State of Iowa
1940

TWENTY-THIRD BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

FOR THE

BIENNIAL PERIOD ENDING DECEMBER 31, 1940

JOHN M. RANKIN
Attorney General

Published by
THE STATE OF IOWA
Des Moines

ATTORNEY GENERAL'S DEPARTMENT

FRED D. EVERETT, Albia, Iowa* ..... Attorney General
JOHN M. RANKIN, Keokuk** ..... Attorney General
J. C. EICHHORN, Oskaloosa .... First Assistant Attorney General
JENS GROTHE, Charles City ..... Assistant Attorney General
FLOYD PHILBRICK, Cedar Rapids .... Assistant Attorney General
HORACE E. PIKE, Waterloo ..... Assistant Attorney General
JOHN E. MULRONEY, Fort Dodge .....
..Special Assistant Attorney General—State Tax Commission
G. H. CLARK, JR., Ida Grove..Special Assistant Attorney General
—State Highway Commission
DONE HISE, Des Moines ....Special Assistant Attorney General
—State Board of Social Welfare
NELLIE FISH, Waterloo .....Secretary to Attorney General
BERNICE PETERSON, Albia .....Secretary
WINIFRED FOLEY, Anamosa .....Secretary
MARY UTTERBACK, Des Moines .....Secretary
FREDA BLACKWOOD, Newton .....Secretary

*Died June 10, 1940
**Appointed June 17, 1940

"*Duties.* The printing board shall:
"1. Let contracts, except as provided in section 205, for all printing for all state offices, departments, boards, and commissions when the cost of such printing is payable out of any taxes, fees, licenses, or funds collected for state purposes.
"2. Direct the manner, form, style, and quantity of all public printing when such matters are not otherwise expressly prescribed by law."

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

It will be noted, however, that to the State Printing Board is delegated the sole authority to provide all printing and to let proper contracts therefor, and it is consequently the duty of the State Printing Board to provide for the printing and purchase of such certificates inasmuch as Section 194 specifically excepts printing from the administrative duties of the commissioner of motor vehicles.

From a review of the statutes, it would appear that it is the duty of the commissioner of motor vehicles to prescribe the form of the certificate and to submit such form to the State Printing Board and there the duty of the commissioner of motor vehicles ceases; and it is thereafter for the State Printing Board to provide such certificates in accordance with the form prescribed by the commissioner of motor vehicles in accordance with law.

It is, therefore, our opinion that it is the duty of the commissioner of motor vehicles to prescribe the form, which includes the determining and selecting of the kind of certificate to be issued, but because of the exception as to printing such certificates shall be provided by the State Printing Board in accordance with Chapter 14 of the 1935 Code of Iowa.

WEED COMMISSIONER: TOWNSHIP TRUSTEE: BOARD OF SUPERVISORS. Board of supervisors may appoint a township trustee as weed commissioner in any township in which such person is not a township trustee.

April 3, 1939. *Mr. Edward C. Schroeder, County Attorney, Boone, Iowa:* Received your letter of April 1, 1939, wherein you ask our opinion relative to the right of the board of supervisors to appoint a township trustee as weed commissioner in a township of which he is not township trustee.

We are of the opinion that such appointment would be legal and proper.

Section 4819, Chapter 131, Acts of the 47th General Assembly, provides:

"The board of supervisors of each county shall appoint either a county weed commissioner or one township weed commissioner for each township whose term of office shall not exceed one year * * *."

In considering this question it is necessary, as we view it, to analyze two legal propositions:

Does the appointment in question violate the provisions of Section 13327, Code of Iowa, 1935, which reads as follows:

"Members of boards of supervisors and township trustees shall not buy from, sell to, or in any manner become parties, directly or indirectly, to any contract to furnish supplies, material or labor to the county or township in which they are respectively members of such board of supervisors or township trustees."

As we view it, such appointment would not be contrary to the provisions of this section. The board of township trustees, of which the trustee proposed to be appointed is a member, does not hire the weed commissioner. This is done by the board of supervisors. The prohibition in section 13327 relates to "furnish labor to the county or township in which they are respectively members of such board of supervisors or township trustees." Clearly then, the proposed appointment being made by the board of supervisors and not by the township trustees, it would not be violative of the provisions of the section last above quoted.

The other legal principle which must be considered is whether the office of township weed commissioner is incompatible with that of township trustee.

Many cases lay down the rule that in case of incompatibility of office, the incumbent is presumed to have resigned the office first held and becomes exclusively the incumbent of the office to which he was last elected or appointed. See *State vs. Anderson*, 155 Iowa 271. This, of course, would not prevent the appointment of a township trustee as weed commissioner even though the two offices would be incompatible, but it would operate to create a vacancy in the office of township trustee and we, therefore, call this principle of the law to your attention. However, we are of the opinion that the office of township trustee and weed commissioner are not incompatible.

"Incompatibility between offices depends upon whether one is subordinate to the other and whether the duties of the two are inherently inconsistent with regard to the public interests."

This was the definition adopted in the *Anderson case, supra*, for incompatibility.

Under this definition we are clearly of the opinion that there is no incompatibility between the office of township trustee in one township and weed commissioner in another. In this connection we might add that we feel the situation would be reversed were the board to appoint a township trustee weed commissioner in the township of which he is trustee.

We reach the conclusion therefore that the board of supervisors may appoint a township trustee as weed commissioner in any township in which such person is not a township trustee.

COUNTY ATTORNEY: CITY ATTORNEY: When city attorney is elected county attorney there is a vacancy in office of city attorney. If county attorney performs the services usually performed by city attorney he is entitled to compensation upon a quantum meruit basis.

April 4, 1939. *Mr. George Wright, County Attorney, Eagle Grove, Iowa:* Received your letter of the 30th ult., wherein you ask our opinion on the following proposition:

"Would the fact that one person was appointed by the city council as city attorney about April 1, 1939, for a two-year term, and thereafter was elected county attorney, qualified, and began acting as county attorney about January 3, 1939, cause a vacancy as city attorney?

"If the foregoing question is answered in the affirmative, and after January 3, 1939, the same person continued in good faith to perform the duties which he had theretofore performed as city attorney, which duties were in nowise in conflict with his duties as county attorney, would he be entitled to compensation on a quantum meruit basis?"

Answering your first inquiry, we are of the opinion that when a city at-

torney is elected county attorney a vacancy occurs in the office of city attorney, as the duties of the two offices are incompatible.

As to your second inquiry, it is our opinion that if the county attorney performs the services usually performed by the city attorney, he is entitled to compensation therefor upon a quantum meruit basis, if such services are performed pursuant to an express or implied contract.

HIGHWAY COMMISSION: ROAD IMPROVEMENTS: EXPENSE OF MAINTENANCE: It is mandatory on the board of supervisors to grade, drain, bridge, gravel or maintain any road or street which is a continuation of the county trunk system or a continuation of a local county road, etc. Criterion set up as to maintenance, by county, of secondary roads in cities and towns.

Ames, Iowa, April 4, 1939. *Reid L. Hunt, County Attorney, Tipton, Iowa:* This will acknowledge receipt of your request for an opinion on the following questions:

"In our county there are no cases in which continuation of county trunk roads or county local roads in towns and cities have been formally designated as a part of the secondary road system of our county. There are instances where certain roads within cities and towns have been in the past surfaced and maintained by the county. For example, in the town of Tipton a street running north and south of the west part of town, the last street on the west, in fact, was some seven to eight years ago surfaced with rock, and this road has subsequently been maintained by the county inasmuch as they travel this street going to and from the county garage.

