs, concerned with municipalities under Mayor-Council form of government, of which there are more than nine hundred in Iowa, at page 29, states:

"Even though you are its presiding officer, you are not a member of the council and apparently have no right to vote on matters that come before it. Now in one section of the Code it says that the mayor has the right to vote in case of a tie, but more recent legislation says that all ordinances and resolutions must be approved by a majority of all members elected to the council. In view of this, and a recent decision of the Iowa Supreme Court, it seems that there would never be an occasion when you would vote on an ordinance or resolution."

The mayor possesses no power to break a tie vote on the adoption of any resolution or ordinance in such municipal corporations.

4.3 September 25, 1957

GROUP INSURANCE: In programs of hospital and medical services for city employees the term "employees" does not include their qualified dependents. Under such section, the city may pay toward the cost of group insurance programs an amount up to but not exceeding the employee's. However, the maximum contribution of both the city and the employee is limited to 2% of earnings. The term "employees" in the named chapter was defined differently as affects group life insurance and group accident and health insurance. As to such insurance, a city or town may not purchase accident and health insurance to include firemen, policemen and waterworks employees. Sections 2 and 3 of the same Act do not apply to firemen, policemen and waterworks employees insofar as the city is authorized to pay a portion of the premium paid by such employees who apply for group health and accident insurance.

Mr. Chet B. Akers, Auditor of State: This will acknowledge receipt of yours of the 16th ult. in which you submitted the following:

"I would appreciate receiving an official opinion on the following items listed below concerning the amendment to Chapter 365A, Code of Iowa, 1954.

"365A 1. Most programs of hospital and medical service include both the employees and their qualified dependents. Does 365A include the authority for cities and towns to establish programs insuring the dependents of employees?

"365A 2. (1) Is it permissible for the city to pay toward the cost of a group insurance program an amount up to but not exceeding the employee assessment?

"(2) Are both the City Council contributions and the employee assessment limited to 2% of earnings?

"365A 3. If dependents of employees are included in a program, can the City Council contribute the amount of employee assessments including the assessment for dependents?

"365A 7. (1) Was it the intent of the Iowa legislature to define 'employee' with reference to group life insurance differently than under group accident and health insurance?

"(2) Is it permissible for a city or town to purchase group accident and health insurance to include firemen, policemen and waterworks employees?

"(3) Would sections 2 and 3 of 365A, as amended, apply to firemen, policemen and waterworks employees insofar as the city paying a like portion of the premium paid by such employees who apply for group health and accident insurance?"

In reply thereto we advise as follows. Section 365A, Code 1954, as amended by Chapter 185, Acts of the 57th General Assembly, provides as follows:

"365A.1 The council in any city or town may establish plans for and procure group insurance, hospital or medical service for the employees of such city.

"365A.2 The funds for such plans shall be created from the following sources:

"1. Contributions from employees who elect to participate in any such plan; and

"2. Contributions authorized by the city council from the general fund of said city in amounts not exceeding the aggregate amounts assessed against and collected from employees who elect to participate in any such plan. The funds for each plan shall be kept separately.

"If the policy is an accident and health insurance policy, in lieu of compliance with subsections (1) and (2) of this section the funds for the plan may be created solely from contributions from employees who elect to participate in the plan.

365A.3 All employees participating in any such plan the fund of which is created under the provisions of subsections (1) and (2) of section 365A.2 of the Code shall be assessed and required to pay an amount to be fixed by the city council not to exceed the two percent which shall be contributed by the city according to the plan adopted, and the amount so assessed shall be deducted and retained out of the wages or salaries of such employees.

"365A.7 With reference to group life insurance policies 'employee' as used in this chapter is defined to be a person employed by the city on a weekly, monthly or yearly basis and who is actually performing duties under such employment, including the members or the employees in the police department, fire department and the waterworks. With reference to group accident and health insurance policies, 'employee' as used in this chapter is defiend to be a person employed by the city on a weekly, monthly, or yearly basis and who is actually performing duties under such employment."

1. The answer to your question #1 is in the negative. This conclusion has the support of an opinion of this Department issued August 17, 1956, to Mr. C. B. Akers, Auditor of State, copy of which is attached.

Based upon the foregoing statute we answer your questions seriatum as follows:

2. In answer to the question set forth in subsection 1 of question #2 the answer is in the affirmative. In answer to the question set forth in subsection 2 of question #2 the maximum contribution of both the city and the employee is limited to 2% of earnings.

3. Answering your three questions included in your question respecting Section 365A.7, we advise (1) it was the intent of the Legislature to define "employees" in Chapter 365A, Code 1954, as amended by Chapter 185, Acts of the 57th General Assembly, differently as respects group life insurance and group accident and health insurance. (2) It is not permissible for a city or town to purchase group accident and health insurance to include firemen, policemen and waterworks employees. (3) Sections 2 and 3 of Chapter 365A as amended by Chapter 185, Acts of the 56th General Assembly, do not apply to firemen, policemen and waterworks employees insofar as the city is authorized to pay a like portion of the premium paid by such employees who apply for group health and accident insurance.

4.4 September 25, 1957

TRAFFIC REGULATION: A city council can neither enact nor enforce an ordinance providing for yield signs rather than stop signs under Chapter 321, Code of 1954.

Mr. Earl E. Hoover, Clay County Attorney: Receipt of your inquiry of June 28, 1957, is hereby acknowledged. The essence of that inquiry is as follows:

"Can a City Council pass, and effectively enforce an ordinance adopting the use of yield signs within a city or town in lieu of regular stop signs, which yield signs have been adopted by the National Safety Council? If such an ordinance is legal, is there any restriction on which highways or streets in a town that the signs can be erected on?"

By virtue of Section 366.1, 1954 Code of Iowa, municipal corporations are empowered to establish ordinances *not inconsistent with the law,* and pursuant thereto such municipalities are authorized to enforce those ordinances.

Under Section 321.236, Code of 1954, local authorities have no power to enact or enforce ordinances in conflict with, contrary to, or inconsistent with Chapter 321 of the Iowa Code, 1954. Traffic signs, under this chapter, must conform to the standards adopted in the State Highway Commission manual. Section 321.252 is the enabling provision for this statement and is as follows:

"The state highway commission shall adopt a manual and specifications for a uniform system of traffic-control devices consistent with the provisions of this chapter for use upon highways within this state. Such uniform system shall correlate with and so far as possible conform to the system then current as approved by the American Association of state highway officials."

According to Section 321.255, Code of 1954, local authorities shall erect devices such as conform to the state manual.

"Local authorities in their respective jurisdiction shall place and maintain such traffic-control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this chapter or local traffic ordinances or to regulate, warn, or guide traffic. All such traffic-control devices hereafter erected shall conform to the state manual and specifications."

The highway commission manual now in effect contains the type of signs which are to be used. It is mandatory that local authorities conform with said manual. At no place is there any provision made for a "yield sign" as opposed to a "stop sign". Furthermore, it appears that a "yield sign" is in conflict with Section 321.319 stated below:

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

"The foregoing rule is modified at through highways and otherwise as hereinafter stated in this chapter."

Therefore, a "yield sign" is unauthorized under the provisions of Chapter 321, Iowa Code of 1954, and a city council can neither enact nor enforce an ordinance providing for "yield signs" in lieu of "stop signs".

In view of this answer, it is not necessary to answer your second question as to the streets on which yield signs could be posted.

4.5

Airport Levy — Is made as part of levy for Municipal Enterprise fund and allocated at discretion of council. (Strauss to Carlsen, St. Rep., 7/14/58) #58-7-8

4.6

Airports — Operation of airport by municipality — Tort liability therefor — (Abels to Wolverton, Iowa Aeronautics Comm., 3/20/57) #57-3-35

In general, operation of an airport is a governmental function and cities and towns are not liable in tort for negligence in the exercise thereof.

4.7

Airport Zoning — May be done under Sec. 329.3 where airport hazard area resulting from airport owned by foreign municipality exists within the territorial confines of an Iowa municipality. (Abels to Rush C. Clarke, Asst. Atty. General, North Platt, Nebraska, 1/9/58) #58-1-12

4.8

Annexation of territory in another county — (Abels to Branstad, Winnebago Co. Atty., 3/7/57) #57-3-11

Cities and towns have no power to annex territory in an adjoining county, regardless of whether the machinery for annexation is set in motion by the city or town council or by affected landowners.

4.9

Assessor — A City Assessor is required to furnish an official bond for the performance of his duties as such. (Brinkman to Miller, Chmn. St. Tax Comm., 8/8/58) #58-8-23

4.10

Assessor — Expenses in special charter cities — In special charter cities which collect their own property taxes, the expenses of preparing tax books for use by the city treasurer and of computing city taxes due may not be prorated to the other taxing bodies under Section 405.18, Code 1954, as amended. (Abels to Leir, Co. Atty., Davenport, Iowa, 2/4/57) #57-2-1

4.11

Auction Sales — License. Reciprocal exemptions (to nonresident auctioneers crying sales in Iowa) with respect to licensing *auctioneers* contained in Section 546.1, Code 1954, is not an exemption from licensing *auction sales* under Chapter 546A, Code 1954, or under city ordinances adopted in accordance with the provisions of sections 368.6(5) and 368.8(5), Code 1954. (Abels to Mather, Co. Atty., 1/21/57) #57-1-26

4.12

Bridge levy — Cities and towns can maintain and control their own bridge levies. All bridges in cities and towns of less than 8,000 population can be constructed and maintained from the secondary road fund. (Lyman and McKinney to Remley, Jones Co. Atty., 4/17/58) #58-4-35

4.13

Bridges — Culverts larger than 36 inches in diameter must be paid for by the city when that city controls its own bridge levy. (Lyman to Goodenberger, Madison Co. Atty., 8/15/58) #58-8-26

4.14

Bridges — Cities and towns controlling own bridge levy determines size of culverts in streets and have duty to maintain same. (Lyman to Goodenberger, Madison Co. Atty., 7/30/58) #58-8-14

4.15

City and County Engineers — Whether a person is designated as an "acting" city engineer or an "acting" county engineer, he must still be qualified as a registered engineer under Chapter 114, 1958 Code of Iowa. (Swanson to Dean, Bd. Eng. Exam., 11/25/58) #58-11-2

4.16

City Engineer — Qualifications for office — Interest in contracts with city (Erbe and Swanson to Dean, Chm. St. Bd. of Exam. for Professional Engineers, 3/25/57) #57-3-43

1. One serving in the capacity of a city engineer must be qualified under Chapter 114, Code 1954, as a registered engineer or land surveyor.

2. When one accepts an appointment as city engineer, he becomes an officer of that city or town and is forbidden by Sec. 368A.22, Code 1954, to be interested directly or indirectly "in any other contract or job or work or material or the profits thereof or services to be furnished or performed for the city or town."

4.17

City and County Employees — Group hospital and surgical insurance may be provided on payroll deduction plan by either city or county but only the city may contribute toward premium cost. (Strauss to Hultman, Black Hawk Co. Atty., 4/8/58) #58-4-24 (Also see 4.3)

4.18

Civil Service — Applicability to park board employees. (Strauss to Schroeder, St. Senator, 9/17/57) #57-9-24

4.19

Civil Service — Class of cities, effective date; residence of police chief; credit not transferable. (Erbe to Loveless, Gov., 11/27/57) #57-11-31

4.20

Elections — Special Charter Cities. Where a special charter city having a population of over 15,000 has by ordinance provided for non-partisan municipal primaries and elections and desires to resume partisan primaries and elections under the provisions of sections 43.112, 43.114 and 363.2, Code 1954, proper procedure is to repeal the ordinance establishing non-partisan primaries and elections. (Abels to Rep. Hendrix, 2/18/57) #57-2-12

4.21

Explosives — Power of municipality to regulate transportation of explosives within its corporate limits — (Lyman to Brown, Shenandoah City Atty., 3/15/57) #57-3-31

Sec. 368.11, Code 1954, expressly grants authority to cities and towns to regulate the transportation of explosives within their corporate limits. The re-routing of ammunition trucks and vehicles carrying explosives around a city would not be a restriction of interstate commerce.

4.22

Fence Viewers — Jurisdiction in cities and towns — (Abels to Bromwell, Asst. Linn Co. Atty., 3/27/57) #57-3-47

Township trustees have no jurisdiction as fence viewers within the corporate limits of cities and towns. (1934 AGO 396 quoted in opinion).

4.23

Fire Protection — Whether occasion under which an off-duty fireman is called to duty is a "serious emergency" under Code Section 410.19, Code 1954, is a question of fact. (Abels to Johnson, Webster Co. Atty., 2/11/58) #58-2-1

4.24

Fire Protection with Township — Notice of election to authorize city to join with township in operation of fire equipment — (Abels to Pappas, Cerro Gordo Co. Atty., 3/27/57 #57-3-48

There are no statutory provisions specifying the type of notice to be used for a special election under Sec. 368.12, Code 1954, to authorize a city or town to join in the operation of fire fighting equipment with an adjoining township. Notice in the manner provided for in Sec. 407.8, Code 1954, is suggested.

4.25

Hospitals — Authority of city treasurer to withhold municipal hospital funds for payment of delinquent water bill. (Swanson to McNeal, St. Rep., 5/27/57) #57-5-37

City or town treasurer has no authority to withhold municipal hospital funds coming into his hands as treasurer of board of hospital trustees for payment of past due water bill due municipality unless ordered to do so by board of hospital trustees.

4.26

Hospitals — Publication of trustees' proceedings. Not a "utility." (Abels to Needham, Supt. of Printing, 11/14/57) #57-11-17

4.27

Hospitals — (a) Powers of trustees are limited by Code Section 380.6. (b) Power to establish vested in city council under Code Section 368.27. (c) Expenditure of municipal enterprise fund governed by Code Section 404.10. (Strauss to Morrow, Allamakee Co. Atty., 4/10/58) #58-4-21

4.28

Libraries — Free public libraries may contract with any city, town, school corporation, township or county for its use by the residents thereof and without distinction as to whether the residents reside within or without the city making the contract. (Strauss to Grafton, St. Trav. Lib., 9/30/58) #58-9-1

4.29

Libraries — Library supplies may not be purchased from library trustees. (Strauss to Grafton, Dir. St. Trav. Lib., 8/1/58) #58-8-16

4.30

Libraries — Power to rent quarters belongs to council. (Erbe to Grafton, Dir. Trav. Library, 6/3/58) #58-6-1

4.31

Mausoleum when owned by individual proprietor on private lots in municipal cemetery not subject to provisions of Chapter 566A, Code of Iowa. (Strauss to Werling, Cedar Co. Atty., 6/20/58) #58-6-22

4.32

Mayor's Court — Fines for violation of ordinances allocated to general fund. (Strauss to Akers, St. Auditor, 7/8/58) #58-7-4

4.33

Member of city council — Ineligibility for city office created during his elective term. (Abels to Leir, Scott Co. Atty., 5/13/57) #57-5-14

The prohibition against a member of a city council being appointed during his elective term to an office created by the council during the same term, as expressed in §368A.21, Code 1954, is general and absolute.

4.34

National Guard — Leave of absence status of civil employees for inactive duty training in National Guard. (Erbe to Tandy, Adjutant General, 5/21/57) #57-5-28

Municipal employees are not entitled to leave of absence without loss of pay when engaged in "inactive duty training" and drills as members of the National Guard.

4.35

Ordinances — Posting where no newspaper published. (Abels to Holley, Butler Co. Atty., 10/8/58) #58-10-17

4.36

Ordinances — Veto by mayor. (Strauss to O'Connor, St. Senator, 10/29/57) #57-10-39

4.37

Police Court — Payment when judge on salary. (Abels to Erhardt, Wapello Co. Atty., 4/1/58) #58-4-19

4.38

Parking lots — No power to purchase land on contract or pledge future meter income. (Strauss to Miller, St. Senator, 9/19/57) #57-9-29

4.39

Peddler's License Ordinance — Whether applicable to book salesmen is a moot question. (Strauss to Carlsen, St. Rep., 3/20/58) #58-3-15

4.40

Policemen and Firemen — Eligibility lists. (Strauss to Schaefer, City Atty., Ottumwa, Iowa, 4/26/57) #57-4-33

In the administration of civil service controlling the promotions in police and fire departments, intermediate promotional examinations for policemen and firemen may provide a legal promotional eligibility list.

4.41

Policemen and Firemen — May not simultaneously be on both payroll and pension roll. (Abels to Reppert, State Rep., 5/7/57) #57-5-6

Under Chapter 365 and Chapter 411, Code 1954, firemen and policemen subject to said chapters may not simultaneously occupy both the payroll and the pension roll when temporarily physically disabled by injury or illness.

4.42

Policemen and Firemen — Right to pension — Age and length of service requirements — Retention on payroll in case of disability. (Abels to Reppert, State Rep., 5/1/57) #57-5-1

(1) Under §411.6, Code 1954, policemen and firemen must satisfy *both* the age and length of service requirements to be eligible for retirement. (2) Whether an ill or injured fireman or policeman remains on the payroll or draws disability pension depends on his status. Status as an employee depends on local regulation. Retired status for disability is provided for in §411.6, subsections 3 to 7, Code 1954.

4.43

Police Subsistence Allowance — The subsistence allowance authorized by Sec. 120, Internal Revenue Code, 1954, to be made to police officials of the State, territory or possession of the U. S. or political subdivisions thereof is not part of gross income for the purpose of taxation of such income nor is it so regarded in making computation of earned compensation for benefits to policemen under either Ch. 410 or Ch. 411, Code 1958. (Strauss to Reppert, St. Rep., 9/18/58) #58-9-11

4.44

Public Improvements — Assessment against state property. (Strauss to Cunningham, Secy. Exec. Cncl., 12/8/58) #58-12-12

4.45

Public Improvements — Liability of state for special assessments. (Bianco to Fair Board, 2/57) #57-2-28

4.46

Real Estate — Sale to city by council member. Prohibited by code section 368A.22. (Abels to Akers, St. Auditor, 6/25/57) #57-6-42

4.47

Real Estate — Under the provisions of the statute, Section 368.18, Municipal Corporations do not have any power to purchase land with intent to lease the land to a private industry. (Strauss to Storey, Dir. Ia. Dev. Comm., 8/18/58) #58-8-7

4.48

Retirement Plans — Under code section 411.6 a policeman seeking retirement benefits must attain the age of 55 at the time of retirement. (Strauss to Duffy, St. Rep., 8/13/58) #58-8-24

4.49

Sewage Disposal System — Management by trustees under Code Chapter 397. (Abels to Erhardt, Wapello Co. Atty., 3/11/58) #58-3-8

4.50

Special Assessments — Any or all installments of a special assessment not yet paid together with accrued interest thereon may be paid on the due date of any installment. Section 391.60, Code 1954. (Abels to Williams, Co. Atty., 1/9/57) #57-1-11

4.51
Special Charter Cities — Councilmen — elections. (Strauss to Loveless, Gov., 9/3/57) #57-9-2

4.52
Swimming Pools — No authority to poll voters on whether to close on Sunday. (Abels to Akers, St. Auditor, 6/25/57) #57-6-43

4.53
Taxation — Cancellation of taxes due on land purchased by city. (Strauss to Tucker, Johnson Co. Atty., 6/4/58) #58-6-3

4.54
Transit Systems — Effect of repeal of existing statute on reference made to such statute in other acts of same General Assembly. (Strauss to St. Representative Petruccelli, 4/22/57) #57-4-26

Rule followed that the repeal of the statute referred to will have no effect on the reference statute unless the reference statute is repealed by implication with the referred statute. Held that the repeal of §324.2, Code 1954, by H.F. 440 would not operate to repeal the reference to said section by H.F. 372; and that the reference in H.F. 372 would be recognized to any substitute to §324.2. (Citing: *Sutherland, Statutory Construction*, 3rd Ed., page 549, and *in re Heath*, 144 U.S. 93).

4.55
Transit Systems — House File 372, Acts 57th G. A. — *City ordinance imposing tax or license fee as "Provision of Law".* (Abels to Petruccelli, St. Representative, 6/6/57) #57-6-12

A city ordinance imposing a tax or license fee on vehicles used for the transportation of passengers by an urban transit company is a "provision of law" within the meaning of §2 of House File 372, Acts 57th G. A.

4.56
Transit Systems — Applicability of 57 G. A., Ch. 43, to all operators. Proration of license fees. (Strauss to Johnson, Webster Co. Atty., 7/17/57) #57-7-33, 57-7-16

4.57
Transit Systems — Registration of busses, cars or vehicles used in transportation of passengers — Issuance of registration receipts — refund of current registration fees. (Strauss to Butterfield, Pres. Co. Treas. Assn., 5/24/57) #57-5-36

(1) Act makes no provision for refund of a part of current registration fees (paid prior to July 4, 1957 for year 1957). (2) Act will require payment of $25.00 fee for year 1959 if payment made prior to June 30, 1959, and registration after said date will be made and fees paid on basis of permanent registration law. (3) Registration receipt and plates for any bus, car, or vehicle will be issued the same as if registration fees were paid to county treasurer to become part of the county fund and county treasurer has implied duty to transmit fees to city.

4.58
Vacancies in office — Boundary change creating new wards. How filled. (Strauss to Loveless, Gov., 9/23/57) #57-9-37

CHAPTER 5

CONSERVATION

STAFF OPINIONS

LETTER OPINIONS

5.1 March 13, 1957

Compliance by the Conservation Commission with a request from the County Conservation Commission for a conveyance of State conservation land authorized by Chapter 12, Acts of the 56th General Assembly, for use by the County Conservation Commission only invests the County Conservation Commission with possession or use and does not divert title thereto.

Mr. W. Grant Cunningham, Secretary, Executive Council: Reference is herein made to yours of the 20th ult. with attached letter of Bruce Stiles, Director of the Conservation Commission, in which he stated the following:

"Under date of Aug. 25, 1941, the state acquired title to a certain sixteen acre tract of land on the Wapsipinicon River in Chickasaw County, Iowa, which, according to the minutes of the actions of this commission approving the purchase, was acquired for 'fishing access', the lands being described as, 'Lots 2 and 5 of the Irregular survey of the N½ of Sec. 21 T. 95 N, R 14 W'.

"At an early date a mill and concrete dam had been constructed on the site, but at the time of the state's acquisition only the dam and the foundation of the mill remained.

"On Sept. 14, 1945, the commission's chief engineer made an inspection and reported that recent floods had scoured out the down-stream side of the dam and caused most of it to fall into the hole washed out, thus virtually destroying the dam.

"He further advised that it would require the expenditure of at least $5000 for reconstruction.

"After further investigations and reports, the commission, at its meeting on Feb. 24, 1947, voted to not spend any money for reconstruction, and nothing further has been done since.

"This commission has received a letter dated Feb. 2, 1957, from the President and Secretary of the Chickasaw County Conservation Board which has been established under the provisions of Chap. 12 of the Acts of the 56th G. A., requesting the conveyance by the state to said Board of the sixteen acres above described.

"(Apparently title should be in the County, not in the Board, as seems provided by Secs. 4 and 7 of said Chap. 12.)

"This commission has, by resolution, recommended the said conveyance and hereby requests your approval under the provisions of Sec. 111.32 of the 1954 Code."

Concerning the foregoing we advise that Section 7, subsection 2 of Chapter 12 of the Acts of the Fifty-sixth General Assembly, provides as follows:

"To acquire in the name of the county by gift, purchase, lease, agreement or otherwise, in fee or with conditions, suitable real estate within or without the territorial limits of the county areas of land and water for public parks, preserves, parkways, playgrounds, recreation centers, forests, wildlife and other conservation purposes. The state conservation commission, the county board of supervisors, or the governing body of any city, town or village may, upon request of the county conservation board, designate, set apart and transfer to the county conservation board for use as parks, preserves, parkways, playgrounds, recreation centers, play fields, tennis courts, skating rinks, swimming pools, gymnasiums, rooms for arts and crafts, camps and meeting places, community forests, wildlife areas and other recreational purposes, any land and buildings owned or controlled by the state conservation commission or such county or municipality and not devoted or dedicated to any other inconsistent public use. In acquiring or accepting land, due consideration shall be given to its scenic, historic, archeologic, recreational or other special features, and no land shall be acquired or accepted which in the opinion of the board and the state conservation commission is of low value from the standpoint of its proposed use."

We have previously ruled that the power of the Executive Council in conveyance of park land is confined to sale or exchange and the sale thereof at an inadequate price constitutes a gift unauthorized under Section 111.32. See letter opinion to the Executive Council dated October 26, 1956, where it is said: "The gift of such land, like its sale for an inadequate price, requires specific statutory authorization." No such authority is vested in the Council by Section 111.32, Code of 1954. However, in connection with this request an official opinion issued by this Department November 4, 1955, to Mr. Bruce F. Stiles, State Conservation Director, stated the following:

"Circumstances under which property under the control of the conservation commission *may* be transferred to a county conservation board are specified in subsection 2, section 7, chapter 12, Acts of the 56th General Assembly, as follows:

"' * * * The state conservation commission, the county board of supervisors, or the governing body of any city, town or village may, upon request of the county conservation board, designate, set apart and transfer to the county conservation board for use as parks, preserves, parkways, playgrounds, recreation centers, play fields, tennis courts, skating rinks, swimming pools, gymnasiums, rooms for arts and crafts, camps and meeting places, community forests, wildlife areas and other recreational purposes, any land and buildings owned or controlled by the state conservation commission or such county or municipality and not devoted or dedicated to any other inconsistent public use * * * '

"We would therefore advise you that the appropriation in question may be expended only for the express purposes named in section 1, supra, which do not include procurement of land for county parks. However, where property is acquired for one of the purposes expressly named in

section 1, and use of all or part of such property as a county park is not inconsistent with the public use for which it was acquired, the conservation commission, under the provisions of section 7, supra, *may* at its discretion, upon request of the county conservation board, designate or set apart lands or waters for such park use."

Compliance by the Conservation Commission with a request of a County Conservation Board, such as is shown in the letter exhibited, does not divest the State of its title to the land. It merely diverts its use from the State Conservation Commission to the County Conservation Board for the uses described in subsection 2 of Section 7, Chapter 12, Acts of the 56th General Assembly, heretofore set forth. While the statute is silent as to the method by which this transfer may be accomplished, we are of the opinion that the Conservation Commission could by a resolution reciting the power vested in it by the designated sub-section transfer the property to the County Conservation Board for its use. The duration of this permissive use is not fixed by statute and because of absent statutory direction it would appear that such use may at least endure until the Conservation Commission desires to recapture the possession of the land for use for another and different public purpose.

5.2 May 29, 1958

LICENSE (Hunting and Fishing): MILITARY PERSONNEL

1. World War II has been terminated for the purpose of the exemption of a license to hunt and fish to members of the military or naval forces of the United States, provided for in Sec. 110.17, Code of 1958.

2. Korean conflict held to be a "war" within the provisions of Section 110.17, Code of 1958.

3. Korean conflict has not been terminated for the purposes of Section 110.17, Code of 1958.

Mr. Bruce F. Stiles, Director, State Conservation Commission: Your letter of March 27, 1958 reads as follows:

"We respectfully request your opinion as to whether members of the Military Forces of the United States are at this time required to have a license to hunt or fish in Iowa."

Section 110.17, Code of 1958, reads in pertinent part as follows:

"License not required. . . Nor shall any person during the time the United States is engaged in war who is a member of the military or naval forces of the United States be required to have a license to hunt or fish in this State."

In a previous opinion of this office appearing in 1946 *Opinions of the Attorney General,* page 106, considering the exemption above, we said:

"The statute in question clearly refers to the time the United States of America is engaged in war, and therefore the authority is squarely placed in Congress, the competent body to proclaim the end of the war, or in the President should he receive such power from Congress. This does not mean that a formal declaration of peace is needed, for a properly passed resolution or proclamation of the President that a state of war no longer exists will terminate the war and remove the exemption pro-

vided in this statute. However, by the better authority the act of surrender of an enemy is not enough. From all Federal activities it is quite apparent that in both the minds of Congress and the mind of the President it is not desirable at this time to terminate the war by such a resolution or proclamation and that they consider the state of war to still exist.

"This does not bind the State of Iowa for an indeterminate period. This method of terminating the exemption is not the only one available, for the State of Iowa can terminate it by action of the Iowa Legislature at its next session. It may repeal that part of Section 1794.098 which extends the exemption to members of the military or naval forces of the United States. Should the Legislature of the State of Iowa feel that the Congress of the United States and the President prefer to extend the war period for some time, as is evident at present by all Federal activities, and that this exemption proves detrimental to your department and the State, you may present the matter to the 52nd General Assembly for proper action.

"Therefore, until one of these contingencies occurs, members of the military or naval forces of the United States are not required to have a license to hunt or fish in this state."

Since the writing of the above opinion the following peace treaties have been ratified by the United States Senate and signed upon the dates indicated:

Italy	February 10, 1947
Hungary	February 10, 1947
Rumania	February 10, 1947
Bulgaria	February 10, 1947
Japan	September 8, 1951

No formal state of war existed between the United States and Austria, Finland or Siam (now Thailand). Although no peace treaty has been ratified and signed with Germany, on October 19, 1951 a joint resolution was approved by the Congress of the United States stating that the state of war existing between the United States and the Government of Germany was terminated, effective upon that date. (Public Law 181, 82d Congress). On October 24, 1951 Presidential Proclamation 2950 was signed to a similar effect. Thus, World War II has been terminated and the exemption provided in this statute has been removed as regards World War II.

The Korean Conflict presents a second and somewhat different problem. The question of whether a state of war existed in Korea, as a result of the Communist aggression in Korea in June 1950 and the subsequent forcible intervention of the United Nation Armed Forces, has been considered by the Iowa Supreme Court. In the case of *Faber v. Loveless*, ———Iowa———, 88 N.W. 2d 112, 115, the Court said:

"Appellant, apparently seeking to differentiate the instant Act (Korean Bonus Act) from the prior ones (World War I Bonus Act and World War II Bonus Act), stated they dealt with payments to persons who served in the armed forces of the United States during a war, while in the instant case, there was not a war — merely a police action. . . If in order to place the instant case within the orbit of the Kendall and Beardsley cases, supra, the Korean Conflict must be termed a 'War', we have no hesitancy in so doing."

We are of the opinion that the Korean conflict was also a "war" in terms of Section 110.17, Code of 1958.

In a letter opinion addressed to you dated April 22, 1955, this office considered the question of whether the Executive Order No. 10585, dated January 4, 1955, terminated the war in Korea as such termination would bear upon the provisions of Section 110.17 of the Iowa Code. The conclusion therein reached was that the Executive Order was effective only insofar as it affected the combat pay exclusion. It was not effective as terminating the war in Korea.

We find no further federal action bearing upon this problem. We have considered the fact that no formal state of war having been declared a termination of the "war" will not necessarily be concluded by a treaty. However there are several other methods outlined in our opinion above by which the federal or state government could terminate the "war" within the provisions of Section 110.17, Code of 1958.

We have also considered Chapter 63, Acts of the Fifty-seventh General Assembly, entitled "An Act to provide veterans of the Korean conflict with the same rights and privileges as other veterans." This Act, as stated, relates to veterans whereas Section 110.17, Code of 1958, relates to persons who are members of the armed forces. In addition Chapter 63, Acts of the Fifty-seventh General Assembly, amends by inserting in specified statutes the applicable dates to be used in connection therewith; Section 110.17, Code of 1958, is not included. Chapter 63, Acts of the Fifty-seventh General Assembly, contains no general section which could be considered as a legislative enactment terminating the exemption contained in Section 110.17, Code of Iowa.

Therefore, to quote from the 1946 *Opinions of the Attorney General,* page 106, we are of the opinion that:

". . . Until one of these contingencies occurs, members of the military or naval forces of the United States are not required to have a license to hunt or fish in this state."

5.3 July 14, 1958

SOIL CONSERVATION —

Subdistrict organization petition — landowner — "landowner" means all persons owning a proprietary interest in the real estate.

Mr. William H. Greiner, State Soil Conservation Committee: In your letter of June 24, 1958, you ask the following question:

"As used in Section 467A.14 what constitutes 65% of the landowners? I give the following examples for your consideration.

"1. A man owns four separate farms. Is this considered one owner or does each parcel of land count as one?

"2. A husband and wife own a farm (likewise two brothers) in partnership. Is this one or two landowners?

"3. A husband and wife own a farm in partnership and the wife owns another farm separately. Who or what do you count?

"4. In the case of an estate with several heirs, how many are counted?"

Section 467A.14, Code of Iowa, is as follows:

"When the landowners in a proposed subdistrict desire that a subdistrict be organized, they shall file a petition with the commissioners of the soil conservation district. The area must be contiguous and in the same watershed but in no event shall it include any area located within the boundaries of an incorporated city or town. The petition shall set forth an intelligible description by congressional subdivision, or otherwise, of the land suggested for inclusion in the subdistrict. The petition shall contain a brief statement giving the reasons for organization, requesting that the proposed area be organized as a subdistrict and must be signed by sixty-five per cent of the landowners in the proposed subdistrict. Land already in one subdistrict cannot be included in another. The soil conservation district commissioners shall review such petition and if found adequate shall arrange for a hearing thereon."

Section 467A.3, (10) is as follows:

" 'Landowner' includes any person, firm, or corporation who shall hold title to three or more acres of land lying outside incorporated cities or towns and within a proposed district or a district organized under the provisions of this chapter."

In the case of *Johnson v. Board of Supervisors*, 237 Iowa 1103, 1107 the Supreme Court said:

"The substance of the classic definition of 'title' is: the means whereby the owner has the just possession of his property. (Citations given). But 'title' is frequently used to mean ownership. (Citations given)."

Section 4.1(2) is as follows:

"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."

An examination of S. F. 349 of the 56th G.A., which later was enacted as Chapter 225, Acts of the 56th G.A. and was codified as Section 467A.13 to 467A.20 inclusive, reveals that prior to amendments the present Section 467A.14 read as follows:

"When *a majority of* the landowners . . . The petition . . . must be signed by *a majority* of the landowners in the proposed subdistrict . . ." (Emphasis supplied)

By amendment the percentage figure was raised from a majority to sixty-five (65) percent.

The Legislature has had occasion to use the terms "landowner" and "majority of the landowners" in other sections of the Code. See Sections 462.11 and 462.12. The Supreme Court of Iowa has interpreted without discussion that the terms above when used in 462.11 and 462.12 mean the number of landowners and not the area which each might own. *See State ex rel Peiper v. Patterson*, 246 Iowa 1129. Under the rule of statutory construction set out above as Section 4.1(2), Code of Iowa, we are of the opinion that "landowners" and "sixty-five (65) per cent of the land-

owners" as used in Section 467A.14 likewise refers to the number of landowners.

Therefore, in answer to your question one above, we are of the opinion that the man is to be considered one landowner. There can be no distinction between a landowner whose lands are contiguous and the landowner whose lands are separated.

14 *Am. Jur.* 77:

"The American theory is that the legal title of the partnership realty is held by the co-partners as tenants in common, . . .

"Each cotenant buys in, sells out, or encumbers his interest at pleasure, and without affecting the legal relation between them beyond the going out of one and the going in of another . . ."

and 14 *Am. Jur.* 76:

"A cotenancy has been defined as a tenancy that arises when two or more persons become seized of property in such manner that they have an undivided possession, but several freeholds. This means, of course, that the right of possession is an essential element of all cotenancies . . . The ownership and right of possession must extend to the entire property.

"While the term 'cotenancy' is broad enough to include both a joint tenancy and a tenancy in common . . ."

Enough has been quoted to show that there is no "partnership" ownership of real estate, but rather a cotenancy interest as defined above. Each of cotenants is a landowner within Section 467A.14, if the qualifications of 467A.3 (10) are met.

In reply to question 3 the answers to questions 1 and 2 make it clear that each are landowners, and the wife is counted as one owner.

In reply to your 4th question in the event the landowner dies intestate, his heirs take undivided interest as tenants in common. The reply made to question 2 would then apply.

5.4 September 8, 1958

CONSERVATION COMMISSION — MEANDER LINE — TITLE TO BED OF NAVIGABLE RIVERS — LICENSE

1. A meander line is a line run by the government for the purpose of defining the sinuositites of the banks of bodies of water, and as a means of extending the quantity of the land in fractional areas subject to sale by the government.

2. Title to bed of navigable rivers passed to the State of Iowa upon admission to the Union.

3. Owners of land, tenants and their children may hunt, trap and fish on their own land and adjacent roads, however a license is required to hunt, fish, or trap below the ordinary high water mark of a navigable river irrespective of ownership of the land above the high water mark.

Mr. Edwin A. Getscher, Fremont County Attorney: Your letter of July 30, 1958 reads in part as follows:

"One Mr. A, living in Fremont County and being a tenant farmer on lands through which flows the Nishnabotna River, below the confluence of the East and West Nishnabotna Rivers, was sitting on the bank fishing in said river. The game warden summoned him into court to answer to the charge of fishing in State waters without a license.

"Question:

"1. What constitutes a meandered stream?

"2. Where the lands and stream involved are outside the city limits would the title to the river bed be in the State exclusive of the riparian owners?

"3. Would a man sitting on lands on which he is a tenant and throwing his hook into a meandered stream be required to purchase a license to do so?"

In reply to your first question, 8 *Am. Jur.* 766 is as follows:

"In surveying land adjacent to a stream, whether navigable or not, lines are often run from one point to another along or near the bank or margin of the stream in such a manner as to leave a quantity of land lying between these lines and the thread or bank of the stream. These are called meander lines, and they define the sinuosities of the stream which constitutes the boundary. . . . "

Patton in *Iowa Land Title Examinations* states at page 73:

"Where navigable lakes, streams, etc., intercept the surveys, they produce fractional divisions, known as fractional sections, fractional quarters, etc. The divisions of a fractional section are numbered, and called 'lots.' The sinuosities of the shore are marked, usually a short distance back from it, by a surveyed line, called a 'meander line.' Meander corners are established at all these points where township or section lines intersect the meander line."

The Iowa Supreme Court said in *City of Cedar Rapids v. Marshall,* 199 Iowa 1262, 1264:

"The meander line, however, is not a boundary line, but one which was run by the government for the purpose of defining the sinuosities of the banks of the stream, and as a means of extending the quantity of the land in a fractional area subject to sale by the government."

This definition needs only to be enlarged to include banks of bodies of water to be of general application.

The *Biennial Report of the State Conservation Commission* includes a table with the following heading and information:

"Meandered Rivers. The following is a list of meandered rivers and description of upper limits of meander line:

" * * *

"9. *Nishnabotna River.* To north line township 67 north, range 42 west, Fremont County northeast of Hamburg."

In reply to your second question, it is settled law in Iowa that title to the beds of navigable streams passed to the State of Iowa in its sovereign capacity upon admission to the Union. See *State v. Jones,* 142 Iowa 398, *City of Cedar Rapids v. Marshall,* 199 Iowa 1262, *State v. Livingston,* 164 Iowa 31, *McManus v. Carmichael,* 3 Iowa 1. If the stream be nonnavigable, it is the rule that adjoining proprietors hold to the thread or center of the stream. See *State v. Livingston,* supra; *Noyes v. Collins,* 92 Iowa 568.

Title to the river bed remains in the State until transferred in a recognized manner. As you point out in your letter, one manner and example is the case of cities establishing a River-Front Improvement Commission pursuant to Chapter 372, Code of Iowa, whereafter the Commission holds "fee simple title" in "trust for the public".

The relationship between "meandered" and "navigable" was said to be as follows in the case of *State v. Nichols*, 241 Iowa 952, 968:

"Plaintiff argues that the lake was navigable because it was meandered. This is a matter for consideration but it is not decisive." (Cases cited.)

Your third question was the subject of consideration in a letter opinion of this office dated October 11, 1956, addressed to Benton County Attorney Keith Mossman, the pertinent parts of which are set out as follows:

"Receipt is acknowledged of your letter of September 29th as follows:

" * * *

" 'Section 110.1 of the 1954 Code of Iowa provides: "No person except as otherwise provided in this chapter shall fish, trap, hunt, . . . without first procuring a license." Section 110.17 provides, however, that owners or tenants of land and their children may hunt, fish, or trap upon such land without securing a license. I am reliably informed that the Cedar River in Benton County, Iowa, is what is known as a navigable or meandering stream. In view of this fact, I will appreciate your opinion as to whether or not owners or tenants of land whose land is adjacent to the Cedar River, can fish in the Cedar River without first obtaining a license. . . . '

" * * *

"Your second question relates to exemption from obtaining licenses under Section 110.1 existing by virtue of the provisions of the first paragraph of Section 110.17 which reads as follows:

" 'License not required. Owners or tenants of land, and their children, may hunt, fish or trap upon such lands and may shoot ground squirrels, gophers, or woodchucks upon adjacent roads without securing a license so to do.'

"It should be noted that the exemption is phrased in terms of 'owners or tenants of land' and that the only exception to such ownership or tenancy is 'upon adjacent roads'. Whether the bed of the stream in question is subject to individual 'ownership or tenancy' is, therefore, the controlling factor in answering your question. Assuming your information that the stream in question is navigable is correct, the following excerpt from *Patton on Titles*, page 291, section 83 appears pertinent:

" '. . . Upon the acquisition of new territory by the United States from a foreign country, the United States became vested with title to all lands under the navigable waters thereof which had not been previously granted to other parties by the former government. These titles did not pass to the territorial governments which were created, but remained in the federal government in trust for the future state or states which might be erected out of the territory. Upon a state being subsequently admitted to the Union, the title passed to it. . . . Whether it shall assert title, and if so, what waters it shall consider navigable and the line at which it shall establish the division between public and private ownership are. . . . matters for the legislative and judicial policy of each separate state.'

"The decision of our Supreme Court in *City of Cedar Rapids v. Marshall*, 199 Iowa 1262, also appears pertinent to your inquiry. At page 1263 thereof appears the following:

"'It is conceded by all parties that the Cedar River through the city of Cedar Rapids was meandered by government surveyors, and that it was in fact, at the time of the government survey a navigable stream. It is also admitted that the title to the bed and banks of said river below the ordinary high water mark became vested in the state of Iowa, at the time of the admission of the state into the Union.'

"And at page 1264:

"'The term "ordinary high water mark" has been frequently defined by this and many other courts. It is not the line reached by unusual floods, but is the line to which high water ordinarily reaches (citing cases)'.

"There are a number of other Iowa cases holding that the line between private and public ownership along a navigable stream is the ordinary high water mark. However, the quoted case is sufficient for purposes of furnishing the answer to your inquiry and also appears to support the statement of fact in your letter that the Cedar River is considered a navigable stream. Assuming the said river was considered, in fact, navigable at the time of the government survey, land below the ordinary high water mark is public domain held by the State in trust for the public and not susceptible to private ownership. It follows that a license is required to hunt, fish, or trap below the ordinary high water mark irrespective of ownership of land above the high water mark."

This conclusion remains the opinion of this office.

5.5

Boat traffic on water impounded by power company dam. In absence of agreement contrary power to regulate remains exclusively in the State of Iowa. (Gritton to N. S. Gould, Delaware Co. Atty., 1/10/58) #58-1-13

5.6

Boat dock permit fees — No refund of fees paid under invalid statute. (Gritton to Stiles, St. Cons. Dir. 10/11/57) #57-10-22

5.7

County Conservation Board — Election to Create: May be held as special election on primary election day. Separate ballots required. (Strauss to Frye, Floyd Co. Atty., 4/10/58) #58-4-7

5.8

County Conservation Board: (a) County Attorney is required to render to county conservation board such assistance as shall not interfer with his regular employment. (b) Expenditures by the board are not subject to the prior approval of the county board of supervisors. (Gritton to Leir, Scott Co. Atty., Davenport, Iowa, 1/13/58) #58-1-18

5.9

County Conservation Board; budget, transfer of surplus at end of fiscal period. (Gritton to Holley, Butler Co. Atty., 7/18/57) #57-7-25

5.10

County Conservation Board; parks; tort liability. (Bianco to Hanrahan, Polk Co. Atty., 7/1/57) #57-7-1

5.11

County Conservation Board: (a) Not an employer for Workmen's Compensation purposes. (b) Employees are *county* employees for Workmen's Compensation purposes. (Gritton to Holley, Butler Co. Atty., 4/17/58) #58-4-13

5.12

County Conservation Board: Questions submitted to voters. Where petition was filed too late for submission to voters at November election, "next" election within the meaning of the statute is the June primary. (Strauss to Poston, Wayne Co. Atty., 3/19/58) #58-3-13

5.13

Hunting and fishing license exemption — The exemption of Sec. 110.17 applies only to lands rented as a tenant. Hired hand is not a tenant. (Erbe to Schroeder, Jackson Co. Atty., 12/2/58) #58-12-8

5.14

Possession of Bull frogs in privately owned waters — Breeding and sale thereof lawful. (Bianco to Beckman, Chief Div. of Fish and Game, St. Conservation Comm., 6/18/57) #57-6-29

Person who has legally acquired and stocked a private preserve with giant bull frogs, not native to the public waters of this state, may legally possess, propogate and dispose of such frogs in any manner he may choose.

5.15

State Commission — Conservation officers — Salaries based on prior service — "Prior service" construed. (Bianco to Stiles, St. Conservation Director, 6/26/57) #57-6-44

The term "prior service" as used in House File 288, Acts 57th G. A., and referring to salary increases based on longevity of service, refers to prior service as a conservation officer only.

5.16

State Commission Publications — Sale or free distribution. (Bianco to Stiles, Dir., St. Cons. Comm., 7/1/57) #57-7-2

5.17

State Commission Publications — Distribution to purchasers of hunting licenses. (Strauss to Stiles, Dir., St. Cons. Comm., 8/6/57) #57-8-9

5.18

Sanitary Districts — Special assessments — Sewage disposal rentals — Connection and inspection charges — Liability of State therefor. (Bianco to Rush, Chm., Div. Lands & Waters, St. Conservation Comm., 6/19/57) #57-6-34

State property held by the State in its soverign capacity cannot be made the subject of special assessment, except when specifically made so by legislative act. Under §2, Chap. 13, Acts 54th G. A., State is liable

only for *sewage disposal rentals. A connection charge or an inspection charge* is not a rental, but constitute separate and distinct fees for a different kind of utility and service, hence State need not pay any such charges which may be established by a sanitary district.

5.19

State Conservation Commission — Blanket bonds — The Commission does not have authority to enter into a blanket bond contract for employees of the Commission. (Gritton to Stiles, Dir., State Conservation Comm., 3/2/58) #58-3-17

5.20

State Conservation Commission — Must pay ten dollars ($10.00) fee required by paragraph 5, Sec. 9, Chap. 229, 57th G. A., upon application for a permit required by Chap. 455A, Code 1954, as amended. (Gritton to Bruce Stiles, Director, State Conservation Commission, 1/8/58) #58-1-8

5.21

State Conservation Commission — Reversion to General fund of certain appropriated monies. (Strauss to Stiles, St. Cons. Comm., 1/31/58) #58-1-3

5.22

State Conservation Commission — Trust Fund — Interest from investment properly diverted to State General Fund. (Strauss to Stiles, Dir., State Conservation Commission, 2/20/58) #58-2-2

5.23

State lakes — recovery of dead bodies — Under our statutes no specific duty is imposed upon peace officers in general nor on officials of the State Conservation Commission for the recovery of the body of a person drowned in Lake Okoboji. Though public officials, within their proper jurisdiction, may lend such aid as they may be able to, the primary duty and responsibility for such recovery rests with the surviving spouse or next of kin. (Bianco to Stiles, St. Cons. Comm., 2/26/57) #57-2-30

5.24

State Forester — Employment; consent of Conservation Commission; performance of duties by Supt. of Forestry. (Strauss and Gritton to Stiles, Dir., St. Cons. Comm., 8/8/57) #57-8-11

5.25

State Parks — Agreements with municipalities for maintenance. (Gritton to Rush, Chmn. Div. of L.&W., St. Cons. Comm., 8/20/57) #57-8-29

5.26

Waters and Watercourses — Interstate Watershed Districts — Where structure erected in Missouri impounds and backs up water in Iowa, the Missouri district being the "person" wishing to use the land of another, must obtain the easements to the Iowa land under water. (Gritton to Griener, St. Soil Cons. Comm., 9/18/58) #58-9-5

5.27

Waters and Watercourses — Navigable Streams — Regulations relating to boat lights and other equipment — Conflict between Federal and State statutes and regulations. (Bianco to Stiles, St. Conservation Comm., 6/27/57) #57-6-48

Where Federal Government has assumed jurisdiction over any navigable waters, and there is a conflict between the Federal statutes and regulations and those of the State relating to lighting and other equipment on vessels using such waters, the Federal laws and regulations are paramount.

5.28

Waters and Watercourses — Navigable Streams — Riparian Lands and Owners — Title to lands below high water mark, including the bed of a navigable stream, is in the State of Iowa — Filling in of part of river bed an encroachment. (Bianco to Vollertson, Atty., Davenport, Iowa, 6/17/57) #57-6-25

The title of the State of Iowa to land bordering upon the Mississippi River extends to the ordinary high water mark and the filling in of a part of the river bed within such boundary constitutes an encroachment on lands belonging to the public.

CHAPTER 6

CONSTITUTIONAL LAW

STAFF OPINIONS

LETTER OPINIONS

6.1 March 11, 1957

The three days within which a Bill presented to the Governor shall be returned as provided by Article III, Section 16, of the Constitution and Section 3.5, Code 1954, providing the bill is not returned to the Legislature within that time, does not include the day the Bill is presented to the Governor.

The Honorable Herschel C. Loveless, Governor of Iowa: This will acknowledge receipt of yours of the 5th inst. in which you have submitted the following:

"I respectfully request a ruling of the Attorney General of Iowa on Article III, Section 16, of the Constitution of Iowa, relative to the period of time during which the Governor may sign a Bill while the General Assembly is in session.

"Specifically the question raised has to do with the following sentence, which appears in Article III, Section 16:

'If any bill shall not be returned within three days after it shall have been presented to him, Sunday excepted, the same shall be a law in like manner as if he had signed it, unless the General Assembly by adjournment, prevent such return'.

"The question at issue is whether or not the day on which a Bill is delivered to the Governor's office counts as one of the three days during which the Governor has to sign the Bill."

We advise as follows. In addition to the constitutional provision quoted by you, statutory provision of like effect exists in Section 3.5, Code of Iowa 1954, providing as follows:

"*Failure of governor to return bill.* When a bill has passed the general assembly, and is not returned by the governor within three days as provided in the constitution, it shall be authenticated by the secretary of state indorsing thereon: 'This bill, having remained with the governor three days (Sunday excepted), the general assembly being in session, has become a law this ..... day of .....,

.....
Secretary of State.' "

The exact question propounded by you appears not to have had consideration by this department or the Supreme Court; however, it has had consideration and determination by courts elsewhere and text writers.

In an annotation appearing in 54 *American Law Reports*, page 339, the applicable rule is set out:

"In computing the period of time within which the chief executive of a state may approve an act of the legislature presented to him, or within which the act, if not returned, will become law, the rule is that the day of presentation is to be excluded and the last day included."

Supporting the foregoing are cases from the appellate courts of California, Florida, Kansas, Louisiana, Minnesota, Mississippi, Missouri, South Carolina and New Hampshire.

Typical of the holdings in the various cases above determined is the *Minnesota case of State ex rel. Putnam v. Holm, Secretary of State*, 215 N. W. 200. In that case address is made to a constitutional provision of Minnesota couched in the same language used in Section 16 of Article III of the Iowa Constitution. The Court there, without discussion or argument, stated:

"There is no doubt that the time must be computed by excluding Wednesday, the day the bill was presented to the Governor, and by including Saturday, the third day thereafter, unless an intervening day is to be excluded."

Addressing itself to the same question the Supreme Court of Kansas in *State ex rel. Dawson, Atty. Gen., v. Session, Secretary of State*, 115 Pacific 641, used this language:

"The words, 'within three days after it shall have been presented,' would indicate to people of common understanding that the Governor was to have the full three days. In view of the highly important nature of his duties, as a branch of the lawmaking power, and in view of the interpretation that had already been placed upon like language, in California, and many decisions applying the same interpretation to other instruments, it is believed that it was intended that the Governor should have three full working days to consider and act upon a bill. Stinson v. Smith, 8 Minn. 366 (Gil. 326).

"The general rule (which the rule of the Code does not apply) to include the day on which the act is done in computing time from or after an act or event is not inflexible. When not expressively declared to be inclusive or exclusive the words 'after,' 'from,' 'subsequent,' and the like are susceptible of different significations and are used in different senses, having an exclusive or inclusive meaning according to the subject matter, context, and the purpose to be accomplished. Note in 49 L. R. A. 193, 243, and cases there cited. There is no abstract right or wrong in any method of computation. Warner v. Bucher, 24 Kans. 478. Fractions of a day may be considered when necessary to do justice in the particular case. Coal Co. v. Barber, supra. 'In some cases where the time is to be computed from some event or some act done, the day within which the event transpired or the act was done is also to be excluded.' English v. Williamson, 34 Kan. 212, 8 Pac. 214."

A like construction of our Constitution and statute is justified under our dictionary statute, Section 4.1, subsection 23, providing as follows:

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

Taking into consideration that section and the words "from and after April 1, 1893," as written in the contract, the Supreme Court in *Chicago Title and Trust Company v. Smyth,* 94 Iowa 401, 407, stated:

"Mr. Bishop, in his work on Contracts (section 1343), states the rule thus: 'Where time is computed from an act done, the general rule is to include the day. Where it is computed from the day of the act done, the day is excluded.' He adds: 'But it is believed that not all courts will, and none should, adhere to this or any other like technical distinction, in a case where, by disregarding it, they can better carry into effect what, all the considerations being taken into account, it is reasonably plain the parties meant.' In support of this latter statement a number of cases are cited. In Wilcox v. Wood, 9 Wend. 345, it was held that a lease from the first day of May in one year to the first day of May in the succeeding year excluded the first day. Our statement of the rule is in harmony with paragraph 23 of section 45 of the Code, prescribing rules to be observed in the construction of statutes. It is there provided that in computing time the first day shall be excluded, and the last included, unless the last falls on Sunday. Applying this rule to the language under consideration, we must say that the words 'from and after April 1, 1893,' exclude that date."

And see *Arnold v. Kossuth County,* 151 Iowa 155, 130 N. W. 816.

In view of the foregoing we advise you that the three days provided for return of a Bill presented to you by the Legislature for signing does not include the day upon which the Bill is presented to you for your signature.

6.2 May 20, 1957

CONSTITUTIONAL LAW — GOVERNOR — Loss of Citizenship Rights by Reason of Conviction in Federal Court — Authority of Governor to Restore Convict to Citizenship Rights. The power and authority to restore citizenship rights lost by reason of conviction in federal court of an "infamous crime" rests exclusively in the Governor. The Governor is the sole judge as to what conditions must be met before such restoration may be granted.

Mr. Samuel O. Erhardt, Wapello County Attorney: Your recent inquiry to the Attorney General as to executive clemency has been handed to me for reply. In it you state:

"The question has come up as to whether or not the Governor of the State of Lowa has the right to grant executive clemency in connection with a person convicted under the federal statute. In this particular case the conviction was approximately five years ago and the sentence was completed and the defendant has been released from parole for approximately four years. He would like to have his civil rights restored.

"If the Governor has the right would he need a recommendation from the federal judge, the federal attorney and other federal officials, or would executive clemency be granted by a recommendation from the local county judge, local county attorney, sheriff and so forth?"

Official opinions of this office (1912 OAG 823, 1948 OAG 270) have held previous convictions of an infamous crime in the Federal as well as State courts sufficient to deny rights of citizenship. (See also 79 A. L. R. 38; *Hogan v. Hartwell*, 7 S. 2d 889.)

Additionally, the earlier opinion held, with reference to Code Section 5706 (substantially the same as what is now Section 248.12, Code 1954), "the effect of this section is to give the Governor the power to restore to the convict his right to vote where the same has been lost by reason of his conviction of an infamous crime."

This line of reasoning is reinforced by the leading case on the problem: *Arnett v. Stumbo*, 153 S. W. 2d 889, (1941).

There the Kentucky court held under the provisions of the Kentucky Constitution authorizing the Governor to restore sufferage and office holding rights by executive pardon to one convicted of a felony, that the Governor had authority to restore citizenship rights to one convicted in the Federal courts of violating a Federal statute for which a felony punishment was provided, as against a contention that a pardon by the President of the United States was essential to restore his lost rights.

Thus, in answering your first question, we reaffirm the 1912 opinion of this office, referred to above, in holding that the Governor would under Section 248.12 have authority to restore all rights of citizenship lost as a result of a prior Federal conviction.

In answer to your second question, since the power to restore rights of citizenship lost by reason of conviction of crime rests exclusively in the Governor, we think that in view of the statute he is the sole judge as to what conditions must be met before such restoration may be procured, including the nature, kind and number of recommendations he desires to be filed with his office relating to a particular case.

6.3 May 20, 1957

Section 8.31, Code 1954, while conferring power upon the Governor to reduce appropriations made by the General Assembly, the power thus conferred, if exercised, violates Article III, Section 24, of the Constitution and unconstitutionally ties the hands of future Legislatures.

Honorable Herschel C. Loveless, Governor of Iowa and Mr. Glenn D. Sarsfield, State Comptroller: This will acknowledge receipt of yours of the 8th inst. in which you have submitted the following:

"Section 8.6, Subsection 13, Code of Iowa, 1954, reads as follows:

"'Specific powers and duties. The specific duties of the state comptroller shall be: * * * 13. Certification for levy. On August 1 the state comptroller shall, for each year of the biennium, certify to the state tax commission, the amount of money to be levied for general state taxes. . . .'

"Section 8.31, Code of Iowa, 1954, Quarterly requisitions — exceptions — modifications, has to do with allotments of appropriations and modifi-

cation thereof by the Governor, subject to the concurrence of such finding by the Executive Council.

"We respectfully request an official opinion as to the following:

"1. In the event that the Governor, with the concurrence of the Executive Council, should notify the State Comptroller of his intent to modify appropriation allotments to the extent that the total budget obligations would be reduced to the estimated budget resources available without levying any state property tax, would the Comptroller be relieved from certifying to the State Tax Commission any amount of money to be levied for general state taxes, as provided in Section 8.6, Subsection 13, Code of Iowa, 1954.

"2. Are appropriations for the various school aids, and various other state aids, provided for by House Files 593, 594, 595, 596, Senate Files 469 and 470, Acts of the 57th General Assembly, subject to the provisions of Section 8.31?

"3. Are appropriations for capital improvements, provided for by House Files 597, 598, 600, 601, Senate Joint Resolution 3, Senate Files 474 and 475, Acts of the 57th General Assembly, subject to the provisions of Section 8.31?

"4. Are standing limited appropriations provided by Chapters 426, 159, 24, 2, 227, and 258, Code of Iowa, 1954, subject to the provisions of Section 8.31?

"5. Are standing unlimited appropriations, some of which are provided by Chapter 425, and various other Chapters, Code of Iowa, 1954, which can be found listed under Standing Appropriations of the 1957-59 State Budget (copy enclosed), subject to the provisions of Section 8.31?

"6. In the event that the Governor modifies allotments, as provided by Section 8.31, is such modification effective on the appropriation to the Budget and Financial Control Committee, provided by Senate File 471, Acts of the 57th General Assembly?

"7. In the event that you should rule that any of the above items or items of this type are exempt from the provisions of Section 8.31, would it then be possible for the Governor to modify such allotments as are subject to the provisions of Section 8.31 to the extent that he may deem necessary in order not to exceed the estimated budget resources available?

"8. In the event that the Governor modifies allotments, as provided by Section 8.31, is such modification effective on the statutory salaries, such as those provided in Section 2 of Senate File 457, Acts of the 57th General Assembly?

"9. In the event that the Governor modifies allotments, as provided by Section 8.31, is such modification effective on the statutory salaries, such as those provided in Section 13 of Senate File 457, Acts of the 57th General Assembly?

"10. In the event that the Governor modifies allotments, as provided by Section 8.31, is such modification effective on the statutory salaries such as those provided in the Code for which the appropriation for same is provided in Section 44 of Senate File 457, or other similar acts of the 57th General Assembly?"

In reply thereto we advise that in the view that we take of this situation answer seriatim to your request is not required. Section 8.31, Code 1954, under the authority of which the Governor with the consent of the Executive Council would modify allotments provides:

"8.31 *Quarterly requisitions — exceptions — modifications.* Before an appropriation for administration, operation and maintenance of any department or establishment shall become available, there shall be submitted to the governor, not less than twenty days before the beginning of each quarter of each fiscal year, a requisition for an allotment of the amount estimated to be necessary to carry on its work during the ensuing quarter. Such requisition shall contain such details of proposed expenditures as may be required by the governor.

"The governor shall approve such allotments, unless he finds that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, in which event he may modify such allotments to the extent he may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of such fiscal year, and shall submit copies of the allotments thus approved or modified to the head of the department or establishment concerned, and to the state comptroller, hereinabove provided for, who shall set up such allotments on his books and be governed accordingly in his control of expenditures.

"Allotments of appropriations made for equipment, land, permanent improvements, and other capital projects may, however, be allotted in one amount by major classes or projects for which they are expendable without regard to quarterly periods.

"Allotments thus made may be subsequently modified by the governor either upon the written request of the head of the department or establishment concerned, or in the event the governor finds that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, upon his own initiative to the extent he may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of such fiscal year; and the head of department or establishment and the state comptroller, hereinabove provided for, shall be given notice of such modification in the same way as in the case of original allotments.

"Provided, however, that the allotment requests of all departments and establishments collecting governmental fees and other revenue which supplement a state appropriation shall attach to the summary of requests a statement showing how much of the proposed allotments are to be financed from (a) state appropriations, (b) stores, and (c) repayment receipts.

"The procedure to be employed in controlling the expenditures and receipts of the state fair board and the institutions under the state board of education, whose collections are not deposited in the state treasury, will be that outlined in section 8.6, subsection 7.

"The finding by the governor that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, as provided herein, shall be subject to the concurrence in such finding by the executive council before reductions in allotment shall be made, and in the event any reductions in allotment be made, such reductions shall be uniform and prorated between all departments, agencies and establishments upon the basis of their respective appropriations."

This statute was enacted by the 45th General Assembly as Chapter 4, Paragraph 24, in 1933. Prior to the enactment of this statute, allotments were authorized under what is now Section 3.13, Code 1954, which provides as follows:

"*Pro rata disbursement of appropriations.* Annual appropriations shall be disbursed in accordance with the provisions of the acts granting the same pro rata from the time such acts shall take effect up to the first day of the succeeding quarter as provided in section 3.12."

then existent in substantially that form as Section 59, Code of 1931. Another form of allotments appear as Section 57 of Chapter 218 of the 41st General Assembly and re-enacted as Section 57 of Chapter 275, Acts of the 42nd General Assembly, which provided as follows:

"No state department, institution, or agency receiving appropriations under the provisions of this act shall expend funds or approve claims in excess of its appropriations, except as otherwise provided in this act. If the expenditures of any state department, institution, or agency shall in any other manner exceed the amounts of its appropriations, the members of the governing board of any such state department, institution or agency who shall have voted for such excessive expenditure, or, if there be no governing board, the head of any such state department, institution or agency making excessive expenditure or approving excessive claims shall be personally liable for the full amount of the authorized deficit thus created.

"The executive council, with the approval of the director of the budget, is authorized where the appropriation of any department, institution or agency is insufficient to properly meet the legitimate expense of such department, institution or agency of the state, to transfer from any other department, institution or agency of the state having an appropriation in excess of its necessity, sufficient funds to meet that deficiency."

This statute substantially in the foregoing form exists as Section 8.39, Code 1954. Allotment under Section 3.13 was the subject of an opinion appearing in the 1907 Report of the Attorney General at page 48, exhibited as follows:

"IOWA STATE COLLEGE OF AGRICULTURE AND MECHANIC ARTS — APPROPRIATION FOR — WHEN PAYABLE — Held that under the provisions of an act of the twenty-ninth general assembly, the Iowa State College of Agriculture and Mechanic Arts is entitled to receive such pro rata portion of the first quarterly installment of the annual appropriation made by the thirty-first general assembly as the whole amount of the quarterly installment bears to the time which will elapse between the taking effect of the act and the 1st day of July following.

"Sir: I am in receipt of your communication of the 8th instant, in which you request my opinion whether the Iowa State College of Agriculture and Mechanic Arts may be permitted to draw from the state treasury the pro rata portion of the annual appropriation made by the thirty-first general assembly, which the amount of the quarterly installment of such annual appropriation bears to the time from the taking effect of the act to the first day of the succeeding quarter. In compliance with such request I respectfully submit the following:

"Chapter 177 of the acts of the twenty-ninth general assembly makes the fiscal year of the state begin with July 1st and end with June 30th of the succeeding year, and provides that when annual appropriations are made payable quarterly, the quarters shall end with September 30th, December 31st, March 31st and June 30th. Section 2 of that chapter provides:

" 'Annual appropriations hereafter made shall be disbursed in accordance with the provisions of the act granting the same, pro rata from the time such acts take effect until the first day of the succeeding quarter, as provided in section 1 of this act.'

"House file No. 400 of the thirty-first general assembly became a law on the 13th day of April, 1906. Under the provisions of section 2 of the act of the twenty-ninth general assembly, the Iowa State College of Agriculture and Mechanic Arts is entitled to receive such pro rata

portion of the first quarterly installment of the annual appropriation made by the thirty-first general assembly, as the whole amount of the quarterly installment bears to the time which will elapse between the taking effect of the act and the first day of July following.

"The same rule must be applied to all annual appppropriations made to other state institutions by the thirty-first general assembly, which are payable in quarterly installments, as all such appropriations are governed by the provisions of section 2 chapter 177 of the acts of the twenty-ninth general assembly."

More to the point of this discussion is the following comment appearing in 14 Iowa Law Review at page 369 on the power vested in the Executive Council and director of the budget by the Acts of the 41st General Assembly:

"The 41st and 42nd General Assemblies granted to the Executive Council power to redistribute appropriations whenever the fund for any department is 'insufficient to properly meet the legitimate expense' for that department, and there is in another department an amount 'in excess of its necessity.' The 'approval of the director of the budget' is made a prerequisite of the exercise of that authority. This legislation not only raises the question of a delegation of legislative power, but also suggests a conflict with constitutional provisions in regard to appropriations.

"Inasmuch as judicial review of acts of the Executive Council has seldom been requested, this discussion of the problems so raised must be submitted without the satisfaction of knowing it to be fully supported by judicial decisions. However, it may be assumed as a basis for study that while the Executive Council occupies a more responsible and respected position than many of the minor ministerial boards and commissions the powers delegated to it can be no more extensive than the legislature can constitutionally grant, nor more than the council can constitutionally receive.

"The legislature cannot delegate legislative power, but it can grant fact-finding and administrative authority to boards and commissions, and make the operation of statutes conditional upon the findings of these bodies. If the appropriations made by the legislature are not absolute, the power of redistribution given to the council and budget director is akin to the power of appropriation itself; but if the appropriation of the legislature is absolute subject to be used only upon the council's and budget director's determination of the existence of a necessity, then it may be said that only ministerial power has been delegated and the power placed in the Executive Council and budget director is entirely proper. As it is obvious that a deficiency cannot be foreseen, and that when it arises legislative action is likely to be impossible, it seems entirely proper that some agency should be provided to remedy the situation. One of the primary functions of the Executive Council being the conduct of the affairs during the adjournment of the legislature, the delegation of the power to it seems entirely appropriate unless other constitutional restrictions intervene."

and addressing itself to a concrete example of action within the authority of the foregoing statutes, it continues:

" * * * The legislature declared that each department should receive $100,000 but at the same time provided that the council and budget director might allow one department to receive a sum in excess of that and the other less. Difficult as it may appear, it might be possible to justify this delegation of power, if merely the determination of facts were left to the Executive Council and budget director, but the statute goes further. It allows the council to determine the facts and then

within its discretion, subject only to the approval of the director of the budget, to make such allotment of funds as it sees fit. If the council and budget director can be given authority to determine the amount of funds to be used by a department, they have in effect the power to make appropriations or at least to amend or in effect to repeal the action of the legislature in making appropriations. The power of appropriation, however, is a legislative power and constitutionally should be exercised only by the General Assembly."

The allotment power vested by Section 8.31 is broad in its terms and confers power on the Governor and the Executive Council not previously existing. The specific power vested in the Governor by such Section with the consent of the Executive Council if he finds that the estimated budget resources during the fiscal year are insufficient to pay all appropriations in full, in which event he may modify such allotments to the extent he may deem necessary in order that there shall be no overdraft or deficit in the several funds of the state at the end of such fiscal year, is in effect a power to reduce appropriations made by the Legislature.

This power in our judgment, if exercised, would amount to an unconstitutional act for two reasons.

First, it would amount to an exercise of the power of appropriation vested solely in the Legislature by the Constitution. This provision, paragraph 24 of Article III, provides as follows:

"Appropriations. Sec. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law."

The language of the Iowa Law Review comment respecting the allotment there under discussion is in our judgment pertinent to the allotment provided for by Section 8.31. And this power vested in the executive branch of the government is viewed as follows in the case of *State ex rel Crable et al v. Carter*, 103 P. 2d 518, where the Supreme Court of Oklahoma stated:

"Since the power of the Governor to veto items in an appropriation bill is limited by the Constitution any attempt on the part of the Legislature to enlarge the exercise of that power and to change the specified mode or manner of its exercise would contravene the constitutional provision fixing the limit of such power. It therefore appears that the statement made in the case of State ex rel. v. Carter, supra, that the Legislature is without authority to empower the Governor to reduce an item in the appropriation bill is fundamentally correct and is controlling of the question here presented.

"This conclusion, as we view it, is in harmony with our fundamental concept of government relating to the division of powers. The responsibility of preventing the excessive expenditure of such funds rests primarily upon the Legislature who can refuse to appropriate such excess funds; but if appropriated, the responsibility thereupon shifts to the Governor who by the exercise of his constitutionally granted veto power, at the time and in the manner prescribed and limited by the Constitution, can prevent such excessive expenditure. However desirable it may be to prevent the expenditure of funds in excess of available revenues, the courts must scrupulously maintain the powers delegated to the legislative and executive branches of government, but at the same time must as carefully maintain the constitutional restrictions imposed upon the exercise of those powers, for herein lies the safeguard of representative government. We find nothing in our Constitution which indicates that

the framers thereof contemplated that the Governor might be granted a continuing veto power which, under any circumstances or conditions, might be exercised long after the Legislature has adjourned."

Second, Section 8.31 heretofore quoted together with Section 8.30, both enacted by Chapter 4 of the 45th General Assembly, is an attempt to tie the hands of future legislatures. Section 8.30 expressly states:

"*Availability of appropriation.* The appropriations made shall not be available for expenditure until allotted as provided for in section 8.31. *All appropriations now or hereafter made* are hereby declared to be maximum and proportionate appropriations, the purpose being to make the appropriations payable in full in the amounts named in the event that the estimated budget resources during each fiscal year of the biennium for which such appropriations are made, are sufficient to pay all of the appropriations in full. The governor shall restrict allotments only to prevent an overdraft or deficit in any fiscal year for which appropriations are made."

Such action on the part of one legislature has had the consideration of the Supreme Court in *State v. Executive Council,* 207 Iowa 923, 223 N. W. 737, *Solberg v. Davenport,* 211 Iowa 612, 232 N.W. 477. In the *Executive Council* case the Court, addressing itself to the problem, stated this:

" * * * In the absence of any constitutional provision to such effect, no general assembly has power to render its enactment irrevocable and unrepealable by a future general assembly. No general assembly can guarantee the span of life of its legislation beyond the period of its biennium. The power and responsibility of legislation are always upon the existing general assembly. One general assembly may not lay its mandate upon a future one. Only the Constitution can do that. It speaks as an oracle, and stands as a monitor over every general assembly. The funds resulting from license fees and gasoline taxes are within the legislative power, and are necessarily subject to the control of the existing general assembly. Its enactment in relation thereto will continue in force until repealed. The power of a subsequent general assembly either to acquiesce or to repeal is always existent. It must be held, therefore, that Sections 13 and 15, above quoted, were and are wholly ineffective and void."

and in the *Solberg* case it was observed:

" * * * The general rule is too well settled to need citation of authority that each legislature is an independent body, entitled to exercise all legislative power under the limitation of the Constitution of this state and the United States, and no legislature can pass a law which would be binding on subsequent legislatures. * * * "

We submit the foregoing and its conclusion with full knowledge that the Legislature is the sole judge of the wisdom and policy of legislation and that "in passing on laws that are submitted for his approval, the executive is regarded as a component part of the lawmaking body, and as engaged in the performance of a legislative, rather than executive, duty" (50 Am. Jur. Paragraph 96, title Statutes) and that the courts are the final arbiter of the constitutionality of the acts of the Legislature.

In the performance of the Attorney General's duty to issue advisory opinion such as is here contained, we are mindful of what has been said with reference thereto by Justice Larson of the Iowa Supreme Court in an article appearing in Vol. 41, No. 3, Iowa Law Review:

"that the advice of this constitutional officer, trained in the law, is necessary to expedite, fix and clarify the powers, duties and obligations of those persons administering the necessary functions of government.

"Such an obligation places upon the attorney general the highest professional responsibility, for these opinions not only affect and control the administration of government in all its vast undertakings but also act as a protection and safeguard for the general public in its rights and privileges. Thus, upon inquiry, public officers may be advised that they have no power or authority to initiate contemplated practices tending to invade constitutionally-protected or other private rights."

and so far as this opinion affects the Comptroller, we call attention to the following from the case of *O'Connor v. Murtagh,* 225 Iowa 782:

" 'The comptroller was bound to observe the constitutional provision that no money be drawn from the treasury but in consequence of appropriations made by law.' "

6.4

Aliens — Filipino citizens, corporations and associations, right to acquire land and engage in business in Iowa. (Gritton to Romulos, Phillippine Embassy, Washington, D. C., 7/8/57) #57-7-5

6.5

Allocation of revenue from sales tax proceeds to agricultural land tax credit fund — Two-thirds vote of each House not required, only simple majority. (Erbe to Nicholas, Lt. Gov., 4/11/57) #57-4-14

A two-thirds vote of the members elected to each branch of the General Assembly is not required to pass Senate File 460, which proposes, among other things, an allocation of revenue from the proceeds of the sales tax (Chap. 422, Code 1954) to the Agricultural Land Tax Credit Fund (established by §426.1, Code 1954, as amended) since such appropriation is for a public purpose. (Citing: *Dickinson v. Porter,* 240 Iowa 393, 31 N.W. 2d 110).

6.6

Construction of word "Act" in title of legislative measures. (Strauss to State Senator Dewel, 4/11/57) #57-4-15

Article III, §29, Constitution of Iowa, treating of the meaning of the word "Act" in the title of an Act, is limited to an *Act* of the Legislature and not to a *Bill* for an Act.

6.7

County Boundaries changed by change in state boundary. Constitutional provision for submission to electorate not applicable. (Strauss to Nolan, Sen., 9/18/57) #57-9-25

6.8

Creation, alteration and termination of school districts — Four year high school district — Special aid for "Standard" schools — (Abels to St. Rep. Sersland, 3/27/57) #57-3-46

The power of the legislature with respect to the creation, alteration, termination and establishment of standards for school districts is plenary. The legislature may constitutionally require all school districts to become

part of a four-year high school district by a certain date. It may constitutionally provide special aid to districts meeting standards prescribed by it.

6.9

Disability bonus fund of World War I — Diversion of funds to Korean Veterans' bonus not permissable. (Erbe, Atty. Gen. to Representatives Vance and Hendrix, 2/13/57) #57-2-19

6.10

Duty of General Assembly to reconsider Bill vetoed by Governor. (Erbe and Strauss to Gov. Loveless, 4/18/57) #57-4-23

A constitutional duty rests upon the General Assembly to reconsider a bill vetoed by the Governor, but no remedy is provided for its failure to perform such duty.

6.11

Election and Privileges Committee — Power of committee to investigate and to summon and subpoena witnesses. (Erbe and Strauss to Governor Loveless, 4/29/57) #57-4-36

The title to H.J.R. 23, Acts 57th G.A., proposing the creation of a joint bipartisan committee as an election and privileges committee, conforms to the requirements of Article III, §29, Constitution of Iowa, and to §3.1 (4), Code 1954. The investigative powers, including the power to summon and subpoena witnesses, are within the constitutional powers granted to the legislative branch of our government.

6.12

Exemption from registration of school busses owned by private contractors and private or parochial schools — (Abels to Whitney, Chm. Schools Committee, House of Rep., 3/22/57) #57-3-41

(1) Payment of public funds to institutions under sectarian management has been held violative of Art. I, Sec. 3, Const. of Iowa, but tax exemptions to such institutions have been held not violative of said provisions. (2) The word "school" used in a statute without express modification or qualification has been held to include public schools only. (Citing *Knowlton v. Baumhover,* 182 Iowa 691, *Trustees of Griswold College v. State,* 46 Iowa 275, and *Silver Lake Cons. School Dist. v. Parker,* 238 Iowa 984).

6.13

General Assembly — Compensation of members — Expense allowances — Hold-over members in Senate — (Strauss to Miller, St. Sen., 3/22/57) #57-3-39

Compensation of members of General Assembly cannot be constitutionally fixed on any basis except on the basis of "per diem and mileage". Sec. 25, Art. III, Const. of Iowa, expressly forbids the allowance to members of the State Legislature of any *personal expenses* other than mileage. (Citing *Gollarno v. Long,* 214 Iowa 805, 243 N.W. 719; and 5 A.L.R. 2d

1217). An increase in the compensation of members of the Legislature is available to hold-over senators in the succeeding General Assembly.

6.14

House Member holding other office — 1. State Representative prohibited from holding office as mayor under Const., Art. III, §22. 2. Vacancy occurs in House of Representatives if member elected Mayor during term. (Strauss to McDonald, Cherokee Co. Atty., 7/23/58) #58-7-11

6.15

House member holding other office — Section 22, Article III, Constitution of Iowa, does not disqualify person holding position of Justice of the Peace from being seated as a member of the House of Representatives in General Assembly. (Strauss to Hanson, St. Representative, 1/18/57) #57-1-24

6.16

Longevity pay plan under Merit system — Examined and found constitutional. (Strauss to Zimmerer, Comm. Pub. Health, 5/13/58) #58-5-17

6.17

Proposed legislation fixing sales tax at 2% until State balance reaches certain minimum figure, then tax to be increased to 3% by responsible executive or body. (Iverson to Lisle, State Representative, 4/2/57) #57-4-4

The predication of a change in the sales and use tax rates upon an administrative finding of fact would be constitutional.

6.18

Resolution recognizing a particular religious faith in the State of Iowa — (Erbe to State Rep. Goode, 3/14/57) #57-3-24

Since religious rights of individuals have been zealously protected by constitutional and statutory provisions in this state, little occasion has arisen for reference to specific religious faiths in public documents. A search of the session laws and resolutions adopted by our previous general assemblies reveals no instance where any particular religious faith has ever been recognized as a major faith in this state.

6.19

Social Welfare Board — Public officers have no capacity to question the constitutionality of statutes. (Strauss to Hanrahan, Polk Co. Atty., 3/27/58) #58-3-24

6.20

State Boundaries — General Assembly cannot delegate power to fix. (Erbe to Nolan, Sen., 11/12/57) **#57-11-13**

CHAPTER 7

CORPORATIONS

STAFF OPINIONS

LETTER OPINIONS

7.1 January 22, 1958

CORPORATIONS: Corporations and partnerships may not be incorporators of corporations organized under Ch. 491, 1954 Code.

Hon. Melvin D. Synhorst, Secretary of State. Attention: Mr. Berry O. Burt: This will acknowledge receipt of yours of the 13th inst. in which you recall a conclusion reached by us that corporations and partnerships may not be incorporators of Iowa profit corporations, and you enclose therewith a copy of a letter from Shepard & Shepard contending that both corporations and partnerships may be incorporated. You ask for advice. The letter of Shepard & Shepard states the following:

"Enclosed herewith are the following:

"1. Articles of Incorporation of.....

"2. Check for $69.00 payable to Secretary of the State of Iowa in payment of the recording fee ($4.00), incorporation fee ($25.00) and the excess stock fee ($40.00).

"It was tentatively suggested by Mr. Burt as his personal opinion that a corporation and a partnership may not be incorporators of a corporation in a note appended January 8, 1958, in returning the foregoing to us.

"We respectfully differ with Mr. Burt and feel the enclosed Articles should be filed and accepted in routine fashion by your office for the following reasons:

"1. No statute of the State of Iowa requires incorporators to be natural persons. See article by Edward R. Hayes in *39 Iowa Law Review 417.*

"2. In actual practice, your office has in the past approved Articles of Incorporation where both a corporation and a partnership were the incorporators. See article by Edward R. Hayes *39 Iowa Law Review 418.*

"3. Section 491.1 of the Code states 'Any number of persons may become incorporated etc.' Section 4.1(13) sets forth definitions to be used in the construction of Iowa statutes and therein states the word 'person' is extended to incorporated bodies, which we feel would be adequate authorization for a corporation to be incorporators.

"Citations appearing in Iowa Code Annotated under this section support this contention. There are numerous cases as well as opinions of the Attorney General stating the word person includes a corporation.

"It would be an easy matter to use a 'dummy' individual as an incorporator in lieu of the partnership and corporation who are the real parties in interest, transferring stock from the 'dummy' to the real parties in interest after the Certificate of Incorporation has been issued by your office. I have never felt, however, this procedure was necessary,

and I think the better procedure is to publicly advise everyone, including potential creditors, in the published Notice of Incorporation of the real parties in interest in the newly formed corporation.

"In view of the foregoing, we respectfully request that the customary Certificate of Incorporation issue in routine fashion."

In reference to the foregoing we advise as follows: 1. Section 491.1, Code 1954, describes how a corporation for profit may be incorporated and provides specifically as follows:

"*Who may incorporate.* Any number of persons may become incorporated for the transaction of any lawful business, but such incorporation confers no power or privilege not possessed by natural persons, except as hereinafter provided."

Whether the word "persons" in the foregoing statute includes by definition a corporation seems not to have been determined by our Supreme Court nor to have been the subject of opinion by this Department. However, it has been adjudicated in other states. In 13 *Am. Jur.*, paragraph 23, title "Corporations" the rule is stated:

" * * * * Moreover, the view is taken that a statute providing for the formation of corporations by two or more 'persons' refers to natural persons and that a corporation cannot, therefore, become an incorporator under such a statute. * * * * "

The cases cited in support thereof are *State v. Rutland R. Light & Power Co.*, 85 Vt. 91, 81 A. 252, Ann. Cas. 1914A, 1305; *Denny Hotel Co. v. Schram*, 6 Wash. 134, 32 P. 1002, 36 Am. St. Rep. 130.

The *Rutland* case states the following:

"No fee would accrue under P. S. 4287, which provides (as amended by Acts 1908, No. 103) that three or more 'persons' may by articles of association form a corporation, because it refers to natural persons only, and not to corporations. This is apparent from the requirement that the persons associating shall be 'of age', which could not, of course, refer to artificial persons. And, were these qualifying words omitted from the statute, the result would be the same. Thus it was held, in Factors' etc., Ins. Co. v. New Harbor Protection Co., 37 La. Ann. 233, that a corporation was not a 'person,' within the meaning of a statute authorizing the formation of a corporation by not less than six persons. And in Denny Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 130, it was held that a statute empowering two or more 'persons' to form a corporation did not authorize a corporation to become a subscriber to the stock of another corporation, though another statute provided that the term 'person' might be construed to include a corporation."