"1. Is the grading, draining, bridging, graveling or maintenance of the road through cities and towns discretionary with the board of supervisors where such roads have not been designated as included in the secondary road system?

"2. Can a road heretofore maintained by the county in a city or town, but not a part of the secondary road system, and particularly a trunk road, be improved or repaired at county expense without the adoption of such road as a county trunk road with approval of the highway commission?"

Answering your first question, Section 4644-c47 of the Code of 1935 provides as follows:

"4644-c47. County trunk roads in cities and towns. The board of supervisors may, subject to the approval of the council of any city or town, purchase or condemn right of way therefor or eliminate danger at railroad crossings, and shall grade, drain, bridge, gravel or maintain any road or street which is a continuation of the county trunk highway system, or a continuation of a county local road which is built to grade and surfaced or about to be built to grade and surfaced, and which is (1) within, or partly within and located along the corporate limits of, any town, or (2) within or partly within and located along the corporate limits of, any city, including cities under special charter, having a population of less than twenty-five hundred, or (3) within that part of any city, including cities acting under special charter where the houses or business houses average not less than two hundred feet apart. The location of such extensions shall be determined by the board of supervisors. The council's approval shall extend only to the consideration of such improvements in their relationship to municipal improvements such as sewers, water lines, change of established street grades, sidewalks or other municipal improvements."

A previous attorney general on January 22, 1930, rendered the following opinion with respect to the section quoted.

"We are of the opinion that under said section it is mandatory on the board of supervisors to grade, drain, bridge, gravel or maintain any road or street which is a continuation of the county trunk system or a continuation of a

local county road which is built to grade and surface, or about to be built to grade and surface and which is within one of the three classes designated in said Sec. 48."

(Sec. 4644-c47, Code of 1935, appeared as Sec. 48 of Chap. 20, Acts of the 43rd General Assembly.)

This opinion conforms to our views in the matter. The sentence, "The location of such extension shall be determined by the board of supervisors," has reference only to "where" rather than "when" the extension shall be located.

Answering your second question, by the express provision of Section 4644-c2 highways within cities and towns are not a part of the secondary road system; however, although technically not a part of the secondary system it becomes necessary to incorporate plans for *construction* work, on such extensions, in the construction program submitted to the Highway Commission for approval under the provisions of Section 4644-c24; this view of the matter is necessary since the legislature has made it mandatory that such extensions be improved, requiring that payment therefor be made from funds pledged to construction by the provisions of Section 4644-c9 and Section 4644-c10 of the Code. Improvement classified as *maintenance* however, is payable from the maintenance fund and does not necessitate the approval of the Highway Commission unless it falls within the provisions of Section 4672 of the Code relating to contracts exceeding $2,000.00 in cost of any *one* bridge or culvert.

Whether or not previous expenditures by the county for construction or maintenance of streets or portions thereof in cities and towns accomplishes a "location" of extensions of the secondary road system in such cities and towns, and thus obligates the county to continue its expenditures thereon, is a factual question upon which we do not venture an opinion. There might be some force to the contention if such road or street is a continuation of an improved road of the secondary system.

We trust this answers your questions, and are returning herewith copy of an opinion which you enclosed with your letter.

MOTOR VEHICLE COMMISSIONER: CERTIFICATE HOLDERS: It is within the discretion of the commissioner of motor vehicles to determine and select the kind of certificate holders to be issued by the State of Iowa, such holders to be purchased by contract upon competitive bidding as required by Section 194, always providing, however, that a contract for such purpose, should it be for one hundred dollars ($100.00) or more, may not be executed without the approval of the Executive Council.

April 5, 1939. *Mr. Earl Miller, Secretary of State:* Your letter of April 4, 1939, asking our opinion as to the following matter, has come to the writer for attention.

"I would like to be advised especially as to whether or not it shall be left to the discretion of the commissioner of motor vehicles to select the kind of certificate holders as in section 203 of the Acts of the 47th General Assembly, to be furnished by the State of Iowa and also as to whom shall have the authority to designate where the same shall be purchased."

For the purpose of this opinion, we quote from Chapter 134 of the Acts of the 47th General Assembly:

"Sec. 16. *Powers and Duties of Commissioner.* Subject to the approval of the secretary of state, the commissioner is hereby vested with the power and is charged with the duty of observing, administering, and enforcing the provisions of this chapter and of all laws regulating the operation of vehicles or

the use of the highways the enforcement or administration of which is now or hereafter vested in the department. For the purposes of this chapter he shall be deemed a peace officer.

"Sec. 63. *Registration Card Signed, Carried, and Exhibited.* Every owner upon receipt of a registration card shall write his signature thereon with pen and ink in the space provided. Every such registration card shall at all times be carried in the vehicle to which it refers and shall be displayed in the container furnished by the department. Such certificate container shall be attached to the vehicle in the driver's compartment so that same may be plainly seen without entering the car.

"Sec. 194. *Contracts for Plates.* The commissioner shall, subject to the approval of the executive council, purchase all number plates, containers, and other supplies required by this chapter, except printing and except expenditures of less than one hundred (100) dollars, after receiving competitive bids under open specifications. The bidders shall be required to furnish samples of such supplies and in awarding the contract the commissioner may consider the quality and suitability of the samples submitted as well as the price quoted. A record of all bids submitted shall be kept and the samples submitted shall be preserved until the next subsequent letting.

"Sec. 203. *Certificate Containers.* The commissioner shall approve devices for holding and displaying the certificates of registration, and may require such devices so to receive and hold such certificates that when the certificate is removed from the holder the certificate will be destroyed or mutilated so it cannot be used on other vehicles.

It is to be observed that the enforcement of the Motor Vehicle Law is placed with the commissioner of motor vehicles. In order that such law might properly be administered, certain directory statutes relating to such administration were included in the law. Section 203 is of such a nature.

This statute contemplates that certain devices must be approved for the purpose of holding and displaying the certificate of registration. It is mandatory upon the commissioner to make such approval and because of the general duties imposed by the chapter, and more particularly by this statute, the duty of such approval is solely his. Upon him rests the responsibility and with him is the complete discretion as to approval.

Nevertheless, it is to be observed that a contract for the purchase of such containers may not be let without the consent and approval of the Executive Council. It is clear that though the legislature has delegated broad administrative and discretionary powers to the commissioner of motor vehicles, it did on the other hand prohibit him from making purchases or entering into contracts for purchase to the extent of one hundred dollars ($100.00) or more without first obtaining the consent and approval of the Executive Council.

It is manifest that the legislature intended the duties of the commissioner of motor vehicles to be purely administrative in nature and therefore it vested in him the direction and discretion as to such administration but thereafter his duties are qualified and the legislature prohibited to and excepted from him the entry into contracts which would require an expenditure of one hundred dollars ($100.00) or more unless the Executive Council should first grant its approval.

We are, therefore, of the opinion that it is within the discretion of the commissioner of motor vehicles to determine and select the kind of certificate holders to be issued by the State of Iowa, such holders to be purchased by contract upon competitive bidding as required by Section 194, always providing, however, that a contract for such purpose, should it be for one hun-

dred dollars ($100.00) or more, may not be executed without the approval of the Executive Council.

PUBLIC OFFICES: JUSTICE OF PEACE: TOWNSHIP CLERK: Any one person, for the reason that it is against public policy, may not at the same time hold the office of justice of the peace and township clerk.

April 5, 1939. *Senator O. H. Henningsen, Savery Hotel, Des Moines, Iowa:* Your request for an opinion as to the following matter, has come to the writer for attention.

May one person hold both the office of justice of the peace and township clerk at the same time?

It is elementary that no one person may hold two offices of public trust at the same time and more especially is this true when such offices are incompatible with each other. In many instances the common law rule is recognized by statute and certain public officers are expressly prohibited from holding public office other than the one with which they are invested. Public policy requires that integrity of office must be preserved and this is the reason for the general rule.

It is to be conceived that while occupying the office of township clerk, a justice of the peace might, and in many instances could, so abort his office as such justice as to work injustice and fraud upon one and in favor of the other and the converse is easily as true. Each office and the duties, obligations and trusts of each could be brought to work such a benefit in favor of the other as to be entirely unconscionable. Such contemplated acts would seriously breach the integrity of the office and the public for whose benefit the office was created and the duties imposed would suffer accordingly. It is clearly to be seen that the nature of the two offices, together with the duties and obligations as required by statute are incompatible each with the other.

It is, therefore, our opinion that one person, for the reason that it is against public policy, may not at the same time hold the office of justice of the peace and township clerk.

HIGHWAY COMMISSION: SPECIAL MOBILE EQUIPMENT: REGISTRATION FEE: An opinion defining "special mobile equipment" and the registration fee therefor.

Ames, Iowa, April 5, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: W. H. Root:* This will acknowledge receipt of your request for opinion covering a list of questions involving interpretation of provisions of the Motor Vehicle Act. The questions submitted are the outgrowth of a conference held on March 23, 1939, between representatives of the Highway Commission, the Motor Vehicle Department, Contractors' Association and the Attorney General's office, and are stated as follows:

"A. A contractor owns a truck and trailer or semi-trailer. This truck is never used in any capacity except to pull this trailer or semi-trailer from one job to another or from one point in the gravel pit or stone quarry to another point in the same pit or quarry. The trailer or semi-trailer is used for hauling equipment such as gravel plant, dragline or tractor which is also owned by the contractor.

"Question 1. Is this truck 'special mobile equipment'?

"Question 2. If it is ruled that this truck is not 'special mobile equipment' what should be the registration fee for such truck?

"Question 3. Is this trailer or semi-trailer 'special mobile equipment'?
"Question 4. If it is ruled that this trailer is not 'special mobile equipment' what would be the registration fee thereon?
"B. Same conditions as A except that in addition to pulling the trailer or semi-trailer in question the truck is also used for pulling a second trailer or semi-trailer. This necessitates the truck occasionally traveling from one job to another without a trailer or semi-trailer.
"Question 5. Is this truck 'special mobile equipment'?
"Question 6. If it is ruled that this truck is not 'special mobile equipment,' how much should the registration fee be?
"C. A contractor owns a truck upon which he loads a tractor or other piece of equipment which he also owns and this equipment is transported thus from one job to another. The truck is never used for any other purpose.
"Question 7. Is this truck 'special mobile equipment'?
"Question 8. If it is ruled that this truck is not 'special mobile equipment,' what should the registration fee be?"

Section 49 of Chapter 134 of the Acts of the 47th General Assembly provides as follows:

"Section 49. Vehicles subject to registration—exception. Every motor vehicle, trailer, and semi-trailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter except: * * *
"4. Any special mobile equipment as herein defined."

Section 1, paragraphs 4, 5, 7 and 15 of the Act define the terms "motor truck," "truck tractor," "road tractor" and "special mobile equipment," respectively, as follows:

"Section 1. * * *
"4. *Motor truck* means every motor vehicle designed primarily for carrying livestock, merchandise, freight of any kind, or over seven persons as passengers.
"5. *Truck tractor* means 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. * * *
"7. *Road tractor* means every motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon either independently or any part of the weight of a vehicle or load so drawn. * * *
"15. *Special mobile equipment* means every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including road construction of maintenance machinery, ditch-digging apparatus and well-boring apparatus. The foregoing enumeration shall be deemed partial and shall not operate to exclude other such vehicles which are within the general terms of this paragraph."

Your questions all more or less involve an interpretation of the definition last above quoted. Our task is somewhat simplified by the decision in *State vs. Griswold*, (Ia.) 280 N. W. 489, portions of the opinion of which are set forth as follows:

The dispute in that case concerns a vehicle known as a "feed grinder" consisting of a grinding mill weighing 1,800 pounds and a motor weighing 2,250 pounds, all affixed permanently by means of bolts, to the chassis of what had been a Ford truck.

"There was apparently no unoccupied portion of the chassis that was suitable for the transportation of property.
"The vehicle was not used for any purpose except that of operating the mill, nor for the transportation of passengers."

Quoting further the court says:

"The definition above quoted indicates that vehicles that are 'special mobile equipment' have two characteristics; first, they are not designed or used primarily for the transportation of persons or property; and second, they are incidentally operated or moved over the highways."

As to the first characteristics it was contended that the truck was originally designed for carrying property, that if the mill was just "set on" the vehicle and upon arriving at the job was removed, no one would contend that the vehicle was used for the transportation of property. On this assumption it was contended that the fact that the "mill and motor were mounted on the truck and bolted down" did not "change the picture." The court held, however, "that the picture to be envisioned from the definition is that of a vehicle that is specially equipped in such manner and with such permanency that the vehicle and the equipment is in reason to be looked upon as an integral whole. As the vehicle and the special equipment have been thus incorporated into one apparatus possessing the characteristics mentioned we have what the legislature means, that is, a special equipment that is mobile." "With respect to the second characteristic of special mobile equipment, i. e., that they are incidentally operated or moved over the highways, * * *" the court said, "it appears to us, however, that the legislature had in mind the thought of chance or of something undesigned or unintended when they used the word 'incidentally' in connection with such a subject matter as driving on the highway. It seems more reasonable to look upon this word 'incidentally' as characterizing the operation of a vehicle when the operating is something 'naturally happening or appertaining, especially as a subordinate or subsidiary feature.' * * * In saying 'incidentally operated' the legislature evidently had reference to such operation over the highways as naturally appertains to the use of the special mobile equipment."

It is well to note at this point that a consideration of each particular vehicle, with respect to its use, design and description, is ordinarily necessary in the final analysis for a determination of its eligibility for exemption from registration requirements. Without such descriptive information the opinion of this department must be general in character and of value only as a measuring stick in the interpretation of the provisions of the act.

With respect to your first question, situation "A" specifies the vehicle or vehicles as a "truck and trailer or semi-trailer." Obviously the mere fact that it may travel but a few miles in any given year does not alone exempt it from registration and license requirements. Obviously also, the fact that the truck may have been converted, in a substantially permanent manner, into a truck-tractor or road-tractor does not alone exempt it as special mobile equipment since such units are specifically provided for by Section 153 of the Act.

As defined in Section 1 of the Act, and quoting from the Griswold case, "vehicles that are special mobile equipment have two characteristics; first, they are not designed or used primarily for the transportation of persons or property; and second, they are incidentally operated or moved over the highways."

The absence of either of these characteristics in our opinion is fatal to a claim of exemption. Where a truck, by removal of its box and otherwise altered, is, by way of illustration, substantially converted into a power unit and designed or used for moving trailers or semi-trailers over the highways from one job to another as well as from one point in a gravel pit or quarry to another, it is nevertheless subject to registration as a truck-tractor or road-tractor. The last sentence of the paragraph defining "special mobile

equipment" is of no aid to us in this instance because it can hardly be included in the same category with "construction or maintenance machinery, ditch digging apparatus, and well boring apparatus," dependent for its motive power on some other power unit. If the ditch digging apparatus were, for example, mounted on the chassis of the truck in a substantially permanent manner, then, in our opinion, it would come within the rule of the Griswold case.