And the *Schram* case, concerning the proposition, states:

"As to the second proposition, a corporation can only be formed in the manner provided by law, and has only such powers as the law specifically confers upon it. We do not think that a corporation was within the contemplation of the legislature when they used the expression, 'two or more persons,' in section 1498, 1 Hill's Code. It is true that section 1709, 2 Hill's Code, provides that the term 'person' may be construed to include the United States, this state, or any state or territory, or any public or private corporation, as well as an individual. But it does not follow, by any means, that the term 'person' is always to be construed as a private corporation, any more than it is always to be construed as the United States. Mor. Priv. Corp. §433, says: 'A corporation cannot, in the absence

of express statutory authority, become an incorporator by subscribing for shares in a new corporation, nor can it do this indirectly by persons acting as its agents or tools;' citing Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475. The author, continuing, says: 'The right of forming a corporation is conferred by the incorporation laws only upon persons acting individually, and not upon association.' This, it seems to us, for manifest and manifold reasons, is in accordance with public policy; and we therefore decide that, under the existing laws of this state, one corporation cannot subscribe to the capital stock of another corporation.

* * * * "

These cases provide precedent for interpretation of our statute heretofore exhibited. It is true, as stated by Mr. Hayes in his comment, that no statute requires incorporators to be natural persons. It is to be observed that Mr. Hayes does not comment upon the question here presented. However, in view of the authorities cited and in view of the provisions of our dictionary statute, Sec. 4.1(13), providing:

"*Person.* The word 'person' may be extended to bodies corporate."

and the following from *State v. Wignall,* 150 Iowa 651, 128 N. W. 935,

" * * * It is a familiar doctrine that the meaning of a word used in a statute, as 'person' in the particular case, must be construed in connection with the words with which it is associated. * * * "

in our judgment would have no persuasive bearing upon the conclusion we reach that a corporation is not a person within the meaning of Sec. 491.1, Code 1954, and may not be an incorporator of an Iowa profit corporation.

2. Insofar as the question concerns a partnership as a person within the foregoing statute, it seems to us it likewise does not appear to have been the subject of adjudication or opinion. However, the reasoning which excludes corporations as persons is equally applicable to partnerships. According to authority a partnership is an entity and distinct from the members thereof. *Lansing v. Land Co.,* 158 Iowa 693, 698, states:

" * * * A partnership under our law is a distinct entity, and the judgment against it was not a judgment against the individual members of that entity or artificial person known as a partnership. Brumwell v. Stebbins, 83 Iowa 425; Mason v. Rice, 66 Iowa 174; Anderson v. Wilson, 142 Iowa 164, Sullivan v. Nicoulin, 113 Iowa 82; Graham Co. v. Wohlwend, 116 Iowa 358."

And the case of *National Sewer Pipe Company v. Smith-Jaycox Lumber Company,* 183 Iowa 17, states:

" * * * That a copartnership is a separate entity, and that a judgment against it cannot be levied upon the individual property of its members, see the following authorities: National City Bank of Chicago v. Fairbank State Bank, 173 Iowa 489; Mudge v. Railway Mail Eq. Co., 167 Iowa 656; Capital Food Co. v. Globe Coal Co., 142 Iowa 134; Lansing v. Bever Land Co., 158 Iowa 693. * * * "

By reason of the foregoing we reach the conclusion that a partnership like a corporation is not a person within the meaning of Sec. 491.1, Code 1954, and may not be an incorporator of an Iowa profit corporation.

7.2

Corporate officers — A corporate officer who is also a notary is barred from acknowledging a corporate statement executed by him to any other than the corporation by reason of personal interest in the transaction. (Strauss to Hall, I.C.C., 11/7/58) #58-11-1

7.3

"*Fixed dividends*" are required to be paid annually and may not be considered as "unpaid patronage dividends" for the purpose of computing maximum surplus under Section 499.30, Code 1954. "Deferred patronage dividends" are properly considered as "unpaid patronage dividends" for purposes of computing maximum surplus. (Abels to State Sen. Tate, 1/10/57) #57-1-14

7.4

Foreign Corporations — Application for permit — Duty of Secretary of State. (Erbe to Synhorst, Secy. of State, 10/1/57) #57-10-1

7.5

Foreign Corporations — Renewal of permits — Fees — Renewal periods. (Strauss to Synhorst, Secy. of State, 7/12/57) #57-7-13

7.6

Foreign Corporations — Application forms for permits bearing reprint of statutes may be distributed by Secy. of State without charge (Strauss to Synhorst, Secy. of State, 8/6/57) #57-8-7

7.7

Merger of two foreign corporations — New corporation qualifying in Iowa not entitled to credit for unused portion of fees of merged corporation. (Strauss to Synhorst, Secretary of State, 5/8/57) #57-5-9

No statutory authority for Secretary of State to credit a newly organized Delaware corporation with the unused portion of the qualifying fees of a West Virginia corporation (previously qualified in Iowa) which had been merged with the Delaware corporation.

CHAPTER 8

COUNTIES AND COUNTY OFFICERS

STAFF OPINIONS

LETTER OPINIONS

8.1 April 8, 1957

COUNTY OFFICERS — BOARD OF REVIEW: Removal of residence by a member of the board of review from the township from which he was appointed to a township in which another member of the board resides creates no automatic vacancy.

Mr. Howard M. Remley, Jones County Attorney: Receipt is acknowledged of your letter of March 28th as follows:

"I have been requested by the Jones County Assessor's office to submit the following question to you for legal opinion:

"Section 442.1 of the 1954 Code of Iowa provides among other things, as follows: 'No two members of the Board of Review shall be citizens of the same town or township, and not more than two members shall be of the same profession or occupation * * * * * '.

"At the time the Jones County Board of Review was last constituted, Henry Biere of Hale Township (Hale Township voting precinct, as well) was appointed for a four-year term on the Board of Review, commencing January 1, 1956. In the Fall of 1956, said Board member moved from Hale Township into the town of Olin, in Rome Township, Jones County, Iowa, in which same town and township another member of the Board of Review, to-wit: C. M. Miles (real estate broker member) also now resides, and resided for many years last past. Therefore, at the time of his appointment, Henry Biere did not live in any town or township in which any other member resided, but at the time of his moving, he did move into a town and township and voting precinct in which another member of the Board of Review, to-wit: the real estate broker member, did reside, does reside, and had resided for many years last past. The question submitted is whether or not the above quoted provisions in Section 442.1 prevent the member of the Board of Review who moved into the town, township and voting precinct of another member from continuing to serve on the Jones County Board of Review? Further, if the member who moved into the town, township and voting precinct of another member refuses to resign, or does not resign, how is it determined which of the two members shall continue to serve on the Board, and which shall be replaced, or can both members serve until the end of their appointed terms, respectively?"

The provision from Section 442.1, Code 1954, quoted in your letter is preceded by the following provision:

"The board *as selected* shall include at least one farmer, one registered real estate broker and at least one person experienced in the building and construction field . . . " (Emphasis ours)

Physical proximity of the two provisions gives rise to an inference that the words "as selected" relate to the residence as well as occupation requirements.

Section 442.1 does not define "vacancy". It merely provides that:

"Vacancies in the board of review shall be filled temporarily by the board of supervisors until such time as a regular conference is called for the selection of new members."

"Vacancy" is defined in terms of removal of residence in Section 69.2(3), Code 1954, as follows:

"Every civil office shall be vacant upon the happening of either of the following events:

" * * * * * *

"The incumbent ceasing to be a resident of the state, district, county, township, city, town or ward by or for which he was elected or appointed, or in which the duties of his office are to be preformed."

This definition doesn't fit the situation described in your letter. The officer in question was selected "from" rather than "by or for" a given township. His duties are exercised within the entire county rather than in said township.

We are, therefore, of the opinion that no "vacancy" is created by the situation described in your letter within the terms of the quoted pertinent statutes, although a disability has been created which, if circumstances remain unchanged, will prevent appointment of said incumbent for a new term upon the expiration of his present term, or will prevent reappointment of the other member currently residing in the same township for a new term, depending upon whose present term first expires.

8.2 June 28, 1957

COUNTY EMPLOYEES, LIABILITY INSURANCE. When county board of supervisors purchases motor vehicle liability insurance limited in coverage to vehicles "*owned*" by the county, it may not insure in excess of policy limits specified in Section 332.2(20), Code 1954. However, if it purchases broader coverage insuring liability of employees operating vehicles "*owned or used*" by the county, the policy limits specified in H.F. 364, 57th G.A. apply.

Mr. William S. Sturges, Plymouth County Attorney: Receipt is acknowledged of your letter of June 19, as follows:

"This office requests an official Attorney General's opinion on the following:

"The 57th GA enacted HF 364, which became law by publication on April 11, 1957, said bill being as follows:

" 'All state commissions, departments, boards and agencies and all commissions, departments, *boards*, districts, municipal corporations, and agencies of *all political subdivisions of the state* of Iowa *not otherwise authorized* are hereby authorized and empowered to purchase and pay the premiums on liability, personal injury and property damage insurance covering all officers, proprietary functions and employees of such public bodies, including volunteer firemen, while in the performance of any or all of their duties including operating an automobile, truck, tractor, machinery or other vehicles *owned or used* by said public bodies, which insurance shall insure, cover and protect against individual personal, corporate or quasi-corporate liability that said bodies or their officers or employees may incur.

" 'The amount of insurance that said commissions, departments, boards and agencies may purchase shall not exceed ten thousand dollars ($10,000.00) for property damage or twenty-five thousand ($25,000.00) for personal injury or death of one person, and subject to said limit for one person, fifty thousand dollars ($50,000.00) for personal injury or death of more than one person, arising out of a simple accident.' (Effective April 11, 1957 — by publication)." (Emphasis ours)

"The 57th GA also enacted HF 116 which becomes law on July 4, 1957 and which act increases the proofs of financial responsibility and security

required by the Motor Vehicle Financial Responsibility Act (Chap. 312A) to $5,000 property damage, $10,000 bodily injury or death per person and $20,000 bodily injury or death of two or more persons per accident.

"Section 332.3(20) of the 1954 Code, which has been neither expressly repealed nor amended, provides as follows:

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

" ' * * * * * * *

" '20. To purchase and pay the premiums on liability and property damage insurance covering and insuring county employees while in the performance of their duties and operating an automobile, truck, road grader, machinery, or other vehicles *owned* by the county, which insurance shall insure, cover and protect against individual personal liability the county employees or employee may incur. The amount of insurance a county may purchase shall not exceed five thousand dollars for property damage or five thousand dollars for personal injury or death of one person or ten thousand dollars for personal injury or death of more than one person arising out of a single accident.' " (Emphasis ours)

" * * * * * * *

"QUESTIONS:

"1. Does a County Board of Supervisors fall within the provisions of HF 364 authorizing them to purchase insurance in the amounts and for the purposes therein set forth?

"2. Is Section 332.3(20), 1954 Code, a separate or 'other' authorization which would be an exception to HF 364; or, was Section 332.3(20), 1954 Code, repealed by implication by the passage of HF 364?

"3. If Section 332.3(20) sets forth the limits of insurance which the Board may purchase for employees operating vehicles in their work, is it then the employees' personal liability to provide the difference of proof of financial responsibility and security when required by Chapter 312A?"

1. In answer to your first question, you are advised that the phrase "boards . . . of all political subdivisions of the state" is on its face of sufficient breadth of scope to include county boards of supervisors.

2. In answer to our second question you are advised that Section 332.3(20), Code 1954, provides for purchase of liability insurance by the County Board of Supervisors and therefore is within the meaning of the phrase "otherwise authorized" insofar as purchase of the particular limited liability coverage therein expressly authorized is concerned.

3. In answer to your third question you are advised that liability coverage, which by the terms of the policy is limited to vehicles *"owned"* by the county, is limited to the policy limits specified in Section 332.3(20), Code 1954, and it would be necessary for an employee under such coverage to supply other evidence of financial responsibility at his own expense for purposes of meeting the new financial responsibility standards.

However, if the broader risk arising out of operation of vehicles "owned or used" is purchased, the coverage afforded is of a type *"not* otherwise authorized" for purchase under Section 332.3(20) and may, therefore, be purchased under H.F. 364, 57th G. A. with policy limits as authorized therein.

8.3 March 13, 1957

COUNTY HOSPITAL TRUSTEES. (1) Failure to qualify for office within the time prescribed by statute creates a vacancy. (2) Quo warranto is the proper method for challenging the status of a de facto officer. (3) Participation of a de facto member in the official acts of a public body does not invalidate such acts.

Mr. Grant L. Hayes, Ringgold County Attorney: Receipt is acknowledged of your letter of March 5th as follows:

"One W. was elected at the general election in 1954 to a six year term as Hospital Trustee of the Ringgold County Hospital, owned and operated by the County. He took office on January 1, 1955, but did not qualify by taking the oath of office as required by law. He later discovered he had not done so and on February 16, 1957, signed the qualification before the County Auditor and it was filed by the County Auditor on said date. He has been acting as hospital trustee, since January 1, 1955.

"1. Does the failure to qualify as above stated create a vacancy in the office of Hospital Trustee so far as 'W' is concerned?

"2. Does he have the right, under the above set of facts to sit as a hospital trustee and discharge the duties of such trustee?

"3. Is he subject to removal? If so, who has the duty to commence action to remove him?

"4. Assuming his acts since January 1, 1955 would have been legal had he qualified as by law provided, are such acts legal in view of the fact he failed to so qualify?

"5. What effect does it have that he filed qualification on February 16, 1957?"

1. In answer to your first question, Section 347.11, Code 1954, provides with respect to elective county hospital trustees as follows:

"Said trustees *shall,* within ten days after their appointment or election, qualify by taking the usual oath of office . . . " (Emphasis ours)

The word "shall" when used in statutes is ordinarily construed as mandatory. *Vale v. Messenger,* 184 Iowa 553, 168 N.W. 281; *Jefferson County Farm Bureau v. Sherman,* 208 Iowa 614, 226 N.W. 182; *State v. Hanson,* 210 Iowa 773, 231 N.W. 428; *Hansen v. Henderson,* 244 Iowa 650, 56 N.W. 2d 59.

With respect to vacancies in office, Section 69.2, Code 1954, provides in pertinent part:

"Every civil office *shall* be vacant upon the happening of either of the following events:

" . . . . .

"2. A failure of the incumbent or holdover officer to qualify within the time prescribed by law . . . " (Emphasis ours)

The answer to your first question is thus furnished in the affirmative by the plain language of the statutes. Also see *Plymouth County v. Kersebom,* 108 Iowa 304, 79 N.W. 67, and opinion appearing at page 95 of the 1940 Report of the Attorney General.

2. On the basis of the answer to your first question, the answer to your second question is in the negative.

3. It would seem something of an anomaly to seek to remove one from an office on the ground that such office is vacant. The more appropriate procedure would appear to be that provided in R.C.P. 299 (Chapter 660, Code 1954) which provides:

"A civil action in the nature of quo warranto, triable by equitable proceedings, may be brought in the name of the state against any defendant who is:

"(a) Unlawfully holding or exercising any public office or franchise in Iowa . . . "

4. The answer to your fourth question appears to be furnished by the decision of our Supreme Court in the case of *State v. Powell*, 101 Iowa 382, wherein the Court held, that although the acting directors of an independent school district who were duly elected were sworn by a person having no authority to administer oaths, they became officers *de facto* and their acts as such in electing a secretary and treasurer were valid. Also see *Herbst v. Held*, 194 Iowa 679, wherein the Court held that a board of directors of an independent school district which has been supplanted by the official organization of a new and larger district became *de facto* officers of the new corporation by openly, notoriously, in good faith, and with the apparent acquiescene of the people acting for and on behalf of the new corporation and that the acts of such *de facto* officers could not be collaterally attacked.

Noting that in the cited cases the acts of a public body composed *entirely* of *de facto* officers were upheld, it logically follows that the acts of an official board of which *one* of the members was a *de facto* officer would be similarly upheld.

5. Referring again to the express provisions of the statutes quoted in answer to your first question, you are advised that "qualification" after the time specified in the statutes is of no effect. However, your attention is directed to Section 347.10, Code 1954, which provides:

"Vacancies in the board of trustees shall be filled in the same manner as original appointments, such appointees to hold office until the following general election."

Thus, should the board of supervisors appoint the incumbent to fill the vacancy caused by his own failure to qualify within the time specified in Section 347.11, supra, he would then have ten days after the date of such appointment within which to qualify.

8.4 **August 30, 1957**

COUNTY TREASURER: County Treasurer exceeds his power in exacting a fee for the service of mailing registration certificates and plates for automobiles and the postage therefor.

Mr. Samuel O. Erhardt, Wapello County Attorney: This will acknowledge receipt of yours of the 13th inst. in which you submitted the following:

"Our County Treasurer has asked for an Attorney General's opinion on the legality of making a service and postage charge in connection with mailing out the 1958 license plates.

"On Page 17 of the July, 1957 issue of the Iowa County Officer Magazine, it is noted that an Assistant Polk County Attorney had advised the Polk County Treasurer that such a charge is legal.

"However, before advising our local treasurer, I would like an opinion from your office."

In reply thereto we advise as follows. The duty of the County Treasurer in respect to administration upon receipt of an application for title is to issue a registration receipt and certificate of title, which registration receipt shall be delivered to the owner. See Acts of the 55th General Assmbly, Chapter 127, paragraph 7. Insofar as his duty is concerned in respect to the application for plates, according to Section 321.24, Code 1954, he shall *issue* to the owner one registration plate for a motorcycle, trailer or semitrailer, and two registration plates for every other motor vehicle. There is no express provision bestowing power upon the County Treasurer to make a charge for any service in connection with delivery of the registration certificate or the issuance of registration plates. Absent express authority to make a charge for such service, the County Treasurer has neither power nor duty to exact a fee therefor. Reason and authority support that conclusion. County officers are ministerial officers and have only the powers expressly conferred upon them and such incidental powers as may be needed to effectuate the express power. Specifically, as to the County Treasurer of Polk County, it was said in the case of *Grigsby-Grunow Co. v. Hieb Radio Supply Co.*, 71 F. 2d 113, the following:

"The county treasurer of Polk County, Iowa, has only such authority as is vested in him by statute, * * * "

and the Attorney General in the year 1906 in the Report for that year at page 424 said.

"It is a well settled rule of law that no public officer can charge fees for any service performed by him, except such as are specifically fixed by statute, and section 498 of the code provides that the recorder shall charge and receive for recording each instrument containing four hundred words or less, fifty cents; and for each additional one hundred words or fraction thereof, ten cents. He is not entitled to charge or receive any fees in addition to those provided for by the section referred to."

It is true that a like conclusion was reached in an opinion of this Department appearing in the Report for 1919-1920 at page 517 but that conclusion is based upon the statute then in force, being Chapter 275, Acts of the 38th General Assembly, which among other things provided that the County Treasurer "*without expense to the applicant* shall issue and deliver or forward by mail or express to the owner a certificate of registration and container for same in such form as the department may prescribe, and duplicate number plates bearing a number corresponding

to the number assigned to such motor vehicle". This provision of the statute was subsequently repealed. However, this repeal does not justify an inference that the reverse is true and that therefore the treasurer has the authority to make a charge for the service. Such an inference cannot survive the rules of law heretofore set forth.

To exact a fee for this service without statutory authority and based upon inference will result in confusion among the ninety-nine counties having authority and duty to issue and deliver such registration certificates and plates. It is a fair assumption that neither uniformity in exercising the claimed authority nor uniformity in the charge therefor would exist. The Constitution provides otherwise. Article III, Section 30, among other things, states:

"In all cases above enumerated, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State; * * *."

By reason of the foregoing we are of the opinion that exacting a fee for the service of mailing registration certificates and plates for automobiles, and the postage charge therefor, exceeds the power of the County Treasurer. This is not to be understood as preventing the County Treasurer in his discretion from issuing plates and delivering registration certificates by mail where the cost thereof is paid voluntarily. In such event such payment shall be accounted for to the County General Fund.

8.5 May 31, 1957

(1) To issue stamped warrants in anticipation of the tax levy is contrary to Section 343.10, Code of Iowa, 1954. (2) Clarke County Board of Supervisors can lease space in the County Court House to the Clarke County Extension District if the space is not needed for the operation of the County government. (3) The County Extension District cannot enter into a rental agreement in excess of one year which would obligate future tax moneys.

Mr. James H. Cothern, Clarke County Attorney: We are in receipt of your recent inquiry as follows:

"Clarke County recently constructed a Court House. All available space in the Court House is in use. The Clarke County Extension Service has requested office space in the Court House. It has been suggested that an addition be built to the Court House to satisfy this request. The estimated cost of this addition is $5000.00. Because of the recent outlay of funds for the new Court House the Board of Supervisors does not have the available funds to construct this addition. It has been suggested that the Board of Supervisors issue a warrant to the Clarke County State Bank in the amount of $5000.00. The Clarke County State Bank has voiced a willingness to accept such a warrant, and will charge four per cent interest per annum on the unpaid balance. The Clarke County Extension service is willing to either enter a long term lease or a contract with the Board of Supervisors whereby the Extension Service would repay as rent $800.00 a year to the Board of Supervisors until the total cost of the addition to the Court House has been paid. After the total cost has been paid the Extension Service would have the use of the addition rent free, thus in the long run conserving tax funds.

"The problem, it appears, involves three questions:

"1. Can the Clarke County Board of Supervisors issue an unpaid warrant to the Clarke County State Bank in the amount of $5000.00, such warrant to draw four per cent interest on all unpaid sums, for the purpose of constructing an addition to the Clarke County Court House?

"2. Can the Clarke County Board of Supervisors lease county property to the Clarke County Extension District for a period in excess of one year?

"3. In light of Chapter 24 of the 1954 Code of Iowa, can the Council of the Clarke County Extension District enter into a lease for a period in excess of one year; or, may the Council of the Clarke County Extension District enter into a contract with the Clarke County Board of Supervisors in which the Extension District agrees to pay $800.00 a year to the Clarke County Board of Supervisors until the total cost of the addition to the Court House has been paid?"

1. In response to your question numbered one, above, reference is made to Sections 343.10 and 345.1, 1954, Code of Iowa, set out in pertinent part hereunder:

"343.10 *Expenditures confined to receipts.* It shall be unlawful for any county, or for any officer thereof, to allow any claim, or to issue any warrant, or to enter into any contract, which will result, during said year, in an expenditure from any county fund in excess of an amount equal to the collectible revenues in said fund for said year, plus any unexpended balance in said fund for any previous years.

" * * * * * * * "

"345.1 *Expenditures — when vote necessary.* 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, . . . until a proposition therefor shall have been first submitted to the legal voters of the county, . . . "

Clearly, since the proposed expenditure will be approximately $5,000.00, it would not be necessary to first submit the proposition to the legal voters of the county as provided in Section 345.1. (See 1925 OAG 216.) The answer to your question is, therefore, controlled by Section 343.10.

The definition of "collectible revenue" as used in Section 343.10 if found in 1934 OAG 92. "The words 'collectible revenue' . . . should be interpreted to mean revenue that could be collected from a given tax levy." Since to issue stamped warrants would be to anticipate the tax levy, it would be contrary to Section 343.10, Code of Iowa, 1954. (1930 OAG 253, 1923-24 OAG 123.) The answer to your first question is in the negative.

2. It is a well established rule that the County Board cannot lease space in the Court House for private purposes in the absence of a legislative grant of power. (See *State ex rel Wadsworth v. Board of Supervisors of Linn County, et al,* 6 N.W.2d 877; *Hilger v. Woodbury County,* 200 Iowa 1318, 206 N.W. 660.)

This office has ruled that in the event the leasing organization be private, if the purpose (of the organization) is public, the Board may

lease Court House space. (1938 OAG 314 at 317, 318.) This would indicate then that an organization, public both in organization and purpose, could, properly, have Court House space leased to it. (See 1936 OAG 217, where State police broadcasting station was ruled to be a proper lessee of Court House space.)

Thus, in answer to the second question, it is our opinion that Clarke County can lease Court House space to the District if the space is not needed for the operation of the County Government. (Note: In view of our answer to your question numbered three, infra, we do not consider your question with respect to whether the Clarke County Board can lease to the District for a period in excess of one year.)

3. Section 176A.8(15) I.C.A. authorizes County Agricultural Extension Districts to pay rent.

Section 176A.8(9) I.C.A. requires the Districts "to prepare annually" a budget in accordance with the provisions of Chapter 24, Code of 1954. The clear intent and purpose of this section is that the financial operations of the County Agricultural Extension Districts will be controlled by applicable provisions of Chapter 24.

Section 24.14, Code of 1954, reads in part as follows:

"24.14 *Tax limited* . . . no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, . . . "

The word "expenditure" is not limited in its meaning to the actual disbursements but also includes amounts contracted to be paid. (1925 OAG 373.)

Therefore, it is the opinion of this office, that the District cannot enter into a rental agreement, in excess of one year, which would obligate future moneys.

Similar reasoning would apply to the second part of your third question.

8.6 **August 11, 1958**

BOARD OF SUPERVISORS—BOARD OF CONTROL—VOCATIONAL REHABILITATION — A board of supervisors has no authority, under Section 223.13, 1958 Code of Iowa, to approve voluntary commitments or admissions to the Woodward State Hospital and School or the Glenwood State School for the purpose of vocational rehabilitation of feeble-minded people.

Mr. Ray Hanrahan, Polk County Attorney, Des Moines, Iowa: In substance, you have, by the letter of June 18, 1958, asked the following question:

May the County Board of Supervisors enter into a plan for vocational rehabilitation of mentally retarded children who are borderline cases by approving voluntary commitments or admissions under Section 223.13, 1958 Code of Iowa, to the Woodward State Hospital and School and the Glenwood State School?

As pointed out, the Board of Supervisors, under Section 223.13, 1958 Code of Iowa, is imbued with the authority stated below:

"Voluntary commitments or admissions to the hospitals must be with the approval of the board of supervisors of the county of legal settlement, except those private patients received under section 223.5."

Hospitals, as used above, mean the Woodward State Hospital and School and the Glenwood State School. See Section 223.1, 1958 Code of Iowa. This section states that such hospitals shall be maintained as follows:

" . . . for the training, instruction, care, and support of feeble-minded residents of this state."

According to both your letter and the accompanying data sheet, it is clear that this is a vocational rehabilitation program. There is no express authority given in chapter 332, 1958 Code of Iowa, which may be construed to allow the board of supervisors to enter into such a program.

A board of supervisors has only such powers as are expressly conferred, or necessarily implied therefrom. *Hilgers v. Woodbury County*, 200 Iowa 1318, 206 N.W. 660. See also: *1956 Attorney General Opinion, page 202.* It is obvious that, in the instant situation, there is no express authority. Moreover, the statutory language cannot be extended to grant an implied power.

Vocational rehabilitation is covered by Chapters 258 and 259, 1958 Code of Iowa. Neither of these chapters provide for rehabilitation of feeble-minded people. An examination of those chapters shows that people "disabled in industry or otherwise" constitute, in the main, the class of people to be helped.

In addition, vocational rehabilitation, by definition, cannot be brought within the scope of Section 223.1, supra, inasmuch as "training, instruction, care, and support" do not mean "rehabilitation." "Training" is not defined either by statute or by judicial construction. Websters New Collegiate Dictionary states that 'train' means:

"to form by instruction, discipline, drill, etc.; educate; narrowly, to teach so as to be fitted, qualified, proficient, etc."

"Training" is defined as:

"Art, process, or method of one who trains; state of being trained."

"Rehabilitate" is given this definition:

"To restore to former capacity; reinstate. To fit to make one's livelihood again; . . . "

The "training" mentioned in Section 223.1, supra, cannot be conceived to mean a restoration to former capacity since such capacity is that sought to be averted, or at least mitigated. Likewise, such "training" apparently is not, within the contemplation of the statute, for the purpose of preparing feeble-minded people to make a livelihood. If such were intended the statutory expression would have referred to vocational training or rehabiltation rather than just training.

Legislative intention is to be deduced from the words used and such words are to be given their plain and ordinary meaning. *Byers v. Iowa Employment Security Commission*, 247 Iowa 830, 76 N.W. 2d 892.

Therefore, in the absence of statutory authority, the Board of Supervisors cannot by virtue of Section 223.13, 1958 Code of Iowa, approve voluntary commitments or admissions to the Woodward or Glenwood institutions for the purpose of vocational rehabilitation of feeble-minded people.

8.7

Airports — Use of gravel from county owned pits or stockpiles on municiple airport projects. (Abels to Smith, O'Brien Co. Atty., 6/19/57) #57-6-33

Gravel from county owned gravel pits or county gravel stockpiles may be used on access roads to city airports, but may not be used for runways and taxiways at city airports.

8.8

Agricultural Extension Council — No power to manage fairs. (Forrest to Poston, Wayne Co. Atty., 10/18/57) #57-10-27

8.9

Board of Review — Removal of residence by board member from one township to another wherein another board member resides. (Erbe and Abels to Remley, Jones Co. Atty., 4/9/57) #57-4-10

Removal of residence by a member of the board of review from the township from which he was appointed to a township in which another member of the board resides creates no automatic vacancy in the board of review.

8.10

Compatibility of Office — The offices of Deputy or Assistant Assessor and members of the County Board of Education are incompatible. (Brinkman to Cooper, Buena Vista Co. Atty., 9/22/58) #58-9-8

8.11

County Assessor — The County Assessor has no express power to a higher assessment upon mineral right property, such as limestone, gravel pits, oil and coal mines which are being worked, than other property. However such power is implied from Sec. 441.9(2) and Sec. 441.13, Code 1958. (Strauss to Gillespie, St. Sen., 9/3/58) #58-9-21

8.12

County Assessor — May not simultaneously act as clerk of an incorporated town. (Piper, Spcl. Consl., Tax Comm. to Tipton, Dir., Prop. Tax Div., Tax Comm., 4/15/58) #58-4-11

8.13

County Assessor — Employment of mayor as assistant prohibited. (Pruss to Tipton, Dir., Property Tax Division, State Tax Commission, 10/2/57) #57-10-5

8.14

County Assessor — The office of constable and that of deputy (or "assistant") county assessor are incompatible, and can not be held by the same person at the same time. Sections 441.4 and 441.9(1), Code 1954, construed. (Strauss to Tucker, Co. Atty., 1/21/57) #57-1-25

8.15

County Assessor — Salary fixed by county conference. (Strauss to Stafford, Lucas Co. Atty., 9/20/57) #57-9-32

8.16

County Assessor is not permitted nor authorized to send out assessments bearing name of his deceased predecessor. He may, however, adopt assessments already made and completed by such predecessor and send them out under his own signature. (Strauss to Bruner, Co. Atty., 1/3/57) #57-1-1

8.17

County Attorney — Compensation of Assistant. Code sections 340.2 and 340.10 distinguished. (Strauss to Oeth, Dubuque Co. Atty., 2/25/58) #58-2-6

8.18

County Attorney does not represent private groups promoting multi-county fire districts. (Abels to Garretson, Henry Co. Atty., 6/17/58) #58-6-9

8.19

County Attorney — Duty to represent county board of education school districts. (Strauss to Lewis, Shelby Co. Atty., 10/7/57) #57-10-3

8.20

County Attorney — Duty to represent hospital trustees, former county officers. (Strauss to Levis, Audubon Co. Atty., 7/7/57) #57-7-17

8.21

County Attorney — Employment by drainage district. (Strauss to Norelius, Crawford Co. Atty., 10/7/57) #57-10-12

8.22

County Attorney — Expenses incident to conference called by attorney general. (Strauss to Gray, Calhoun Co. Atty., 9/26/57) #57-9-46

8.23

County Attorney — Maintenance of office outside county seat. Expenses. (Strauss to Akers, State Auditor, 7/12/57) #57-7-14

8.24

County Attorney — The duty of the County Attorney in performing official services for the Township trustees does not include services incident to and arising out of anticipatory bonds issued under authority of Ch. 359, Code 1958, and if employed by the Township to perform such services

they have a legal right to pay therefor. (Strauss to Winkel, Kossuth Co. Atty., 10/8/58) #58-10-18

8.25

County Attorney — Duties of county attorney in connection with appeal from condemnation proceedings conducted on behalf of township. (Erbe to Melson, Greene Co. Atty., 6/10/57) #57-6-14

It is the duty of the county attorney to handle, without extra compensation, the defense against a landowner's appeal to the District and Supreme Courts from condemnation proceedings conducted on behalf of a township. (§472.2 (2), Code 1954, cited; also compare §359.18, Code 1954).

8.26

County Attorney — Duties of, in respect to requests for and rendition of opinions. (Abels to O'Brien, Woodbury County Atty., 3/1/57) #57-3-3

A private building trades council is not authorized to request an opinion from the county attorney, nor is it entitled to request the opinion of the office of the attorney general, but should obtain its legal services from attorneys engaged in private practice. (Reference made to sections 13.2 (4) and 336.2 (7), Code 1954, and to 41 Iowa Law Review 351).

8.27

County Attorney — Duties of county attorney in connection with bond election, issue and sale. (Strauss to Holley, Butler Co. Atty., 6/5/57) #57-6-9

It is the duty of the county attorney to perform the legal work in connection with the calling of an election for a proposed bond issue and the issuance and sale thereafter of bonds approved by the voters at such election, without compensation other than his salary provided by law.

8.28

County Auditor — County auditor may destroy old newspaper files if official publications contained therein are otherwise on file or preserved. (Abels to Holley, Butler Co. Atty., 6/3/57) #57-6-4

There is no statutory authority for the destruction of old county records, but neither is there any duty to preserve indefinitely files of old newspapers accumulated in the absence of a statutory requirement that they be so accumulated.

8.29

County Auditor — Appointment and salaries of deputies. (Strauss to Camp, Union Co. Atty., 7/31/57) #57-7-37

8.30

County Auditor — Married woman may maintain separate residence and domicile in county where office held. (Strauss to Getscher, Fremont Co. Atty., 10/22/57) #57-10-32

8.31

County Auditor — Time when salary warrants may be issued. (Abels to Camp, Union Co. Atty., 4/1/57) #57-4-2

In the absence of statute, sound public policy supports issuance of salary warrants on the last regular working day in the month where the last day of the month falls on a Sunday or a holiday.

8.32

County Auditor —

1. County Auditor may eliminate illegal site levy.

2. Schoolhouse levies voted prior to reorganization terminate on effective date of new district.

3. Library tax terminates on reorganization in absence of contract.

4. Emergency tax may be eliminated by auditor where not approved by State Board.

5. Tax certified without statutory authority may be eliminated by auditor. (Strauss to Sarsfield, St. Comp., 8/6/58) #58-8-20

8.33

County Board of Supervisors cannot delegate its discretionary powers for providing medical attendance to indigent poor to a committee of local doctors. (Bianco to Templeton, Hancock Co. Atty., 9/2/58) #58-9-15

8.34

County Board of Supervisors has no power to grant an option to sell the court house premises at a time in the future under its power to sell when the property is no longer needed to fulfil the purpose of its acquisition. (Strauss to Hultman, Blackhawk Co. Atty., 9/22/58) #58-9-3

8.35

County Board of Supervisors — Primary Ballot — Residence in same township as incumbent does not preclude candidacy *for nomination* although it may affect eligibility *for election.* (Strauss to Darrington, St. Rep., 4/28/58) #58-4-12

8.36

County Board of Supervisors — Power to license auctioneers. (Strauss to Buck, Van Buren Co. Atty., 9/11/57) #57-9-20

8.37

Board of Supervisors — Duty to provide a suitable and safe place for holding court and for filing of court records. (Strauss to Thomas, Mills Co. Atty., 6/20/57) #57-6-37

A court is not bound to remain in a dangerous structure until it falls and destroys the life of the judge or its officers. Board of Supervisors, having duty and power to provide a court house, have inherent power to provide the court with a suitable and safe place for the holding of court at the county seat. Power of Board to provide Clerk of Court with offices at county seat would include duty to furnish such offices elsewhere at county seat when suitable and safe office is not available in court house.

8.38

County Board of Supervisors is empowered under the provisions of §§331.21 and 332.3 (5), Code 1954, to approve additional claims for fees for publication of official notices under §618.11, Code 1954, where less than the statutory fees was originally charged through mistake or ignorance of the provisions of such statute. (Bianco to Mather, Sac Co. Atty., 5/21/57) #57-5-30)

8.39

County Board of Supervisors — Power to sell county farm no longer needed for public use — Employment of services of licensed realtor — Disposition of proceeds of sale. (Strauss to Thomas, Mills Co. Atty., 4/10/57) #57-4-12

A county poor farm may be sold by the board of supervisors when it has been determined by them that it is no longer needed as a farm, and, in effecting a sale thereof, the board may employ the services of a licensed realtor and pay a reasonable commission out of the sale proceeds for such services; such sale must be for cash and the proceeds thereof placed in the general fund.

8.40

County Board of Supervisors — Unliquidated claim against county for excessive dog tax. (Strauss to Goodenberger, Madison Co. Atty., 4/10/57) #57-4-11

An unliquidated claim arising out of an excessive dog tax may be asserted against a county under §331.21, Code 1954.

8.41

County Board of Supervisors — Use of maintenance fund for construction of maintenance buildings after approval by electors. (Strauss to Dunn, Hardin Co. Atty., 3/11/57) #57-3-16

Where voters of county have authorized the construction and equipping of a maintenance shop at a cost of not to exceed $50,000, and that the cost thereof shall be paid from the county maintenance fund, the board of supervisors may erect and equip two buildings for maintenance purposes if such structures can be built and equipped within the $50,000 limit authorized by the electors.

8.42

County Board of Supervisors Resolutions naming county charges, or those likely to become such, on whom the notice to depart provided for by Section 252.20, Code 1954, is to be served, are required to be published under Section 349.16, Code 1954, as part of the proceedings of said board. (Erbe, Atty. Gen. to Camp, Co. Atty., 1/10/57) #57-1-12

8.43

County Board of Supervisors — Power to employ extra claims counsel. (Strauss to O'Brien, Woodbury Co. Atty., 10/9/57) #57-10-15

8.44

County Board of Supervisors — Sheriff — Fees — Authority to furnish sheriff with automobiles — Expenses and mileage fees when sheriff uses county-owned vehicle. (Strauss to Hanrahan, Polk Co. Atty., Des Moines, 2/26/57) #57-2-29

Under Section 337.11(10), Code 1954, board of supervisors may purchase and operate automobiles used by the sheriff in the performance of his duties. However, it is optional with the sheriff as to whether or not he will furnish his own means of transportation or use that furnished by the county. If he uses transportation furnished by the county, he can charge only expenses in connection therewith, and in such case if mileage is recovered as a part of the costs such mileage fees should be paid to the county by the sheriff.

8.45

County Coroner — Fees in multiple death cases. (Strauss to Holley, Butler Co. Atty., 9/4/57) #57-9-8

8.46

County Coroner — Under Section 340.19, Code 1954, neither the coroner nor the county has a claim against the estate of a decedent for services rendered by a physician employed by the coroner to perform an autopsy. (Swanson to Nelson, Co. Atty., Nevada, Iowa, 2/15/57) #57-2-11

8.47

County Engineer — A county engineer must be a registered civil engineer. Duties under code section 309.17, 314.3. (Lyman and McKinney to Scholz, Mahaska Co. Atty., 2/7/58) #58-2-7

8.48

County Engineer — Engineers office, telephone expense, and office equipment such as a typewriter to be paid from county general fund. (Lyman to Johnson, Lee Co. Atty., 2/4/58) #58-3-12

8.49

County Engineer — No statutory authority, express or implied, authorizing the use of county money to pay the dues of county engineers and assistant county engineers to a professional organization of the character of the Iowa Engineering Society. (Strauss to Shepherd, Ass't. Polk Co. Atty., 11/20/58) #58-11-12

8.50

County Home — Purchase for and dispensation of drugs and medicines by county home steward to county home inmates and employees. (Abels to Buchheit, Fayette Co. Atty., 5/13/57) #57-5-13

Steward of county farm has no statutory authority to purchase wholesale stocks of "drugs and medicines" for dispensation to inmates or for resale to "paying" patients at the county home or to county farm employees.

8.51

County Home — Annual inspection of insane inmates by state psychiatrist. (Faulkner to Hansen, St. Bd. Cont., 4/14/58) #58-4-9

8.52

County Home — Only "poor persons" may qualify for admission. 1946 OAG 79, cited. (Strauss to Klotzbach, Buchanan Co. Atty., 3/12/58) #58-3-5

8.53

County Home — Whether purchase of adjoining real estate is for county purpose must be determined by Board of Supervisors. (Strauss to Meyer, Winneshiek Co. Atty., 4/24/58) #58-4-10

8.54

County Home — Proposition to expend more than $10,000.00 for *equipment* need not be submitted to electors. (Strauss to Boeye, Montgomery Co. Atty., 8/13/58) #58-8-21

8.55

County Home — Installation of 12,800 feet of pipe to convey gas supply to County Home, installation of gas conversion burners and acquisition of small parcel of real estate for meter installation service held not to be "improvements" within meaning of Section 345.1, Code 1954, and hence submission of question to voters not required. Further held that proposed construction project does not constitute a repair but is a "public improvement" within the meaning of Section 23.1, Code 1954, and would require the furnishing of a performance bond, and that procedure prescribed under Chapter 23, Code 1954, should be followed in the installation and completion of the proposed improvements. Also held that the cost of the proposed improvement and required real estate is payable out of the county general fund and that such cost must be paid from the collectible revenues for the tax year in conformity with Section 343.10, Code 1954, and cannot be paid over a period of years under the guise of monthly service charges. (Strauss to King, Co. Atty., 1/8/57) #57-1-9

8.56

County Hospitals — Duty of trustees to certify and supervisors to levy tax for. (Strauss to Camp, Union Co. Atty., 7/26/57) #57-7-31

8.57

County Hospitals — Nursing Homes — A board of Hospital Trustees is an agency of express powers as set forth in §347.13 and §347.14, Code 1958, and no authority appears therein for such Board to operate a nursing home for elderly people. (Strauss to Morrison, Washington Co. Atty., 8/19/58) #58-8-6

8.58

County Hospitals — Pathology and radiology services. Fees collected for doctors. Publication of bills. (Erbe to Statton, Boone Co. Atty., 11/1/57) #57-11-1

8.59

County Hospitals —

1. Power to own jointly with city confined to population brackets specified in Code Chapter 348.

2. County may purchase existing hospital.

3. City cannot give away its hospital.

(Strauss to Frye, Floyd Co. Atty., 7/22/58) #58-7-10

8.60

County Hospitals — Publication of salary schedule proper. (Strauss to Statton, Boone Co. Atty., 3/24/58) #58-3-19

8.61

County Hospitals — Bonds — (a) Code Section 346.11 not applicable. (b) Section 347.1 to Section 347.8, 407.2 and 75.1 to 76.9 applicable. (Abels to Parkin, Jefferson Co. Atty., 4/15/58) #58-4-22

8.62

County Hospital Trustees — Code Section 347.9 precludes mortician from serving as county hospital trustee. (Strauss to Grimes, Monroe Co. Atty., 5/19/58) #58-5-11

8.63

County Insanity Commission — Not compensated for voluntary admission cases. (Abels to Remley, Jones Co. Atty., 9/4/57) #57-9-10

8.64

County Memorial Hospitals — Disbursement of funds — Power of board of supervisors to disapprove claims — Scope and extent. (Abels to Strack, Grundy Co. Atty., 6/27/57) #57-6-46

The power of a board of supervisors acting under §332.3 (5), Code 1954, to disapprove claims submitted for approval and payment under §37.16, Code 1954, extends only to fraudulent claims or claims the payment of which would be in direct violation of statute.

8.65

County Memorial Hospitals — Under Code Chapter 37 only one memorial per governmental unit is contemplated except as provided in section 37.22 (Abels to Strack, Grundy Co. Atty., 8/8/58) #58-8-28

8.66

County Public Hospitals — Hospitalization in another County — Where indigents having settlement in one county are hospitalized in the county public hospital of another county:

1. The statute of limitations applies as the function performed is proprietary.

2. The claim for each indigent is a separate independent account.

3. The doctrine of laches also may be applicable.

(Abels to Burdette, Decatur Co. Atty., 10/10/58) #58-10-13

8.67

County Public Hospitals — Membership in local chamber of commerce — Payment of fees not authorized. (Erbe to Melson, Greene Co. Atty., 4/12/57) #57-4-16

A public county hospital operating under the provisions of Chap. 347, Code 1954, is not authorized to pay for a membership in a local chamber of commerce.

8.68

County Officers — Federal Social Security — Elective county officials "refunds" of retoractive payments to contribution fund — (Abels to Camp, Union Co. Atty., 3/18/57) #57-3-32

Under Sec. 97C.14, Code 1954, no authority exists for refund by the county of any part of the 3% contribution paid by elective officials thereunder for retroactive coverage.

8.69

County Recorder — Fees for certified copies of recorded instruments for use by federal tax officials. (Strauss to Akers, St. Auditor, 7/9/57) #57-7-7

8.70

County Recorder — Fees for release of lease of real estate. (Strauss to Gould, Del. Co. Atty., 9/11/57) #57-9-18

8.71

County Recorder — Certification of copies of discharge. (Strauss to Roggensack, Clayton Co. Atty., 7/25/58) #58-7-6

8.72

County Recorder need furnish free copies of discharge only in connection with claims against the United States. (Strauss to TePaske, 6/20/58) #58-6-23

8.73

County Sheriff — Wife of Sheriff acting as radio operator — (Strauss to Hindt, Lyon Co. Atty., 3/15/57) #57-3-29

The wife of the sheriff is not entitled to compensation from the county for operating a radio in assistance to the sheriff in the performance of his duties.

8.74

County Sheriff — Quarters furnished sheriff in county jail — Payment for utilities furnished — Discretion of board of supervisors. (Abels to Skiver, Osceola Co. Atty., 6/27/57) #57-6-47

If the quarters furnished the sheriff in the county jail are necessarily incident to performance of his lawful duties and use of such jail as a prison, utilities should be furnished in the same manner as to the remainder of the building.

8.75

County Treasurer — Public Funds — House File 28, Acts 57th G. A. — Funds "belonging to State Treasury" — Remittance of road funds by county treasurer to State Treasurer or in lieu thereof, deposit in interest-bearing bank account. (Abels to Abrahamson, St. Treasurer, 6/18/57) #57-6-28

"Primary road funds" and "motor vehicle funds" in the hands of the county treasurer are within the meaning of the phrase, "money belonging to the State Treasury" as used in §2 of House File 28, Acts 57th G. A., and are subject to report, remittance, or deposit thereunder, subject to authorized deductions.

8.76

County Treasurer — Joint application for motor vehicle registration and title. (Swanson and Faulkner to Brown, Dept. Pub. Safety, 9/27/57) #57-9-50

8.77

County Treasurer — Mailing motor vehicle registration plates. Postage. (Strauss to Erhardt, Wapello Co. Atty., 9/16/57) #57-9-22

8.78

County Treasurer — Motor vehicle registration. Franked envelopes not supplied by Pub. Safety Dept. (Abels to Carlson, Dir. M. V. Reg. Div., St. Dep. Pub. Safety, 8/20/57) #57-8-31

8.79

County Weed Commissioner — Appointment of person otherwise employed by county as weed commissioner — (Erbe to Camp, Union Co. Atty., 3/4/57) #57-3-4

A county board of supervisors may not appoint a person already holding one employee position under the county to the additional position of weed commissioner for the county, even though the duties of the two positions be not conflicting. Sec. 317.3, Code 1954, cited as controlling.

8.80

Courthouse — Power to erect includes power to purchase existing building. (Strauss to Pappas, Cerro Gordo Co. Atty., 6/10/58) #58-6-5

8.81

Courthouse — Replacement of existing radiators with combination heating and ventilating units connected to an existing heating plant is not an erection, addition, extension, remodeling, or reconstruction of a court house within the meaning of §345.1, Code 1954. (Abels to Frye, Floyd Co. Atty., 5/20/57) #57-5-25

8.82

Courthouse — Accumulated interest on bonds issued — Use of county general fund to cover deficiency in construction costs not authorized. (Erbe, Atty. Gen., to Representative Nielsen, 2/12/57) #57-2-18

Interest accumulated since sale of bonds, resulting in additional funds being available over amount authorized by electorate for the construction of a courthouse, can not be used for the expense of constructing the building. Funds may not be transferred from the county general fund to assist in defraying such costs in the event that insufficient funds are on hand to erect such building.

8.83

Domestic Animal Fund — Residence not prerequisite to validity of claims. (Strauss to McDonald, 2/7/58) #58-2-3

8.84

Domestic Animal Fund — Excess funds may not be used by humane society for care, keep and maintenance of dogs, nor for construction of shelters for abandoned dogs. (Forrest to Johnson, Lee Co. Atty., 4/15/57) #57-4-19

8.85

Employee's Insurance — County has no authority to act as withholding agent except as provided in Code Section 514.16, nor does it have power to make contributions. (Strauss to Gray, Calhoun Co. Atty., 6/27/58) #58-6-25

8.86

Fire Districts — Multi-county. (Abels to Hendrix, St. Repr., 7/22/57) #57-7-26

8.87

Gravel beds — Power of board of supervisors to contract for removal of gravel at future time. Advance payment unauthorized. (Strauss to Mather, Sac. Co. Atty., 10/24/57) #57-10-33

8.88

Insane Persons — Payment made to a claimant county from the state mental aid fund is to be credited to the county fund for the insane. (Pesch to Bd. of Control, 12/17/58) #58-12-4

8.89

Liens for support of insane. When perfected. (Faulkner to Gould, Delaware Co. Atty., 7/30/57) #57-7-36

8.90

Liens for Support of Insane — The lien provided by §230.25, Code 1954, applies to property owned by an insane person kept at a county home. (Abels to Gould, Delaware Co. Atty., 6/19/57) #57-6-32

8.91

Official Newspaper — Qualifications to be met. (Strauss to Winkel, Kossuth Co. Atty., 5/19/58) #58-5-24

8.92

Soldier's Relief — There is no statutory authority for the reversion or transferring back to the regular Soldier's Relief Fund at the end of a

particular year of the Emergency Soldier's Relief Fund established by Section 250.20, Code 1954, as amended, even though no use has been made of such emergency fund during the year and the fund continues to increase in amount. (Strauss to Meyer, Co. Atty., Decorah, Iowa, 2/14/57) #57-2-8

8.93

Soldier's Relief — Effect of A.D.C. payment — Veteran whose children receive ADC may qualify under Code Chapter 250. (Strauss to Hanrahan, Polk Co. Atty., 2/5/58) #58-2-18

8.94

Soldier's Relief — How granted to member of County Board of Supervisors. (Strauss to Patterson, Exec. Secy., Bonus Board, 6/5/58) #58-6-2

8.95

Soldier's Relief — Payment of installments on indigent soldier's mortgage. (Strauss to Larson, Ass't. Story Co. Atty., 4/15/58) #58-4-62

8.96

Soldier's Relief — Percentage granted cannot be fixed by inflexible rule but must be measured by the merits of each case. (Abels to Martin, Keokuk Co. Atty., 5/13/58) #58-5-15

8.97

Veterans' Graves — Maintenance by county. (Abels to DeKay, Cass Co. Atty., 9/4/57) #57-9-9

8.98

Veterans — Soldiers and Sailors — World War I Bonus Board — Soldier's Relief Commission — Part payment of relief granted to veteran or his dependents from World War I Disability Bonus Fund — (Strauss to Lucken, St. Rep., 3/13/57) #57-3-21

Although it has been a practice of long standing, there is no express statutory authorization for the action of the State Bonus Board in paying half of the relief granted by a county Soldier's Relief Commission in those instances where the county commission is cooperating with the Bonus Board.

8.99

Weed Law — County equipment purchased from proceeds of levy authorized by code section 317.20 may not be used for road maintenance. (Forrest to Statton, Boone Co. Atty., 5/23/58) #58-5-21

8.100

Zoning Airports — May be done under Sec. 329.3 where airport hazard area resulting from airport owned by foreign municipality exists within the territorial confines of an Iowa Municipality. (Abels to Rush C. Clarke, Ass't. Atty. General, North Platte, Nebraska, 1/9/58) #58-1-12

8.101

Zoning Airports — Power to grant "Clear Zone" or "Hazard Zone" easements over county property — (Strauss to Levis, Audubon Co. Atty., 3/12/57) #57-3-19

No statutory power is granted to a county to impose an easement establishing a "clear zone" or "hazard zone" for an adjacent airport over county property still needed for county purposes.

8.102

Zoning Commission — Power to regulate junk yards — (Erbe to Nelson, St. Rep., 3/20/57) #57-3-33

Under Ch. 358A, Code 1954, a county zoning commission has no power to regulate unsightly junk or automobile wrecking yards outside of city or town limits (sections 358A.3 and 358A.5, Code 1954, cited). Possible use of Sec. 657.2, Code 1954, relating to nuisances, suggested.

8.103

Zoning — (1) Under provisions of Ch. 358A, Code 1958, zoning restrictions and regulations with respect to residential use of building and structures become effective immediately upon adoption of an ordinance by the Board of Supervisors, although restrictions on commercial and industrial enterprise would not be effective until approved by the requisite number of real property owners. (2) The entire unincorporated area of the County may by action of the Board be made an undivided area and upon proper petition of the real property owners in the area the restrictions would be effective of such unincorporated areas. (Strauss to Larson, Ass't Story Co. Atty., 10/6/58) #58-10-24

8.104

Zoning — Limitations on zoning powers of supervisors. (Abels to Frye, Floyd Co. Atty., 7/18/57) #57-7-22

8.105

Zoning — The terms "area" and "district" are defined for purposes of Code Section 358A.3 in Code Section 358A.4. (Strauss to Larson, Ass't. Story Co. Atty., 3/24/58) #58-3-20

8.106

Zoning — Under Chapter 358A, Code 1954, county supervisors have no power to impose a schedule of fees for building permits, moving permits, trailer parks, etc. (Strauss to William Pappas, Cerro Gordo Co. Atty., 1/22/58) #58-1-25

CHAPTER 9
COURTS

STAFF OPINIONS

LETTER OPINIONS

9.1 March 5, 1957

SUPREME COURT CLERK: Binding briefs, arguments, records and original copies of decisions and printing dockets may be contracted as directed by the Court.

Mrs. Helen M. Lyman, Clerk of the Supreme Court, Supreme Court of Iowa: Receipt is acknowledged of your letter of March 3rd as follows:

"At the suggestion of the Supreme Court I am requesting you to furnish this office with the law concerning the Printing and Binding for the Clerk of the Supreme Court office."

It is our understanding that the "binding" referred to consists of binding the records and briefs and arguments filed with your office in printed form and of binding the original copies of decisions of the Court, which records, briefs and arguments, and decisions exist in pamphlet form prior to binding. In connection therewith we would refer you to Section 15.7, Code 1954, as herein set forth and underscored as follows:

"The term 'printing' as used in this and chapters 16 and 17 shall include binding and may include material, processes, or operations necessary to produce a finished printed product, *but shall not include binding*, rebinding or repairs of books, journals, *pamphlets*, magazines or literary articles by any library of the state of any of its *offices*, departments, boards and commissions *held as part of their library collection.*"

Given that the items bound exist in pamphlet form at the time of binding and are thereafter held as part of the library collection of your office, such binding falls within the underscored words of exception in the quoted section and hence is not within the duties of the printing board as set forth in the other provisions to which said section refers.

It is our understanding that the "printing" to which your letter refers is the printing of your docket and that the question is whether such printing must be let through the state printing board or may be contracted directly by your office.

Article III, Section 1, Constitution of Iowa, provides as follows:

"Departments of government. Section 1. The powers of the government of Iowa shall be divided into three separate departments — the

Legislative, the Executive, and the Judicial: *and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.*" (Emphasis ours)

Article V, Section 1, Constitution of Iowa, provides as follows:

"Courts. Section 1. The Judicial power shall be vested in a Supreme Court, Districts, and such other Courts, inferior to the Supreme Court, as the General Assembly may, from time to time, establish."

Court Rule 10 provides as follows:

"Immediately after the time expires during which causes may be docketed for trial at a term of court, and clerk shall make and have printed, the docket for the term, which shall give all causes for trial, their number, the party appealing, the court and county from which the appeal is brought, the attorneys, the period for which each cause is assigned for trial, whether noticed for oral argument, and any other proper matter for the information of the court and attorneys. Under the direction of the chief justice, the clerk shall so assign motions and petitions for rehearing that they will be submitted to the proper division or the full bench. He shall furnish a copy of the docket to each judge of this court and to each attorney having a cause at the term."

Since the docket to which your inquiry refers exists by virtue of and only by virtue of Supreme Court Rule 10, it follows that preparation, duplication, and distribution of said docket are parts of a judicial function, and that, by virtue of the quoted constitutional provisions, such acts are to be done as the Court directs without reference to the powers of either of the other two branches of government or any department or board within either of said departments.

9.2 May 6, 1958

DEPARTMENT OF PUBLIC SAFETY — EXPERT WITNESS — SUBPOENA — FEES:

1. A member of the Department of Public Safety who is subpoenaed to give expert testimony must obey the subpoena and testify to any matter which has come to his knowledge by virtue of his position as a member of the department.

2. All fees earned by a member of the department as an expert witness must be turned over to the department in accordance with the statutes provided in the Code of 1958.

Mr. Russell I. Brown, Acting Commissioner, Department of Public Safety: This will acknowledge receipt of your letter of March 26 in which you ask for an opinion on the following questions:

"1. If a member of the Department received a subpoena to appear in a civil suit as an *expert* witness, would his objection, to so act, (based on his pure *discretion*), be legally sustained?

"2. Can the Department charge a fee for the services of its expert witness in civil actions, (under Section 80.21, 1954 Code); *and*, the individual, himself, who acts as the expert witness, charge another fee payable to and for *himself* for the work he does in preparing for a trial in his 'off-the-job' time?

"3. Does Section 80.21 of the 1954 Code contemplate, or control in any degree, the action of a member of the Department who may or may not desire to offer his services, as an expert witness, to the public, in civil law suits?"

Basically your first qustion seems to involve two questions:

First, if a member of the Department receives a subpoena must he obey said subpoena?

Then there is the further question: What can such member be compelled to testify to in obeyance to the subpoena?

We answer these two questions as follows:

58 Am. Jur. 30 (Witnesses) section 13, states:

"The ordinary process by which the attendance of witnesses in court is required is the subpoena."

Section 622.23, Code of 1958, provides that:

"The clerks of the several courts shall, on application of any person having a cause or matter pending in court, issue a subpoena for witnesses under the seal of the court, * * *."

The Code of 1958 further provides in Section 622.76:

"For a failure to obey a valid subpoena *without a sufficient cause or excuse,* * * *, the delinquent is guilty of a contempt of court and subject to be proceeded against by attachment * * *." (Emphasis supplied).

We hasten to point out that a witness is not an *expert* witness until qualified as such to the satisfaction of the court. While a person may be denominated as an *expert* witness, such person is only a witness in the true sense of the word until such time as proved competent by laying of proper foundation. You will find these statements in accord with the following authorities with excerpts from the same:

20 *Am. Jur.* 659 (Evidence) section 786: "When a witness is offered as an expert upon a matter in issue, his competency, with respect to special skill or experience, is to be determined by the court as a question preliminary to the admission of his testimony."

Jones, *The Law of Evidence in Civil Cases*, 4th Ed., Vol. 2, section 369, p. 691: "The question as to whether or not a witness who is offered as an expert possesses the requisite qualifications to entitle him to give expert testimony, is one which is to be determined by the court."

It is, therefore, our opinion that if a member of the Department of Public Safety receives a subpoena to appear as a witness said member must obey the subpoena, in the absence of sufficient cause or excuse, or be guilty of contempt and subject to punishment therefor.

Having obeyed the subpoena, and assuming the person has proven to the satisfaction of the court his competency to give expert testimony, gives rise to the second question. This question of how far a witness may be compelled to testify as an expert has been the subject of much judicial discussion.

In the case of *Cooper v. Norfolk Redevelopment & Housing Authority*, 197 Va. 653, 90 S.E. 2d 788, 789, the Court pointed out that:

"There is conflict among the decisions as to the right of an expert to decline to give his expert opinion when called to testify on matters under judicial inquiry. Apparently a majority of courts which have dealt with this question hold that the expert may be compelled to testify as to an opinion he is qualified to give by reason of his prior training and experience and without having to make any special preparation to qualify to do so. * * *"

The Alabama Court in *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611, said:

"* * * the same principle which justifies the bringing of the mechanic from his work-shop, the merchant from his store-houses, the broker from his change, or the lawyer from his engagements, to testify in regard to some matter which he has learned in the exercise of his art or profession, authorizes the summoning of a physician, or surgeon, or skilled apothecary, to testify of a like matter, when relevant to a cause pending for determination in a judicial tribunal."

And in the case of *Pennsylvania Co. for Insurance v. Philadelphia*, 262 Pa. 439, 105 A. 630, it was pointed out:

"The process of the courts may always be invoked to require witnesses to appear and testify to any facts within their knowledge but no private litigant has a right to ask them to go beyond that."

To these cases should be added that of *Barnes v. Boatman's Nat. Bank of St. Louis*, 348 Mo. 1023, 156 S. W. 2d 597, 600, wherein the Missouri Court asked:

"* * *, what is meant by the phrase 'for expert testimony'? If this means that he, as an expert, is called to give testimony on a subject with which he is already conversant, then it is against public policy to pay anything other than the regular witness fee."

Section 622.71, Code of 1958, provides:

"No peace officer who receives a regular salary, * * * shall, in any case, receive fees as a witness for testifying in regard to any matter coming to his knowledge in the discharge of his official duties in such case in a court in the county of his residence, * * *."

In the light of the foregoing cases and the statute as set out above, it is our opinion that a person subpoenaed from your Department as a witness, and who qualifies as an expert, *must* testify to any matter which has come to his knowledge by virtue of his position as a member of the Department.

It is further submitted, however, that such witness could not be compelled to engage in matters of study and research as a preparatory step to rendering an expert opinion. A private litigant would not be so entitled without paying additional compensation.

In answer to your second question we must point out that Section 80.21, Code of 1958, is by no means the only statute pertaining to witness fees. Section 622.71 has been referred to in the foregoing material. The words "peace officer" therein are defined in Section 748.3 as including "all special agents appointed by the commissioner of public safety and all members of the state department of public safety excepting the members of the clerical force".

Section 79.1 is also applicable and provides that all salaries shall be in *full* compensation of *all* services, except as otherwise expressly provided.

We realize that a member of your department, if served a subpoena to appear outside of his county of residence, would be entitled to regular witness fees as provided in Section 622.69, or if the limit were exceeded as provided in Section 622.66 and 622.68, Code of 1958, and fees were deposited in accordance with Section 622.67, the witness would be entitled to such fees. *HOWEVER*, none of these fees could be retained personally by members of your department. Section 80.21 prohibits such retention and provides that "such fees or rewards earned * * * shall be credited to the fund as herein provided to pay the expenses of this department".

In all of the cases in which a member of your department would be subpoenaed to give expert testimony, such member testifying would, in all probability, have received his knowledge of the subject matter under inquiry because of his position as a member of the department. As such a member he is paid a monthly salary which represents his *full* compensation for all his services.

It is therefore our opinion that your department cannot charge a fee for the services of a member testifying as an expert witness in obeyance to a subpoena in a court in the county of such member's residence. Your department may charge the fees provided for an appearance outside the county of residence as provided in the code sections heretofore referred to, but such fees must be paid to the department.

In answer to the second part of your second question, it is our opinion that, while the expert witness may charge a fee for work done in preparing for trial, such fee must be turned over to the department. We realize the practical considerations involved in such a situation. For example, if an expert witness is to give the desired assistance some additional time must be spent in preparation, consultation, and examination of subject matter. Nevertheless, the law is clear. The witness has become an expert by virtue of his position. If he must spend some additional time in preparation he stands to make no personal gain over and above his regular salary.

You inquire further in your third question as to what control is contemplated, if any, by Section 80.21 over the action of a member of your department who may or may not desire to offer his services to the public as an expert witness.

From a study of this particular statute it becomes apparent to us that no other control is contemplated other than that the fees must be turned over to the department. This aspect has been amply discussed in our answer to your second question and warrants no further consideration at this time.

9.3

Change of venue in J. P. Court — If there is but one active justice of the peace in a county, it appears he may properly overrule a motion for

change of venue, or the parties may, by consenting to personal jurisdiction, have the cause transferred to district court. (Faulkner to Norelius, Crawford Co. Atty., 12/1/58) #58-12-17

9.4

Courts-Martial, Summary — Situation where National Guard is under state control. (Forrest to Tandy, Adj. Gen., 10/4/57) #57-10-9

9.5

Divorce, Waiting period — Retroactive and prospective application of 57th G. A., Ch. 256 (Gritton to Sackett, Judge, 7/5/57) #57-7-4

9.6

Disbarment — Payment of costs and expense, preservation of evidence. (Dvorak to Hays, Justice Iowa Supreme Court, 10/1/57) #57-10-2

9.7

Funds — District judges have no authority to order expenditure of surplus in probate referee fund for county law library. (Strauss to Hanrahan, Polk Co. Atty., 12/17/57) #57-12-17

9.8

Garnishment — House File 113, Acts 57th G. A. — Correlation of proposed amendatory act into present garnishment statutes. (Strauss to State Senator Shaff, 4/4/57) #57-4-6

Garnishment is an auxiliary and not an original action. Lines 1 to 33 of House File 113, Acts of the 57th G. A. can be correlated to existing Iowa garnishment procedure and at the same time preserve the substantive features thereof. Proper pleading by judgment debtor and by garnishee can preserve weekly $30.00 exemption and make available excess earnings over that sum to the plaintiff-creditor.

9.9

Garnishment — Judgments prior to 7/4/57 — Limitation on amount. (Strauss to O'Malley, Sen., 11/20/57) #57-11-25

9.10

Garnishment — Effect of deductions from wages — Under Chap. 268, 57th G. A., only deductions for taxes affect amount of wages subject to garnishment. (Strauss to Hon. Jack Wormley, Newton, Iowa, 1/9/58) #58-1-11

9.11

Grand Jury — Secretary to county attorney may serve as clerk of grand jury. (Strauss to Poston, Wayne Co. Atty., 10/14/57) #57-10-23

9.12

Judges' Expenses — Reimbursement can only come from legislative claims committee when incurred in connection with bar association or other association activity. (Strauss to Cullison, District Judge, 9/2/58) #58-9-14

9.13

Jurors — Mileage Allowance. (Strauss to Akers, State Auditor, 7/9/57) #57-7-8

9.14

Jurors — Police court. (Strauss to Dunn, Hardin Co. Atty., 4/24/58) #58-4-18

9.15

Justice of the Peace — Under Code Section 601.131 only 50% of excess over $1200 may be retained by the office irrespective of how many justices succeeded one another in the office in a given year. (Strauss to Lewis, Asst. Scott Co. Atty., 3/27/58) #58-3-25

9.16

Justice of the Peace — Jurisdiction coextensive with county boundaries. (Pesch to Stewart, J. P., 8/18/58) #58-8-27

9.17

Juvenile — An order of a juvenile court revoking a prior commitment and subsequent transfer by mittimus to another institution is not reviewable by this department, but reviewable only in further judicial proceedings. (Pesch to Bd. of Control, 10/9/58) #58-10-15

9.18

Juvenile Court — Power to release from probation. (Forrest to Draheim, Wright Co. Atty., 11/12/57) #57-11-24

9.19

Municipal — Office of municipal judge incompatible with membership in General Assembly. (Strauss to Loveless, Gov., 9/3/57) #57-9-1

9.20

Municipal Court — Clerk of municipal court entitled to demand a receipt for any moneys paid out by him if deemed necessary and proper for the efficient operation of his office. Combined receipt and satisfaction of judgment form may be used for the convenience of a party entitled to the proceeds of a judgment. (Gritton to Harbeck, Clerk, Municipal Ct., 1/23/57) #57-1-30

9.21

Municipal — Salary of substitute judge. (Strauss to Shaff, St. Sen., 6/17/58) #58-6-20

9.22

Process — No statutory authority to pay sheriff's fee for serving subpoena out of court expense fund. (Strauss to Poston, Wayne Co. Atty., 4/3/58) #58-4-63

9.23

Retirement systems — Notice. Time and amount of deposit. Amount of annuity. Deduction of Social Security benefits. (Strauss to Sarsfield, St. Comp., 10/7/57) #57-10-11

9.24

Vacancy in municipal court judgeship — Filled by appointment by Governor — Inability of municipal court judge to hold court and to act. (Erbe, Atty. Gen. and Dvorak to Loveless, Governor, 2/22/57) #57-2-26

A vacancy in the office of municipal court judge, occasioned by the death of the incumbent, is to be filled by appointment by the governor. In the case of the inability of any municipal court judge to act, any other judge of any municipal or district court may hold municipal court during such inability, *or* the governor may appoint an "acting" judge to hold court during such inability of the regular judge. Statutory salary may be paid to both the regularly-elected judge and to the appointed "acting" judge during the period of the regular judge's inability to hold court.

CHAPTER 10

CRIMINAL LAW

STAFF OPINIONS

LETTER OPINIONS

10.1 January 29, 1957

PAROLE AGREEMENTS: The word "state" as set out in Section 247.10, 1954 Code of Iowa, read in the light of the definition in Section 4.1, (15), 1954 Code of Iowa, contemplates not only the District of Columbia, but additionally, those possessions of the United States which the Congress has seen fit, by special enactment, to give territorial status for *all* purposes under the law.

Mr. R. W. Bobzin, Director, State Board of Parole: Reference is made to your letter dated December 5, 1956, in which you request opinion of the Attorney General as to whether the word "state" under the Iowa enabling statute, Section 247.10, 1954 Code of Iowa, may be construed as meaning and including Alaska, Hawaii, Puerto Rico, the Virgin Islands and the District of Columbia, so as to comprehend the amendment of the Crime Control Consent Act (Public Law 970, 84th Congress) by Congress to the effect that the term "states" as used in the Act would include such possessions.

There is no question that the last of these, the District of Columbia, may be so considered in view of Section 4.1, subsection 15, 1954 Code of Iowa, which defines the term "state" as follows:

"*State.* The word 'state', when applied to the different parts of the United States, includes the District of Columbia and the territories, and the words 'United States' may include the said district and territories."

With respect to Hawaii and Alaska the United States Government has seen fit to annex the same as territories as shown at c. 339, Section 2, 31 Stat. 141, dated April 30, 1900, and c. 387, Section 1, 37 Stat. 512, dated August 24, 1912, respectively. The question then becomes one of whether or not the word "territories" as employed in the Iowa Code section cited above, contemplates that such possessions as these fall within its meaning in view of its wording: "The word 'state', when applied *to the different parts of the United States,* . . ."

We think it does, regardless of the possible implication that it only refers to mainland territories, i. e., those existing prior to recognition

of all the forty-eight states, e. g. the "Iowa territory", prior to 1846. The only previous determination from this office in the matter seems to confirm this. (See opinion of the Attorney General 1909, at page 133.) Hawaii, under the terms of Section 2, c. 339, 31 Stat. 141, dated April 30, 1900, and Alaska, under Section 3, c. 387, 37 Stat. 512, dated August 24, 1912, have acquired the status necessary to come within the purview of the Iowa statute, since these territories, though not a part of the United States mainland, bear a similar legal relationship to the United States as did certain mainland territories prior to their achieving statehood.

Congress has not seen fit to use similar language in dealing with Puerto Rico and the Virgin Islands. The first of these is called a self-governing commonwealth pursuant to Public Law 600, 81st Congress, July 25, 1952, and the Virgin Islands, has only recently (Public Law 517, 83rd Congress, Section 3378, 68 Stat. 49) had the basic law applicable to it, (Section 1, et seq. 39 Stat. 1132) revised without its being given the status heretofore granted Alaska and Hawaii.

Further evidence of the intended status of each of these possessions by the Congress may be taken from the fact that in certain legislation only (e. g. Securities Act of 1933, Federal Flood Insurance Act of 1956) these possessions have been called "territories", so as to fall within the scope of the particular legislation concerned, hence, indicating again, the intent by the Congress not to have awarded full territorial status.

In the face of this, such authorities as 49 Am. Jur. 326, 327, and 86 C. J. S. at 611, indicate generally that all political subdivisions of the "outlying dominion of the United States" fall within the term "territories". However, we feel that whether any particular political subdivision can be called a territory so as to come within the Iowa statute cited above, depends upon the language employed by the Acts of Congress relating thereto. Such language is not reposed in the statutes relating to Puerto Rico and the Virgin Islands.

10.2

Aeronautics — Failure to register as airman — An indictable misdemeanor. (Abels to Wolverton, Air. Comm., 8/20/58) #58-8-29

10.3

Arrest — In general the power of a town marshal to make arrests outside corporate limits of town in which he serves is no greater than that of a private citizen. Exceptions are noted as in the case of fresh pursuit, or where such marshal is called upon by the governor or the attorney general in the enforcement of law, or where he is acting under other special statutory authority. (Abels to Mather, Sac Co. Atty., 1/4/57) #57-1-5

10.4

County Jail — Medical Aid — 1. Medical aid expenses of a prisoner maintained in the county jail are payable from the county general fund and not the poor fund or the Soldiers' Relief Fund. 2. It is not necessary for the sheriff to obtain permission of the Board of Supervisors before re-

moving a prisoner from the county jail to receive medical aid. (Faulkner to Hoover, Clay Co. Atty., 9/22/58) #58-10-27

10.5

Detainers — (a) Code Section 247.5 not applicable to detainers filed by out-of-state authorities and requirement of support by indictment or information not applicable. (b) No right to demand out-of-state trial exists under said section. (c) Where detainer is not invalid parole would not be granted as a matter of policy and question of extradition is moot. (Erbe and Faulkner to Bd. of Control, 4/9/58) #58-4-27

10.6

Evidence — Use of fingerprints to establish prior conviction. (Forrest to Thompson, Chief, Bur. Crim. Inv., 5/16/58) #58-5-14

10.7

Extradition expenses — Not assessable as costs. (Dvorak to Nazette, Linn Co. Atty., 10/29/57) #57-10-38

10.8

Gambling — Lotteries — Giving of attendance prize at show as constituting a lottery. (Dvorak to Sen. Tate, 2/8/57) #57-2-17

A nonprofit organization, sponsoring a building and home furnishing show, charges an admission fee of 25¢ for all adults, and gives a new automobile as an attendance prize to the person whose name is drawn from the names of those who purchased tickets to the show. Held to be a lottery. *State v. Mabrey*, 245 Iowa 428, cited.

10.9

Gambling — Lotteries — Agreement to give away furnished house to purchaser of winning ticket held to be illegal. (Bianco to Cunningham, Secretary, State Fair Board, 4/4/57) #57-4-7

An agreement which contemplates selling tickets for a consideration to win a prize, constitutes a lottery, and is illegal under the statutes of this state.

10.10

Gambling — Pinball machines as gambling devices — Free games are things of value — (Dvorak to Schroeder, Co. Atty., Maquoketa, Iowa, 2/4/57)

A pinball machine so designed that if in its operation a certain score is made the player is awarded one or more free games but, in order to avail himself of the free games, he must put a penny for each such game in a second slot in the machine, is a gambling device. *State v. Wiley*, 232 Iowa 443, and *State v. John Doe, et al.*, 242 Iowa 458, cited.

10.11

Gambling — Lotteries — Puzzle Contest — Prize contest involving both skill and chance — (Dvorak to Hoover, Clay Co. Atty., 3/8/57) #57-3-12

A puzzle contest may be a lottery even though skill, judgment, or research enters thereinto in some degree, if chance enters into the solution of a part of the problem and thereby proximately influences the final result; in other words, the rule that chance must be the dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative sense. Under Iowa decisions, generally any enterprise which consists of the giving of any consideration for an opportunity to win a prize is in violation of the lottery laws of this state. Particular "puzzle contest" scheme reviewed and held to be a lottery.

10.12

Justice of the Peace — 1. An arresting officer may, according to *State v. Benzion*, 79 Iowa 467, receive bail from the arrested person charged with a misdemeanor before appearance of such person before magistrate. 2. Under §754.6, 1958 Code of Iowa, a justice of the peace is required to complete the indorsement on the warrant, which indorsement may in the absence of statutory mandate, require no bail. (Faulkner to Johnson, Lee Co. Atty., 8/14/58) #58-8-1

10.13

Justice of the Peace Courts — Appeal of a nonindictable misdemeanor from justice of the peace court to district court is authorized by Sections 762.35, 762.43, and 762.48, 1958 Code of Iowa. (Faulkner to Norelius, Crawford Co. Atty., 11/20/58) #58-11-3

10.14

Justice of the Peace — Jurisdiction — No power to commit person for contempt for nonpayment of fine — Judgment for payment of fine and not requiring imprisonment until fine paid, enforceable by execution. (Gritton to Parkin, Jefferson Co. Atty., 5/15/57) #57-5-20

(1) A justice of the peace has no authority to commit a person to jail for contempt for the nonpayment of a fine where the judgment imposing the fine does not provide for imprisonment. (2) Judgments of a justice of the peace requiring the payment of money as a fine and not providing that defendant be imprisoned until payment, are to be generally enforced by execution.

10.15

Larceny — Sale or concealment of mortgaged property or property held under a conditional bill of sale — Removal from state — Prosecution — Demand for satisfaction of debt or return of property necessary. (Dvorak to Winkel, Kossuth Co. Atty., 5/17/57) #57-5-22

Mere removal from the state of property subject to a mortgage or a conditional bill of sale is not of itself alone sufficient to constitute a violation of §§ 710.12 and 710.13, Code 1954. Mortgagee or conditional sale vendor must demand satisfaction of the debt or a return of the property constituting the security prior to the institution of criminal proceedings. Furthermore, a felonious intent on the part of the mortgagor or conditional sale vendee to conceal or destroy the encumbered property, and that he acted wilfully in that respect must be shown.

(*State v. Julien*, 48 Iowa 445, and *State v. Delevie*, 219 Iowa 1317, 260 N.W. 737, cited).

10.16

Parole — Uniform Narcotic Drug Act — Time to be served on conviction for violation of Narcotic Drug Act — (Forrest to State Bd. of Parole, 3/5/57) #57-3-8

The *State Legislature has fixed* the minimum time of confinement for a violator of the Uniform Narcotic Drug Act by express provisions in Section 204.22, Code 1954. Where sentence is imposed for the minimum term only, the board of parole is precluded from applying the provisions of Section 246.39, Code 1954, or any other parole or probationary provisions to the confinement time set out in the judgment of conviction and sentence, and he must remain confined for such period.

10.17

Parolees — Iowa and Illinois are members of interstate compact whereunder parole violators may be returned to sending state without formality of extradition. (Erbe and Faulkner to Loveless, Gov., 4/8/58) #58-4-29

10.18

Paroles — Board of Parole — Governor — Executive clemency — Respective powers and authority of Board of Parole and Governor discussed. (Forrest to Bobzin, Secretary, Bd. of Parole, 4/26/57) #57-4-34

(1) The Board of Parole has no authority to make recommendations to the Governor in the restoration of citizenship rights, remission of fines, discharge from jail sentence, or discharge from suspended sentence, except where the latter fall within the requirements set out in §248.3, Code 1954. (2) §248.3, Code 1954, lodges the parole discharge power in the Governor.

10.19

Paroles by Court — Application of 57th G. A., Ch. 119, to sentences suspended prior to its enactment. (Dvorak to Cahill, Des Moines Co. Atty., 8/8/57) #57-8-15

10.20

Paroles — Governor — County Probation Officer — Power to discharge from parole — Fixing time of discharge from parole. (Forrest to Kramer, Chief Probation Officer, Fort Dodge, Iowa, 4/29/57) #57-4-35

(1) The power to discharge from parole is imputed to the Governor under §248.3, Code 1954. (2) As a practical matter, county probation officer, having peculiar access to fact situations, generally fixes time of release from parole of parolees under his jurisdiction.

10.21

Paroles — Sentences for two or more offenses — Construed as one continuous term. (Dvorak to Bd. of Parole, 8/14/57) #57-8-23

10.22

Sexual Psychopaths — A person committed to a state mental institution

as a criminal psychopath must be detained therein until released in accordance with Sec. 225A.12, Code of Iowa, 1958. (Pesch to Bd. of Control, 11/13/58) #58-12-11

10.23

Trading Stamps — Redemption for cash — Particular type of "Cash Discount" card illegal. (Dvorak to O'Brien, Woodbury Co. Atty., 6/6/57) #57-6-11

Trading stamps may be redeemed for cash at stated face value rather than in merchandise. So-called "cash discount" cards having, in addition to places for affixing stamps, a seal under which a sum varying in amount from $1.00 to $10.00 is printed, and through which amount of "cash discount" is determined after card is filled and seal then broken, violates state gambling statutes.

10.24

Warrant of Arrest — Preliminary Information — A justice of the peace, under Secs. 754.3 and 762.6, may in his discretion issue either a warrant of arrest or summons. His discretion does not provide that he may *not* issue a warrant of arrest. (Faulkner to Hudson, Pocahontas Co. Atty., 10/16/58) #58-10-11

10.25

Words and Phrases — "Moral turpitude" discussed. (Faulkner to Wilson, Immigration Service, 12/8/58) #58-12-15

CHAPTER 11

DRAINAGE DISTRICTS

LETTER OPINIONS

11.1

Assessment of state-owned land — Chap. 20, Sec. 3, 51st G. A., remains effective with respect to land in District 13, Muscatine County. (Gritton and Faulkner, to Charles E. Sayre, Supt. Land Acquisition and Surveys, State Conservation Commission, 1/13/58) #58-1-14

11.2

Assessments against State property — Liability of Highway Commission in Code Section 455.50. (Strauss to Dancer, Secy., Bd. of Regents, 6/12/58) #58-6-12

11.3

Assessments against State Property — Liability of Highway Commission lands for special assessments. (Lyman to Melson, Greene Co. Atty., 10/10/57) #57-10-17

11.4

Assessment of benefits to benefited State-owned lands under jurisdiction of State Conservation Commission — (Erbe to State Rep. Hendrix, 3/1/57) #57-3-2

House File 117, 57th G. A., as originally introduced, would provide for the levy of a "tax" rather than for the "assessment" of a benefit. It is objectionable on the grounds that: (1) It places a creature of statute (drainage or levee district) in a position paramount to the sovereign (State of Iowa) with respect to a particular "tax"; and (2) It attempts to amend the wrong statute (Sec. 427.1, Code 1954, relating to tax exemption) and fails to accomplish its announced purpose to specially assess benefits conferred on certain state-owned lands. Amendment to pending House File 117 suggested (amending Ch. 455, Code 1954) to eliminate objections.

11.5

Bridges — (Flores, Gen. Counsel, Highway Comm. to Norelius, Crawford Co. Atty., 3/12/57) #57-3-20

A drainage district, building a bridge with drainage district funds upon private property (and not within the right of way of any established county or township road) in order to compromise a claim by an individual against said district, cannot be reimbursed for the cost thereof out of county secondary road funds.