The facts as stated in "A," preceding your first question, in our opinion, bring both the truck and tractor or semi-trailer within the classification of vehicles subject to registration. The trailer or semi-trailer is designed or used primarily for the transportation of property, a part of which transportation at least is along the highways, and it therefore cannot be classified as special mobile equipment.

Although these vehicles may make little use of the highways the legislature has not seen fit to graduate license fees in proportion to such use.

In answer to your second question, if the vehicle is designed or used as a "truck" or "motor truck," as defined by Section 1, the amount of the license fee is fixed by Sections 150 to 152, inclusive, of the Act. If designed or used as a truck-tractor or road-tractor the amount of the license fee is fixed by Section 153 of the Act.

The answer to question four is covered by the provisions of Section 154 of the Act.

Questions "5," "6," "7," "8" under situations "B" and "C" are covered in our answers to the questions under situation "A."

Under situation "B" the fact that the truck, truck-tractor or road-tractor is used to draw several trailers or semi-trailers does not exempt it from classification as a vehicle subject to registration, and we find no provision of the act which would justify the Motor Vehicle Department in fixing a license fee in an amount less than that provided for the load capacity of the largest trailer drawn.

Under situation "C" the truck is obviously "designed or used primarily for the transportation of * * * property" and the license fee required is covered by Sections 150 to 152, inclusive, of the Act.

We are unable to give definitions and provisions of the Act any other logical interpretation; in their general application they adequately cover the great majority of vehicles and situations with reasonable degree of certainty. Legislation of general application which covers a great many kinds and types of vehicles under varied conditions cannot always be accommodated to every exceptional situation, and where unwarranted hardship is apparent in a given case, we are not wholly without a remedy in view of the provisions of Sections 491 to 494, inclusive.

We trust the foregoing may be of some help in clearing up the controversial situations involved.

COUNTY SUPERINTENDENT: EXPENSES OUTSIDE COUNTY: ADDITIONAL COMPENSATION: Board of supervisors is without authority to make an allowance for any expense, travel or otherwise, for activities outside the county for county superintendents. County superintendent's salary is fixed for the term and the board is without any authority to increase the same during the term, under any pretext.

April 5, 1939. *Mr. D. W. Dickinson, County Attorney, Eldora, Iowa:* In your letter of April 4th, you say:

"The county superintendent of schools asked that I write you in regard to expense which he incurs, and whether the same can be paid under Section 5233 of the Code. It is necessary that he travel outside of the county at times in arranging the Tri-county Institute, which I understand has replaced the former County Institutes, and in doing so he has mileage which is not within the county, and the question is, can the board pay him mileage outside of the county, in view of the apparent restriction of the statute?

"He also desires to attend some state school activities at Sioux City, and the question again arises whether or not he is entitled to mileage outside of the county, and his thought is that the board can allow it as additional compensation as long as they do not consider the additional pay as expense, and it seems that he has information from other counties that this is being done."

Section 5233 of the 1935 Code of Iowa, provides:

"5233. Expenses of county superintendent. The county superintendent shall, on the first Monday of each month, file with the county auditor an itemized and verified statement of his actual and necessary expenses incurred during the previous month in the performance of his official duties within his county and such expenses shall be allowed by the county board of supervisors and paid out of the county fund, as other expenses of the county, but the total amount so paid in any one year for traveling expenses of the superintendent shall not exceed the sum of four hundred dollars, unless approved by the board of supervisors. In determining the actual and necessary expenses incurred under this section, mileage at the rate of five cents per mile for distance actually traveled may be included."

In our opinion the foregoing provision forbids any allowance by the board for any expense, travel or otherwise, for activities outside the county.

Section 5232 of the 1935 Code, provides:

"5232. County superintendent. Each county superintendent of schools shall receive an annual salary of not less than eighteen hundred dollars, and such additional compensation as may be allowed by the board of supervisors in each particular county, but in no case to exceed three thousand dollars."

The above Section has been interpreted by the supreme court in the case of

Kellogg vs. Story Co. Board of Supervisors, 219 Iowa 399.

in which the court said:

"The power obviously intended to be conferred by the legislature upon boards of supervisors is to, at any regular meeting of the board, fix the salary of the county superintendent and others, not that it may be fixed at the will of the board at any or at each successive regular meetings thereof. When once fixed for the term, the power of the board of supervisors was at an end. Holmes vs. Lucas Co., 53 Iowa 211; Goetzman vs. Whitaker, 81 Iowa 527. Having at a prior regular meeting of the board of supervisors fixed the salary of the appellee county superintendent at $2,100 per year, it could not at any subsequent or on successive regular meetings of such board, alter or change the salary thus fixed during the term of office for which appellee was elected. Such construction of the statute removes a doubt and uncertainty as to the salaries of officers referred to in the statute."

The law seems to be settled that after the county superintendent's salary is fixed for the term, that the board is without any authority to increase the same during the term, under any pretext.

SCHOOL DISTRICTS: ABANDONING SCHOOL BUILDINGS: The sale, lease or other disposition of any schoolhouse or site or other property belonging to the corporation must be by vote of the electors.

April 5, 1939. *Miss Jessie M. Parker, Superintendent of Public Instruction:* Replying to your request for an opinion on the following:

"Does the board of education of the Independent School District of Council Bluffs have authority to wreck and abandon school buildings without a vote of the people and pay for same from either the general or the schoolhouse fund?"

We desire to call your attention to Section 4217, paragraph 2, of the 1935 Code of Iowa, which reads as follows:

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

"Par. 2. Direct the sale, lease or other disposition of any schoolhouse or site or other property belonging to the corporation, and the application of the proceeds thereof."

The above quoted section plainly empowers the electors to direct the sale, lease or other disposition of any schoolhouse or site or other property belonging to the corporation, and compels us to arrive at no other conclusion than that the Independent School District of Council Bluffs is without authority to wreck and abandon the school building in controversy without a vote of the electors of that school district.

AUDITS: SCHOOL: CITY: The state auditor would be allowed to bring various school audits down to June 30, 1938, after the passage of Senate File No. 2, but thereafter the audits can be made by the state auditor's office only if the city or school district so elect and before making further audits an election in favor of the state auditor's office must be made.

April 6, 1939. *Honorable Chet B. Akers, Auditor of State. Attention: Mr. T. E. DeHart:* We have received your request for an opinion upon the following question:

"In view of the passage of Senate File No. 2 in regard to city and school audits as previously made by this office, will we be allowed to bring various school audits down to the date of June 30, 1938?"

We have examined Senate File No. 2 in regard to city and school audits, which we understand has now become a law by publication. This statute provides that the yearly audit to be made by cities and school districts may be made by the state auditor or by certified or registered public accountants, and the cities and school boards have the right to elect who shall make the audit.

Under this section we would be of the opinion that you would not be allowed to bring various school audits down to June 30, 1938, after the passage of this bill. The audits to be made after the passage of this bill can be made by the state auditor's office only if the city or school district so elect and before the state auditor's office makes any further audits of the affairs of a city or school district, an election in favor of the state auditor's office must be made.

LEASES: COUNTY LANDS: BOARD OF SUPERVISORS: The board of supervisors may enter into oil or gas leases on lands obtained by the county by foreclosure of school fund mortgages or by tax sales to the county.

April 6, 1939. *Mr. Grant L. Hayes, County Attorney, Mount Ayr, Iowa:* We have received your request for an opinion upon the following question:

Can a board of supervisors execute an oil or gas lease on lands obtained by the county at tax sale or by foreclosure of school fund mortgage, and in the latter instance can the lease extend beyond six years?