11.6

Drainage Fund — In drainage district where all work has been completed, balance remaining of drainage fund may be disposed of under the provisions of Sec. 455.68, 1958 Code. (Strauss to Levis, Audubon Co. Atty., 11/10/58) #58-11-17

11.7

"Record owner" as used in Section 462.9, Code 1954, refers to person of record holding legal title to lands in district. A person who is buying a farm on contract and paying the taxes, but who does not yet have title to such farm, is not entitled to vote at a drainage district election. (Strauss to Pritchard, Monona Co. Atty., 1/17/57) #57-1-23

11.8

Road Crossings — A board of supervisors, under §455.118, Code 1954, is given the power to exercise its discretion with respect to moving, building or rebuilding a road which a drainage ditch or drain crosses, but such board is only obligated to do so in the case of a *legally-established* drainage district. (Lyman to Kreamer, Worth Co. Atty., 4/18/57) #57-4-25

11.9

Roads rebuilt — If a drainage district has been established by one of the three methods set out in Sections 455.1, 455.7 as amended, or 455.152 et seq., Code 1954, Board of Supervisors has the duty, under Section 455.118, Code 1954, to construct or rebuild a roadway or crossing made necessary by the installation of a drainage ditch. (Lyman to Ensign, Atty., Northwood, Iowa, 1/23/57) #57-1-31

CHAPTER 12

ELECTIONS

STAFF OPINIONS

LETTER OPINIONS

12.1 January 28, 1958

LEGISLATURE: A vacancy in the office of Senator in the General Assembly occurring at a time when the General Assembly is not in session and will not convene prior to the next General Assembly and occurring more than thirty days prior to the holding of such election shall be filled at such election, and nominations therefor made at the Primary Election to be held prior thereto.

Hon. Curtis G. Riehm, State Representative: This will acknowledge receipt of yours of the 8th inst. in which you submitted the following:

"Bill Tate of the 43rd Senatorial District resigned as Senator from that district. The question I have in mind is whether or not this office will come up for election in the June primary of this year and for filling this office in November for the following two years for the reason that Bill was elected State Senator from the 43rd Senatorial District in November of 1956 and served less than one year of the four year term.

"Your opinion on this matter would be very much appreciated."

In reply thereto we advise as follows. Article III, Section 12, of the Constitution provides with respect to vacancies in the Legislature the following:

"*Vacancies.* Section 12. When vacancies occur in either house, the Governor or the person exercising the functions of Governor, shall issue writs of election to fill such vacancies."

Such writs of election by statute are provided for the filling of such vacancies at the times here designated. Section 69.14, Code 1954, provides as follows:

"*Special election to fill vacancies.* A special election to fill a vacancy shall be held for a representative in congress, or senator or representative in the general assembly, when the body in which such vacancy exists is in session, or will convene prior to the next general election, and the governor shall order such special election at the earliest practicable time, giving ten days notice thereof."

And Section 69.13, Code 1954, provides for filling such vacancies under other circumstances than exhibited in Section 69.14, as follows:

"*Vacancies — when filled.* If a vacancy occurs in an elective office in a city, town, or township ten days, or a county office fifteen days, or any other office thirty days, prior to a general election, it shall be filled at such election, unless previously filled at a special election."

Application of these statutes to the situation presented discloses that the Legislature is not in session and will not convene prior to the next General Election and therefore the vacancy in office, being a State office occurring more than thirty days prior to the next General Election, shall be filled at such General Election to be held in November, 1958. In view of this situation the vacancy in the office of Senator in the Iowa Legislature being filled at the next General Election, nomination therefor shall be made at a Primary Election to be held in June, 1958. Section 43.3, Code 1954, so provides as follows:

"*Offices affected by primary.* Candidates of all political parties for all offices which are filled at a regular biennial election by direct vote of the people, except the office of judge of the supreme and district courts, shall be nominated at a primary election at the time and in the manner hereinafter directed."

Opinions of this Department appearing at pages 121, 66 and 68 of the 1934 Report of the Attorney General, by the facts therein stated and implication, disclose situations covered by Section 69.14, Code 1954, and held that vacancies described in such opinions are to be filled at special elections.

12.2 **February 11, 1958**

Under Ch. 53, 1954 Code, concerning absentee voting, held: 1) Application for an absentee ballot sought by reason of expected illness or physical disability may be made personally by mail; 2) the ballot issued by the Auditor in response to application must be delivered by mail to the voter and not by an agent of the voter; 3) the ballot and application must be delivered to the Auditor by mail and not by personal agent of the voter and must reach the Auditor prior to election day; 4) the limited power of administering oaths and taking affirmations bestowed on county officers may be exercised by the deputy county auditor.

Mr. Vincent E. Johnson, Poweshiek County Attorney: This will acknowledge receipt of yours of the 27th ult. in which you submitted the following:

"I would like to request an opinion on the following matters having to do with the authority and duties of the County Auditor in regard to election procedures:

"1) Under Section 53.10, if a voter is absent from the county and requests an application for ballot by letter, the auditor may send him both the application and ballot at the same time. Is it permissible to extend this same procedure to a voter within the county and who requests an absent ballot for any of the reasons stated in Section 53.1, or must the application be made in the office of the Auditor personally where the voter is within the County and not absent therefrom?

"2) After the application has been delivered to the voter by the Auditor and such voter is within the county, may the ballot be delivered to an agent of the voter personally by the auditor, or must such ballot be mailed to the voter by the auditor?

"3) May the ballot and application be returned to the Auditor by personal agent of the voter to the office of the County Auditor after proper affirmation and oath properly subscribed to, or must the voter mail said ballot and application back to the Auditor in order to arrive in his hands not later than the day of election?

"4) I believe that you have rendered a previous opinion wherein it has been stated that it was within the authority of the County Auditor to subscribe to oaths and take affirmations within his office, but that this authority did not extend to the performance of such duties outside his office. If this is true, may the legally constituted deputy auditor also subscribe to oaths and take affirmations within the office of the county auditor?"

In reply thereto we advise as follows. Answers to your questions #1, #2, and #3 are found in opinion of the Attorney General appearing in the Report for 1934 at page 533, copy of which is hereto attached. On the authority of that opinion interpreting statutes currently the same as here interpreted we advise as follows:

A. 1) In answer to your question #1 we would advise that the application of the voter where the absentee ballot is sought by reason of expected illness or physical disability may be personally made at the office of the Auditor or by mail.

2) In answer to your question #2 we would advise you that the ballot issued in response to the application cannot be delivered to an agent of the voter but must be mailed to the voter by the Auditor.

3) In answer to your question #3 the ballot and application therefor may not be returned to the Auditor by personal agent of the voter to the office of the County Auditor but must be mailed by the voter to the Auditor and must reach the Auditor prior to election day or the vote will not be counted.

B. In answer to your question #4 we advise that according to Section 78.2, 1954 Code, the Auditor is a county officer possessing the following limited authority with respect to the administration of votes and taking affirmations:

"*Limited authority.* The following officers and persons are empowered to administer oaths and to take affirmations in any matter pertaining to the business of their respective office, position, or appointment:

*****

"3. All county officers other than those named in section 78.1."

This same power impliedly by reason of Section 78.3, 1958 Code, exists in the deputy county officers. Section 78.3 provides as follows:

"*Jurat by deputy.* In preparing a jurat to an oath or affirmation administered by a deputy, it shall be sufficient for the deputy to affix his own name, together with the designation of his official position, and the seal of his principal, if any."

Under this limited power a deputy county treasurer was authorized to administer oaths to applicants for registration of motor vehicles. 1919-1920 Report of the Attorney General 515. And a deputy sheriff, according to the case of *Conable v. Hylton,* 10 Iowa 593, has the same power as his principal to administer an oath to his garnishee when required to do so by the plaintiff. Therefore, we are of the opinion that a deputy county auditor has the same area of authority under this statute as the County Auditor.

12.3

Absentee ballot applications — Except for school and municipal elections and applications by armed forces members, only application forms furnished by the County Auditor may be used. (Strauss to Leir, Scott Co. Atty., 8/5/58) #58-8-15

12.4

Absentee Ballots — Application and ballot may not be mailed at same time unless voter is absent from county. (Strauss to Buchheit, Fayette Co. Atty., 4/15/58) #58-4-14

12.5

Absentee Ballots — If no application is on file, absentee ballots may not be voted, opened, or counted. (Strauss to Bandstra, Marion Co. Atty., 4/1/58) #58-4-3

12.6

Absent Voters' Law — (1) Challenging committees have no right with respect to ballots; their function is limited to challenge of persons appearing to vote; their right with respect to canvass of vote by judges of election is the same as that of any other member of the general public. (2) Absentee voters' ballots must reach the county auditor prior to election day in order that delivery may be made before opening of the polls. (3) The "head of the ticket" could mean President, Governor or U. S. Senator, depending upon what offices are to be filled at a particular election. (Strauss to O'Brien, Woodbury Co. Atty., 6/4/57) #57-6-7

12.7

Ballots — Name of candidate for constable who died prior to printing of ballot should not appear on ballot. (Strauss to Meyer, Winneshiek Co. Atty., 3/17/58) #58-3-14

12.8

Ballots — The names of candidates for county office nominated by petition should be printed on the ballot and a column added to provide for a write-in vote for all county offices as well as those for which candidates' names are printed. The name of a candidate deceased since nomination is not required to be printed upon the ballot. (Strauss to Thomas, Mills Co. Atty., 9/11/58) #58-9-23

12.9

Ballots — There is no statutory authority for instructing a voter how a

ballot may not be marked. (Strauss to Johnson, Webster Co. Atty., 10/15/58) #58-10-12

12.10

Bond Election — Repair of Courthouse — (a) May be submitted at primary on separate ballot. (b) Election date for special election may be changed on rescission of original resolution. (c) Vote required is governed by Code Section 75.1. (Strauss to Schroeder, Jackson Co. Atty., 4/4/58) #58-4-8

12.11

Campaign Expenditures — Salary increase by 57th G. A. does not increase authorization under Code Section 2.11 for 1958 campaign. (Strauss to McManus, St. Sen., 4/14/58) #58-4-20

12.12

Candidate's expense statement — §56.1, Code 1958, requiring a candidate for office in any primary, municipal, special or general election to file a statement of disbursements and expenditures in seeking such a nomination or election does not include within its terms a statement if such candidate made no disbursements nor incurred expense for such purpose. (Strauss to Synhorst, Secy. of State, 8/15/58) #58-8-10

12.13

Candidates — Qualifications — Statutory qualifications must be met at time of filing affidavit. Refers to letter opinion of March 22, 1956. (Strauss to Parkin, Jefferson Co. Atty., 4/1/58) #58-4-2

12.14

Canvass of vote on special question submitted to voters at primary. (Strauss to Werling, Cedar Co. Atty., 6/4/58) #58-6-15

12.15

County Officers — Resignation of incumbent-nominee after primary. Where incumbent county officer who has also been nominated at the primary to succeed himself resigns, the County Convention may nominate a candidate for the short-term vacancy but not for the new term. (Strauss to Dunn, Hardin Co. Atty., 6/23/58) #58-6-16

12.16

Election Boards — Additional board may be named in precincts with over 1,000 voters. Election counting boards are authorized for general and primary elections by Code Section 51.1. (Strauss to Powers, Appanoose Co. Atty., 4/3/58) #58-4-15

12.17

Fire Protection — An election for the appointment of trustees for a fire district and trustees thereof is a special election and absentee voting not authorized for members of the armed forces in such election. (Strauss to Meyer, Winneshiek Co. Atty., 8/22/58) #58-8-2

12.18

Illegal mark on ballot — In a recount the following with respect to ballots is pertinent: 1) Ballot marked by ballpoint pen or indelible pencil is legal; 2) ballot perforated by person marking the ballot, whether accidental or not, is probably an identification mark and should be rejected; 3) cartwheel in circle is not authorized and should not be counted; 4) check mark not authorized and should not be counted; 5) ballot bearing "X" in party circle and several "X's" in same column is valid and should be counted for all of the persons on ballot whether marked by an "X" before their name or not. (Strauss to Poston, Wayne Co. Atty., 11/12/58) #58-11-13

12.19

Nomination — Where a township is entitled to a nomination and election of two Justices of the Peace and the names of two candidates for that office were printed on the primary ballot for one ward of the City of Bloomfield and not on the primary ballots for the whole township, no nomination is made notwithstanding candidates' certification by the canvassing board. The Auditor would be justified in recognizing these as illegal nominations and declining to place the names on the ballot. (Strauss to Wright, Davis Co. Atty., 9/17/58) #58-9-9

12.20

Nominations — Candidate deceased prior to primary. (Strauss to Synhorst, Secy. of State, 5/28/58) #58-5-29

12.21

Nominations — Municipal primaries; form of ballot; number to vote for. (Erbe to Walsh, Pottawattamie Co. Atty., 11/6/57) #57-11-10

12.22

Nominations — Time for filing papers. (Strauss to Tobias, Town Clerk, Dike, Iowa, 10/21/57) #57-10-29

12.23

Nomination — Under Code Chapter 43, County Central Committee cannot nominate candidate where no candidate received statutory minimum vote at primary. (Strauss to Kellogg, Harrison Co. Atty., 6/9/58) #58-6-7

12.24

Notice of submission of special question — In the absence of express statutory prescription, the common law standard of "reasonableness" applies. (Abels to Bert A. Bandstra, Marion Co. Atty., 1/27/58) #58-1-28

12.25

Pasters on Ballots — A write-in vote and a vote by sticker will not count unless the square before the written or sticker vote is marked with the usual cross. Stickers can only be handed out at least 100 feet from the polls. (Strauss to Lucken, St. Rep., 9/17/58) #58-9-12

12.26

Polling place outside township — Necessity for new petition for each

election under Chap. 66, 57th G. A. (Strauss to Wright, Davis Co. Atty., 3/10/58) #58-3-4

12.27

Polling places — Neither County Supervisors nor township trustees may purchase sites or erect buildings in absence of statutory authorization. (Strauss to Hayes, Ringgold Co. Atty., 4/10/58) #58-4-16

12.28

Primary Ballot — Residence in same township as incumbent County Supervisor does not preclude candidacy *for nomination* although it may affect eligibility *for election.* (Strauss to Darrington, St. Rep., 4/28/58) #58-4-12

12.29

Primary Elections — Candidates for party committeeman and committeewoman, placing names on ballot, use of pasters. (Strauss to Leir, Scott Co. Atty., 4/21/58) #58-4-17

12.30

Residence — One who has established residence in another county with no intent to return is not entitled to vote in county of origin by absentee ballot. Ballot may be rejected by judges or challenged. (Strauss to Burdette, Decatur Co. Atty., 5/1/58) #58-5-4

12.31

Special Election Boards — The provisions of Sec. 49.19 requiring election boards at special elections to be the same as the last general election as related to Sec. 49.12, which requires an election board to be composed of three judges and two clerks, shall apply to special election, notwithstanding that election board conducting election of 1958 was composed of three officials as provided by Sec. 49.17. (Strauss to Bedell, Dickinson Co. Atty., 12/12/58) #58-12-5

12.32

Township polling places — Use of courthouse. (Abels to Hudson, Pocahontas Co. Atty., 10/11/57) #57-10-20

12.33

Township trustees — polling places — Power of township trustees to change places where election held. (Strauss to Bedell, Dickinson Co. Atty., 8/16/57) #57-8-28 (See also 12.23)

12.34

Vacancy in nomination — A vacancy in the nomination for county office may be filled by the County Central Committee and the name of the vacancy nominee can be certified by the Committee to the County Auditor any time before election. The name of the vacancy nominee may be placed upon the ballot under the provisions of Secs. 49.58, 49.59, 49.60, 49.61, 49.62, Code '58. (Strauss to Sturges, Plymouth Co. Atty., 10/7/58) #58-10-28

12.35

Vacancy in Senate — (1) Governor, as soon as he is advised of vacancy in office of state senator or representative, shall by way of proclamation call a special election at the earliest practical time giving ten (10) days notice thereof. (2) Sheriff then gives ten (10) days notice of the election by causing Governor's proclamation to be published in some newspaper printed in the county. (3) Nominations for state representative and for senator for a district composed of one county shall be made by the party county central committee, which shall certify such nominations as provided in §43.88, Code 1954. (Strauss to Frommelt, St. Rep., 6/18/57) #57-6-27 (See also 12.1)

12.36

Voters' names — Judges and clerks have no power to disclose names of persons who have or have not voted. (Strauss to Coffman, St. Rep., 2/17/58) #58-2-8

CHAPTER 13

HEALTH

STAFF OPINIONS

LETTER OPINIONS

13.1 January 22, 1958

CITIES AND TOWNS: Fluoridation of public water supplies.

1. Fluoridation of public water supplies is a valid exercise of a statutory grant of police power to enact ordinances to preserve the health of the inhabitants of a city or town.

2. The local body to which general police power is granted under the laws of Iowa is the city or town council.

3. Installation and operation of fluoridation equipment under an ordinance made by a city or town council in exercise of its statutory police power is subject to inspection by and directions of the State Department of Health.

Dr. Edmund G. Zimmerer, Commissioner, Department of Public Health: Receipt is acknowledged of your letter of January 9 in which you submit the following:

"Section 135.11, subsection 7, Code of Iowa, requires the State Department of Health to 'make inspections of the public water supplies . . . throughout the state, and direct the manner of installation and operation of the same.' In this connection, questions have arisen as to the power of cities and towns to fluoridate local public water supplies, by what local body, if any, provision for fluoridation may be made, and what duties with respect to installation and operation by cities of fluoridation equipment are imposed upon this Department.

"Your opinion and advice is requested."

In answer to your questions as to the authority of cities and towns to fluoridate local water supplies, the duties imposed upon your office and particularly those duties imposed by Section 135.11, subsection 7, Code 1954, we advise as follows:

The statutes confer no express power upon cities and towns to fluoridate water supplies. In general, cities and towns are creatures of statute with only those powers expressly conferred by statute or reasonably and necessarily implied as incident to exercise of a power expressly conferred by statute. See *Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa 455, *Van Eaton v. Town of Sidney*, 211 Iowa 986, 231 N.W. 475; *Charles Hewit & Sons v. Keller*, 223 Iowa 1372, 275 N.W. 95; *Huff v. Des Moines*, 244 Iowa 89, 56 N.W. 2d 54. Since no *express* statutory authority for fluoridation of local water supplies exists in the laws of Iowa, the power, if it exists at all, must be an implied power. No decision of our Supreme Court points to the existence of an implied power to fluoridate and it thus becomes necessary to examine the decisions of courts in other states.

In *Dowell v. Tulsa* (Oklahoma), 273 P. 2d 859, 43 A.L.R. 2d 445, the city of Tulsa enacted an ordinance providing for fluoridation of the city water supply. Plaintiffs sought to enjoin the enforcement of the ordinance contending that: (1) The ordinance amounted to an unwarranted exercise of the police power in violation of the Fourteenth Amendment, Constitution of the United States. (2) The ordinance was an exercise of power in excess of that granted to the city by the state legislature. (3) The ordinance violates the First Amendment to the Constitution of the United States relating to freedom of religion. (4) The ordinance was in violation of an Oklahoma statute prohibiting use of "fluorine compounds" in "food".

The Oklahoma Supreme Court ruled against plaintiffs on all four issues and upheld the power of the city of Tulsa to fluoridate its public water supply. Of particular interest to the inquiry considered in this opinion is the Court's ruling on contention 2. The Court said at pages 450 and 451 of 43 *A.L.R.* 2d:

"While most of the reported cases that have arisen in the past involved the so-called 'purity' or 'purification' of municipal water supplies and the regulations upheld with reference thereto were designed to prevent contamination or pollution with consequent epidemics or spread of disease, notice Annotations, 6 ALR 228, and 8 ALR 673, 23 ALR 228; 72 ALR 673, we think the weight of well-reasoned modern precedent sustains the right of municipalities to adopt such reasonable and undiscriminating measures to improve their water supplies as are necessary to protect and improve the public health, even though no epidemic is imminent and no contagious disease or virus is directly involved. See Blue v. Beach, 155 Ind 121, 56 NE 89, 50 LRA 64; and the Annotations thereto, at 80 AM St Rep 212; 25 Am Jur, 'Health', secs 21 and 25, inclusive, 56 Am Jur 'Water Works', Sec 76. Where such necessity is established, the Courts, especially in recent years, have adopted a liberal view of the health measures promulgated and sought to be enforced. See McQuillin, Municipal Corporations (3d Ed), Vol 7, Sec 24.224. As said in 11 Am Jur, 'Constitutional Law', Sec 271, at page 1023:

" 'The protection of the public health and safety is the basis of much valid regulation over persons. This broad field includes not only legislation relating to the prevention and curtailment of disease through quarantine, when not in conflict with Federal regulations on the subject, vaccination, and segregation in special hospitals of persons suffering from contagious and infectious illnesses, but also measures relating to eugenics and the maintenance of a healthy, normal, and socially sound populace.'

"As knowledge in both the medical and dental fields has increased, the subject of health in both of these spheres has become more important, and modern experience shows that private convenience and individual freedom of action are required to yield to the public good in instances where formerly there was observed no necessity for legislative interference. See Territory v. Hop Kee, 21 Haw 206, Ann Cas 1915D, 1082, and other authorities cited in notes to 37 Am Jur, 'Municipal Corporations', Secs 286 and 288. No principle is better established in our system of jurisprudence than the one that '"'Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations. . . . imposed in the interests of the community.'"' Chicago, B. & O. R. Co. v. McGuire, 219 US 549, 565, 31 S Ct 259, 55 L Ed 328, as quoted in West Coast Hotel Co. v. Parrish, 300 US 379, 57 S Ct 578, 582, 81 L Ed 703, 108 ALR 1330. Plaintiffs concede, as they must, that municipalities may chlorinate their water supply, Commonwealth v. Town of Hudson, 315 Mass 335, 52 NE2d 566, McQuillin Municipal Corporations (3d Ed), Vol. 7, Sec 24.265 and though they contend, under one proposition, that a city's treatment of its water supply with fluorides is the unlicensed practice of medicine, dentistry and pharmacy under our Statutes, they here argue that such treatment must be distinguished from treatment with chlorides, because the latter will kill germs, purify water and accordingly aid in the prevention and spread of disease, whereas fluorides will not. We think that if the putting of chlorides in public water supplies will in fact promote the public health, the distinction sought to be drawn by plaintiffs is immaterial. To us it seems ridiculous and of no consequence in considering the public health phase of the case that the substance to be added to the water may be classed as a mineral rather than a drug, antiseptic or germ killer; just as it is of little, if any, consequence whether fluoridation accomplishes its beneficial result to the public health by killing germs in the water, or by hardening the teeth or building up immunity in them to the bacteria that causes caries or tooth decay. If the latter, there can be no distinction on principle between it and compulsory vaccination or inoculation, which, for many years, has been well-established as a valid exercise of police power. See Blue v. Beach and other authorities cited, supra, as well as the Annotations at 93 ALR 1434. See also De Aryan v. Butler, 119 Cal App 2d 674, 260 P2d 98, in which some of the same arguments made here were made and rejected concerning the fluoridation of the water supply of the City of San Diego, California. While the evidence in the present case did not purport to establish fluoridation as a remedy or prevention for any specific contagious disease, it did show, without contradiction, that it will materially reduce the incidence of caries in youth. The relation of dental hygiene to the health of the body generally is now so well recognized as to warrant judicial notice. Accordingly, we hold that in establishing the fluoridation prescribed by Ordinance 6565, as effective to reduce dental caries, the evidence also sufficiently established it as a health measure to be a proper subject for exercise of the police power possessed by the City of Tulsa."

Froncek et al v. City of Milwaukee, 269 Wis. 276, 69 N.W. 2d 242, was an action brought by various "residents, taxpayers, and water users" to enjoin the city from expending any money in carrying out a resolution of the council providing for fluoridation of the city's water supply. The Supreme Court of Wisconsin held that the resolution of the city providing for fluoridation of the city water supply was a reasonable exercise of the city's police power. The Court said at page 247 of 69 N.W. 2d:

"We agree with the decision of the court below denying the injunction because it is within the province of the legislative authority to enact such measures in the interest of promoting public health and welfare, even though the act to protect general health is not based strictly upon an

infectious, contagious or dangerous disease. Well reasoned precedents sustain the right of municipalities to adopt reasonable undiscriminatory measures to improve public health even though no epidemic or dangerous disease is involved."

In *Kaul v. City of Chehalis* (Wash.), 277 P.2d 352, the Court said:

"Appellant challenges the validity of ordinance No. 653-A adopted June 25, 1951, by the city commissioner of the city of Chehalis. The ordinance provides:

" 'That a source of fluoridation approved by the State Department of Health be added to the water supply of the City of Chehalis under the rules and regulations of the Washington State Board of Health, such addition to be administered in a manner approved by the State Director of Public Health.'

" * * * * * * *

"Did the city council exceed its authority when it adopted ordinance No. 653-A providing for fluoridation of the water?

"Article XI, §11, of the state constitution provides:

" 'Police and Sanitary Regulations. Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.'

" * * * * * * *

"Dental caries is neither infectious nor contagious. This, however, does not detract from the fact that it is a common disease of mankind. As such, its prevention and extermination come within the police power of the state.

" * * * * * * *

"We find nothing in the ordinance which is in conflict 'with the general laws' or which detracts from the constitutional and statutory grants to the city to make and enforce local police, sanitary, and other regulations. Nor do we agree that the fluoridation is *ultra vires* simply because the police power is exercised through a municipal agency operated by the city in its proprietary capacity.

" * * * * * * *

"We fail to see . . . where any right of appellant guaranteed by the constitution has been invaded. . . "

" * * * * * * *

"The trial court did not err in concluding that the ordinance was a valid exercise of the police power and violated no constitutional rights guaranteed to appellant."

The Supreme Court of Louisiana said, in *Chapman v. City of Shreveport*, 225 La. 859, 74 So. 2d 142 at page 145:

" . . . it is well settled that courts will not interfere with the legislative authority in the exercise of its police power unless it is plain and palpable that such action has no real or substantive relation to the public health or safety or general welfare. . . "

At page 146: "The plan for fluoridation, therefore, bears a reasonable relation to the general welfare and the general health of the community, and is a valid exercise of the (general police) power conferred by Section 20.1 of the charter if it is not arbitrary or unreasonable. (Parenthetical insertion supplied)

" * * * * * * *

"There is no merit in appellee's contention that if the city charter grants to the city council of Shreveport authority to fluoridate its water supply, such action to that extent is a violation of the United States Constitution. . . "

Kraus v. City of Cleveland (Ohio), 121 N.E. 2d 311, was an action by a taxpayer to enjoin the city of Cleveland from expending any money for fluoridation of city water under certain city ordinances. The Court held that the ordinances were not unconstitutional and were a proper exercise of the city's police power for the protection of the health of its inhabitants.

Baer v. City of Bend (Oregon), 292 P.2d 134, was an action to enjoin fluoridation of a city water supply. It was held that fluoridation was not offensive to the constitutional guarantee of religious liberty.

Some of the cases are summarized at 56 *American Jurisprudence*, Waterworks and Water Companies, §76, Pocket Part, p. 50, as follows:

"As a general rule public water purification and medication-fortification (specifically fluoridation) measures have been held to be valid exercises of the police power. The legislature, in authorizing a health agency to require purification or medication of water supplies, does not thereby attempt unlawful delegation of legislative power. And water purification and medication-fortification measures have been held not to be defective from the standpoint of due process of law, nor, in the case of medication-fortification by the addition of fluorides, do they constitute the illegal practice of medicine, or (notwithstanding the objection of certain religious sects to medical treatment generally) a violation of the guaranty of freedom of religion."

(Citing: *State Bd. of Health v. Greenville*, 86 Ohio St. 1, 98 N.E. 1019, Ann Cas. 1913D 52; *Dowell v. Tulsa* (Okla.) 272 P.2d 859; Annotations at 43 A.L.R. 2d 455 to 465)

At 43 *A.L.R. 2d* 459, it is said:

"Governmental or administrative measures involving the medication or fortification of public water supplies which have been the subject of judicial attention have all been of the same kind — those providing for the addition of fluorides to aid in the prevention of tooth decay. Such measures have in each case been upheld against a variety of attacks on constitutional and other grounds."

Thus, from the decided cases and textbook generalizations of their effect, it appears to be the rule that municipal bodies operating under a general grant of police power conferred upon them by the legislature may provide for the fluoridation of local public water supplies as an incident of the expressly conferred power to preserve the public health.

The delegation of police power by the General Assembly of the State of Iowa to cities and towns is contained in Section 366.1, Code of Iowa, which provides as follows:

"Power to pass. Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to

provide for the safety, *preserve the health*, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days." (Emphasis ours)

That the quoted section is a delegation of general police power was stated by our Supreme Court in *Huff v. City of Des Moines*, 244 Iowa 89 at page 92, 56 N.W. 2d 54, wherein the Court said:

"Section 366.1, Code 1950, authorizes enactment of such ordinances as may 'seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof' . . . Relative to what is now section 366.1, supra, we said in Cecil v. Toenjes, 210 Iowa 407, 410, 228 N.W. 874, 875: 'Contained within that legislation are elements generally known as police power. Such power had its source in the state, and by the foregoing statute was delegated to the municipality.' . . . "

On the basis of the persuasive nature of the cases decided in other states and in the absence of Iowa case authority directly in point, we are of the opinion that provision for fluoridation of local water supplies is a valid exercise of a general grant of police power by the legislature to cities and towns to "preserve the health . . . of . . . the inhabitants thereof". Since such grant of police power to cities and towns under the statutes of Iowa is in the form of an authorization to cities and towns to "make and publish ordinances" we are of the opinion that the power may only be exercised by action of a city or town council in making and publishing an appropriate ordinance. Since the power to "make and publish ordinances" is conferred subject to the condition that such ordinances be "not inconsistent with the laws of the state", and the "laws of the state" pertaining to the health aspect of public water supplies provide in Section 135.11(7) that the State Department of Health shall: "Make inspection of the public water supplies . . . and direct the method of installation *and operation* of the same", we are of the opinion that installation and operation of fluoridation equipment under an appropriate ordinance as aforesaid would be subject to the inspection and direction of the State Department of Health. You are, accordingly, so advised.

13.2 July 31, 1958

PUBLIC HEALTH — Itinerant cosmetologists. In order to determine whether in a given situation the practice of cosmetology (or other practice under Code Section 147.75) is itinerant, consideration must be given to (1) the kind of business, (2) the place where it is conducted, (3) the intended duration of stay by the practitioner.

Dr. Edmund G. Zimmerer, Commissioner of Public Health: Receipt is acknowledged of your letter of July 25 as follows:

"I request an opinion upon the following question:

"Does a woman operating a beauty salon in one town in a county in Iowa, who also works in a beauty salon in another town in the same county, require an itinerant's license?

"I am sending you the file on this matter which gives several conflicting opinions and would appreciate your clarification."

The file to which your letter refers contains copies of prior opinions of this office on the same, or a substantially similar question, with varying answers. The prior opinions bear the dates September 17, 1929; October 25, 1935; February 27, 1939; October 19, 1943; and May 9, 1945.

Relating these to the published biennial reports of this office reveals an opinion appearing at page 1136 of the 1930 Report, which states that a cosmetologist *occasionally* called to another city to do permanent waving is not an itinerant. The letter dated September 17, 1929, enclosed with your file, does not appear in the published reports but states that a "practitioner who is *occasionally* called away from his residence in order to treat a patient" is not an itinerant and to that degree is consistent with the book opinion. It further states an "itinerant" is one who has a route.

The opinion dated October 25, 1935, also appears at page 330 of the 1936 Report of the Attorney General. It states:

". . . one is an itinerant who solicits persons to meet him for professional treatment at places other than his office maintained at the place of his residence. One who establishes offices in several different cities thereby becomes an itinerant. This is true because of the express language of the statute. There is no express prohibition against maintaining two offices or places of business in the same city. . ."

The opinion dated February 27, 1939, also appears at page 104 of the 1940 Report of the Attorney General. In determining the meaning of the word "itinerant", that opinion cites four decisions of our Supreme Court:

Town of Scranton v. Hesson, 151 Iowa 221, 130 N.W. 1079;
Snyder v. Closson, 84 Iowa 184, 50 N.W. 678;
Iowa Commissioner v. Gauss, 85 Iowa 21, 51 N.W. 1147;
State v. Logsdon, 215 Iowa 1297, 248 N.W. 4

On the basis of the said case decisions, the 1939 opinion lays down the following tests for itineracy, quoting from the *Scranton* case as follows:

"Ordinarily it is the character of the business which is the determinative feature, rather than the residence of the merchant, and in solving this problem three things must be considered: First; the kind of business; second, the place where it is conducted; and, third, the duration or intended duration thereof."

The opinion dated October 19, 1943 does not appear in the 1944 Report of this office. However, it refers to the opinion in the 1936 Report as hereinabove quoted with approval, stating:

". . . Miss ———————— can work in two shops or places of business in the same city as long as she publicly displays her license in those shops, without obtaining an itinerant license. . ."

The opinion dated May 11, 1945, does not appear in the published reports of this office. It deals with a fact situation where a licensed cosmetologist traveled with her husband who was an auditor of county accounts. Said cosmetologist traveled with her husband from county-seat

town to county-seat town and practiced cosmetology at each such town during the period of time it took him to audit the books at each such town. In ruling that the cosmetologist in question was an itinerant, the opinion relied on the fact that legal residence as contemplated by the statute could not be acquired at each county-seat town during the brief stay at each town involved in the particular fact situation.

The pertinent statute under which your question arises is Section 147.75, Code of Iowa, which provides as follows:

"*Defined.* 'Itinerant physician', 'itinerant osteopath', 'itinerant chiropractor', 'itinerant optometrist', 'itinerant cosmetologist', or 'itinerant chiropodist' as used in the following sections of this title shall mean any person engaged in the practice of medicine and surgery, osteopathy, osteopathy and surgery, chiropractic, optometry, cosmetology, or chiropody, as defined in the chapter relative to the practice of said professions who, by himself, agent, or employee goes from place to place, or from house to house, or by circulars, letters, or advertisements, solicits persons to meet him for professional treatment at places other than his office maintained at the place of his residence."

In addition to the opinions contained in your file, and opinions contemporaneous therewith contained in published reports of this office, of interest is an opinion appearing at page 198 of the 1916 Report of this office, which states:

"In the case which you present, I believe the physician who has his residence in one city where he receives professional calls and also has an office in another adjacent city, although a separate corporation, would not be an itinerant physician, for his office and his residence would be regarded as the same place, even though separated by the corporation line separating the two cities. . ."

The statute construed in the 1916 opinion contains the same definition of "itinerant" as appears in the present statute.

From the opinions hereinabove discussed there seems no question but that one who maintains more than one office or place of business *at his place of residence* is not an itinerant. The confusion seems to arise out of the phrase "place of residence" and it appears that out of the rather definite statement in some of the opinions to the effect it is not itineracy to maintain two offices in a single city, the erroneous impression has arisen that "city" and "place of residence" are synonymous terms. The error in this assumption should be apparent on a moment's reflection. If it were true a practitioner who resided in the county outside the corporate limits of any city or town would have *no* place of residence and hence could not maintain any office.

To take another approach, it might be said that one who resides within the limits of a city has his "place of residence", in one sense, in the house or other dwelling unit he calls home. Following this concept to its ultimate conclusion would result in the ridiculous rule that anyone who practiced his profession outside the confines of the four walls he happened to call "home" would be an itinerant. Is not one's "place of residence" as capable of description in terms of *county* as in terms of *city* or *specific dwelling unit*? In fact, the term is frequently used inter-

changeably with "domicile" which includes the entire state. See, for example, Article II, Section 1, and section 4, Constitution of Iowa, and Sections 277.12, 53.5, 48.7, 1958 Code of Iowa, for various governmental subdivisions considered as "place of residence" for various purposes.

Thus, it appears that identification of who is intended to be classed as "itinerant" by Section 147.75 is confused rather than aided by exclusive reliance on the phrase "place of residence".

The word "itinerant" is derived from the Latin *"iter, itineris,"* meaning "going, walk, road, way, journey, march". As applied to the practice of a trade or profession it conveys the idea that one carries his business in his pack as a peddler and has no fixed and permanent office or place of business. Thus, one who plied his trade from door to door, erected a tent or parked a trailer at a temporary location and moved on when he had "worked" the immediate area, or rented a hotel room for a temporary stay for the same purpose would be an itinerant.

The best tests for identifying an itinerant are those set forth at page 104 of the 1940 Report of this office, as quoted from the *Scranton case*, to wit:

1. The kind of business. (Does the operator make appointments in advance, standing appointments, etc?)

2. The place where it is conducted. (Is it in a tent? Trailer? Hotel room? Quarters unsuitable for year-round operation? What is duration of lease?)

3. The intended duration of stay. (For example, the kind and amount of equipment used in the shop, stock of cosmetics, etc.)

Applying the foregoing to your specific question you are advised the activity described in your letter does not appear to be itinerant in nature. We expressly refrain, however, from stating that carrying on the practice of cosmetology at two fixed and permanent locations for indefinite duration of time in one county is not itineracy for the reason that, as in prior opinions involving two such locations in a city, such declaration might be misconstrued as defining "county" to be synonymous with "place of residence". We affirm, rather, that each case must be determined on its own merits by application of the three tests hereinabove set forth.

All opinions or parts of opinions inconsistent herewith are hereby withdrawn.

13.3 November 1, 1957

BOARD OF MEDICAL EXAMINERS.

1. Payment of salaries of clerical assistants authorized or an inspector appointed under Sec. 147.103 is not controlled by the place or places at which such personnel perform the work assigned them by the Board of Medical Examiners.

2. The place or places where such personnel perform their work is subject to the discretion of the Board of Medical Examiners unless such place was specified in the request for such personnel and made part of the authorization or appointment, but state-owned furniture may not be used at a place other than state-furnished quarters.

3. The responsibilities of the Department of Health to disburse funds appropriated to it for the use of the Board of Medical Examiners and keep records thereof bears no relation to the place of employment of personnel furnished said Board under Sec. 147.103.

4. The only statutory procedure authorized for collecting and handling examination, license and renewal fees in connection with the practice of medicine and surgery is that prescribed in Sec. 147.102.

Dr. Edmund G. Zimmerer, Commissioner of Public Health: Receipt is acknowledged of your letter of October 8 as follows:

"Under Section 147.103, Code of Iowa, (1954), the Board of Medical Examiners has since March 1, 1954, employed one 'inspector' and one 'clerical assistant.' These two employees have been paid salaries from funds appropriated for that purpose by the Legislature, presently by the Department Appropriation Act, Section 17, Item 19.

"The Department of Health has provided office space, utilities, bookkeeping and other supporting services.

"On September 30, 1957, the two above described employees moved to the offices of a private firm in a downtown building, removing from the State Office Building current correspondence and records of the Board of Medical Examiners, and certain office furniture and equipment used by the employees and purchased from the aforementioned appropriation.

"This move gives rise to certain questions involving the duties and responsibilities of the Department of Health in its administrative relationship to the Board of Medical Examiners, as follows:

"1. Is it legal and proper for the Department of Health to continue issuance of salary warrants to two employees, appointed under the two separate provisions of Section 147.103, for full time employment at $6,600 and $2,244 per annum respectively, while such employees are removed from the direct supervision and cognizance of the Department?

"2. Must such a move of employees and equipment be approved by the Commissioner of Health and/or the State Executive Council?

"3. What are the responsibilities of the Department of Health in disbursing and maintaining records for the funds appropriated in Section 17, Item 19, of the current Appropriation Act, as to proper use of such funds and audit accountability?

"4. Under Section 147.102, Code of Iowa, 1954, is it mandatory that fees, particularly renewal fees, go directly to the secretary of the Board whatever his location, and if so, what source of funds may be used to provide the additional staff, equipment, and facilities needed to effect the change from the present procedure of collection by the Department of Health?

"It is emphasized that the Commissioner of Health raises no questions as to duties and responsibilities in the areas of examinations, issuance of licenses, or enforcement of the professional practice acts.

"For the purpose of clarifying the official relationship with the Board of Medical Examiners, and to furnish a guide for similar relationships with eight other licensing boards, the Commissioner of Public Health requests an official opinion on the questions outlined."

Section 147.103, Code 1954, provides as follows:

"Clerical help, inspectors and supplies. Subject to the approval of the executive council, the examining boards for medicine and surgery, chiropractic, osteopathy, and osteopathy and surgery, may employ such clerical assistance as may be necessary to enable said boards to perform the duties imposed upon them by law. Payment for such assistance shall be made out of the appropriation provided for said examining boards in the biennial departmental appropriations. The executive council shall also furnish said boards with the necessary quarters and all articles and supplies required for the public use, and the provisions of section 147.26 shall not apply to said boards. The commissioner of public health, upon the request of and with the approval of the medical examining board, shall appoint an inspector and incur such other expenses as may be necessary to properly administer and aid in the enforcement of the provisions of the law relating to those licensed to practice medicine and and surgery by said board. The amount of compensation for such inspector shall be fixed by the executive council and paid from the same funds as is provided for the clerical assistants."

Chapter 1, Section 17, Acts of the Fifty-seventh General Assembly, makes appropriations for the current biennium as follows:

"For the department of health there is hereby appropriated from the general fund of the state for each year of the biennium beginning July 1, 1957, and ending June 30, 1959, the sum of five hundred eighty-two thousand one hundred sixty dollars ($582,162.00) or so much thereof as may be necessary to be used in the following manner:

" * * * * * *

"19. Medical Examining Board
For Compensation, support, maintenance and miscellaneous purposes ..... 13,940.00"

In answer to your first question, *clerical assistants* furnished an examining board under Section 147.103 are subject, by its express terms, only to the approval of the executive council. The duties and powers of the Board of Medical Examiners are fixed by statute. Prior to the enactment of Chapter 95, Acts of the Fifty-seventh General Assembly, said powers and duties consisted exclusively of receiving applications for licensure, passing on the qualifications of applicants, and recommending candidates for license on the basis of examination or reciprocity. See Sections 147.12 to 147.28, 147.36 to 147.42, 147.49 to 147.53, 147.102 and 148.1 to 148.3, Code 1954. In other words, the Board's duties were largely clerical. Section 147.23 relates to the manner of performance of such duties and provides:

"Transaction of business by mail. Each examining board shall, as far as practicable, provide by rule for the conducting of its business by mail, but all examinations shall be conducted in person by the board or by some representative of the board as provided in section 147.39. Any official action or vote taken by mail shall be preserved by the secretary in the same manner as the minutes of regular meetings."

Since the duties of the board apart from the actual conducting of examinations (required by Section 147.27 to be conducted either at the seat of government or at the state university) are directed to be accomplished by mail, it follows that such clerical duties may be performed at any mailing address deemed convenient by the Board of Examiners as by its

rules of internal management it may provide. Obviously, any clerical assistance furnished to the Board for the purpose of assisting it in the performance of such duties would be of little use to it unless available at such address.

Thus, if *clerical assistance* has been authorized the Board by the Executive Council, under Section 147.103, without specification as to the place where such assistance shall be rendered, there appears no statutory authority for the Department to discontinue payment for such assistance from funds appropriated to the said Department under Chapter 1, Section 17, paragraph 19, Acts of the Fifty-seventh General Assembly, so long as such authorization remains in force. Section 147.103 expressly provides:

"Payment for such assistance *shall* be made out of the appropriation provided for said examining boards in the biennial departmental appropriations." (Emphasis ours)

Prior to the enactment of Chapter 95, Acts of the Fifty-seventh General Assembly, the situation relative to the *inspector* authorized in Section 147.103 was somewhat less clear. In view of the nature of the powers conferred upon the Examining Board as described above there would appear to be little occasion for investigative work by the Board except in connection with the validity of credentials presented by applicants for examination. It appears noteworthy that the appointment provided in Section 147.103 is by the Commissioner and that approval by the Executive Council in the case of an inspector extends only to his compensation rather than to authority for his employment. Prior to the enactment of Chapter 95, Acts of the Fifty-seventh General Assembly, enforcement of the laws affecting licensed practitioners rested entirely with the Commissioner rather than with the Examining Board. See Sections 147.87 and 135.11, subsections 13 to 15. However, the inspector authorized in Section 147.103 would seem to be for a purpose other than such enforcement as the Commissioner is empowered to provide other personnel for such purpose by Sections 147.88 and 135.11(16). With the independent enforcement powers conferred upon the Board of Medical Examiners by Chapter 95, Acts of the Fifty-seventh General Assembly, it would now seem clear that the said Board has powers and duties making reasonable the use of an "inspector" and that the place or places of "inspection" be designated by the Board with payment made "from the same funds as is provided for clerical assistants".

2. Your second question is in part answered above. Where unrestricted approval or appointment has been made under Section 147.103 it appears within the reasonable discretion of the Board of Examiners to direct the place of employment of personnel so provided it so long as such authorization continues. Whether it has abused such discretion to the degree justifying withdrawal of authorization or revocation of appointment is, of course, a question of fact outside the scope of this opinion. With respect to furniture and equipment purchased from the aforesaid appropriation or prior similar appropriations, ownership is ultimately in the State of Iowa rather than any department or board. If it were purchased for the use of the Board of Examiners then its proper location appears to

be at whatever place the work of the Board of Examiners which it was purchased to facilitate is carried on. Responsibility to the State for its care and preservation would, of course, rest with the Board of Examiners as would conversion of its use to unauthorized purposes. However, it should be particularly noted that 'The executive council *shall* furnish said boards with the necessary quarters. . . ", Section 147.103, supra. Nevertheless, the situation you describe appears based on the premise by the Board that its work to be done by the said employees necessitates no "quarters" within the meaning of said provision as said work is transacted by mail. If no "quarters" are necessary, no furniture can be necessary. The use of furniture would imply need for *more than* a mere mailing address. Under the facts submitted you are advised state-owned furniture cannot be used or kept at a place other than state-furnished "quarters".

3. In answer to your third question you are advised that the responsibilities of the Department with respect to disbursement of funds and maintenance of records are not affected by the location of the place where the work of examining boards is performed, unless claim is made for rent or maintenance of such place, in which event the Department should determine whether quarters have been requested and approved under Section 147.103.

4. Section 147.102, Code 1954, to which your fourth question refers, provides as follows:

"Chiropractors and osteopaths. Notwithstanding the provisions of this title, every application for a license to practice medicine and surgery, chiropractic, osteopathy, or osteopathy and surgery, shall be made direct to the secretary of the examining board of such profession, and every reciprocal agreement for the recognition of any such license issued in another state shall be negotiated by the examining board for such profession, and all examination, license, and renewal fees received from such persons licensed to practice any of such professions shall be paid to and collected by the secretary of the examining board of such profession, which secretary shall turn the same over to the department of health on the first day of January, 1925, and quarterly thereafter."

It should be noted that the mandatory word "shall" is used throughout Section 147.102 and it is expressly provided that its provisions shall be followed "notwithstanding the provisions of this title". Your letter does not describe the "present procedure of collection by the Department of Health" to which it refers nor does it specify what additional expense the Board of Medical Examiners might incur by complying with the provisions of Section 147.102, which your question implies it has not done in the past.

However, you are advised that no alteration to the method of procedure prescribed by said section appears authorized. Hence, the Board of Medical Examiners, as a creature of statute, has no authorized alternative but to follow it.

13.4

Basic Science Board of Examiners — "Retake" examinations — (Abels to *take" examinations.* (Abels to Hertel, Chm. Bd. of Exam., Basic Sciences, 6/3/57) #57-6-2

Under the express language of §146.16, Code 1954, "retakes" are authorized only in *subjects* failed. Where an applicant fails in no subjects but does not attain the required average of 75%, individual subject "retakes" are not authorized and applicant must apply for a new examination.

13.5

Basic Science Law — Matters relating to the conducting and grading of examinations in the basic sciences are to be determined by the rules and policies established by the board of examiners. (Abels to Peterson, Sec. Bd. of Examiners, 1/16/57) #57-1-20

13.6

Basic Science Board of Examiners — "Retake" examinations — (Abels to Hertel, Chm. Bd. of Examiners, Basic Sciences, 3/20/57) #57-3-34

Under Sec. 146.16, Code 1954, "retake" examinations may be given only in subjects in which the applicant failed to attain the required grade at the regular examination.

13.7

Chiropodists — Examination questions to applicants for license to practice chiropody. (Abels to Howard, Secretary Bd. of Chiropody Examiners, 5/15/57) #57-5-18

State Board of Chiropody Examiners may screen lists of questions prepared by National Board of Chiropody Examiners and incorporate such questions in Iowa license examinations, provided such lists are supplemented where necessary to encompass the full scope of subject matter required to be covered in such examinations by §149.3 (3), Code 1954.

13.8

Chiropractic Examiners — Approval of clerical help by Executive Council. (Strauss to Cunningham, Secy., Executive Council, 2/1/57) #57-2-15

The power of approval of appointment of clerical assistance for the board of chiropractic examiners is vested in the Executive Council. In the exercise of its discretion it may take into consideration the necessity for clerical assistance as well as the qualifications of the proposed appointees.

13.9

Chiropractic Examiners — Compensation of secretary of board — Claim to be certified by Commissioner of Public Health — Duty of Comptroller to pay properly certified claim. (Strauss to Opsahl, Sec. Bd. of Chiropractic Exam., 6/21/57) #57-6-39

Claim by secretary of board for compensation for per diem services should be certified by Commissioner of Public Health rather than by other two members of Board of Chiropractic Examiners. If claim is in proper form and correct amount, is unpaid, and is properly verified and certified, State Comptroller has no discretion to disapprove it.

13.10

Chiropractic Examiners — Compensation of secretary of board. (Strauss to Opsahl, Secy., Bd. of Chiropractic Examiners, 5/24/57) #57-5-35

Under the provisions of §§147.22 and 147.24, Code 1954, a member of the board of chiropractic examiners who performs duties as secretary of such board, is entitled to be compensated for the performance of such duties.

13.11

Chiropractic Examiners — Chapter 66, Code 1954, provides exclusive method for removal from office of an officer of an examining board during the annual term for which he was selected. (Abels to Opsahl, Secretary of Board of Chiropractic, 1/4/57) #57-1-3

13.12

Cosmetology — Embalmers need no cosmetology license to dress the hair of a corpse. (Abels to West, Costmetology Div., Health Dept., 9/30/57) #57-9-53

13.13

Cosmetology Examiners — Appointment of division heads "Executive Secretary" and other employees — (Abels to Wickard, Chm. Bd. of Examiners, Div. of Cosmetology, 3/7/57) #57-3-10

The Cosmetology Division of the State Department of Health is created pursuant to Sec. 135.11, Code 1954, and the power of the Commissioner of Health to appoint division assistants and employees is not subject to the approval of the Board of Cosmetology Examiners, unless the duties of such division assistants or employees are combined with the duties of some other appointee for whose appointment the Board's approval is required by statute.

13.14

Cosmetology — The giving of complete oil baths to a woman or child with incidental massage for the purpose of ordinary cleanliness and relaxation as distinguished from cosmetic or skin beautification purposes is not within the contemplation of Section 157.1, Code 1954, defining the practice of cosmetology. (Abels to Buchheit, Co. Atty., 1/3/57) #57-1-2

13.15

Cosmetology — Schools offering courses in "advanced cosmetology." Situations where no license required. (Abels to Saf, Exec. Secy., Bd. of Medical Examiners, 8/5/57) #57-8-6

13.16

Cosmetology — License Examination — Applicants must present diploma or certificate from licensed *and* approved school. (Abels to Zimmerer, Commissioner of Public Health, 11/1/57) #57-11-1

13.17

Dental Examiners — Licensure of dentists — Responsibility for investi-

gation and enforcement of licensing requirements against unlicensed practitioners — (Abels to Glann, Member St. Bd. of Dental Examiners, 3/8/57) #57-3-15

In general the powers of the Board of Dental Examiners extend only to the examination of applicants for license and recommendations for licensure of candidates for license. All other licensing powers and enforcement powers rest with the Commissioner of Public Health.

13.18

Dental Examiners — Adoption or administration of National Board Examination. (Abels to Zimmerer, Comm. Pub. Health, 5/19/58) #58-5-23

13.19

Dentistry — X-ray photography not "practice of dentistry." (Abels to Zimmerer, Comm. Pub. Health, 7/18/57) #57-7-24

13.20

Local Board of Health — Trailer parks: Section 1, Ch. 97, Acts 56th G. A., amending Section 135D.20, Code 1954, not retroactive, and only claims for inspection and regulation services rendered by local board of health accruing on and after July 4, 1955, may be paid from the appropriation provided therein. (Abels to Zimmerer, State Commissioner of Health, 1/7/57) #57-1-7

13.21

Medical Examiners — Second examinations. Fees. (Abels to Saf, Ex. Secy., Bd. Med. Examiners, 10/11/57) #57-10-19

13.22

Mobile Home Parks — Reduction of license fees on renewals. (Abels to Heeron, Deputy Comm., Bd. of Health, 5/14/57) #57-5-17

For purposes of the reduction of license fees under §135D.5, Code 1954, on renewal licenses, such reduction applies in years subsequent to the first year in which an annual license was actually issued.

13.23

Nurse Examiners — "Three years course of study" as used in Sec. 152.4, Code 1954, refers to quantitative content of the course rather than elapsed time for its completion and may be considered to mean academic years rather than calendar years if the prescribed subjects can be adequately treated or mastered in such time. (Abels to Vera M. Sage, Executive Secretary, Nurse Examiners, 1/22/58) #58-1-26

13.24

Nursing Home Regulations — Enforcement of Code Chapter 413 does not depend upon the existence of departmental regulations (Abels to Zimmerer, Health Comm., 8/1/58) #58-8-27

13.25

Osteopaths — The provision in §374.14 (4) empowering county hospital

trustees to withhold or annex conditions to hospital privileges for nonresidents of the county extends only to nonresident patients and not to nonresident physicians of resident patients. (Abels to Edmund, Secy., Ost. Bd., 5/13/57) #57-5-12

13.26

Osteopaths — May serve as physician-member of the County Insanity Commission. (Abels to W. S. Edmund, Secetary, Bd. of Osteopathic Examiners, 621 Third St., Red Oak, Iowa, 1/8/58) #58-1-10

13.27

Pharmacy Examiners — The exception in Section 147.100, Code 1954, to the requirement in Section 147.82, Code 1954, that all license renewal fees be paid into the State Treasury extends only to the additional renewal fee of $2.50 to which the statutory exception specifically refers. (Abels to Rabe, Secy. Bd. of Pharmacy Examiners, 2/19/57) #57-2-14

13.28

Pharmacy Examiners — Appropriation effective July 4 for administration of law effective January 1 may be expended in preparation for enforcement. (Abels to Rabe, Secretary, Bd. of Pharmacy Examiners, 8/2/57) #57-8-2

13.29

Pharmacy License — According to code section 155.13, may be denied for any substantial failure to comply with code chapter 155. (Abels to Rabe, Pharmacy Bd., 9/3/58) #58-9-19

13.30

Pharmacy License — According to code section 155.13, may be suspended or revoked for any substantial failure to comply with any provision of code chapter 155. (Abels to Rabe, Pharmacy Bd., 9/3/58) #58-9-18

13.31

Pharmacy License — A separate license must be obtained for "each and every *place* of business" where retail pharmacy is practiced under code section 155.12. (Abels to Rabe, Pharmacy Bd., 9/3/58) #58-9-16

13.32

Physicians and Surgeons — Discretion of physician in disclosing information as to blood transfusions received by his patients governed by canons of ethics of medical profession rather than by state statutes. (Abels to State Senator Shaff, 1/4/57) #57-1-4

13.33

Physicians and Surgeons — Sale to physician. Application of sales tax law. (Pruss to Willis, Dallas Co. Atty., 9/25/57) #57-9-45

13.34

Plumbing code — Printing and distribution. 57 G. A., Ch. 56 not applicable. (Gritton to Houser, Dir. Health Eng., Health Dept., 7/17/57) #57-7-19

13.35

Proprietary Medicines — Whether a given remedy is exempt from provisions of Ch. 205 is a question of fact. (Abels to Dunn, Hardin Co. Atty., 10/1/57) #57-10-2

13.36

School Licenses — Board has no power to prohibit night schools or limit number of licenses on theory enough schools exist. (Abels to Zimmerer, Comm'r of Pub. Health, 11/1/57) #57-11-1

13.37

Tuberculosis — Transfer of patients from Oakdale. (Bianco to Falk, Page Co. Atty., 8/6/57) #57-8-10

CHAPTER 14

HIGHWAYS

STAFF OPINIONS

LETTER OPINIONS

14.1 June 17, 1957

Under House File 42, Acts of the 57th G. A., Sections 309.8 and 309.12, being secondary road construction fund and secondary road maintenance fund, were repealed and the funds abolished on July 4, 1957. On July 4, 1957, the secondary road fund comes into existence and after July 4, 1957, maintenance and construction funds currently collected shall be combined and such combined funds known as the secondary road fund will show on the books of the County Auditor and County Treasurer. The construction road program provided by Section 309.22 as amended by Section 5 of House File 42 will control such programs after July 4, 1957. Construction programs adopted prior to that date will be carried out as adopted.

Mr. C. B. Akers, Auditor of State: This is in response to a recent request from Mr. Dewey S. Butterfield, Black Hawk County Treasurer, concerning House File 42, Acts of the 57th General Assembly, which request embraced the following:

"Can maintenance and construction funds currently being collected be combined after July 4, 1957?

"Can Auditor and Treasurer show a combined fund as secondary road fund as of July 4, 1957, or must they be kept separate as levied for year 1957?

"Must the County Engineer and Supervisors carry out the construction road program as approved by the Board of Approval under Sec. 309.22, or can they proceed under House File 42 after July 4, 1957?

In reference thereto we advise as follows:

1. House File 42 effective July 4, 1957, repealed Section 309.8, Code 1954, being the secondary road construction fund and repealed Section 309.12 which is the secondary road maintenance fund. These funds as

they exist on July 4, 1957, are abolished. Thereafter, according to House File 42, there is created a secondary road fund to which all funds derived from tax levies for secondary road construction and maintenance purposes shall be allocated. Section 18 of House File 42 provides with reference to classification of the County road funds the following:

"Sec. 18. The classification of county road funds into 'secondary road construction funds' and 'secondary road maintenance funds' is hereby abolished. Wherever in any statute the words, 'secondary road construction fund' or 'secondary road maintenance fund' appear, they shall be construed to mean, 'secondary road fund'."

Thus, on July 4, 1957, there will be no statutory secondary road construction fund or secondary road maintenance fund and there will be none thereafter except the secondary road fund. Therefore, we advise in answer to your questions 1 and 2 that after July 4, 1957, both maintenance and construction funds currently being collected shall be combined. We further advise that the County Auditor and Treasurer shall show this combined fund as the secondary road fund after July 4, 1957. Current accounting systems shall be adjusted to meet the requirements of the changes made by House File 42.

2. In answer to your question with respect to the construction road program we advise that Section 309.22 was amended by Section 5 of House File 42 as follows:

"Sec. 5. Section three hundred and nine point twenty-two (309.22), Code 1954, is hereby amended as follows:

"1. By striking from lines one (1), two (2) and three (3) the words, 'Before proceeding with any construction work on the secondary road system for any year or years' and inserting in lieu thereof the words, 'On or before the first day of November of each year'.

"2. By striking from lines five (5) and six (6) the words, 'or project' and inserting in lieu thereof the following 'for the next calendar year'.

"3. By inserting a period after the word 'year' in line seven (7) and striking the remainder of said section."

In our opinion this change will operate as follows. Any construction program adopted prior to July 4, 1957, may be carried out as adopted. Thereafter, any program will operate under Section 309.22 as amended by House File 42.

14.2 **March 26, 1958**

HIGHWAYS — Secondary road construction program of county subject to approval of Highway Commission as to type and manner of construction, but priority of improvement of secondary roads is within the sound discretion of the board of supervisors.

Mr. John G. Butter, Chief Engineer, Iowa State Highway Commission: I have your request for an opinion on the following:

"County A adopted a secondary road construction program on October 29, 1957, and submitted it to the Iowa State Highway Commission for

approval. The Iowa State Highway Commission approved the program on November 13, 1957, and returned it to County A. Part of the program called for the surfacing of six miles of a farm-to-market road with secondary funds using a four inch soil aggregate base, six inch rolled stone base and two inches of bituminous concrete type (B) at an estimated cost of $149,000.00. The six miles of proposed surfacing is a continuous stretch of an east-west road all in the same township. For the sake of clarity I will refer to this road as the 'north' road.

"The Highway Commission has a five year program of making traffic studies of all roads in the ninety-nine counties of the state, covering twenty counties each year. Among the counties covered in 1957 was County A, and for the most part these studies were made in July and August of that year. Since the approval of County A's program, these traffic studies have been tabulated and further studies thereof made by our safety and traffic department. Among other things, these traffic studies show the average daily traffic on the 'north' road embraced in County A's program. The studies also show the average daily traffic on a five mile stretch of a local secondary road one mile south of the 'north' road which I will refer to as the 'south' road. The study further shows an estimate of the amount of traffic which would be diverted to the 'south' road, and indicates certain advantages which might accrue to surrounding communities if the 'south' road were first improved.

"Prior to approving County A's program and since that time, there has been an opposition group as well as a supporting group thereto in the county. The opposition group wants the 'south' road to be first improved, and the supporting group is in favor of the 'north' road which was embraced in the program of the board and approved by the Highway Commission on November 13, 1957. On at least three occasions, October 1, 1957, February 18, 1958, and March 4, 1958, members of the opposition and/or supporting groups have had audiences with the Iowa State Highway Commission. In the last audience before the Commission on March 4, 1958, both objectors and supporters of County A's program were present and heard by the entire Commission.

"In view of the above, does the Iowa State Highway Commission have the authority to recall and review County A's secondary road construction program and reconsider its approval thereof in relation to the controversy over the two roads in question?"

The procedure for adopting a secondary road construction program is set out in Chapter 309 of the 1954 Code of Iowa. The first paragraph of Section 309.22, as amended by the 57th G.A., provides:

"On or before the first day of November of each year, the board of supervisors shall, subject to the approval of the state highway commission, adopt a comprehensive program for the next calendar year based upon the construction funds estimated to be available for such year."

Former Section 309.23 of the Code of 1954 set up a board of approval for secondary road construction programs consisting of the members of the board of supervisors and the board of trustees of each township. This section required that the board of supervisors ". . . shall, together with the county engineer, proceed to plan a program of construction of both county trunk and local county roads, always observing the plans filed by the boards of trustees". This section was repealed by the 57th G. A., as was the designation of "trunk roads", and the following section enacted:

"In the preparation of the county secondary road program required by section three hundred and nine point twenty-two (309.22) of the Code, the board of supervisors shall meet and consult with the township

trustees as to the improvements needed for the secondary roads in the various townships." (309.10 I.C.A.)

By repeal of Section 309.23, the board has been given wider discretionary powers in the preparation of the secondary road program. The requirement that they shall "always observe the plans filed by the board of trustees" has been eliminated from the law. Apparently the only requirement in that respect now is that the board shall "meet and consult" with the township trustees.

Section 309.24 calls for a uniform and unified plan in arriving at the program.

Section 309.25 provides for giving material considerations for farm-to-market roads:

"In planning and in adopting said program or project by the board of supervisors, said board and county engineer shall give due and careful consideration, (1) to the location of primary roads, and of roads heretofore improved as county roads, (2) to the market centers and main roads leading thereto, and (3) to rural mail and school bus routes, it being the intent of this chapter that said program or project will, when finally executed, afford the highest possible systematic, intracounty and intercounty connections of all the roads of the county."

This section is followed by several additional requirements of the board such as the considering of what roads should be embraced in the program, requiring the engineer to make a survey in view of the public necessity and convenience, and also consider the present and most urgent need and necessity for early construction of the roads embraced in the program. These sections are finally followed by the necessary surveys, construction specifications and letting provisions on which I will not elaborate upon in this opinion. The evident purpose of these sections was to provide local self-government with a plan of checks and balances, the board to confer with the township trustees, adopt a sound program, with a final check and approval of the program by the Highway Commission.

The phrase "subject to approval of the state highway commission" in Section 309.22 is not to be interpreted as giving the Commission authority to arbitrarily refuse to approve a program, but means that they shall investigate and pass upon and render judgment as to whether the program is sound, in relation to the estimated available revenues, the type and manner of construction, and whether such a construction program conforms to the standard plans and specifications in order to provide the public a uniformly constructed system of secondary roads. This is emphasized by the provisions of Section 307.5, Code of 1954, which, among other things, sets out the duties of the Iowa State Highway Commission with respect to counties and provides that the Commission shall "adopt standard plans of highway construction and maintenance and furnish the same to the counties", and also "furnish information and instruction to, answer inquiries of, and advise with, highway officers on matters of highway construction and maintenance and the reasonable costs thereof". It is further evidenced by Section 309.16, Code of 1954, which provides

that the Commission ". . . shall when requested by the board of supervisors advise with said board as to the manner of constructing and maintaining the secondary roads".

It must be assumed that the approval of the Iowa State Highway Commission of the secondary road construction program of County A was something more than just a ministerial act. The program was received and reviewed by a portion of the engineering staff of the Highway Commission, judgment rendered thereon, and its approval recommended to the Commission. The Commission, following the advice of their engineers, and, I assume, considering the program in the light of their own knowledge and experiences in such matters, approved the program.

Traffic studies are important in the planning and adopting of any road program and certainly that factor is one to be considered along with those set out under Section 309.25, but that section does not require that any one of the several factors be given weight in preference to others but presupposes that all factors will be taken into consideration, so that when a program is finally executed, it will afford "the highest possible systematic intracounty and intercounty connections of all the roads of the county".

There is no question that the jurisdiction and control of secondary roads is placed in the hands of the county board of supervisors. (Section 306.3, Code of 1954 as amended.) All the above sections of the Code as to the procedure in adopting a program places certain powers and duties upon both the board of supervisors and the Highway Commission. The board is charged with the duty of selecting the roads to be improved, and the Highway Commission is charged with the duty of approving (or disapproving) that program depending on whether or not the program conforms to standard plans and specifications as devised by the Highway Commission and furnished to the county. It is within the sound discretion of the board of supervisors as to which road should be first improved, and the courts will not interfere with that discretionary power unless abused. (See OAG 1951, p. 11. See also Annotations to 91 ALR, pp. 242-247, in which the authorities are unanimous that highway officers, having jurisdiction and control of a highway system, have the right to designate, locate, redesignate, relocate, alter or change any portion of that system.) Further emphasis is placed on this right to select which road shall be first improved by the provisions of Section 306.4, Code of 1954, which provides in part that "In the construction, improvement, operation or maintenance of any highway, . . . the board or commission which has control and jurisdiction over such highway, . . . shall have power on its own motion, to alter . . . any such highway . . . and to establish new highways . . . which are intended to become part of the highway system over which said board or commission has jurisdiction and control".

The controversy in County A comes down to one final proposition as to whether the "north" or "south" road should be first improved. The legislature has placed the jurisdiction and control of secondary roads in the hands of the boards of supervisors of their respective counties. The board

is elected by the voters of that community. In County A it has an opposition as well as a supporting group of the electorate as to which road should be first improved. As to the priority of improvements of secondary roads, the Iowa State Highway Commission cannot substitute its discretion for that of the board of supervisors, the elected road officials of County A. Nor is the Highway Commission a judicial body for appeal. Nor is it the governing body of the county. In Fuller & Hiller v. Shannon & Willfong, 205 Iowa 104, 215 NW 611, the court stated on page 107:

"The state highway commission is not the governing body of a county. The commission is simply an agency of the state for certain purposes."

The Iowa State Highway Commission has only the authority as given by statute. State v. Fitch, 236 Iowa 208, 17 NW 2d 380, and Merchants Motor Freight v. Iowa State Highway Commission, 239 Iowa 888, 32 NW 2d 773.

In answer to your original question and with respect to the particular facts presented, you are advised as follows:

1. The Iowa State Highway Commission has authority to approve or disapprove a county's secondary road program in relation to whether or not such construction program conforms to the standard plans and specifications and manner of construction;

2. The priority of improvements of secondary roads is within the sound discretion of the board of supervisors, and the courts will not interfere with that discretionary power unless abused. Nor can the Iowa State Highway Commission substitute its discretion for that of the board of supervisors, the elected officials of the county, on matters of priority of improvement of secondary roads.

Under the factual situation of this case, the Iowa State Highway Commission does not have the authority to recall and review County A's secondary road construction program and reconsider its approval thereof.

14.3 **July 17, 1958**

HIGHWAYS — Farm-to-Market Roads: The 40% equalization farm-to-market fund is available for expenditure on the farm-to-market system and authorized additions thereto, however the additional mileage added to the farm-to-market system need not be considered in the allotment of those funds.

Mr. John Butter, Chief Engineer, Iowa State Highway Commission: The Iowa State Highway Commission has requested an opinion on the following:

"Under Section 312.5 of the Code of Iowa, the Iowa State Highway Commission has the duty of allocating equalization farm-to-market funds to the counties. In order to carry out the objects of that section, the Highway Commission made an estimate of the cost of completing to a gravel surface the mileage of the State farm-to-market system as it existed on Jan. 1, 1954. The Highway Commission has been allotting

farm-to-market equalization funds based on that existing mileage of Jan. 1, 1954.

"On Nov. 24, 1956, County A passed a resolution stating that the surfacing, grading and culverts on their farm-to-market system was completed and requested an addition of over one hundred miles to that system. The additions were approved by the Highway Commission on Dec. 13, 1956.

"Must the Iowa State Highway Commission take into consideration this added mileage to County A's farm-to-market system in the allotment of equalization funds?"

The division of road use tax funds to the farm-to-market road fund is set out in Section 312.5, Code of 1958. That section reads as follows:

"The road use tax funds credited to the farm-to-market road fund by the treasurer of state, are hereby divided as follows, and are to be known respectively as:

"1. Area allotment farm-to-market road funds, sixty percent; and

"2. Equalization farm-to-market road funds, forty percent.

"3. All such funds distributed on need basis, shall be reported to each county auditor of the state by January 1 of each year, setting forth all amounts distributed to each county in the state on the need basis.

"All farm-to-market road funds, except funds which under Section 310.20 come from any county's allotment of the road use tax funds, shall be allotted among the counties by the state highway commission. Area allotment farm-to-market road funds and federal aid secondary road funds received by the state, shall be allotted among all the counties of the state in the ratio that the area of each county bears to the total area of the whole state.

"The equalization farm-to-market road fund shall be used for such construction and reconstruction of farm-to-market roads and bridges as is necessary to accomplish a uniformity of relief for the improvement of such roads and bridges among the counties of the state. Each county seeking relief from the equalization farm-to-market road fund shall make application to the state highway commission on or before July 1 each year, showing cause for need of such relief. The state highway commission shall take into consideration all costs such as the cost of grading, bridges, culverts, drainage, surface material and labor required to complete said farm-to-market roads in all counties. In allotting equalization farm-to-market road funds among counties, the state highway commission shall also take into consideration existing unobligated credit balances in each county's farm-to-market road fund at the time such allotments are made. Allotments of equalization road funds shall be made to the counties in the ratio that each county's requirements bears to the requirements of the state as a whole. The state highway commission shall make such allotments as are required to carry out the objects of this section."

Section 312.5 above prescribes the manner of dividing road use tax funds credited to the farm-to-market road fund. The two divisions set out therein are the area allotment fund and the equalization fund. Area allotment funds ". . . shall be among all the counties of the State in the ratio that the area of each county bears to the total area of the whole state." Insofar as area funds are concerned the Legislature has provided an exact and precise formula for their distribution.

On equalization allotments, Section 312.5, reads in part:

"The equalization farm-to-market road fund shall be used for such construction and reconstruction of farm-to-market roads and bridges as

is necessary to accomplish a uniformity of relief for the improvement of such roads and bridges among the counties of the state," and

"Allotments of equalization road funds shall be made to the counties in the ratio that each county's requirements bears to the requirements of the state as a whole. The state highway commission shall make such allotments as are required to carry out the objects of this section."

Whereas allocation of area allotments is reduced to an exact and precise formula by which distribution is made "among all the counties", the allocation of equalization allotments "to the counties" placed a duty upon the Highway Commission to develop a method under which to make distribution, and furthermore provided that the Iowa State Highway Commission ". . . shall take into consideration all costs such as the cost of grading, bridges, culverts, drainage, surface material and labor required to complete said farm-to-market roads in all counties", and ". . . shall also take into consideration existing unobligated credit balances in each county's farm-to-market road funds at the time such allotments are made." Pursuant to that direction the Highway Commission developed a formula under which the forty percent equalization fund is allocated to the counties based on the estimate of the cost of completing the farm-to-market system of the state to a gravel surface using as a common denominator in its formula the existing mileage in that system as of January 1, 1954.

To equalize is ". . . to make equal, to cause or to correspond, or be like in amount or degree, as compared with something". Words and Phrases, Vol. 14A, pp. 439-441 and cases cited therein. If the State Highway Commission is to "equalize" the disbursement of funds in the ratio that each county's requirements bears to the requirements of the state as a whole there must be a common starting point. The common starting point or the common denominator used by the Highway Commission is the existing mileage in farm-to-market system as of Jan. 1, 1954. If the Highway Commission is taking into consideration ". . . all costs such as the cost of grading, bridges, culverts, drainage, surface material and labor required to complete said farm-to-market roads in all counties", and the ". . . existing unobligated credit balances in each county's farm-to-market road funds at the time such allotments are made", and is providing a uniformity of relief among the counties, then its formula for allotting equalization funds, using as a common base for distribution the mileage existing in the farm-to-market system on Jan. 1, 1954, cannot be considered as unreasonable or arbitrary. Section 312.5 gives the Highway Commission some discretionary power in making a determination of the allocation of equalization funds and the courts won't interfere with that discretionary power unless abused. Furthermore, the language of Section 312.5 indicates that there is no automatic right or entitlement to any portion of the equalization fund by a county.

The 1956 Report of the Attorney General recognizes on page 166 that ". . . the use of the equalization farm-to-market fund is not limited to the original farm-to-market system . . . but may be expended on additions to the farm-to-market system since the enactment of that law", and under Section 310.10, Code of 1958, additional mileage may be added to the

farm-to-market system of a county "when all farm-to-market roads in any county have been built to established grade, bridged and surfaced in a manner suited to the traffic thereon, . . ." Whereas mileage may be added, and equalization, if received, may be expended on additions to the system, there is nothing mandatory in the language of the sections above that equalization funds "must" be allotted.

In summary, and in answer to your question, please be advised:

1. The use of farm-to-market equalization funds may be expended on additions to the farm-to-market system since the enactment of that law. (See 1956 Report of Attorney General, pages 164-166.)

2. The Highway Commission, distributing equalization farm-to-market funds under Section 312.5 of the 1958 Code, is not required to take into consideration the additional mileage to county A's farm-to-market system in the allotment of equalization funds.

14.4

Appraisers' fees — Condemnation of land for road purposes — Allowable fees. (Abels to McKeon, Asst. Polk Co. Atty., 5/2/57) #57-5-3

Compensation of appraisers appointed under §306.22, Code 1954, is governed by §79.2, Code 1954.

14.5

Billboards and Signs — Obstruction of view — Authority of Highway Commission or Board of Supervisors to remove from right-of-way — Abatement as public nuisance under certain conditions. (Lyman to Cranberg, Reg. & Trib. Editorial Staff, 5/8/57) #57-5-10

Billboards and advertising signs within the boundary lines of public highways are prohibited and may be removed by highway commission or board of supervisors as to roads under their respective jurisdictions. Billboards and advertising signs, whether on public or private property, which so obstruct the view of any portion of a public highway or railroad track as to render dangerous the use of a public highway are public nuisances and may be abated as such. (§§319.10 through 319.13 and 321.259, Code 1954, considered.)

14.6

Board of Supervisors — Authority to issue permits to enter upon private land prior to condemnation for highway. (Strauss to Lewis, Ass't Scott Co. Atty., 7/11/57) #57-7-10

14.7

Board of Supervisors can prohibit operation of trucks or other commercial vehicles on secondary roads for a period exceeding 90 days under Section 321.473, Code of 1958. 2. Board of Supervisors may not close secondary road except by reason of deterioration or climatic conditions as set out in Section 321.471, Code of 1958. (Lyman and McKinney to Kellogg, Harrison Co. Atty., 6/3/58) #58-6-8

14.8

Board of Supervisors — Highways, removal of obstructions. (Lyman and McKinney to Buchheit, Fayette Co. Atty., 12/31/57) #57-12-4

14.9

Board of Supervisors — Maintenance garage, power to condemn land for. (Lyman and McKinney to Hudson, Pocahontas Co. Atty., 10/31/57) #57-10-42

14.10

Board of Supervisors may not abandon a county road without observance of proper legal formalities. (Lyman and Flores to Norelius, Crawford Co. Atty., 2/5/58) #58-2-10

14.11

Board of Supervisors may not make gift of obsolete bridge to landowner but may sell it at a fair valuation if no longer needed for county purposes; county boards to supervise any installation of bridge over drainage ditch to protect efficiency of ditch; no expense of installation of a private bridge should be borne by drainage district unless it is as a part of a general settlement of damage due to establishment or enlargement of such district. (Lyman to Gray, Calhoun Co. Atty., 8/13/58) #58-8-9

14.12

Board of Supervisors may pass resolution extending secondary roads into cities and towns of less than 2,500 population. (Lyman and McKinney to Nelson, Story Co. Atty., 2/10/58) #58-2-15

14.13

Board of Supervisors — Power to establish speed zones near public schools. (Lyman to Kellogg, Harrison Co. Atty., 9/5/57) #57-9-13

14.14

Board of Supervisors — Redesignation of County trunk roads. (Lyman to Bruner, Carroll Co. Atty., 10/21/57) #57-10-30

14.15

Board of Supervisors — Responsibility of Board to maintain established road — Action by private individual to compel maintenance of road — Vacation of county secondary road. (Flores, Gen. Counsel, Highway Comm., to McDonald, Cherokee Co. Atty., 6/14/57) #57-6-22

(1) Board of Supervisors have positive duty to maintain established county road, but degree of maintenance depends somewhat on amount of use of road by the public. (2) Private individuals can probably bring an action in mandamus to compel maintenance of a road which is part of the county road system. (3) Board of Supervisors may vacate any county secondary road after giving due notice and holding public hearings as provided in Chap. 306, Code 1954.

14.16

Board of Supervisors — Secondary roads; tax levy for maintenance, con-

struction, and farm-to-market roads. (Strauss to Lyman, Spec. Ass't Atty. Gen. Highway Comm., 7/23/57) #57-7-28

14.17

Board of Supervisors — Authority of board to share in construction costs of bridge in city controlling own bridge levy. (Lyman to Te Paske, Sioux Co. Atty., 6/4/57) #57-6-8

Board of supervisors may share in the construction costs of bridges in cities and towns having a population of 8000 or less, though having no statutory duty to construct a bridge located on a city street which is neither a primary highway nor a secondary road.

14.18

Bridges — Approaches as part of bridge, a fact question — Duty and authority to maintain and repair — City or county obligation. (Pruss, Gen. Counsel, Highway Comm., to Mather, Sac Co. Atty., 6/12/57) #57-6-19

Question of whether an approach is a part of a bridge is a fact question (citing Iowa cases), the determination of which is generally made by the governing body expending public funds for constructing or repairing the approach. Liability for negligence in construction or maintenance of bridges within cities and towns rests upon the municipality (citing Iowa cases). After a county has erected a bridge inside city limits, bridge becomes a city street and city alone is required to keep same in reasonable and ordinary good care (citing Iowa cases and authority). Minor repairs and maintenance of approaches should be taken care of by cities and towns. If bridge located on a farm to market road, may be possible to use farm to market funds for major repairs or construction work.

14.19

Cattleways under highways (McKinney, Gnl. Cnsl. Hwy. Comm. to Scholz, Mahaska Co. Atty., 10/3/57) #57-10-7

14.20

County bridges — Liability of county for damages resulting from use of defective bridge. (Lyman to Winkel, Kossuth Co. Atty., 10/8/57) #57-10-14

14.21

County roads — Establishment and width of roadway. (Flores, Gen. Counsel, State Highway Commission, to Powers, Appanoose Co. Atty., 4/29/57) #57-4-37

A county road established in 1858 and laid out without mention of its width assumed a width of 66 feet throughout its length under Chap. 38, §515, Code 1851. The later platting of the road as a forty-foot street instead of a sixty-six foot highway through a town would not provide anyone with a valid claim.

14.22

Culverts on highways within cities and towns that do maintain their own bridge levies must be paid for by the city and do not come under the provisions of Section 309.3. (Lyman to Goodenberger, Madison Co. Atty., 7/30/58) #58-7-1

14.23

Farm Lanes — Cannot be absorbed into the county road system. (Lyman and McKinney to Martin, Keokuk Co. Atty., 2/28/58) #58-2-16

14.24

Farm lanes and private roads do not come under code chapter 311. (2) The county need not provide a driveway for every lot in a subdivision. (Lyman to Meyer, Winneshiek Co. Atty., 10/31/58) #58-11-15

14.25

Highway Commission publications — Sale or free distribution. (Strauss to Lyman, Spcl. Ass't Atty. Gnl., 8/22/57) #57-8-39

14.26

Reimbursement to utilities for relocation of facilities on Federal Aid highway projects — (Swanson to St. Rep. Vance, 3/14/57) #57-3-25

House File 230, which provides for the reimbursement to utilities for nonbetterment costs associated with relocation of facilities, in its present form covers not only the interstate highway system but also any Federal Aid project there might be in the state, and state might deprive itself of rights under the Federal Highway Act of 1956 if broad language of present bill is retained and enacted into law. Amendment to language of bill suggested to meet present objections.

14.27

Repealing effect of proposed amendatory legislation on previously passed legislation and existing statutes. (Strauss to State Senator Schroeder, 4/15/57) #57-4-18

The rule of law with respect to repeal of amendments to an original act as affected by the repeal of the original act, is that repeal of the original act repeals those provisions of the original act which re-enacted an amendatory item. Provisions added by the amendatory act not complete within themselves, that is, those that must be read together with re-enacted provisions of the original act in order to be understood or enforced are also held repealed. (Citing: *Sutherland, Statutory Construction*, 3rd Ed., §1939).

14.28

Institutional Roads — The Board of Control is under no legal obligation to direct the maintenance, repair or improvement of bridges unless the same are within or adjacent to the separate road district for each state institution as provided in Sec. 308.1, 1958 Code of Iowa. (Pesch to Hansen, Bd. of Control, 12/31/58) #58-12-1

14.29

Park Roads — Cost of graveling county road adjacent to state-owned hunting lands. (Gritton to Sayre, St. Cons. Comm., 7/13/57) #57-7-15

14.30

Parks, wayside — Highway Commission may accept gifts of land for wayside parks under authority conferred by Chap. 150, Acts of the 56th G.A. Grantee in deed should be State of Iowa for the benefit of the Highway Commission. Gifts with conditions attached may not be accepted. A gift of real estate should not be accepted without prior investigation of title and encumbrances and liens, hence, abstract of title should be provided. (Strauss to Cunningham, Secy., Executive Council, 6/3/57) #57-6-1

14.31

Secondary Road Budget — 57th G. A., *Ch. 141.* Discussion of "Road Clearing fund" (Lyman to Morrison, Washington Co. Atty., 10/21/57) #57-10-31

14.32

School Roads — Are secondary roads under jurisdiction of Board of Supervisors and revert to owner of tract from which taken upon abandonment. (Lyman and Thomson to Leir, Scott Co. Atty., 4/9/58) #58-4-36

14.33

Secondary Roads — Removal of excess dirt from ditches on county roads — Use or disposal thereof. (McKinney, Gen. Counsel, Highway Comm. to Mossman, Benton Co. Atty., 9/23/57) #57-9-38

14.34

Secondary Roads — The Board of Supervisors have only such power over the highways of the state as is delegated by the legislature and the power to enter into an agreement with a privately owned company to remove rock located under a secondary road and assume other powers with respect thereto is in excess of the power delegated (Strauss to Williamson, Adair Co. Atty., 8/18/58) #58-8-11

14.35

Secondary Roads — Vacation: Boards of supervisors may not abandon a county road without observance of proper legal formalities. (Lyman and Flores to Norelius, Crawford Co. Atty., 2/5/58) #58-2-10

14.36

Secondary Roads — Contracts exceeding $5,000: Must be advertised and public letting held thereon, including granular materials to be used therein. (Lyman to Pappas, Cerro Gordo Co. Atty., 3/17/58) #58-3-23

14.37

Secondary Roads — Roadways that reach the status of public roads can be absorbed by the county into the county road system. (Lyman and McKinney to Martin, Keokuk Co. Atty., 3/28/58) #58-3-26

CHAPTER 15

INSTITUTIONS

STAFF OPINIONS

LETTER OPINIONS

15.1 May 31, 1957

MENTAL HEALTH INSTITUTES: No formal hearing is required for issuance of an order of commitment by a county insanity commission where a voluntarily-admitted patient has been found insane after observation and examination by the institution superintendent under Section 229.1, Code 1954.

Mr. Robert W. Burdette, Decatur County Attorney: Receipt is acknowledged of your letter of April 29th as follows:

"Code Section 229.1, 1954 Code of Iowa, makes provision for temporary admittance to a state mental health institution on the recommendation of two physicians. Then a further provision of the section provides that a superintendent of such an institution may recommend to the county Insanity Commission that a permanent commitment to the institution be made. However, the Code Section fails to set out the procedure under which the Commission would make such a commitment.

"My question is, 'Is a formal hearing before the county Insanity Commission required to make such a commitment, or, may the Commission make the commitment without formal hearing, appointment of an attorney and the other requirements of a formal hearing required by the Code for an involuntary commitment?'

"We have been informally advised that both methods are being practiced by various counties and so far as we know, there is no Supreme Court case or other authority determining this particular question."

Section 229.1, Code 1954, to which your letter refers provides in pertinent part as follows:

" * * * * *

"Provided, however, that application for admission may be made on behalf of a person by his attending physician and another physician

experienced in the treatment of mental diseases, for a temporary admission for observation, examination, diagnosis and treatment, which admission shall not be for a period of more than thirty days *and only after the written consent of said person.* The application shall be made to the superintendent of the state hospital in the district in which the county of his residence is located. Said application shall not be accepted by the superintendent if by doing so it will result in an over-crowded condition or if adequate facilities are not available. *At the expiration of the admission period, the superintendent shall make a certified report of the findings as to the mental illness of said applicant,* one copy of which shall be sent to the attending physician filing the application and, *if said report finds that said person is insane and in need of treatment, a copy shall be sent to the commission of insanity* of the county in which the applicant is a resident.

"If the certification of the patient's condition to his attending physician by the hospital superintendent states that a further period of observation and treatment is indicated without commitment of the person as insane, the attending physician may authorize a further period of such observation and treatment as recommended. During such extended period of observation, if the patient is not discharged a recommendation for commitment as insane may be filed with the commission. *If the commission does not issue a commitment as insane after recommendation by the superintendent within five days following receipt of such recommendation,* the superintendent may, upon authority of the board of control, discharge such patient from the hospital, and the hospital and board of control, after discharge of such patient, shall be absolved of further responsibility in connection with the case until such time as the same person may be committed."

" * * * * * * " (Emphasis ours)

It should be noted that the temporary admission is voluntary as evidenced by written consent. Where such consent is not given, the procedure for commitment is initiated by information and the commission conducts a hearing and considers evidence of insanity as provided in Sections 229.2 to 229.16. However, it should be noted that, even under such involuntary procedure, the ultimate determination on the question of sanity is made at a mental health institute. See Section 229.9. Thus, the ultimate test for sanity whether submitted to voluntarily under Section 229.1 or involuntarily under 229.9 is observation at a mental health institute resulting in the recommendation of the superintendent thereof. In neither case can the person alleged to be insane be *committed* by the commission prior to such observation and recommendation.

It follows that the formal hearing procedure before the commission exists for the purpose of justifying detention of an allegedly insane person at a mental health institute for the requisite period of examination rather than for the purpose of determining whether such person should be "committed". In other words, the hearing is the "due process" justifying deprivation of liberty for the period necessary to scientifically determine whether the allegedly insane person is, in fact, insane. However, where the person *is willing* to undergo the examination of his own volition, no need for such justification appears to exist, hence the formal hearing procedure seems superfluous.

It is, therefore, our opinion that no formal hearing is required for commitment of one who has been found in fact to be insane in the course

of voluntary examination under Section 229.1 and that the county insanity commission may order the commitment of such person on the basis of the prescribed observation and examination and the superintendent's recommendation made pursuant thereto without formal hearing.

15.2 November 13, 1958

CRIMINAL LAW: SEXUAL PSYCHOPATHS: A person committed to a state mental institution as a criminal psychopath must be detained therein until released in accordance with §225A.12, Code of Iowa, 1958.

Board of Control of State Institutions, Attention: Mr. J. O. Cromwell, M. D., Director of Mental Institutions: This will acknowledge receipt of your letter under date of November 6, 1958, set out as follows:

"A patient named, George Alfred Loehr, was admitted to the Mental Health Institute at Independence, September 23, 1957, under the provisions of the Criminal Sexual Psychopathic Law, Chapter 225A.

"It seems that the court acted in accordance with paragraph 225A.11. He has been under treatment and apparently shown no improvement. The Medical Staff has indicated that it appears the release of Mr. Loehr is incompatible with the welfare of society.

"Mr. Loehr now raises the question, through his Attorney, that he be returned to the court although the Medical Staff reports no improvement. Can the person be returned to court and tried on the criminal charges pending against him or must such person remain in the hospital indefinitely; perhaps the balance of his life, although he has never been tried for his alleged criminal act? In this particular case there is some question as to whether the man has actually committed the criminal act. While the doctors find evidence for such a possibility they also doubt the actual event that was alleged to have occurred.

"From the Medical point of view, he is considered to be an inadequate personality who will continue to make a poor adjustment and probably will have an occasional "run-in" with the law. He is not insane. Apparently, the doctors find in their examination, of him, that he does have sexual tendencies which might legally be considered to come within the meaning of the Criminal Psychopathic Law. Of course, they have no clear cut evidence that he did perform the criminal act for which he was committed to the hospital, even though the sheriff and witnesses claim positive evidence which they would give if case came to trial.

"The Medical Staff would like to discharge this man from the Hospital on the grounds that they cannot help him with further treatment. They consider him relatively harmless but potentially capable of committing harmful act. They would recommend that he be tried for his Criminal Act and dealt with accordingly. Can this be done or must we keep him in the State Hospital indefinitely?"

Section 225A.11, Code of Iowa, 1958, provides that:

"If the person is found to be criminal sexual psychopath the court may commit him to a state hospital for the insane, where he shall be detained and treated until released in accordance with the provisions of this chapter or may order such person to be tried upon the criminal charges against him, as the interests of substantial justice may require. The hospital staff shall make periodic examinations of any such person committed,

with the view of determining the progress of treatment, and shall report to the court not less than once a year."

Section 225A.12, Code of Iowa, 1958, provides that:

"At any time after commitment, an application in writing setting forth facts showing that such criminal psychopath has improved to the extent that his release will not be incompatible with the welfare of society may be filed with the committing court. Whereupon the court shall issue an order which will return the person to the jurisdiction of said court for a hearing. This hearing shall in all respects be like the original hearing to determine the mental condition of the defendant. Following such hearing, the court shall issue an order which shall cause the defendant either to be (1) placed on probation for a minimum of three years, or (2) returned to the hospital, provided that upon the expiration of said probationary period the said person may be discharged."

Fahr, *Iowa's New Sexual Psychopath Law*, 41 Iowa Law Review 523, loc. cit. 553, states:

"One of the largest problems is that of release. If it be conceded that the current state of medical science cannot promise 'cures', though it may selectively promise improvement, there is a nice question of when these 'sexual psychopaths' may be returned to society. * * * * * * * * * * * . In Iowa the new law specifies that a rehearing shall be held, in all respects like the original hearing, in the court of original commitment, when a written application is presented to that court 'setting forth facts showing that the criminal psychopath has improved to the extent that his release will not be incompatible with the welfare of society.' This is a very loose standard indeed, and far from requiring a 'cure,' as release of two-thirds of those committed abundantly proves. * * * * * * * * * * * * * * * * * ."

In your letter you state that "it seems that the court acted in accordance with paragraph 225A.11", and for purposes of this opinion it will be assumed that the court committed him to the Mental Health Institute at Independence, Iowa. Having been thus committed "he shall be detained and treated until released in accordance with the provisions of this chapter (225A)," Section 225A.11, supra.

The fact that "the Medical Staff would like to discharge this man from the Hospital on the grounds that they cannot help him with further treatment" is not a sufficient basis for filing an application to the committing court for release for hearing on the matter. The statute is clear in that the application must set "forth facts showing that such criminal psychopath has improved to the extent that his release will not be incompatible with the welfare of society", Section 225A.12, supra.

In view of the foregoing, it is my considered opinion that before a criminal psychopath may be returned to the committing court for a hearing, said person having been committed to a state hospital for the insane, an application must be filed with said court setting out sufficient facts to show that said person has improved to such an extent that said person's release will in no wise be incompatible with the welfare of society.

You additionally ask whether the Medical Staff can recommend that this man be tried for his criminal act and dealt with accordingly? Commitment as a criminal psychopath to a state mental health institute was

made, in this case, by the court in lieu of the court ordering said person to be tried upon the criminal charges against him. Such a recommendation by the Medical Staff would be of no avail since once committed, this person shall be there detained and treated until released in accord with the provisions of Section 225A.12, supra, as provided in Section 225A.11, supra.

15.3 May 1, 1958

IOWA SOLDIERS HOME — Contribution of members toward own support and maintenance.

A member of the Iowa Soldiers Home who receives a United States Government pension and a railroad retirement pension shall contribute not more than one-half thereof toward his support and maintenance inasmuch as Sections 219.14 and 219.15, 1958 Code of Iowa, were enacted at the same legislative session and must be construed together.

Board of Control of State Institutions, Attention: Mr. George W. Callenius: In the correspondence referred to this office by your letter of April 1, 1958, the following fact situation is posed:

A member of the Iowa Soldiers Home at Marshalltown, Iowa, receives a United States Government pension of $135.45 per month, and a railroad retirement payment of $81.00 per month. His wife has no independent income and, as stipulated, is dependent upon her husband's pension and retirement benefits. The wife does not reside in the Iowa Soldiers Home.

On March 1, 1958, $94.95 was paid toward the support of the husband in the Soldiers Home for the month of March. An additional $81.00 was requested.

Under Section 219.14, 1958 Code of Iowa, it is provided that a member of this Home shall contribute from a United States Government pension, or any other source of income, toward his support in an amount determined by the Board of Control but not to exceed the actual cost thereof. However, according to Section 219.15, 1958 Code of Iowa, a member of such Home receiving a pension or compensation who has a dependent wife shall deposit with the commandant one-half the amount thereof which is then sent to the dependent wife.

In view of these two sections how much of the pension money received by the member in the Iowa Soldiers Home is to be contributed toward his support and maintenance. These two sections referred to above are stated below:

"219.14 Contributing to own support. Every member of the home who receives pension, compensation or gratuity from the United States Government, or income from any source of more than twenty dollars per month shall contribute to his or her maintenance or support while a member of the home. The amount of such contribution shall be determined by the board of control but in no case to exceed the actual cost of keeping and maintaining such person in said home. The board may require every member of the home to render such assistance in the care of the home and grounds as the physical condition of any such member will permit."

"219.15 Payment to dependents. Each member of the home who receives a pension or compensation and who has a dependent wife or minor

children shall deposit with the commandant forthwith on receipt of his pension or compensation check one-half of the amount thereof, which shall be sent at once to the wife if she be dependent upon her own labor or others for support, or, if there be no wife, to the guardian of the minor children if dependent upon others for support. The commandant, if satisfied that the wife has deserted her husband, or is of bad character, or is not dependent upon others for support may pay the money deposited as herein provided to the guardian of the dependent minor children."

Code provisions corresponding to sections 219.14 and 219.15, 1958 Code of Iowa, were first enacted in 1913. At that time the counterpart of Section 219.14, 1958 Code of Iowa, provided that a United States Government pension of a member in the Iowa Soldiers Home was *not* to be used for support and maintenance of such member. The provision corresponding to Section 219.15, 1958 Code of Iowa, stated that one-half the pension of a member of the Iowa Soldiers Home must be deposited with the commandant who in turn would forward such amount to the dependent wife.

No statutory revision pertaining to the question herein considered occurred until 1939 when Chapter 94, Forty-Eighth General Assembly, was enacted. That enactment expressly repealed the prior existing chapter relating to the Iowa Soldiers Home. In the new enactment, as Section 15, it was provided that the recipient of a United States Government pension shall contribute to his support and maintenance as a member of the Iowa Soldiers Home in an amount fixed by the Board of Control which was not to exceed the actual cost thereof.

The effect of this repeal and enactment in lieu thereof is that provisions corresponding to sections 219.14 and 219.15, 1958 Code of Iowa, in their present form and meaning, were enacted at the same session of the legislature. The general rule of statutory construction is that statutes in pari materia should be construed together. This applies with peculiar force to statutes passed at the same legislative session. *Iowa Farm Serum Co. v. Board of Pharmacy Examiners*, 240 Iowa 734, 35 N.W. 2d 848; *Iowa Motor Vehicle Ass'n v. Board of Railroad Commissioners*, 207 Iowa 461, 221 N.W. 364; *McKinney v. McClure*, 206 Iowa 285, 220 N.W. 354.

To harmonize or give effect to both Section 219.14 and Section 219.15, 1958 Code of Iowa, the conclusion is that the contribution of a member of the Iowa Soldiers Home toward his support is to be that fixed by the Board of Control which shall not exceed the actual cost. In addition, it shall not exceed one-half the pension or compensation received by such member since one-half thereof must be deposited with the commandant for the member's dependent wife.

In the fact situation presented, the total of the pensions received by the member is two hundred sixteen dollars and forty-five cents ($216.45) per month. Of this amount one-half is subject to contribution for the purpose of support and maintenance of the member. Therefore, the contribution shall not exceed one hundred eight dollars and twenty-three cents ($108.23).

15.4 February 18, 1957

Legal settlement — not acquired by continuously residing in county for period of two years when said period was interrupted by receipt of county poor support.

Mr. A. F. Draheim, Jr., County Attorney, Wright County: In your letter of January 21, 1957, you raise a question concerning a legal settlement as between two counties. You inquire as to which county should be liable to the State for the support of a patient in the State Sanitorium in a situation wherein the facts are as follows:

"Mr. 'X' moved to an acreage which he owns in 'A' County in March, 1954. He formerly lived in 'B' County and had received poor support under Chapter 252, 1954 Code, from 'B' County.

" 'B' County continued poor support payments to Mr. 'X' after he had moved to 'A' County. You advise the records indicate 'B' County granted poor support to Mr. 'X' on June 17, 1954, August 17, 1954, September 17, 1954, and two weeks hospitalization in August, 1956 —

"Further, 'B' County requested 'A' County in August, 1956 to proceed under Chapter 255, Code 1954, to arrange for University Hospital treatment for Mr. 'X' which 'A' County obliged.

"Subsequently, Mr. 'X' was transferred from the University Hospital to the Oakdale Sanatorium."

Section 252.16, Subsection 2, 1954 Code of Iowa, provides:

"Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of two years without being warned to depart as provided in this chapter."

The foregoing subsection, however, is qualified by Section 252.16, Subsection 3, 1954 Code of Iowa, which states:

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

The dictates of the legislature are specific and clear. Legal settlement cannot be obtained, even though no notice to depart has been served, when one continues to receive county poor support during the two year period of residence which by the statutes, is a prerequisite to acquiring a new legal settlement. See Audubon County v. Vogessor, 1940, 228 Iowa 281; 1942 Report of Attorney General, page 37; 1938 Report of Attorney General, page 869, at notes 10 & 11, pp. 877-879; also see 1954 Report of Attorney General, page 178.

Accordingly, under the fact circumstances herein presented, it is our opinion that "B" County is the statutory legal settlement of Mr. "X". At no time subsequent to his taking up a new residence in "A" County in March, 1954, did he ever reside in said county two years without "being supported by public funds."

Therefore, it is our opinion that "B" County remains liable for Mr. "X's" support at the State Sanatorium.

Section 252.17, 1954 Code, provides:

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

15.5

Adoption of minor inmate — Where adoption is annulled in proceedings brought under Section 600.7, Code 1954, and child is returned under order of court to the custody of the State Board of Control, all legal relations incident to such adoption are destroyed *ab initio* with the result that the child's legal settlement for purposes of maintenance at a state institution is the same as though the "adoption" had never taken place. (Abels to Watts, Adams Co. Atty., 1/16/57) #57-1-21

15.6

Mentally retarded children — Voluntary admission to State Health Institute — Responsibility for payment of costs — Lien for assistance furnished. (Abels to Holley, Butler Co. Atty., Allison 2/20/57) #57-2-23

(1) Mentally retarded children being maintained and instructed in school at a state mental institute are not entitled to be supported as "handicapped children" under the provisions of Chapter 281, Code 1954, as amended. (2) Support of such children, when admitted as voluntary patients, is governed by sections 229.41 and 229.42, Code 1954. (3) Under the provisions of Section 230.25, Code 1954, no lien of assistance attaches to parents' property for such support.

15.7

Children born in institution — Legitimacy: Where husband and wife are, respectively, inmates of the State Penitentiary and the Women's Reformatory, and the wife gives birth to a child, such child is presumed to be legitimate, and such presumption will remain until the contrary is properly proved in proceedings before a court having jurisdiction of the parties. (Abels to Lappen, Bd. of Control, 1/16/57) #57-1-19

15.8

Compensation of sheriff for conveying persons to and from state institutions. (Abels to Parsons, Dep. Clerk, Bd. of Control, 5/31/57) #57-5-40

Reference made to 1936 Report of Attorney General, page 372, which comprehensively covers the matter of expenses allowable to a sheriff for conveying persons to and from state institutions. It is noted that statutory mileage rate payable has been increased since date of quoted opinion to present rate of 9¢ per mile.

15.9

Death Certificates — Inmates of State Institutions. May not be presigned by Superintendent. (Abels to Zimmerer, Comm. Pub. Health, 9/19/57) #57-9-30

15.10

Glenwood — Board of Control has no authority to send patients outside

Iowa for medical treatment. (Abels to Hansen, Bd. of Control, 12/19/57) #57-12-20

15.11

Iowa Annie Wittenmyer Home — Liability for support of children admitted or committed to Home. (Abels to Watts, Adams Co. Atty., 6/3/57) #57-6-6

The word "its", as used in §244.14, Code 1954, in connection with a county's liability for destitute children admitted or committed to the Iowa Annie Wittenmyer Home, refers to legal settlement rather than to residence.

15.12

Inebriates and Drug Addicts — Lien for support at state institution not automatic. (Abels to Hindt, Lyon Co. Atty., 11/20/57) #57-11-23

15.13

Insane Persons — Support by adult child — Action to compel — Liability under both common law and statutes — (Strauss to Williamson, Co. Atty., Greenfield, Iowa, 2/13/57) #57-2-7

The adult son of an insane patient committed to a state hospital for the insane may be held liable for the support and maintenance of such person in an ordinary action at law without the joinder of other adult children of such insane person in the proceedings. The adult child of a parent who is unable to support herself because of mental and physical disabilities is made liable for her support under common law as well as by chapter 252, Code 1954. However, recovery against the adult child under the statutes (chapter 252) is limited to expenses and charges incurred subsequent to July 4, 1939.

15.14

Insane Persons — Facilities for psychiatric examination and treatment. Expenditures from county fund for insane. (Abels to Nelson, Story Co. Atty., 8/22/57) #57-8-34

15.15

Institutional lien. Under section 230.25 attaches to all property of insane person but not to interest of contract seller of real estate. Release of lien by supervisors. (Pruss to Buchheit, Fayette Co. Atty., 11/12/57) #57-11-15

15.16

Leave of absence for person committed to Woodward State Hospital — To be determined as provided in Sec. 222.36, 1958 Code of Iowa. (Pesch to Bd. of Control, 11/25/58) #58-12-10

15.17

Legal Settlement — Employee at institution — Change of status from patient to employee to patient. No change in settlement. (Abels to Meyer, Winneshiek Co. Atty., 1/2/58) #57-12-1

15.18

Legal Settlement of Institution inmate married on convalescent leave. (Faulkner to Parsons, Dep. Clerk, Bd. of Control, 5/6/58) #58-5-5

15.19

Legal Settlement — State Institution Inmate — Where finding as to settlement has stood unchallenged for forty years no occasion for present inquiry exists. (Abels to Lappen, Chm. Bd. of Control, 12/30/57) #57-12-6

15.20

Liens for care of inmates at Woodward State Hospital — Age bracket of 21 to 31 years of age. (Erbe to State Rep. Nielsen, 3/1/57) #57-3-1

The charge or lien imposed upon the property of any patient over twenty-one years of age and under thirty-one years of age or upon the property of persons legally bound for the support of any such patient for the cost of his support and treatment at the Woodward State Hospital is limited to seventy-five percent (75%) of the cost thereof. (Citing Ch. 120, Sec. 2, Acts of the 56th G. A.)

15.21

Liens for care at Woodward — Chapter 120, Acts 56th General Assembly, contains no language purporting to give it retroactive effect. And it contains no express language cancelling, forgiving or wiping out any charges or liens for support and treatment which existed prior to its effective date, July 4, 1955. (Strauss to Poston, Co. Atty., Corydon, Iowa, 2/11/57) #57-2-4

15.22

Liens for care of feeble-minded — Section 223.16, Code 1954, as amended by 56th G.A., insofar as the exemption from lien therein provided for is concerned, is not retroactive. (Strauss to Garretson, Henry Co. Atty., 11/10/58) #58-11-14

15.23

Men's Reformatory — County jail prisoner incarcerated in reformatory for safe-keeping not entitled to time off for good behavior, or transportation, clothing and money on discharge. (Pesch to Bd. of Control, 7/9/58) #58-7-19

15.24

Mental Health Institutes — Voluntary admission — When costs paid by county — No compensation to comm'rs. (Abels to Remley, Jones Co. Atty., 9/4/57) #57-9-10

15.25

Oakdale — Liability of county of legal settlement for care of tuberculosis patients under "Certificate of Free Treatment". (Erbe to Dancer, Secretary Finance Committee, St. Bd. of Regents, 5/9/57) #57-5-11

Indigent patients admitted under "certificate of free treatment" remain the liability of the county of legal settlement until discharged as free from communicable tuberculosis. There is not statutory authority for the "revocation" of such certificate.

15.26

Oakdale Sanatorium — The superintendent of the Oakdale Sanatorium may, under Sec. 254.7, 1958 Code of Iowa, have a tuberculosis patient segregated and forcibly detained if such patient has violated state law (see Sections 139.31 and 139.32), a department of health rule, or an institution rule by filing a complaint and obtaining a court order authorizing such action. (Faulkner to Dancer, Secy., St. Bd. of Regents, 11/19/58) #58-11-5

15.27

Prison Industries — 1. Salaries, travel allowance, and maintenance equipment and construction of buildings payable from revolving fund. 2. Fund from which salaries are paid depends on whether employee has general status as board of control or institution employee or is exclusively employed by the industries. (Faulkner to Hansen, Bd. of Control, 8/5/58) #58-8-17

15.28

Soldiers Home — Use of U. S. Government pension for support and maintenance at Home. (Faulkner to Board of Control, 4/9/58) #58-4-61

15.29

Soldiers' Home Common-law Marriage as Basis for Admission — 1. Common-law marriage exists and is recognized in the State of Iowa. 2. Burden of proving the existence of a common-law marriage is upon the parties seeking admission to the Iowa Soldiers' Home. 3. If the burden is sustained and all other conditions precedent to admission have been met a common-law marriage will qualify an applicant(s) under Sec. 219.4, 1958 Code of Iowa. 4. The determination of eligibility to the Iowa Soldiers' Home is for the Board of Control. (Pesch to Callenius, Bd. of Control, 10/27/58) #58-10-6

15.30

I.S.C. — Tort liability of State College and its employees for publication of information on pest and weed control discussed. (Erbe to Dancer, Secretary, Bd. of Regents, 5/7/57) #57-5-5

Iowa State College is not a corporate body, and being a department or arm of a sovereign state is entitled to governmental immunity from suit and tort liability arising from its research and publications on pesticide chemicals and relating to pest and weed control. In order to hold one of its employees liable in tort, it would be necessary for a claimant to prove some act of personal negligence by such employee was the legal cause and cause in fact of the alleged injury.

15.31

Sterilization of Inmates — No fee is payable for sterilization performed

under Code Chapter 145 by staff surgeon at Woodward State Hospital. (Abels to Kain, Secy. Bd. of Eugenics, 8/8/58) #58-8-28

15.32

Support of feeble-minded — Where board of control or its superintendent indicated to a county in 1949 that maintenance of inmate at Glenwood was covered by his earnings, no claim for past maintenance is now collectible from such county. (Abels to Hansen, Bd. of Control, 12/30/57) #57-12-3

15.33

Support of feeble-minded — Liability of County of legal settlement. (Abels to Lewis, Ass't Scott Co. Atty., 9/24/57) #57-9-41

15.34

Transfer of inmates — Juvenile Home to Glenwood. (Faulkner to Parsons, Dep. Clerk, Bd. of Control, 5/8/58) #58-5-6

15.35

Tuition for inmate of state institution — The Board of Control has no legal obligation to pay tuition charges for education in a public school of a person committed to a mental health institute. (Pesch to Bd. of Control, 11/13/58) #58-11-7

15.36

Wages of inmates — What is "practicable" or "proper" under section 218.42, Code of Iowa is a question of fact, not law. (Abels to Hansen, Bd. of Control, 12/18/57) #57-12-18

15.37

Woman's Reformatory — A female committed to the women's Reformatory for an offense less than felony does not lose rights of citizenship. (Pesch to Lappen, Chmn., Bd. of Control, 7/28/58) #58-7-16

CHAPTER 16

INSURANCE

STAFF OPINIONS

LETTER OPINIONS

16.1 June 11, 1957

INSURANCE: Manufacturers service contracts for replacement of electronic components which become defective in the course of operation of a television receiver in the hands of a consumer are not "insurance".

Mr. Oliver P. Bennett, Commissioner, Insurance Department: Receipt is acknowledged of your letter of May 29th in which you submit the following:

"We wish to request your opinion on the following question:

"Does a warranty contract, sold under the following circumstances, constitute insurance within the meaning of Title XX, Code of Iowa, to-wit

"1. The contract is issued for a flat consideration by a wholly owned subsidiary corporation of the manufacturer of T.V. sets.

"2. The contracts are sold exclusively to the purchasers or owners of sets sold by said manufacturer.

"3. The contract provides for the replacement of parts damaged from causes for which the manufacturer might not otherwise be responsible and over which he has no control.

"4. The contract is renewed annually for periods during which the manufacturer or dealer would not otherwise guarantee the set."

In a sample contract transmitted with your letter appears the following pertinent clause:

"This contract does not cover service, maintenance or repair necessitated by loss or damage resulting from any cause not under the control of ..... Company, including but not limited to loss incurred in transportation of the receiver or due to fire, water, windstorm, hail, lightning, earthquake, theft, negligence, riot or any other cause originating outside the television receiver and antenna."

The laws of Iowa pertaining to insurance may be found in Title XX, Code 1954. Section 505.8, Code 1954, defines the general powers and duties of the insurance commissioner which includes "general control, supervision, and direction over all insurance business transacted in the state, *and shall enforce all the laws of the state relating to such insurance.*" Thus, if the contracts in question be insurance they are subject to the "general control, supervision and direction" of the commissioner. Title XX, unfortunately, does not illuminate the reader to the extent of defining exactly what is meant by "insurance". For purposes of examination of accounts, Section 507.1, Code 1954, does define an insurance "company", as one "organized under the provisions of Chapters 508, 510,

511, 515, 518, except county mutual, and 520 and all companies or associations admitted or seeking to be admitted to this state under the provisions of any of the chapters herein referred to."

Examination of the chapters specified eliminates all but Chapter 515 on "Insurance Other Than Life" from having any application to the type of subject matter involved in the contract in question. Section 515.48 enumerates the "kinds of insurance" which may be contracted by companies "organized under this chapter or authorized to do business in this state". Review of said enumeration reveals that it consists of the very risks expressly excluded by the contract clause quoted above. There appears to be nothing in Title XX, Code 1954, on insurance which expressly or by reasonable inference would suggest that a contract to repair defects or damage consisting of mechanical or electrical breakdown or failure was contemplated by the General Assembly in enactment of any statutes contained in Title XX, Code 1954.

That service contracts for maintenance repairs are not within the customary scope of nonlife insurance appears further confirmed by "exclusion d." which is a standard clause in the "National Standard" automobile policy, which is the most common type of nonlife insurance. Exclusion "d" provides:

"This policy does not apply:

" * * * * * *

"d. under any of the coverages, to any damage to the automobile which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other loss covered by this policy."

See Appleman, *Insurance Law and Practice*, §3222. Thus, the type of *service* contemplated by the contract in question is the very type *excluded* from insurance under policies of insurance commonly in use and the type of *loss* excluded from the contract in question is of the very type commonly deemed as within the scope of "insurance" under standard "comprehensive" policy coverages.

"Insurance" has been the subject of judicial definition. In *Moresh v. O'Reilly*, 187 A. 619, 120 N.J.Eq. 534, it was held that:

"A contract which for consideration undertakes to do anything *other than to pay a sum of money* on destruction or injury to something in which the other party has an interest *is not* a contract of insurance." (Emphasis ours)

Also see *Commonwealth v. Provident Bicycle Association*, 36 A. 197, 178 Pa. 636, wherein the Court held:

"An association which contracts with its members, for a specified annual sum *to repair* bicycles in case of an accident . . . *is not an insurance* company . . . " (Emphasis ours)

"Casualty insurance" is defined "to include those forms of indemnity providing for *payment* for loss or damage to property, except from fire or the elements, *resulting from accident or some unanticipated contingency.*" — 44 C.J.S., Insurance, §6.

None of the quoted definitions fit the contract in question. It provides for service and replacement parts, not for payment. It provides for such service and replacements in instances which are neither "accidental" nor "unanticipated". It is completely normal an foreseeable that electronic components will break down in operation and require replacement. The contract in question merely enables a set owner to pay in advance for repair of troubles he may normally expect to encounter at some time during his ownership of the set.

We are of the opinion that the manufacturers service contract described in your letter is not "insurance", either by statutory definition, judicial definition, or customary usage of the insurance industry.

16.2 July 3, 1958

INSURANCE — Deposit of Security. 1. Where an Iowa company is merged or consolidated with a foreign company and policies issued by the foreign company are substituted for those issued by the former Iowa company in the hands of the Iowa policyholders the matter of security deposit is governed by section 508.10, Code of Iowa. 2. Where a foreign insurance company reinsures the business of an Iowa company and as part of the reinsurance agreement succeeds to its assets and liabilities so that in effect there is a substitution of insurer rather than of policy, then security deposits made by the former Iowa company must be left on deposit with the Iowa Insurance Department under the provisions of section 508.20, Code of Iowa.

Mr. Oliver P. Bennett, Commissioner, Insurance Department of Iowa: Receipt is acknowledged of your letter of June 5 as follows:

"Recently the American Home Life Company of Spencer, Iowa, was merged into the Lincoln Mutual Life Insurance Company of Lincoln, Nebraska. The surplus of the Iowa company was exhausted whereas the Nebraska company has a substantial surplus so that the position of the policyholders of American Home Life Company as augmented in this respect.

"The American Home Life Company had its legal reserve funds on deposit with this department pursuant to the provisions of Section 511.8, Code of Iowa. All assets and liabilities of the Iowa company has been assigned to the Nebraska corporation in conjunction with the merger including these deposits. It will now be necessary that the Nebraska company maintain an adequate reserve deposit in that state.

"Will you please advise us if we are now authorized to turn the physical possession of this legal reserve deposit over to the Nebraska company.

"Touching on this point, see 'Charles R. Fischer, Commissioner of Insurance of Iowa, as Receiver for American Life Insurance Company vs. American United Life Insurance Company.' "

Since our insurance statutes appear to make no use of the word "merger", it is assumed that the word "merged" as used in the first paragraph of your letter refers to "consolidation" or "reinsurance" under Chapter 521, Code of Iowa. It is further assumed that the "consolidation" or "reinsurance" in question complied with all of the pertinent

statutes of Nebraska and also complied with all of the pertinent provisions of Chapter 521, Code of Iowa, including those of Section 521.13, which provides as follows:

"*Consolidation prohibited.* No company or companies as defined by section 521.1 shall consolidate or reinsure with any other company or companies not authorized to transact business in this state."

Your letter states that the security deposits in question were made under Section 511.8 of the Code, a provision which occupies some five pages of the 1958 Code and, therefore, is not set forth herein. Examination of the said section, however, reveals it applies to "any company organized under Chapter 508".

It is stated as a matter of fact in your letter that the only company now in existence is the "Nebraska company". Therefore, the matter of security deposit by the Nebraska company would seem to be governed by the provisions of Section 508.10 as follows:

"*Foreign companies — capital or surplus — investments.* No company incorporated by or organized under the laws of any other state or government shall transact business in this state unless it is possessed of the actual amount of capital and surplus required of any company organized by the laws of this state, or, if it be a mutual company of surplus equal in amount thereto, and the same is invested in bonds of the United States or of this state, or in interest-paying bonds, when they are at or above par, of the state in which the company is located, or of some other state, or in notes or bonds secured by mortgages on unencumbered real estate within this or the state where such company is located, worth one and two-thirds times the amount loaned thereon, which securities shall, at the time, be on deposit with the superintendent of Insurance, auditor, comptroller, or chief financial officer of the state by whose laws the company is incorporated, or of some other state, and the commissioner of insurance is furnished with a certificate of such officer, under his official seal, that he as such officer holds in trust and on deposit for the benefit of all the policyholders of such company, the securities above mentioned. This certificate shall embrace the items of security so held, and show that such officer is satisfied that such securities are worth the amount stated in the certificate. Nothing herein contained shall invalidate the agency of any company incorporated in another state by reason of its having exchanged the bonds or securities so deposited with such officer for other bonds or securities authorized by this chapter, or by reason of its having drawn its interest and dividends on the same."

Your letter also refers to *American United Life Ins. Co. v. Fischer*, 130 F. 2d 643. In that case the language indicates what took place therein was not "merger" or "consolidation", but a "reinsurance plan". Whatever it may have been it is clear that the result of the transaction was that a Michigan insurance company survived as the only company actively doing business and that it did not survive for long but became insolvent. The Court held, at page 647 of 130 F. 2d:

"The effect of the transaction under Iowa, and by virtue of the powers vested in the approving commission, was simply to substitute the Michigan company for the Iowa company in the performance of the obligations of the Iowa company to its policyholders under the Iowa statutes, and to leave the situation, with respect to the securities here involved, the same under the Iowa law as if the Iowa company had continued to maintain the deposit. The power to preserve the statutory trust which was then in existence in favor of the Iowa company's policyholders, and to require

that it should remain subject to the terms and conditions of the statutes by which it was created, in its continuing obligations was, we think, clearly within the power of the approving commission."

In finding the deposit originally made by the Iowa company was properly held by the Iowa Insurance Commissioner in trust for the protection of the Iowa policyholders after the Michigan company had assumed the performance of the Iowa company's outstanding policies, transferred its assets to the Michigan company, and ceased to exist, the Court appears to have given significance to the following facts set forth at page 646 of 130 F. 2d:

"The Iowa company's policies, which were reinsured, had printed on their face, 'The full reserve of this policy is secured by a deposit of approved securities with the State of Iowa,' and in the body of the policies there was a provision that 'The legal reserve on this policy shall be invested in approved securities and deposited with the State of Iowa as required by law.' The Michigan company did not attempt to rewrite the policies of the Iowa company, but simply issued to each policyholder a certificate of assumption agreeing to 'carry out all of the provisions of said policy and perform all of the obligations therein contained as fully as the same would or should have been performed by the Iowa company'. The Michigan company never had questioned its obligation to maintain the deposit, but had regularly adjusted the amount of the securities to the net cash value of the policies, during the fifteen or seventeen years that preceded the insolvency proceedings against it in the Michigan state court."

Section 508.10 of our Code relates to deposits of security by foreign insurers doing business in Iowa. It provides for deposits either with the insurance commissioner of Iowa or with the corresponding official in such company's home state.

Section 508.20 of our Code may also have bearing on the problem. It provides as follows:

"*Reinsurance securities — title vested in commissioner.* The title to all securities deposited with the commissioner of insurance by any domestic life insurance company or association which has been, or hereafter shall be, reinsured by a foreign life insurance company, shall be vested in the commissioner for the use and benefit of only the policies of the company reinsured in force at the date of such reinsurance agreement."

The fact revealed by your letter is that an Iowa insurance company has gone out of existence. Its obligations have been assumed by, and its assets transferred to, the Nebraska company. It does not appear whether the Nebraska company has rewritten the policies of the Iowa company as its own or will rewrite them as its own or whether, as in the quoted case, it has merely assumed the obligation of the Iowa company to perform its contracts.

Your question therefore must be answered hypothetically.

(1) If the Nebraska company issues new policies to the Iowa policyholders in place of the original policies issued by the Iowa company and it has security deposited with the Nebraska commissioner complying with the requirements of Section 508.10 of the proper kind and amount, it appears that your Department may recognize the existence of such se-

curity, on proper certificate, and permit withdrawal of the excess security on deposit with your Department.

(2) On the other hand, if the transaction was "reinsurance" and the Nebraska company merely undertook to fulfill the contractual obligation of the former Iowa company, as in the quoted case, then the provisions of Section 508.20 apply and the deposit must be maintained in your Department for the protection of the policyholders of the former Iowa company.

16.3

Agents Licenses (State) — 1. Do not exempt agents from compliance with valid local licensing ordinances. 2. Validity of local license ordinances is for the courts to determine. (Abels to Bennett, State Insurance Commissioner, 3/18/58) #58-3-10

16.4

Agent's license — Application fees for licensing under Code Section 522.3. Fee must be paid for first-time license application for each type or kind of insurance. (Abels to Orebaugh, Dep. Commissioner, Ins. Dept., 2/25/58) #58-2-11

16.5

Ambulance Service — Furnished on payment of fixed membership fee is not insurance nor does it amount to "membership sales" under Code Chapter 503. (Abels to Orebaugh, Ins. Dept., 10/22/58) #58-10-10

16.6

Assessment — Maximum premium. (Abels to Bennett, Ins. Comm., 11/5/57) #57-11-5

16.7

Automobile liability insurance on public employees coverage extended only to officers and employees, not to the State of Iowa — (Erbe and Swanson to State Sen. Tate, 3/27/57) #57-3-45

Commissions, departments, boards and other agencies of the State and its political subdivisions are authorized and empowered to buy liability insurance covering and insuring their officers and employees while in the performance of their duties and operating an automobile, truck, tractor, machinery or other vehicles owned or used by such public agencies, and to pay for the same from their funds. Since Sec. 517A.1 uses the terminology "which insurance shall insure, cover and protect against *individual personal* legal liability, legislative intent was to cover only officers and employees and not the State of Iowa.

16.8

Health and Accident — Auditor cannot deduct health and accident premiums from salaries of County employees as a collection agent for profit-making insurance company. (Strauss to Roggensack, Clayton Co. Atty., 8/13/58) #58-8-13

16.9

Reinsurance certificates — Necessity for furnishing same to insured — (Abels to Bennett, Commissioner of Insurance, 3/22/57) #57-3-40

Under Sec. 682.17, Code 1954, which requires that a certificate of reinsurance *"shall be furnished to the insured"* in connection with certain guaranty or surety company bonds, a blanket declaration of intention *to procure* such reinsurance may not be substituted for the actual reinsurance certificate.

16.10

Reinsurance — "Contract of Reinsurance" between Iowa Insurance Company and foreign State Mutual Benefit Society prohibited. (Erbe to Bennett, St. Ins. Comm., 6/6/57) #57-6-10

Membership in a mutual benefit society is *not* insurance nor is the certificate of membership in such society an insurance policy. Approval of a particular "contract of reinsurance" with foreign state mutual benefit society denied, since company in question not organized under Iowa Code chapters specified in §521.7, Code 1954.

CHAPTER 17

LABOR

STAFF OPINIONS

LETTER OPINIONS

17.1 July 8, 1958

LABOR COMMISSIONER: CHILD LABOR LAWS—

Children under the age of sixteen, under Section 92.2, 1958 Code of Iowa, are not prohibited from working after the hour of 6 P. M. as pages in a public library for the reason that said library is not a "store", "shop", or "in the distribution or transmission of merchandise or messages".

Mr. Don Lowe, Labor Commissioner, Bureau of Labor: In your letter of May 28, 1958, an opinion is requested as to the following fact situation:

May minors, under 16 years of age, work in public libraries after 6 P. M. as part time pages when such work consists of shelving books and obtaining requested books from the shelves?

Section 92.2, 1958 Code of Iowa, is controlling as to the hours worked by children under sixteen years of age, and is stated in part below:

"No person under sixteen years of age shall be employed *at any of the places or in any of the occupations specified in section 92.1* before the hour of seven o'clock in the morning or after the hour of six o'clock in the evening. . ." (Emphasis supplied)

The reference to Section 92.1, 1958 Code of Iowa, includes the following places and occupations as within the scope of Section 92.2, supra:

". . . Any mine, manufacturing establishment, factory, mill, shop, laundry, slaughter house, or packing house, or in any store or mercantile establishment where more than eight persons are employed, or in any livery stable, garage, place of amusement, or in the distribution or transmission of merchandise or messages. . ."

In particular, your inquiry is addressed to whether or not the words "store", "shop", or "in the distribution or transmission of merchandise or messages" are broad enough to encompass a public library.

As to the wording, "in the distribution or transmission of merchandise or messages", you are referred to a *1952 Attorney General Opinion, page 124*, where the following appears:

"We find no pertinent definition of the word 'distribution', either in the dictionary or among words judicially defined. However, the word 'distribution' in connection with the sale of merchandise, is so generally used and accepted as meaning *the sale of merchandise, or the ordinary transactions of a merchant. . .*" (Emphasis supplied)

From this opinion, it necessarily follows that a public library is not within the statutory wording. While there may, in a sense, be distribution, there is no sale of merchandise, hence, no distribution of merchandise, and certainly there is no distribution or transmission of messages.

With regard to the meaning of "store" you are directed to the case of *In re Mead's Estate*, 277 N.W. 694, where it was said:

". . . While the word 'library' is at times used as comprising both a collection of books and the building or room in which the collection is housed, *it is also used as meaning a collection of books, not kept for sale. . .*" (Emphasis supplied)

The italicized wording is important when considered with the multitude of cases cited in *Words & Phrases, Volume 40*, beginning at page 219. "Store" is almost universally held to mean a place or establishment where a sale is made or consummated. This sale may be at either the wholesale or retail level. Inasmuch as a library, public or otherwise, does not ordinarily conduct or negotiate sales it is, in our opinion, not a "store".

In addition, we are of the opinion that a public library is not, by definition, a "shop". According to the above cited authority in Words & Phrases a "shop" is synonymous with a "store". Therefore, it too is a place where a sale occurs whereas a library is not.

On the basis of this distinction, it is concluded that a public library is not a "store" or "shop". Likewise, it is not, as above stated, "in the distribution or transmission of merchandise or messages." Therefore, minors under sixteen years of age may work as part time pages in a public library after 6 P. M.

17.2

Anti-Injunction laws — Closed shop and Union security — Secondary boycotts. (Erbe, Atty. Gen. to Evans, Iowa Development Commission, 2/21/57) #57-2-24

Iowa does not have an anti-injunction law insofar as labor problems are concerned; on the contrary, Chapters 736A and 736B, Code 1954, provide for the issuance of injunctions under certain circumstances. Several limitations are imposed by Chapter 736A, Code 1954, on union security and the "closed shop". Secondary boycotts are declared illegal under the provisions of Chapter 736B, Code 1954.

17.3

Boiler inspection —

1. An inspection fee is due and payable by the owner or operator of a "Koch Kettle" (jacket kettle) only if the steam pressure exceeds 150 pounds per square inch.

2. The ordinary and common meaning ascribed to the word boiler notwithstanding, a "Koch Kettle" (jacket kettle) by statute, is not a boiler.

3. Jurisdiction to inspect jacket kettles is expressly granted in Sec. 89.2, Code of Iowa, 1958.

4. Only such rules and regulations of the A.S.M.E. Code of 1937 as amended that in no wise conflict with Chapter 89, Code of Iowa, 1958, may be adopted by the Commissioner of Labor. (Pesch to Lowe, St. Labor Comm'r., 11/12/58) #58-11-10

17.4

Boiler Inspector — Has no duty to inspect liquid petroleum tanks. (Strauss to Cunningham, Secy., Exec. Council, 7/23/58) #58-7-12

17.5

Contracts governing wages, hours and working conditions — (Abels to St. Rep. Nielsen, 3/27/57) #57-3-49

Cities and towns have no authority to enter into agreements with labor unions for the purpose of fixing wages, hours, and working conditions of municipal employees. (1946 AGO 162, cited in opinion).

17.6

Labor commissioner — Sale or free distribution of pamphlets. (Strauss to Lowe, Labor Comm., 8/22/57) #57-8-38

17.7

Labor dispute arbitration — Whether or not facts surrounding labor dispute exist to bring it under code section 90.1 must be determined by the governor. (Erbe and Abels to Rinard, Adm. Ass't to Gov., 11/5/57 #57-11-4

17.8

Preference to Iowa labor — Construction contracts containing "Prevailing Wage" provisions — (Abels to St. Rep. Naughton, 4/27/57) #57-3-50

(1) Under Sec. 73.3, Code 1954, preference must be given to Iowa labor in school construction. (2) Provisions or clauses for the payment of "prevailing wages", as determined or to be determined by the Secretary of Labor under the "Davis-Bacon Act" (40 U.S.C.A. 321) cannot properly be included in building specifications made for the purpose of soliciting bids for school construction.

17.9

Union dues — Employer not required to withhold in absence of specific agreement. (Cass to Iowa Development Commission, 5/13/57) #57-5-15

In the absence of a specific agreement between the employer, the employee and the union effecting a "check-off" system it is thought that in Iowa there is no requirement that an employer must withhold union dues from an employee's wages and to pay such dues withheld to a labor union, association, or organization. (§§ 736A.4 and 736A.5, Code 1954, considered).

CHAPTER 18

MINORS

LETTER OPINIONS

18.1

Adoption Records — May not be opened except on court order. (Abels to Jensen, Taylor Co. Atty., 6/12/58) #58-6-6

18.2

Billiards and billiard halls — Synonymous terms, sale of beer, exclusion of minors. (Dvorak to Draheim, Wright Co. Atty., 8/8/57) #57-8-26

18.3

Billiard halls — Section 726.9, Code 1954, refers to any billiard room and makes no exception in regard to billiard rooms operated by fraternal or charitable organizations. One who permits a minor to enter and remain in a billiard room or to play either billiards or pool therein violates the statute. (Dvorak to Hoover, Co. Atty., 1/22/57) #57-1-28

18.4

Child Labor — A parent need not obtain a work permit for his own child to work in an establishment listed in code section 92.1 operated by such parent even though the child may be fourteen but less than sixteen years of age. (Faulkner to Lowe, Labor Comm., 5/8/58) #58-5-3

18.5

Children born in wedlock — Presumption of legitimacy. (Abels to Draheim, Wright Co. Atty., 10/11/57) #57-10-21

18.6

Child Labor — Drive-in ice cream and soft-drink establishment is a restaurant within the meaning of Code Section 92.11. (Faulkner to Lowe, Labor Comm., 4/28/58) #58-4-26

18.7

Duties of Step-parent — A step-parent is not liable for the support, maintenance and education of a step-child, where he has not voluntarily received the step-child into the family and does not treat it as a member thereof. (Bianco to Caffrey, St. Bd. Soc. Welf., 9/19/58) #58-9-10

18.8

Dependent Children — Temporary absence from state — effect upon A. D. C. eligibility. (Bianco to Caffrey, Chmn. St. Bd. Soc. Wel., 11/5/57) #57-11-8

18.9

Dependent Children — When committed Soldiers' Relief not available. (Strauss to Johnson, Lee Co. Atty., 12/10/57) #57-12-14

18.10

Juvenile Delinquents — Juvenile Court: Petition may be filed in any county where child is found, by any reputable citizen, without filing fee, irrespective of where crime was committed, under Code Section 232.5. (Faulkner to Buchheit, Fayette Co. Atty., 3/18/58) #58-3-11

18.11

Lascivious acts with Minors — A child past his or her sixteenth birthday, who has not reached his or her seventeenth birthday, is not "of the age of sixteen years" as provided in Sec. 725.2, 1958 Code of Iowa. (Faulkner to Winkel, Kossuth Co. Atty., 9/24/58) #58-9-4

18.12

Legitimacy — Aliens: Whether Code Section 675.11 extends to foreign national is for the courts to decide. (Erbe to Dr. Karl Wolf, Consul of Austria, 4/15/58) #58-4-23

18.13

Name Change: Effect of marriage. Code Sections 674.1 and 599.1 and *Ingalls v. Campbell,* 24 Pac. 904 cited. Marriage does not remove civil disability. (Also see #58-2-12) (Strauss to Bandstra, Marion Co. Atty., 3/5/58) #58-3-1

18.14

Name Change: Effect of marriage and divorce. Also see informal opinion #58-3-1. (Strauss to Bandstra, Marion Co. Atty., 2/7/58) #58-2-12

18.15

Ordinances prohibiting persons under a certain age from entering taverns and billiard parlors. (Dvorak to Garth Mann, Dallas Center, Iowa, 6/18/57) #57-6-26

(1) One who operates a billiard hall *where beer is sold,* and who permits a minor to enter and remain in such billiard hall or to play either billiards or pool therein, violates §726.9, Code 1954, as amended by House File 229, Acts 57th G. A. (2) City or town council may by ordinance establish minimum age limits for minors for the purpose of regulating their admittance to billiard halls *which do not sell beer* and regulating their participation while there in games of pool or billiards. (3) Although Chap. 124, Code 1954, does not expressly prohibit minors from entering taverns, cities and towns have power to enact ordinances prohibiting

persons under the age of twenty-one (21) years from entering such premises.

18.16

Presumption of legitimacy of children born in wedlock. (Erbe to Knight, Div. Passport Office, Dept. of State, Washington, D. C., 4/18/57) #57-4-22

Chap. 675, Code 1954, refers to children born out of wedlock. Under Iowa laws, a child born to a woman is presumed to be the legitimate offspring of her husband, in the absence of a court decision to the contrary.

18.17

Jails — Person under 18 years of age, although married, must be separately confined. (Abels to Schroeder, Jackson Co. Atty., 5/17/57) #57-5-24

§599.1, Code 1954, providing that all minors attain their majority by marriage, has no effect upon §356.3, Code 1954, requiring that prisoners in county jail under the age of 18 years be separately confined. Chronological age and not status of "majority" is the controlling fact under the latter statute.

18.18

"Retarded" Children — Term not defined in statute. (Abels to Mooty, St. Rep., 11/7/57) #57-11-11

18.19

Settlement of person under twenty-one having attained majority by marriage — How acquired — (Cass to Watts, Adams Co. Atty., 3/22/57) #57-3-42

A person under twenty-one having attained majority by marriage and having resided in this state and a particular county for two years without being warned to depart, gains a settlement in the county of his residence regardless of prior service of notice on his parents during his minority preventing the family from acquiring a settlement in said county and despite his subsequent failure or the failure of his father to file an affidavit with the county board of supervisors that they were no longer paupers and intended to acquire a settlement in that county. Wife of such person takes settlement of the husband.

18.20

Work Permits —

1. A hospital as an institution does not come within the prohibited establishments enumerated in Sec. 92.1, Code of Iowa, 1958.

2. The definition of workshop appearing in Sec. 91.15, Code of Iowa, 1958, has no application to chapter 92, Code of Iowa, 1958.

3. Whether a girl under 16 years of age is prohibited from being employed as a nurse's aid is a fact question. (Pesch to Lowe, Labor Comm., 10/28/58) #58-10-5

CHAPTER 19

MOTOR VEHICLES

STAFF OPINIONS

LETTER OPINIONS

19.1 December 5, 1957

RECIPROCITY: PRORATION OF REGISTRATION FEES:

1. The Reciprocity Board has authority to prorate registrations by a "prorating arrangement" with an individual interstate motor carrier operating motor vehicles under Chapter 326 for the purpose of imposition of the compensation tax but, under Sec. 321.56, as re-enacted, it is necessary to have in effect a reciprocity agreement with the duly authorized representative of the county, state, territory, or federal district, otherwise the reciprocity board is without authority to prorate registrations under Chapter 321.

2. Motor carriers of passengers operating both interstate and intrastate over Iowa highways are not permitted to prorate registrations under the provisions of Sec. 321.54 and Sec. 321.56, as re-enacted.

Iowa Reciprocity Board, Gentlemen: In your letters of October 4 and 9, 1957, the following questions were presented:

1. May the Reciprocity Board exercise their authority to prorate registrations without entering into a prorate agreement with the other states affected?

2. Whether motor carriers of passengers operating both interstate and intrastate over Iowa highways would be permitted to prorate their fleets under our Iowa statutes.

With regard to your first question, authority to prorate registrations by reciprocity agreements was found in Section 321.56, Code of 1954, which section is a grant of authority to the Reciprocity Board. That section has been repealed by Section 2 of Chapter 169, Acts of the Fifty-seventh General Assembly. Set out below are the pertinent parts of the said chapter enacted in lieu of Section 321.56, Code of 1954:

"2. The motor vehicle reciprocity board shall have authority to make *reciprocity agreements with the duly authorized representatives of any county, state, territory or federal district* exempting the residents of such county, state, territory or federal district using the highways of this state from the registration requirements of this chapter. . . Notwithstanding any provisions of this chapter to the contrary or inconsistent herewith *such agreements* may provide with respect to resident or nonresident fleets of two (2) or more commercial vehicles which are engaged in interstate movement, that the registration of such fleets be apportioned between this state and the other states in which such fleets operate. . . When a vehicle has been licensed in one of the reciprocating states under an agreement as provided herein, such vehicles shall not be subject to licensing in the other reciprocating state." (Emphasis supplied)

The wording "such agreements" refers to the antecedent "reciprocal agreements". Under the above provisions the Reciprocity Board is authorized to make reciprocity agreements "with the duly authorized representatives of any county, state, territory or federal district." The sentence beginning with "Notwithstanding" thus relates to reciprocal agreements which can be made only with the enumerated entities. In effect, that clause expands the scope of reciprocal agreements but does not authorize making proration agreements with individual motor carriers as such.

However, section 1 of Chapter 169, Acts of the Fifty-seventh General Assembly, amends Section 326.2 of the Code of Iowa, 1954. Section 326.2, as amended, gives further authority to the Reciprocity Board. That authority is stated in the following words which constitute a part of the text of Section 326.2, as amended.

" . . . *in addition to the authority granted the reciprocity board by section three hundred twenty-one point fifty-six (321.56) of the Code* to enter into agreements for such apportionment of motor vehicle registration with the duly authorized representatives of any county, state, territory, or federal district, *the reciprocity board is hereby authorized to enter into prorating arrangements with individual interstate motor carriers operating motor vehicles as defined in this chapter. . .* " (Emsis supplied)

This amendment to Section 326.2 appeared as House File 484. That bill as originally written contained the words "such agreements" where the words "prorating arrangements" now appear. The words, "such agreements", refer to reciprocity agreements, which, as above stated, cannot be made with an individual interstate motor carrier. Thus, by using the words "prorating arrangements" the above wording is given effect in that it is indicative of authority in addition to that granted in Section 321.56. Construed in any other way, the amendment would have a nullifying effect or no meaning whatsoever because no additional authority would have been granted.

It is a rule of statutory construction that in seeking the meaning of a statute the entire act should be considered. *Iowa Nat. Mut. Ins. Co. v. Chicago, B. & Q. R. Co.*, 246 Iowa 971, 68 N.W. 2d 920; *Davis v. Davis*, 246 Iowa 262, 67 N.W. 2d 566. A closely related rule is that it is the duty of the court to give effect to every word of an act. To so read a statute as to give no purpose to an enacted provision is a matter to be avoided where a reasonable alternative exists. *Davis v. Davis*, supra; *Holzhauser v. Iowa State Tax Commission*, 245 Iowa 525, 62 N.W. 2d 229.

In addition, another rule of statutory construction is applicable. Statutes in pari materia shall be construed together and this rule applies with peculiar force to statutes passed at the same session of the legislature. *Iowa Farm Serum Co. v. Board of Pharmacy Examiners*, 240 Iowa 734, 35 N.W. 2d 848. Such statutes are to be harmonized if that is reasonably possible. *McKinney v. McClure*, 206 Iowa 285, 220 N.W. 354.

Therefore, it is the conclusion of this office that the Reciprocity Board has authority to prorate registration by a "prorating arrangement" with an individual interstate motor carrier operating motor vehicles under Chapter 326 for the purpose of imposition of the compensation tax. But under the registration provisions of Chapter 321, the Reciprocity Board must, prior to prorating the registrations of carriers, have in existence an agreement with the representatives of the county, state, territory, or federal district involved, and, in the absence of such an agreement, the board is without authority to prorate the registrations under the provisions of Chapter 321.

As to your second question, although authority to prorate registrations is found in the above discussed Chapter 169, Acts of the Fifty-seventh General Assembly, it is necessary to consider subsection 5 of section 2, Chapter 169, which is a part of the enactment in lieu of Section 321.56:

"5. Nothing herein contained shall authorize the waiving of the registration requirements of this chapter relating to motor vehicles operated within the state in intrastate commerce."

When taken with the definition of "intrastate transportation" found in the second paragraph of Section 321.54, Code of 1954, a direct prohibition against prorating registrations appears. That definition is stated below:

"The term intrastate transportation as used herein shall mean the transportation for compensation of persons or property originating at any point or place in the state of Iowa and destined to any other point or place in said state irrespective of the route or highway or highways traversed, *including the crossing of any state line of the state of Iowa*, or the ticket or bill of lading issued and used for such transportation." (Emphasis supplied)

Since registration may be prorated by reciprocity agreement as to "resident or nonresident fleets of two (2) or more commercial vehicles which are engaged in interstate movement", there exists a conflict between subsections 2 and 5 of section 2, Chapter 169. More specifically, the "interstate movement" involves "intrastate commerce" and therein lies the conflict. To solve the conflict it is necessary to refer to certain rules of statutory construction. Such rules state that statutes should be so construed that no part will be considered superfluous, and effect should

be given to every provision of a statute. *Board of Directors of Menlo Consol. School Dist. of Menlo v. Blakesley,* 240 Iowa 910, 36 N.W. 2d 751. To give effect to each subsection, "interstate movement" must be construed to apply to motor vehicles of a fleet engaged exclusively in "interstate movement". Those vehicles which are simultaneously engaged in interstate movement and intrastate commerce, therefore, come within the prohibition of subsection 5 as set out above. Again, reference is made to the case of *Iowa Farm Serum Co. v. Board of Pharmacy Examiners,* supra. A reiteration of the principle that statutes in pari materia should be construed together and that this principle applies with peculiar force to statutes enacted at the same legislative session has application in this instance.

Therefore, your second question is answered in the negative in that it is the opinion of this office that motor carriers of passengers operating both interstate and intrastate over Iowa highways are not permitted to prorate registrations under the provisions of Section 321.56 (as reenacted) and 321.54.

19.2 July 3, 1958

MOTOR VEHICLES, REGISTRATION OF — RECIPROCITY:

Registration is required of nonresidents engaged in remunerative employment within the State of Iowa except when such person commutes from his residence in another state or such employment is "seasonal or temporary".

While the Reciprocity Board is authorized to enter into reciprocity agreements exempting nonresidents from the registration requirements of Chapter 321, Code of Iowa, 1958, such agreements must be in accord with the existing statutes and a proper construction thereof.

Mr. John J. Kellogg, Harrison County Attorney: This will acknowledge receipt of your request for an official opinion of the Attorney General relative to a certain legal problem therein stated as follows:

"I would like an official opinion to clarify the following problem relative to registration of motor vehicles of nonresidents temporarily residing in Iowa. The facts are as follows:

"In Harrison County we have several school teachers who are residents of the State of Nebraska and who have domiciles in both states, but consider themselves to be residents of Nebraska. These people have been advised by Nebraska authorities that under Nebraska Legislative Bill #301, 1957, a reciprocity bill in which reciprocity is granted residents of many states, including Iowa, even though they reside in Nebraska for more than thirty days, that they are not required to purchase Iowa license plates.

"These same teachers are also advised by Iowa authorities that since their employment keeps them in Iowa for more than one-half of the year their residence within this state is not seasonal or temporary under Section 321.55 of the Code, and they must purchase Iowa plates and register their cars in Iowa.

"My questions are:

"1. Does Iowa have a reciprocity agreement with the State of Nebraska releasing persons such as are described above from the liability of purchasing Iowa license plates for their cars?

"2. Assuming the answer to question 1 is in the negative, would the employment of school teachers in Iowa be considered seasonal or temporary under Section 321.55?

"3. Does Section 321.53 as amended by the 55th G.A. in itself eliminate the necessity of an Iowa registration for the above mentioned school teachers, if the State of Nebraska has a reciprocity agreement?"

The applicable statutes pertaining to the questions submitted are set out as follows:

1. Section 321.53, Code of Iowa, 1958, provides that:

"A nonresident owner, except as provided in sections 321.54 to 321.56, inclusive, of a private passenger motor vehicle, not operated for hire, may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration plate or plates issued for such vehicles in the place of residence of such owner. A nonresident who leases a vehicle from a resident owner shall not be considered a nonresident owner of such vehicle for the purpose of exemption under this section. This section shall be operative to the extent that under the laws of the foreign country, state, territory, or federal district of such nonresident owner's residence like exemptions and privileges are granted to vehicles registered under the laws and owned by residents, of this state."

2. Section 321.55, Code of Iowa, 1958, further provides in pertinent part as follows:

"Every nonresident, in addition to those mentioned in section 321.54, (which provides for registration of certain nonresident carriers) *but not including a person commuting from his residence in another state or whose employment is seasonal or temporary, engaged in remunerative employment * * * within this state* and owning and operating any motor vehicle, * * * 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." (Emphasis supplied)

3. Nebraska Legislative Bill No. 301, Laws passed by the Sixty-eighth Session of the Legislature of the State of Nebraska, 1957 (60-305.01 Revised Statutes, 1957), provides as follows:

"A nonresident owner, except as otherwise provided in this section, owning any foreign vehicle which has been duly registered for the current calendar year in the state, country, or other place of which the owner is a resident, and which at all times, when operated in this state, has displayed upon it the number plate or plates issued for such vehicles in the place of residence of such owner, may operate or permit the operation of such vehicle within the state without registering such vehicle or paying any fees to this state, *except that any nonresident owner gainfully employed in the State of Nebraska, operating a passenger car in this state, must obtain Nebraska license plates and pay the personal property tax, the same as a Nebraska resident, after thirty days of continuous employment, unless the state of his legal residence grants immunity of such fees to residents of our state operating a passenger car in that state.*" (Emphasis supplied)

4. Section 321.56, Code of Iowa, 1958, establishes a reciprocity board to be located at the Seat of Government. Subdivision two (2) of said section, in pertinent part provides:

"2. The motor vehicle reciprocity board shall have authority to make reciprocity agreements with the duly authorized representatives of any county, state, territory or federal district exempting the residents of such county, state, territory or federal district using the highways of this state from the registration requirements of this chapter with such restrictions, conditions, and privileges or lack of them as such board may deem advisable provided the residents of this state when using the highways of such other state shall receive exemption of a similar kind to a like degree."

In answer to your first question, we advise as follows:

1. For the purpose of this opinion it is assumed that the persons involved are domiciled in Nebraska, since, as a matter of law, a person can have only one domicile. You will find this statement in accord with the following authorities:

Ruth & Clark, Inc. v. Emery, 233 Iowa 1235, 11 N.W. 2d 397.

Fisher & Van Gilder v. First Trust Joint-Stock Land Bank of Chicago, 210 Iowa 531, 231 N.W. 671.

2. While Section 321.56, supra, authorizes the reciprocity board to enter into reciprocity agreements, such board cannot enter into an agreement not in accord with the existing statutes and a proper construction thereof. *State v. Robbins*, 235 Iowa 602, 15 N.W. 2d 877.

3. A person who is a nonresident of Iowa and who teaches in Iowa is one engaged in remunerative employment within said state. For such person to come within the exception in Section 321.55, supra, said person must commute from his residence in another state or be engaged in seasonal or temporary employment.

4. Section 321.55, supra, is self-executing, thereby rendering ineffectual a reciprocity agreement treating of the said matter not in accordance therewith.

Your first question is, therefore, answered in the negative.

Your second question pertains to whether the employment of teachers in Iowa is considered as being "seasonal or temporary".

1. The motor vehicle law does not define the words "seasonal or temporary". Since the statutes are lacking of such definition, the legislature must have deemed that such words were to be used in accordance with their common and ordinary meaning.

2. *Funk and Wagnalls New Standard Dictionary of the English Language* defines seasonal and temporary as follows:

(a) seasonal — "Of, pertaining to, or characteristic of a season or the seasons; as, seasonal changes. * * *. Employed for a certain season. Casual: said of certain trades. * * *."

(b) temporary — "Lasting for a short time only; * * *. One holding a position temporarily."

3. Section 279.13, Code of Iowa, 1958, provides for automatic continuation of a teaching contract until such time as said contract is modified or terminated by mutual agreement of the board of directors and the teacher. Since the contract is of such nature, employment under such contract defies definition as being "seasonal or temporary".

4. Learning is by no means seasonal nor is it temporary. Likewise, teaching, which is accelerative of such learning, is neither "seasonal or temporary".

It is, therefore, the opinion of this office that the employment of school teachers in Iowa is not "seasonal or temporary" so as to bring such employment within the purview of the exception contained in Section 321.55, Code of Iowa, 1958.

Your third and last question is answered in the negative as the statutory language of Section 321.53, supra, does not provide for, or imply, an exception from motor vehicle registration for the persons mentioned in the factual situation you present. To hold otherwise would be in direct conflict with Section 321.55, Code of Iowa, 1958.

19.3 April 29, 1958

MOTOR VEHICLES — Passing: The act of "passing" for the purposes of Code Section 321.304(3) is one continuous act up to and including the completion of the passing until the passing car is again in its proper lane.

Mr. Arthur H. Johnson, Webster County Attorney: Receipt is acknowledged of your letter of April 19 as follows:

"Section 321.304(3), Code of Iowa, provides, in substance, as follows:

"No vehicle shall in overtaking and passing another vehicle, or at any other time, be driven *to the left side* of the roadway under the following conditions:

"(3) Where official signs are in place directing that traffic keep to the right or a distinctive center line or off-center line is marked. . . . . .

"For the past two years we have had difficulty in the interpretation to be given to that section when a member of the Highway Patrol charges an operator with passing on a yellow line under conditions whereby the operator of the vehicle *has completed his pass and in returning to the right hand side of the roadway cuts across the end of the yellow line.* (Emphasis supplied)

"* * * * * *

"I would appreciate it if this matter could be reviewed by your staff and if an official opinion should be rendered interpreting such criminal statute in the light of the above conditions."

Section 321.304, Code 1958, provides as follows:

"Prohibited passing. No vehicle shall, in overtaking and passing another vehicle or at any other time, be driven to the left side of the roadway under the following conditions:

"1. When approaching the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed for a distance of approximately seven hundred feet.

"2. When approaching within one hundred feet of any narrow bridge, viaduct, or tunnel, when so signposted, or when approaching within one hundred feet of or traversing any intersection or railroad grade crossing.

"3. Where official signs are in place directing that traffic keep to the right or a distinctive center line or off-center line is marked, which distinctive line also so directs traffic as declared in the sign manual adopted by the state highway commission."

In construing subsection 2 of said section our Supreme Court in its decision in the case of *Young v. Blue Line Storage Co.*, 242 Iowa 125 at page 133, 44 N.W. 2d 391, stated as follows:

". . . The pertinent parts of the statute referred to in section 321.304, Codes 1946 and 1950, read:

" 'No vehicle, shall, in overtaking and passing another vehicle or at any other time, be driven to the left side of the roadway under the following conditions:

" '* * *

" '2. * * * when approaching within one hundred feet of or traversing any intersection * * *.'

"The theory of the defendant as shown in its argument is that when approaching 'within 100 feet' it can only mean within the distance of 100 feet the driver should not start to pass, and that it does not mean that if a collision happens within 100 feet of the intersection the individual who is passing is guilty of negligence. We disagree with the defendant in this respect. The statute itself indicates the contrary. It says, 'when within 100 feet' of an intersection. Therefore, no matter when defendant's truck was started to be driven, if, when within 100 feet of the intersection it remained on the left side of the highway it was traversing, it violated this statute. The driver of a following car could very well pass to the left side of the road, but if he continued in that position until within 100 feet of that intersection he would violate the rule. The court in the instruction upon this phase of the evidence so instructed and was correct. Such has been the holding in other jurisdictions and in certain cases cited by the plaintiff. See Holland v. Edelblute, 179 Va. 685, 20 S. E. 2d 506; Greer v. Marriott, 27 Ala. App. 108, 110, 167 S. 597, 598, in which, in interpreting an act similar to our own, the court says:

" 'We hold that the passing of one car by another going in the same direction is one continuing act, from the time the rear car pulls out of the direct lane of travel in the rear of the car to be passed, *up to and including the completion of the passing and the passing car is again in its proper lane.*' (Emphasis added)

"American Products Co. v. Villwock, 7 Wash. 2d 246, 271, 109 P. 2d 570, 581, 132 A.L.R. 1010, 1027, in discussing a statute similar to ours, but applied to curves, the court instructed that it should be unlawful to overtake and pass another vehicle proceeding in the same direction upon any curve when the view of the operator of such overtaking vehicle is obstructed or obscured within a distance of 800 feet, and says, in part:

" 'While the literal language of the statute lends support to appellant's contention, the impracticable, and almost absurd, results that would flow from the construction contended for, indicate clearly that the statute was intended, and should be interpreted, to prohibit the overtaking and pass-

ing of other vehicles proceeding in the same direction, not only while actually upon a curve, but also while approaching any curve, when the view of the operator of the overtaking vehicle is obstructed within a distance of 800 feet.'

"And the same rule may apply to our statute. We are satisfied that the court correctly instructed upon this subject."

Presumably "passing" has the same meaning under subsection 3 as under subsection 2. Thus, the operator of a vehicle who has reached a position in advance of another vehicle and, "in returning to the right hand side of the roadway cuts across the end of the yellow line" *has not* "completed his pass", as is apparently assumed by your question, within the meaning of the definition of the act of passing adopted in the above-quoted decision of our Supreme Court. Therefore, the described act is, in our opinion, in violation of Section 321.304(3), Code of Iowa.

19.4 June 28, 1957

MOTOR VEHICLES — TRUCKS — Combination of Vehicles — Towing of Mobile Homes. (Sections 321.457 and 321.1(4), (5), (6), Code 1954, construed)
(1) A combination of vehicles, consisting of a "semi-trailer" together with a "motor truck" or a "truck tractor" which does not exceed a maximum length of 50 feet and which complies with the maximum width, height and gross weight requirements of our statutes, may be legally operated upon the highways of this state.
(2) A "motor truck" is not permitted to tow a mobile home even though the over-all length of the combination of vehicles is not in excess of 50 feet.

Mr. Clinton Moyer, Commissioner, Department of Public Safety: This will acknowledge your letter in which you request an official opinion on the following two questions:

"1. Some units are now operating in Iowa which consist of a truck with a 'storage box' behind the cab and a fifth wheel mounted behind the box which is approximately over the rear tandem of the vehicle. These vehicles then carry or pull a semi-trailer. The box on the front unit is perhaps 10 feet in length. Is such a unit a tractor under our law which may be operated legally in Iowa?"

"2. Would a truck be permitted to pull a housetrailer under the provisions of Section 321.457(3), as amended, so long as the over-all length is not in excess of 50 feet?"

We will answer your questions in the order given above.

1. It is our understanding that the "storage box" referred to in your letter is being used for purposes other than a storage compartment, namely, it is being used as a freight-carrying device hauling cargo independently of any semi-trailer attached. This storage box is anchored to the tractor unit behind the cab and at arrival at destination can be removed by the use of a hoisting crane.

Section 321.1(4), Code of 1954, defines a motor truck as:

" * * * Every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over seven persons as passengers."

Section 321.1(6) of the Code of Iowa defines a truck tractor as:

" * * * every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn."

Under the definitions set out above, it appears that we have a unit being used as both a "motor truck" and "truck tractor".

If in the broadest sense we could interpret such a vehicle as a "motor truck" pulling a semi-trailer, rather than a "truck tractor" towing a semi-trailer, the only prohibition can be found in Section 321.457(3), Code of Iowa, 1954, as amended, which reads as follows:

"No combination of truck tractor and semi-trailer, nor any other combination of vehicles coupled together, unladen or with load, shall have an overall length, inclusive of front and rear bumpers, in excess of fifty feet."

As long as the combination of vehicles does not exceed the maximum length of 50 feet (Section 321.457, subparagraph 3, Code of Iowa, 1954, as amended), the maximum width of 8 feet (Section 321.454, Code of Iowa, 1954), the maximum gross weights (321.463, Code of Iowa, 1954), and the maximum height (Section 321.456, Code of Iowa, 1954), it is the opinion of this office that such a combination of vehicles can be legally operated upon the highways of this state.

2. In answer to your second question, Section 321.457, subparagraph 4, Code of Iowa, 1954, as amended, reads as follows:

"However, a mobile home not in excess of forty-eight (48) feet in length may be drawn by any motor vehicle, except a motor truck, provided, however, that the mobile home and its towing unit shall not be in excess of an overall length of sixty (60) feet. For the purposes of this subsection, a light delivery truck, panel delivery truck or 'pickup' shall not be construed to be a motor truck * * * ."

A light delivery truck, panel delivery truck, or pickup is defined in Section 321.1(5), Code of 1954, as:

" * * * any motor vehicle designed to carry merchandise or freight of any kind, not to exceed 2000 lbs."

Subparagraph 3 of Section 321.457, as amended, prescribes a maximum length of 50 feet for any combination of vehicles coupled together. Subparagraph 4 of Section 321.457 set out above, makes a specific exemption in the case of mobile homes and grants the right to tow a mobile home 48 feet in length provided that the combination of vehicles is not longer than 60 feet in length. It also specifically sets out that a mobile home may be drawn by any motor vehicle other than a motor truck. Subparagraph 4 further sets out that a light delivery truck or pickup shall not be construed to be a motor truck. These vehicles as defined in Section 321.1(5) narrows the field of motor vehicles that can be used to tow mobile homes. A truck would not be permitted to tow a mobile home

even if the over-all length of the combination of vehicles were not in excess of 50 feet.

The answer to your second question is in the negative.

19.5 October 3, 1958

MOTOR VEHICLES — Section 321.436, 1958 Code of Iowa.

1. A record completely void of any evidence that the excessive noise did result from an inadequate or improper muffler, would not constitute a prima facie case of violation of Sec. 321.436, supra.

2. Section 321.436, supra, applies to trucks, a truck being a motor vehicle, as defined in Sec. 321.1(2), supra.

Mr. Robert D. Parkin, Jefferson County Attorney: This will acknowledge receipt of your request for an official opinion relative to certain legal problems therein stated as follows:

"1. Where the record made is totally void of any evidence with a reference to a muffler, either as to whether or not a vehicle is equipped with a muffler, or as to the condition or adequacy or type of muffler in use, does Code Section 321.436 apply in a prosecution for excessive noise.

"2. If Code Section 321.436 is the proper section under which to bring a charge of excessive noise, is the fact of noise alone sufficient to establish the charge, or is it necessary that there be some evidence as to the muffler on said automobile, or absence of a muffler, or the operating condition of the muffler.

"3. If a charge of excessive noise is brought under Section 321.436, is there a prima facie case made to show that the vehicle was *not* equipped with an adequate muffler, so as to make out a case of excessive noise without evidence as to the muffler; or evidence only that the muffler was not an adequate muffler.

"4. Does Code Section 321.436 apply only to passenger vehicles, or does it apply also to trucks, and if to trucks, is there a violation of Section 321.436 based on excessive noise alone, without reference to the type of vehicle, type or condition of muffler or other conditions as listed in said section.

"Your early reply in way of an interpretation of this Section as to whether or not reference must be made to particular mufflers on particular cars, or whether excessive noise made by a car is adequate, would be greatly appreciated and facilitate the law enforcement officers in this section of the state."

The applicable statutes pertaining to the questions submitted are set out as follows:

Section 321.1(2), 1958 Code of Iowa, defines "motor vehicle" to mean:

"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."

Section 321.436, 1958 Code of Iowa, provides that:

"*Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke,* and no person shall use a muffler cutout, by-pass or similar device upon a motor vehicle on a highway." (Underscoring added.)

For purposes of this opinion the latter part of Section 321.436, supra, to-wit:

", and no person shall use a muffler cutout, by-pass or similar device upon a motor vehicle on a highway."

is of no direct concern, since the above language imposes an absolute prohibition regardless of the quantum of noise. 60 *C. J. S.* (Motor Vehicles) section 34, p. 156; Babbit, *Motor Vehicle Law,* fourth edition, section 1472, p. 1052.

In answer to questions 1, 2 and 3 you are advised as follows:

Criminal statutes are strictly construed against the State and the affirmative burden is placed upon the State to prove every essential element constituting the crime. *State v. Cooper*, 221 Iowa 658, 265 N.W. 915; *State v. Burns*, 181 Iowa 1098, 165 N.W. 346.

The act(s) to be prevented and the standard of conduct to prevent said acts are prescribed by the Motor Vehicle Law, Section 321.436, 1958 Code of Iowa.

The language of Section 321.436, supra, imposes a mandatory duty upon an owner of a motor vehicle to see that said motor vehicle is equipped at all times with a muffler "in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke".

The issue or ultimate fact to be proved is: Was the motor vehicle being operated without a proper and adequate muffler so as to cause the excessive noise with which the accused was charged?

As to the practicality of enforcing a statute such as Section 321.436, supra, the California District Court of Appeal in *Smith v. Peterson*, 131 Cal. App. 2d 241, 280 P. 2d 522, 527 said:

"It appears to us that the requirement that a motor vehicle be equipped with a muffler in constant operation so as to prevent any excessive or unusual noise seems as certain as any rule which could be practically enforced. ***. It may be that physicists have established definite standards of loudness of sound and means for measuring it, but this does not mean that such laboratory operations must be carried out by traffic officers on the highway where violations of this statute must be found and the evidence against them obtained. ***.

"*We conclude that the words 'excessive' or 'unusual', when viewed in the context in which they are used are sufficiently certain to inform persons of ordinary intelligence of the nature of the offense which is prohibited, and are therefore sufficient to establish a standard of conduct which is ascertainable by persons familiar with the operation of automobiles.*" (Underscoring added)

However, proof of excessive noise, without more, is not sufficient evidence to constitute a prima facie case under Section 321.436, supra. The State having the burden of proof of every essential element constituting the crime must prove that the excessive noise was resultant from an inadequate or improper muffler.

Therefore, we are of the opinion that a record completely void of any evidence that the excessive noise was, or did result from an inadequate or improper muffler, would not constitute a prima facie case of violation of Section 321.436, supra.

Your fourth and last question is answered as follows:

A "motor vehicle" by definition includes *every vehicle which is self-propelled*, excluding trackless trolleys. Section 321.1(2), supra. (Underscoring added)

It therefore becomes apparent that Section 321.436, supra, applies also to trucks. The same burden, in this instance, is placed upon the State to prove that the excessive noise was resultant from an inadequate or improper muffler.

It is our further opinion that in order to establish a prima facie case of violation of section 321.436, no reference need be made to the type of vehicle, other than such vehicle was a "motor vehicle" as defined, supra.

19.6 October 23, 1958

MOTOR VEHICLES—MANDATORY REVOCATION OF OPERATOR'S LICENSE UPON CONVICTION OF DRIVING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUOR:

The date of mandatory revocation is the date of revocation by the Department of Public Safety.

Mr. Emery L. Goodenberger, Madison County Attorney, Winterset, Iowa: This will acknowledge receipt of your request of September 11, 1958, for an official opinion relative to a certain legal problem therein, stated as follows:

"A was convicted of Operating a Motor Vehicle while intoxicated on August 13, 1958. The Department of Public Safety received a copy of the Judgment Entry on the following date. The defendant received notice of the driver's license revocation on August 18, 1958, stating that his license was revoked as of August 13, 1958. On August 14, 1958, A was seen driving his car.

"Does the driver's license revocation take effect on the date of the Judgment Entry, the date the department revokes the license, or on the date the defendant receives notice that his license has been revoked?"

The applicable statutes pertaining to the questions submitted are set out as follows:

Section 321.206, 1958 Code of Iowa, provides as follows:

"Whenever any person is convicted of any offense for which this chapter makes mandatory the revocation of the operator's * * license of such person by the department, the court in which such conviction is had shall require the surrender to it of all operator's * * * licenses then held by the person so convicted and the court shall thereupon forward the same together with a record of such conviction to the department."

Section 321.209 (2), supra, provides that:

"*The department shall forthwith revoke the license of any operator * * upon receiving a record of such operator's* * * conviction of any of the following offenses, when such conviction has become final:

"2. Driving a motor vehicle while under the influence of intoxicating liquor * * ." (Underscoring added)

Section 321.281, 1958 Code of Iowa, in pertinent part provides that:

"The court in pronouncing sentence may provide as to the period during which a new license to operate a motor vehicle shall not be issued to the defendant, provided said period shall not be less than sixty days nor more than one year from the date of revocation; and the clerk of court shall forthwith certify to the department a true copy of the judgment sentencing the defendant under this section. The department may receive an application for and shall grant a new license at the expiration of the period provided in the judgment of the court notwithstanding the provisions of sections 321.177 and 321.212."