Clearly it is the intent of the law that lands obtained by foreclosure of school fund mortgages or by tax sales to the county, should be sold as soon

as possible in order to realize payment of the indebtedness or tax and in order that the land may again be placed in a taxable status. This does not mean, however, that the sale must be made immediately and during the period the land is held by the county the law sanctions the renting of the land.

Section 4483 of the 1935 Code places the management of school lands in the board of supervisors and Section 4509 provides for a county auditor's report as to rents received from school lands. Section 10260-g1 provides for the disposal of rents received from lands purchased by the county at tax sales.

In *Poweshiek County vs. Buttles, et al.*, 70 Iowa 246, it was held, in relation to school lands that the board could do "any acts which, in the exercise of the wisdom and care, men of affairs ordinarily bestow for the security and collection of debts, * * *."

The act of renting the land for oil or gas or other minerals would certainly be an act directed toward the objective of realizing a sum sufficient to pay the obligation of a tax or mortgage, and we are of the opinion that such an oil or gas lease would in either instance be within the powers of the board of supervisors.

The fact that under the law school lands must be sold within six years would be immaterial. This law presents no prohibition on the right to sell a portion of the land before the expiration of the six-year period and such a lease as herein contemplated amounts to a disposal of a part of the realty, or at least it could be interpreted as a contract where for a consideration the lessee might obtain a part of the realty. The lease could extend beyond the six-year period as the county would at the time of sale merely sell the remaining interest or the land subject to the lease.

SUPERVISOR STATE AUDITS: CERTIFIED PUBLIC ACCOUNTANT: A registered accountant who accepts the position of supervisor of state audits in the auditor's office would still retain his rights as a registered practitioner in this state, and such supervisor should be registered under the provisions of Section 1905-a8 of the Code of 1935 as a practitioner under that chapter.

April 6, 1939. *Honorable Chet B. Akers, Auditor of State. Attention: Mr. G. S. Worden:* You have requested an opinion from this office upon the following propositions:

1. Whether the acceptance of the position of supervisor of state audits disbars a certified public accountant from retaining his rights as a registered practitioner.
2. Whether a certified public accountant must qualify under Section 1905-c6 to be entitled to practice.

There is no doubt as to the answer to the first question, and the supervisor of audits, if he is a certified public accountant, certainly retains his rights as a registered practitioner. The State Accounting Division of the State Auditor's Office was organized to carry out the provisions of Chapter 5, Acts of the 45th General Assembly, and one of their duties was to audit the institutions formerly audited by expert firms of public accountants under Section 397-d1 of the 1931 Code. This same chapter provided that audit reports should, as nearly as possible, correspond and be prepared similar in form to the audit reports rendered by certified public accountants. It was only right that the auditor of state should secure the services of a certified public accountant and a duly registered practitioner to manage and supervise a staff of

accountants to carry out the provisions of Chapter 5, Acts of the 45th General Assembly, and we are of the opinion that such a registered accountant who accepts the position of supervisor of state audits in the auditor's office would still retain his rights as a registered practitioner in this state. The situation is not unlike the attorneys who accept positions in the attorney general's office as assistant attorneys general, and who by such acceptance would never be held to lose their rights as practicing attorneys.

The second question is not very clear, but we can state generally that we are of the opinion that the supervisor of state audits in the office of the auditor of state is engaged in the practice of accountancy within the meaning of that statute in that he is an office manager, and we believe that he should be registered under the provisions of Section 1905-c8, Code of 1935, as a practitioner under this Chapter.

SCHOOLS: PURCHASE OF TEACHERAGE OR HOME FOR SUPERINTENDENT: Board of directors of school district cannot purchase a house and lot of any value for the use of the superintendent of schools, unless by vote of the electors.

April 8, 1939. *Mr. Donald W. Harris, County Attorney, Bloomfield, Iowa:* We have your favor of April 6th in which you say:

"The Consolidated School District of Troy, of Davis County, Iowa, requests your opinion as to the authority of the board of directors to purchase a house and lot within the school district for the purpose of a teacherage or home for the superintendent of the school. They desire to purchase a house and lot not to exceed $2,000.00 in value and pay for the same from the general fund.

"By virtue of Section 4177 of the Code of Iowa, 1935, I have questioned their authority to proceed in this manner, hence the request for your opinion on this subject."

I beg to advise you that we agree with your interpretation of Section 4177 of the 1935 Code of Iowa, which reads as follows:

"4177. School buildings—tax levy—special fund. The board of each school corporation organized for the purpose of establishing a consolidated school shall provide a suitable building for such school in that district, and may at the regular or a special meeting call a special election to submit to the qualified electors of the district the question of voting a tax or authorizing the board to issue bonds, or both, for any or all of the following purposes:

"1. To secure a site, build or equip a schoolhouse.

"2. To build a superintendent's or teacher's house.

"3. To repair or improve any school building or grounds, when the cost will exceed two thousand dollars.

"All moneys received for such purposes shall be placed in the schoolhouse fund of said corporation and shall be used only for the purposes for which voted."

The authority given to the board of each school corporation is to do certain things in a certain specified manner, as outlined in the foregoing section. That is to say, they may, at a regular or special meeting, call a special election to submit to the qualified electors of the district the question of voting a tax or authorizing the board to issue bonds, or both, and the only thing the board may do without a vote of the electors is to repair or improve any school building or grounds when the cost will be $2,000.00 or less.

The closing sentence of the above quoted section, "All moneys received for such purposes shall be placed in the schoolhouse fund of said corporation and shall be used only for the purposes for which voted," certainly precludes

the board from purchasing a house and lot of any value for the use of the superintendent of schools, unless by vote of the electors.

INVESTMENTS: BUILDING AND LOAN ASSOCIATIONS: (Subsec. 2, Sec. 13, Senate File 147, 48th G. A.) Banking institutions and life insurance companies, together with the other institutions, organizations and officials as included in Subsection 2 of Section 13 of Senate File 147 of the Acts of the 48th General Assembly, may invest in the shares of savings and loan associations organized under the laws of this state and under the laws of the United States regardless of investments heretofore authorized for such institutions, corporations and officials by other statutes.

April 12, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: George E. Virden, Building and Loan Supervisor:* Your letter of April 8, 1939, asking our opinion upon the following matter, has come to the writer for attention:

"Does Subsection 2 of Section 13 of Senate File 147, as amended and adopted by the 48th General Assembly, authorize banking institutions, life insurance companies and other institutions, organizations and officials to invest in the shares of savings and loan associations organized under the laws of this state and under the laws of the United States regardless of investments heretofore authorized for such institutions, corporations and officials by other statutes?"

For the purpose of this opinion, Subsection 2 of Section 13 of Senate File 147 of the Acts of the 48th General Assembly is as follows:

"Administrators, executors, guardians, guardians of veterans, trustees, receivers and fiduciaries of all kinds, banking institutions, trust companies, life insurance companies, assessment life insurance associations, fraternal beneficiary societies, orders and associations, mutual benefit societies, mutual insurance companies, nonmutual and mutual life, fire, tornado, hail, windstorm and other assessment insurance associations, cooperative associations, credit unions, trustees of cemetery funds, financial institutions of every kind and character, public officials having the custody of public funds, political subdivisions of the state having control of sinking funds, teachers, firemen and other pension and retirement funds and eleemosynary institutions are authorized without any order of court to invest in the shares of savings and loan associations organized under the laws of this state and under the laws of the United States, subject to the limitations as to the amount of shares which may be issued to any one member."