In 60 C.J.S., Motor Vehicles, Section 160(a), at page 482, it is stated:

"*A license to drive a motor vehicle* not being a vested right, * * , *is subject to* suspension or *revocation as a statute* or ordinance *may provide*, the legislature having full authority to prescribe the conditions on which such a license will be revoked. * * * * * ." (Underscoring added).

In the case of *Doyle v. Kahl*, 242 Iowa 153, 46 N.W. 2d 52, the Supreme Court of Iowa stated as follows:

"Appellant further contends that the suspension of the license without a hearing, is depriving him of his property without due process of law. The fallacy of this claim is that his so-called property right is not such in the ordinary sense. It is a privilege granted to him under certain specific conditions, subject to all laws pertaining thereto at the time the same is issued or may be later enacted, if otherwise valid. That this is the established rule, see 60 C.J.S., Motor Vehicles, Sections 109, 119, 120, 159; 108 A.L.R. 1156, annotation on 1162, 125 A.L.R. 1455, annotation on 1459; Larr v. Digman, 317 Mich. 121, 26 N.W. 2d 872; Hendrick v. State of Maryland, 235 U.S. 610, 35 S. Ct. 140, 59 L. Ed. 385."

The Iowa Legislature has made specific provision for the mandatory revocation of an operator's or chauffeur's license for conviction of driving a motor vehicle while under the influence of intoxicating liquor. Section 321.209 (2), supra.

A construction of statutes substantially the same as those heretofore set out in this opinion to wit: Sections 321.206, 321.209 (2), 321.281, 1958 Code of Iowa, may be found in the case of *Emmertson v. State Tax Commission*, 93 Utah 219, 72 P. 2d 467, 112 A.L.R. 1174. The Utah Supreme Court said:

"It is evident therefore that the revoking of the license is madatory on the commission upon receipt of a record of conviction, and is not founded upon any order or judgment of the court. * * * . The Court cannot suspend that result of conviction (revocation) because it is no part of the Court's judgment; it is a result imposed by law mandatorily. * * * * * * * * * * * * * * *

The statute does not say that the commission must have a certified copy of the record of the court pertaining to the case. *It simply says that, upon receiving, a record of the conviction, the commission shall make the order on its records showing the license revoked.* * * * * * * * * * * * * * * * *

We have already shown that the revocation is mandatory; that the act of the commission is merely ministerial * * ; that the statute itself voids the license upon conviction. All, therefore, that can be necessary is for the court to transmit in writing to the commission such record or report as to show the name of the court, the charge, the date of trial and the verdict, so the proper entries can be made showing the license revoked and the proper and sufficient reasons therefor. * * * * * ." (Underscoring Added).

It becomes apparent in view of the foregoing decision of the Supreme Court of Utah that conviction of the offense therein designated, effects a revocation by force of statute. The revocation being a consequence of final conviction; it is the event which follows an antecedent or condition precedent.

When a defendant-licensee has been convicted of driving a motor vehicle while under the influence of intoxicating liquor, a mandatory duty is imposed upon the Department of Public Safety to immediately revoke the operator's or chauffeur's license of defendant-licensee upon receipt of said license(s), the same having been surrendered to the court in which conviction was final, and the record of conviction. This mandatory duty is purely ministerial; an obligation that cannot be legally avoided by said department.

In 60 C.J.S., Motor Vehicles, Section 160 (c), at page 489, it is stated:

"The legislature has full authority to designate the agency through which a license to drive a motor vehicle will be * * * revoked, * * * . Only such officers or boards as are authorized by the statute have power to revoke * * * an operator's license. * * * ."

It is further stated in 60 C.J.S., supra, Section (d), at page 489, that:

"Proceedings to suspend or revoke a license to drive a motor vehicle are not criminal proceedings, and, where a specific procedure is established by statute for the suspension or revocation of such a license, a different procedure is unauthorized."

In an official opinion of this office, the same appearing in the 1940 *Report of the Attorney General* 193, the following language appears at page 195 thereof.

"The theory of the law relating to the suspension and revocation of licenses is that the sole duty of revocation shall rest with the Motor Vehicle Department, the merits of the offense alone resting with the court, and that in order that the department shall have all pertinent information available to its use, copies of all records are required to be sent to the department together with the licenses, * * * so that the department may act as prescribed by law."

Further support for this conclusion is found in 5A Am. Jur., Automobiles, Sections 136 and 137.

In view of the foregoing, we are of the opinion that upon conviction of driving a motor vehicle while under the influence of intoxicating liquor, the date of the mandatory revocation, in this instance, is the date of the revocation by the Department of Public Safety.

19.7

Aircraft not "motor vehicles". (Abels to Wolverton, Air Enf. O., 9/20/57) #57-9-34

19.8

Bottled gas carriers —

1. Driver must be 21 or over.

2. Chauffeur's license required if vehicle exceeded 5 tons gross weight. (Forrest to Herrick, Chief, Highway Patrol, 7/9/58) #58-7-3

19.9

Brooder house as "Implement of Husbandry" — (Flores, Gen. Counsel, Highway Comm. to Nelson, Story Co. Atty., 3/11/57) #57-3-18

Under Sec. 321.453, Code 1954, excepting certain vehicles, machinery, etc., from the size, weight and load restrictions of Ch. 321, the term "implement of husbandry" does not include a brooder house being transported over the highways on skids, wheels of its own, or on a straight truck.

19.10

Chauffeur's License: 1. An implement dealer driving a truck owned by such dealer, classified and registered as a Class "J" truck and designed primarily for carrying merchandise or freight of any kind, must secure a chauffeur's license. 2. An owner of a fleet of trucks who drives his own truck, such truck being used to haul freight must secure a chauffeur's license if such truck is required to be registered at a gross weight classification exceeding 5 tons and such truck is designed primarily for carrying freight. (Pesch to Timmons, Ass't. Dubuque Co. Atty., 6/26/58) #58-6-19

19.11

Combination of Vehicles —

1. A "combination of vehicles" cannot exceed 50 feet in over-all length. Sec. 321.457, Code of Iowa, 1958.

2. A "combination of vehicles" must comply with the combined gross weight requirements corresponding to the distance between the extreme axles of the combination. Sec. 321.463, supra.

3. All other pertinent requirements must be met, in addition to the foregoing as specified. (Pesch to Hoover, Clay Co. Atty., 10/7/58) #58-10-26

19.12

Covering loads — Mere failure to cover a load of gravel with a tarpaulin is not unlawful. (Construing Sec. 321.460, Code 1954). (Erbe, Atty. Gen. to Williams, Co. Atty., 1/8/57) #57-1-8

19.13

Farm Truck — Nonresident registration: A truck owner who farms leased land in Illinois, has sale outlets in Iowa for disposal of the produce from such leased land, and occasionally uses his truck in delivering produce from Illinois to Iowa is subject to Iowa registration and licensing requirements if a resident. If a nonresident of Iowa, this truck owner is subject to registration and licensing requirements of this state under Sec. 321.55, Code 1954, when carrying on business within this state and owning and operating his truck within this state, provided such use is not seasonal or temporary employment. (Swanson & Faulkner to Mark D. Buchheit, Fayette Co. Atty., 1/28/58) #58-1-30

19.14

Financial Responsibility Act — Exceptions and applicability. Judgment of non-liability. (Swanson and Faulkner to Brown, Comm. Pub. Saf., 9/25/57) #57-9-43

19.15

Financial Responsibility — Certified check as evidence of. (Swanson to Brown, Comm. Pub. Saf., 9/20/57) #57-9-56

19.16

Financial Responsibility — State department of public safety authorized and required to suspend operating privileges of defaulting judgment debtor on receipt of certified copy of judgment for costs unless one or more of specific exemptions set out in Chapter 321A, Code 1954, become operative. Security deposited with department prior to judgment would be applicable toward satisfaction of such judgment. Department has no authority to release funds for the payment of court costs unless the judgment debtor should specifically authorize such release or unless code provisions relating to executions are followed. No statutory authority to department to apportion funds deposited with it to give priority as to judgment for costs over remaining judgment indebtedness. Department is not authorized to release funds deposited with it to the payment of an ordinary judgment on the merits in the absence of proper proceedings under execution by the judgment creditor. (Swanson to Moyer, Comm. of Pub. Safety, 2/15/57) #57-2-10

19.17

Four Wheel Trailer — §321.310, 1958 Code of Iowa. The Legislature succeeded in exempting commercial fertilizer operations of the type described herein from the prohibition of §321.310, supra, by allowing four-wheel trailers to be towed or pulled by either a Class "A" truck or a farm tractor. (Pesch to Johnson, Clinton Co. Atty., 8/15/58) #58-8-8

19.18

House Trailers — Permits where maximum size exceeded. (Lyman to Butler, Chf. Eng., Highway Comm., 11/25/57) #57-11-30

19.19

Implements of Husbandry — Vehicles subject to registration — Exceptions. (Swanson to Moyer, St. Comm. of Public Safety, 4/25/57) #57-4-31

(1) Wagon box trailers used by a farmer only in transporting produce, farm products or supplies hauled to and from market are subject only to a $5.00 registration fee. (2) A vehicle qualifying as an "implement of husbandry" (such as, a manure spreader), and being used temporarily on the highways by a farmer moving from one farm to another and transporting his personal household effects as an incidental part of such temporary movement, is exempt from registration requirements under §321.18, Code 1954.

19.20

License — motor vehicle operator — Carrying and exhibiting. (Swanson and Faulkner to Brown, Comm. Pub. Saf., 9/30/57) #57-9-57

19.21

Livestock Loading Chutes: There is no violation of Sec. 2, Chap. 167, 56th G.A., when a portable livestock chute is in excess of thirteen feet and drawn by a truck twenty feet in length inasmuch as this is "combination of vehicles" which is not in excess of fifty feet in length. The above Sec. 2 is an exception to the maximum length requirement of Sec. 321.457, Code 1954, and such exception applies to the portable chute and the vehicle drawing it, and not to such chute as a single unit. Further, such exception applies only to such chutes thirteen feet or less in length. (Swanson & Faulkner to Wm. M. Tucker, Johnson Co. Atty., 1/28/58) #58-1-31

19.22

Notice of suspension of operator's or chauffeur's license — Notice of suspension to an inmate of the state penitentiary or a patient in the mental health institute. A general discussion of what constitutes notice under Section 321.16, 1958 Code of Iowa to the above mentioned persons, and a practical solution for complying therewith. (Pesch to Brown, Dept. Pub. Safety, 10/21/58) #58-11-6

19.23

Intoxicated driver — Aiding and abetting — Accomplice. (Dvorak to Bandstra, Marion Co. Atty., 5/24/57) #57-5-33

A person who is not the legal titleholder, but who has possession and control of a motor vehicle, and who causes or aids in the operation of the vehicle by an intoxicated person, though not himself engaged in the actual physical operation of the vehicle at the time, may be indicted for operating a motor vehicle while intoxicated. (Various cases cited in discussion).

19.24

Oversize and overweight vehicles — Permit for movement on the highways. (Erbe to Loveless, Gov., 8/29/57) #57-8-42

19.25

Parking — Section 321.354, Code of 1958: (a) Parking a motor vehicle on a highway which results in leaving less than the prescribed twenty feet unobstructed roadway for the free passage or flow of traffic constitutes a violation of the statute unless, of course, such parking is legally excused under Section 321.355 Code of 1958. (b) This opinion is limited in its application in that it does not answer the question as to whether such a parking would constitute a prima facie case of contributory negligence, such question not being raised by the inquiry submitted. (c) The word "highway" as used in the statute includes a secondary road, and applies to the same, since the statute applies to "any highway outside of a business or residence district". (Swanson and Pesch to Elgin, Warren Co. Atty., 5/28/58) #58-5-28

19.26

Purchase by State: Maximum payable under code section 21.2(4). (Strauss to Cunningham, Secy., Exec. Council, 5/26/58) #58-5-2

19.27

Private Hospitals — Vehicles not exempt from registration. (Swanson and Faulkner to Brown, Pub. Saf. Comm., 9/20/57) #57-9-35

19.28

Prohibited passing — Driving on left side of roadway — Violation. (Abels to Stoebe, Humboldt Co. Atty., 6/7/57) #57-6-13

Under §321.304, Code 1954, the prohibited act is the operation of the motor vehicle to the left of the center line of the roadway while overtaking or passing in a no-passing zone, irrespective of whether the tires of the vehicle ever come into contact with the "distinctive center line" in the process of moving to the left of the roadway or returning therefrom. (*Young v. Blue Line Storage Co.*, 242 Iowa 125, 44 N.W. 2d 391, cited.)

19.29

Prohibited passing. (Erbe and Swanson to Judge Sackett, Indianola, Iowa, 4/10/57) #57-4-13

The passing of one car by another proceeding in the same direction is one continuing act, from the time the rear car pulls out of the direct line of travel in the rear of the car to be passed, up to and including the completion of the passing and the passing car is again in its proper lane. (*State v. Holling*, 78 N.W. 2d 25; *State v. Coppes*, 78 N.W. 2d 10; *Young v. Blue Line Storage Company*, 242 Iowa 125, 44 N.W. 2d 391; and *State v. Paul*, 242 Iowa 853, 48 N.W. 2d 309, cited).

19.30

Reconstructed Vehicle: If materially altered, must comply with meaning of subsections 13 and 14, Sec. 321.317(3), Code 1954, since it would then never have been registered prior to January 1, 1954. (Swanson and Faulkner to Robt. N. Johnson, Lee Co. Atty., 1/27/58) #58-1-29

19.31

Registration certificate containers — Quantity to be delivered to county treasurer. (Swanson to Brown, Pub. Saf. Comm., 8/14/57) #57-8-24

19.32

Registration — Delinquent — penalty — Section 321.134, Code of 1958: An affidavit filed in lieu of the surrender of the registration plates will not bring the owner of a motor vehicle under the provisions of Section 321.134. (Swanson and Pesch to Brown, Comm. Pub. Safety, 5/20/58) #58-5-10

19.33

Registration of farm trailers — When necessary. (Swanson to Draheim, Wright Co. Atty., 4/25/57) #57-4-32

Unless a farm trailer falls specifically within the exceptions set out in §321.18, Code 1954, it should be registered under the provisions of §321.123, Code 1954.

19.34

Registration, Government and hospital owned vehicles. (Swanson and Faulkner to Brown, Comm. Pub. Saf., 9/20/57) #57-9-35

19.35

Registration — Interplant vehicles. (Swanson to Brown, Pub. Saf. Comm., 8/14/57) #57-8-25

19.36

Registration — Refund on return of plates. (Swanson and Faulkner to Brown, Comm., Pub. Saf., 9/27/57) #57-9-51

19.37

Registration refunds — Appropriated funds administered and warrants written by Safety Commissioner and not by Comptroller. (Strauss to Brown, Acting Pub. Safety Commissioner, 9/2/57) #57-9-40

19.38

Registration —

1. Whether motor vehicles are exempt from registration under Sec. 321.55, Code of Iowa, 1958, is largely a question of fact.

2. When a statute, Sec. 321.55, provides the conditions to be met to afford exemption from registration requirements, a reciprocity agreement not in accord therewith is ineffectual. (Pesch to Goodenberger, Madison Co. Atty., 10/22/58) #58-10-8

19.39

Release of lien on transfer — A lien noted on a certificate of title need not be released and cancelled by the lienholder before a transfer can be made by the owner. (Pesch to Brown, Public Safety Dept., 12/18/58) #58-12-2

19.40

Safety regulations — Interstate carriers. Federal rules take precedence. (Faulkner to Brown, Comm. Pub. Saf., 9/25/57) #57-9-44

19.41

School busses — Penalty for violation of section 321.373 (17). (Abels to Winkel, Kossuth Co. Atty., 12/30/57) #57-12-5

19.42

Station wagon registration — A vehicle designated by the manufacturer as a station wagon, notwithstanding the fact that the same vehicle may by definition be a motor truck, is required to be registered on the basis of the fee schedule provided in Sec. 321.109, 1958 Code of Iowa. (Pesch to Brown, Pub. Safety Dept., 12/19/58) #58-12-3

19.43

Towing of motor patrol or road grader behind pickup truck — (Swanson to St. Rep. Carson, 3/21/57) #57-3-38

The towing of a motor patrol or road grader behind a pickup truck from point to point for construction work would be in violation of Sec. 321.309, Code 1954.

19.44

Trailer coaches — Brake requirements — Repeal of Section 321.245, Code 1954, and enactment of substitute. (Dvorak to Tucker, Johnson Co. Atty., Iowa City, 2/20/57) #57-2-22

"Trailer coach" intended for human habitation must be equipped with brakes regardless of its weight. Chapter 166, Acts 56th G.A., which repealed Section 321.425, Code 1954, and enacted substitute in its stead, makes no provision against the sale or offering for sale of a motor vehicle, trailer or semi-trailer which is not equipped with brakes in proper condition and adjustment as required in Chapter 321, Code 1954.

19.45

Vehicles owned by armed forces personnel subject to registration — (Swanson to Nelson, Story County Atty., 2/28/57) #57-2-31

Motor vehicles owned by R.O.T.C. instructors at Iowa State College are required to be registered in accordance with the Iowa statutes. Case of *Dameron v. Brodhead*, 345 U. S. 322, is in no way controlling on the question of the registration of automobiles in this state.

19.46

Vehicles owned by armed forces personnel in Iowa — Subject to regis-

tration. (Erbe to Col. Albert J. Clark, Office of J. A. G., Dept. of the Air Force, Washington, D. C., 4/1/57) #57-4-1

Attorney General's opinion of February 28, 1957, to Nelson, Story County Attorney (Reference No. 57-2-31) reconsidered and reaffirmed. Cases of *Dameron v. Brodhead,* 345 U. S. 322, and Woodroffe v. The Village of Park Forest (U.S.D.C., No. Dist. of Ill.) decided 10/16/52, distinguished.

19.47

Water Haulers: Commercial haulers of water not entitled to 25% overload on their registration (Sec. 321.466, Code 1954). (Lyman to Carl Schach, Safety & Traffic Engineer, State Highway Commission, 1/21/58) #58-1-23

CHAPTER 20

SCHOOLS

STAFF OPINIONS

LETTER OPINIONS

20.1 March 6, 1957

SCHOOL RESIDENCE is not the same as legal domicile but depends on "actual residence" which in turn depends upon determination by the local board, subject to appeal under Chapter 290, of the purpose in fact for which the child is present in the school district.

Mr. John H. Holley, Butler County Attorney: Receipt is acknowledged of your letter of February 28th relative to residence for school purposes of a person of school age who is employed on a farm and resides with his employer rather than his parents. You submit the following question:

"The question raised is this: Can the young man be said to be a resident of the district where his employer resides so that the school district where the employer resides is obligated to pay his tuition and transportation costs to its designated school, which is Clarksville? Or is the young man a resident of the town of Greene, where his parents reside, and thus is obligated to attend the Greene school, if he is to be educated at public expense?"

In answer thereto we would refer you to Section 282.6, Code 1954, which provides that "Every school shall be free of tuition to all *actual* residents between the ages of five and twenty-one years . . . ". Residence for school purposes is not the same as legal domicile. A temporary residence if not taken for the primary purpose of obtaining free schooling may be sufficient for school privileges (including those of attending high school under the provisions of Section 282.17, Code 1954). See 1934 Report of the Attorney General, page 238. Also see *Carbon District v. Adams Co.*, 221 Iowa 1047 and *Mount Hope School District v. Hendrickson*, 197 Iowa 191. A general statement of what is held to constitute "actual residence" appears at 26 L.R.A. 581 as follows:

"So far as a rule can be deduced from cases upon this subject it seems to be that a child is entitled to the benefits of the public schools in the district in which it lives if it has gone there in good faith for the purpose of acquiring a home and not for the purpose of taking advantage of school privileges. But that it will not be permitted to go into a district chiefly for the purpose of getting school advantages."

The questions of "good faith" and "primary purpose" are, of course, questions of fact to be determined in the first instance in each case by the local school board of the district where actual residence is claimed. In the event of an adverse ruling by the local board the appeal procedure provided in Chapter 290 may be followed to determine the question of actual residence.

20.2 February 15, 1957

COMMUNITY SCHOOL DISTRICTS are part of the county school system.

Mr. Lynn W. Morrow, Allamakee County Attorney: Receipt is acknowledged of your letter of February 13th as follows:

"I am writing for an opinion on the following:

"Facts: A city independent school maintaining a four year high school, consolidated and took in area in three counties, then later they again adjusted their boundaries and took in greater territory, and this was done under Chapter 275 of the 1954 Code.

"Section 275.27 of the Code states that such schools are known as community schools and becomes a part of the county school system.

"Section 273.2 of the Code states that independent and consolidated schools maintaining a four year high school are not a part of the county school system unless by vote of the populace they become part of said county school system.

"Question: Can a school district such as described in the facts above, vote on the member at large for the county school board by virtue of Section 275.27, or does section 273.2 apply and such a district be not able to vote for the member at large to the County Board of Instruction?"

Section 275.27, Code 1954, to which your letter refers provides as follows:

"Names. School districts created or *enlarged* under the provisions of this chapter *shall be* known as *community* school districts and *shall* be part of the county school system and all provisions of the law applicable to the common schools generally shall be applicable to such districts in addition to the powers and privileges conferred by this chapter." (Emphasis ours)

Section 273.2, Code 1954, to which your letter also refers provides, in pertinent part, as follows:

"The county school system shall embrace all the public schools of the county, except *independent* and *consolidated* school districts that maintain four year high school . . . " (Emphasis ours)

Section 275.27, supra, was enacted by the 56th General Assembly. Section 273.2, supra, was enacted by the 52nd General Assembly. Thus, if there be any conflict between the quoted provisions then, by the familiar rule of construction, Section 275.27, the later enactment, would prevail.

However, we are unable to see any conflict between the two provisions. Section 275.27 expressly applies to *community* school districts which it defines as districts created or *enlarged* under the provisions of Chapter 275. Since under the facts of your letter the district in question was *enlarged* under Chapter 275, it is a "community" school district by express statutory definition and a part of the county school system by virtue of the mandatory "shall" used in the said section.

On the other hand, the exception in Section 273.2 is specifically limited to "independent" and "consolidated" districts. Since the district you describe is neither but is a "community" district by virtue of having been enlarged under Chapter 275, it is a part of the county school system under the express wordage of Section 273.2 as well as Section 275.27.* They may, therefore, vote for the member-at-large.

**Contra: Des Moines Ind. Comm. Dist. v. Armstrong et. al.*, 3/10/59.

20.3 May 22, 1957

SCHOOL REORGANIZATION: (1) H.F. 158, 57th G.A., applies only to school reorganization commenced by filing a petition on or after May 3rd. (2) S.F. 1, 57th G.A., applies to all school reorganization elections held on or after May 10th irrespective of date petition was filed.*

**Cf. Grant v. Norris*, ————Iowa————, 85 N.W. 2d 261.

Mr. N. E. Hyland, Legal Adviser, Department of Public Instruction:

Receipt is acknowledged of your letter of May 16th as follows:

"We respectfully request an official opinion on the following matter:

"On May 2, 1957, there was filed with our Department a notice and affidavit of appeal in the case of Board of Education in and for Ida County, R. J. McNelly Secretary and Executive Officer, v. Board of Education in and for Ida County, R. J. McNelly Secretary and Executive Officer and Board of Education in and for Woodbury County, C. G. Hadley, Secretary and Executive Officer acting as a single board in accordance with Section 275.16.

"What procedure should be followed and under which law should our decision be made — Chapter 275 prior to the amendments or on the basis of Chapter 275 as amended?

"On May 13, 1957, there was filed with this Department a notice and affidavit of appeal in the case of Board of Education in and for Calhoun County, A. L. Wiseman Secretary and Executive Officer, v. Board of Education in and for Calhoun County, A. L. Wiseman Secretary and Executive Officer, Board of Education in and for Webster County, J. Clare Robinson, Secretary and Executive Officer acting as a single board in accordance with Section 275.16.

"The affidavit of appeal indicates that the joint boards held their adjourned hearing May 6, 1957, from which the appeal is taken. What procedure should be followed in hearing this appeal?"

Your letter does not reveal what particular amendments of the 57th General Assembly give rise to your question. Apparently it arises under Section 15, House File 158, Acts of the 57th General Assembly, effective May 3, 1957, which amends existing hearing procedure. Your question apparently is whether the hearing procedure to be followed is that prescribed in Section 275.16, Code 1954, as it appears in the 1954 Code or whether the procedure to be followed is that prescribed by the amended version of Section 275.16.

Pertinent to your inquiry is Section 18 of House File 158 which provides as follows:

"Section 18. This Act being deemed of immediate importance shall be in full force and effect from and after its passage and publication in the Gowrie News, a newspaper published at Gowrie, Iowa, and the Marcus News, a newspaper published at Marcus, Iowa; provided, however, that this Act shall not affect any reorganization proposal for which a petition has been filed prior to the effective date of this Act with the superintendent of schools."

Unfortunately, the language of the quoted "grandfather clause" is not as free from ambiguity as might be desired. Had the legislature chosen to employ the phrase "proposed reorganization" rather than "reorganization proposal" its intention would have been somewhat less obscure. Had it chosen to use the phrase "apply to" rather than "affect" its meaning would have been clearer.

The word "affect" has been judicially defined as meaning "act upon; lay hold of; impress, influence; change." *Gilman v. Burlingham*, 216 P.2d 252, 256, 188 Or. 418 and other cases annotated at 2A *Words and Phrases*, pages 303 to 310.

The word "proposal" has been judicially defined as meaning "an offer, as of marriage; an introduction as to a measure in a legislative assembly; and it may also mean an expression of intention or design." *Taylor v. Miller*, 18 S.E. 504, 505, 133 N.C. 340 and other cases annotated at 34 *Words and Phrases*, page 596.

Under the facts of your letter, and considering the notice periods prescribed in Chapter 275, it is patent that the petition in both cases "proposing" the respective reorganizations must have been filed prior to May 3, 1957. What, then did the "proposal" propose to do? Obviously, it proposed to create a new school district but it proposed more than that. It "proposed" to create such new district *by means of the lawful procedure in force at the time of its filing.* It was impossible at that time to "propose" reorganization under any other method because no other method then existed. Thus, granted that the proposal evidenced by the filing of the petition intended a lawful objective, part of such proposal must have been to follow the procedure prescribed by law at the time of its filing, including the "appeal" provisions of Section 275.20, Code 1954.

Alteration of the "proposal" by superimposing the amendments contained in Section 15 of House File 158 would certainly "affect" it within the meaning of the definitions hereinabove cited. Therefore, you are advised that under Section 18, House File 158, as it applies to your question, the amendments to Section 275.16, Code 1954, contained in Section 15 of House File 158 have no application to either of the cases described in your letter of May 16th.

On May 14th, you submitted the following questions relating to matters having a similar subject:

"We respectfully request an official opinion on the following matter:

"Chapter 275, Code of Iowa, 1954, was amended by the 57th General Assembly, changing many of the steps in the procedure of reorganization. Some of the Acts of the 57th General Assembly have publication clauses and some do not. House File 158, which became effective May 3, 1957, stated that the provisions of the Act shall not affect any reorganization proposal for which a petition has been filed prior to the effective date of this Act with the Superintendent of Schools.

"1. Does this mean specifically that if a petition was filed with the County Superintendent prior to May 3, 1957, that that reorganization proposal would proceed under the provisions of Chapter 275, Code of Iowa, 1954, before the amendment, until such time as it becomes officially disposed of?

"2. If the provisions are followed in accordance with Chapter 275, Code of Iowa, 1954, before the amendment as it pertains to House File 158, would Senate File 1, as it amends Chapter 275, Code of Iowa, 1954, affect the reorganization procedure from the effective date of May 10, 1957, as each step in this comes into play in the absence of the so called, 'Grandfather's Clause,' in Senate File 1?

"3. Pursuant to the above, on a reorganization proposal, where the petition was filed prior to May 3, 1957, and the date for election is subsequent to that date, must the voting procedure set out in Senate File 1 be used?

"4. In a reorganization affecting two districts wherein the petitions were filed with each of the respective boards prior to May 3, 1957, would the procedure in Chapter 275, before the amendment, be followed or would they follow the procedure in House File 158?"

1. On the basis of the above discussion and definition of the words "affect" and "proposal" as used in Section 18, House File 158, the answer to your first question is in the affirmative.

2. Senate File 1, 57th General Assembly, contains no "grandfather clause" as does House File 158. However, Section 4.1, Code 1954, contains the following pertinent provision:

"Rules. In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute:

"1. Repeal — effect of. The repeal of a statute does not revive a statute previously repealed, *nor affect* any right which has accrued, any duty imposed, any penalty incurred, or any *proceeding commenced,* under or by virtue of the statute repealed.

" * * * * * * * " (Emphasis ours)

The only amendment to *Chapter 275,* to which your inquiry pertains, contained in Senate File 1 appears in Section 5 of said Act which *repeals* Section 275.20, Code 1954, and enacts a substitute. In order to determine the applicability of Section 4.1(1) to said repeal of Section 275.20, it is necessary to determine whether or not a school reorganization procedure in which a petition was filed prior to May 10th, the effective date of Senate File 1, is a "proceeding commenced" within the meaning of Section 4.1(1), Code 1954. It appears that school reorganizaton procedure is not a "proceeding" within the meaning of Section 4.1. According to numerous cases annotated at 34 *Words and Phrases,* pages 81 to 108 and at pages 27 to 31 of the pocket part thereto, the phrase "a proceeding" is limited in application to matters in Court. Also see 72 *Corpus Juris Secundum* 972. That the legislature intended Section 5 of Senate File 1 to apply to all reorganization elections seems evidenced by the fact that it felt it necessary to incorporate a "grandfather clause" in House File 158 which amends Chapter 275 extensively but omitted doing so in Senate File 1 *which was enacted* subsequent to and with knowledge of the contents of House File 158 and which, in Section 5, the very section under discussion, repeals part of House File 158.

We are, therefore, of the opinion that Section 5 of Senate File 1 applies to all school reorganization elections from and after May 10th, its effective date, without regard to the time the reorganization petition was filed.

3. On the basis of our answer to your second question, the answer to your third question is in the affirmative.

4. On the basis of our answers hereinabove stated to your letter of May 16th and to the first question in your letter of May 14th, the procedure followed in your fourth question would be that set forth in Section 275.10, Code 1954, prior to its repeal by Section 2, House File 158, 57th

General Assembly, in all cases where *both* petitions were filed prior to May 3rd.

In summary:

1. House File 158, 57th General Assembly, is applicable only to school district reorganization commenced by the filing of a petition on and after May 3rd.

2. Senate File 1, Section 5, 57th General Assembly, applies to *all* reorganization elections held on and after May 10th, irrespective of the date the petition was filed.

20.4 June 11, 1957

SCHOOL REORGANIZATION: 1. Section 275.8, Code 1954, as amended by the 57th General Assembly requires joint planning as a mandatory prerequisite to the effectuation of a proposal for creation of a joint district where the petition was filed after May 3, 1957. 2. Section 275.9, Code 1954, as amended by the 57th General Assembly, requires dismissal of a petition for creation of a joint district filed after May 3, 1957, where there has been no joint planning as defined in Section 275.8 as amended by the 57th General Assembly, unless the joint boards at their meeting under Section 275.16, Code 1954, elect to proceed with such planning prior to disposition of such petition, for purposes of completing which planning they may recess from time to time.

Mr. Harold DeKay, Cass County Attorney: Receipt is acknowledged of your letter of June 1st as follows:

"I have the following two questions relative to school reorganization:

"1. Does Section 275.8 of the 1954 Code of Iowa, as amended by the 57th General Assembly, require joint planning by the County Boards of Education of two or more counties as a mandatory prerequisite of the effectuation of a proposal for district boundary change where the petition for reorganization was filed after the effective date of Senate File 1 and House File 158?

"2. Does that portion of Section 275.9 of the 1954 Code of Iowa as amended by the 57th General Assembly, which states, 'It shall be the mandatory duty of the County Board or joint County Boards to dismiss the petition if the above provisions are not complied with fully.' require the dismissal of a petition for reorganization filed after the effective date of House File 158 and Senate File 1, where that petition seeks to form a district where land is located in more than one county, where there is already, and prior to the filing of the petition, a county plan for each county, but there is no joint county plan?"

This office has under consideration a similar inquiry from the Honorable Willard M. Freed, State Representative from Gowrie, to which this opinion will also serve an answer.

In answer to your first question, we would advise you that Section 275.9, Code 1954, as amended by House File 158, Acts of the 57th General Assembly, provides in pertinent part:

"The provisions of sections 275.1 to 275.5, inclusive, of the Code relating to studies, surveys *and adoption of county plans* shall constitute a mandatory prerequisite to the effectuation of any proposal for district boundary change. It shall be the mandatory duty of the county board or joint county boards to dismiss the petition if the above provisions are not complied with fully." (Emphasis ours)

Section 275.5, Code 1954, provides as follows:

"Tentative plans. The county board of education shall prepare and approve plans for reorganization of school districts within the county after consultation with the boards of the various districts in the county and the state department of public instruction. Within ten days after the county board has approved their tentative plan they shall file such plan with the state department of public instruction. Any proposal for boundary change shall first be submitted to the county board of education for approval before circulation as a petition. The county board of education shall adopt and file a tentative county plan with the state department of public instruction no later than sixty days after such proposal has been presented to them for their approval under this section. Such proposals may provide for reducing an existing school district to less than four government sections and where such proposal is put into effect by election by one of the methods thereinafter provided the county board shall attach such remaining portions of less than four sections to another school district as provided for in their county plan."

Section 275.5 also was amended in minor particulars not material hereto by House File 158.

Section 275.8, Code 1954, as amended by House File 158 provides in pertinent part:

"For purposes of this chapter the planning of joint districts is defined to include all of the following acts . . . " (Emphasis ours)

Thus, "planning" as required in Section 275.5 is a "mandatory prerequisite to the effectuation of any proposal for district boundary change" by virtue of the express langauge of Section 275.9 as amended. "Planning" as referred to in Section 275.5 is clarified by the definition of "joint planning" contained in 275.9 as amended. Therefore, inasmuch as the definition of "joint planning" is expressly "for purposes of this chapter" and relates to the general act of planning contained in Section 275.5, a part of "this chapter" which in turn is made "a mandatory prerequisite to . . . effectuation" by express provision of Section 275.9 as amended, such "joint planning" is a "mandatory prerequisite" to "effectuation" of any proposal for a joint district where the petition containing such proposal is filed after May 3, 1957, the effective date of House File 158.

In answer to your second question, we would refer you to Section 275.16, Code 1954, as amended by House File 158, which provides in pertinent part as follows:

"The joint boards acting as a single board shall determine whether the petition conforms to county plans or, *if the petition requests a change in county plans, whether such change should be made, and shall have the authority to change the plans of any or all the county boards affected by the petition* and it shall determine and fix boundaries for the proposed corporation as provided in section 275.15 of the code or dismiss the petition. . . . . " (Emphasis ours)

Thus, where the several boards of the counties in which territory included in the proposal for a joint district lies have not engaged in joint planning, as defined in Section 275.8 as amended, prior to the hearing under 275.16 as amended, they must do so under the provisions of Section 275.9 as amended before taking steps for the effectuation of the district as such joint planning is, as pointed out in our answer to your first question, a "mandatory prerequisite to the effectuation." However, there is nothing to prevent said joint boards from accomplishing such joint planning at the hearing under Section 275.16 as amended and as hereinabove quoted in pertinent part. If the board so sees fit, it can recess the said hearing from time to time for such period of time as is necessary to accomplish the "joint planning" including the various documents, plats and filings required by Section 275.8 as amended. Having complied with said "joint planning" prerequisite, it may then proceed to fix boundaries as proposed by the petition. It should be noted that although the provision for "*adjourned* hearing" formerly provided in Chapter 275 for purpose of considering boundary changes was repealed by House File 158, there is nothing to prevent *recess* of the original hearing pending final disposition of the petition under the ordinary rule of parliamentary procedure stated at page 107 of *Demeter's Manual of Parliamentary Law and Procedure*, as follows:

"The motion to recess requires a second, is amendable but undebatable, and takes a majority vote. It cannot be reconsidered. It is a privileged motion of the third highest rank. The motion is equivalent to an 'intermission' in the proceedings. *The intermission can be long or short. For instance in convention which last several days, although the motion most frequently used between and at the end of each day's meeting is 'to adjourn', in reality the motion meant and intended is 'to recess'*, — because adjournment *terminates* the convention session, while recessing only halts business temporarily and does not end the convention as does adjournment. Hence, although members propose the motion to adjourn, the motion to recess is actually meant, and the convention chairman should so state it." (Emphasis ours)

Thus, there is nothing to prevent the joint board from recessing as necessary to complete joint planning prior to final disposition of the petition. However, there is similarly nothing to require it to perform such planning at such time. If it sees fit not to proceed with the joint planning, it must dismiss the petition as provided in Section 275.9 as amended.

In summary, the answers to your questions are:

1. Section 275.8, Code 1954, as amended by the 57th General Assembly requires joint planning as a mandatory prerequisite to the effectuation of a proposal for creation of a joint district where the petition was filed after May 3, 1957.

2. Section 275.9, Code 1954, as amended by the 57th General Assembly, requires dismissal of a petition for creation of a joint district filed after May 3, 1957, where there has been no joint planning as defined in Section 275.8 as amended by the 57th General Assembly, unless the joint boards at their meeting under Section 275.16, Code 1954, elect to proceed with

such planning prior to disposition of such petition, for purposes of completing which planning they may recess from time to time.

20.5 November 29, 1957

SCHOOLS: COMMUNITY DISTRICTS:

1. May not call themselves "independent" districts.*
2. May not levy the tax for sites provided in Section 297.5, Code 1954.*

*See H.F. 206, 58th G.A.

Honorable C. B. Akers, Auditor of State. Att: Mr. Earl C. Holloway, Supervisor of County Audits: Receipt is acknowledged of your letter of November 12 as follows:

"The following questions have been asked about the reorganization of school districts:

"1. When a school district containing a city has been created or enlarged, does it lose the right to be called an independent district? Section 275.27 provides that it 'shall be known as a community district and become part of the county school system.'

"2. If an independent district containing a city becomes a community school district, can such district legally levy the tax as provided in Section 297.5, not to exceed one mill for school fund to be used for the purchase of sites for said school district?"

It is assumed that the questions contained in your letter refer to school districts which have been created or enlarged under the provisions of Chapter 275, Code 1954.

The answer to your first question is directly furnished by Section 275.27 to which your letter refers. It unequivocally states:

"School districts created or enlarged under the provisions of this chapter *shall be known as community school districts. . .* " (Emphasis ours)

No clearer manifestation of legislative intention than the quoted language would seem possible. However, further confirmation that the quoted words mean what they say appears in Section 274.6, Code 1954, as amended by Chapter 136, Fifty-sixth General Assembly, as follows:

" . . . Other school corporations shall be designated as follows. . . the community school district of (some appropriate name), in the county (or counties) of (naming county or counties), State of Iowa; or, the (some appropriate name) community school district, in the county (or counties) of (naming county or counties), State of Iowa."

Thus, by the plain language of the statutes, the name of a district created or enlarged under Chapter 275 may not contain the word "independent" unless circumstances exist locally which would justify insertion of the word "independent" as "some appropriate name" as provided in Section 274.6 hereinabove quoted. Reference to the map of Iowa indicates an "Independence" but reveals no "Independent" so that the possibility of appropriate use of the word in such manner appears remote.

Your second question relates to Section 297.5, Code 1954, which provides as follows:

"Tax. The directors in any independent district whose territory is composed wholly or in part of territory occupied by any city may, at their regular meeting in July, or at a special meeting called for that purpose between the time designated for such regular meeting and the third Monday in August, certify an amount not exceeding one mill to the board of supervisors, who shall levy the amount so certified, and the tax so levied shall be placed in the schoolhouse fund and used only for the purchase of sites in and for said school district."

Your question is essentially whether the word "independent" as used in Section 297.5 partakes of its ordinary dictionary meaning or of a special technical meaning referring to a particular type of school district organization only.

Section 4.1(2), Code 1954, provides as follows:

"Words and phrases shall be construed according to the context and 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."

Thus, the question is whether the word "independent" as used to modify the word "district" in Section 297.5 is used in the generic dictionary sense as a descriptive adjective so as to refer to semi-autonomous, tax-certifying public school corporations generally or is used as a technical term to signify school corporations organized under specific statutes providing or having provided for the creation of a particular type of corporation called an independent district.

Since "independent" as used in the school laws had a definite technical meaning with reference to particular types of school organization (See Sections 274.23 to 274.34, 274.37 and 274.38, Code 1950, all of which were repealed by the Fifty-fifth General Assembly) it follows that Section 297.5, Code 1954, applies only to that class of districts organized and existing as "independent districts". That the technical names assigned by statute to various types of school district organization are to be given their technical meaning is supported by the decision in *Cook v. Cons. School Dist.*, 240 Iowa 744 at page 752, 38 N.W. 2d 265, wherein our Supreme Court said:

". . . The statutory requirements to be followed would depend upon the type of school corporation. If it was an independent school district in a city, or a town, or a village with the required population then Code sections 274.23 and 274.24 and any other requirements of Chapter 274 of the 1946 Code should be followed. But if, as in the case at bar, the school being enlarged is a consolidated school, the applicable provisions of Chapter 276 of the 1946 Code, entitled 'Consolidated School Districts' should be followed."

Thus, the tax in question may not be levied in a "community" school district for the reason such district is not an "independent" district.

20.6 March 7, 1958

ABSENTEE VOTING: There is no authority for absentee voting in a community school district election.*

Mr. John J. Wilkinson, Iowa County Attorney: Responding to your oral request for opinion of the Department in respect to absentee voting in a school election in a community school district composed of two counties in which the voter desiring to vote an absentee ballot resides in one county of the district and the secretary of the district resides in a different county, we would advise as follows. Absentee voting is provided for by Section 53.1, Code 1958, not yet in circulation, and provides as follows:

"*Right to vote — conditions.* Any qualified voter of this state may, as provided in this chapter, vote at any general, municipal, special, or primary election, or at any election held in any Independent town, city, or consolidated school district:

"1. When, in the conduct of his business or due to other necessary travel, he expects to be absent on election day from the county in which he is a qualified voter.

"2. When, through illness or physical disability, he expects to be prevented from personally going to the polls and voting on election day."

It will be seen that absentee voting is authorized at any general, municipal, special or primary election or at any election held in any Independent town, city, or consolidated school district. A community school district, not being either an Independent town, city or consolidated school district, absentee voting is not authorized therein.

*See H.F. 206, 58th G.A.

20.7 March 7, 1958

SCHOOL REORGANIZATION:

1. Duty of county attorney to represent county board of education in single-county school reorganization appeals under Section 275.15, Code 1958.

2. Duty of county attorney to represent county board of education in joint-county school reorganization appeals under Section 275.16, Code 1958.

3.* Power of state department to "modify" decisions of joint county boards of education on appeal in school reorganization matters under Section 275.16, Code 1958.

*Cf., *Bd. of Ed., Franklin Co. v. Bd. of Ed., Hardin Co.*, S. Ct. of Iowa, 4/8/59.

Mr. Harold G. DeKay, Cass County Attorney: Receipt is acknowledged of your letter of February 12 as follows:

"1. Where a petition for reorganization is filed with the County Board of Education and all of the proposed reorganized area lies within one county under the provisions of Section 275.12 of the 1954 Code of Iowa,

as amended, and as a result of proper hearing and dismissal by the County Board, a school district appeals that decision to a court of record in the county, and such school board is represented by retained counsel, is the County Attorney required to represent the County Board of Education in this and in subsequent appeals?

"2. Where a petition for reorganization under Chapter 275 is filed by electors, and the land involved lies in more than one county and after proper notice, the petition is dismissed by the joint boards of education, and the electors are represented by retained counsel and after the dismissal a school district with the same lawyer retained by said electors files an appeal to the State Department of Public Instruction, is, under those circumstances, the County Attorney of the county wherein the petition was filed under the provisions of this Chapter, required to represent the County Board of Education in this appeal and in subsequent appeals to follow.

"3. Does your office interpret that portion of Section 275.16 of the 1954 Code of Iowa, as amended, which reads as follows: 'The State Department shall have the authority to affirm the action of the joint boards, to vacate, to dismiss all proceedings, or to make such modification of the action of the joint boards as in their judgment would serve the best interest of all the counties.' to mean that the State Department of Public Instruction may grant affirmative relief to the appellant where such affirmative relief would constitute a complete reversal of the decision of the joint county boards in fixing boundaries and granting what the joint county boards refused to grant?"

1. In answer to your first question you are advised that the office of the County Board of Education is a county office and as such is an arm of the county. Therefore, the answer to your first question is provided by Section 336.2(6), Code 1958, as follows:

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

"* * * * * *

"6. Commence, prosecute and defend all actions and proceedings in which any county officer, in his official capacity, or the county, is interested, or a party."

As was further stated in a letter opinion of this office addressed to Mr. Walter Willett, Tama County Attorney, dated July 3, 1952, hereby adopted and affirmed:

"If the business of the county, and the work before the County Attorney, which otherwise would require his attention, is such that assistance is required in order to perform the duties in connection with all county business, the County Board of Supervisors should, under its general powers, prescribed by Chapter 332, and confirmed by the concluding portion of Section 341.7, employ such legal assistance as may be required and in their discretion they may determine, to undertake the defense of any actions against the county or its officials."

2. In answer to your second question, insofar as it relates to matters "submitted to the state board of public instruction" under Section 275.8, Code 1954, or, under Section 275.16, Code 1958, where a "controversy arises" between "the county board or boards" and "any school district aggrieved" so that the "aggrieved" board may "bring the controversy to the state department of public instruction, as provided in section 275.8", you are advised that you are not required to represent your county board in administrative proceedings before the State Board of

Public Instruction or the State Department of Public Instruction for the reason that no requirement exists that parties before said board or department be represented by attorney. Thus, you are neither required to nor prohibited from appearing as "spokesman" for the county board of education before the State Board or Department of Public Instruction. When hearing and determining such matters, the department or board although functioning in a sense as a "court" in that it hears and decides a dispute to which it is not a party, between two adverse contestants, it nevertheless is not a court of law in which the cases of the respective contestants must be presented by members of the bar.

As to the "subsequent appeals to follow" the decision of the State Department or Board, such proceedings are in court and your duty to represent the county board of education is the same as indicated in the answer to your first question.

3. Your third question presents a somewhat more complicated problem. On the face of the statutory language quoted in your letter as read out of context it would seem the authorization "to make such modification of the action of the joint boards as would serve the best interest of the counties" confers unlimited discretion to fix boundaries. It is our impression such was not the intention of the General Assembly. In general, Chapter 275 commits the power to plan and approve the reorganization of school districts to county boards of education. Sections 275.1 to 275.9 provide for preparation by county boards of education of comprehensive plans for reorganization of school districts. The county board is required in Section 275.1 to conduct studies and surveys of a variety of local educational factors enumerated in Section 275.2. It is required to conform its plan to certain minimum educational standards set forth in Section 275.3; to conduct public hearings in connection with studies and surveys by Section 275.4. It is required to embody its findings based on such studies and surveys in a county plan under Section 275.5, which shall be progressively put into effect under Section 275.6. It is required to budget and expend sums of money for the foregoing purposes. It has complete charge of passing on reorganization proposals and conducting elections. The reorganized district becomes part of the county school system administered by the county board of education upon coming into existence.

On the other hand, the powers of the State Superintendent, Board, and Department under Chapter 275 are few and almost exclusively advisory in nature. The State Superintendent may relax pupil-population requirements in limited circumstances under Section 275.3. He may prepare and furnish specimen "reorganization plans and suggestions" under Section 275.4. The Department serves as a central repository for completed plans under Section 275.5. The Department "shall co-operate with the several county boards" under Section 275.8.

Thus, read in the light of the context comprising the entire chapter which reveals the role of the state agency to be primarily advisory as characterized by such words as "suggestions", "recommendations" and "shall co-operate", it seems unlikely that the power "to make such modi-

fication of the action of the joint boards as would in their judgment serve the best interest of all the counties" contemplates "such affirmative relief (as) would constitute a complete reversal of the decision of the joint county boards and granting what the joint county boards refused to grant" as queried in your third question. It appears more probable that the "modification" contemplated in Section 275.16 would be confined to such matters as elimination of unauthorized questions from the proposition to be submitted to the electors such as, for example, questions pertaining to the location of schoolhouses, future bond issues and the like or for the inclusion of omitted items required by statute to be included such as manner of electing directors.

As was stated by our Supreme Court in *State ex rel Herberts v. Klemme Community School District*, 247 Iowa 48 at page 53, 72 N.W. 2d 512:

"The legislature seems to have preferred to intrust to the respective county boards of education the duty to protect against the gerrymandering or ill advised or designed redistricting, and perhaps this is sufficient. They are usually composed of persons of integrity and high purpose."

Note should also be taken of the words of the Supreme Court in its decision in *Everding v. Board of Education*, 247 Iowa 743 at page 747, 76 N.W. 2d 205, where the Court said:

"In reaching the correct interpretation of the applicable provisions of Chapter 275 we should consider the entire Act and, so far as possible, construe its various provisions in the light of their relation to the whole. This is a fundamental rule of statutory construction. . . . (Citing cases)."

Also at page 753, idem, where the Court said:

". . . The right of appeal under Section 275.16 seems to be granted only for the protection of the county plan where joint boards fix boundaries of a proposed district that do not conform to the plan. . ."

It is true that Section 275.16 has been amended subsequent to the quoted decision by insertion of the specific phrase concerning which you inquire. However, the general tenor and framework of Chapter 275 remains essentially similar to what it was prior to the amendments made by the Fifty-seventh General Assembly which appear to have been intended primarily for clarification and amplification of detail rather than substantial change in procedure under the chapter.

Viewing the chapter as a whole it appears to remain true that, as stated in the article at 3 *Drake Law Review* 57, 71, cited at page 752 of the *Everding* case, supra:

"The position of the county board of education as the supreme agency at all stages of reorganization proceedings is fortified."*

It is, therefore, our opinion that the power "to make such modification of the action of the joint boards" placed in question by your letter does not authorize the state department to substitute its judgment as to what district boundaries shall be voted upon for that of the respective county boards nor does it authorize in the terms of your question "granting what the joint county boards refused to grant", except to the extent

necessary "for the protection of the county plan where joint boards fix boundaries of a proposed district that do not conform to the plan" and neglect to amend such plan.

In summary, the answers to your three questions are:

1. Yes.

2. (a) No (as to administrative hearings.)

   (b) Yes (as to proceedings in court.)

3. No.

*Contra, *Hohl et al v. State Board*, 94 N.W. 2d 787.

20.8 March 7, 1958

SCHOOL DISTRICTS: INSURANCE:

Under Section 517A.1, Code 1958:

1. School districts are empowered to purchase and pay the premiums on insurance therein described to the extent not otherwise authorized in other statutory provisions and to the extent that common-law immunity from tort liability permits the existence of insurance risks.

2. Insurance covering operators of school busses is "otherwise authorized" by Section 285.10(6) but insurance on other vehicles and machinery owned or used by the school district may be purchased under Section 517A.1.

Mr. William S. Sturges, Plymouth County Attorney: Receipt is acknowledged of your letter of February 24 in which you submit the following:

"This office respectfully requests an official Attorney General's Opinion interpreting Acts 1957 (57 G.A.) Ch. 246, §1, which became effective April, 1947.

"1. Are public school districts and their boards of directors authorized and empowered, under the above section, to purchase and pay the premiums on the insurance therein described?

"2. Assuming the authority to purchase . . . Does said act authorize the purchase of a general liability policy, or is said section limited in application to only insuring against liability incurred in the use of automobiles, trucks, tractors, machinery or other vehicles owned or used by public bodies?"

The Act of the Fifty-seventh General Assembly to which you refer has been codified as part of Section 517A.1, Code 1958, and provides as follows:

"Authority to purchase. All state commissions, departments, boards and agencies and all commissions, departments, boards, districts, municipal corporations and agencies of all political subdivisions of the state of Iowa *not otherwise authorized* are hereby authorized and empowered to purchase and pay the premiums on liability, personal injury and prop-

erty damage insurance covering all officers, proprietary functions and employees of such public bodies, including volunteer firemen, *while in the performance of any or all of their duties including operating an automobile, truck, tractor, machinery or other vehicles owned or used by said public bodies,* which insurance shall insure, cover and protect against individual personal, corporate or quasi corporate liability that said bodies or their officers or employees may incur.

"The amount of insurance that said commissions, departments, boards and agencies may purchase shall not exceed ten thousand dollars for property damage or twenty-five thousand dollars for personal injury or death of one person, and subject to said limit for one person, fifty thousand dollars for personal injury or death of more than one person, arising out of a single accident." (Emphasis supplied)

The nature and authority of school districts has been defined in *Waddell v. Beord,* 190 Iowa 400, 175 N.W. 65, quoted with approval in *Dean v. Armstrong,* 246 Iowa 412, 68 N.W. 2d 51, to the effect that a school district:

". . . is a legislative creation. It is not organized for profit. It is an arm of the state, a part of its political organization. It is not a 'person' within the meaning of any bill of rights or constitutional limitation. It has no rights, no functions, no capacity, except such as are conferred upon it by the legislature. . ."

Section 274.1, Code 1954, Code 1958, provides as follows:

"Powers and jurisdiction. Each school district now existing shall continue a body politic as a school corporation, unless hereafter changed as provided by law, and as such may sue and be sued, hold property, and exercise all the powers granted by law, and shall have exclusive jurisdiction in all school matters over the territory therein contained."

1. From the above-quoted case and statute definitions of a school district, we conclude that the word "district" as used in Section 517A.1, Code 1958, is sufficiently broad to comprehend "school district". Thus, in answer to your first question, public school districts and their boards of directors are authorized to purchase and pay the premiums on insurance therein described to the extent, of course, that they are not "otherwise authorized" by other statutory provision and subject to the condition, naturally, that within the scope of the statute's authorization an *actual risk* can be determined to exist. In this connection it should be noted that the immunity of school districts and of school officers in the performance of governmental functions from tort liability does not leave any particularly fertile field of bona-fide risks to be insured. See the following cases:

Larsen v. School District., 223 Iowa 691
Smith v. Iowa City, 213 Iowa 392, 239 N.W. 29
Shirkey v. Keokuk County, 225 Iowa 1159
Ford v. School District, 223 Iowa 795
Lane v. Dist. Twp., 58 Iowa 462.

Also see the following prior opinions of this office:

1940 *Report of the Attorney General,* page 232
1936 *Report of the Attorney General,* page 274
1934 *Report of the Attorney General,* page 329
1930 *Report of the Attorney General,* page 267
1928 *Report of the Attorney General,* page 242
1912 *Report of the Attorney General,* page 198

For statutes "otherwise authorizing" purchase of insurance by a school district see Sections 87.1 (as construed at 1936 *Report of the Attorney General*, page 274), 279.25 and 285.10(6), Code of Iowa.

2. The answer to your first question furnishes the answer to your second question. Purchase of a "general liability" policy is not authorized by the statute for the reason that a school district does not have "general" liability and purchase of coverage in excess of actually existing and possible bona-fide legal risk would amount to misapplication of public funds to the extent that the premium charge for the coverage purchased exceeded the premium charge which would properly be imposed for coverage limited to risks outside the protection of common-law immunity from liability.

With respect to the purchase of motor vehicle liability insurance, Section 285.10(6), Code 1954, Code 1958, empowers local school boards to:

". . . purchase liability insurance or such other coverage as deemed necessary to protect the driver or any authorized employee from liability incurred by said driver or employee as a result of operating the bus and for damages or accident resulting in injury or death to the pupils or employees being legally transported."

Since the coverage authorized by Section 285.10(6), appears fully as broad with respect to school busses as that afforded where "not otherwise authorized" by Section 517A.1, supra, you are advised that purchase of insurance covering a "driver or employee" in connection with the operation of a school bus is authorized by the former section but coverage on operators of other vehicles and machinery by Section 517A.1. In this connection see official opinion of this office directed to your office under date of June 28, 1957. (8.2)

20.9 August 12, 1958

SCHOOL DISTRICTS: Indebtedness — Where by operation of sections 274.4 and 274.5 action to test the validity of the organization or reorganization of a school district has been barred, such school district has the capacity to incur bonded indebtedness as provided in Chapter 296, Code 1958.*

*See S.F. 305, 58th G.A.

Mr. Isadore Meyer, Winneshiek County Attorney: Receipt is acknowledged of your letter of July 15 as follows:

"Reference is made to our telephone conversation of this date concerning the problem of the Decorah Community School District. ————, the bond attorneys, gave an opinion that the merger under Section 275.10 was not legal, since the legislature repealed this Section on May 3, 1957, and the concurrent meeting of the two boards, that is the Freeport Independent School District Board and the Decorah Independent School District Board, was not had until July 1, 1957, as set out in Section 275.10. In addition, of course, in this case the statute of limitations began to run October 1, 1957, when the descriptions were filed in the County Auditor's Office, and has now gone by.

"In view of the serious need of school room here at Decorah, we are interested in trying to get the local banks to purchase bonds in the event of a favorable election, for a period of a year or two, until we can get a legalizing act from the legislature. We have taken the matter up with our local banker, Mr. ————————, who is a member of the State Banking Board, and want an opinion from your office as to whether or not the local banks may legally purchase these bonds.

"I am enclosing all pertinent correspondence herewith."

Examination of the correspondence file enclosed with your letter reveals that the question you intended to ask was not whether or not "the local banks may purchase these bonds" but rather whether or not the school district in question is a de jure corporation with power to issue bonds in the manner and by the procedures provided by statute for issuance of bonds by such corporations. Whether or not a bank can or should bid on a given school bond issue depends on a number of factors, including an examination of the entire procedure employed by the school district. We do not have the facts with respect to the procedure employed before us nor is it our duty to superintend the bonding procedures of municipalities.

However, as to the particular point in controversy, as revealed by the correspondence file enclosed with your above letter, it appears that the school district in question has exercised the franchises and privileges of a school district for a period in excess of six months and that no action has been filed in any court challenging its right to exist and to exercise such franchises and privileges. The question of the legal capacity of such district is, therefore, answered by the decision of our Supreme Court in the case of *Swan Lake Consolidated School District v. Dolliver Consolidated School District*, 244 Iowa 1269, 58 N.W. 2d 349.

In the said case, the Defendant district had been formed by a procedure which, because of the type of organization of the prior-existing district which formed its nucleus, it was not lawfully entitled to employ. In fact, in an almost identical prior case, *Cook v. Cons. Sch. Dist.*, the Court had held the organization of the Truro School District invalid because it had been formed by the same unauthorized procedure. The Court pointed this out at page 1276 of 244 Iowa and stated that it would hold the organization of the Defendant district invalid but for the presence of one additional fact, and that was the fact that Plaintiff had allowed over six months to elapse before bringing its action. During said six-month period Defendant had exercised the franchises and privileges of a school district. The Court based its decision on sections 274.4 and 274.5, Code 1950, quoted at page 1278 of 244 Iowa, hereinafter set forth as follows:

"No action shall be brought questioning the legality of the organization of any school district in this state after the exercise of the franchises and privileges of a district for the term of six months." (Section 274.4)

"Every school corporation shall, for the purpose of section 274.4, be deemed duly organized and to have commenced the exercise of its franchises and privileges when the president of the board of directors has been elected; and the record book of such corporation duly certified by the acting secretary thereof, showing such election and the time thereof shall be prima facie evidence of such facts." (Section 274.5)

Clearly, the District you describe qualifies as a valid organization under the *Dolliver case* and the statutes applied therein. However, the said statutes have since been amended and it is, therefore, necessary to consider them in their present form. Section 274.4, Code 1958, provides:

"*Record of reorganization filed.* When an election on the proposition of organizing, reorganizing, enlarging, or changing the boundaries of any school corporation carries by the required statutory margin or any area of less than four sections is attached to any school corporation by order of a county board of education, the county superintendent, or the secretary of said school corporation, shall file a written description of the new boundaries of the school corporation in the office of the county auditor of each county in which any portion of the school corporation lies."
Section 274.5, Code 1958, provides:

"*Action to test reorganization.* No action shall be brought questioning the legality of the organization, reorganization, enlargement, or change in the boundaries of any school corporation in this state unless brought within six months after the date of the filing of said written description in the office of said county auditor or county auditors."

Thus, the present statutes operate even more liberally in favor of the District described in your letter than did the prior similar statutes in favor of the Dolliver school district. It is no longer even necessary to prove the exercise of "franchises and privileges" but only that the prescribed written description of boundaries has been on file in the office of the county auditor for a period of six months. This is apparently true in the case you describe and it follows that the organization of the district must be presumed valid for the reason that no action may now be brought questioning it.

The correspondence enclosed with your letter mentions the more recent decision of the Supreme Court in *Grant v. Norris*, 249 Iowa ————, 85 N.W. 2d 261, as vitiating the effect of the *Dolliver* case because "it was a case holding the organization of a school district invalid." Since *Grant v. Norris* involved no issue relating to Code sections 274.4 and 274.5 and makes no reference to said sections, the mere fact that "it was a case holding the organization of a school district invalid" appears to have no relevance to your question.

To the extent that *Grant v. Norris* does to some degree rely on the general savings clause in Code Section 4.1 for the proposition that a school reorganization, commenced under a statute subsequently repealed, properly continues to completion under the repealed procedure, it would, on the contrary, seem *to support* the contention *for validity* of the organization of the district you describe, irrespective of whether or not the statute of limitations has run. In any event, it would seem to supply the "color of law" essential to the existence of a *de facto* school corporation and the subsequent operation of the statute of limitations would seem to bar any action seeking to establish that such *de facto* corporation was not also *de jure*.

Our Supreme Court has on many occasions held that quo warranto is the exclusive method for testing the validity of the organization of a school district *after it has commenced operations as such — Dunn v.*

Burbank, 190 Iowa 67, *Cook v. Cons. Sch. Dist.*, supra, *Swan Lake v. Dolliver*, supra, *Andrews v. Hadley*, 246 Iowa 550 at pages 559 to 563, 63 N.W. 2d 234. In *Dunn v. Burbank*, the Court said, at page 71 of 190 Iowa:

"To avoid this, and to be in a position to demand payment of the school moneys into its own treasury, the district of Cedar Falls must successfully attack the corporate organization of Cedar Heights. This is no mere 'Incidental or emergent issue'. It is the one central and paramount issue raised by interveners. If there be any incidental or 'emergent' issue presented, it is the diversion of the taxes from the district of Cedar Heights to the district of Cedar Falls which will follow as an incident of an adjudication that the judgment incorporating Cedar Heights is void. But following our decision in the *Nelson* case, and subsequent decisions to the same effect, such an adjudication is reserved by the statute for proceedings in quo warranto."

Were it not for the apparent exclusiveness of *quo warranto* as a means of testing the validity of such district, we would recommend that the question be raised in a *declaratory judgment* action, brought by the board of directors under Rules of Civil Procedure 261 to 269, against the petitioners who presented the petition for a bond election to the board under Code Section 296.2, joining all of the electors and taxpayers of the district as defendants, stating the board fears actions in mandamus if they fail to proceed with the bond issue and actions in injunction if they do proceed, and praying for a declaration of their rights and powers under the pertinent statutes, as the proper way to settle in advance the question at hand.

The question presented by your letter is one affecting the public credit. If the bond issue in question were floated and, even upon the most remote contingencies later proven bad, the attendant notoriety might so destroy public confidence in school and other municipal bond issues that thereafter all such issues would go begging on the market. Situations can be imagined where bond issues *might* be found bad by the Supreme Court in circumstances somewhat different from those you describe. For example, despite the statute of limitations hereinabove discussed, there is the *possibility* of a direct proceeding before the Supreme Court for a writ of quo warranto. Original jurisdiction was exercised by the Supreme Court of Michigan in *Attorney General v. Bay City*, 334 Mich., 514, 54 N.W. 2d 365, despite the existence of a statute of limitations similar to the one hereinabove considered. Under Article V, Section 4, of our Constitution, which empowers our Supreme Court to "issue all writs and process necessary to secure justice to the parties" it is not beyond the realm of possibility that our Supreme Court might, as did the Michigan Court, take original jurisdiction to grant such writ in circumstances such as you describe. However, there are no Iowa cases where it has done so.

For further example, the procedure employed in attempting to create a school district might be so foreign to any statutory method that the "color of law" requisite to the concept of even a *de facto* corporation might be completely lacking. In such event it would follow nothing resulted from such procedure in favor of which the statute of limitations could run. However, such is not your case, according to the recital of

facts upon which you present your question, it appearing that the statutory procedure was followed but that the statute followed, Section 275.10, Code 1954, was repealed after proceedings were commenced and before they were completed. In *DeBerg v. County Board*, 248 Iowa 1040 at pages 1044, 1045; 82 N.W. 2d 710 and 83 N.W. 2d 734, it was held that procedure to incorporate a *noncontiguous area* was so foreign to statute that not even a *de facto* corporation resulted. Presumably if no *corporation whatsoever* resulted from the procedure, Code Sections 274.4 and 274.5 could not shield the operation by imposing a bar. We say "presumably" because the statute of limitations was not an issue in the *DeBerg* case. However, as has been pointed out, the facts stated in your inquiry recite at least "color of statute".

You are, therefore, advised that, *on the basis of the facts stated*, as viewed in the light of the statutes and *existing* Iowa case precedents, the district in question appears to have the legal capacity to incur bonded indebtedness in the manner and within the limits provided by statute and that bonds evidencing such indebtedness could be purchased by local banks, as provided in Section 526.25(4), Code 1958, provided statutes relating to obtaining the authorization of electors, debt limit, time limit, interest limit, manner of sale and other pertinent provisions of statute which, in general, are contained in Chapters 75, 76, 296 and 298, Code 1958, are fully complied with.

20.10

Agricultural land credit fund — State aid to schools and school districts — Authority of State Comptroller to issue warrants therefor. (Strauss to Sarsfield, St. Comptroller, 5/14/57) #57-5-16

Senate File 460, Acts 57th G. A., allocating from the State General Fund all the unobligated balance above twenty-four million dollars to the various school districts in the state in a particular manner is an appropriation for such purpose and an allocation to such specified school districts, and authorizes the State Comptroller to issue warrants therefor.

20.11

Appeals — From State Supt. — authority of local school board to pay cost where not a party. (Abels to Bruner, Carroll Co. Atty., 7/17/57) #57-7-18

20.12

Appeals — Reorganization — From State Supt. — Voluntary dismissal — Limitations as to number. (Abels to DeKay, Cass Co. Atty., 10/1/57) #57-10-3

20.13

Automobiles — operation by students during noon intermission. (Abels to Strack, Grundy Co. Atty., 5/17/57) #57-5-23

School boards have authority to make and enforce rules and regulations pertaining to the operation of automobiles by students during the school noon intermission.

20.14

Board of directors — May not receive compensation as secretary for superintendent of school. (Abels to Arminger, Secretary Bd. of Education, Inwood, Iowa, 4/5/57) #57-4-9

Compensation of school board member is expressly prohibited by §279.29, Code 1954. A member of a school board cannot receive compensation for serving as secretary to the superintendent of the school.

20.15

Board of Public Instruction — Departmental Rules and Regulations. No power to control discretion conferred by statute on local boards. (Abels to Wright, Supt. Pub. Instr., 9/3/57) #57-9-5

20.16

Buildings — Remodeling — Submission to electors — Funds. (Abels to Pappas, Cerro Gordo Co. Atty., 7/18/57) #57-7-23

20.17

Bond Elections — Submission as special question at general election. (Abels to Oeth, Dubuque Co. Atty., 8/21/58) #58-8-30

20.18

Building Contracts — Change orders in school building contract so as to allow the construction of additional class rooms are subject to the bid requirements of Section 297.7, Code 1954. (Abels to Hyland, Dept. of Public Instruction, 1/23/57) #57-1-29

20.19

Closed School Reopening — Applicability of §279.15, Code 1954. (Abels to Klotzbach, Buchanan Co. Atty., 6/3/57) #57-6-5

Procedure for reopening schools set forth in §279.15, Code 1954, applies only to schools closed by operation of that particular statute.

20.20

Closing schools — Tuition and transportation charges. Contracts with other districts. Procedure. (Abels to Getscher, Fremont Co. Atty., 8/20/57) #57-8-33

20.21

Code of Iowa — Free distribution to State Board of Public Instruction. (Abels to Johnston, Asst. Supt. Pub. Instr., 9/24/57) #57-9-39

20.22

Community Recreation program — Districts have authority to participate in community recreational program when school is not in session under the provisions of code chapters 300 and 377. (Abels to Wilson, Muscatine Co. Atty., 5/27/58) #58-5-1

20.23

Compulsory Reorganization Payment of agricultural land tax credit in

full as condition precedent, prospective in operation — School district reorganization — Eligibility to vote thereon. (Abels to Molison, State Senator, 4/24/57) #57-4-29

(1) Condition of payment in full of agricultural land tax credit expressed in proposed Senate File 1, Acts 57th G. A., must be construed as prospective in operation under the rule of construction that the legislature is presumed not to have intended to enact meaningless provisions.

(2) House File 158, Acts 57th G. A., limits eligible voters at school reorganization elections to those residing within the proposed boundaries. (But see Senate File 1, Acts 57th G. A., passed after this opinion was rendered, and which was amended so as to repeal the provisions of House File 158, Acts 57th G. A., discussed under No. 2 above).

20.24

County Board of Education may amend its schedule of regular meetings under Section 273.10, Code 1954, at a special meeting for the purpose of enabling it to make an appointment to fill a vacancy on said board. (Abels to Willis, Co. Atty., 1/4/57) #57-1-6

20.25

County Board of Education — 57th G. A., Chap. 126, requires county boards of education to *list* (not lump) bills and claims for publication. (Abels to Loren Brown, Mitchell Co. Atty., 1/3/58) #58-1-4

20.26

County Board of Education — Supplies furnished county board under Sec. 332.9 and 332.10. Telephone. Rate of consumption does not alter character of supplies furnished. See also 1954 OAG 3. (Abels to Scholz, Mahaska Co. Atty., 2/25/58) #58-2-4

20.27

County Board of Education — Has no power to employ public health nurse. (Strauss to Akers, St. Auditor, 6/27/58) #58-6-17

20.28

County Board of Education — Membership on the County Board of Education is not a lucrative office and a member of the General Assembly can legally be elected or appointed to such board. (Strauss to Remley, Jones Co. Atty., 10/10/58) #58-10-20

20.29

County Board of Education — Membership on County board incompatible with office of secretary of local board. (Abels to Morrow, Allamakee Co. Atty., 10/28/58) #58-10-4

20.30

County School System — Where facts determining proper school system for administration of a new district are in doubt by reason of operation of school by such district in both counties and a dispute over which county contained the greater number of electors of the proposed school district,

an action for declaratory judgment brought by the new school district may furnish a final determination of its administrative status. (Abels to Hasbrouck, Guthrie Co. Atty., 1/15/58) #58-1-21

20.31

County System —

1. County Board cannot appeal budget decisions of State Appeal Board to Attorney General.

2. County Superintendent can ask County Attorney's opinion but can't request the County Attorney to obtain him someone else's.

3. Statutory duty to "plan" and "supervise" certain local functions doesn't authorize County Board to hire personnel to perform the planned acts for the local school.

4. County Board cannot circumvent lack of statutory authority to hire nurse by giving the nurse the title "attendance officer".

5. Legally there is only one licensed class of registered nurses. (Abels to Morrow, Allamakee Co. Atty., 10/29/58) #58-10-3

20.32

County Superintendent — Reorganization of school districts. Determination of county school system of administration. (Abels to Williamson, Adair Co. Atty., 9/19/57) #57-9-31

20.33

County Superintendent — Traveling expenses of superintendent. (Strauss to Akers, Auditor of State, 3/15/57) #57-3-30

The traveling expense of the county superintendent is fixed by the county board of education. If so fixed, the cost of meals while visiting schools or on other business within the county may properly be paid as traveling expenses of the county superintendent.

20.34

Designation of schools outside district — Unlawful where school in district open. (Abels to Tucker, Johnson Co. Atty., 8/20/57) #57-8-32

20.35

Designation of schools outside state — Discretion of local boards. (Abels to Sersland, St. Rep., 12/30/57) #57-12-7

20.36

Dissolution of a de facto school corporation pursuant to court order — Election of directors. (Abels to Brown, Mitchell Co. Atty., 3/8/57) #57-3-13

Election of directors in school districts restored to operation as an incident of dissolution of a de facto school corporation pursuant to court order in a quo warranto action is subject to order of the district court. (Referring to situation created by decision of Supreme Court of Iowa in

State of Iowa, ex rel Warrington, et al. v. Community School District of St. Ansgar, Iowa, et al., ————Iowa————, 78 N.W. 2d 86)

20.37

District names — There is no method for changing the name of a school district without change in boundaries or type of organization or both. (Abels to Jack H. Bedell, Dickinson Co. Atty., 1/2/58) #58-1-1 (See, however, *Des Moines Ind. Comm. Dist. v. Armstrong, et. al.,* 3/10/59, 94 N.W.————.)

20.38

Effect of independent amendments to same statute contained in separate acts of legislature — School district reorganization — Eligibility to vote thereon. (Abels to Gov. Loveless, 4/24/57) #57-4-28

(1) Approval of House File 158, Acts 57th G. A., by the Governor would not have the effect of repealing independent amendments to §275.12, Code 1954, contained in House File 14, Acts 57th G. A., (2) Under House File 158 only those electors residing within proposed boundaries are eligible to vote on school district reorganization. (But see Senate File 1, Acts 57th G. A., as passed by both houses and approved by Governor after this opinion was written, which would change the ruling under No. 2 above.)

20.39

Handicapped children — Reimbursement of local and county programs of special education — Computation thereof — Application of departmental rules and regulations thereto. (Abels to Nelson, Story Co. Atty., 5/21/57) #57-5-29

20.40

Homes for teachers — (Abels to Cady, Franklin Co. Atty., 5/15/57) #57-5-19

Chapter 296, Code 1954, provides the exclusive method for acquisition of teachers' homes by school districts.

20.41

Home for school superintendent — (Abels to Henrickson, Asst. Linn Co. Atty., 3/21/57) #57-3-37

Proceeds of the two and one-half (2½) mill tax levy provided for in Sec. 278.1 (7), Code 1954, may not be expended to purchase a home for the school superintendent.

20.42

Hours for opening polls. (Abels to Bandstra, Marion Co. Atty., 4/30/57) #57-4-38

Hours polls shall open in a school reorganization election is governed by §277.9, Code 1954.

20.43

Investment of Bond Proceedings pending construction of building. (Strauss to Fishbaugh, Shenandoah, Iowa, 6/23/58) #58-6-21

20.44

Junior Colleges — Approval standards. State aid. (Abels to Dancer, Secy. St. Bd. of Regents, 9/25/57) #57-9-42

20.45

Nomination papers for secretary of school board — Error in name of candidate appearing thereon — (Abels to Hanrahan, Polk Co. Atty., 3/8/57) #57-3-14

Section 43.25, Code 1954, relating to partisan primary elections, has no application to school district elections. Section 277.4, Code 1954, contains no express provisions for correcting errors in nominating petitions for school district officers.

20.46

Private school bus— Not exempt from registration. (Pesch to Meyer, 8/13/58) #58-8-22

20.47

Reimbursement for loss of taxes: A. Code Chap. 284 applies to land *removed* from taxation both before and after the effective date of the Act. B. Reasonable proof of the fact of "removal" may be required by the claim processing agency. (Abels to Cunningham, Secretary, Executive Council, 2/19/58) #58-2-13

20.48

Reorganiziation —

1. A declaratory judgment obtained by consent is binding on a school district.

2. Such a judgment is binding upon County Auditors who are made parties to the proceedings.

3. Taxes erroneously collected may be considered in a division of assets under code section 375.29. (Abels to Scholz, Mahaska Co. Atty., 11/17/58) #58-11-28

20.49

Reorganization — Appeals by existing districts. Where proposed district is joint, appeal is under Code Section 275.16; otherwise under Sec. 275.15. (Abels to Erhardt, Wapello Co. Atty., 2/18/58) #58-2-14

20.50

Reorganization — Apportionment of bonded indebtedness. Limitation on bond levy. (Abels to Lier, Scott Co. Atty., 11/22/57) #57-11-29

20.51

Reorganization — A consolidated district not operating a school is not a

rural independent district operating a school for purposes of Code Section 275.20. (Abels to Harbor, St. Sen., 4/7/58) #58-4-31 (but see *Des Moines Ind. Comm. Dist. v. Armstrong et. al.*, 3/10/59.)

20.52

Reorganization — Code chapter 275 does not authorize a reorganzation petition to be filed conditionally, the filing to be prefected at a later date by the happening of some condition subsequent. (Abels to Jensen, Taylor Co. Atty., 11/3/58) #58-11-16

20.53

Reorganization — Continuation of Superintendent's contract under Code Section 275.33. (Abels to Bedell, Dickinson Co. Atty., 4/10/58) #58-4-33

20.54

Reorganization — Description in notices is sufficient when made in terms of existing school districts. 179 Iowa 500 cited. (Abels to Cahill, Des Moines County Atty., 6/17/58) #58-6-10

20.55

Reorganization — Description of boundaries in notice. (Abels to Buck, Van Buren Co. Atty., 10/7/58) #58-10-19

20.56

Reorganization of School Districts. Disposition of "remaining portions". (Abels to Turner, Chickasaw Co. Atty., 8/1/57) #57-8-1. But see S. F. 53, 58th G. A. and *Robrock v. Co. Bd. of Ed.*, 94 N.W. 2d 102.

20.57

Reorganization, Division of Assets — Where Code sec. 275.28 is followed, no subsequent approval by districts is necessary but where Code sec. 275.29 is followed, failure to agree necessitates appointment of arbitrators. (Abels to Parkin, Jefferson Co. Atty., 10/13/58) #58-10-14

20.58

Reorganization — Enrollment. Voters and Petitioners Qualifications:

(1) Only residents of *included* portions of existing districts may sign reorganization petition under Code Section 275.8 but in some cases all residents of such districts may vote at the election as provided in Code Section 275.20. (2) County boards may specify enrollment in excess of minimum provided in Code Section 275.3 if their conclusions based on studies and surveys support such planning. (Abels to Harbor, State Rep., 3/20/58) #58-3-18

20.59

Reorganization — (a) Lease of county fair buildings by reorganized district. (b) Enlargement of petitioned-for boundaries by County Board of Education. (Abels to Turner, Chickasaw Co. Atty., 4/18/58) #58-4-29

20.60

Reorganization — May not result in the formation of a non-contiguous district — Attachment to contiguous district of remaining portions of school district of less than four sections. (Abels to McDonald, Cherokee Co. Atty., 4/17/57) #57-4-21

(1) A presently-existing consolidated school district, the territory of which is reduced by creation of a new school district, may not continue its existence in a non-contiguous state. (2) Remaining portions of a school district of less than four sections may be attached to any contiguouos district under the provisions of §275.5, Code 1954, but may not be further subdivided for attachment. But see S. F. 53, 58th G. A. and *Robrock v. Co. Bd. of Ed.*, 94 N.W. 2d 102.

20.61

Reorganization may proceed "progressively" pursuant to "tentative" plan under Code Sections 275.5 and 275.6. (Abels to Sturges, Plymouth Co. Atty., 4/21/58) #58-4-30

20.62

Reorganization — Merger of two districts — Time limitation on further merger. (Abels to Klotzbach, Buchanan Co. Atty., 4/17/57) #57-4-20

Where two school districts have merged under the provisions of §275.10*, Code 1954, no further merger involving all or part of the territory therein contained may take place prior to July 1st subsequent to the initial merger.

*Repealed by 57th G. A.

20.63

Reorganization — Non-contiguous school districts not authorized. (Abels to Turner, Chickasaw Co. Atty., 4/24/57) #57-4-30

State ex rel. Warrington v. Community School District, 247 Iowa ——, 78 N.W. 2d 86, cited to the effect that non-contiguous districts have never been and are not now authorized by the statutes of Iowa.

20.64

Reorganization Elections — Number of polling places, judges, clerks. Effect of including territory with no resident voters or in which no votes are cast. Voting hours. (Abels to Watts, Adams Co. Atty., 3/11/58) #58-3-7

20.65

Reorganization — Question as to location of new building not proper for submission on ballot. (Abels to Johnson, St. Rep., 9/20/57) #57-9-33

20.66

Reorganization — Section 275.5, Code 1954, relating to attachment of portions of territory of an area of less than four government sections of land remaining after reorganization of school districts, contemplates

attachment of such "remaining portions" to another school district in their entirety without further subdivision thereof. (Abels to Skiver, Co. Atty., 1/10/57) #57-1-13 But see S. F. 53, 58th G. A. and *Robrock v. Co. Bd.*, 94 N.W. 2d 102.

20.67

Reorganization — Tentative County plan — Progressive program. (Abels to Pappas, Cerro Gordo Co. Atty., 11/21/57) #57-11-26

20.68

Reorganization — Under Code Section 274.5 questions pertaining to the validity of the organization of a school district become moot upon the running of the period of limitations therein prescribed. (Abels to Gillespie, St. Sen., 4/9/58) #58-4-32 See S. F. 305, 58th G. A.

20.69

Reorganization — Until a new school district actually becomes effective under the provisions of code section 275.24, the territory proposed for inclusion therein remains taxable in the old districts. There cannot be an effective and present attachment of territory to a purely speculative entity which may or not exist at some future time. (Abels to Van Ginkel, Ass't Cass Co. Atty., 7/31/58) #58-7-7

20.70

Reorganization — When a district is absorbed in its entirety in a new district the new district assumes all of the liabilities of the district so absorbed. (Abels to TePaske, Sioux County Atty., 7/2/58) #58-7-5

20.71

Reorganization — Where directors of a district which ceased to exist by reason of reorganization refuse to turn over assets to their corporate successor after a distribution schedule has been made in the manner provided by statute, the proper recourse is by quo warranto under Code chapter 660. (Abels to Morrow, Allamakee Co. Atty., 10/28/58) #58-10-7

20.72

Reorganization of School districts — Where existence is threatened by reorganization attorney may be retained. (Abels to Bandstra, Marion Co. Atty., 11/5/57) #57-11-6

20.73

Reorganization — Whether dismissal by the State Department of an appeal to it under Code Section 275.8 or 275.16 is a "decision" further appealable to District Court is a jurisdictional question for the Court to decide when the event happens. (Abels to Anderson, Howard Co. Atty., 5/13/58) #58-5-26

20.74

Reorganization — Joint districts — Priority: Where a valid plan embracing territory in four counties has been adopted and filed by the

boards of said counties, a petition for a district involving part of the same territory in two of the counties cannot be acted upon until amendment of the said plan has been accomplished by the same boards, acting jointly, by whose authority it was originally adopted. (Abels to Lynn W. Morrow, Allamakee Co. Atty., 1/31/58) #58-1-35 See *Bd. of Ed. Carroll Co. v. State Bd.*, 95 N.W. 2d 285.