Reviewing the above subsection, we find that the organizations in question may invest their funds in the shares of the savings and loan associations organized under the laws of Iowa and the United States, by specific authorization of the legislature and "without any order of court." This authorization is not in conflict with existing laws or regulations granting the right of investment to such institutions, corporations or officials for the reason that it is not of a limiting nature but seeks to extend to such organizations the further and additional field of savings and loan investments, should it be considered advisable to place their investment with such savings and loan associations rather than in the manner as originally authorized by law.

It is, therefore, our opinion that banking institutions and life insurance companies, together with the other institutions, organizations and officials as included in Subsection 2 of Section 13 of Senate File 147 of the Acts of the 48th General Assembly, may invest in the shares of savings and loan associations organized under the laws of this state and under the laws of the United States regardless of investments heretofore authorized for such institutions, corporations and officials by other statutes.

CHAIN STORE TAX BILL: CONSTITUTIONALITY: (Senate File 456.) Section 13 of the proposed bill would be vulnerable to an attack in the event any person were prosecuted under its provisions on the ground that this statute forbids no specific or definite act and provides for no ascertainable standard of guilt.

April 12, 1939. *Honorable Robert D. Blue, Representative from Wright County, House of Representatives, State House, Des Moines, Iowa:* We are in receipt of your letter of April 7th requesting an opinion from this office with regard to the constitutionality of Divisions II and III of Senate File 456, known as the "Chain Store Tax Bill."

We have examined this bill as passed by the Senate and Section 9 of Division II provides for the making of the regular assessment of the stock of merchandise as of January first, and Section 10 of this Division provides in part as follows:

"When making assessments against stocks of merchandise of chain stores under the provision of section sixty-nine hundred seventy-two (6972), Code, 1935, the assessor shall also take into consideration and make part of the assessment merchandise in transit or held in storage for the store being assessed at any central depot or depots of the particular chain to which the store may belong, and the average valuation of the items composing the stock or merchandise shall not be less than the average cost of similar merchandise of like kind and quality to retail merchants generally in the same taxing district."

Insofar as the above section seeks to place an ad valorem tax on merchandise that might be located in "any central depot or depots" located in another state, then clearly the section would be unconstitutional under the Fourteenth Amendment or the Due Process Clause of the United States Constitution. A state can only levy a tax upon tangible personal property that has a situs within the state. See *Frick vs. Commonwealth of Pennsylvania*, 280 U. S. 473, 45 S. C. 603, 69 O. Ed. 1058. Although this case involved inheritance tax which the State of Pennsylvania sought to impose upon the transfer of property located in the State of New York, the rule announced is applicable to the situation where the tax imposed is directly on the property. We quote as follows from this case:

"This property, by reason of its character and situs, was wholly under the jurisdiction of those states and in no way under the jurisdiction of Pennsylvania. True, its owner was domiciled in Pennsylvania, but this neither brought it under the jurisdiction of that state nor subtracted anything from the jurisdiction of New York and Massachusetts. In these respects the situation was the same as if the property had been immovable realty. The jurisdiction possessed by the states of the situs was not partial but plenary, and included power to regulate the transfer both inter vivos and on the death of the owner, and power to tax both the property and the transfer. * * *"

To the same effect is the rule announced in *Pullman's Car Company vs. Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613, as follows:

"No general principles of law are better settled, or more fundamental than that the legislative power of every state extends to all property within its borders, and that only so far as the comity of that state allows can such property be affected by the law of any other state."

We think also that there is grave doubt as to the constitutionality of this section under the provisions of Section 30, Article III of the Iowa Constitution providing that all laws shall be general and of uniform operation. While it is true that the recent decisions of the supreme court of the United States sanction separate classification of chain stores for tax purposes, still we have

been unable to find any decisions which would be authority for the plan herein contemplated where chain stores are to be assessed for more property than independent stores. The tax contemplated in Section 6972 of the 1935 Code of Iowa is the average value of the stock of merchandise during the preceding year. In all independent stores it is the January first inventory of the stock in the store that controls. This amendment adds goods in transit and in storage to the chain store stock of merchandise, but it is conceivable that an independent merchant might have goods in transit or in storage and such goods would not be added to the independent store owner's "stock of merchandise." No case has gone so far in upholding the chain store classification for tax purposes as to allow independent merchants an immunity from personal property taxes that the chain store cannot obtain.

Division III of the Act is apparently a fair trade practice Act and Section 13 of this Division is as follows:

"It is hereby declared that advertisement, offer to sell, or sale of any merchandise, either by any retailer or wholesaler, at less than cost as defined in this Act, with the intent, effect, or result of unfairly diverting trade from or otherwise injuring a competitor, or with the result of deceiving any purchaser or prospective purchaser, substantially lessening competition, unreasonably restraining trade, or tending to create a monopoly in any line of commerce, is an unfair method of competition, contrary to public policy, and in contravention of the policy of this Act."

These fair trade practice Acts have been upheld in a number of cases. Laws forbidding unfair competition by the charging of lower prices in one locality than those enacted in another have been upheld. See *Central Lumber Co. vs. South Dakota*, 226 U. S. 157, 57 L. Ed. 164. Laws prohibiting the giving of trade inducements to purchasers by way of stamps or other premiums have been upheld. See *Rast vs. Deman & L. Co.*, 240 U. S. 342, 60 L. Ed. 679. Laws fixing the price of milk and requiring retailers of milk to pay certain prices and to retail at certain fixed prices have been upheld. See *Nebbia vs. New York*, 78 L. Ed. 563, 89 A. L. R. 1469.

It would seem that this section is an attempt to regulate the intrastate sales of merchandise at retail in somewhat the same manner that the Clayton Act sought to regulate interstate sales. The Clayton Act sought to prohibit discrimination in price, the effect of which might be to substantially lessen competition or tend to create a monopoly in any line of commerce. Here the object is to prohibit the act that might tend to substantially lessen competition or create a monopoly in any line of commerce, but the act prohibited is different. In the Clayton Act the act prohibited was the discrimination between purchasers. Here the act prohibited is the sale of an article at less than cost and it will be noted that it is not all sales at less than cost that constitute a violation of this Act, but only such sales at less than cost where the sale is made with the intent, effect, or result of *unfairly* diverting trade from or otherwise injuring a competitor, etc. Although the Clayton Act has been upheld, see *George Van Camp & Sons Company vs. American Can Company, et al.*, 278 U. S. 45, 73 L. Ed. 145, 60 A. L. R. 1060, still we do not find any case where the act of selling at less than cost has of itself been declared to be the proper object of a fair trades practice act. A good many cases are collected in the recent case of *People vs. Victor*, decided February 2, 1939, by the supreme court of Michigan, 283 N. W. 666 (Vol. 6 of Advance Sheets).

Here, too, we would be of the opinion that this section would be unconsti-

tutional under the due process clause on the ground that it is too vague and indefinite.

It will be noted that this section does not prohibit all advertisements or sales at less than cost and it does not prohibit all advertisements or sales at less than cost that might divert trade from a competitor, but only those that might *unfairly* divert trade from a competitor, or those which might substantially lessen competition and *unreasonably* restrain trade. These italicized words above have no determinative meaning and the language is too general and indefinite to fix an ascertainable standard of guilt. As authority for our opinion with regard to this section we cite the following cases:

Connally vs. General Construction Co., 269 U. S. 385, 70 L. Ed. 322. Here a statute required a contractor, under penalty, to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed." The supreme court of the United States held that the constitutional guarantee of due process was violated by this statute in that the words "current rate of wages" and the word "locality" were impossible of definite construction, the court stating:

"We are of the opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words 'current rate of wages' do not denote a specific or definite sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., as the bill alleges is the case in respect of the territory surrounding the bridges under construction. The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them. The 'current rate of wages' is not simple, but progressive—from so much (the minimum) to so much (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer. See, People ex rel Rodgers vs. Coler, 166 N. Y. 1, 24, 25, 52 L. R. A. 814, 82 Am. St. Rep. 605, 59 N. E. 716. * * *

"In the second place, additional obscurity is imparted to the statute by the use of the qualifying word 'locality.' Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. * * * The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal."