20.75

Sale of School Property — Code section 278.1 (2) operates independently from the provisions of code section 297.23. School boards have no power to hire or pay commissions to real estate agents. (Abels to Shaff, St. Sen., 7/2/58) #58-7-14

20.76

Retired school employees — Eligibility for retirement benefits — Effect of out-of-state employment on years' service credit — State institution not included in phrase "Public School" — Subsequent employment as affecting retirement benefits — Computation of benefits unaffected by unreceived I.P.E.R.S. and O.A.S.I. benefits. (Abels to Blodgett, Chm. State Employment Security Comm., 6/19/57) #57-6-31

(1) House File 599, Acts 57th G. A., by its express terms applies to school personnel holding valid certificates while employed irrespective of whether or not employed as teachers. (2) No out-of-state employment need be included in the twenty-five year total under House File 599. (3) The phrase "public school" does not include state institutions. (4) Subsequent employment does not reduce payments under House File 599. (5) Payments for which applicant may have been eligible under I.P.E.R.S. or O.A.S.I., but for which he never applied and which he does not receive, do not enter into the computation under House File 599.

20.77

Schoolhouse tax — Code section 278.1(7) provides levy for purchase of playgrounds. (Abels to Thomas, Mills Co. Atty., 5/20/58) #58-5-13

20.78

Taxation — Taxes assessed against land purchased by school district not collectible. (Strauss to Akers, St. Auditor, 6/9/58) #58-6-4

20.79

Teachers retirement. Appropriation "for purposes of this Act" may be expended for administrative costs. (Strauss to Madigan, Chm., Employment Security Commission, 9/5/57) #57-9-11

20.80

Territory restored to school districts, as incident of dissolution of reorganized district pursuant to court order, not a "new" school district. (Abels to Brown, Mitchell Co. Atty., 6/27/57) #57-6-45

County attorney's opinion confirmed that resumption of jurisdiction by a school district over part of its territory previously involved in a reor-

ganization procedure declared invalid by the Supreme Court does not make it a "new" school district.

20.81

Transportation claims — Where parent residing beyond statutory walking distance from school voluntarily transported his children to and from school for a number of years without being "required" so to do by the board and without making claim upon the board, his subsequent discovery that he and the board were mutually mistaken as to the applicable law does not entitle him to recover for such past services intended as gratuitous when undertaken. (Abels to Sturges, Plymouth Co. Atty., 7/29/58) #58-7-15

20.82

Transportation — School busses. Suspension of service. (Abels to Fitzgibbons, Emmett Co. Atty., 9/30/57) #57-9-55

20.83

Transportation — Transportation under code section 285.1 to bus transfer point in districts containing more than one town and operating more than one school. (Abels to Cady, Franklin Co. Atty., 11/14/58) #58-11-9

20.84

Transportation — Use of other facilities when bus transportation is available. (Abels to Hoover, Clay Co. Atty., 3/28/58) #58-4-34

20.85

Tuition — Tax offset against tuition. (Abels to Johnson, Poweshiek Co. Atty., 5/16/57) #57-5-21

20.86

Vacancies on Board — Removal of director's residence from part of joint district in one county to another part of same district across a county line creates no automatic vacancy. (Abels to Buchheit, Fayette Co. Atty., 5/1/58) #58-5-25

20.87

Vocational Education — Acceptance of benefits granted under congressional acts relating to vocational education. (Abels to Pratt, Div. of Vocational Education, Dept. of Public Instruction, 4/5/57) #57-4-8

Senate File 39, Acts 57th G. A., effective July 4, 1957, by its express terms authorizes acceptance of the benefits of all Acts of Congress pertaining to vocational education.

CHAPTER 21

STATE OFFICERS AND DEPARTMENTS

STAFF OPINIONS

LETTER OPINIONS

21.1 June 28, 1957

BOARD OF ACCOUNTANCY — Under the provisions of Sec. 116.4, Code of Iowa 1954, the Legislature intended two classes of expenses, personal expenses of the members of the Board, and the reasonable and necessary expenses of the Board, as such, to enable said Board to discharge their duties as prescribed by Chapter 116, Code of Iowa 1954.

Mr. Edgar S. Gage, Secretary-Treasurer, Iowa Board of Accountancy: We refer to your letter of date May 16, 1957, requesting an opinion, reading as follows:

"The Iowa Board of Accountancy exists under Chapter 116 of the 1954 Code of Iowa to carry out the provisions of that chapter. Carrying out these provisions involves, among other things, the performance of the following functions:

"I Adopt, print, publish and distribute reasonable rules and amendments thereto.

"II Print, publish and distribute an annual register. This involves preparing of format of all registrants in various categories, i. e.; resident and non-resident, certified and registered public accountants, registered firm names, practitioners by location in Iowa, in practice and not

in practice, etc; proof read printer's copy, maintain mailing lists, prepare mailing, fill requests, etc.

"III Register applicants for examination, review all qualifications of examinees, including evaluation of experience and educational qualifications, correspondence with applicants' colleges and references submitted, approve or disapprove applications.

"IV Give examination to applicants in May and November (2½ days each session). Arrange for facilities, procure supplies, prepare notices for publication and notices to candidates. (55 to 65 each session currently).

"V Review graded examinations, approve same, advise candidates of results in each subject. Register results of examination, issue certificates to successful candidates after execution of oath and proper registration.

"VI Receive and register applications for reciprocal certificates. Review and investigate qualifications, approve or disapprove, issue certificates after other requirements of registration are complied with.

"VII Register all certificate holders annually, also firms. Receive applications for registration, review, issue registration cards—currently about 1,000 per year.

"VIII Under Act as amended, receive fidelity bonds or certificates of accountant's liability insurance annually for all registrants in practice, approve and record same.

"IX Receive fees and prepare receipts for registration, for applicants for examination and for reciprocal certificates. Deposit funds and make record of same. Disburse fee refunds and forward net proceeds annually into state treasury. Prepare claims for members and Boards' expenses. Record warrants issued by comptroller for expenses.

"X Keep a record of minutes of proceedings of the Board at all its meetings. Make a biennial report to the Governor of its proceedings, with an account of all moneys received and disbursed, record of revocations and suspensions, etc.

"XI Maintain files of all correspondence and records. Devise application forms. Store examination papers.

"XII Police certificate holders compliance with law. Receive complaints, investigate same, conduct hearings, make decisions.

"XIII Police unlawful practice of accountancy. Receive complaints, investigate, correspond, confer with Attorney General's office, etc.

"XIV Handle notifications of non-resident C. P. A.'s for temporary practice within state.

"XV Attendance at annual meetings of C. P. A. Examiners and other meetings of State and National professional organizations when necessary or desirable.

"In the foregoing the Board has listed some of the functions which are performed in the administration of the Iowa Regulatory Accountancy Law. Such administration, to be properly carried out, involves employing a substantial amount of personal service, engaging specialists on occasion, and incurring other expenses. Are not these expenses of the type referred to in that portion of Section 116.4 which reads 'Bills for the expense of the board — shall be audited and allowed by the state comptroller and shall be paid from the fees received under the provisions of this chapter?'

"May we have an official opinion from your office on the above question?"

Your letter outlines substantially in detail the duties and functions of the Board in carrying out the object, purpose and provisions of Chapter 116 with reference to the practice of certified public accountants in the State of Iowa. We have been informed that when the Board was originally established in the year 1915, by the 36th General Assembly, the number of C. P. A.'s at that time was somewhat less than one hundred, whereas currently there are about one thousand a year registered or re-registered. Obviously the growth in number of accountants has manifestly increased the volume of detailed administrative duties and functions. When the Board was initially organized, the members thereof could quite easily perform all the clerical and administrative duties necessarily involved. Therefore it is evident that the number of accountants registered annually having increased ten-fold, and it appears that with the increasing economic growth of our state this number will further likewise grow; the volume of administrative duties of the Board will increase in direct relation to that growth.

This growth factor, we believe, definitely bears upon your question which, stated in another form, is, what expenses can be considered as *expenses of the Board* as distinguished from *personal expenses* of the members thereof.

Section 116.4, Code of Iowa 1954, is the pertinent statute with which we are presently concerned and reads:

"*No compensation — expenses.* No compensation shall be paid to any member of the board for services as such, but the members thereof shall be allowed the necessary traveling, printing and other expenses incident to the discharge of their duties. *Bills for the expense of the board or its members* shall be audited and allowed by the state comptroller and shall be paid from the fees received under the provisions of this chapter."

The law creating the commission, Chapter 134, Acts of the 36th General Assembly, provided compensation of ten dollars per day for time actually employed, "*and necessary expenses incurred in the discharge of their duties*" for members of the Board. Section 14, Chapter 233, Acts of the 40th General Assembly, eliminated the per diem pay, but provided, "all bills for expenses shall be *audited* and *allowed* by the State Board of Audit and *shall be paid from the fees received.*"

Chapter 59, Acts of the 43rd General Assembly, repealed the then existing law on the subject, enacting a more comprehensive law, enlarging the duties and powers of the Board, including Section 116.4 as it now reads, with a slight change as to *expenses* to read — "the *members thereof shall be allowed necessary traveling, printing and other expenses incident to the discharge of their duties.*"

It would appear that the Legislature in the enactment of these various laws dealing with the matter of the expenses of the Board had in mind two classes or categories of expenses, first, personal expenses of the members of the Board, which would ordinarily include transportation, lodging and meals, second, printing and *other expenses* incident to the

discharge of their duties, meaning the expenses of the Board as such, which includes *printing* as specifically set out in the statute. However, it must have been the intention of the Legislature to provide for the payment of expenses *other* than just printing expense.

In reveiwing the various administrative procedures and functions which the Board under its prescribed powers and duties is called upon to perform it is quite evident that they involve more than just printing, and it is imperative that the Board be provided with many services and supplies in order to properly and efficiently perform their duties. Among these might be mentioned, secretarial, reporters and clerical assistance, stationery and other office supplies, in addition to *printing*, office furniture such as filing cabinets, desks, etc., and the rental of office space, where these services can be carried on expeditiously and efficiently.

The question then is, what was the intention of the Legislature in the various enactments that now constitute Section 116.4, the statute presently under consideration?

A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation, that is, where the statute is ambiguous or will bear two or more constructions, or is of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. We believe there is sufficient doubt in the language used in Section 116.4 to require interpretation or construction. Involved in the problem, of course, is the intention of the Legislature.

We find the following illuminating statement on the matter of intention, in the care of *McGraw v. Seigel*, 221 Iowa at page 132, citing from the case of *Oliphant v. Hawkinson*, 192 Iowa 1259, 1263, 183 N. W. 805, 807, 33 A. L. R. 1433, in which our Supreme Court quoted with approval the following:

"'The intention of the lawmakers is the law. This intention is to be gathered from the necessity of reason of the enactment and the meaning of the words, enlarged or restricted according to their real intent. In construing a statute the courts are not confined to the literal meaning of the words. A thing within the intention is regarded within the statute, though not within the letter. A thing within the letter is not within the statute, if not also within the intention. When the intention can be collected from the statute, words may be modified or altered, so as to obivate all inconsistency with such intention. (Hoyne v. Danisch, 264 Ill. 467, 106 N. E. 341) When great inconvenience or absurd consequences will result from a particular construction that construction should be avoided, unless the meaning of the legislature be so plain and manifest that avoidance is impossible. (People v. Wren, 4 Scam. (Ill.) 269) The courts are bound to presume that absurd consequences leading to great injustice were not contemplated by the legislature, and a construction should be adopted that it may be reasonable to presume was contemplated.'"

A word of great significance in the statute, Section 116.4, is the word "or" contained in the sentence, "Bills for the expense of the board *or* its members shall be audited and allowed by the state comptroller and shall be paid from the fees received under the provisions of this chapter."

In *50 Am. Jur. 267*, Section 281, it is said:

" * * * In its elementary sense, the word 'or' as used in a statute, is a disjunctive particle indicating an alternative. It often connects a series of words or propositions, presenting a choice of either. *If the disjunctive conjunction 'or' is used, the various members of the sentence are to be taken separately.* * * * " (Emphasis ours)

Throughout the various enactments of Section 116.4, it is quite evident that the Legislature intended two things, one that the members of the Board were to be paid a per diem allowance, or necessary traveling expenses involving transportation, lodging and meals, and in addition thereto *necessary expenses* incurred in the discharge of their duties.

If this were not true, how else could the Board discharge its duties prescribed by the law. Certainly the consequences would be more than absurd, if the Board expenses were restricted only to "printing" as now expressed in the law, and the phrase *"and other expenses incident to the discharge of their duties."* were held to a narrow, strict meaning without definition whatsoever. Within this phrase must be read the intent of the Legislature to supply to the Board all of the necessary tools by which it can accomplish the object and purpose of the statute. This intent of the law is within the rule, supra, *"A thing within the intention is regarded within the statute, though not within the letter."* Were it not true, the Board would be unable to function at all, and the object, scope and purpose of the law would fail completely. This is the *absurd consequence* which would result and which should be avoided.

Therefore, it is the opinion of this Department that under the provisions of Section 116.4, the Legislature provided for two classes of expenses, the personal expenses of the members of the Board, *and* the reasonable and necessary expenses of the Board, as such, to enable said Board to discharge their duties as prescribed in the law, Chapter 116, Code of Iowa, 1954, all of said expenses being limited to and paid out of the fees received under the provisions of said chapter.

Your attention is also invited to Section 13.7, Code of Iowa 1954, which prescribes the payment of compensation to any person for services as an attorney or counselor.

21.2 August 7, 1958

BOARD OF ACCOUNTANCY: An individual may (1) register his exact name as a firm with the Board of Accountancy; (2) register as a firm either "John A. Doe & Company" or "John Doe Company"; (3) continue to practice under the firm name and register that name with the Board upon dissolution of a partnership as controlled by the partnership agreement.

Iowa Board of Accountancy: Your recent letter reads in part as follows:

"Firm names are registered by the Iowa Board of Accountancy under the provisions of Section 116.12 of the Iowa Accountancy Law.

"Our question is: Is it legal under the law for the Board to register an individual who applies for a firm name registration under the following circumstances:

"(1) An individual whose name is John A. Doe makes application to register his exact name, as a firm. In other words, should an individual, John A. Doe, be permitted to register his firm name, John A. Doe?

"(2) An individual who starts up a practice of accountancy as an individual practitioner (he may or may not have any employees, but he does not have a partner or partners) requests to register as a firm name either John A. Doe & Company or John Doe Company.

"(3) John A. Doe was formerly in partnership with another registered practitioner, which partnership operated the accounting firm of Brown, Doe & Company, and registered the firm under that name. If the partnership is dissolved, for example by the death of Mr. Doe's partner, can Mr. Doe continue to practice under the firm name and register that firm name with the Board.

"(a) If he did not purchase the name from the partnership or from his partner's estate, or

"(b) If he did make such a purchase?"

Section 116.12, Code of Iowa, is as follows:

"*Fees.* The board of accountancy shall collect the following fees:

" * * *

"3. For issuance of certificates to practice, the sum of ten dollars in December, 1929 and annually thereafter; for periods of less than six months, five dollars.

"4. For registration of firm, assumed, association or corporate names; of certified public accountants not in practice, and of senior accountants entitled thereto, the sum of five dollars payable in December, 1929, and annually thereafter.

" * * * *."

Section 116.3 and Section 547.1, Code of Iowa, are as follows:

"116.3 *Annual register.* The board of accountancy shall have printed and published for public distribution, in January of each year, an annual register which shall contain the names, arranged alphabetically by classifications, of all practitioners registered under this chapter; * * *"

"547.1 *Use of trade name — verified statement required.* It shall be unlawful for any person or copartnership to engage in or conduct a business under any trade name, or any assumed name of any character other than the true surname of each person or persons owning or having any interest in such business, unless such person or persons shall first file with the county recorder of the county in which the business is to be conducted a verified statement showing the name, post-office, and residence address of each person owning or having any interest in the business, and the address where the business is to be conducted."

In discussing the above statute the Iowa Supreme Court in the case of *Ambro Advertising Agency v. Speed-way Manufacturing Co.*, 211 Iowa 276, at page 278, stated:

"* * * To apply the prohibition of the present statute to all the business done in this state by firms operating under trade names, is to go

far beyond the scope of police power. As to business carried on under trade names, the statutory construction to be adopted must be applicable alike to all. It purports no discrimination. The legislative power to prohibit an occupation does not extend to all business carried on under trade names. To construe this statute, therefore, as such prohibition, would be to nullify it as unconstitutional. If it cannot be deemed a prohibition applied to *all* such business, neither can it be deemed a prohibition of *any*."

One may lawfully adopt any trade name in Iowa so long as it is not made a cover or means of fraud and may sue and be sued by it. *Enslow v. Ennis*, 155 Iowa 266, and *Swanson Automobile Co. v. Stone*, 187 Iowa 309.

We are of the opinion that an individual may

(1) register his exact name as a firm with the Board of Accountancy;

(2) register as a firm either "John A. Doe & Company" or "John Doe Company";

(3) continue to practice under the firm name and register that name with the Board upon dissolution of a partnership as controlled by the partnership agreement.

Those parts of OAG 1918, page 550, contrary to this opinion are withdrawn. The many statutory changes and court cases since the date of that opinion have rendered these parts of this opinion inapplicable.

21.3 October 10, 1958

ACCOUNTANCY — REGISTRATION: Board's proposed rule change not inconsistent with Chapter 116. — O. A. G. 82 withdrawn.

Mr. George H. Hansen, Secretary-Treasurer, Board of Accountancy:

Your letter of June 25, 1958 is as follows:

"Confirming our telephone conversation this morning I am writing you this letter to set out a problem which confronts the Iowa Board of Accountancy."

Section 116.17 of the 1954 Code of Iowa provides that:

"It shall be unlawful after September 30, 1929, for any person to practice accountancy in this state as defined in this chapter either as an individual or as a member of any firm or association or under a firm, assumed or corporate name, whether maintaining an office for such practice or not, unless such person is the holder of a certificate to practice for the current year or is entitled to registration as in this chapter provided and has made application therefor."

As you realize, there is a considerable amount of interstate practice of public accountancy. Also, there are several very large CPA firms, sometimes composed of numerous separate but interrelated partnerships, but in any event having a hundred or more partners in the group and operating offices engaged in the practice of accountancy in many cities in the United States, as well as the territories and foreign countries.

Regulations of the Iowa Board of Accountancy now provide in Sec. 10, page 21, that:

"Any partnership practicing accountancy in this state may use the designation of and practice as certified public accountants under a firm name, only if all the members thereof are holders of certified public accountant's certificates granted under the laws of this state. . . . "

Is this regulation required under Sec. 116.17, or any other section of the Iowa regulatory accountancy law? In other words, do all partners, no matter how small or indirect their interest in a partnership, operating an office which practices public accountancy in Iowa have to be registered? This might include, for example, a resident partner in Hawaii who had an interest in a partnership that had an interest in a partnership making audits in Iowa

The Iowa Board of Accountancy believes that the following policy is feasible, practicable and would adequately protect third parties relying on reports of these firms.

1. Consider persons as practicing accountancy in this state, either as an individual or as a member of a firm, only if they are partners resident in an office of the firm which renders accounting service to clients located in the state of Iowa, or

2. If they have any direct responsibility for audits and reports issued by that office, even though not resident partners.

It would appear that the policy of registering partner members of the multistate accounting firms varies considerably. The Iowa Board of Accountancy would like to establish a definite policy within the law, (we hope it can be the one suggested), and require uniform compliance with that policy by all firms required to register with our Board.

An examination of the legislative history of pertinent sections to the problem under discussion shows that Sec. 1830 Code of 1927 was as follows:

"Any citizen of the United States residing in this state, or having a place for the regular transaction of business in the state, as a practicing public accountant, and being over the age of twenty-five (25) years, of good moral character, and who shall have received from the board of accountancy of the state a certificate as provided in this chapter, shall be styled and known as a certified public accountant, and be entitled to use the abbreviations C.P.A. in connection with his name. No other person, *no firm all the members of which are not certified accountants as provided in this chapter,* and no corporation shall use such title or any abbreviation, letters, or figures to indicate that such person, firm, or corporation is a certified public accountant." (Emphasis added)

For an interpretation of this section see *OAG* 1918 page 550.

The 43rd G. A. made major revisions in the law as it relates to accountants and the board of accountancy. Chapter 59, Acts of 43rd G.A. repeals all former statutes relating to these fields and enacts a recodification. This recodification has remained the basic framework of present legislation in these fields.

Section 12, Chapter 59, Acts of the 43rd G.A., provided as follows:

"Sec. 12. REGISTRATION OF PRACTITIONERS: All practitioners engaged in the practice of accountancy in this state at the time of the passage of this act who desire to continue in such practice, shall upon application to the board of accountancy on or before September 30, 1929, be registered as follows:

"(c) All practitioners who, in connection with the practice of accountancy, make use of a firm, association, assumed or corporate name, shall register the same at the time of making application of registration as herein provided, and certificates to practice shall be issued only in the names of individuals; and only firms whose members are all certified public accountants shall use such designation in connection with the use of such firm names."

This section was omitted by the Code Editor in the compilation of the Code of Iowa, 1935. The section was temporary in nature and correctly omitted by the Code Editor. In any event the section required only that all the members of the firm be Certified Public Accountants and not as formerly Certified Accountants in Iowa. The opinion of the Attorney General dated July 14, 1931, and found at OAG page 82 is hereby withdrawn.

The clause "no firm all the members of which are not certified accountants as provided in this chapter," was not included in the recodification of the law by the 43rd G.A., nor has it been inserted by subsequent amendment.

The rule has been stated that the presumption is that the legislature in re-enacting a former statute without change, intended the former construction to continue. (*New York Life Ins. Co. v Burbank* 216 N.W. 742, 209 Iowa 199). In the case under consideration the reverse situation would be the case.

The definitions of "accountant" and the "practice of accountancy" are found in section 116.6, Code of Iowa. I am of the opinion that there is no inconsistency between the rule that the Board proposed to adopt and Chapter 116, Code of Iowa. I am further of the opinion that the regulation of the Board of Accountancy as it now exists, set out above, is not required by Chapter 116, Code of Iowa.

21.4 **June 17, 1957**

The powers of the Budget and Financial Control Committee conferred upon it by the 56th General Assembly limit the allocation from its contingency fund to contingencies arising during the biennium. The application of the State University of Iowa for appropriation of $49,017.67 from that fund does not disclose a contingency.

Honorable George L. Paul, Chairman, Budget and Financial Control Committee: Reference herein is made to the oral request of the Budget and Financial Control Committee for opinion as to the power of that Committee to grant the following request made by the State University of Iowa.

"STATE UNIVERSITY OF IOWA

"9. *Improving Buildings for Emotionally Disturbed and Mentally Retarded Children (5-9-56).*

"Attached as Exhibit A is a tabulation of bids received April 23, 1957, for the above project. Also attached as Exhibit B is a revised budget for this project, totalling $257,351.00. You will notice that this sum is $49,017.67 larger than the amount of money available.

REQUEST

"a. Authority to award contracts for the project as follows:

"General — Barrows Construction Company, Coralville, Iowa

"Base Bid	$163,635.00	
"Less Alts. 2 and 3	4,482.00	
"Net contract sum		$159,153.00
"Electrical — Acme Electric Company, Cedar Rapids, Iowa, base bid		20,753.00
"Mechanical — Ryan Plumbing and Heating Co., Davenport, Iowa		56,000.00

"b. Approval of the project budget as shown on Exhibit B attached.

"c. Allocation to the project account of $130,000 appropriated by the 56th G. A.

"d. Appropriation of $49,017.67 from the General Contingent Fund to the project account."

Respecting your power we advise as follows:

The purposes and the powers of your Committee are disclosed by Section 2.43 and Section 2.44, Code 1954, and by Chapter 43, Acts of the 56th General Assembly. The continuing and standing purposes and powers of the Committee are contained in the foregoing numbered Sections 2.43 and 2.44, and are these:

"2.43 *Authorized purposes of committee.* The authorized purposes of the budget and financial control committee shall be as follows:

1. *Budget.* To gather information relative to budget matters for the purpose of aiding the legislature to properly appropriate money for the functions of government, and to report their findings to the legislature.

"2. *Examination.* Said committee shall examine into the reports and official acts of the executive council and of each officer, board, commission, and department of the state, in respect to the conduct and expenditures thereof and the receipts and disbursements of public funds thereby.

"3. *Reorganization.* The committee shall make a continuous study of all offices, departments, agencies, boards, bureaus and commissions of the state government and shall determine and recommend to each session of the legislature what changes therein are necessary to accomplish the following purposes.

"a. To reduce expenditures and promote economy to the fullest extent consistent with the efficient operation of state government.

"b. To increase the efficiency of the operations of the state government to the fullest extent practicable within the available revenues.

"c. To group, co-ordinate, and consolidate judicial districts, agencies and functions of the government, as nearly as may be according to major purposes.

"d. To reduce the number of offices, agencies, boards, commissions, and departments by consolidating those having similar functions, and to abolish such offices, agencies, boards, commissions and departments, or functions thereof, as may not be necessary for the efficient and economical conduct of state government.

"e. To eliminate overlapping and duplication of effort on the part of such offices, agencies, boards, commissions and departments of the state government."

"2.44 *Powers and duties.* For the purpose of carrying out the foregoing authorized purposes, the committee shall have the following powers and duties.

"1. *Organization.* To elect one of their own number chairman and to determine their own method of procedure.

"2. *Meetings.* To hold monthly meetings at the office of the state comptroller or at such meeting place as the committee may direct. Six members shall constitute a quorum.

"3. *Special meetings.* To meet on call of the chairman of any three members.

"4. *Record.* To make a record of its meetings and transactions which shall be kept in the office of the secretary of state and shall be open to public inspection.

"5. *Subpoenas.* To summon and examine witnesses, administer oaths, compel the production of books and papers and punish for contempt in the conduct of any investigation.

"6. *Investigators.* To employ its own investigators and other necessary personnel and pay for same from funds appropriated.

"7. *Suggestions to governor.* To make suggestions to the governor concerning the committee's opinion as to what ought to be included in the budget.

"8. *Departmental co-operation.* To require all offices, departments, agencies, boards, bureaus and commissions of the state to co-operate and furnish such information as the committee may from time to time desire. The office and facilities of the state comptroller shall be available to the committee for its meetings."

Chapters 43, Acts of the 56th General Assembly, conferred additional purposes and powers upon the Committee in temporary form as follows:

"Section 1. The general contingent fund of the state for the biennium beginning July 1, 1955, and ending June 30, 1957, is hereby created and said fund shall consist of the sum of two million dollars ($2,000,000.00) hereby appropriated thereto from the general fund of the state. Said contingent fund shall be administered by the budget and financial control committee and allocations therefrom may be made only for contingencies arising during the biennium which are legally payable from the funds of the state. Subject to the payment of the compensation and the expenses of members of the budget and financial control committee, authorized by section two point forty-five (2.45), Code 1954, and subject to its use for the payment of obligations incurred under the provisions of subsection six (6) of section two point forty-four (2.44), Code 1954, no allocation from said fund shall be made for the administration of, or carrying out, the provisions of an act passed by the Fifty-sixth General Assembly which does not contain an appropriation. Nor shall the budget and financial control committee allocate any funds for any purpose or project which was, or should have been presented to the general assembly by way of a bill and which failed to become enacted into law. A report of the dispositions made of the fund during the first eighteen months of the biennium shall be made by the budget and financial control committee to the state comptroller prior to the convening of the Fifty-seventh General Assembly and by him included in the printed budget. Any

balance in said contingent fund as of June 30, 1957, shall revert to the general fund of the state.

"Upon the request of the board of control, the budget and financial control committee is authorized to provide from the general contingent fund two hundred fifty thousand dollars ($250,000.00), or so much as may be necessary for the purchase of supplies which may not be available through the Commodity Credit Corporation of the United States Department of Agriculture as provided during the past biennium."

Addressing ourselves herein to item d. of the request, to-wit: Appropriation of $49,017.67 from the General Contingent Fund to the project account (requests a, b and c apparently not being in controversy) it is observed that the power to grant the request arises out of the powers conferred by the foregoing Chapter 43, Acts of the 56th General Assembly because the only money available to the Committee other than providing for the payment of the expense and per diem of the members of the Committee is the denominated contingent fund created by that Chapter. However, the availability of that fund is limited to allocations which "may be made only for contingencies arising during the biennium which are legally payable from the funds of the state". Legislative definition of the term "contingencies" as used in the foregoing Act is lacking. Our Supreme Court appears not to have defined it. The term, however, has been judicially defined in the case of *People ex rel. Bahde v. Toledo St. L. & W. R. Co.*, 83 N. E. 118, 119, 231 Ill. 125, as set forth in Volume 9, Words and Phrases, as follows:

"A 'contingency' has the element of uncertainty and doubt, and is defined as an event which is possible, but which may or may not occur. It is in the nature of a casualty, accident, or chance, and results from an agency the operation of which is uncertain. It is dependent on a possibility and on causes which are undetermined or unknown. Under the road and bridge act, providing for a greater levy in view of some contingency, a certificate of the commissioners that a contingency existed, in that many bridges in the township were becoming unsafe and would have to be repaired and rebuilt, did not show the existence of a 'contingency' within the meaning of the statute."

And, according to the case of People ex rel. *Vaughn v. Chicago, B. & Q. R. Co.*, 96 N. E. 866, 252 Ill. 377, likewise quoting from the Words and Phrases reference,

"No levy may be made to complete payment for the erection of a new bridge across a new drainage channel of a river, for building of such a bridge is not a 'contingency.' "

And see the foregoing reference to Words and Phrases for additional authority.

Quite consistent with the foregoing definitions is the use provided by the Legislature by Section 19.7, Code 1954, to which a contingent fund available to the Executive Council may be put. This Section provides as follows:

"*Contingent fund.* A contingent fund set apart for the use of the executive council may be expended for the purpose of paying the expenses of suppressing any insurrection or riot, actual or threatened, when state aid has been rendered by order of the governor, and for repairing, rebuilding, or restoring any state property injured, destroyed, or lost by

fire, storm, theft, or unavoidable cause, and for no other purpose whatever. Any such project for repair, rebuilding or restoration of state property for which no specific appropriation has been made, which when completed will cost more than one hundred thousand dollars, shall, before work is begun thereon, be subject to approval or rejection by the budget and financial control committee."

and insofar as the terms "contingencies" and "emergencies" are applied to a fund in the hands of a governor of Oklahoma for use among other purposes in supplemental allocations to the Oklahoma State Regents for higher education for emergency needs of the institution, it was said in the case of *Wells v. Childers,* 165 P.2d 371, 375:

"As to enumeration three (supplemental allocations to Oklahoma State Board of Higher Education) it would seem that the ordinary need was foreseeable by the Legislature and was provided for by an appropriation and as such it is not subject to be augmented as a contingency or emergency unless relating to expenditures required under catastrophes such as considered in Prideaux v. Frohmiller, 47 Ariz. 347, 56 P. 2d 631, relating to contingencies and emergencies arising from invasion, riots, or insurrections, epidemics of diseases, acts of God, etc. Therein it was said: 'If the Legislature has had an opportunity to act and has rejected the object as an emergency, or has failed to approve it by appropriating therefor, or the facts fail to show it to be an emergency, the Governor may not * * * ' make the allocation.

"It was held, Prideaux v. Frohmiller, supra: 'The Legislature is the only arm of the state that has any right or power to appropriate public moneys of the state, and also with it lies the power to designate the subjects or objects for which it will permit the expenditure of public moneys. It, and it alone, may select, define, and designate "emergencies" or "contingencies".' "

The request asserting no contingency within the foregoing definitions, the Committee is without power to allocate any money from its contingency fund.

21.5

Accountancy Board — Office space and secretary. (Strauss to Cunningham, Secy., Exec. Coun., 9/4/57) #57-9-6

21.6

Accountancy Board — (1) Phrase, "other expenses incident to the discharge of their duties", as it appears in Section 116.4, Code 1954, refers to expenses incurred in traveling, printing, and those expenses implied as incident to carrying out the duties imposed upon and the powers granted to the board of accountancy under Section 116.2, Code 1954, such as clerical help in the preparation for and conduction of examinations for applicants for registration as public accountants, etc., but does not give the board authority to employ an administrative assistant or full time secretary. (2) It is the duty of the board to determine whether a person granted or renewing a certificate to practice accountancy has filed a proper bond or insurance carrier's certificate with the state auditor in accordance with the provisions of Section 116.11, Code 1954. (Bianco to Gage, Secy. Treas., Bd. of Accountancy, 2/11/57) #57-2-5

21.7

Accountancy Board — Limitation on expenditures thereof. (Erbe and Bianco to Gage, Secy.-Treas., Bd. of Accountancy, 5/23/57) #57-5-32

House File 500, Acts of the 57th G. A., restricts the expenditures of the State Board of Accountancy to a total sum of $3,600.00 per year for legal, technical, and clerical assistants and such expenses as may be necessary to properly carry out the provisions of Chapter 116, Code 1954.

21.8

Absenteeism — Department head may reasonably require of his employees a doctor's certificate of illness as a means of avoiding a reduction in compensation for absence from work by reason of claimed sickness. (Strauss to Wagner, Supt., Bldgs. & Grounds, State Capitol, 2/19/57) #57-2-13

21.9

Aeronautics Commission — Publications — Sale or free distribution of various Aeronautics Commission publications. (Abels to Wolverton, Air Enf. O., 10/11/57) #57-10-18

21.10

Aeronautics Commission — Rule-making power of Commission — Transferability of "Air School" and "Special" certificates. (Abels to Wolverton, Iowa Aeronautics Comm., 6/3/57) #57-6-3

"Air school" and "special" certificates are not transferable under Chap. 328, Code 1954. Requirement that certificate holders report change of address would be proper exercise of the Commission's rule-making power under §328.12 (2).

21.11

Aeronautics Commission — Vacancies in Office — Filled by appointment by Governor — Not subject to Senate confirmation. (Erbe, Atty. Gen. and Abels to Loveless, Governor, 2/15/57) #57-2-20

Appointments made by the governor to fill the balance of unexpired terms when vacancies occur on the Aeronautics Commission do not require Senate confirmation.

21.12

Appropriation act — Discrepancies between total set forth in such act and actual sum of line items. (Strauss to Sarsfield, State Comptroller, 7/11/57) #57-7-11, 57-7-12

21.13

Appropriations — State employees — Changes in rate of pay within salary ranges in effect on April 24, 1957 — Compensation of temporary, part-time or casual personnel — Not subject to approval of Executive Council. (Strauss to Sarsfield, St. Comptroller, 6/13/57) #57-6-21

Salary schedules referred to in Senate File 457, Acts 57th G. A., refer to salary ranges in effect on April 24, 1957, as provided by personnel

rules and regulations, and changes in rates of pay within the salary range may be made effective without the approval of the Executive Council. Employment of temporary or part-time or casual personnel paid by appropriation in S. F. 457 is not subject to the approval of the Executive Council.

21.14

Archeologist — Present Iowa statutes do not authorize the selection or appointment of a state archeologist, and Governor's broad general powers of appointment are not sufficient to establish such an office even on a non-salaried basis. (Erbe, Atty. Gen. to Hoegh, Governor, 1/9/57) #57-1-10 See H. F. 182, 58th G. A.

21.15

Attorney General — No statutory authority for Commission to hire legal counsel — Nor for appointment of full time Assistant Attorney General for Conservation Commission — Employment of Special Assistant Attorneys General. (Erbe to Stiles, St. Conservation Commission Dir., 6/17/57) #57-6-23

Under §13.7, Code 1954, there is a strict statutory prohibition against any department, or the head thereof, or any state board or commission hiring legal counsel. Attorney General is to represent Conservation Commission, but has no authority to appoint a full time Special Assistant Attorney General for Commission work. Senate File 83, Acts 57th G. A. would have authorized such a Special Assistant, but Act was vetoed by Governor. Executive Council limited in its authority to employ a Special Assistant Attorney General to "pending action or proceeding" in which the State is interested.

21.16

Attorney General, representation of State Departments — Disqualified to represent one department in legal proceedings against another. Duty of Executive Council to furnish other counsel under Code Section 13.3. (Erbe to Loveless, Gov., 3/7/58) #58-3-3

21.17

Auditor of State — Where application was considered by the Bonus Board prior to its abolishment and thirty days appeal time expired, there is nothing left for auditor to consider. (Strauss to Ray J. Kauffman, Administrator World War II Bonus Division, 1/2/58, *and* Strauss to Ray J. Kauffman, Administrator World War II Bonus Division, 1/2/58) #58-1-3

21.18

Buildings and Grounds Supt. — Contracts for repairs. Bids. Subcontracting. (Strauss to Wagner, Supt., 9/27/57) #57-9-49

21.19

Buildings and Grounds — Police power of employees in State buildings and parking lots — (Strauss to Wagner, Supt. Dept. of Bldgs. & Grounds, 3/6/57) #57-3-9

Employees of State Department of Buildings and Grounds at present time have no more authority than a private citizen in making arrests in or about the State buildings and state-owned parking lots, since they have not been denominated as peace officers under our statutes. See Ch. 59, 57th G. A.

21.20

Commerce commission — Transmission lines — Franchise by Commerce Commission — Costs. (Erbe and Abels to Iowa State Commerce Commission, 10/29/57) #57-10-37

21.21

Comptroller, Liability for disbursements — A. State Comptroller held not subject to personal liability for funds disbursed by him upon receipt of proper authorization from Budget and Financial Control Committee. B. It is the sole province of the Budget and Financial Control Committee to determine from facts presented to it whether or not the request constitutes an "emergency" or "contingency". (Erbe & Strauss to Glenn D. Sarsfield, State Comptroller, 1/24/58) #58-1-27

21.22

Employees — Military leave — Civil employees entitled to thirty days pay, retention of status and efficiency rating. (Swanson to Housel, Chmn., Liqu. Cont. Comm., 9/18/57) #57-9-26

21.23

Employment Security Commission — 57th G. A., *Ch. 56*, Printing, Sale or free distribution of certain publications. (Strauss to Allen, Gen. Cnsl., Emp. Sec. Comm., 9/11/57) #57-9-19

21.24

Engineering Examiners — If a certificate as an "engineer in training" shall have been issued prior to January 1, 1959, applicant may then take the remaining portion of his examination based on the experience requirements of the statute prior to the amendments. (Swanson to Cunningham, Secy., Eng. Ex'rs., 9/2/58) #58-9-17

21.25

Engineering Examiners — Surveying examinations taken subsequent to civil examination. Examination and certificate fees. (Swanson to Board, 12/2/57) #57-12-2

21.26

Garnishment — May not be summoned as garnishees. (Abels to Lappen, Bd. of Control, 2/25/57) #57-2-27

Iowa has no statute authorizing the garnishment of the State and its officers in their official capacities. The effect of a judgment against a garnishee in such case would be a judgment against the State, and as the State may not be sued without its consent state officials cannot be garnished. See *Sims v. United States*, S. Ct. of U. S. 3/23/59, (255 F 2d 434 affirmed), 3 L.ed. 2d 667.

21.27

Highway Commission — 57th G. A., Ch. 56, Sale or free distribution of "Specifications Book." (Strauss to Needham, Supt. of Printing, 10/3/57) #57-10-6

21.28

Highway Safety Patrol — Proposed classification and compensation plan for Highway Safety Patrol — Required approval by Governor and Executive Council. (Strauss to Moyer, Commissioner of Pub. Safety, 6/19/57) #57-6-30

Plans setting up salary increases for members of Highway Safety Patrol in accordance with formula contained in Senate File 32, Acts 57th G. A., and proposing classification of members of Patrol and establishment of titles and rank of supervisory officers, must be approved by the Governor and the Executive Council before becoming effective.

21.29

Highway Safety Patrol — Right of members of Highway Safety Patrol to receive particular salary increases without reference to existing personnel classifications or salary schedules. (Strauss to Sarsfield, St. Comptroller, 6/13/57) #57-6-20

Members of the Highway Safety Patrol, under the provisions of House File 32, Acts 57th G. A., are entitled to the compensation increases therein provided without reference to personnel classifications or to salary schedules. Right to receive such increase is not affected by changes in administrative proceedings, administrative rules or administrative practices.

21.30

Historical Society — Availability of appropriation under 56th G. A., Ch. 5. (Strauss to Sarsfield, St. Comp., 4/1/58) #58-4-1

21.31

History and Archives — 57th G. A., *Ch. 56,* Printing, Sale or free distribution of publications. (Strauss to Cook, Curator, Dept. Hist. & Arch., 10/4/57) #57-10-8

21.32

History and Archives Dept. — Duty to maintain capitol monuments. (Strauss to Wagner, Supt., Bldgs. and Gnds., 9/4/57) #57-9-7

21.33

Industrial Commissioner — 57th G. A., *Ch. 56,* Sale or free distribution of pamphlets. (Strauss to Greenley, Depy. St. Ind. Comm., 8/21/57) #57-8-37

21.34

Interim committee, "Emergency" — Finding of "emergency" by Interim Committee is binding upon the State Comptroller. (Strauss to Sarsfield, St. Comp., 4/14/58) #58-4-5

21.35

I.P.E.R.S. for part-time employees — Employees under Iowa Public Employees Retirement System whose remuneration in one quarter of the year is less than $200 and in another quarter of the year is $200 or more are required to pay a tax only on the quarter in which the remuneration aggregates $200 and are entitled to exemption from the tax when remuneration is less than $200 per quarter. (Strauss to Meyer, Winneshiek Co. Atty., 12/10/58) #58-12-7

21.36

I.P.E.R.S. — Selection of depositories by State Treasurer not controllable by Commission. (Strauss to Allen, Gen. Counsel, Employment Security Commission, 2/27/58) #58-2-9

21.37

I.P.E.R.S., Soldiers Preference Law — Voluntary retirement — compulsory retirement. (Strauss to Wagner, Supt. Bldgs. & Gnds.), 8/12/57) #57-8-20

21.38

I.P.E.R.S. Investments — Treasurer of State, as custodian and trustee of the Iowa Public Employees' Retirement Fund, established by Sec. 97B.7(1), Code 1958, is limited to investment of the fund with no power of sale and reinvestment. (Strauss to Madigan, Emp. Sec. Comm., 9/11/58) #58-9-13

21.39

Legislative Research Committee — Out of state travel not subject to Executive Council approval. (Strauss to Cunningham, Secy., Exec. Council, 5/5/58) #58-5-7

21.40

Liquor Control Commission — Applicability of Soldiers' Preference Law to employees. (Swanson to Housel, Chmn. Liq. Cont. Comm., 9/18/57) #57-9-27

21.41

Liquor Control Commission — Purchase of alcoholic beverages. Prepayment unauthorized. (Swanson to Housel, Chmn., 9/18/57) #57-9-28

21.42

Mine Examiners — Number of members required on Board. (Strauss to Cunningham, Secy., Executive Council, 5/24/57) #57-5-34

Under §82.1, Code 1954, it is mandatory that State Executive Council appoint and maintain a Board of Mine Examiners at the statutory level of five (5) members.

21.43

National Guard — Reconstruction of building destroyed by fire — Authority of Executive Council. (Forrest to Tandy, Adj. Gen., 1/13/58) #58-1-34

21.44

Natural Resources Council — Flood Control — Authority of Council to remove, relocate, permit or prohibit flood control works — Limitation. (Bianco to Bullard, Acting Dir., Iowa Natural Resources Council, 6/12/57) #57-6-17

The Natural Resources Council is without authority to force removal or relocation of flood control works, established or constructed prior to the creation of the Council, except by condemnation proceedings, but may permit or prohibit such works to be constructed upon a determination of the fact of whether it will adversely affect the efficiency of or unduly restrict the capacity of the floodway.

21.45

Natural Resources Council — Water resources conservation — Fees for permits to divert, store or withdraw waters — Become part of State General Fund. (Erbe to Bullard, Acting Dir., Iowa Natural Resources Council, 6/10/57) #57-6-15

Proceeds of ten-dollar fee for permit to divert, store or withdraw waters become part of the State General Fund, and may not be retained by Resources Council for the payment of publication costs since Legislature failed to establish a trust fund as a depository for such fees.

21.46

Peace officers retirement — Eligibility of trustees. (Swanson to Abrahamson, V. Chmn. P. O. Ret., Acct., & Dis. Syst., 9/30/57) #57-9-58

21.47

Peace Officers — Whether the word "guardian" appearing in Sec. 97A.6 (8) Code of Iowa, 1958, includes a surviving spouse who is the natural parent of a child of the deceased and who has re-married depends upon the application of Sec. 668.3, 1958 Code of Iowa. (Pesch to Brown, Pub. Saf. Dept., 10/21/58) #58-10-9

21.48

Public Safety — 57th G. A., *Ch. 56*, Printing, Sale or free distribution of pamphlets under section 321.15. (Strauss to Carlson, M. V. Reg. Div., Dept. Pub. Safety, 8/21/57) #57-8-36

21.49

Real Estate Commission — 57th G. A., *Ch. 56*, Printing, "Real Estate Primer", Sale or free distribution. (Strauss to Hart, Dir., Rl. Est. Comm., 8/5/57) #57-8-5

21.50

Real Estate Brokers and Salesmen — Compiling and making available list of rental properties without fee as not constituting dealing in real estate. (Strauss to Hart, Div. St. Real Estate Comm., 3/13/57) #57-3-22

A household goods moving and storage company compiling a list of available rental dwellings and facilities which it supplies to its customers

without fee or charge to anyone is not "dealing in real estate" so as to bring it within the definitions of "broker" and "salesman" contained in sections 117.3 and 117.4, Code 1954, and thus require licensure.

21.51

Regents — Board of — House File 588, 57th G. A., appropriating funds for the improvement of buildings to provide equipment and facilities for observation, diagnosis, care and treatment of mentally retarded children and related purposes does not authorize the erection or construction of a separate building but is restricted to the use of the money for additions to existing buildings. (Erbe and Strauss to David A. Dancer, Secretary, Bd. of Regents, 1/6/58) #58-1-6

21.52

Rules and regulations — State Fire marshal. Ch. 76, 57th G. A. automatically rescinded rules existing under prior repealed statute. (Abels to Synhorst, Secy. of State, 8/20/57) #57-8-30

21.53

Sales tax permit — Publications sold by State Departments. (Pruss to Lint, Secy., St. Tax Comm., 10/29/57) #57-10-40

21.54

Supt. of Printing — 57th G. A., *Ch. 56* — Minimum price of publications. (Strauss to Needham, Supt. of Printing, 8/5/57) #57-8-5

21.55

Tax Commission — 57th G. A., *Ch. 56* — Printing, Sale or free distribution of publications. (Pruss to Lint, Dir., St. Tax Comm., 10/4/57) #57-10-10

21.56

Tax Commission Publications — Pursuant to House File 139, Acts of the 57th G. A., distribution of certain publications by the Tax Commission can be made gratis only to public officers; public officers include persons who are officers of not only the State of Iowa or its political subdivisions but of the United States and other states. (Pruss & Brodie, Gen. Counsel, State Tax Commission, to Lewis Lint, Secretary, Iowa State Tax Commission, 1/14/58) #58-1-19

21.57

Traveling library—Disposition of unusable books and materials. (Strauss to Grafton, Dir., Tr. Libr., 8/9/57) #57-8-19

21.58

Treasurer of State — Redemption of warrants issued by state departments — Charge permitted. (Strauss to Abrahamson, State Treasurer, 7/18/57) #57-7-21

21.59

Treasurer — Border patrol — uniforms. (Strauss to Abrahamson, Treas. of State, 8/7/57) #57-8-11

21.60

World War II Claims — Where application was considered by the Bonus Board prior to its abolishment and thirty days appeal time expired, there is nothing left for auditor to consider. (Strauss to Ray J. Kauffman, Administrator World War II Bonus Division, 1/2/58, *and* Strauss to Ray J. Kauffman, Administrator World War II Bonus Division, 1/2/58) #58-1-3

CHAPTER 22

TAXATION

STAFF OPINIONS

LETTER OPINIONS

TAXATION (Continued)

LETTER OPINIONS

22.1 August 13, 1958

TAXATION — PROPERTY TAX — EQUALIZATION OF ASSESSMENTS: The power to equalize valuations between valuations assessed by the City Assessor and valuations assessed by the County Assessor in the same county is granted exclusively to the State Tax Commission and any order of the County Board of Review which attempts to accomplish this is without effect.

Mr. Richard F. Nazette, County Attorney of Linn County: This is to acknowledge receipt of a request for an opinion from your office dated July 29, 1958, as follows:

"The Linn County Board of Review recently passed a motion, the effect of which was to reduce by 15% all real estate subject to reassessment by them. The stated purpose of this act was to adjust the assessment of property in Linn County outside the city of Cedar Rapids and the assessment of the property inside the city of Cedar Rapids subject to assessment by the City Assessor. The Linn County Assessor asked this office for an opinion, which was rendered, and we now request an opinion of your office on the following questions:

"1. Is the power to adjust the valuations as between property in any city assessed by the City Assessor and property in the same county assessed by the County Assessor exclusively reserved to the State Board of Review by Sec. 442.16, 1958 Code of Iowa, or other rule?

"2. If not, has a County Board of Review authority to act in the premises by adjusting the valuations of property in its county as a whole, exclusive of property therein assessed by a City Assessor?

"3. What is the duty of the County Assessor following action by the County Board of Review which would reduce the valuations of all property in its county if such act is for the purpose of adjusting valuations as between such property and property within the same county assessed by a City Assessor?"

The following provisions of the Code of Iowa (1958) appear to have some bearing upon the questions presented:

"Section 421.17 Powers and duties. In addition to the powers and duties transferred to the state tax commission, said commission shall have and assume the following powers and duties:

" * * * .

"2. * * *

"The state tax commission shall determine the degree of uniformity of valuation as between the various taxing districts of the state and shall have the authority to employ competent personnel for the purpose of performing this duty."

" * * * .

"10. * * *

"The state tax commission shall have the power to order made effective reassessments or revaluations in any taxing district as to taxes levied during the current year for collection the following year, and it may in any year order uniform increases or decreases in valuation of all property or upon any class of property within any taxing district, such orders to be effective as to taxes levied during the current year for collection during the following year."

"Section 442.1 County board of review. * * * The board shall meet on the first Monday of May at the office of the county assessor and shall sit from day to day until its duties are completed, which shall not be later than the first day of June, and shall adjust assessments by raising or lowering the assessments of any person, partnership, corporation or association as to any of the items of their assessments in such manner as to secure the listing of property at taxable value. * * * .

"The county board of review may, at its election, hold sessions in any incorporated city or town of the county for the purpose of receiving protests against assessments and to perform its duties as a board of equalization. The county board of review shall have no jurisdiction over assessments in cities having a city assessor as provided by chapter 405 and chapter 405A."

"Section 442.2 Revaluation and reassessment of real estate. *In any year after the year in which an assessment has been made of all the real estate in any taxing district,* it shall be the duty of the board of review to meet at the times provided in section 442.1, and where it finds the same has changed in value, to revalue and reassess any part or all of the real estate contained in such taxing district, and in such case, it shall determine the taxable value thereof, and any aggrieved taxpayer may petition for a revaluation of his property, but no reduction or increase shall be made for prior years. * * * ." (Emphasis supplied).

"Section 442.16 Adjusting county valuations. It (the State Tax Commission) shall adjust the valuation of property in the several counties, adding to or deducting from the valuation of each kind or class of property such percentage in each case as will bring the same to its taxable value as fixed in chapters 427 to 443, inclusive. It shall also adjust the valuations as between property in any city assessed by a city assessor and property in the same county assessed by the county assessor."

The County Board of Review owes its existence to the statutes of this state and, as such, enjoys no powers over and above those conferred by such statutes. An examination of the statutes which grant powers to the County Board of Review reveals that this body may adjust individual assessments to arrive at a listing of property at taxable value. The statutes also grant to the County Board of Review the power to revalue and

reassess all or part of the property within its jurisdiction; however, this power is limited to any year after a year in which the entire taxing district has been assessed and is further contingent upon a finding of change of value. There remains one additional power granted to the County Board of Review which is relevant here. The second paragraph of Section 442.1, Code of Iowa (1958), authorizes this body to function as a board of equalization with the qualification that it shall have no jurisdiction over assessments in cities which have a City Assessor.

It thus appears that if the County Board of Review has authority to make a blanket adjustment of all property within a county to bring assessed values in line with assessed values in a city subject to assessment by a City Assessor such power would be by virtue of the last quoted section. It is clear that the authority of the County Board of Review extends only to a review of the assessments made by the County Assessor. The Board has no extraterritorial jurisdiction. Their function, then, is to equalize the assessments within their particular jurisdiction. When the Board orders a general reduction of all property within their jurisdiction, they are equalizing nothing. The action of the Board in ordering a general reduction is, in effect, the making of a new assessment, which is clearly outside its authority.

The last quoted section of the Code of Iowa (1958) specifically states that the County Board of Review shall have no jurisdiction over assessments in cities which have a City Assessor. The act of ordering a general reduction of all county property for the express purpose of equalizing the county and city property is an attempt to assume jurisdiction over the city assessments.

In addition, it is provided in Section 421.17 (2) and (10), Code of Iowa (1958), supra, that the State Tax Commission shall determine uniformity of valuation between the various taxing districts of the state and that it may order uniform increases or decreases of all property within any taxing district. Section 442.16, Code of Iowa (1958), supra, specifically states that the State Tax Commission is charged with the duty of adjusting valuation between city property assessed by a City Assessor and property in the same county assessed by the County Assessor. Certainly it was the intent of the Legislature to grant this power exclusively to the State Tax Commission. If it was intended that this power was to be given to any other body in addition to the State Tax Commission, a provision to that effect would have been included.

It is the opinion of this office that the power granted to the State Tax Commission to adjust valuations between property assessed by a City Assessor and property in the same county assessed by a County Assessor is exclusively granted to that body and the County Board of Review lacks the power to issue a resolution which would effect this purpose.

An answer to your third question is unnecessary in view of the answers to the first two questions.

22.2 November 14, 1957

HOMESTEAD AND VETERANS' CREDIT.

Mr. Emery L. Goodenberger, Madison County Attorney: This is to acknowledge receipt of your letter dated July 31, 1957, wherein you pose the following questions:

"A lives in Madison County and duly files a claim for military service tax credit prior to July 1, 1956, designating his homestead as exempt, and thereafter, the County Board of Supervisors allows the claim.

"(a) Prior to July, 1956, A sells the property and moves out of state.

"(b) After July 1, 1956, A sells the property and moves out of state before the County Board of Supervisors have levied the tax at the Board meeting in September, 1956.

"(c) After the tax has been levied at the September, 1956, meeting of the Board of Supervisors, A sells the property and moves out of state before January 1, 1957.

"Is A entitled to the Military service tax credit in the situations suggested in (a), (b) or (c)?"

The discussion herein will apply to all military service exemptions allowable pursuant to section 427.3, Code of Iowa, 1954.

Section 427.5, Code of Iowa, 1954, entitled "Reduction — Discharge of Record — Oath" provides:

"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 may record in lieu of the same, a certified copy thereof. Said person shall file with the city or county assessor, as the case may be his claim for exemption or reduction in taxes under oath, which claim shall set out the fact that he is a resident of and domiciled in the state of Iowa, and a person within the terms of section 427.3, and give the volume and page on which the certificate of satisfactory service, order of separation, retirement, furlough to 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. The assessor shall tabulate and deliver or file said claims with the county auditor, having his recommendations for allowance or disallowance endorsed thereon. In case the owner of the property is in active service in any of the armed forces of the United States or of this state, including the nurses' corps of the state or of the United States, said claim may be executed and delivered or filed by the owner's spouse, parent, child, brother, or sister, or by any person who may represent him under power of attorney. 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."

Section 427.6, entitled "Allowance — Continuing Effectiveness," 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 only for the year in which such exemption is filed.

* * * * * ."

Section 426A.3, entitled "Certification of Claims for Military Service Tax Exemption," provides:

"On or before August 1 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. Such certificate shall list the name of each owner and the legal description of the property upon which military service tax exemption has been granted, or the nature of the property upon which such military service tax exemption has been allowed on property other than real estate. The county treasurer shall forthwith certify to the state tax commission the amount of taxes which would be levied upon each property not in excess of twenty-five (25) mills on each dollar of assessed valuation, at the regular property rate imposed on other real and personal property in the taxing district where such military service tax exemption has been granted, were such property subject to normal property taxation."

It seems that certain requirements have been set up by the statute with which a veteran must comply to entitle him to receive the military service tax exemption. First, he must be a person who complies with the provisions of Section 427.3; he must be a resident and domiciled in the state of Iowa; he must own property and he must designate certain property, except that should he fail to designate, the exemption may be allowed on his homestead; he must have recorded a military service certificate or discharge or a certified copy thereof; he must file his claim for exemption under oath, and state that he is the equitable and (sic) legal owner of the property designated by him.

In addition, the claim for exemption must be filed on or before July 1st of any year, and it must be allowed by the Board of Supervisors, all as provided by Section 427.6.

Under your example "(a)" set out above, A has complied with the requirements set out in section 427.5. However, it seems that even though he filed his claim for exemption prior to July 1, 1956, he has sold his property and removed himself from the state prior to the Board of Supervisors allowing his claim for exemption. Therefore, it would seem that if the Supervisors have denied his claim all of the provisions set out in Section 427.6 have not been complied with. If the Board allowed the claim in this case, it would be in error. Your example in "(b)" set out above assumed that the date of levy by the Board of Supervisors is a controlling factor. As a matter of fact, it would seem that the controlling date is the date on which the Board of Supervisors allowed the claim, or should have allowed the claim, not later than August 1st of 1956. It is during the month of July that the Board of Supervisors must allow or disallow claims for military service exemptions, since the Auditor is required to certify to the County Treasurer on or before August 1st of each year all claims for military service tax exemption which have been

allowed. Necessarily, the date for allowance could not be later than August 1st. Therefore, if the Board of Supervisors has allowed the claim prior to the taxpayer selling his property and removing himself from the state, his rights have become fixed, and to carry out the mandate of the statute the exemption should be allowed, since the statute very specifically provides, "shall be effective to secure an exemption only for the year in which such exemption is filed."

As to your query "(c)", wherein A sold the property and moved from the state after the tax was levied in September, 1956, and after his claim was allowed, then it would seem that the exemption must be allowed pursuant to the quoted provisions of Section 427.6. This is so even though he moves out of the state prior to January 1, 1957, since the statute controls.

It would seem that the function of the Board of Supervisors in allowing or disallowing claims is that the Board confirms whether the claimant filed a proper claim, qualifies as a military person and whether he is an owner of property on which the claim is allowed. The statute then provides that on or before August 1st of each year the Auditor must certify the exemptions to the Treasurer. This certainly is for the purpose of allowing the Treasurer to enter upon his records the exemptions that are allowed and to enable the Treasurer to have sufficient time to accomplish the book work involved with this exemption portion of the law. It might be said that this portion of the law is procedural, but at the same time there must be definite dates when these matters become certain so that county officials can properly carry out their functions. There appears to be no legal reason why dates other than those set out above should be used.

22.3 April 15, 1958

TAXATION: Homestead Exemption.

Mr. Robert W. Burdette, County Attorney: This is to acknowledge receipt of your letter wherein you ask our opinion on the following questions:

"1. If a person properly files a homestead exemption on the homestead he is occupying, stating his good faith and intent to occupy said premises for 6 months of the year, is it proper to deny him the homestead exemption in the event he fails to actually occupy the premises for 6 months of that year because of some circumstances, in this case death, that prevents such occupancy?

"2. If the answer to question 1 is that the homestead exemption should not be granted in this case, then my question is: Who is responsible for paying the amount of the homestead exemption which has been erroneously granted, the county or the state?"

What is now subsection 1 (a), Section 425.11, Code of Iowa, 1958, formerly provided in part:

"The homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under this act actually lives six months or more in the year * * *"

This particular portion of the statute, however, was stricken out by Chapter 240, Section 4, Acts of the 49th General Assembly, and there was inserted in lieu thereof, the present law which provides in part:

"The homestead must embrace the dwelling house in which the owner is living at the time of filing the application and said application must contain an affidavit of his intention to occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed, * * *"

Subsection 1 (a), Section 425.11, as it formerly read, supra, was explicit in requiring that the claimant actually live in the dwelling house six months or more during the year for which credit was claimed. The only requirement of the statute in its present form, with respect to occupancy, however, is that the claimant file "an affidavit of his intention to occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed".

In construing Section 425.11 in its amended form, consideration must be given to the intent of the legislature in materially changing the language of the statute. In this regard, 50 Am. Jur., Statutes, Section 275, provides:

"In making material changes in the language of a statute, the legislature cannot be assumed to have regarded such changes as without significance, but must be assumed to have had a reasonable motive. Where a statute is amended, it will not be presumed that the difference between the two statutes was due to oversight or inadvertence on the part of the legislature. To the contrary, the presumption is that every amendment of a statute is made to effect some purpose, and effect must be given the amended law in a manner consistent with the amendment. The general rule is that a change in phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended, and amendments are accordingly generally construed to effect a change, particularly where the wording of the statute is radically different. * * *"

It is equally true, of course, that taxation is the rule, and exemption is the exception. Consequently, a statute granting a homestead tax credit must be strictly construed and those claiming exemptions thereunder, must show that they are within the purview of the act. This does not mean, however, that the rule of strict construction requires the adoption of a strained interpretation, nor one so narrow and restricted as to defeat the apparent legislative purpose. *Johnson v. Board of Supervisors of Jefferson County, 237 Iowa 1103, 24 N. W. 2nd 449, (1946).*

In view of the foregoing, it is the opinion of this office that in determining the validity of a claim for homestead exemption, failure to actually occupy the home as a dwelling house for six months is no longer an all-controlling consideration.

It is clear, however, that the applicant, at the time the application is filed, must, in good faith, intend to occupy the dwelling house for the specified period of time. The good faith of the claimant must be actual and not a figment of the mind or an assumed attitude which is contrary to his undisclosed intentions.

Actual intent, is, of course, in many instances, difficult to ascertain. Each claim must stand or fall on its own merits, and the board, in the exercise of its discretion with respect to the question of intent, must carefully screen the objective facts as they relate to each particular claim. It would appear that death is not, per se, an objective fact that bears on the question of intent. Consequently, if an applicant's demise precludes him from occupying the homestead for six months, it is the opinion of this office that such factor does not in and of itself invalidate his claim for homestead tax credit.

22.4 November 10, 1958

TAXATION: PROPERTY TAX: HOMESTEAD TAX CREDIT: Property is entitled to Homestead Tax Credit where surviving spouse of owner of part interest is occupying homestead pursuant to the right to occupy granted by Section 561.11, Code of Iowa (1958). Such individual is an owner within the meaning of Section 425.11(2), Code of Iowa (1958), since she is occupying as a surviving spouse.

Mr. Leon N. Miller, Chairman, Iowa State Tax Commission, State Office Building: This is to acknowledge receipt of your letter dated September 18, 1958, in which you request the opinion of this department on the following questions submitted to you by Ballard B. Tipton, Director of the Property Tax Division of the State Tax Commission:

(1) "Two brothers and a sister owned a tract of land. The one brother recently became deceased, leaving a surviving spouse who is occupying the homestead on such tract of land. The surviving brother and sister do not and never have occupied said homestead. The deceased brother died testate, leaving all of his property to his widow, but there has not yet been a change of title issued in his estate matter showing that his surviving spouse was given his interest in the tract of land. Here is a case where a surviving spouse is occupying the home property, but the title of the property is held by her with others who are not blood relatives. The question arises as to whether just because she is occupying the homestead as a surviving spouse, she is entitled to have a homestead tax credit.

(2) "Frequently there are cases where a surviving spouse holds a life interest in a homestead that is occupied by her and the remainder interest is held by step children or others who are not blood relatives of such surviving spouse. In those cases it is a fact that the homestead is occupied by the surviving spouse of the deceased owner, and the question arises as to whether that fact entitled him or her to a homestead tax credit irrespective of the fact that the remainder is held by persons who are not blood relatives of such life tenant."

Section 425.11, Code of Iowa (1958), provides in pertinent part as follows:

"For the purpose of this chapter and wherever used in this chapter:

"1. * * * .

"2. The word, 'owner', shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price

named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or where the divided interest is shared only by blood relatives, or by legally adopted children, or where the person is occupying the homestead under a deed which conveys a divided interest where the other interests are owned by blood relatives or by legally adopted children.

"3. * * * .

"Where not in conflict with the terms of the definitions above set out, the provisions of chapter 561 shall control."

Section 561.11, Code of Iowa (1958), provides as follows:

"561.11 Occupancy by surviving spouse. Upon the death of either husband or wife, the survivor may continue to possess and occupy the whole homestead until it is otherwise disposed of according to law, but the setting off of the distributive share of the husband or wife in the real estate of the deceased shall be such a disposal of the homestead as is herein contemplated."

In the situation presented in your first question, the surviving spouse shares the interest with others who are not related to her by blood. Thus, if she was not occupying as a surviving spouse, the homestead would clearly not be entitled to the credit allowed by Chapter 425, Code of Iowa (1958).

The question, therefore, arises whether the Legislature intended to extend the credit to all persons taking as a surviving spouse without requiring them also to be either the owners of the whole interest or sharing the interest with only blood relatives.

An analysis of the statute reveals an intent to make the various requirements of subsection two (2) of Section 425.11, supra, mutually exclusive. The statute in essence states that in addition to the fee simple owner, the person taking as a surviving spouse, or the contract purchaser with not less than ten per cent of the purchase price paid, or the person taking by devise or by operation of the inheritance laws, either a whole or a divided interest shared with only blood relatives or legally adopted children, shall be deemed an owner within the meaning of the statute.

The Legislature in listing those persons who would qualify as an owner saw fit to use the disjunctive rather than the conjunctive, indicating thereby that a person who comes within any one of the alternatives listed in the section shall be deemed to be an owner.

Subsection three (3) of Section 425.11, supra, states that the provisions of Chapter 561 shall be controlling when not in conflict with the terms of the definitions of that section. Chapter 561 is the general homestead chapter, and under Section 11, supra, gives the right to the surviving spouse to occupy the homestead upon the death of the decedent spouse until the homestead is disposed of according to law.

Therefore, where a person occupies the homestead by virtue of being a surviving spouse, i.e., by occupying the homestead until disposed of by law, that person is entitled to the homestead tax credit whether or not he or she holds a whole interest.

This construction finds support in the case of Eysink v. Board, 229 Iowa 1240, 296 N.W. 376, where the Court indicated that the various definitions of "owner" found in Section 425.11(2) should be interpreted as being mutually exclusive. There the Court said:

"It will be observed, that in addition to a fee simple titleholder, the term 'owner' also includes, according to the statute:

"(1) Surviving spouse;

"(2) Purchaser under recorded contract, with ten percent of the purcase price paid;

"(3) Devisee or heir of deceased owner;

"(4) Devisee or heir of an undivided interest where the remaining interest passes to blood relatives or adopted children; and

"(5) Grantee of a deed of a fractional interest where the other interests are owned by blood relatives or adopted children."

Another interpretation would fail to give effect to the entire statute, since, if the surviving spouse is required to hold the whole interest or share the divided interest with blood relatives, the homestead owned by that person would be entitled to the tax credit regardless of whether she is a surviving spouse. In other words, if the person occupying as a surviving spouse must own the whole interest or share the divided interest with blood relatives, the words "occupying as a surviving spouse" in Section 425.11(2) would be rendered wholly ineffectual.

An analysis of the particular facts presented in your first question reveals that the only apparent right of the surviving spouse to occupy the property at the present time arises under the provisions of Section 561.11, Code of Iowa (1958). She would, therefore, be occupying the property by virtue of being a surviving spouse. It is the opinion of this office that the deceased brother's widow is occupying the property as a surviving spouse within the meaning of 425.11(2), Code of Iowa (1958), and, assuming all other requirements of the Homestead Tax Credit Act have been met, the property will be entitled to the Homestead Tax Credit.

This office is currently engaged in litigation involving the situation presented by your second question. Due to long standing policy of the Office of the Attorney General, opinions are not rendered upon questions which are the subject of current litigation.

22.5 September 30, 1957

MOBILE HOMES.

Mr. James E. Bromwell, Linn County Assistant County Attorney: This will acknowledge receipt of your letter dated June 11, 1957, wherein you submitted the following:

"1. Is the owner of a mobile home as described in Chapter 135D of the Code of Iowa (1954) permitted an option as between the payment of the monthly fee provided in 135D.9 and the payment of personal property taxes to be assessed upon the mobile home?

"2. Is the monthly fee provided for in 135D.9 subject to the homestead tax credit?

"3. Is the monthly fee provided for in 135D.9 subject to the military exemption?

"With reference to No. 1 above, we are aware of section 135D.21 which provides that the fee called for by 135D.9 is paid in lieu of property tax. The sense of the question numbered 1, however, is whether the choice between paying the monthly fee and the property tax rests with the owner of the mobile home.

"The questions above further assume that the mobile home is in any event, to be considered as personal property and not permanently affixed to the land so as to be realty."

At the outset it would seem that we should examine the sections of the Code applicable to your questions. Some of those sections are as follows:

"135D.9 Monthly fees. In addition to the primary and annual license fee provided for in section 135D.5, each licensee is hereby required to pay for each occupied mobile home occupying space within such licensed mobile home park a monthly fee as follows: For trailers up to thirty feet in length, two dollars per month or major fraction thereof; for trailers from thirty to thirty-five feet in length, two and one-half dollars per month or major fraction thereof; and for all trailers over thirty-five feet in length, three dollars per month or major fraction thereof which monthly fee shall be paid by the licensee on or before the tenth day of the month, following the month for which such additional fee is due, in the manner herein prescribed. In computing the length herein above described, the total length therein set out shall expressly include the trailer hitch or such other permanent extensions as may be attached to said trailer used or designed for use as a trailer hitch. Provided, however, that the licensee of a mobile home park shall not be required to collect or pay a monthly fee, as herein provided, for any space occupied by a mobile home accompanied by an automobile, if such mobile home and automobile bear license plates issued by any other state other than the state of Iowa, for an accumulated period not to exceed ninety days in any twelve-month period; provided, further, that all occupants of the said mobile home with accompanying automobile are tourists or vacationists. When one or more persons occupying a mobile home bearing a foreign license are employed within the state of Iowa, there shall be no exemption for monthly fees. In the event that an occupied mobile home is not harbored in a mobile home park the owner of said mobile home shall pay a monthly fee in the amount and in the manner as has heretofore been provided in this section. Each mobile home park licensee is hereby required to keep an accurate and complete record of the number of units of mobile homes harbored in his park and to report such information on or before the tenth day of each month to the county assessor and the records of every such licensee shall be open to inspection by the county assessor."

"135D.19 Construction of statute. The licenses and fees provided for in this chapter shall be in addition to any licenses and fees provided for in chapter 321."

"135D.21 Fee in lieu of property tax. All mobile homes for which a monthly fee is collected under the provisions of this chapter shall not be assessed for property tax but this exemption shall not apply to the property contained in any mobile home."

"425.2 Qualifying for credit. Any person who desires to avail himself of the benefits provided hereunder shall each year on or before July 1 deliver to the assessor, on blank forms to be furnished by the assessor,

a verified statement and designation of homestead as claimed by him, and the assessor shall return said statement and designation on July 2 of each year to the county auditor with his recommendation for allowance or disallowance indorsed thereon. * * * . "

"425.11 Definitions. For the purpose of this chapter and wherever used in this chapter:

"1. The word, 'homestead', shall have the following meaning:

"a. The homestead must embrace the dwelling house in which the owner is living at the time of filing the application and said application must contain an affidavit of his intention to occupy said dwelling house, in good faith, as a home for six months or more in the year for which the credit is claimed, * * * .

" * * * * * .

"f. The words 'dwelling house' shall embrace any building occupied wholly or in part by the claimant as a home.

"2. The word, 'owner', shall mean the person who holds the fee simple title to the homestead, and in addition shall mean the person occupying as a surviving spouse or the person occupying under a contract of purchase where it is shown that not less than one-tenth of the purchase price named in the contract actually has been paid and which contract has been recorded in the office of the county recorder of the county in which the property is located, or the person occupying the homestead under devise or by operation of the inheritance laws where the whole interest passes or where the divided interest is shared only by blood relatives, or by legally adopted children, or where the person is occupying the homestead under a deed which conveys a divided interest where the other interests are owned by blood relatives or by legally adopted children.

"3. The words 'assessed valuation' shall mean the taxable valuation of the homestead as fixed by the assessor, or by the board of review, under the provisions of section 441.4, without deducting therefrom the exemptions authorized in section 427.3.

"Where not in conflict with the terms of the definitions above set out, the provisions of chapter 561 shall control."

"427.3 Military service — exemptions. The following exemptions from taxation shall be allowed:

"1. The property, not to exceed three thousand dollars in taxable value, and poll tax of any honorably discharged union soldier, sailor, or marine of the Mexican war or the war of the rebellion.

"2. The property, not to exceed eighteen hundred dollars in taxable value, and poll tax of any honorably discharged soldier, sailor, marine or nurse of the war with Spain, Tyler Rangers, Colorado volunteers in the war of the rebellion, 1861 to 1865, Indian wars, Chinese relief expedition or the Philippine insurrection.

"3. The property, not to exceed seven hundred fifty dollars in taxable value of any honorably discharged soldier, sailor, marine, or nurse of the first world war.

"4. The property, not to exceed five hundred dollars in taxable value of any honorably separated, retired, furloughed to a reserve, placed on inactive status, or discharged soldier, sailor, marine, or nurse of the second world war, army of occupation in Germany November 12, 1918 to July 11, 1923, American expeditionary forces in Siberia November 12, 1918 to April 30, 1920, second Nicaraguan campaign with the navy or marines in Nicaragua or on combatant ships 1926-1933, second Haitian suppressions of insurrections 1919-1920, navy and marine operations in

China 1937-1939 and Yangtze service with navy and marines in Shanghai or in the Yangtze Valley 1926-1927 and 1930-1932, or of the Korean conflict at any time between June 27, 1950 and July 27, 1953, both dates inclusive. As amended Acts 1949 (53 G.A.) ch. 196, § 1; Acts 1955 (56 G.A.) ch. 218, § 1."

"5. The provisions of this section shall apply to personal property held in partnership but not in excess of the value of the veteran's share actually held. As amended Acts 1947 (52 G.A.) ch. 235, § 1."

"441.11 Owner to Assist.

"The Assessor shall list every person in his county or city and assess all the property therein, personal and real, except such as is heretofore exempted or otherwise assessed. * * * * * . "

Your question No. 1 requests a determination as to whether the owner of a mobile home is permitted an option as between the payment of the monthly fee provided for in section 135D.9 and the payment of personal property taxes. As set out above, section 135D.21 specifically provides that mobile homes "shall not be assessed for property tax * * * . "

It would seem that the question is, What was the intent of the legislature when they enacted this Section?

Sutherland on *Statutory Construction*, 3d., in Vol. 2, section 2803 on page 216, provides:

"unless the context otherwise indicates, the use of 'shall' (except in its future tense) indicates a mandatory intent * * * * . "

The legislature has seen fit to set out the mandatory word "shall". The same observation pertains to the language in sections 135D.9 and 135D.19. It would appear that there is no option to the property owner, and your question No. 1 must be answered in the negative.

Your question No. 2 requests a determination as to whether the owner of a mobile home can be allowed the homestead tax credit. Section 425.11 as set out above defines the words "homestead" and "owner".

It would seem that if the owner of a mobile home is to be allowed the homestead tax credit it would first have to be determined that the mobile home could be found to be a "dwelling house".

The Indiana Supreme Court faced the question whether a mobile home constitutes a dwelling house within the meaning of the statutory definition of a homestead. The court treated this question in the case of Simmons v. State, 129 N.E. 2d 121. At page 126 of the Northeastern Reporter the court stated:

"It was never attached to the real estate, but was always a movable chattel. It would not be a building one day and a vehicle the next day when the owner chose to move it as he had the right and intended to do. Proof that the owner lived in his trailer did not make it a building, and if it was not a building, it was not a house any more than a tent is a building, or a truck equipped for living and sleeping is a building, or a wagon which could be used for the same purpose is a building."

Also, it appears from the various sections of chapter 425 that the homestead tax credit will be allowed against real property. Consequently,

for the credit to be applicable we would have to find that the fee or charge imposed by chapter 135D constitutes a real property tax and that the owner of a mobile home could be considered the owner of real estate. However, it is apparent that the owner of the mobile home who has placed it upon leased land is not the owner of the land. On the other hand, the owner of the land does not own the mobile home which in our analysis would have to be considered the "house". Consequently, your question No. 2 must be answered in the negative.

Your question No. 3 requests a determination as to whether the military service exemption can be allowed to the owner of a mobile home.

As set out above, each subparagraph of section 427.3 provides "the property" shall be exempt from taxation. This language has been construed to mean personal and real property and the tax which is exempted is therefore either a real property tax or a personal property tax. Opinion Attorney General, 1946 P. 210.

The Iowa Supreme Court has on several occasions held that exemption statutes must be strictly construed and any doubt upon the question of exemption must be resolved against exemption in favor of taxation. See Lamb v. Kroeger, (1943), 233 Iowa 730, 8 N.W. 2d 405; Ahrweiler v. Board, 226 Iowa 229, 231, 283 N.W. 889. Opinion Attorney General, 1942, Page 79.

Section 441.11 provides for the assessment of all property not exempted or otherwise assessed. As stated above, section 135D.21 provides that all mobile homes subject to the monthly fee "shall not be assessed for property tax * * * ". As a matter of fact, section 135D.19 appears to say that the charge imposed by this chapter constitutes a license and is comparable to that provided for in chapter 321. Therefore, it would appear that your question No. 3 likewise must be answered in the negative.

It would seem that as regards the question contained in your paragraph following your numbered paragraph three, a choice does not exist between paying the monthly fee provided for by chapter 135D and a property tax. Where the mobile home comes within the definition of section 135D.1, then no choice exists. In no section in chapter 135D has the legislature granted an option to pay the license fee or to pay a personal property tax. The legislature has said in section 135D.21, " * * * shall not be assessed for property tax * * * . "

As you noted in your letter of June 11, 1957, we have none of the above questions once the mobile home is placed upon a permanent foundation. In other words, once the mobile home is completely removed from its means of conveyance and placed upon a permanent foundation, it no longer comes within the provisions of chapter 135D.

22.6 May 27, 1958

CORPORATION STOCK.

Mr. Leon N. Miller, Chairman, Iowa State Tax Commission: This is

to acknowledge receipt of a recent request for an opinion of this department in which the following is submitted:

"Should the value of Iowa municipal bonds, which are owned by an insurance company incorporated under the laws of Iowa, be taken into consideration in evaluating the company's stock for the purpose of Iowa corporation stock tax?"

Section 427.1(5), Code of Iowa, 1958, provides:

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

"* * *.

"5. Public securities. Bonds or certificates issued by any municipality, school district, drainage or levee district, river-front improvement commission or county within the state of Iowa. No deduction from the assessment of the shares of stock of any bank or trust company shall be permitted because such bank or trust company holds such bonds as are exempted above.

"* * *."

Section 431.1, Code of Iowa, 1958, provides:

"Shares of stock. The shares of stock of any corporation organized under the laws of this state, except corporations otherwise provided for in chapters 427 to 430, inclusive, and except as provided in section 437.14, shall be assessed to the owners thereof as moneys and credits at the place where its principal business is transacted. The assessment shall be on the value of such shares on the first day of January in each year. In arriving at the assessable value of the shares of stock of such corporations, the amount of their capital actually invested in real estate or tangible personal property shall be deducted from the actual value of such shares. Such property other than moneys and credits shall be assessed as other like property. Any corporation whose shares of stock are subject to assessment under this section shall be entitled to deduct from the actual value of such shares the actual value of shares owned by it in any other corporation subject to assessment under this section, upon submitting satisfactory proof to the assessor that such shares of stock have been assessed under the provisions of this section to the corporation issuing such shares of stock."

Section 431.2, Code of Iowa, 1958, provides:

"Statement to assessor. Every such corporation annually, on or before the twenty-fifth day of January, shall furnish to the assessor of the assessment district in which its principal place of business is located, a verified statement showing specifically, with reference to the year next preceding the first day of January then last past:

"1. Total authorized capital stock and number of shares thereof.

"2. Number of shares of stock issued and par value of each.

"3. Amount paid into the treasury on each share and the total capital paid in.

"4. Description of each tract of real estate owned by said corporation, and the amount of capital actually invested therein.

"5. An itemized list of all other property owned by said corporation, except moneys and credits, together with the location thereof, and the amount of capital actually invested therein.

"6. Date, rate percent, and amount of each dividend declared, and the amount of capital on which each such dividend was declared.

"7. Gross and net earnings, respectively, during the year, and amount of surplus.

"8. Amount of profit added to sinking fund.

"9. Highest price of sales of stock between the first and tenth days of January of the current year.

"10. Highest price of sales of stock during the preceding year, and average price of such sales."

Section 431.3, Code of Iowa, 1958, provides:

"Valuation of stock. If the assessor is not satisfied with the appraisement and valuation furnished as provided in sections 431.1 and 431.2, he may make a valuation of the shares of stock based upon the facts contained in the statements above required, or upon any information within his possession, or that shall come to him, and shall, in either case, assess to the owners the stock at the valuation made by him."

Section 431.4, Code of Iowa, 1958, provides:

"Refusal to make statement. If the officers of any corporation refuse or neglect to make the statement required, the assessor shall make a valuation of the capital stock of the defaulting corporation from the best information obtainable."

Iowa's corporation stock tax is a tax assessed to the owners of shares of stock in Iowa corporations. It is not a tax levied against a corporation upon its assets, even though the corporation is, by statute, liable in the first instance to assure payment. Consequently, if tax exempt securities are a part of a corporation's assets, it can, in no event, be said that a stock tax is a tax on such securities. Van Allen v. Assessors, 3 Wall. (U.S.) 573, (1866); Owensboro Nat. Bank v. Owensboro, 173 U. S. 664, (1899).

In view of the foregoing, it is evident that in the absence of special legislative prohibitions, tax exempt securities owned by a corporation may be taken into consideration in computing the taxable value of its stock.

Sections 431.1, 431.2, 431.3 and 431.4, Code of Iowa, 1958, supra, furnish one complete statutory scheme for arriving at the assessed value of all corporate stock. For the purpose of such assessed valuation, it lays upon the assessor the ministerial duty to compute such assessed valuation upon the basis of the items specified in the statutes. These items are to be furnished under oath by the corporate officers, and do not include any reduction for exempt assets.

It is true that the latter portion of section 427.1(5), supra, provides:

"* * * No deduction from the assessment of the shares of stock of any bank or trust company shall be permitted because such bank or trust company holds such bonds as are exempted above."

At first glance, this provision might appear to permit the deduction of the tax exempt securities from the assessment of the shares of stock of all corporations other than banks and trust companies. The Supreme Court of Iowa, however, in Des Moines Nat. Bank v. Fairweather, 191 Iowa 1240, 18 N.W. 459, (1921), in commenting on the foregoing portion of section 427.1(5), stated on page 1246:

"We do not overlook the last sentence of subsection 1, (now subsection 5), and we may say in passing that this adds nothing to the subject matter of this section and takes nothing away therefrom. It is simply declaratory of the law as it was and is and would be if the sentence were wholly omitted."