United States vs. Capitol Traction Co., 34 App. D. C. 592, 19 Ann. Cases 68. Here the statute made it an offense for any street railway company to run an insufficient number of cars to accommodate "without crowding," and in the course of the court's opinion holding the statute void for uncertainty, the court said:

"The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another.

* * * There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be applied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.

"* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

United States vs. Cohen Grocery Company, 255 U. S. 81. This was a prosecution under the Food Control Act of 1917 providing for a penalty of fine or imprisonment upon any dealer in food supplies charging "any unjust or unreasonable rate of charge in handling or dealing in or with any necessaries."

To the extent that this section set up no ascertainable standard of guilt, the court held it was repugnant to the Fifth and Sixth Amendments to the Constitution requiring due process of law and that persons accused of crime should be adequately informed of the nature and cause of the accusation, the court stating:

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words 'That it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of the opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

In the light of the principles announced in the foregoing decisions, we feel that Section 13 above would be vulnerable to an attack in the event any person were prosecuted under its provisions on the ground that this statute forbids no specific or definite act and provides for no ascertainable standard of guilt.

Judges and juries might well differ on what would or would not be "unfair," or what would or would not be "unreasonable restraint of trade" and on what would or would not be "a substantially lessening of competition." This statute leaves no clear path that a law abiding merchant could follow when he desired to sell merchandise.

We have not been asked for an opinion with regard to the title to this Chain Store Tax Act, but since the Act is entitled "Chain Store Tax and Regulatory Act of 1939" and since it embraces a tax applicable only to chain stores and

a fair trade practice act applicable to all merchants, we would recommend that in order to forestall any attack on the law as unconstitutional under the provisions of Section 29, Article III of the Constitution of the State of Iowa the bill be separated into two Acts, for it would seem that in its present form it would be vulnerable to an attack under the provisions of the above section providing that all Acts shall embrace but one subject.

SCHOOLS: INSURANCE PREMIUMS: School boards cannot legally pay from school funds any part or all of the premium for group accident and health insurance for its employees or withhold a part of the salary of such employee to apply toward payment of such insurance premiums.

April 12, 1939. *Miss Jessie M. Parker, Superintendent of Public Instruction. Attention: R. A. Griffin:* In your letter of recent date, you ask the following questions:

"1. Can the school board of an independent district legally pay from school funds any part or all of the premium for group accident and health insurance for its employees—teachers, janitors, and bus drivers?

"2. Would it be legal for the school board to withhold a part of the salary of such employee to apply toward the payment of such group insurance premiums, the board paying the balance from school funds?

"3. Would it be possible for a school board to legally pay any part of group life, health or accident insurance premiums for such employees from school funds and charge off the same on each participating employee's salary when such employees give their consent in writing to the board?"

We find no statute permitting a school board to levy a tax for the purpose of paying premiums on health insurance.

In Chapter 24 of the 1935 Code of Iowa, which is entitled "Local Budget Law," Section 369 provides:

"369. Definition of terms. As used in this chapter and unless otherwise required by the context:

"1. The word 'municipality" shall mean the county, city, town, school district and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, or road district."

Section 84-e29 of the 1935 Code of Iowa is as follows:

"84-e29. Misuse of appropriations. Any board member, commissioner, director, manager, building committee, or other officer, or person connected with any institution, or other state department or establishment as herein defined, to which an appropriation is made, who shall expend any appropriation for any purpose other than that for which the money was appropriated, budgeted and allotted or who shall consent thereto, shall be liable to the state for such sum so spent, and the sum so spent, together with interest and costs, shall be recoverable in an action to be instituted by the attorney general for the use of the state, which action shall be instituted in the district court of Polk county."

In view of the provisions above quoted, it is our opinion that each of your three questions must be answered in the negative.

COUNTY ATTORNEY: MILEAGE: County attorney not entitled to mileage or expenses incurred going from home to county seat in attendance upon official duties.

April 14, 1939. *Mr. W. R. Byington, County Attorney, Malvern, Iowa:* Received your letter of the 7th inst. asking the opinion of this office on the following legal question:

Are you, as county attorney, living in Malvern, Iowa (not the county seat), entitled to mileage from Malvern to Glenwood, the county seat, in attendance upon your official duties; for example, hearings before the justice of the peace?

It is our opinion that you are not entitled to charge mileage for making these trips.

Section 5228, Code of Iowa, 1935, provides:

"The county attorney shall also receive his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat, * * *"

It is our construction of this statute that, under the provisions quoted, you would not be entitled to traveling or any other expenses while in attendance upon your official duties at either Malvern or Glenwood.

HIGHWAY COMMISSION: ADVERTISING SIGNS: Jurisdiction of the Highway Commission with respect to billboards or advertising signs is not extended to cover extensions of primary roads within cities and towns. Any sign which is not a traffic sign, signal, marking or traffic control device is a billboard or advertising sign covered by the provisions of Sections 4846 and 12396 of the Code.

Ames, Iowa, April 14, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: W. O. Price:* This will acknowledge receipt of your request of recent date for an opinion on the following questions:

"1. Does the Highway Commission have jurisdiction over advertising signs on extensions of primary roads within cities and towns?

"2. Would a sign bearing the name of a town and perhaps with population figures or something of that kind be considered an advertising sign when placed by a public or semi-public body and bearing no commercial advertising? The erection of signs indicating a town some distance away would also come in this category."

Section 4844 of the Code, 1935, declares billboards and advertising signs, on public or private property, to be public nuisances when they obstruct the view of any portion of any public highway or railway track, so as to render dangerous the use of the highway.

Section 4845 imposes the duty of enforcement of the above on boards of supervisors and the county attorney, with respect to secondary roads, and on the Highway Commission and attorney general with respect to primary roads.

Section 4846 clearly prohibits the erection of billboards and advertising signs within the boundary lines of public highways. This provision we interpret as excluding signs suspended over the highway either outside or within a city or town.

Section 4847 imposes the duty of removing existing signs from within the boundary lines of public highways, on the Highway Commission in case of primary roads, and the boards of supervisors in case of secondary roads.

It will be noted at this point that the above sections say nothing concerning jurisdiction of boards of supervisors or the Highway Commission with respect to enforcement of the provisions of Section 4844 in its application to extensions of secondary or primary roads, respectively, in cities or towns; and in spite of the obvious application of Sections 4844 and 4846 to such extensions the authority of city or town officials with respect thereto is not specifically mentioned.

The reason for the latter omission is apparent, however, when we consider further the following provisions.

Section 5945 of the Code, 1935, provides that cities and towns "shall have the care, supervision and control of all public highways, streets, avenues, alleys, public squares, and commons within the city, and shall cause the same to be kept open and in repair and *free from nuisances.*"

Section 12396 in defining what shall be deemed nuisances includes in paragraph "7" thereof, "Billboards, signboards, and advertising signs, whether erected and constructed on public or private property, which so obstruct and impair the view of any portion or part of a public street, avenue, highway, boulevard, or alley or of a railroad or street railway track as to render dangerous the use thereof."