In view of the interpretation the Iowa Supreme Court has placed on subsection 5, it is clear that it in no way authorizes the deduction of exempt securities. Furthermore, our research has failed to disclose any other provision of the Iowa Code which would authorize such deductions. Consequently, we can only conclude that the value of Iowa municipal bonds, which are owned by an insurance company incorporated under the laws of Iowa, must be taken into consideration in evaluating the company's stock for the purpose of Iowa's corporation stock tax.

22.7 **March 4, 1957**

TAXATION: Tax on Building and Loan shares treated as moneys and credits — subject to Korean Bonus levy. The tax imposed by section 431.10 of the 1954 Code of Iowa is to be treated as a moneys and credits tax and apportioned as such in the manner provided in section 429.3. The shares of stock of building and loan associations are subject to the one mill levy imposed by Chapter 61 of the Acts of the 56th General Assembly (Korean Bonus Bill) regardless of whether the tax imposed on such shares by section 431.10 is designated as a moneys and credits tax or only as a tax on other intangible personal property subject to taxation at other than the general property rate.

Mr. C. B. Akers, Auditor of State, Attention: Mr. Earl C. Holloway, Supervisor of County Audits: Reference is made to your letter of February 11, 1957 in which you ask for an opinion on the following questions:

1. "Should the one mill levy on Buildings and Loan shares be treated and apportioned as Monies and Credits?"

2. "Should the one mill levy for the Korean War Bonus on Monies and Credits be applied to the shares of Building and Loan Associations as Section 431.10 provides?"

Your letter indicates that this question has been raised because a certain Building and Loan Association asserts that the tax imposed by section 431.10 of the 1954 Code of Iowa is not a Monies and Credit tax and that, therefore, the Auditor should not add the one mill levy to that tax for the Korean War Bonus.

It is our opinion that it is not necessary to determine the answer to the first question in order to answer the second one.

Section 11 of Chapter 61 of the Acts of the 56th General Assembly, (Section 35B.11, Code of Iowa, 1958) which is known as the Korean War Bonus Act, provides in part:

"To provide for the payment of the principal of said bonds so issued and sold and the interest thereon as the same become due and mature, *there is hereby imposed and levied upon moneys and credits and other*

intangible personal property subject to taxation at other than the general property rate a direct annual tax of one (1) mill upon the dollar, which shall be additional to all other taxes levied upon such intangible personal property, *any other provisions of the Code notwithstanding,* for each of the years said bonds are outstanding. . ."

It is to be noted that the one mill tax is imposed not only upon moneys and credits but also upon "other intangible personal property subject to taxation at other than the general property rate." It seems clear that the tax imposed by section 431.10, if not a moneys and credits tax, is one imposed upon other intangible personal property subject to taxation at other than the general property rate.

Section 431.16 of the 1954 Code of Iowa provides that the taxes provided for in Chapter 431 against building and loan or savings and loan associations and against the shares of stock of such associations shall be in lieu of all other taxes. However, section 11 of Chapter 61 of the Acts of the 56th General Assembly makes provision to avoid the limitation imposed by section 431.16. It does so by the use of the words, "which shall be additional to all other taxes levied upon such intangible personal property, any other provisions of the Code notwithstanding, . . .".

It is our opinion, therefore, that the shares of stock of building and loan associations are subject to the one mill tax imposed by Chapter 61 of the Acts of the 56th General Assembly whether or not the tax imposed upon such shares by virtue of section 431.10 is a moneys and credits tax or whether it is a tax upon other intangible personal property subject to taxation at other than the general property rate.

In answer to question No. 1, it is our opinion that the one mill tax imposed upon the shares of stock of building and loan associations by section 431.10 of the 1954 Code is to be treated as a moneys and credits tax although not specifically so designated by that section. Such shares are of the same nature as other shares of stock upon which a moneys and credits tax is imposed. Before 1931 the shares of stock of building and loan associations were assessed to the individual owners and the Code specifically provided that the stock was subject to a moneys and credits tax. In changing over to assessment to the association rather than the individual, the character of the property itself was not changed though the specific characterization as "moneys and credits" was not continued. We, therefore, believe that the Legislature intended that the tax upon the shares of building and loan stock should still be treated as a moneys and credits tax.

A study reveals that the tax has been collected in the nature of a moneys and credits tax and apportioned as such under the provisions of section 429.3 since a special apportionment was set up by the Acts of the 51st General Assembly. The Legislature is deemed to have knowledge of the interpretation placed upon the statutes and to have acquiesced therein. See John Hancock vs. Lookingbill, 218 Iowa 373, 253 N.W. 604; Lamb vs. Kroeger, 233 Iowa 730, 8 N.W.2d 405.

It might also be pointed out that to treat the one mill imposed by section 431.10 as other than a moneys and credits tax would subject it to

apportionment as a general property tax when, in fact, it is not a tax on property at the general property rate. It would raise insuperable problems in computing the general property tax levy.

In conclusion, therefore, it is our opinion that the tax imposed by section 431.10 of the 1954 Code of Iowa is to be treated as a moneys and credits tax and apportioned as such in the manner provided in section 429.3. It is further our opinion that the shares of stock of building and loan associations are subject to the one mill levy imposed by chapter 61 of the Acts of the 56th General Assembly (Korean Bonus Bill) regardless of whether the tax imposed on such shares by section 431.10 is designated as a moneys and credits tax or only as a tax on other intangible personal property subject to taxation at other than the general property rate.

22.8 **April 9, 1957**

The lien imposed by the Inheritance Tax Law in effect prior to March 11, 1921, was not destroyed by repeal, the imposition of a new statute of limitations by the Acts of the 39th General Assembly or any subsequent statute, and is still valid and enforceable.

Mr. Walter Cochrane, Counsel, Inheritance Tax Division, Iowa State Tax Commission: Reference is made to your letter of January 25, 1957,

"Does the State of Iowa have an inheritance tax lien in those estates where the decedent died prior to March 19, 1921?"

It is our opinion that the inheritance tax lien of the State of Iowa still applies to the property in the estates of decedents dying prior to March 19, 1921.

A historical summary of the law is deemed advisable. Prior to the Acts of the 39th General Assembly, Iowa had only a collateral Inheritance Tax Law. In 1921 the 39th General Assembly substantially revised the Inheritance Tax Law to impose a tax upon direct heirs as well as collateral. Prior to 1921, section 1481-a of the Code read in part as follows:

" . . . The tax aforesaid shall be for the use of the State, shall accrue at the death of the decedent owner and shall be paid to the Treasurer of State within 18 months thereafter, except when otherwise provided in this Act, and shall be and remain a legal charge against and a lien upon such estate and any and all of the property thereof from the death of the decedent owner until paid . . . "

Chapter 38 of the Acts of the 39th General Assembly repealed Section 1481-a of the Code and enacted a new Section 148-1 in lieu thereof. It provided, in part:

" . . . The tax shall be and remain a legal charge against and a lien upon such estate and any and all the property thereof from the death of the decedent owner until paid, provided, however, that said lien shall not continue longer than five years from the date such tax becomes due and payable . . . "

Chapter 38 became effective by publication on March 19, 1921. On April 12, 1921 Chapter 164 of the Acts of the 39th General Assembly became effective by publication. That Act added to the aforequoted provision from Chapter 38 the following:

"Provided, further, such five year limitation shall not apply to estates or beneficiaries embraced in paragraph 'b' of section 4 of this Act, in cases where decedent died prior to the taking effect of this Act."

The question then arises as to the effect of the repeal, the enactment in lieu of the repealed section, and the later amending Act on the lien which existed prior to the Acts of the 39th General Assembly. We have given careful consideration to the authorities available and are of the opinion that the Inheritance Tax lien still applies to the real property belonging to the estates of decedents who died prior to 1921 for the following reasons:

1. The words "The tax" at line 67 of Section 2 of Chapter 38, Acts of the 39th General Assembly refer to the tax assessed by Chapter 38 cited and not to the tax assessed by Chapter 4, Title VII, of the 1897 Code which was the tax imposing chapter applicable to the estate of the above named decedent. Chapter 4, Title VII, of the 1897 Code was expressly repealed by Section 1 of Chapter 38, Acts of the 39th General Assembly and the tax imposed by the sections of the 1897 Code was not the subject of Chapter 38 and was not the subject of the limitation section in that Chapter. In this connection see In Re Estate of Pedersen, 198 Iowa 166, 168, 196 N. W. 785, which reads in part as follows:

"The original collateral inheritance law of this state was Chapter 28, Acts of the 26th General Assembly, which was carried into the Code of 1897 as Chapter 4, Title VII. This Act was subsequently amended and re-enacted, as Sections 1481-a et *seq.* of the Code Supplement of 1913.

"The 39th General Assembly enacted a new statute with reference to the taxation of inheritances. This act created an innovation in the laws of this state, in providing for a direct inheritance tax (Chapter 38, Acts of the 39th General Assembly). It also recodified the collateral inheritance tax law. Section 1 of said act repealed Chapter 4, Title VII, of the Code. Some of the sections of the collateral inheritance law appearing in the Code Supplement of 1913 were repealed, and others were amended, by the new statute."

See also Higgins' Estate, et al vs. Hubbs, 252 P. 519 (Ariz.).

It is clear that the legislature did not establish a limitation as to the tax which is the authority for the present assessment for the legislature was talking about a wholly new and different tax.

2. The conclusion above is supported by the basic premise that a statute of limitations will be given retroactive effect only when it appears by express provision or necessary implication that such was the legislative intent. In this connection please see Hinrichs vs. Davenport Locomotive Works, 203 Iowa 1395, 1398, where the Supreme Court said as follows:

"Prior to the enactment of Section 1386, Code of 1924, by the 40th General Assembly, (extra session), there was no statute of limitations

applicable to claims arising under the Workmen's Compensation Law. The present statute limits the time within which original proceedings may be commenced to two years after date of the injury causing the disability. More than two years elapsed thereafter before this action was commenced. The question, therefore, is as to the applicability of Section 1386 thereto. There is nothing in the specific language of the statute to indicate that it was the intention of the legislature that it should be given retroactive effect, nor do we find anything therein from which such intention may be implied. It is the contention of appellant that less than two years had expired from the date of the accident when the statute went into effect, and that a reasonable time, therefore, existed within which to commence the same. The authority of the legislature to make the statute applicable to the present controversy is, of course, conceded. It had full power, as stated, to give it retroactive effect. The rule apparently of almost universal application is, however, that a statute of limitations will be given retroactive effect only when it appears by express provision or necessary implication that such was the legislative intent."

We believe it would be necessary for the legislature to have shown much more explicitly than it did its intentions (if it had any) that the statute of limitations should apply by Chapter 38 of the Acts of the 39th General Assembly to estates of decedents who died prior to March 19, 1921, in order for the lien for taxes assessed against such earlier estates to have been affected.

As to the effect of a repeal on vested rights, Section 2044, Sutherland Statutory Construction, Third Edition, states as follows:

"Under common law principles of construction and interpretation the repeal of a statute or the abrogation of a common law principle operates to divest all the rights accruing under the repealed statute or the abrogated common law, and to halt all proceedings not concluded prior to the repeal.[1] However, a right which has become vested is not dependent upon the common law or the statute under which it was acquired for its assertion, but has an independent existence. Consequently, the repeal of the statute or the abrogation of the common law from which it originated does not efface a vested right, but it remains enforceable without regard to the appeal."

We do not have to rely solely, however, upon this statement of a rule of statutory construction in Sutherland. The Iowa Code in Section 4.1 provides for the construction of statutes as follows:

"In the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute.

1. Repeal — effect of. The repeal of a statute does not revive a statute previously repealed, *nor effect any right which has accrued, any duty imposed,* any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed." (Emphasis supplied)

It is our opinion that in the instant case a right has accrued in favor of the State of Iowa which is not destroyed by the repeal of the statute. The right accrued when the tax became due at the date of death of the decedent which was prior to the effective date of the repeal. In addition section 4.1 provides that the repeal of a statute will not affect any duty which has been imposed by the statute repealed. The Inheritance Tax Law prior to the Acts of the 39th General Assembly imposed a duty upon

the executor, administrator, or beneficiary to pay the inheritance tax which was due. The effect of this rule of statutory construction in connection with tax liability has been considered by the Iowa court in Tobin and Neary vs. Hartshorn, 69 Iowa 648, 29 N. W. 764. The Attorney General also considered the question in an opinion found in the Report for 1938 at page 303. Both the court and the Attorney General ruled that the tax which had accrued prior to the passage of the repealing acts there under consideration could be collected regardless of the repeal of the act and relied upon the statutory construction guide found in Section 4.1 in reaching this conclusion.

3. Chapter 164, Acts of the 39th General Assembly, Section 4 is regarded by this office as merely legislative interpretation of the lien provisions of Chapter 38 referred to. Some contention has been made that the amendment in Chapter 164 would indicate that the legislature intended a substantial change in the substantive rights existing under Chapter 38 which as pointed out became effective several weeks before Chapter 164. We believe, however, that analysis of the two chapters indicates otherwise. In Sutherland's "Statutory Construction", 3rd Edition, Vol. 1, Section 1931, at page 418 the author has summarized an impressive list of authority from many states to the following effect:

"If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act — a formal change — rebutting the presumption of substantial change."

Among the cases cited in support of this construction rule is Rural Independent School District No. 10 vs. New Independent School District, 120 Iowa 119, 94 N. W. 284, which sustains this conclusion.

4. It is further thought of this office that some thirty-four years of interpretation of the legislative provisions which are the subject of this inquiry by the administrative agencies charged successively with enforcement of the inheritance tax laws is entitled to great weight at this date, not because administrative officers are infallible, but because acquiescence of the legislature and the bar in that interpretation over that period of time is very sound evidence of the correctness of the interpretation followed. In connection with this thought please see:

A. John Hancock Insurance Co. v. Lockingbill, 218 Iowa 373, 253 N. W. 604.

B. Lamb v. Kroeger, 233 Iowa 730, 8 N. W. 2d. 405.

The substance of these cases is that after years of the legislature acquiescing in one interpretation the courts are very slow to adopt a different view. You have indicated you are in a position to show by testimony and records of the division what the practice has been for the period mentioned and that such practice is consistent with the opinions herein expressed. You have at hand "Iowa Law Relating to Inheritance Taxation", edited by B. J. Powers, Assistant Attorney General, 1924 Reprint of 1922 Edition where Chapters 38 and 164 Acts of the 39th General Assembly were interpreted by a member of the Attorney General's staff

to the effect that the subject provision of Chapter 38 did not affect estates in existence on the effective date of Chapter 38. See page 10 of this book.

In connection with the first three points of this opinion, please see Higgins' Estate, et al vs. Hubbs, 252 P. 515 (Ariz. 1926). This case while not factually identical is similar enough to be very persuasive. In that case the decedent died in 1920. In 1922 the Arizona Legislature repealed its Inheritance Tax Law and enacted a new law. A few days after the passage of the new Act, the Legislature, apparently becoming doubtful as to the interpretation which might be placed upon the Act, passed another bill, the effect of which was to preserve the lien and right of collection under the repealed Inheritance Tax Law. Both of the Acts of the 1922 Legislature became effective simultaneously. The Arizona Court said:

" . . . We therefore consider the effect, first of the proviso of subdivision 4, section 1, supra. The 1922 Inheritance Tax Act was obviously taken, at least so far as the parts pertinent to this case are concerned, from Wisconsin. In 1899 (Laws 1899, C 355), the Legislature of Wisconsin adopted an Inheritance Tax Law. Subdivision 4, section 1, of that act, was almost verbatim the same as our subdivision 4, section 1, down to its first semicolon. In 1903 Wisconsin amended the subdivision by adding thereto the exact language of the proviso in question, except that instead of the words 'a tax,' the words 'the tax' were used. Laws 1903, c. 44. In 1913 subdivision 4 was further amended (Laws Wis. 1913, c. 627) by adding the second proviso now contained in our act in regard to contingent interests, and by changing the words 'the tax' to 'a tax'.

"It is not seriously contended by appellants that the Legislature of 1922 intended as a matter of fact to remit the taxes already accrued under the law of 1913. Not only would it be absurd to suppose any sane Legislature intended to give away public money with no legal or moral consideration whatever, which is what in effect the remission of this particular tax would amount to, but the very Legislature which passed the 1922 law, some 13 days after it was adopted, and long before it took effect, passed chapter 26A, supra. Whether that chapter is constitutional or not we need not consider, so far as this particular point is concerned. As an expression of intent it is unmistakable. Appellants, however, insist that, notwithstanding any remission of an accrued tax was furthest from the actual desire or understanding of the Legislature at the time chapter 26 was adopted, nevertheless the language used is so explicit and so unmistakable that we must as a matter of law assume that we know as a matter of fact was not true.

"It is obvious from an examination of the various Wisconsin statutes that the tax referred to in the proviso in question from which vested estates should be exempt was originally meant and understood to be a tax imposed by the particular statute containing the proviso itself; in other words, that no tax should be ex post facto. The first act of Wisconsin containing the proviso uses the words 'the tax', which even by the strictest rules of grammatical construction refer to the particular tax set up in the act itself. How the word 'the' later became changed to 'a' we have no means of ascertaining. We have not, however, been cited to any case from the state of Wisconsin to the effect that such presumably inadvertent change has ever been held to work a release or remission of a vested inheritance tax, and we think common sense, common justice, and an adherence to the doctrine of plain intention require that the word 'a' in the proviso in question should be interpreted as meaning 'the' or 'such' rather than 'any', as contended by appellants . . . "

"We hold, therefore, subdivision 4, section 1, of chapter 26, supra, does not destroy any right of the state to an inheritance tax which had accrued prior to the taking effect of the act of 1922.

"Section 29 of the act, however, expressly repeals the Inheritance Tax Law of 1913, with all amendments, and it is contended by appellants that this is ipso facto a cancellation of the tax. It is ordinarily true as a matter of common law that the repeal of a statute under which taxes are levied puts an end to the right to collect them, unless the repealing statute contains a provision preserving the taxes and the right of collection. Gorley vs. Sewell, 77 Ind. 316; Bryan's Adm'r. vs. Harvey's Adm'r., 11 Tex. 311; Gull R. L. Co. vs. Lee, 7 N. D. 135, 73 N. W. 430. It is urged by the appellee, however, that, notwithstanding this general rule, it is expressly abrogated by paragraphs 5554 and 5560, R. S. A. 1913, Civil Code, which reads as follows:

5554. "The repeal or abrogation of any statute, law or rule does not revive any former statute, law or rule theretofore repealed or abrogated, nor does it affect any right, then already existing or accrued at the time of such repeal, or any action or proceeding theretofore taken, except such as may be provided in such subsequent repealing statute, nor shall it affect any private statute not expressly repealed thereby.

5560. "No action or proceeding commenced before any repealing act takes effect and no right accrued is affected by the provisions of such act, but proceedings therein must conform to the requirements of the Acts passed at the same session of the Legislature so far as such last mentioned Acts are applicable.

"That, if the Higgins Estate was ever subject to an inheritance tax, it had accrued at the time of his death, cannot be disputed. Paragraph 4997, R. S. A. 1913, Civil Code; paragraph 5000, R. S. A. 1913, Civil Code. In such case the tax was unquestionably preserved by the provisions of paragraphs 5554 and 5560, supra. It is urged, however, by appellants, that these paragraphs are unconstitutional, in that they are an attempt by one Legislature to limit or bind the Acts of a future one. That this cannot be done is, of course, undoubted. The authority of the Legislature is limited only by the Constitution itself, and it is axiomatic that any such body may alter, limit, or repeal, in whole or in part, any statute passed by a preceding one, unless there is some constitutional inhibition to the contrary. If paragraphs 5554 and 5560, supra, are to be given the construction placed upon them by appellants as an attempt to deny the Fifth Legislature the right to repeal an act passed by the First Legislature, they are, of course, unconstitutional, illegal, and void. We do not, however, believe for a moment that there was any intent on the part of the First Legislature to assume the right to limit the action of a subsequent one. It was, in our opinion, only an effort to establish a definite rule of statutory construction to the effect that mere repeal of a statute without any further action by the Legislature does not terminate any accrued right conferred by the statute, and to provide a general method of enforcing such rights. We do not think there is any doubt that under our Constitution the Legislature had the right to so provide. It is true that a subsequent Legislature could repeal those paragraphs. But until they are repealed they remain in full force and effect. There was no attempt in chapter 26, supra, to repeal paragraphs 5554 and 5560, and till repealed the rule that the repeal of a statute lapses any accrued rights existing by virtue thereof does not exist in the state of Arizona.

"We therefore hold that any right accrued to the state of Arizona of an inheritance tax upon the estate of Thomas Higgins under the law of 1913 was unaffected by the repeal of that law contained in section 29 of chapter 26, supra, but that, if it ever existed, it still exists as a lien upon the property of the estate, notwithstanding that chapter."

Another persuasive case in this connection is Riley vs. Howard, 193 Calif. 522, 266 P. 293. In that case the court said:

"Contrary to the claim of respondents, it must be announced at the outset as the law of this State, settled beyond the point of controversy that the adoption of the Inheritance Tax Act of 1905 did not in any way affect or disturb any lien created by the Act of 1893 or any amendment thereto. It has been repeatedly held by this court that the Act of 1905 with its repealing clause did not operate to deprive the State of the right to collect or receive or transfer taxes accrued under the Act of 1893 which had not been paid to the State at the time of the repeal to the section, July 1, 1905. Estate of Morton, 153 Calif. 225, 94 P. 1053 and cases cited: Riley vs. Havens, (Calif. Sup.) 225 P. 275; Hunt vs. Wicht, 174 Calif. 205, 162 P. 639, L. R. A. 1917 C 961; Chambers vs. Gallagher, supra; Nichel vs. State, 179 Calif. 126, 175 P. 641; Estate of Brix, 181 Calif. 667, 186 P. 135; Estate of Potter, 188 Calif. 55, 204 P. 826 . . . "

See also Unemployment Compensation Commission vs. L. Harvey and Son Company, et al, (N. Car.) 42 S. E. 2d. 86. In that case the court quoted with approval from Cooley on Taxation as follows:

"The rule favoring a prospective construction of statutes is applicable to statutes which repeal tax laws. Accordingly, it is held that where such a statute is not made retroactive, a tax assessed before the repeal is collectable afterwards; and where taxes are levied under a law which is repealed by a subsequent Act unless it appears clear that the Legislature intended the repeal to work retrospectively, it will be assumed that it intended the taxes to be collected according to the law in force when they were levied."

In McDonald vs. State Tax Commission, 158 Miss. 331, 130 Southern 473, the court, taking the view that inheritance taxes which have accrued and are due under an existing statute are not remitted or released by a subsequent statute which only amounts to an amendment and revision of the prior statute, held that an amendatory inheritance tax statute without a saving clause preserving the rights of the State under the prior statute did not repeal the prior statute so as to render free from tax the estate of one dying before the amendatory statute went into effect where the tax was a fixed charge against the estate from the time of death.

The only indication which seems to have been given by the Iowa Court in connection with this problem is found in the case of In Re Meiner's Estate, 204 Iowa 355, 213 N. W. 938. There the court said:

" . . . The allowance of the executor's account and his discharge therefor imply that the court found that the bequest to the stepchildren were not subject to Collateral Inheritance Tax. It is true that the tax accrued at the date of Mrs. Homan's death, August 25, 1905. 37 Cyc 1574. *The repeal of the law imposing such tax was not made retroactive and would not operate to remit taxes accrued.* 36 Cyc 1225; 37 Cyc 1558; State vs. Slusher (Oregon) 248 P. 358. See State vs. O'Connell (Minn.) 211 N. W. 945 . . . " (Emphasis supplied.)

It is our opinion that the words "the tax" used in Chapter 38 of the Acts of the 39th General Assembly has reference only to the tax imposed by that Chapter and not to the tax which was imposed prior to its passage. It is further our opinion that it was not the intent of the Legislature to give a retroactive effect to Chapter 38. This is evidenced by the fact that no provision was made for such retroactive effect and by

section 4.1 of the Code of Iowa as to statutory construction which provides that accrued rights are not affected by a repeal. It is also our opinion that the Legislature indicated its intention by the passage of Chapter 164 during the same session of the Legislature — a fact which indicates it to be interpretative of the original Act rather than a substantive change in the law. It is further our opinion that long standing administrative interpretation is to be given great weight especially in view of the fact that to hold otherwise would be to give a tax advantage to those who fail to pay when the tax was due and penalize comparatively those who made prompt payment. The amendments to the lien statute post-1921 are in no way pertinent to your question.

It is our conclusion, therefore, that the lien imposed by the Inheritance Tax Law in effect prior to March 11, 1921 was not destroyed by the repeal, the imposition of a new statute of limitations by the Acts of the 39th General Assembly or any subsequent statute, and is still valid and enforceable.

22.9 December 2, 1957

SUSPENDED TAXES: Opinions of this Department appearing in the Report for 1932 at page 221 and the Report of 1942 at page 158, concluding that a Board of Supervisors may remit suspended taxes against any person, his polls, estate, or both, are confirmed and the opinion of this Department appearing in the Report for 1944 at page 82 is withdrawn.

Mr. Isadore Meyer, Winneshiek County Attorney: This will acknowledge receipt of yours of the 20th inst. in which you submitted the following:

"Beginning September 1, 1939, A and her husband, B, received Old Age Assistance from the State Board of Social Welfare. B died intestate a number of years ago. A died December 15, 1956, leaving seven adult children and one small home located in Decorah, Iowa.

"The State Board of Social Welfare requested this office to open an estate for A, so that the property could be sold and their records completed on this transaction. They filed a lien in the estate for $8,385.10.

"The Board of Supervisors of Winneshiek County upon petition by the State Board of Social Welfare suspended the taxes on this property for the years 1939 through 1955. The taxes for 1956 are also unpaid. The total taxes due are $205.35, and the property has been listed for sale on December 9, 1957.

"We have been successful in finding a buyer for the property; however, the highest obtainable price was $500.00. In addition to the usual costs of administration and sale, there will also be a quiet title action required to give the buyer merchantable title as the couple never received a deed to the property, although having lived there since the early 1900's.

"The question has arisen as to whether the Board of Supervisors of Winneshiek County has the authority to compromise the taxes now owed on this property under the authority of Section 427.10 of the 1954 Code of Iowa as amended, which states:

" 'The board of supervisors may, if in their judgment it is for the best interests of the public and the petitioner referred to in Section 427.8, or the public and aged person referred to in Section 427.9 cancel and remit taxes assessed against the petitioner referred to in 427.8, or the aged person referred to in Section 427.9, his polls or his estate or both, even though said taxes have previously been suspended as provided in in Sections 427.8 and 427.9'.

"Also bearing on this matter is Section 427.9 of the 1954 Code of Iowa as amended, which states:

" 'Whenever a person has been issued a certificate of old-age assistance and is receiving monthly or quarterly payments of assistance from the old-age assistance fund, such person shall be deemed to be unable to contribute to the public revenue. The state board of social welfare shall thereupon notify the board of supervisors, of the county in which such assisted person owns property, of the aforesaid fact, giving a statement of property, real and personal, owned, possessed, or upon which said person is paying taxes as a purchaser under contract. It shall then be the duty of the board of supervisors so notified, without the filing of a petition and statement as specified in section 427.8, to order the county treasurer to suspend the collection of all the taxes assessed against said property and remaining unpaid by such person or contractually payable by him, for such time as such person shall remain the owner or contractually prospective owner of such property, and during the period such person receives monthly or quarterly payments of assistance from the old-age assistance fund.'

"In the 1932 opinions of the Attorney General on page 183, a problem similar to ours was presented and your office gave the opinion that the Board of Supervisors did not have the authority to suspend or compromise taxes in such a situation. This opinion was given without referring at all to Section 427.10. Your office was then notified by the same party of Section 427.10 and an opinion was then issued which is in the 1932 opinions of the Attorney General, page 221, which states that Section 427.10 gives the Board of Supervisors authority in such a situation.

"Then in the 1942 opinions of the Attorney General, page 158, your office issued an opinion which stated that the Board of Supervisors may cancel or remit taxes assessed against property for any number of years when such taxes have been previously suspended, and this opinion referred to Section 427.10 for authority.

"However, in the 1944 opinions of the Attorney General, page 82, your office ruled that upon application of the deceased administrator, the Board of Supervisors does not have authority to cancel or remit taxes as an administrator does not come within the meanings set forth in Section 427.9.

"Section 427.10 states 'The Board of Supervisors may . . . cancel and remit taxes issued against . . . the aged person referred to in Section 427.9, his polls or his estate or both . . . ', so it would appear that the 1944 opinion unnecessarily limits the authority granted by Section 427.10.

"In addition, this estate is opened at the request and on behalf of the State Board of Social Welfare, so that they may complete their file on this aged person. Further benefit will also ensue to the aged person's estate by having this property disposed of, the lien released and all matters having to do with the estate completed.

"I would appreciate it if your office would examine what appears to be a conflict in previous rulings and issue an opinion on this matter."

In reply thereto we advise as follows. Review of this situation as disclosed by your letter results in our confirmation of the opinions of this

Department appearing in the Report of the Attorney General for 1932 at page 221 and the Report of the Attorney General for 1942 at page 158 and concurring in the conclusions thereof, to-wit: That under Section 427.10, Code 1954, previously appearing as Section 6951 of the Code of 1939 and prior thereto, that the Board of Supervisors may remit suspended taxes assessed against any person, his polls, estate, or both. The opinion of this Department appearing in the Report of the Attorney General for 1944 at page 82, reaching a contrary conclusion is hereby withdrawn.

22.10 April 8, 1958

County Treasurer has no power to waive the personal property tax lien created by Ch. 220, Acts of the 56th G. A.

Mr. Walter J. Willett, Tama County Attorney: This will acknowledge receipt of yours of the 19th inst. in which you submitted the following:

"Our County Treasurer has been asked by the local County Agriculture Stabilization and Conservation office to execute a waiver of lien against their loans under the purchase agreement program. My question then arises as follows:

"What right does the County Treasurer have to waive a tax lien against personal property which has been assessed for taxes? What right does the County Treasurer have to execute a conditional waiver of a tax lien against personal property which has been assessed for taxes?

"I enclose a copy of the bulletin sent to me by the County Treasurer. I also noticed another interesting question that may be a legal question and not subject to an Attorney General's opinion involving the priority of liens. No doubt every County Treasurer and County Attorney will be faced with some questions in regard to this and I thought maybe you would like to make an answer that would take care of the situation."

Copy of the bulletin issued by the County Agricultural Stabilization and Conservation office accompanying your letter is exhibited as follows:

"Chapter 445 of the Code of Iowa as amended by the 1956 legislature requires that county treasurers publish a delinquent personal property tax list in a newspaper in the county once each week for two consecutive weeks, the last of which shall be not more than two weeks before the first Monday in December. The taxpayer has ten days after publication of the list to pay the delinquent tax. If not paid in ten days a distress warrant is issued by the county treasurer to the sheriff or any tax collector of the county commanding him to forthwith distrain, seize, levy upon and sell any personal property belonging to the delinquent taxpayer sufficient to make the full amount of taxes, interest, penalty and costs.

"We have discussed this matter with the Attorney in Charge and it has been his ruling that these tax liens must be recognized and handled in our price support programs the same as chattel mortgage liens against the commodity offered for price support.

"We expect that all county ASC offices in Iowa will be involved in this matter when making loans and when accepting purchase agreement commodities. Effective immediately all county ASC offices shall obtain a list (providing, of course, a list has been published by the treasurer) of delinquent taxpayers. This list may be obtained from the county treasurer or clipped from the newspaper, if such are not available. This

list will be kept in the county office. The list obtained now will be for taxes due and payable in 1957. New lists shall be obtained for each subsequent year.

"When producers whose names appear on the delinquent tax list make application for a loan, the county office shall proceed as follows: (1) Require producer to present a paid tax receipt before approving the loan, or (2) Obtain a lien waiver from the county treasurer.

"In the last instance the county treasurer will probably make a conditional waiver, the condition being that the amount of tax, including interest, be a set-off on the note in favor of the county treasurer.

"It is the opinion of the Attorney in Charge that in cases where loans are completed and the mortgage filed prior to the time the delinquent tax list is published by the county treasurer, our mortgage is entitled to priority over the lien of the county."

In reply thereto we advise as follows:

A. Reasons, either of which would suffice, deny the power in the County Treasurer to waive either absolutely or conditionally the personal property lien created by Chapter 220, Acts of the 56th General Assembly. This statutory lien as created by the foregoing statute provides:

"Personal property taxes, together with any interest, penalty, or costs, shall be a lien in favor of the county upon all the taxable personal property and rights to property belonging to the taxpayer whose personal property tax is delinquent."

1. No express or implied authority is vested in the County Treasurer by the foregoing Act or otherwise granting the power to the Treasurer to waive the lien of this tax. In that situation the ministerial character of the County Treasurer's office is stated in the case of *Grigsby-Grunow Co. v. Hieb Radio Supply Co.*, 71 F. 2d 113, as follows: "The County Treasurer of Polk County, Iowa has only such authority as is vested in his statute." And *Supervisors v. United States*, 85 U. S. 71, 18 Wallace 71, 21 L. Ed. 771, states:

"It is very plain that a mandamus will not be awarded to compel county officers of a State to do any act which they are not authorized to do by the laws of the State from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes, and having no authority beyond that conferred upon them by the author of their being. * * *"

2. The power creating tax liens, their duration and extent is constitutional and legislative. 51 Am. Jur., Sec. 1010 title Taxation, states the rule as follows:

"Tax liens, their duration, extent, and priority, are creatures of the local constitutions and statutes; taxes are not liens even upon the property against which they are assessed unless made so by statute. When given, a tax lien is simply a security established by statute of which the tax collector may avail himself in default of payment of taxes. It is on the property itself, not on the interest of the person assessed. The purpose is to allow the land to be taken or sold for nonpayment of taxes.

"Except as created or governed by the organic law, the existence and priority of tax liens are matters within the control of the legislature; unless limited by the state constitution, the legislature has the undoubted

right and power to make taxes assessed against particular pieces, kinds, or items of property a lien upon all the property of a taxpayer. * * *"

And to the same rule it is stated in *Linn County v. Steele*, 223 Iowa 864, 273 N. W. 920, 110 A. L. R. 1492, that:

"First, let us take note of a well-recognized principle of law that taxes are not a lien upon the property assessed, or other property of the taxpayer unless expressly made so by statute, and this lien cannot be enlarged by judicial construction. Jaffray & Co. v. Anderson, 66 Iowa 718, 719, 24 N. W. 527; Bibbins v. Clark & Co., supra; Frankel v. Blank, 205 Iowa 1, 213 N. W. 597.

And insofar as control of the lien so created is concerned, the rule is stated in Section 1014, 51 Am. Jur. in terms as follows:

"The existence and the priority of tax liens are commonly regarded as matters within the control of the legislature, except as otherwise determined by organic law, and it is undoubtedly the general rule that the legislature may abolish or legislate out of existence a tax lien of any kind previously created by it in its favor or in favor of any subordinate taxing unit, unless prevented from doing so by some special provision of the state constitution. * * *"

B. Opinion concerning the question of priority as between the personal property lien here under consideration and the lien of a mortgage made and held under the Agricultural Stabilization and Conservation division is withheld pending a presentation of a fact situation.

22.11 September 16, 1958

Personal property taxes become a lien upon personal property when delinquent on the first day of April after maturity in the event the first half has not been paid, and on the first day of October after maturity in the event second half is not paid. Personal property assessment does not create a lien.

Mr. James W. Hudson, Pocahontas County Attorney: This will acknowledge receipt of yours of the 27th ult. in which you submitted the following:

"I would like an opinion from your office relative to the above cited code section and the following fact situation. I presume this request for an opinion would be considered simultaneously with another request for an opinion which I have just mailed to your office this date concerning personal property taxes.

"On January 1, 1957, the fixtures in a grocery store were assessed to A, the owner and operator of said store. On July 10,1957 A gave a chattel mortgage to C secured by said fixtures. On January 1, 1958 said fixtures were again assessed to A. On January 29, 1958, A conveyed these fixtures to C with a Bill of Sale for $1 and other consideration and in lieu of foreclosure.

"My particular question is as to when under the above cited section and fact situation does Pocahontas County have a lien against these fixtures for personal property taxes under the last sentence of the above cited code section. Do these taxes become a lien on the date of assess-

ment, or are they only a lien after they become delinquent. If they are a lien on date of assessment, would they be prior to the mortgage of C under this section?"

In reply thereto I advise as follows. Section 445.19, 1958 Code, under which this problem arises, provides:

"*Lien of personal taxes.* All poll taxes and taxes due from any person upon personal property shall, for a period of one year following December 31 of the year of levy, be a lien upon any and all real estate owned by such person or to which he may acquire title and situated in the county in which the tax is levied. From and after the expiration of said one year said taxes shall be a lien on all such real estate for an additional period of nine years provided said taxes are entered upon the delinquent personal tax list as provided by law. But in no instance shall said taxes be a lien after the expiration of ten years from December 31 of the year in which levied. This section shall apply to all poll taxes and to all taxes on personal property whether levied prior or subsequent to the time this section takes effect. Personal property taxes, together with any interest, penalty, or costs, shall be a lien in favor of the county upon all the taxable personal property and rights to property belonging to the taxpayer whose personal property tax is delinquent."

Specifically, by the foregoing, a lien of personal taxes is imposed upon the real estate of the taxpayer on December 31 of the year in which the tax is levied. Insofar as the lien of taxes on personal property levied on personal property is concerned, no specific date is fixed by that statute. However, the foregoing statute does provide such lien on personal property when the personal property tax becomes delinquent. Section 445.37, Code 1958, fixes the time when such personal property taxes become delinquent. This statute provides the following:

"*When delinquent.* In all cases where the half of any taxes has not been paid before the first day of April succeeding the levy, the amount thereof shall become delinquent from the first day of April after due; and in case the second installment is not paid before the first day of October succeeding its maturity, it shall become delinquent from the first day of October after due."

See the case of *Schoenwetter v. Oxley*, 213 Iowa 528, 239 N.W. 118, where it is said:

" * * * The personal property tax for 1926, for which the sale in controversy was made, became delinquent from the first day of April, 1927; or if for only the latter half of the tax, from the first day of October. Code, 1927, Section 7211. * * * "

And see opinion of the Attorney General appearing in the Report for 1925, 1926, at page 116, where it is said:

"The personal taxes become delinquent under the provisions of the statute referred to by you, on the 1st day of April and the 1st day of October in each year. And if the first half of the taxes due are not paid prior to the 1st day of April, then the taxes are delinquent and it is the duty of the county treasurer to proceed to collect the same by distress or sale, under the provisions of Section 7109, Code 1924. The section just referred to makes it the duty of the treasurer to collect 'all delinquent taxes * * * .' The taxes are delinquent under the statute at the time we have just stated, and we are, therefore, of the opinion that the treasurer can enforce collection by distress or sale after April 1st or October 1st, depending upon whether or not the first installment of the tax was paid."

Accordingly, if one-half of the personal tax has not been paid before the first day of April succeeding the levy, the amount of the tax becomes delinquent on the first day of April and in the event the second installment is not paid before the first day of October succeeding its maturity it likewise shall become delinquent from the first day of October after due. In view of the foregoing I answer your questions as follows:

1. Taxes upon personal property levied on personal property do not become a lien on the date of assessment.

2. They become a lien when delinquent on April 1st following the year of levy if the first half be then delinquent and on October 1st following the year of levy if the second half be delinquent.

3. The personal property assessment is not a lien and no lien is created thereby.

22.12 August 5, 1958

RESTAURANTS: An ice cream establishment where only ice cream sundaes, popcorn, etc. are sold is not a restaurant within the meaning of the word as used in §445.31, Code 1958, unaffected by the definition of the word restaurant contained in Chapter 170, Code 1958.

Mr. Marshall F. Camp, Union County Attorney: Your recent inquiry reads in part as follows:

"Would an ice cream establishment, where only ice cream, sundaes, popcorn, etc., are sold, and no hot dogs or meat products, be classified as a restaurant within the provisions of Section 445.31?"

In reply thereto your attention is directed to the language of the following statute:

"445.31 *Lien follows certain personal property.* Taxes upon stock of goods or merchandise, fixtures and furniture in hotels, restaurants, rooming houses, billiard halls, moving pictures shows and theatres, shall be a lien thereon * * *."

While doubtless a lien may be imposed upon the stock of merchandise, fixtures and furniture of a restaurant for delinquent taxes upon such stocks, what constitutes a restaurant subject to the imposition is not there defined. While a restaurant has been defined generally as an "eating house"; an establishment where refreshments or meals may be procured by the public; also a restaurant is an establishment where meals may be obtained by the public; and according to the case of *Richard's v. Washington Fire and Marine Ins. Co.*, 27 N. W. 586, 588, 60 Mich. 420, as follows:

" 'Restaurant' has no defined meaning, and is used indiscriminately for all places where refreshments can be had, from the mere eating house or cookshop to the more common shops or stores where the chief business is vending articles of consumption and confectionary, and the furnishing of eatables to be consumed on the premises is subordinate."

Such definition becomes important in determining an operation that does not constitute a restaurant. Such is the situation here under con-

sideration. Insofar as the sale of ice cream, sundaes, etc., is concerned, our Supreme Court in the case of *In re Applications of Henery*, 124 Iowa 358, 100 N. W. 43, in distinguishing such articles, said this:

"It was shown that some or all of the applicants were in the habit of selling soda water and ice cream during the season for such refreshments, and it is contended by the county attorney that this brings such places of business within the description of 'eating houses, restaurants, and saloons,' keepers of which cannot be lawfully granted permits. We think this would be a strained and unreasonable interpretation of the statute. The sale of soda water and ice cream is ordinarily carried on as a mere incident in connection with some other business or occupation, and it would be a wide departure from the usual and accepted meaning of the words to hold that every place in which such refreshment is found to be classed as restaurant, eating house, or saloon. Such is not the practical interpretation which the people generally have placed upon the law, and we are not justified in establishing any such extreme precedent. The distinction between places provided solely or principally as resorts for food or drink and those which are devoted to other legal business is recognized by the Michigan court in *Kitson v. Mayor*, 26 Mich. 325, cited by the appellant."

And see *Greco v. Moosbrugger*, 42 N. E. 2d 211, 212, where it is said:

"A drug store soda fountain at which proprietor dispensed ice cream, sodas, soft drinks, cakes and cookies, and packaged crackers and candy was not a 'restaurant' covered by order promulgated under minimum wage law fixing minimum wages to be paid to minors engaged in establishments at occupations relating to the furnishing of food."

And to the same effect see *State v. Seithel*, 21 S. E. 2d 195, 197, 201 S. C. 1.

It is true that the word "restaurant" is defined for the purposes of Chapter 170 as follows by Section 170.1(4), Code 1958:

"4. 'Restaurant' shall mean any building or structure equipped, used, advertised as, or held out to the public to be a restaurant, cafe, cafeteria, dining hall, lunch counter, lunch wagon, or other like place where food is served for pay, * * *"

However, such statutory restriction of a defining word has been the subject of the following comment in *Young v. O'Keefe*, 246 Iowa 1182 at page 1186, as follows:

"Of course common-law and dictionary definitions must yield when the legislature, by express enactment, defines its own terms. Muscatine City Water Works v. Duge, 232 Iowa 1076, 1082, 7 N. W. 2nd 203; 82 C. J. S., Statutes, section 315; 50 Am. Jur., Statutes, sections 261, 262, 263.

"Certainly, as has been aptly said a legislative body may be 'its own lexicographer.' But when it assumes the role of lexicographer we must treat it as one. We must read its language literally, especially when it redefines a word that already has a definite, fixed and unambiguous meaning.

"We are required here to interpret, not the language of the main pension provisions, but what purports to be the legislative definition of that language."

The use of such restriction in the case of *Railway Mail Ass'n. v. Corsi*, 56 N. E. 2d 721, has been stated:

" * * * The words 'when used in this article' shows a legislative intent to create special definitions of limited application which are not to be enlarged or restricted by other definitions of the same terms contained in other statutes or in other parts of the Labor Law. Metropolitan Life Ins. Co. v. New York State Labor Relations Board, 280 N. Y. 194, 20 N. E. 2d 390."

And where such specific definition is restricted to a particular chapter its effect upon the same word used in another statute is shown in the case of *Minnix v. State,* 282 P. 2d 772 at 775 as follows:

" * * * It is within the province of the legislative body to define words appearing in legislative acts, and where an act passed by the legislature embodies a definition, it is binding on the courts. Traxler v. State, 96 Okl. Cr. 231, 251 P. 2d 815. And as stated in 50 Am. Jur., Statutes, §262: 'Indeed, a statutory definition supersedes the commonly accepted, dictionary, or judicial definition of a term used therein, the term may not be given the meaning in which it is employed in another statute, although the two may be in pari materia.' "

Thus the definition of the word "restaurant" does not permit the meaning of the same word when employed in another statute to be attached to it even if in *pari materia.* In other words, the definition of restaurant as contained in Chapter 170 does not impose its meaning as used in Section 445.31. I am of the opinion that an ice cream establishment as described in your letter is not a restaurant within the meaning of Section 445.31.

22.13 January 18, 1957

An income tax return purporting to be a joint return of income by both husband and wife must be signed by both to be so considered. A return purporting to report the income of the husband or wife only, signed by that person alone, and indicating that the other is not filing separately may claim and receive the $24.00 "husband and wife" exemption.

The Honorable Curtis G. Riehm, State Representative from Hancock County and Mr. Martin A. Lauterbach, Chairman, Iowa State Tax Commission: This will acknowledge your concurrent requests for an opinion on a single question submitted in the following forms:

Representative Riehm's request:

"Two years ago by reference the IRC Code of 1954 was included in the income tax law of Iowa. Now the Tax Commission has made a ruling to the effect that if a married taxpayer claims both exemptions on a return 'it is in effect a joint return and he as well as his spouse must sign.'

"The effect of such a ruling (which I disagree with) would mean that a tax return not titled as a joint return would be ruled a joint return, merely by claiming of the credit for the wife, and would require the inconvenience of the wife's signature.

"From the administrative standpoint, the marginal return viewpoint, I can't believe that the ruling is good, nor do I believe the ruling is valid under Iowa law. Therefore, I request your official opinion thereon as soon as possible."

Mr. Lauterbach's request:

"Section 422.12 Code of 1954, as amended by Acts of the 56th General Assembly, provides for deduction of computed tax — the deduction being $12.00 for a single individual; $24.00 for husband and wife, or head of household.

"The Rules and Regulations No. 10 adopted by the State Tax Commission and approved by the Attorney General, provides in Rule 22.12-2 that:

"a. A married person living with husband or wife at the close of the taxable year, or living with husband or wife at the time of the death of that spouse during the taxable year, may, if a single joint return is filed, deduct from the computed tax a personal exemption of twenty-four dollars ($24).

"An official opinion is asked as to whether or not a return filed by a husband, without the signature of the wife, may be considered a joint return entitled to the $24.00 credit. In other words, is a husband or wife filing an individual return entitled to the $24.00 credit in the event the other spouse does not file an individual return?"

In response to these requests we call your attention to the following provisions of the 1954 Code of Iowa as they are presently applicable following amendments thereto by the Acts of the 56th General Assembly:

"Section 422.12. Deductions from computed tax. There shall be deducted from the tax after the same shall have been computed as set forth in this division, a personal exemption as follows:

"1. For a single individual twelve dollars.

"2. For husband and wife or head of household, twenty-four dollars.

"3. For each dependent, an additional twelve dollars ($12.00). As used in this section, the term 'dependent' shall have the same meaning as provided by the Internal Revenue Code of 1954.

"For the purpose of this section the determination of whether an individual is married shall be made as of the close of his tax year unless his spouse dies during his tax year, in which case such determination shall be made as of the date of such death. An individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married."

"Section 422.13. Return by individual.

"1. Every individual having a taxable income for the tax year from sources taxable under this division, of one thousand one hundred twenty-five dollars or over, if single, or if married and not living with husband or wife; or having a taxable income for the tax year of one thousand seven hundred fifty dollars or over, if married and living with husband or wife, shall make and sign a return.

"2. If husband and wife living together have an aggregate taxable income of one thousand seven hundred fifty dollars or over, each shall make such a return, unless the income of each is included in a single joint return.

" * * * ."

The above quoted provisions of law are stated as they apply to all returns based upon income for the calendar years of 1955 and 1956, and as to all income from fiscal years beginning during the calendar years of 1955 and 1956. Chapter 45, §6, Acts, 56th G. A.

Except for the due date of returns, Section 422.21 of the 1954 Code of Iowa was unchanged by the Acts of the 56th General Assembly. It reads, as amended, as follows:

"Form and time of return. *Returns shall be in such form as the commission may, from time to time, prescribe,* and shall be filed with the commission on or before the last day of the fourth month after the expiration of the tax year. In case of sickness, absence, or other disability, or whenever, in its judgment, good cause exists, the commission may allow further time for filing returns. *The commission shall cause to be prepared blank forms for said returns* and shall cause them to be distributed throughout the state and to be furnished upon application, but failure to receive or secure the form shall not relieve the taxpayer from the obligations of making any return herein required. *The state tax commission may as far as consistent with the provisions of the code so draft income tax forms as to conform to the income tax forms of the internal revenue department of the United States government.* (Emphasis ours)

"The state tax commission is hereby authorized and directed to make available to persons required to make personal income tax returns under the provisions of this chapter, and when such income is derived mainly from salaries and wages or from the operation of a business or profession, a form which shall take into consideration the normal deductions and credits allowable to any such taxpayer, and which will permit the computation of the tax payable without requiring the listing of specific deductions and credits. In arriving at schedules for payment of taxation under such forms the state tax commission shall as nearly as possible base such schedules upon a total of deductions and credits which will result in substantially the same payment as would have been made by such taxpayer were he to specifically list his allowable deductions and credits. In lieu of such return any taxpayer may elect to list permissible deductions and credits as provided by law. It is the intent and purpose of this provision to simplify the procedure of collection of personal income tax, and the commission shall have the power in any case when it deems it necessary or advisable to require any taxpayer, who has made a return in accordance with the schedule herein provided for, to make an additional return in which all deductions and credits are specifically listed. The commission may revise the schedules adopted in connection with such simplified form whenever such revision is necessitated by changes in federal income tax laws, or to maintain the collection of substantially the same amounts from taxpayers as would be received were the specific listing of deductions and credits required."

It is to be noted that Section 422.21 above quoted states specifically what would be otherwise implied, namely, that the forms prescribed shall be consistent with the provisions of the Iowa Code.

Conformity of the forms with Federal Income Tax forms is set up as the ideal to which the Tax Commission should aspire but the Commission is limited in this respect by the mandatory provision that such forms must be consistent with Iowa law. It is a further general observation that the adoption of the forms themselves would not necessarily settle the question of who must sign them. We are not referred to the Internal Revenue Code of 1954 for the law on this point by the Legislature and must necessarily determine it from the provisions of Section 422.12 and 422.13 of the Code, above cited, and any pertinent regulations by the Tax Commission.

"Taxable income" as used in the Code and in this opinion is a word of art meaning in general income subject to Iowa taxation less permissible deductions therefrom other than the personal exemptions provided by Section 422.12 of the Code.

A close study of Section 422.13 of the Code reveals that the Legislature classified the income tax situations of married persons into two categories. Subsection one (1) under that section refers to the situation where only the husband or only the wife has taxable income. In that situation the only requirement is that the married individual having such income and living with husband or wife must as such an individual make and sign a return. In this situation there is no requirement that the spouse having no taxable income either make a return of any kind or sign the return of the spouse having income. Where only one of the two marriage partners has taxable income, the individual having such income is entitled upon filing a return signed by him to the personal exemption provided for by Section 422.12(2) of the 1954 Code of Iowa in the amount of twenty-four dollars.

The legislative intent to treat a married person whose spouse has no separate taxable income differently, so far as filing requirements are concerned, from a married person whose spouse does have such taxable income is clear from the fact that two subsections were enacted to deal separately with each situation, and from the fact that Section 422.13(1) grants to the otherwise qualified married individual whose spouse has no separate income, the same exemption from filing requirements available to the husband and wife who each had such taxable income under Section 422.13(2). The effect of this is to extend to the individual so situated the same personal exemption applicable to the husband and wife situation last referred to. Sections 422.12 and 422.13 must be construed together to avoid the anomaly of causing a married individual not required by law to file a return because his taxable income was but $1,749.99 to pay, should he nonetheless file a return, exactly $8.00 tax in the event his spouse should fail to sign that return.

The second category is that where both of the marriage partners (living together) have taxable income as defined by law. Provision for this situation is found in Section 422.13(2) of the Code and states in effect that where they together have the minimum amount of taxable income there stated each shall make "such a return", unless the income of each is included in a single "joint return". The reference by the words "such a return" is to the type of return indicated by Subsection one (1) of Section 422.13, which is explicitly a signed return. The words "joint return" from Subsection two (2) of Section 422.13 must be considered in connection with their definitions and particularly the definition of the word "joint". This word is defined by Words and Phrases, Vol. 23, p. 43, as meaning "united; combined; done by or between two or more unitedly; shared by or between two or more." Since the law is clear that filing as individuals the husband and wife would be required to sign their returns and since the word "joint" implies a unifications of such separate returns, we believe the legislative intent that a return purporting to report taxable income of both husband and wife must be signed by both

is likewise clear. A return purporting to be a joint return must be signed by both husband and wife to be so considered. As above indicated, the claim of a $24.00 exemption is not by itself evidence of such intent.

Regulation 22.12-2a, quoted in part in the request by Mr. Lauterbach, is not inconsistent with the laws and falls short of perfection only in that it does not point out the right of a married individual living with husband or wife in the first situation above discussed to claim the $24.00 exemption.

For the reasons above stated, it is our conclusion in answer to your specific questions that a return filed by a husband living with his wife without the signature of the wife may not be considered a joint return, but is nonetheless qualifying for the $24.00 personal exemption in the event the other spouse has no separate income and the return filed indicates such spouse is not filing separately. Where the return of a husband and wife does, in fact, purport to be a report of income of both, it must be signed by both in order to constitute a complete return of income.

The official opinion to Martin Lauterbach, Chairman of the State Tax Commission, Des Moines, Iowa, concerning "Use Tax" written September 20, 1956, has been withdrawn.

22.14 **January 10, 1957**

The doctrine of "constructive receipt" and the tests embodied in that doctrine are applicable in determining authority to tax an individual's income where that individual has changed his residence from one state to another. Each case must be determined on its own facts under that doctrine.

Mr. Elmer F. Heckinger, Director Corporation & Individual Income Tax Division: Reference is made to your letter of November 27, 1956 in which you raise a question as to whether income from a Wisconsin profit-sharing trust received in annual payments by an Iowa resident is to be included in the Iowa Income Tax returns for the years 1951 and 1952. The information you give is that his right to income from the profit-sharing trust is by virtue of his employment by a Wisconsin corporation while he was a resident of Wisconsin. Upon termination of his employment with this company, it was agreed that his vested interest in the trust would be paid to him in the form of annual distributions.

It is certain that at some point the amount to which he is entitled would be subject to income tax, since it is simply deferred compensation for services rendered. See analogy in Secs. 401-404, Internal Revenue Code of 1954. It was not taxable when it was placed in the fund by the employer assuming a bona fide trust situation. Was it then income at the time he terminated his employment, and his share became available to him? Or is it income at the time of each annual distribution? The answer depends upon the provisions of the profit-sharing trust agreement. Did the individual have a right to the full amount at the time his

employment terminated? Was it of his own choosing that it is paid to him in annual distributions?

The "doctrine of constructive receipt" has often been applied in determining in which year a certain amount is taxable, i.e., whether it is taxable in the year in which the compensation becomes payable or in the year in which the compensation was actually received by the taxpayer. Article 38 of the Iowa Income Tax Regulations, which were in force during the years here in question, referred to constructive receipt of income and defined it as, "that income which is not reduced to possession of the taxpayer but is available to him and could have been claimed by the taxpayer when set aside for him." This doctrine exists in the law independently of Article 38 of the Income Tax Regulations. The doctrine is referred to in 85 Corpus Juris Secundum, Taxation, Section 1096(c). It is there stated:

"Under the various statutes income of a taxable nature is not subject to taxation unless it is realized or received, but realization need not take the form of an actual receipt of cash or property by the taxpayer, as it may occur when there is a constructive receipt of the income by the taxpayer * * * * *. Furthermore, it has been stated that if the taxpayer is to be deemed in constructive receipt of income, the essential point is that he must have an unqualified right to the use and enjoyment of the money and other property deemed to be income. There must be no strings on the taxpayer's right to receive and do with the income as he pleases, and, indefiniteness as to the amount and a contingency as to receipt preclude the idea of constructive receipt."

The phrase "constructive receipt" is found in Volume 8A, Words and Phrases, page 587, and is there defined by a number of courts of other jurisdictions. Among them is Weil v. C.I.R., C.A. 2, 173 F.2d 805, 806, where it is stated:

"The doctrine of 'constructive receipt' treats as taxable any income that is unqualifiedly subject to the demand of a taxpayer on the cash receipts and disbursements method of accounting whether or not such income has actually been received in cash, and the doctrine may be invoked by either the taxpayer or the commissioner of internal revenue."

In Blum v. Higgins, C.C.A.N.Y., 150 F.2d 471, 473, is found:

"Under Treasury regulation 94, taxpayer is in 'constructive receipt' of income if it is available to him without any substantial limitation or restriction as to the time or manner of payment or condition upon which payment is made."

We believe the "constructive receipt doctrine" is equally applicable in determining whether certain receipts were income within the meaning of the Iowa Income Tax Law in the nonresident situation as it is in determining in which taxable year receipt took place. In the instant situation, if the taxpayer at the time he terminated employment had an unqualified right to the use and enjoyment of the full amount of his interest in the profit-sharing trust fund, then it was constructively received at that time and was income to him while he was a resident of Wisconsin. If, however, under the trust agreement he had to take it in annual distributions or someone other than he had the right to determine whether it would be paid in one lump sum or in annual distributions,

then he would not have an unqualified right to the use and enjoyment of the full amount of his share in the trust, and it was not constructively received by him while a resident of Wisconson and is taxable in Iowa to the extent the payments from the trust are constructively or actually received by him while an Iowa resident.

You raise further question as to similar situations, such as one where the individual works in a state other than Iowa and at the time of such work is a resident of a state other than Iowa. The individual then moves to Iowa and becomes a resident here and sometime subsequent to such change of residence actually receives a salary payment which is for work performed in a state other than Iowa. We believe the same test could be applied to that situation as in the case of the profit-sharing trust income, i.e., whether it was constructively received while a nonresident. It must be determined whether the individual had an unqualified right to the use and enjoyment of the salary before he became a resident of Iowa. Was it available to him without restriction so that it could have been claimed by him prior to becoming an Iowa resident?

A similar test could be applied in other situations, such as where property was sold before leaving the other state but payment was not actually received until after the vendor became an Iowa resident. It should be determined what rights the vendor had to that income before he became a resident of Iowa.

It is therefore, our conclusion that the doctrine of "constructive receipt" and the tests embodied in that doctrine are applicable in determining authority to tax an individual's income where that individual has changed his residence from one state to another. Each case must be determined on its own facts under that doctrine.

22.15 May 15, 1958

INCOME TAX: The word "willful" in determining the imposition of penalties for failure to file income tax return within time prescribed or for the making of a false return as used in §422.25, Code 1958, means intentionally, deliberately and with a bad or evil intent. The voluntary payment of the tax where there has been a failure to file a return or the filing of an erroneous return when made after May 1, 1956, has no bearing upon the imposition of the penalty provided for in §422.25, Code 1958.

Mr. Leon N. Miller, Chairman, State Tax Commission: This will acknowledge receipt of yours in which you submitted the following:

"The Tax Commission is having some difficulty in determining the meaning of subsection 3 of Section 422.25 of the 1954 Code of Iowa as amended through 1955. For your information the statute is as follows:

"'3. In addition to the tax or additional tax as determined by the commission under the provisions of subsections 1 and 2 of this section, the taxpayer shall pay interest on such tax or additional tax so determined at the rate of six percent per annum, computed from the date the

return was required by law to be filed. In case of failure to file a return on the date prescribed therefor (determined with regard to any extension of time for filing) unless it is shown that such failure was due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five per cent in the aggregate. In case of willful failure to file a return with intent to evade tax, in lieu of the five percent monthly penalty above provided, there shall be added to the amount required to be shown as tax on such return fifty percent of the amount of such tax, and in case of willful filing of a false return with intent to evade tax, there shall be added to the amount required to be shown as tax on such return fifty percent of the amount of such tax.'

"From the above statute it is clear that the interest is at six per cent per annum, computed from the date the return was required by law to be filed.

"It is difficult from the above statute to distinguish when the twenty-five per cent penalty should apply and when the fifty per cent is applicable.

"In order to give you a better picture of our problem, will say that a large number of taxpayers are now filing their 1955 and 1956 returns together with the tax plus six per cent interest and twenty-five per cent penalty. Most of these are voluntary disclosures on the part of the taxpayers.

"The question is, should we assess them for the additional twenty-five per cent penalty?

"In conclusion we would like to have an opinion from your office as to whether or not the taxpayer should be assessed 25% or 50% penalty when voluntary disclosures are made."

In reply thereto we advise as follows.

1. The statute involved herein is Section 422.25(2), Code 1958, which is exhibited as follows:

"In addition to the tax or additional tax as determined by the commission under the provisions of subsection 1 of this section, the taxpayer shall pay interest on such tax or additional tax so determined at the rate of six per cent per annum, computed from the date the return was required by law to be filed. In case of failure to file a return, or to pay the tax required to be paid with the filing of the return, on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure was due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return five percent of the amount of such tax if the failure is for not more than one month, with an additional five percent for each additional month or fraction thereof during which such failure continues, not exceeding twenty-five percent in the aggregate. In case of willful failure to file a return with intent to evade tax, in lieu of the five percent monthly penalty above provided, there shall be added to the amount required to be shown as tax on such return fifty percent of the amount of such tax, and in case of willful filing of a false return with intent to evade tax, there shall be added to the amount required to be shown as tax on such return fifty percent of the amount of such tax."

The significant part of the foregoing statute upon which conclusion here is based is this: "In case of willful failure to file a return with

intent to evade tax, in lieu of the five percent monthly penalty above provided, there shall be added to the amount required to be shown as tax on such return fifty percent of the amount of such tax, and in case of willful filing of a false return with intent to evade tax, there shall be added to the amount required to be shown as tax on such return fifty percent of the amount of such tax." It will be noted that the imposition of the fifty percent tax is contingent upon the willful failure to file a return with intent to evade the tax or the willful filing of a false return with intent to evade the tax. If the penalty resulting from such action were by statute made criminal, the rule appears to be set forth in the case of *Hargrove v. United States*, 90 A. L. R. 1276, 67 F. 2d 820, where in considering the court's charge, it is stated:

"In the light of this colloquy, the failure of the court to give the charge requested, and his charging as he did, is not only significant of, it leaves no doubt as to, what he intended to charge, and what he did charge. We quote from this charge:

" 'Another element of the offense, in both instances, is the matter of willfulness. That of course is largely a matter of intention. The word "intent" in this connection means that general intent which always arises as a matter of law when some one willfully or intentionally does that which is unlawful. . . .

" 'Ignorance of the law, of course, gentlemen, is not excused. The question of willfulness and intent rests then and depends upon whether you find that the defendant willfully and knowingly did what he intended to do . . . . A man may have no intention to violate the law and yet if he willfully and knowingly does a thing which constitutes a violation of the law he has violated the law.'

"The court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its willful doing. In the first class of cases, especially in those offenses mala prohibita, the law imputes the intent. Landen v. U. S. (C. C. A.) 299 F. 75; U. S. v. Balint, 258 U. S. 250, 42 S. Ct. 301, 66 L. ed. 604. Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. In the second class of cases, a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence. Potter v. U. S. 155 U. S. 438, 15 S. Ct. 144, 39 L. ed. 214; Felton v. U. S., 96 U. S. 699, 24 L. ed. 875, Spurr v. U. S. 174 U. S. 728, 19 S. Ct. 812, 43 L. ed. 1150; Townsend v. State (Tex. Cr. App.) 51 S. W. (2d) 696, 701; Foster v. U. S. (C. C. A.) 256 F. 207, Bentall v. U. S. (C. C. A.) 262 F. 744; Murdock v. U. S. (C. C. A.) 62 F. 2d 926; O'Brien v. U. S. (C. C. A.) 51 F. 2d 193; U. S. v. Praeger (D. C.) 149 F. 474."

This view was further elaborated on in the case of *Chow Bing Kew v. United States*, 248 F. 2d 466, 471, as follows:

"Concerning the word 'wilful' in a criminal statute the Supreme Court states in Screws v. United States, 325 U. S. 91, at page 101, 65 S. Ct. 1031, 1035, 89 L. Ed. 1495:

" 'We recently pointed out that "willful" is a word "of many meanings, its construction often being influenced by its context:" Spies v. United States, 317 U. S. 492, 497, 63 S. Ct. 364, 367, 87 L. Ed. 418. At times, as the Court held in United States v. Murdock, 290 U. S. 389, 394, 54 S. Ct. 223, 225, 78 L. Ed. 381, the word denotes an act which is intentional rather than accidental. And see United States v. Illinois Central

R. Co., 303 U. S. 239, 58 S. Ct. 533, 82 L. Ed. 773. But "when used in a *criminal statute, it generally means an act done with a bad purpose.*" Id., 290 U. S. at page 394, 54 S. Ct. at page 225. And see Felton v. United States, 96 U. S. 699, 24 L. Ed. 875; Potter v. United States, 155 U. S. 438, 15 S. Ct. 144, 39 L. Ed. 214; Spurr v. United States, 174 U. S. 728, 19 S. Ct. 812, 43 L. Ed. 1150; Hargrove v. United States, 5 Cir. 67 F. 2d 820, 90 A. L. R. 1276. In that event something more is required than the doing of the act proscribed by the statute. Cf. United States v. Balint, 258 U. S. 250, 42 S. Ct. 301, 66 L. Ed. 604. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. Spurr v. United States, supra, 174 U. S. at page 734, 19 S. Ct. at page 815; United States v. Murdock, supra, 290 U. S. at page 395, 54 S. Ct. at page 225.' (Emphasis added.)"

However, the meaning of the word "willful" in connection with the imposition of the aforementioned penalties, that is, where the penalty consists of an addition to the tax, appears not to have been the subject of adjudication. Its meaning as applied to its statutory use generally has been a subject of determination in Iowa. In the case of *Nelson v. Deering Implement Company*, 241 Iowa 1248, 1256, it was stated:

"The statute (section 562.2) hereinbefore set forth provides that a tenant willfully holding over after the term and after notice to quit shall pay double the rental value thereof during the time he holds over. The trial court held that appellee's holding over was not willful and therefore the double rental could not be allowed. Above we have set out parts of the record which cannot be construed otherwise than that the holding over by appellee was willful. The term 'willfully' has been held to mean, intentionally, deliberately, with bad or evil purpose, contrary to known duty. State v. Roth, 162 Iowa 638, 144 N. W. 339, 50 L. R. A., N. S., 841 (a removal case); Parker v. Parker, 102 Iowa 500, 71 N. W. 421; Werner v. Flies, 91 Iowa 146, 59 N. W. 18. In the Parker case, supra, the term was discussed and various authorities analyzed. It was held there that generally speaking, the term included the disregard of the rights of others knowingly and with a stubborn purpose, or contrary to a known duty or without authority, and careless whether he have a right or not."

The term "willful" was further defined in the case of *Beatty v. United States*, 191 F. 2d 317, under a rent control case involving the use of the term in Section 562.2, Code 1946, to the effect that a "tenant or his assignee willfully holding over after the term, and after notice to quit, shall pay double the rental value thereof during the time he holds over to the person entitled thereto." There the Court stated:

"The term 'willfully', as used in this section of the statute, has been held by the Iowa Supreme Court to mean 'deliberately, with bad or evil purpose, contrary to known duty. * * * the disregard of the rights of others knowingly and with a stubborn purpose, or contrary to a known duty or without authority, and careless whether he have a right or not.' Nelson v. Deering Implement Co., 241 Iowa 1248, 42 N. W. 2d 522, 527. Cf. also Stewart v. Burlington & M. R. R. Co., 32 Iowa 561, 563. In short, for purposes of the statute, the term has the significance of obstinately or defiantly, with lack of reasonable regard on all the circumstances for the question of legal right or wrong."

It would appear that insofar as the penalty of fifty per cent imposed in the event of the willful failure to file a return with intent to evade the tax, the meaning set forth above would control. The imposition thereof would depend upon whether the failure to file was made intentionally, deliberately and with a bad or evil intent. This interpretation of the use

of the word "willful" in the statute is the more reasonable in view of the other statutory provisions that the mere failure to file without excuse authorizes the imposition of a penalty up to twenty-five per cent in addition to the amount of the tax. In other words, by making the penalty fifty per cent instead of five per cent to twenty-five per cent by reason of willfulness, it would appear that the plain intent is that the imposition of such fifty percent penalty would depend upon the action of the taxpayer being intentional, premeditated and with an evil design to evade payment of the tax.

Insofar as the imposition of the fifty percent penalty for the willful failure to file a return with intent to evade the tax or the filing of a false return with intent to evade the tax is concerned, the word "willful" as hereinbefore defined would be applicable in determining the imposition of the fifty per cent penalty. In either case the burden is on the Tax Commission to justify the imposition of the penalty under administrative procedures that may be adopted by it.

2. Insofar as your question as to whether voluntary payment of the tax, where there has been a failure to file a return or the filing of an erroneous return is concerned, we are of the opinion that the voluntary character of this payment would have no bearing upon the imposition of either the twenty-five per cent or the fifty per cent penalty unless the payment was made prior to the first day of May, 1956. Section 4, Chapter 211, Acts of the 56th General Assembly, provides as follows:

"'The penalties provided for by subsections three (3) and eight (8) shall not apply in the case of any taxpayer who, during the period from the effective date of this Act through April 30, 1956, voluntarily (before notification by the commission that his returns or his failure to file a return are being investigated) discloses to the commission that he has failed to file a return or that he has filed an erroneous return and pays forthwith the tax properly due plus interest thereon computed at six per cent (6%) per annum from the due date.'."

Imposition of either penalty is a question of the intent as disclosed by the actions of the taxpayer concerned and unaffected by his subsequent voluntary disclosure that he has failed to meet the statutory requirements for payment of the income tax within the statutory time.

22.16 October 9, 1958

INCOME TAX — NONRESIDENTS: A person who rents a room in order to be near his work in this state, and has a family and home in another state to which he returns periodically, is a nonresident for the purposes of Sections 422.16, Code of Iowa (1958), and his employer must withhold from his wages as provided by statute.

Mr. Leon N. Miller, Chairman, Iowa State Tax Commission: This is to acknowledge receipt of your letter of August 15, 1958, in which you request of this department a clarification of subsection eight (8) of Section 422.4, Code of Iowa (1958). You present the following factual situation:

"Mr. X of the State of Missouri maintains a home in Missouri where his wife and children reside at all times. Mr. X is employed in the Z plant at Newton, Iowa and rents a room in Newton. He goes home to his family on some week ends and remains in Iowa on others. He has been employed by the Z Company for five years, and but for this employment would not be living in Newton. Z Company claims that X is a resident of Iowa and they are thereby relieved from withholding the tax from his wages under Section 422.16, Code of Iowa, 1958."

The following sections of the 1958 Code of Iowa are applicable:

"422.16 Withholding agents and nonresidents.

"1. Excepting as provided herein and in section 422.17, every withholding agent shall deduct and withhold in each calendar year five percent of all gross income, in excess of fifteen hundred dollars, which such withholding agent pays, including the five percent so withheld, to any nonresident during such calendar year, provided, however, that on incomes derived entirely from salaries not exceeding four thousand dollars, the amount withheld shall be two percent. * * * ."

"422.4 Definitions controlling division. For the purpose of this division and unless otherwise required by the context:

" * * * .

"8. The word 'resident' applies only to individuals and includes, for the purpose of determining liability to the tax imposed by this division upon or with reference to the income of any tax year, any individual domiciled in the state, and any other individual who maintains a permanent place of abode within the state."

" * * * .

"12. The word 'nonresident' applies only to individuals, and includes all individuals who are not 'residents' within the meaning of subsection 8 hereof."

The issue presented by the question propounded is whether X is a nonresident of Iowa. In order to determine this, it is first necessary to determine whether he comes under the classification of a "resident" as that term is used in Section 422.4(8), Code of Iowa (1958).

As defined by statute, a resident includes individuals domiciled in the state, and those maintaining a permanent place of abode within the state.

Domicile is defined in Reg. 22.5-2, 1958 I. D. R., p. 412, to include physical presence at a particular locality, together with the intent to constitute it a permanent abiding place. Under this definition it becomes evident that since Mr. X maintains a home for his family in Missouri, and returns there whenever his work does not require his presence in Iowa, his domicile is in Missouri, and not in Iowa.

This leaves the determination of whether X "maintains a permanent place of abode within the state."

There are no decisions in this jurisdiction defining what is meant by the phrase "permanent place of abode", but it must be presumed that the Legislature in using these words intended to convey an idea separate and distinct from "domicile" since each part of the statute must, if possible, be given effect. Holzhauser vs. Iowa State Tax Commission, 245 Iowa 525, 62 N.W. 2d 229.

It is the opinion of this department that the words "permanent place of abode" as used in Section 422.4(8), supra, were intended to mean a home permanently established by the taxpayer which he habitually uses as his home during some time in the year, even though his domicile may be in another state. They imply something more than a place of temporary sojourning, but rather a degree of permanence. Some indication of the permanency is the type of home established. Furnished rooms and apartments, especially in the absence of a long lease, must usually be regarded as temporary. Quarters leased by the year or longer, particularly if furnished by the taxpayer, are likely to be considered permanent.

It is obvious that, as in the case of domicile, determining the place of permanent abode is largely a question to be governed by the facts of each case. Some factors, however, to be considered are the type of home established, the nature of ownership and the purpose to which it is put.

Applying these considerations to your specific question, you are advised that if Mr. X maintains a permanent home for his family in Missouri, returning there periodically to visit them, and if his presence in Iowa is for the purpose of being near his work, he does not have a permanent place of abode within the state.

It is, therefore, our conclusion, under the specific facts as submitted, that Mr. X is a nonresident of the State of Iowa within the meaning of Section 422.16 and the Z Company is required to withhold from his wages as provided in Section 422.16, Code of Iowa (1958).

22.17

Agricultural Produce is subject to personal property taxation with the exception of the crops and products described in §427.1 (13) and grain received at elevators, etc. within this state for storage, accumulation, etc. provided by §428.35, Code 1958. 2. Taxable agricultural produce becomes subject to personal property tax lien on April 1 after the due date of the first half of the unpaid taxes and the second half on October 1 after due date of the last half. (Strauss to Glenn, U. S. Dept. Agr., 8/15/58) #58-8-12

22.18

Assessment by Local Bodies — City, County and school districts have no power to enter into an agreement extending beyond current year for property valuation by outside agency. (Strauss to Pike, Woodbury Co., 7/28/58) #58-7-17

22.19

Board of Review — (1) The Board of Review may not change an assessment in other than a real estate assessment year except where a determination has been made that the property in question has changed in value. (2) The Board of Review may recommend that the State Tax Commission reduce an individual assessment in other than a real estate assessment year. (3) Whether a person is experienced in the building and construction field is a matter of fact. (4) The acts of de facto members of a Board of Review are valid. (Brinkman to Miller, St. Tax Comm., 10/8/58) #58-10-21

22.20

Board of Review — Authority to add to assessment rolls buildings not assessed in real estate year. The County board of review has no authority in subsequent years to add to the assessment rolls buildings which were not assessed at the time of the assessment of real estate. (Brinkman to Tipton, Tax Comm. Dir., 8/15/58) #58-9-22

22.21

Butterfat excise — Sales of cream by county farms — Collection of butterfat excise tax by first buyer — No exemption to county but refund only. (Bianco to Barker, Mgr., Iowa Dairy Industry Comm., 6/24/57) #57-6-41

The first buyer of cream produced by a county farm must collect the butterfat excise tax imposed by §179.5, Code 1954, by deducting same from price charged by producer. County as a subdivision of the State is not exempt from payment of tax but may make proper application for refund thereof.

22.22

Butterfat Tax — The Iowa Dairy Industry under the provisions of Chapter 179, Code 1958, may cause an examination to be made of the books, records, etc., of any person, bearing upon the amount of any butterfat tax collected or to be collected and may enter into a contract for the exercise of such authority and pay the expense thereof. (Strauss to Sarsfield, St. Comp., 10/30/58) #58-10-2

22.23

Estates of Decedents — Federal estate taxes and Iowa inheritance taxes not deductible as debts. (Pruss to Park and Sendlinger, Atty., 10/28/57) #57-10-36

22.24

Estates of Decedents — Property in hands of trustee for use of charitable or religious organization. Trustee not a "charitable institution" for exemption purposes. (Strauss to Holley, Butler Co. Atty., 3/10/58) #58-3-9

22.25

Forest and fruit tree reservations — In order to qualify for the exemption contained in Sec. 441.14, Code of Iowa, 1958, a showing that some trees have been planted on or before January 1 of the year in which the exemption is claimed must be made, although it is not necessary to show that two hundred trees to the acre have been planted. The fact that the forest trees are considered a crop does not deprive the owner of the forest reservation of the exemption. (Brinkman to Meyer, Winneshiek Co. Atty., 12/10/58) #58-12-13

22.26

Governmental exemption from taxation. (Iverson to Sauvain, Purchasing Agent, Iowa State College, 4/13/57) #57-4-24

The Internal Revenue Code of 1954 (§422.4 as made applicable to Part II of Chap. 32) provides an exemption as to tread rubber used in the recapping of tires for the exclusive use of the State. Under §422.45 (5) tax certifying and tax levying bodies of the State and subdivisions of the same are exempt from Iowa Sales Tax.

22.27

Grain Handling Tax — A grain handling tax cannot properly be assessed for a particular year where the grain in question has not been handled during that year. (Brinkman to Tipton, Tax Comm., 8/8/58) #58-8-18

22.28

Grain — Unprocessed grain subject to grain handling tax held by cooperative — Exempt from property tax. (Iverson to Lauterbach, Chm. State Tax Comm., 5/20/57) #57-5-26

A cooperative purchasing and receiving grain not yet processed to meet its commitments to furnish its members seed corn is liable for the grain handling tax on the grain so handled and is consequently exempt from property taxation on such grain so long as such grain remains unprocessed.

22.29

Homestead Tax Credit — The homestead tax credit cannot be granted to property when one occupies under a contract of purchase and has not as yet actually paid one-tenth of the contract price. (Brinkman to Walsh, Pottawattamie Co. Atty., 8/8/58) #58-8-25

22.30

Homestead Tax Credit — Ward is considered owner of property within the meaning of the Homestead Tax Credit Law. (Brinkman to Buchheit, Fayette Co. Atty., 10/10/58) #58-10-16

22.31

Homestead Tax Credit — Where property is conveyed to daughter subject to payment of $1,200 per year to mother and daughter occupies property, homestead tax credit is allowable assuming all other requirements are met for reason that daughter is an owner within meaning of Sec. 425.11, 1958 Code of Iowa. (Brinkman to Hindt, Lyon Co. Atty., 10/7/58) #58-10-25

22.32

Homestead Tax Credit — Military Service Tax Credit —

1. Where owner within the meaning of Sec. 425.11, Code of Iowa, (1958), occupies homestead until September 1, he is entitled to Homestead Tax Credit.

2. One who becomes equitable owner of property prior to July 1 and who files for exemption prior to July 1 and who otherwise meets requirements set by statute is entitled to Military Service Tax Credit.

3. Recordation of instrument by which ownership is claimed is not a prerequisite to the granting of the Military Service Tax Credit.

4. Vendee in executory contract to purchase real estate is equitable owner of property and as such is entitled to Military Service Tax Credit if requirements of statute are otherwise met. Option holder in option to purchase real estate is not entitled to Military Service Tax Credit.

5. Owner who is vendor in real estate contract and occupying property as a homestead need not specifically be given the right of occupancy by the terms of the contract in order to qualify for Homestead Tax Credit. (Brinkman to Miller, St. Tax Comm., 9/25/58) #58-9-2

22.33

Income Tax — Military Personnel: State Tax Commission may presently proceed without hindrance of any limitations as to time of filing notice of lien, time of distress, and sale of property, or time of bringing action at law or equity to collect income taxes, the collection of which was deferred under the provisions of the Soldiers' and Sailors' Civil Relief Act. (Iverson to Heckinger, St. Tax Commission, 1/21/57) #57-1-27

22.34

Income Tax and F.I.C.A. contributions of persons engaged by Committee to proofread Report — (Iverson to Prentis, Chm. Iowa Taxation Study Committee, 3/14/57) #57-3-26

The two persons engaged by the Iowa Taxation Study Committee under oral contract on a per hour basis to proofread the report of that committee were subject to the control of said committee only as to the result to be accomplished and not as to the means and details by which that result was accomplished and, consequently, were not employees within the meaning of the provisions of the 1954 Internal Revenue Code requiring the withholding of Federal Income Tax or F.I.C.A. contributions.

22.35

Income Tax — Corporations — Net operating loss deduction — (Iverson to Heckinger, Director Income Tax Div., St. Tax Commission, 3/27/57) #57-3-51

For Iowa corporate income tax purposes an operating loss should be reduced by amount of refund and increased by amount of payments of federal income tax applicable to the loss year.

22.36

Income Tax — Authority of State Tax Commission to prescribe form and details required for individual returns. (Iverson to Lauterbach, Chm. St. Tax Comm., 5/28/57) #57-5-38

The State Tax Commission has authority under present law to prescribe income tax forms requiring details relating to income which are not required on present forms.

22.37

Income Tax — Voluntary payments by employer to widow of deceased

employee. (Pruss to Eischeid, Inc. Tax Div., Tax Comm., 10/30/57) #57-10-41

22.38

Income Tax — Wages paid by Iowa employer to nonresident employee. (Pruss to Eischeid, Inc. Tax Div., Tax Comm., 8/7/57) #57-8-13

22.39

Income Tax — Withholding from wages of nonresidents. Collection. (Pruss to Hewitt, Sup., Lien Dept., Tax Comm., 12/19/57) #57-12-21

22.40

Income Tax — Condemnation awards to property owners. (Pruss and Piper to St. Tax Comm., 12/13/57) #57-12-12 #57-9-36

22.41

Income Tax — Net income, capital gains, valuation of remainder interests. (Pruss to Swanson, Atty., 7/26/57) #57-7-32

22.42

Income Tax — Out-of-state income of Iowa resident. (Pruss to Mershon, Atty., 11/5/57) #57-11-7

22.43

Income Tax — Code Section 422.25(3) provides fraud penalty for willful failure to file return. Tax employees should assess penalty in all cases subject to waiver on showing failure not willful. (Pruss to Eischeid, Director, Income Tax Division, Tax Commission, 2/5/58) #58-2-20

22.44

Income Tax — Confirms #58-2-20. (Pruss to Stephenson, Auditor, Income Tax Division, Tax Commission, 2/10/58) #58-2-21

22.45

Income Tax — Delinquent list: Tax Commission may not publish a list of persons who filed no return for the reason that mere failure to file does not of itself show there was a duty to file. (Strauss to Miller, Chmn., St. Tax Comm., 4/23/58) #58-4-49

22.46

Income Tax — Federal Judge and Clerk temporarily assigned to Iowa. (Strauss to Lundberg, Clerk to Judge Beck, 5/16/58) #58-5-18

22.47

Income Tax — Power of Auditor of State to examine individual and corporate returns on file with Commission. (Pruss to Dailey, Senator, 2/5/58) #58-2-22

22.48

Income Tax — Taxability of trust income of children to the parent and inclusion of trust income in the parent's return and dependency credit

to the parent; trust income need not be included in the individual income tax return of the parent, and the parent is entitled to claim children as dependents where he provides one-half of their support, and the children must pay the tax on their trust income. (Pruss to George J. Eischeid, Dir., Income Tax Div., State Tax Commission, 1/20/58) #58-1-22

22.49

Income Tax — State of Iowa has no authority under Sections 422.16(1) and 422.4(14), Code 1954, to require federal agencies to withhold tax on the earnings of nonresidents. (Pruss to Piper, Spec. Consel, State Tax Commission, to George J. Eischeid, Dir., Income Tax Div., State Tax Commission, 1/7/58) #58-1-5

22.50

Income Tax — Federal income and estate taxes are not deductible under the provisions of Sec. 429.4, Code Iowa (1958), in determining the assessable value of moneys and credits. (Brinkman to Hudson, Pocahontas Co. Atty., 9/22/58) #58-9-7

22.51

Inheritance Tax — Individual exemptions to minors under guardianship — (Strauss to Gould, Delaware Co. Atty., 3/4/57) #57-3-6

Section 450.9 (5), Code 1954, authorizes a $5,000.00 credit or exemption to each of certain lineal descendants. The fact that but one guardian has been appointed for several minor wards and that the clerk of the district court has docketed the several guardianships under one file number will not have the effect of over-riding the plain words of the statute.

22.52

Inheritance Tax — Bequest to county for care of indigent exempt. (Pruss to Pappas, Cerro Gordo Co. Atty., 8/22/57) #57-8-40

22.53

Inheritance Tax — Appraisers fees: Not deductible. (Pruss to Eischeid, Dir., St. Tax Comm., 4/3/58) #58-4-43

22.54

Inheritance Tax — Building or savings and loan shares listed in names of two or more individuals considered held by "tenancy" in common necessitating release by heirs of deceased "tenant" in absence of express power of withdrawal. (Pruss to Carson, Savings and Loan Dept., State Auditor, 2/28/58) #58-2-23

22.55

Inheritance Tax — The Treaty between the United States and the Federal Republic of Germany entered into force on July 14, 1956, prevents the State of Iowa from collection the rate of inheritance tax prescribed by Sec. 450.11, 1958 Code of Iowa, with respect to property passing from persons dying on or after that date to persons who are resident nationals

of the Federal Republic of Germany. (Brinkman to Miller, St. Tax Comm., 10/6/58) #58-10-23

22.56

Liens — Where State of Iowa acquired title to certain real estate by delivery of deeds to Conservation Commission prior to December 31 of a particular year, taxes levied against property for that year could not attach as a lien against the State although deeds not recorded until after January 1 of following year. Sections 445.28 and 445.30, Code 1954, construed. (Bianco to Sayre, St. Conservation Commission, 1/16/57) #57-1-22

22.57

Lien of income, sales and use taxes — Recording of lien — Release of lien — Necessity of acknowledgments to render recordings valid. (Wilson, Gen. Counsel, St. Tax Comm., to Berge, Atty., Garner, Iowa, 6/19/57) #57-6-35

Income, sales and use tax liens are not "conveyances" and the recording thereof is not governed by the provisions of §§ 558.41 and 558.42, Code 1954, but by the provisions of chapters 422 and 423, Code 1954, as amended, which specifically provide when and where they shall be recorded, and there is no requirement therein that the signature of an authorized official of the State Tax Commission signing a release of a tax lien and bearing the seal of said Commission must be acknowldeged as a condition precedent in order to render valid either the recordation of the "Notice of tax lien" or the "release" thereof.

22.58

Moneys and Credits subject to a life estate and which are not required to be otherwise listed by Section 428.1, Code 1954, are to be listed by and taxed to the life tenant thereof at their actual value as distinguished from any actuarial valuation based upon life expectancy. (Iverson to Johnson, Atty., Fort Dodge, Iowa, 1/14/57) #57-1-17

22.59

Moneys and Credits — Determination of value of capital stock of a national or state bank — Money held by vendee under a contract for conveyance of real estate — Bank deposits, where assessable — (Iverson to De Kay, Cass Co. Atty., 3/14/57) #57-3-28

1. In determining the value of the capital stock of a national or state bank, any portion of the reserve owned by the Federal Government or one of its instrumentalities should be excluded, but any portion invested in government securities or pledged to the Federal Government should be included.

2. Money held by the vendee under a contract for the conveyance of real estate on January 1 and which is to be paid to the vendor at a later settlement date is assessable to the vendee under the moneys and credits statutes, but the amount due on the settlement date would be deductible as a "debt" under Sec. 429.4, Code 1954.

3. Bank deposits are assessable in the taxing district in which the owner resides regardless of where the depository bank is located.

22.60

Moneys and Credits — Intangible personal property held by resident fiduciary. (Iverson to Duhigg, Palo Alto Co. Atty., 4/3/57) #57-4-5

A resident executor, administrator or trustee must report for moneys and credits taxation and pay the Iowa moneys and credits tax upon intangible personal property which he holds by virtue of his office when such executor, administrator or trustee is domiciled in the state of Iowa (Sections 428.1, 428.2, 428.3, 428.8 and 427.13, subparagraph 4, Code 1954, considered).

22.61

Moneys and Credits — Foreign corporation stock taxable. (Strauss to Spies, Palo Alto Co. Atty., 12/4/58) #58-12-16

22.62

Moneys and Credits — Iowa resident living in Washington, D. C. — Bank deposits, Where assessable — Personal property in hands of administrator or executor. (Iverson and Wilson, Gen. Counsel, to Wilson, Muscatine Co. Atty., 6/21/57) #57-6-40

Bank deposits in a Washington, D. C. Bank, held by a federal employee living in said city but retaining his legal residence in Iowa by words and by actions, such as voting by absentee voter's ballot and the filing of Iowa resident income tax returns, are subject to taxation as moneys and credits in the county of his Iowa residence. Personal property, in the hands of an administrator or executor in his official capacity, is assessable and taxable in the county and state in which he is domiciled.

22.63

Moneys and Credits tax — Deductions for several minors under one guardianship. (Strauss to Gould, Del. Co. Atty., 7/9/57) #57-7-6

22.64

Moneys and Credits — Exemption status of bills, notes, mortgages, contracts. Interest. (Pruss to Klotzbach, Buchanan Co. Atty., 11/1/57) #57-11-3

22.65

Moneys and Credits — Annuity: An agreement which provides that in exchange for a sum of money an annuity is to be paid on an annual basis to the annuitant by a religious institution, subjects the principal amount to moneys and credits tax such not being exempt under 427.1(10), Code of 1958. The payments received by the annuitant are subject also to the moneys and credits tax. (Strauss and Pesch to Templeton, Hancock Co. Atty., 5/14/58) #58-5-12

22.66

Moneys and Credits Tax — Taxability of offer and acceptance contracts as moneys and credits; determined to be within the exception of Chap.

213, Laws of the 57th G. A., and therefore not taxable. (Pruss to Donald L. Nelson, Story Co. Atty., 1/8/58) #58-1-9

22.67

Moneys and Credits — A contract to sell real estate is not assessable to the vendor. 1928 OAG 370. (Pruss and Piper, to Dunn, Hardin Co. Atty., 4/3/58) #58-4-44

22.68

Moneys and credits held by a trustee for a church must be listed for taxation. Trustees may claim $5,000 exemption. (Pruss to Martin, Keokuk Co. Atty., 2/28/58) #58-2-24

22.69

Moneys and Credits — Widow's allowance valid deduction under Code Sections 635.12 and 429.4. (Pruss and Brodie to Frye, Floyd Co. Atty., 4/4/58) #58-4-46

22.70

Motor Fuel Tax — A refund cannot be made under chapter 324, 1958 Code of Iowa to a person, other than a licensee, who purchases "special fuel" for operating or propelling a farm tractor, said person having paid the tax thereon. (Pesch to Marchi, Fuel Tax Div., 9/2/58) #58-9-20

22.71

Motor Fuel Tax — Whether a project is a public fund drainage project is a question of fact. (Pesch to Abrahamson, St. Treas., 8/29/58) #58-8-1

22.72

Motor Fuel Tax — Transport registration: Code Section 324.14 refers to actual load, not capacity. (Strauss to Marchi, Dir., M.F.T.D., St. Treas., 4/24/58) #58-4-55

22.73

Motor fuel and special fuel tax — Pending legislation digested and considered. (Strauss to Loveless, Governor, 5/29/57) #57-5-39

House File 440, Acts of the 57th G. A., designed and proposed as substitute for Chapter 324, Code 1954, preserves generally the substantive features of said Chapter 324 and protects the interests of the State in the administration and enforcement provisions thereof.

22.74

Motor fuel and special fuel tax. Consumption in state not test for refund. (Strauss to Marchi, Dir., M. F. Tax Div., Treas. of State, 9/3/57) #57-9-4

22.75

Motor vehicle fuel tax. Public construction and maintenance. (Strauss to Abrahamson, Treas. of St., 8/6/57) #57-8-8

22.76

Motor vehicle fuel tax. Exemption for governmental bodies. (Strauss to Borg., Supt., Gas Tax Ref. Div., Treas. of State, 9/3/57) #57-9-3

22.77

Motor vehicle fuel tax — Purchases of liquefied gas from retailer or dealer by contractor as heating fuel — Exemption from tax — Tax refund to dealer. (Erbe and Iverson to Abrahamson, St. Treasurer, 6/10/57) #57-6-16

Sales of liquefied gas by a retailer or dealer to a contractor for use as a temporary heating fuel for drying purposes in a torch and blower system, which is similar to a salamander, on a construction project, even though paid for from public funds, is exempt from imposition of the motor vehicle fuel tax. If such sale is made by a dealer, any tax the dealer may have paid may be recovered by the dealer.

22.78

Motor vehicles — The years for which refund of property taxes collected upon cement mixers permanently mounted upon motor vehicles may be allowed under the dictrine of *Crown Concrete Co. v. Conklin,* 75 N.W. (2d) 351, are to be determined by reference to Section 614.1(5), Code 1954, and not by reference to the date of the Attorney General's opinion (3/16/54) preceding and in accordance with that doctrine. (Iverson to Tipton, St. Tax Commission, 1/10/57) #57-1-16

22.79

Personal property tax — Property consigned for delivery to customer — Assessable to catalogue store — (Iverson to Lauterbach, Chm. St. Tax Comm., 3/20/57) #57-3-36

Iowa catalogue stores must pay personal property taxes upon display merchandise and merchandise received at their stores and held for delivery to the purchasers, but not on merchandise consigned directly from out-of-state warehouses to Iowa purchasers. Sections 428.16 and 428.17, Code 1954, construed.

22.80

Personal property tax — agricultural products — Corn — When not exempt from assessment — (Iverson to Greenwood, St. Rep., 3/26/57) #57-3-44

Corn purchased by a farmer for feeding purposes is assessable, and corn harvested more than one year previous to the listing is also assessable if on hand on January first of the year of assessment.

22.81

Personal property tax — Arrangement on list, collection, compromise. (Pruss to Jensen, Taylor Co. Atty., 7/25/57) #57-7-29

22.82

Personal property tax — Merchandise held for customer pick up in catalog store. (Pruss to Sears Roebuck, 12/30/57) #57-12-8

22.83

Personal property tax — Stock of goods, bulk sale, lien, date of sale. (Pruss to Nelson, Greene Co. Atty., 8/28/57) #57-8-41

22.84

Personal property — (a) Wagon boxes are subject to personal property tax even though attached to a licensed trailer; (b) grain handling tax applies only to the receiving of grain and not to the loading out of grain; (c) grain which is owned by the owner of an elevator and which is received at that elevator is subject to the grain handling tax; (d) after grain is processed, other than hulling, cleaning drying, grading or polishing, it is subject to personal property tax; (e) grain which is handled is defined in section 428.35 (1), Code of Iowa, 1958, is not subject to the personal property tax even though such grain is stored for more than one year. (Brinkman to Draheim, Wright Co. Atty., 5/19/58) #58-5-27

22.85

Personal property — A transfer by a mortgagor to a mortgagee of the mortgaged goods in satisfaction of the mortgage debt is not a sale in bulk within the meaning of Sec. 445.31, 1958 Code of Iowa. (Brinkman to Hudson, Pocahontas Co. Atty., 10/2/58) #58-10-22

22.86

Personal property tax — The Board of Supervisors has no authority to compromise interest and penalties on taxes which have become a lien on real estate. (Brinkman to McDonald, Cherokee Co. Atty., 11/19/58) #58-11-11

22.87

Property tax — Where a building or a portion thereof is erected on land owned by another, the landowner is not liable for the taxes assessed against such building, whether it has been assessed as real property or personal property under Section 428.4, Code 1954. (Iverson to Holley, Co. Atty., Allison, Iowa, 2/14/57) #57-2-9

22.88

Property tax — Property held by a religious organization under a recorded contract of sale does not qualify for exemption provided by Section 427.1(9), Code 1954, said statute requiring any deed or lease under which such property may be exempt to be of record at the time the board of supervisors makes the levy to the holder to tax exemption. The board of supervisors has no power to cancel an assessment where it believes the assessor or board of review has made an error in judgment in denying an exemption. Statutory authority to overrule such action is vested solely in the courts upon appeal. (Iverson to Winkel, Co. Atty., Algona, Iowa, 2/11/57) #57-2-6

22.89

Property tax — When lien of taxes attaches — Time when taxes are due and payable. (Strauss to Hart, Div. Real Estate Comm., 5/2/57) #57-5-2

Real estate taxes attach as a lien against property in this state after termination of December 30 at 12:00 M. subsequent to the assessment and levy, and thereafter such taxes are due and payable in accordance with the provisions of §445.36, Code 1954.

22.90

Refunds of taxes illegally or erroneously exacted — When mandamus will lie — Appeals to board of review and district court — Burden on complainant to show assessing officer acted illegally — Complainant must show property to have been disproportionately assessed to obtain relief — Taxpayer not entitled to interest in event of refund (Iverson to Johnson, Webster Co. Atty., 4/22/57) #57-4-27

(1) Mandamus will lie to compel refund of taxes illegally or erroneously exacted or paid in a proper case even though such payment was without protest. (2) In a situation where overvaluation only is claimed, the statutory procedure for appealing an assessment to the board of review and then, if necessary, to the district court is mandatory and jurisdictional. (3) A presumption exists that the assessing officer has acted legally in making his assessment and the burden of proof otherwise is on the complainant. (4) To justify a complaint as to a tax assessment the complainant must show his property to be disproportionately assessed with other property in the taxing district. (5) No interest is due a taxpayer upon the amount of tax paid in the event a refund of property taxes is made under the provisions of §445.60, Code 1954.

22.91

Property appraisal by private firm — Ch. 405, Code 1958, does not* confer general statutory powers upon the three taxing bodies, the City Council, Board of Supervisors, and School Board, and their specific powers thereunder do not include the power to contract with expert appraisers to check on valuations of Des Moines real estate. (Strauss to Hanrahan, Polk Co. Atty., 12/4/58) #58-12-14 *See S. F. 92, 58th G. A.

22.92

Property tax receipts — When new County Treasurer takes office on Jan. 2, 1959, the receipts for 1958 taxes payable in 1959 shall be signed by the new treasurer. (Strauss to Mather, Sac Co. Atty., 12/10/58) #58-12-6

22.93

Property tax — Assessment of platted lots — "Improved" lots — Revaluation and reassessment of real estate. (Iverson to Nelson, Story Co. Atty., 6/28/57) #57-6-50

An "improvement" necessary to render lots "improved" for assessment as individual lots must be such as tends to alter the pre-existing dedication of the land. The filing of a plat does not operate to freeze the value of the platted land for purposes of taxation.

22.94

Property tax — Lease by state from private owner confers no tax exemption. (Erbe to Cook, Curator, Hist. & Archives Dept., 7/18/57) #57-7-20

22.95

Property tax — Incorrect listing of acreage of real estate. No tax refund. (Pruss to Fitzgibbons, Emmet Co. Atty., 10/14/57) #57-10-25

22.96

Property tax — Exemption, Claims. (Strauss to Burdette, Decatur Co. Atty., 8/13/57) #57-8-21

22.97

Property tax — Land owned and operated for profit by a church not exempt. (Abels to Stoebe, Humboldt Co. Atty., 7/29/57) #57-7-35

22.98

Property tax — exemption of property where title in church was only transitory. (Pruss to York, Sup. Fid. Dept., St. Tax Comm., 12/20/57) #57-12-22

22.99

Property Tax — Building overlooked by assessor. Additional taxes for years prior to actual increase in valuation not collectible. (Strauss to Hanrahan, Polk Co. Atty., 3/28/58) #58-3-27

22.100

Property Tax — Burned building — No refund where assessed valuation remained unchanged. (Strauss to Strack, Grundy Co. Atty., 4/3/58) #58-4-42

22.101

Property Tax — Military Personnel — R.O.T.C. personnel stationed in Iowa but not domiciled in Iowa not eligible for Veterans exemption or Homestead Credit. (Strauss to Tucker, Johnson Co. Atty., 4/3/58) #58-4-47)

22.102

Property Tax Assessment of Electric Generating Plants and Transmission Lines — (1) The word "apportioned" in 428.25, Iowa Code, means that each district should be assigned that portion of the value of the property in question which is located in that district. (2) the words "other construction" appearing in 437.2(2), Iowa Code, does not refer to power plants. (3) (a) Generating plant located wholly outside city or town limits should be assessed under provisions of 428.24; (b) poles, towers, wires, substation equipment and other construction located within city and town limits should be assessed under provisions of 428.24; (c) Poles, towers, wires, substation equipment and other construction located outside city and town limits should be assessed under provisions of 437.6. (Brinkman to Tipton, Dir., Prop. Tax Div., State Tax Comm., 6/10/58) #58-6-13

22.103

Property Tax — Property conveyed to city subject to a term for years is taxable. (Strauss to Bandstra, Marion Co. Atty., 5/21/58) #58-5-22

22.104

Property Tax — Railway property — Where transferred after December 31, should be listed and assessed for current year by local assessor as Tax Commission only assesses property owned by railway on Dec. 31. (Pruss and Piper to Goodenberger, Madison Co. Atty., 4/4/58) #58-4-45

22.105

Property Tax — Where qualified organiaztion holds property as a contract purchaser, which contract is recorded, and use of property is solely for appropriate object, the property qualifies for an exemption under the provisions of Sec. 427.1(9), 1958 Code of Iowa. (Brinkman to Remley, Jones Co. Atty., 9/22/58) #58-9-6

22.106

Property Tax — The Board of Supervisors may not compromise delinquent real estate taxes without the property having been offered for sale for taxes for two consecutive years and not sold or sold for only a portion of the delinquent taxes. (Brinkman to Morrow, Allamakke Co. Atty., 11/12/58) #58-11-18

22.107

Property Tax — Refund — Refund may not be made for eight preceding years. (Strauss to Branstad, Winnebago Co. Atty., 6/12/58) #58-6-11

22.108

Property Tax — Refund where assessment included nonexistent building. Code Section 332.3 confers no authority to refund. Section 445.60 may provide relief. (Strauss to DeKay, Cass Co. Atty., 2/17/58) #58-2-25

22.109

Property Tax — Where taxpayer contemplates leaving state — Code Sections 445.42, 445.43, 445.44 apply to nonresidents only. Where a resident owner of assessed personal property attempts to sell such property and leave the state, or attempts to remove himself and the property from the state, the County Treasurer may proceed by distress, if the tax is delinquent, or by ordinary proceedings and attachment where not delinquent. (Pruss and Brodie to Hudson, Pocahontas Co. Atty., 4/4/58) #58-4-48

22.110

Public Utilities — The Board of Supervisors has authority under §445.19, Code 1958, to compromise delinquent taxes upon telephone companies provided that the conditions specified in such statute are met. (Strauss to Elgin, Warren Co. Atty., 8/28/58) #58-8-4

22.111

Sales tax — State lien for unpaid sales taxes on homestead. (Iverson to Buchheit, Fayette Co. Atty., West Union, 2/21/57) #57-2-25

The lien of the State of Iowa for unpaid sales taxes is applicable to the homestead of the taxpayer, and such homestead may be sold for the payment of such sales taxes.

22.112

Sales tax — Sales tax on motor vehicle fuel used in manufacturing. (Iverson to State Senator Walker, 4/2/57) #57-4-3

Motor vehicle fuel purchased by a manufacturer may be either subject to or exempt from Iowa sales taxation depending upon the facts concerning the use to which it is applied. (Reference made to *Fischer Artificial Ice & Cold Storage Co. v. State Tax Commission,* ———— Iowa ————, 81 N.W. 2d 437).

22.113

Sales tax — Liability for tax on purchases by county home steward of drugs and medicines for home inmates and employees. (Iverson to Buchheit, Fayette Co. Atty., 5/20/57) #57-5-27

Since no "gain", "benefit" or "advantage" accrued to the vendors of drugs and medicines to county home steward for dispensation to county home inmates and employees, such vendors not regarded as "retailers" for sales tax law purposes.

22.114

Sales taxes — Enforcement of lien by levy under distress warrant prior to time of filing of petition in bankruptcy — Effect of release of levy. (Iverson to Hoover, Clay Co. Atty., 6/20/57) #57-6-38

Where sheriff has levied on personal property under a distress warrant for unpaid sales taxes, prior to the date of the filing of a petition in bankruptcy, State Tax Commission is in position to assert that its lien for sales taxes is valid against the trustee in bankruptcy. Commission cannot voluntarily release such levy after filing of petition in bankruptcy since property would be turned over to trustee free of the levy, or might be set off to the bankrupt as exempt and disposed of by him before a second levy could be made.

22.115

Sales tax — Freight, delivery and transportation charges on goods sold. (Pruss to Miller, Tax Comm., 9/27/57) #57-9-52

22.116

Sales tax — Materials furnished under contract prior to July 1, 1957. Rate of tax. (Pruss to Tax Comm., 8/15/57) #57-8-27

22.117

Sales tax — Permits can't be revoked on basis of past gambling offense. (Pruss and Brodie to Cunningham, Sales Tax Div., Tax Comm., 12/19/57) #57-12-9

22.118

Sales and Use Tax — Collection and remittance to the State. (Pruss to Johnson, St. Rep., 7/25/57) #57-7-30

22.119

Sales and Use Tax — Construction equipment brought into state. (Pruss to Bliss, Asphalt Ass'n, 10/25/57) #57-10-35

22.120

Sales and Use Tax — Effect of distributor or wholesaler relying on retailer — contractor's permit. (Pruss to Cunningham, Sales Tax Div., Tax Comm., 11/22/57) #57-11-27

22.121

Sales and Use Tax — Exemptions. Lions Clubs and Chambers of Commerce. (Pruss to Wooldridge, Insp., Tax Comm., 12/10/57) #57-12-13

22.122

Sales and Use Tax — Veterinary medicine. (Pruss to Miller, Chm. St. Tax Comm., 8/8/57) #57-8-17

22.123

Sales and Use Tax — Refund to relief agencies. (Pruss to Vogl, Aud., Tax Comm., 11/18/57) #57-11-20

22.124

Sales and Use Tax — Poultry "litter" is not exempt from retail sales tax as a material used in disease control or health promotion of livestock. (Pruss and Brodie to Cunningham, Dir., Sales & Use Tax Div., State Tax Commission, 3/24/58) #58-3-22

22.125

Sales and Use Tax — Request for names and amounts of sales of taxpayers in a particular area by research assistant of Iowa State College; a research assistant is not a state officer as provided by Sec. 422.65, but said request could be made by a member of the Board of Education; it is for the State Tax Commission to decide whether this information will be disclosed upon receipt of a request by a state officer. (Pruss to Lewis Lint, Secretary of the State Tax Commission, 1/14/58) #58-1-20

22.126

Sales and Use Tax — State departments collecting sales tax on the distribution of publications required to be charged for under Chap. 55, 57th G. A., are neither eligible nor required to obtain a sales tax permit under Code Section 422.53(2). (Strauss to Miller, Chairman, State Tax Comm., 3/20/58) #58-3-21

22.127

Sales and Use Tax — Supporting statement for obtaining sales tax refund by a tax levying or tax certifying body, must be supplied by the contractor pursuant to Sec. 422.45(6)(a); alterations in this statement may be made by tax levying or tax certifying bodies. (Pruss to Roscoe Bane, Supervisor, Construction Contract Refunds, Sales and Use Tax Div. St. Tax Comm., 1/22/58) #58-1-24

22.128

Sales and Use Tax — The question is whether a city which owns an interstate bridge is entitled to refund of all sales and use tax paid by a contractor on rehabilitation of an interstate bridge where some of the materials were used in that portion of bridge outside of the state; the clear intent of the statute is that all sales and use tax paid on contracts with a governmental subdivision upon application pursuant to Sec. 422.45(6), Code 1954. (Pruss to Roscoe Bane, Supervisor Construction Contract Refunds, Sales & Use Tax Division, State Tax Commission, 1/3/58) #58-1-2

22.129

Savings and Loan Associations — Shares held by an Iowa resident taxpayer in a savings and loan association having its principal place of business in a state other than Iowa are subject to taxation as moneys and credits under the provisions of Section 429.2, Code 1954. (Iverson to Norelius, Co. Atty., 1/10/57) #57-1-15

22.130

Savings and Loan Associations — (1) A federal savings and loan association is subject to Iowa taxation. (2) Sections 431.7 - 431.16, Code of Iowa (1958) are the proper sections under which federal savings and loan associations are taxed. (3) The value of U. S. Government obligations held by a federal savings and loan association is not to be deducted in arriving at the value of such association shares. (Brinkman to Miller, Chmn. Tax Comm., 8/13/58) #58-8-5

22.131

Tax Records — The Tax Commission has the power to destroy useless use tax records after they have been in the custody of the Tax Commission for at least five years. (Brinkman to Lint, Secy., Tax Comm., 7/29/58) #58-7-18

22.132

Use Tax — Liability for Use Tax on Carbon Electrodes used in manufacturing operations — (Iverson to State Tax Commission, 3/14/57) #57-3-27

An Iowa carbide corporation using carbon electrodes in the manufacture of carbides must pay Iowa Use Tax on the consumption thereof for the reason that such carbon electrodes only incidentally become a part of the carbide product and such electrodes are readily obtainable in Iowa.

22.133

Use Tax — Chapter 423, Code of 1958 — Whether a motor vehicle purchased outside the state was intended for use in Iowa is a question of fact. The burden of proof being on the property owner to establish that such motor vehicle *was not* purchased for use in Iowa. Pesch to Tucker, Johnson Co. Atty., 5/12/58) #58-5-9

22.134

Use Tax — Refund — The person paying the use tax to the county treasurer or state motor vehicle department is the proper party to apply for such refund. Whether such refund applied for is due is a question for determination by the Tax Commission. (Pesch to Tucker, Johnson Co. Atty., 5/19/58) #58-5-19

22.135

Veterans — Korean Bonus — Procedure for tax levy authorized in 1922 OAG 186. (Strauss to Gaston, Iowa Electric Light and Power Co., 4/17/58) #58-4-60

22.136

Veterans — Korean Veterans' Bonus — Taxation — Moneys and credits — Delinquency date for payment of taxes — Collection of additional tax from estates. (Iverson to Fisher, Asst. Linn Co. Atty., Cedar Rapids, 2/19/57) #57-2-21

Because of late certification of tax list, no penalty should be imposed on taxpayers until after the expiration of eighty-three (83) days after tax books have been received by county treasurer (reference made to 1940 AGO 393). Collection of the additional personal property tax in accordance with the Korean Veterans' Bonus levy may be had from estates which are still open even though a certificate has been issued under Section 682.35, Code 1954, except in the event the personal property tax liability of the estate has been compromised under Section 682.36, Code 1954.

22.137

Veterans — Tax exemption. Veteran of both World Wars gets one exemption. (Strauss to Loveless, Governor, 4/29/57) #57-8-43

22.138

Veterans — Military service tax credit — Disallowance of claim — Lien of tax credit on property which has passed into hands of bona fide purchaser — (Iverson to Smith, O'Brien Co. Atty., 3/11/57) #57-3-17

Where a military service tax exemption claim is disallowed by the State Tax Commission and no appeal is taken, the amount of credit allowed and paid from the military service tax credit fund does not become a lien upon the property designated where such property has passed into the hands of a bona fide purchaser.

CHAPTER 23

TOWNSHIPS

STAFF OPINIONS

LETTER OPINIONS

23.1 March 7, 1957

Township trustees may anticipate the collection of an annual tax by the issuance of warrants payable under the levy for the ensuing year.

Mr. Jack H. Bedell, Dickinson County Attorney: I have received yours of the 8th ult. in which you submitted the following:

"The Lloyd Township Board of Trustees submitted at the primary election a proposition calling for an annual levy of a tax not to exceed 1½ mills on the property of the township for the purposes outlined in Section 359.42 of the 1954 Code of Iowa. That proposition carried at said election, and the 1½ mill levy has been levied. This levy will return approximately $2500.00, half of which will be received in April and half of which will be received in November. The Lloyd Township Trustees desire to purchase certain fire equipment costing $4050.00.

"My question is whether or not the Lloyd Township Trustees can issue warrants to be paid at a later date for the $4050 with which to purchase this equipment, and if so, how said warrants should be dated and executed. I recognize the fact that Section 359.45 authorizes these trustees to issue bonds in anticipation of the revenue received from the 1½ mill levy, but the trustees do not desire to follow this method as they have been able to obtain suitable financing from a local bank provided they can issue warrants in advance."

In reply to the foregoing we advise as follows. Provision for the levy of a tax for the purchase, owning, renting or maintaining fire equipment and providing housing for the same is made by Section 359.43 as amended by Chapter 181, paragraph 1, of the Acts of the 56th General Assembly, which statute provides as follows:

"*Levy.* The township trustees may levy an annual tax not exceeding one and one-half mill on the taxable property in the township, without the corporate limits of any city or town which may be wholly or partially within the limits of the township, for the purpose of exercising the powers granted in section 359.42, when so authorized by an affirmative vote equal to at least sixty percent of the total vote cast for and against a proposal thereof at an election held pursuant to section 359.44."

Anticipation of the collection of the tax so authorized and the issuance of long term bonds is provided by Section 359.45, 1954 Code of Iowa, as follows:

"*Anticipatory bonds.* Townships may anticipate the collection of taxes authorized by sections 359.43 and 359.44, and for such purposes may issue bonds payable in not more than ten equal annual installments and at a rate of interest not exceeding five percent per annum and payable at such place and be in such form as the board of trustees shall designate by resolution. Sections 23.12 to 23.16, inclusive, and chapter 408, so far as applicable, shall apply to such bonds."

The foregoing is the only statutory authority for incurring debt for the purchase and ownership of fire equipment by the trustees. However, in addition, by rule of law limited anticipation of the collection of taxes levied is authorized. This rule as it appears in the Report of the Attorney General for 1930 at page 54 is:

"A municipal corporation may anticipate the taxes levied under the rule that taxes levied are taxes in praesenti. The district may therefore issue warrants in any one year to the amount of the tax levied and to be collected for the ensuing year."

We are therefore of the opinion that your township trustees can issue warrants after the 1957 levy payable in 1958 dated at the time of issuance and stamped not paid for want of funds payable from anticipated taxes under such levy.

23.2

Cemeteries, Polling places — 1. Election not required for sale of surplus unused cemetery site. 2. Election is required to purchase schoolhouse for polling place. (Strauss to Gray, Calhoun Co. Atty., 8/8/58) #58-8-19

23.3

Fire Districts — Counsel — Payment from public funds. (Strauss to Buchheit, Fayette Co. Atty., 9/13/57) #57-9-21

23.4

Fire Districts — Incusion or taxation of cities and towns for benefited fire districts is not contemplated by the 57th G. A., Chapter 178. (Abels to Winkkel, Kossuth Co. Atty., 1/8/58) #58-1-7

23.5

Fire Districts — Taxation — Levy for benefited district. Question submitted may be for less than statutory maximum. (Abels to Norelius, Crawford Co. Atty., 7/29/57) #57-7-34

23.6

Fire Districts — Transfer of equipment to benefited district by township. (Abels to Hendrickson, Ass't. Linn Co. Atty., 8/7/57) #57-8-12

23.7

Fire Protection — A township, or a group of townships joined together for fire protection, may not legally enter into a purchase contract to pay for fire fighting equipment over a period of time on the assessment dates of the fire tax levy, nor may they elgally sign a chattel mortgage covering such equipment. (Strauss to Sen. Tate, 2/11/57) #57-2-3

23.8

Fire Protection — Authority to contract with private corporation, with other public bodies. (Abels to Remley, Jones Co. Atty., 9/16/57) #57-9-23

23.9

Fire Protection — Identication number system for homes and roads. Purchase under Code Section 359.42. (Abels to Johnson, Lee Co. Atty., 3/12/58) #58-3-6

23.10

Fire Protection — No authority, either express or implied under Chapter 357A for Board of Supervisors to separate a township or a part of a township from the benefited fire district petitioned for. (Strauss to Meyer, Winneshiek Co. Atty., 8/25/58) #58-8-3

23.11

Fire Protection — Only statutory authority for incurring indebtedness for the purchase of fire fighting equipment is by annual fire tax levy (Sec. 359.43, Code 1954) or by the issuance of anticipatory bonds (Sec. 359.45, Code 1954). (Strauss to Sen. Tate, 2/5/57) #57-2-2

23.12

Fire Protection — Propositions under Code Section 359.43 and 359.44 are submitted to voters outside corporate limits and specified notice should be posted outside corporate limits. The proposition voted on by city and town residents under Code Section 368.12 is a separate proposition. (Abels to Klotzbach, Buchanan Co. Atty., 5/21/58) #58-5-20

23.13

Fire Protection — The provisions of Section 357A.13, Code 1958, impliedly make applicable to benefited fire districts the limitation of exercise of powers "without the limits of a city or town" as set forth in Sections 359.43 and 359.44. (Abels to DeKay, Cass Co. Atty., 5/6/58) #58-5-16

23.14

Fire Protection — There appears to be no statutory authority for discontinuing the tax levied for fire protection under the provisions of sections 359.42, et seq., Code 1954. (Strauss to Hendricksen, Asst. Co. Atty., 1/16/57) #57-1-18

23.15

Public Park — Tax — Land must be "acquired" by the township prior to the levying of the tax provided in 359.30, Code of Iowa.

23.16

Public Park — Shelter house — A shelter house is a "necessary improvement" within the meaning of Section 359.30, Code of Iowa. (Gritton to Cooper, Buena Vista Co. Atty., 7/28/58) #58-7-2

CHAPTER 24

WELFARE

STAFF OPINIONS

LETTER OPINIONS

***See S.F. 34, 58th G.A.**

24.1 July 22, 1958

CHILDREN'S BOARDING HOMES — EMOTIONALLY AND MENTALLY HANDICAPPED — LICENSE: Persons having the care and custody for hire of three or more children, as defined by Section 237.2, Code of Iowa, 1958, are subject to license therefor by the State Board of Social Welfare.

Mrs. Irene Smith, Chairman, State Board of Social Welfare: Reference is made to request of the State Board of Social Welfare, under date of July 7, 1958, for an opinion upon the following question:

"We are requesting an interpretation of our responsibility *in licensing* day care or nursery facilities *which give care* to school age child who is too handicapped emotionally or mentally to attend public schools, and for which other facilities are needed.

"We have conferred with the State Department of Public Instruction, Division of Special Education and have learned they have no jurisdiction for providing instruction for such children."

Section 237.2 of the 1958 Code of Iowa reads as follows:

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

The Attorney General, upon a related question, has on two previous occasions, ruled as follows:

"It has been and it is still our opinion that any boarding home which has facilities *to take care of* three children and indicate a willingness to do so even though such home actually has only one or two children living there, it is a proper home to be licensed as a children's boarding home." (See O.A.G., 1942, p. 97, and O.A.G. 1938, p. 570)

In the above quoted statutory definition, a person shall be deemed to maintain a children's boarding home, who receives *for care and treatment* or has in his custody at any one time more than two children for the purpose of providing them with food, *care* and lodging.

Webster's International Dictionary defines the word "care" to mean: "charge, oversight or management, implying responsibility for safety." Section 4.1 (2) of Chapter 4 of the Code (Construction of Statutes) provides that "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."

It is, therefore, our opinion that in accordance with the approved usage of the language, care given in a day nursery to emotionally or mentally handicapped children, would subject any person having such children in his custody to the licensing requirements of Chapter 237, Code of Iowa, (Children's Boarding Homes).

24.2 August 5, 1957

AID TO DEPENDENT CHILDREN cannot be granted to the mother of an illegitimate child unless and until the county board of social welfare with the advice of the county attorney, has certified that the parent is cooperating in legal and other efforts to obtain support for said child from the person legally responsible for said support.

Mr. William Q. Norelius, County Attorney: In your recent inquiry, you advise:

"The unwed mother of an illegitimate child applied to the County Board of Social Welfare for a grant of aid to dependent children as same is provided for in Chapter 239, Code of Iowa 1954. The mother has admitted the illegitimacy of the child for which said aid is requested, but has steadfastly refused to divulge the name of the child's father.

"Under the provisions of Section 239.5 of the Code of Iowa, 1954, no payment for aid to dependent children shall be made unless and until the County Board of Social Welfare with the advice of the County Attorney shall certify that the parent receiving the aid for the children is cooperating in legal action and other efforts to obtain support money for said child from the persons legally responsible for said support.

"The County Board of Social Welfare has not certfied that the mother is cooperating in legal actions and other efforts to obtain support money for said child from the father of the child, nor has the County Attorney advised the Board of Social Welfare that the mother has or is cooperating in said legal actions.

"The County Board of Social Welfare suspended assistance pending further investigation of the paternity of the illegitimate child.

"I hereby request your opinion:

(a) whether or not a County Board of Social Welfare is legally obligated to grant aid to dependent children when the mother of an illegitimate child refuses to divulge the name of the known father in order that legal action may be taken against him for the support of said child.

(b) May aid to dependent children be granted when the County Board of Social Welfare, with the advice of the County Attorney, has not certified that the parent receiving the aid for the child is cooperating in legal actions and other efforts to obtain support money for said child from persons legally responsible for said support as provided in Section 239.5, Code of Iowa, 1954."

Under the applicable provisions of Section 239.5, 1954 Code of Iowa, which you have set out in your inquiry, it is clearly the intention of the legislature that no public funds shall be expended by the State Department of Social Welfare as aid to dependent children unless and until the County Board of Social Welfare certifies that the parent receiving the aid for the child is cooperating in legal actions and other efforts to obtain support money for said child from the person or persons actually responsible for the child's support. The law further provides that the County Board's certification shall be "with the advice of the County Attorney."

Accordingly, the obligation rests with the County Board of Social Welfare to refer such matters to the attention of the County Attorney prior to certifying an applicant to the State Welfare Department for payment of monthly aid to dependent children assistance benefits. Upon such referral, the duty rests upon the County Attorney to investigate the facts of the situation to determine whether or not under the circumstances, the parent will cooperate in efforts to obtain support for children in need of public assistance from those who may be legally responsible for such support. The purpose of such a provision is clearly to require support for a child from those primarily liable, prior to resorting to public funds for such child's support.

It is our opinion that whether or not the disclosure of an illegitimate child's father in such circumstances is necessary, would be discretionary with the County Attorney. He is an agency of government to advance the ends of justice. Due to the high professional standard and appreciation of duty contemplated by law from one in a position of a county attorney, he holds the trust and confidence of all public officials, his profession, the courts and the public. Accordingly, we believe that the law quite properly leaves the determination of the relevancy of such delicate questions of paternity in support matters such as this to the confidential discussions and investigations that are common to the offices of all attorneys.

Consequently, we believe that the fact of paternity in this instance is not necessarily a proper matter for consideration of the County Board of Social Welfare in conducting their administrative responsibility of receiving applications for, and certifying applications to the State Department of Social Welfare for payment. The County Board need only concern itself in such situations to one's eligibility for assistance and whether assistance should otherwise be granted upon appraisal from the County Attorney that the parent "is cooperating."

The obvious reason that the legislature designated the County Attorney as the person to advise the County Board whether or not one is coop-

erating in support proceedings, is that he is charged by law with responsibility of bringing such criminal or civil actions as may be necessary for the proper protection of the State or County. Regardless of whether he advises the County Board of Social Welfare that a parent is or is not cooperating under the applicable provision of Section 239.5, the County Attorney may, after investigation, find it necessary to proceed under any one of the pertinent chapters of the 1954 Code of Iowa, ranging from Chapter 675 — Paternity of Children and Obligations of Parents thereto; to Chapter 731A — Wanton Neglect of Children, or one of the chapters allowing him to commence civil proceedings, such as Chapter 252A — Uniform Support of Dependents.

Consequently, in regard to your first inquiry hereinbefore set out as (a) in the sixth paragraph of your letter, we would advise you that the County Board of Social Welfare is not obligated to certify any grant of assistance in such instances unless the County Attorney advises that the parent is cooperating in legal actions and other efforts to obtain money from the father or other persons who may be legally or primarily responsible for the support of the needy child.

Your second inquiry hereinbefore set out as (b) necessarily gives rise to a review of the facts of the particular situation involved. Section 239.7, 1954 Code, specifically provides appellate procedure for an appeal by an applicant to the State Board of Social Welfare from any adverse administrative ruling or action by the County Board of Social Welfare; and to the District Court from any such adverse administrative ruling from the State Board of Social Welfare. The criteria determining the propriety of the acts of administrative agencies in each situation would, in our opinion, turn upon whether the District Court under the provisions of said Section 239.7 finds that the Board had abused its discretion or committed fraud in refusing to certify an assistance grant. Accordingly, it is our view that the answer to your inquiry would depend upon whether, in the first instance, the County Attorney properly exercised his discretion in advising the County Board as to whether or not one "was cooperating". See Scheenberger v. State Board of Social Welfare, 228 Iowa 399.

With regard to the particular fact situation presented, we note that you advise in the fourth paragraph of your letter hereinbefore set out that the County Board of Social Welfare *suspended assistance* pending further investigation of the parent of the child. It is clear under Section 239.5 that the law contemplates such investigation as a condition precedent rather than a condition subsequent to the County Board's certification of an assistance grant. Likewise, under said section, it is clear that the State Department of Social Welfare should not approve an Aid to Dependent Children grant of assistance until the County Board of Social Welfare shall certify said grant. Accordingly, as you advise that assistance was suspended, it is clear that the County Board of Social Welfare must have previously and improperly so certified assistance, or a suspension would not be necessary.

In supervising the administration of the welfare assistance programs throughout the ninety-nine counties of this State, the State Department must necessarily rely upon, and assume the propriety of administrative acts of the County Board of Social Welfare to be in accordance with the law and the rules and regulations of the department until such time it is specifically appraised to the contrary. Accordingly, when it has been forwarded the County certificate under Section 239.5 that an Aid to Dependent Children assistance grant should be entered and paid, it is obligated to pay same. It must assume that the County Board of Social Welfare acted with the advice of the County Attorney.

However, it is our opinion under the facts presented, that should the State Department of Social Welfare be advised, or determine by investigation, that the applicable provisions of Section 239.5 supra have not been complied with, then payment of a grant thereunder to a parent who is not cooperating should cease. Specifically, said section 239.5 requires that

" * * * No payment for aid to dependent children shall be made unless and until the county board of social welfare with the advice of the county attorney shall certify that the parent receiving the aid for the children is cooperating in legal actions and other efforts to obtain support money for said children from the persons legally responsible for said support."

It should be noted, however, that termination of the assistance grant does not provide for the subsistence needs of a child found in such circumstances. To carry out the intent of the law, it is presumed that the County Board might find it desirable to arrange to have the assistance grant for the benefit of the child paid to a guardian as defined under the provisions of Section 239.5, as amended by Section 4, Chapter 6, Acts of the 56th G.A., and Section 239.1 (4), Code of Iowa, 1954, instead of to the child's parent.

24.3 December 22, 1958

CHILD WELFARE SERVICES: FOSTER CARE: USE OF FEDERAL AND STATE FUNDS:

(1) Federal funds, as allocated by federal agencies may be used for foster care of children who are homeless, dependent and neglected and in danger of becoming delinquent.

(2) State funds appropriated for child welfare services cannot be used for foster care expense under the present provisions of Chapter 235 of the Code.

(3) The State Board may promulgate rules and regulations for the expenditure of such funds.

Mrs. Irene Smith, Chairman, State Board of Social Welfare: Reference is made to intra-office communication dated December 8, 1958; for an official opinion regarding use of federal and/or state child welfare funds for payment of foster care costs; attached hereto by reference, as Appendix "A", from which we quote in pertinent part the following:

"Iowa's child welfare services program has, since its inception, been financed by funds from two sources — federal and state. For the fiscal year 1959 the following amounts were available to the State Board of Social Welfare for use in carrying out the child welfare program in Iowa:

"1. Funds allocated in accordance with the provisions of Title V of the Social Security Act by the Children's Bureau, U. S. Department of Health, Education and Welfare — $262,762.

"2. State funds appropriated by the legislature and available for the second year of the biennium (including the carryover of funds from the first year) — $430,000.

"total funds available — $692,762."

"In view of the fact that Iowa's child welfare program has over the years, been seriously handicapped by the fact that neither federal nor state funds have been considered available for the payment of 'care of children' as an inherent part of services, and in view of the fact that there are, at the present time, both federal and state funds which the State Board could allocate for the payment of such care, the following questions are referred for formal opinion:

"1. Is the State Board empowered in either Chapter 234 or 235 to expend federal funds for any of the purposes for which federal policy allows such funds to be used?

"2. Is the State Board empowered to expend state funds in carrying out the purposes of Chapter 235, for the payment of the costs of 'care of children' as an inherent part of providing social welfare services for children and in co-operating with the several county departments in the development of such services?

"3. Within its power to plan and supervise all public child welfare services and activities, may the State Board set up rules and regulations governing the use of either federal or state funds in the payment of foster care costs, day care costs and return of runaway children?"

We will discuss the questions submitted seriatum. With reference to the first question as to the use of federal funds, in addition to the federal statutes quoted in Appendix "A", we find the following federal law also pertinent to the question, as found in Public Law 85-840, approved August 28, 1958, to-wit:

"Sec. 521. For the purpose of enabling the United States, through the Secretary, to cooperate with State public welfare agencies in establishing, extending, and strengthening public-welfare services (hereinafter in this title referred to as 'child-welfare services') for the *protection and care of* homeless, dependent, and neglected children, and children in danger of becoming delinquent, there is hereby authorized to be appropriated for each fiscal year, beginning with the fiscal year ending June 30, 1959, the sum of $17,000,000."

"Sec. 522 (a) The sums appropriated for each fiscal year under Section 521 shall be allotted by the Secretary for use by cooperating State public-welfare agencies which have plans *developed jointly by the* State agency and the Secretary, as follows:

"Sec. 523 (a) From the sums appropriated therefor, and the allotment available under this part, the Secretary shall from time to time pay to each State with *a plan for child-welfare services* developed as provided in this part an amount equal to the Federal share (as determined under section 524) of the total sum expended under such plan (including the cost of administration of the plan) in meeting the costs of district, county, or other local child welfare services, in developing State services for the encouragement and assistance of adequate methods of community child-

welfare organization, in paying the costs of returning any runaway child who has not attained the age of eighteen to his own community in another State, and of maintaining such child until such return (for a period not exceeding fifteen days), in cases in which such costs cannot be met by the parents of such child or by any person, agency, or institution legally responsible for the support of such child; Provided, That in developing such services for children the facilities and experience of voluntary agencies shall be utilized in accordance with child-care programs and arrangements in the States and local communities as may be authorized by the State."

Section 235.2 (4) of the Code of Iowa, provides that the State Department shall — "Apply for and receive any funds which are or may be allotted to the State by the United States or any agency thereof for the purpose of developing child welfare services."

Section 234.14 provides:

"Sec. 234.14 Federal grants. The state treasurer is hereby authorized to receive such federal funds as may be made available for carrying out any of the activities and functions of the state department, and all such funds are hereby appropriated for expenditure upon authorization of the state board."

Therefore, under these provisions of the law, both federal and state, where there has been developed a plan for child-welfare services and such plan is developed jointly by the state and federal officials, that such federal funds can be used for "foster care" as provided by the federal rules and regulations as quoted in Appendix "A" on page 1 thereof. Said federal funds may, therefore, be set up as federal grants, under the provisions of Sec. 234.14 and may be received and expended upon authorization of the State Board.

The answer to the second question of necessity lies in the application and construction of the Iowa statutes relating to child welfare, Chapter 235 of the Code. In your letter, Appendix "A", the pertinent statutes have been set out in extenso.

Sections 235.2 and 235.3 specifically spell out the powers and duties of the State Department and the State Board. Diligent search throughout the provisions of the law fails to disclose any reference to the use of state funds for "foster care", "day care", or "return of runaway children."

In construing a statute, the objective is to discover the true intent of the legislature.

Originally, the Child Welfare services were administered by the Board of Control. (Chapter 181-A-1, Code of Iowa, 1935) This law was repealed and the present law enacted by the 47th General Assembly and approved May 7, 1937. The general supervisory powers originally granted the Board of Control were retained and considerably enlarged and expanded in scope under the present law.

Significantly, the following provision of the old law, with reference to foster care of children was omitted from the present law, to-wit:

"Promote the rehabilitation of disrupted families who have normal children who are wards of the state or the placement of such children in wholesome foster homes."

In the case of Boyd v. Smyth, 200 Iowa 687, 205 NW 522, 43 ALR 1381, writ of error dismissed (1926) Boyd v. Smyth, 46 S. Ct. 470, 270 U.S. 635, 70 L. Ed. 772, it was held: Where statutes are revised, and some parts of the original are omitted, *parts omitted cannot be revived by construction*, but are considered annulled.

We have another rule of construction applicable to the question before us; i.e., the maxim — 'Expressio unius est exclusio alterius" — the expression of one thing is the exclusion of another.

In a Nebraska case it was said:

"The maxim 'Expressio unius est exclusio alterius' means that where a statute or ordinance enumerates the things on which it is to operate, or forbids certain things it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention."

In re: Shirley's Estate, 76 NW 2d 749, 753 162 Neb. 613

The above rules of construction, and a study of the provisions of Chapter 235, constrains us to the belief that the legislature did not intend to provide for the actual expenditure of state funds for the payment of the expenses for foster care of children, as defined in Section 235.1 of the Code.

We now come to the third question propounded as to the promulgation of rules and regulations for use of federal or state funds, for foster care.

Chapter 234 sets forth the powers and duties of the State Board; to formulate rules and regulations as may be necessary and outline such policies as may be necessary for competent and efficient administration and to cooperate with federal agencies in such reasonable manner as may be necessary to qualify for federal aid. We think without question, the State Board can promulgate rules and regulations for use of federal or state funds, within the prescribed limits of the respective laws as applicable to the federal funds or state funds.

We have heretofore stated that under federal law and regulations, the federal funds as allocated may be used for foster care costs, day care costs and return of runaway children.

As to state funds, there is no authority under present statutes, permitting use of state funds for costs of foster care as such. Such state funds must be limited in use to the payment of the supervisory services spelled out in Chapter 235.

By legislative interpretation the fund for the payment of these state costs is known as the "Child Welfare Fund". (See Chapter 4, Laws of the 57th General Assembly) This fund is also burdened with its proportionate share of the general administrative expenses of operating the State Department, under the provisions of Section 234.6, subparagraph 5, of the Code.

It is therefore our considered opinion that:

1. Federal funds, as allocated by the federal government, under a joint plan, as developed under the provisions of Public Law 85-840 and

related federal rules and regulations, may under the provisions of Section 234.14 be received and expended for foster care of children who are homeless, dependent and neglected children, and children in danger of becoming delinquent, if so provided by such plan.

2. State funds, as appropriated for child welfare services, under the present provisions of the law, Chapter 235, as amended, cannot be expended for foster care, as such. Such funds may only be used for the payment of the supervisory services as defined in said chapter, with the additional burden of its proportionate share of the general administrative expenses of operating the state department.

3. And the State Board may promulgate rules and regulations for the proper use of both federal and state funds within the prescribed limits of the law of each sovereignty.

APPENDIX "A"

Federal funds are made available to the states in accordance with the provisions of Title V, Part III of the Social Security Act, and may be expended in accordance with the provisions of Section 523 as amended by Public Law 85-840, August 28, 1958:

"Section 523 (a) — From the sums appropriated therefor and the allotment available under this part, the Secretary shall from time to time pay to each State with a plan for child welfare services developed as provided in this part an amount equal to the Federal share (as determined under section 524) of the total sum expended under such plan (including the cost of administration of the plan) in meeting the costs of district, county, or other local child welfare services, in developing State services for the encouragement and assistance of adequate methods of community child welfare organization, in paying the costs of returning any runaway child who has not attained the age of eighteen to his own community in another State, and of maintaining such child until such return (for a period not exceeding fifteen days), in cases in which such costs cannot be met by the parents of such child or by any person, agency, or institution legally responsible for the support of such child: Provided, That in developing such services for children the facilities and experience of voluntary agencies shall be utilized in accordance with child-care programs and arrangements in the States and local communities as may be authorized by the State."

(Handbook for Child Welfare Services, pages 3001-3002, Sections 4, 5 and 8)

"4. *Foster Care* — Costs of foster family or group care, including the operation of a group home, for children and unmarried mothers for whom the public welfare agency assumes responsibility by providing or purchasing services and care.

"5. *Day Care* — Costs of foster family or group day care, including the operation of day care centers for children for whom the public welfare agency assumes responsibility by providing or purchasing services and care.

"8. *Return of Runaway Children* — costs of maintenance and transportation, including an attendant when necessary, for the return of runaway child under eighteen from one State to his own community in another State when such costs cannot be met by his parents or any person, agency or institution legally responsible for the support of such child. Maintenance for such child pending his return may be paid for a period not exceeding fifteen days."

235.2 *Powers and duties of state department.* The state department in addition to all other powers and duties given it by law, shall:

"1. Administer and enforce the provisions of this chapter.

"2. Join and cooperate with the government of the United States through its appropriate agency or instrumentality or with any other officer or agency of the federal government in planning, establishing, extending and strengthening public and private child welfare services within the state.

"3. Make such investigations and to obtain such information as will permit the state board to determine the need for public child welfare services within the state and within the several county departments thereof.

"4. Apply for and receive any funds which are or may be allotted to the state by the United States or any agency thereof for the purpose of developing child welfare services.

"5. Make such reports and budget estimates to the governor and to the general assembly as are required by law or such as are necessary and proper to obtain the appropriation of state funds for child welfare services within the state and for all the purposes of this chapter.

"6. Cooperate with the several county departments within the state, and all county boards of supervisors and other public or private agencies charged with the protection and care of children, in the development of child welfare services."

235.3 *Powers and duties of state board.* The state board shall:

"1. Plan and supervise all public child welfare services and activities within the state as provided by this chapter.

"2. Make such reports and obtain and furnish such information from time to time as may be necessary to permit cooperation by the state department with the United States Children's Bureau, the social security board, or any other federal agency which is now or may hereafter be charged with any duty regarding child care or child welfare services."

24.4 September 5, 1958

STATE BOARD OF SOCIAL WELFARE: POWER TO LICENSE: Under the provisions of Chapter 232, Code of Iowa, 1958, the State Board of Social Welfare does not have power to license county detention homes and schools.

Mrs. Irene Smith, Chairman, State Board of Social Welfare: Reference is made to intra-office communication dated July 24, 1958, requesting an Attorneys' General opinion, the pertinent part thereof reading as follows:

"In an informal opinion written March 14, 1947, Mr. T. S. Herrick laid down the basis for the Department's policy of trying to license county detention homes. (We have attached a copy of this opinion) Since that date we have issued a child caring license under the authority of Chapter 237 to those detention homes which applied for a license and which met the Department's requirements.

"Within the past year the basis of our authority for licensing detention homes has been questioned by the County Attorney and the Board of Supervisors in Webster County. In another county the Board of Super-

visors was reluctant to sign an application for a license, although this was finally accomplished by having the superintendent of the detention home sign the application and the home was subsequently licensed.

"Since the County Attorney and the Board of Supervisors of Webster County have questions about the validity of the informal opinion, we would like to request a formal opinion from the Attorney General's office which would clarify the authority of the Department with respect to the licensing and the supervision of county detention homes."

County detention homes and schools are authorized by Chapter 232 of the Code of Iowa, specifically Section 232.35 which provides:

"232.35 Detention home and school in certain counties. In counties having a population of more than forty thousand, the board of supervisors shall, and in counties of over thirty thousand, said board may provide and maintain, separate, apart and outside the inclosure of any jail or police station, a suitable detention home and school for dependent, neglected and delinquent children."

Other statutes which we believe applicable and pertinent to the question involved herein are the following:

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

"Section 235.2 Powers and duties of state department.

" * * *

"7. Aid in the enforcement of all laws of the state for the protection and care of children.

"8. Co-operate with the juvenile courts of the state, * * * "

"Subsection 5, Section 235.3: *Designate* and *approve* the *private* and *county institutions* within the state to which neglected, dependent and delinquent children may be legally committed and to have supervision of the care of children committed thereto, and the right of visitation and inspection of said institutions at all times."

Section 235.5 Licenses. Licenses issued to maternity hospitals, private boarding homes for children and private child-placing agencies by the state board of control of state institutions, shall remain in effect for the period for which issued, unless sooner revoked according to law. Thereafter, it shall be the duty of each of such agencies to apply to the state board of social welfare for a new license, and to submit to such rules regarding the same as the state board may prescribe."

In the interpretation and construction of statutes, the cardinal rule to be followed, is to seek the legislative intent from the statute as a whole.

The intent of the legislature in the absence of previous construction of enactments, must be determined both from the language used and the purpose of legislation. (See Long v. Northrup, 225 Ia. 132, 279 NW 104, 116 ALR 1475)

A court cannot expand meaning of a statute beyond legitimate scope of terms utilized. (See The Peterson Co. v. Freeman, 204 Iowa 644, 215 NW 746)

Also, statutes must be given reasonable and not arbitrary, interpretation. (Brutsche v. Inc. Town of Coon Rapids, 223 Ia. 487, 272 NW 624)

Does the State Board of Social Welfare, under the above quoted statutes, have the power to license county detention homes? We think not.

Section 232.37 plainly states that the State Board *"shall designate and approve"*. Clearly, this does not mean to license. If the legislature had intended to empower the Board to issue licenses to county homes, it could have said so. This is further borne out by the provisions of Chapter 236 (Maternity Hospitals), Chapter 237 (Children's Boarding Homes) and Chapter 238 (Child-Placing Agencies) all of which specifically require licenses and grant specific power to license, to the Board, of the operators of the institutions defined therein. And furthermore, the same designation of institutions to be licensed is reiterated in Section 235.5 supra, as contained in Chapter 235 dealing generally with child welfare.

We then come to the question: What is the intent and meaning of the language used, to-wit: "shall designate and approve". The question was answered by a ruling of the Attorney General as reported in O.A.G. 1906, on page 167, in the following language:

"Third — Section 14 of the act (now Section 232.37) provides that the board of control shall designate and approve the institutions and associations to have charge of juveniles committed under the act. The language of the provision is mandatory and must, in my opinion, be construed as requiring the board to designate and approve the institutions to which such children may be committed. That is, the board must act according to its best judgment and discretion."

Therefore, under the discretionary powers of the State Board to designate and approve the institutions to which such children may be legally committed, we have this situation. As to *private* institutions, the Board has specific power to license, as well as designate and approve. As to county institutions, it has only power to designate and approve.

As to county institutions, this of necessity implies that some mode of affirmation must be given to the authorities in charge of such county institutions, in the nature of a certificate or letter or notice of such designation and approval. With such designation and approval, the Board is likewise granted express right to supervise, visit and inspect at all times, such institutions.

In conclusion, we are of the opinion that under the provisions of Chapter 232, the State Board of Social Welfare is not authorized to issue licenses for the operation of county detention homes and schools.

24.5 May 14, 1958

LEGAL SETTLEMENT—BLIND PERSONS—POOR SUPPORT LAW.

Under the provisions of Chapter 122, Laws of the 57th General Assembly, (Section 252.16, Code 1958), a blind person who has resided in any one county for a period of six months, acquires a legal settlement in such county and may qualify for aid under the Poor Support Law, Chapter 252, Code of Iowa.

Mr. D. M. Statton, Boone County Attorney: Reference is made to your favor of April 10, 1958, reading as follows:

"Upon request of Mr. Percy E. Barry, Director of Social Welfare, Boone County, Iowa, this office would like to have a construction placed upon Chapter 122 of the Acts of the 57th General Assembly found at page 149 in the Laws of the 57th General Assembly (Section 252.16, Code 1958), as published. The section cited changes the provisions in regard to the support of any blind person who is receiving assistance under the law of this State and states in the last sentence of the section, 'Any such person who has resided in any one county of this State for a period of six months shall have acquired legal settlement for support as provided in this chapter.'

Under date of February 24, 1958, the Boone County Department of Social Welfare received a letter from Mrs. Sylvia Cox, Director of the Shelby County Department of Social Welfare in which she states that it is the opinion of their county attorney that a person who resides in Shelby County and who is blind and who was served with a non-residence notice prior to the change of law would not have gained settlement in Shelby County. A non-residence notice was served upon this person under date of September 19, 1956, and notice to the Auditor of Boone County was submitted under date of April 8, 1957. At that time we acknowledged legal settlement of this person to be in Boone County. The effective date of the change in the law was July 4, 1957."

Chapter 122 of the Laws of the 57th General Assembly, (Section 252.16, Code 1958), amended Section 252.16 of Chapter 252 Code of Iowa 1954 (Support of the Poor) and reads as follows:

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

The primary statutory construction rule is to ascertain and give effect to the legislature's intention. Grant v. Norris, 85 N.W. 2d 261 page 266, (Ia.) (Citing other authorities)

In the construction of a statute, the report of a legislative committee may be properly considered in its interpretation. (See Yarn v. City of Des Moines, 243 Ia. 991, 54 N.W. 2d 439).

The explanatory note appended to House File 212, which became Chapter 122, Acts of the 57th General Assembly, (Section 252.16, Code 1958), reads as follows:

"This act is to allow the blind receiving a state pension to qualify for additional aid from a county in case of illness, accident, or other unforeseen circumstances."

Chapter 241, Code of Iowa, 1958, (Aid for the Blind) authorizes assistance or money payments to blind persons in need. The amount of assistance is fixed with due regard to the condition of the individual, including all resources available to the applicant or recipient, household situation and community in each instance, together with the essential need due to the individual's mental or physical condition, subject to the rules, regulations and standards adopted by the State Board of Social Welfare.

Such assistance does not include provision for emergencies, in the nature of illness, accident, or other unforeseen circumstances. In such cases the blind person of necessity resorted to the relief provided by counties under the Poor Support Law, Chapter 252 of the Code.

Under said law the provisions for legal settlement created an obstacle in some cases for such additional relief and therefore the legislature sought to remedy the situation by the enactment of Chapter 122, Acts of the 57th General Assembly, (Section 252.16, Code 1958), eliminating the provisions for the establishment of legal settlement as to blind persons, as prescribed in subsections 1, 2 and 3 of Section 252.16, thereby allowing a blind person to acquire a legal settlement by residence only for a period of six months in any county.

The amendatory statute in question became effective July 4, 1957. From the facts stated in your letter the blind person involved *has been* a resident of Shelby County since on or about September 19, 1956, and it is now more than ten months since the effective date of the law.

We also note that the language of the act is written in the past tense; the evident intent of the legislature being that the act shall operate retrospectively as to residence as well as prospectively. However, the retrospective effect of this act is limited to residence.

The legislative intent is the governing consideration in the interpretation of all statutes, and this includes the determination of whether a given statute is meant to operate retrospectively or prospectively only. (See in re Town of Avon Lake, 88 N.W. 2d 784, 786, ———Ia.———.)

In applying the rule, as expressed in Appleby v. Farmers State Bank, 244 Ia. 288, 294, 295, 56 N.W. 2d 917, 921; for the purpose of determining the legislative intent as to retrospective or prospective application of a statute; the courts will look first, at the language of the act; second, they will consider the evil to be remedied; and third, whether there was a previously existing statute governing or limiting the mischief which the new act is intended to remedy.

Clearly the Act in question comes within this rule of construction.

Where legislative intent is clearly and plainly expressed without any ambiguity in a statute enacted to confer a right or privilege upon or compliance therewith, there is no room for construction. Vale v. Messinger, 184 Ia. 553, 168 N.W. 281.

As to blind persons, the language of the Act eliminated the restrictive provisions for acquiring legal settlement in the old law, substituting residence only for a period of six months. This was the evil to be remedied under the previous statute as it applies to blind persons. The manner by which person acquired legal settlement is merely procedural and can be changed at any time by an act of the legislature. Op. Atty. Gen. 1942, P. 178.

The right or privilege of receiving poor relief is a statutory right and the obligation or duty of a county to furnish it is well established.

Therefore it is our opinion that under the amendatory Act, Chapter 122, Laws of the 57th General Assembly, Section 252.16, Code 1958), a blind person who has resided in any one county for a period of six months, and thereafter applies to said county for aid under Chapter 252 of the Code, said blind person, if she meets all other requirements of the Poor Support Law, acquires a legal settlement and may qualify for such aid.

24.6 August 1, 1958

BOARD OF SOCIAL WELFARE: SALARIES OF EMPLOYEES: WHO MAY FIX: The State Board of Social Welfare, within its express authority laid down by the statutes, has complete authority to regulate the payment of the compensation of employees of either the State Board or County Boards of Social Welfare.

Mrs. Irene Smith, Chairman, State Board of Social Welfare: Reference is made to communication from the State Board of Social Welfare, dated July 17, 1958, which reads in pertinent part, as follows:

"Under the merit system, there are two types of salary increments, one by adjusting the range of the classification in which our regulations specify that the person moves to the same step in the new range that they held in the old range. When this type of salary action occurs, the State Board has complied with merit system regulations by moving all individuals to their proper classification and they have not asked for approval of County Boards of Social Welfare. They have followed this course since it is necessary for merit system employees to work within the range of their classification and were they not to move them to the corresponding step, many times the person would be working at a salary falling below the range of the new classification.

"The second type of increment is salary advancement which means moving from the initial step in a salary range to the maximum which under our regulations may occur step by step at six-month intervals. We have followed the practice in the past of having the County Boards of Social Welfare recommend this type of salary action. We have a few isolated instances wherein the County Boards of Social Welfare have refused advancements for employees doing a satisfactory job within the range of their classification. This has resulted in the employee being penalized through no fault of their own. We are concerned because there are isolated cases where employees doing satisfactory work or better work year after year still are not at the maximum.

"Would the State Board of Social Welfare be acting within their authority if they granted the salary advancement or step raises to these employees without the County Board of Social Welfare also recommending the salary advancement?"

In answering your question, the particular statutes with which we are primarily concerned are the following:

Section 234.6 Powers and duties of the state board.

The state board shall be vested with the authority to administer old age assistance, aid to the blind, aid to dependent children, child welfare, and emergency relief, and any other form of public welfare assistance that may hereafter be placed under its administration. It shall perform such duties, formulate and make such rules and regulations as may be necessary; shall outline such policies, dictate such procedure and delegate

such powers as may be necessary for competent and efficient administration. It shall have power to abolish, alter, consolidate or establish divisions and may abolish or change offices created in connection therewith. *It may employ necessary personnel and fix their compensation.* It may allocate or reallocate functions and duties among any divisions now existing or hereafter established by the state board. It may promulgate rules and regulations relating to the employment of investigators and the allocation of their functions and duties among the various divisions as competent and efficient administration may require.

The state board shall:

1. Within ninety days after the close of each fiscal year, prepare and print for said year a report to the governor, which shall include a full account of the operation of the acts under its control, adequate and complete statistical reports by counties and for the state as a whole concerning all payments made under its administration, and such other information as it may deem advisable, or which may be requested by the governor or by the general assembly.

2. Co-operate with the federal social security board created by title VII of the social security act, 42 U.S.C. 901, enacted by the 74th Congress of the United States and approved August 14, 1935, or other agency of the federal government for public welfare assistance, in such reasonable manner as may be necessary to qualify for federal aid, including the making of such reports in such form and containing such information as the federal social security board, from time to time, may require, and to comply with such regulations as such federal social security board, from time to time, may find necessary to assure the correctness and verification of such reports.

3. *Exercise general supervision over the county boards of social welfare and their employees.*

4. Furnish information to acquaint the public generally with the operation of the acts under the jurisdiction of the state board.

5. With the approval of the governor and comptroller, set up from the funds under their control and management an administrative fund and from said administrative fund to pay the expenses of operating the state department.

Section 234.12 County board employees.

The county board shall employ a county director and such other personnel as is necessary for the performance of its duties. The number of employees shall be subject to the approval of the state board. The county director and all employees shall be selected solely on the basis of the fitness for the work to be performed, with due regard to experience and training, but graduation from college shall not be made a prerequisite of any such appointment. It shall be a prerequisite to obtaining an appointment that the applicant shall have been a legal resident of Iowa for at least two years prior to the time of making said application.

Any appointment made by the county board, *other than clerical or stenographic help,* shall be *subject to review* by the state board in this respect, that if any appointee is not properly carrying out the duties for which he is appointed, or if any appointee is not qualified or capable of handling the duties for which he is appointed, and the state board so finds, it shall certify a copy of such finding to the county board and the *county board shall then discharge the said employee and shall fill the vacancy.*

Section 234.13 Compensation of county board employees.

The compensation of county board employees shall be fixed by the county board of social welfare and *shall be paid* by the *state board,* from funds made available for that purpose. However, the compensation of

all employees shall be subject to the approval of the state board and the county board of supervisors.

In addition thereto, reference is made to Iowa Departmental Rules, pp. 231 to 249 inclusive (Merit System) and for purposes of brevity, we will omit quotations therefrom.

At the inception of the social welfare program, Chapter 19 (S.F. 42) Laws of the 45th General Assembly, Ex. Session, a major portion of the powers of administration of the law was placed in county boards. See Chapter 266-f1, Code of 1935 (Old Age Assistance)

In order to qualify for federal funds, under the expanding social welfare program, the legislature enacted Chapter 151, (S.F. 373) Laws of the 47th General Assembly. (Social Welfare Act) By this law, a Department of Social Welfare was created to place in a single state agency the authority to supervise the administration of the plan for aid to the aged, blind, dependent children and child welfare and emergency relief.

In this cooperative effort, the intent of Congress and the legislature is expressed by the Court in the case of HJERLEID v. STATE, 229 Iowa 818, 1.c. 828, in the following language:

"The intent of congress and of the legislature was that, instead of administering relief locally as theretofore, there should be a single state agency for the administration of the plan for relief; and there can be no dispute that chapter 151 of the Acts of the Forty-seventh General Assembly was enacted for the purpose of obtaining the federal grant and was intended to conform to the general intent of the congress to make the administration of the various kinds of relief through a single state unit."

" * * *

"The board may not only outline the policies and dictate the procedure, but it may also delegate such powers as may be necessary for competent and efficient administration. We see nothing in the language of the section quoted which would indicate that the State Board is in any way merely a supervisory board. With power vested in such board, it is reasonable to think that it is in control of the administration of the various forms of relief. That it was the intent of the legislature to take away the powers previously granted to the County Board and vest them in the State Board is shown further by various changes made by amendment to the law as it formerly appeared in the 1935 Code."

This brings us up to the question of whether or not the State Board has the authority to grant salary advancement or step raises to employees of the County Boards.

In the Hjerleid case, the Court held that such employees are employees of the State and not of the County. We quote the language of the Court in said case at page 829:

"Considering, therefore, the limitation of the powers of the County Board by subsequent amendment and the transfer of these powers to the State Board, *it is clear that the use of the word 'employee' in one section of the act, when limited and defined by subsequent provisions, did not, merely by such designation, make the investigator a county employee.*

"*As to the right to employ, the county is limited by the approval of the State Board and has no independent authority.* It can engage no more employees than the State Board permits and its employees are subject to review by the State Board. *So far as employment is concerned, the in-*

tent of the statute appears to be that the county, while it may formally name the employee, yet it does so for the State Board and as agent of such board.

*" * * * Under such statute, the County Board has not an independent right of appointment, but the appointees named by the County Board as a matter of convenience, may be only such as are authorized by the State Board, and subject to its right to pass upon the qualifications of any appointee. In other words, through the agency of the county officials the appointment is made, but it is controlled by the other provisions of the act."*

We now call attention to the provisions of the merit system as promulgated by the Merit System Council, I.D.R. pp. 231 to 249, inclusive, under the state law and in cooperation with the federal law, the Social Security Act.

Under the Merit System, rules and regulations are laid down for examinations to qualify for appointment to various positions in the state departments participating therein. Provision is made for classification of employees; a comprehensive compensation plan, under which three steps in pay are provided, viz, initial, intervening and maximum rates in each job classification. Also for salary advancements, within the salary range, without change of duty, and schedules of salaries.

Section 234.13 provides that the compensation of county board employees shall be fixed by the county board and shall be paid by the state board from funds made available for that purpose. In regard to this provision of the law, the Supreme Court in the Hjerleid case, at page 830, had this to say:

"It is not disputed by appellees that under the terms of the statute the compensation of the employee is paid by the State. While it is fixed by the County Board of Social Welfare, it cannot be so fixed except with the approval of the State Board and the County Board of Supervisors; and the actual payment is made by the State. This is not a mere right of review, but there is vested in the State Board the right to regulate the payment, and the payment is by the State."

The Court then went on to say on page 832:

"In addition to these expressions of the legislative intent, the various enactments throughout indicate that the State Board is the responsible authority for the administration and that in the administering of the welfare acts the county acts as agent of the state department. It is unnecessary to review all of these provisions, some of which have been pointed out before.

"Our conclusion must be that the actual authority is vested in the State Board, and that it must necessarily act through the various agencies enumerated in the statutes."

Therefore, as to all county welfare employees under the Merit System, and under the rationale of the Hjerleid case, even though Section 234.13 states that the compensation of county board employees shall be fixed by the county board, the county board as agents of the state department, must follow the orders and directives of the state board as promulgated in the Merit System rules. To hold otherwise would be tantamount to placing the servant in the shoes of the master. And this is precisely what occurs in those instances where the County Boards of Social Welfare

have refused advancements for employees doing a satisfactory job within the range of their classification.

The Supreme Court in the Hjerleid case also stated at page 827:

"We are inclined to the view that the authority of the State Board was not supervisory merely, but executive in its character, and an examination of the statutes so indicates."

In answer to your question, we are of the opinion that the State Board of Social Welfare would be acting within its express authority laid down by the statutes to regulate the payment of the compensation to such employees of the County Board. This authority could be exercised by proper rules and regulations if not already provided.

24.7 January 16, 1958

EMPLOYMENT SECURITY COMMISSION — ACTUARIAL INVESTIGATIONS — There is no specific provision in Chapter 135, Acts of the Fifty-seventh General Assembly, relative to employing an actuary or conducting an actuarial investigation. Thus, the legislature did not intend to make such provision and the Employment Security Commission cannot therefore pay the cost of an actuarial investigation from the $250,000 appropriation.

Mr. Don G. Allen, Chief, Legal Services Division, Iowa Employment Security Commission: In your letter of December 20, 1957, the following question was, in substance, presented:

May the Employment Security Commission use $500 of the $250,000 appropriation authorized in Chapter 135, Laws of the Fifty-seventh General Assembly, for the purpose of conducting an actuarial study to present an accurate picture to the Legislature, in view of the fact that the existing appropriation is insufficient to meet the benefit claims anticipated?

The appropriation set forth in Section 2, Chapter 135, Laws of the Fifty-seventh General Assembly, is as follows:

"Sec. 2. There is hereby appropriated from the general fund of the state of Iowa to the employment security commission an amount not to exceed two hundred fifty thousand dollars ($250,000.00), *or so much thereof as may be necessary to carry out the provisions of this Act.*" (Emphasis supplied)

To answer your question, it is necessary to review other pension or retirement systems.

Chapter 97A, Code of 1954, established the Public Safety Peace Officers' Retirement System. Specially, Section 97A.5, subsection 11, Code of 1954, provides for the State Commissioner of Insurance to make an actuarial investigation every two years.

With regard to the Iowa Public Employees' Retirement System, Section 97B.3, Code of 1954, authorizes the Iowa Employment Security Commission to adminster the system. Under Sections 97B.5 and 97B.59, Code of

1954, the Commission is authorized to appoint and fix the compensation of an actuary. Section 97B.60, Code of 1954, states that once every two years the Commission shall cause an actuarial investigation to be made so that the Commission can report its findings and recommendations to the General Assembly.

Similar provisions, under Chapter 411, Code of 1954, have been established as to actuarial employees, duties of an actuary, and actuarial investigations every two years relative to retirement systems for policemen and firemen.

In the case of each of the above reviewed pension or retirement systems, specific provisions have been enacted as to employment of actuarial advisers and conducting actuarial investigations. The Teachers' Retirement Allowance System has no provision dealing with either employment of actuaries or conducting actuarial investigations. Therefore, it is reasoned that the Legislature had no intention to make such provision. Had it so intended, a specific provision therefor would have been enacted. To alter, amend or add to the words of a statute under the guise of interpretation is not statutory construction but legislation. *Hindman v. Reaser*, 246 Iowa 1375, 72 N.W. 2d 559; *Eittreim v. State Beer Permit Board*, 243 Iowa 1148, 53 N.W. 2d 893.

Therefore, you are advised that, there being no specific provision for an actuarial investigation or employment of actuarial advisers, the cost of an actuarial study cannot be paid out of the $250,000 appropriation established by Chapter 135, Laws of the Fifty-seventh General Assembly.

24.8 **May 22, 1957**

The board of supervisors has authority to cancel or remit taxes on the property of a deceased aged person on application of such aged person's administrator.

Mr. James D. McKeon, Assistant County Attorney: This will acknowledge receipt of your letter of May 16 wherein you pose the following question:

"Can real property taxes be compromised, cancelled or remitted where the real property, after death in probate, is sold for less cash receipt than necessary to retire the already suspended tax and the cost of administration of the estate?

"In connection with this problem, is the additional and included question:

"Can the administrator or the executor of the estate under Section 427.10 of the 1954 Code of Iowa, petition the Board for a remission as specified in line 9 thereof:

'his polls or estate or both even though taxes have previously been suspended as provided . . . . '"

It is our opinion that the proper interpretation of Section 427.10 of the Code is that set forth in 1942 Report of Attorney General, p. 158, and not that set forth in 1944 Report of Attorney General, p. 82.

Section 427.10, Code of 1954, reads as follows:

"The board of supervisors may, if in their judgment it is for the best interests of the public and the petitioner referred to in section 427.8, or the public and the aged person referred to in section 427.9, cancel and remit the taxes assessed against the petitioner referred to in section 427.8, or the aged person referred to in section 427.9, his polls or estate or both, even though said taxes have previously been suspended as provided in sections 427.8 and 427.9."

You have noted that there is reference in that section to taxes assessed against the estate of a decedent and to a combination of those assessed against the estate and the deceased petitioner. It was clearly and obviously the intent of the legislature to permit boards of supervisors in their sound discretion to cancel and remit the taxes assessed against the property for any year or any number of years when such taxes have been previously suspended under the provisions of Sections 427.8 or 427.9. Since the real property in the question posed is to be sold for the purpose of paying debts and expenses of administration, it is apparent that the executor or administrator has such charge of such property as would make him the proper person to petition the board of supervisors for remission or cancellation of the suspended taxes in this case. The public purpose to be served in such event would be that of fostering the return of such property to effective taxability. The opinion appearing in 1944 Report of Attorney General, p. 82, which holds that a board of supervisors has no authority to cancel or remit taxes on the property of a deceased aged person on application of such aged person's administrator, takes an unnecessarily legalistic view of Section 427.10 and is hereby overruled.

24.9

Aid to Dependent Children — Cooperation required of applicants. Discussion of necessity for referral to county attorney. (Bianco to Walsh, Pottawattamie Co. Atty., 2/20/58) #58-2-17

24.10

County Board of Social Welfare — County auditor as member of Board — (Strauss to Akers, Auditor of State, 3/4/57) #57-3-5

A county auditor may not be a member of the county board of social welfare. Section 234.9, Code 1954, construed.

24.11

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24.12

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24.13

Custodial Homes — Social Welfare — Under the provisions of Chap. 93, 57th G. A., the county board acts as a fact finding body in the inspection

of "custodial homes" with ultimate decisions as to licensure remaining in the State Department of Health. (Bianco to Carris, Dir. Stds. and Proc., State Welfare Dept., 2/4/58) #58-2-5

24.14

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24.15

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24.16

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24.17

Legal Settlement — Separate maintenance not "divorce" for purposes of change in settlement. (Abels to Morrow, Allamakee Co. Atty., 11/19/57) #57-11-21

24.18

Legal Settlement — Married Women — Minors — Settlement of married women — Settlement of minor when parents acquire settlement during time of his incarceration in state institution. (Abels to Parsons, Dep. Clerk, Bd. of Control, 5/22/57) #57-5-31

(1) A woman having a legal settlement in a county in Iowa does not lose such settlement by marriage to a man having no legal settlement in Iowa. (2) A married woman having a legal settlement in and residing in a county in Iowa does not lose such settlement by reason of her husband's loss of his settlement. (3) Acquisition of settlement, by the parents of a minor confined in a state institution, subsequent to the date of confinement of such minor, confers no settlement upon the minor during his confinement, nor can he derive settlement from his parents upon release subsequent to reaching his majority.

24.19

Legal Settlement — Contest between counties — Determination of settlement of poor person — Refusal to accept notice of relief granted to poor person. (Strauss to Skiver, Osceola Co. Atty., 5/8/57) #57-5-8

§252.22, Code 1954, does not vest a county auditor with the authority to determine the settlement of a poor person. A notice of relief granted to a poor person given by mail as provided by said code section is not "service", and a refusal to accept such notice is not a refusal of service. If legal settlement is disputed, auditor of second county should have so

advised, but having failed to do so, first county should treat settlement as being in dispute and proceed under provisions of §252.23, Code 1954.

24.20

Legal Settlement — Payment of a single medical claim by one county as affecting acquisition of settlement in another county. (Strauss to Hoover, Clay Co. Atty., 5/8/57) #57-5-7

The payment of an isolated $4.00 medical bill by one county while the beneficiary of such payment is living in another county does not bar the establishment of either a residence or settlement in the second county by such beneficiary.

24.21

Mental Age — is not a statutory test for determining legal settlement. (Abels to Morrow, Allamakee Co. Atty., 4/23/58) #58-4-25

24.22

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24.23

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24.24

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