Obviously cities and towns have complete authority over their streets and public grounds for all purposes including the erection thereof of billboards, signboards and advertising signs, and are under a duty to remove the same if they constitute a nuisance, unless such authority is divested or modified by statutes relating to primary road extensions.

Section 4755-b2 of the Code, 1935, provides in part as follows:

"4755-b2. Road systems defined. The highways of the state are, for the purposes of this chapter, divided into two systems, to wit: the primary road system and the secondary road system. The primary road system shall embrace those main market roads *(not including roads within cities and towns)* which connect all county seat towns and cities and main market centers, and which have already been designated as primary roads under chapter 241, code of 1924; * * *."

Chapter 154, Acts of the 47th General Assembly, which repealed Section 4755-b26 of the Code of 1935, gives the Highway Commission authority to "construct, reconstruct, improve and maintain" extensions of the primary road system within any city or town, subject to the approval of the council in so far as such proposed improvement relates to municipal improvements therein itemized.

Since Section 4755-b2 specifically excludes roads within cities and towns from the primary road system, the jurisdiction and responsibility of the city or town council over the same, in our opinion, is not divested by the provisions of Chapter 154, aforesaid, which merely gives the Highway Commission authority to improve and maintain such road or street when it elects to incorporate the same as an *"extension"* of the primary road system, obviously for the convenience of public travel. We are aided in this conclusion by a quotation from the opinion in *Wallace vs. Foster*, 213 Ia. 1151, 241 N. W. 9, at page 11, wherein the court said:

"This act (Sec. 4755-b26 of the Code, 1927 and 1931) does not make such road or street within a city or town a part of the 'primary road system.' It does not purport to do so. It does give the Highway Commission authority to *improve* certain roads and streets of the municipality if the city council approves thereof. It does not appear from the statute that the legislature had any intent to affect the municipal responsibility in regard to such streets. The power conferred on the Highway Commission is to improve such streets, but the duties and responsibilities of the municipality in relation thereto do not appear to have been divested by the legislature."

We conclude therefore that the jurisdiction of the Highway Commission with respect to billboards or advertising signs is not extended to cover extensions of primary roads within cities and towns. The jurisdiction thereof

by the city or town, however, should be exercised with caution in view of its responsibility for the erection of a sign covered by the prohibitions of Sections 4846 and 12396 of the Code heretofore referred to.

With respect to your second question we are of the opinion that any sign which is not a "traffic sign, signal, marking or traffic control device," referred to in Sections 283 to 291, inclusive, of Chapter 134 of the 47th General Assembly, is a "billboard" or "advertising sign" covered by the provisions of Sections 4846 and 12396 of the Code heretofore referred to, and allied provisions.

CIVIL SERVICE COMMISSION: POLICE OFFICER: Civil Service Commission can not grant a rehearing to policeman who three years before was suspended by the commission. Policeman now stands in exactly same position as if he had never been employed by the city.

April 15, 1939. *Mr. Paul L. Kildee, Assistant County Attorney, Waterloo, Iowa:* We have your letter of the 4th inst. in which you ask our opinion on the following legal question:

A police officer was discharged by the mayor for conduct not becoming an officer and demanded a hearing before the Civil Service Commission. The commission, after hearing the evidence, permanently suspended the said officer.

Three years have now elapsed since the date of the hearing and the officer has requested a new hearing in an attempt to be reinstated. He is desirous of having your opinion as to whether or not he can demand such a hearing and if not whether there is anything in the law to prevent the Civil Service Commission in granting him a new hearing, should they see fit.

It is our opinion that the Civil Service Commission has lost jurisdiction of this case and that the police officer referred to stands exactly in the same position as if he had never been employed by the City of Waterloo.

Section 5702, Code of Iowa, 1935, provides:

"No person appointed from the civil service list shall be removed arbitrarily, but may be removed after hearing, by a majority vote of the civil service commission for misconduct or failure to properly perform his duties."

Section 5703, Code of Iowa, 1935, gives the person having the appointing power the right to suspend or discharge any subordinate for neglect of duty, disobedience of orders or misconduct. This section further provides that chiefs of police shall report suspensions or discharges to the superintendent of public safety. In other cities the report shall be made to the mayor.

Section 5704, Code of Iowa, 1935, provides:

"If there is an affirmance of the suspension or discharge of any person who secured his appointment or employment through examination by the civil service commission, he may, within five days thereafter, appeal therefrom to said commission. If the appointment or employment was secured through civil service examination by the city council, the appeal shall be made to such council. If the suspension or discharge is revoked, the person who suspended or discharged such officer or employee may in like manner appeal."

Section 5705, Code of Iowa, 1935, provides:

"If the appeal be taken by the person suspended or discharged, notice thereof, signed by the appellant and specifying the ruling appealed from, shall be filed with the city clerk; if by the person making such suspension or discharge, such notice shall also be served upon the person suspended or discharged."

Section 5711, Code of Iowa, 1935, provides:

"The council or civil service commission, as the case may be, shall determine the matter on its merits. If the appeal is taken by a suspended or discharged employee and reversed, he shall be reinstated as of the date of his

suspension or discharge, and be entitled to compensation for such part of the period while suspended as the commission may determine."

It is apparent that the policeman in question has had the benefit of all statutes relating to civil service. Over three years have elapsed since the date of the decision of the Civil Service Commission. It is apparent, therefore, that the policeman in question can not legally demand another hearing before said Commission and we find no statute that authorizes the Civil Service Commission to re-assume jurisdiction of the case. It is also apparent that the Civil Service Commission, being a creature of the statute, has only such rights as are expressly given to it by the legislature. Manifestly, such Commission can not now, after three years, under the guise of a rehearing, reinvest itself with jurisdiction to determine the status of the policeman.

We reach the conclusion, therefore, that the policeman can not demand a hearing at this time before the Commission, nor has the Commission a right to grant him a new hearing, even granting their desire to do so.

PLATS: RECORDING: It is not necessary that the recorder of a county record the notice of a sheriff's sale, but only the plat need be recorded.

April 18, 1939. *Mr. Weston E. Jones, County Attorney, Charles City, Iowa:* We are in receipt of your request for an opinion from this office with regard to the duties of the recorder in recording plats under Section 10139 of the 1935 Code of Iowa. The specific question, as we understand it, is:

Must the recorder record the notice as well as the plat?

Section 10139 of the 1935 Code of Iowa provides as follows:

"*Platted by officer having execution.* Should the homestead not be platted and recorded at the time levy is made upon real property in which a homestead is included, the officer having the execution shall give notice in writing to said owner, and the husband or wife of such owner, if found within the county, to plat and record the same within ten days after service thereof; after which time said officer shall cause said homestead to be platted and recorded as above, and the expense thereof shall be added to the costs in the case."

It would appear that the notice of the sheriff's sale is already made of record in the clerk's office and the above section specifically provides that the "officer shall cause said homestead to be platted and recorded."

The notice is not a part of the plat, and it would seem from the specific direction of the foregoing statute that only the plat need be recorded.

TAXATION: SOLDIER'S EXEMPTION: HOMESTEAD CREDIT: Senate File 182 only applies to assessments made for the purpose of determining the homestead credit on the tax for the year 1939 and future years, and Senate File 183 may, in the discretion of the board of supervisors, be made to apply upon the tax of a veteran for the year 1938.

April 19, 1939. *Iowa State Board of Assessment and Review. Attention: Mr. George Tinley:* We have your request for an opinion with regard to the application of Senate Files 182 and 183. The particular question is:

Do these statutes, which become law on July 4, 1939, have any application with regard to taxes payable in 1939?

Senate File 182 provides as follows:

"The words 'assessed valuation' shall mean the valuation of the homestead as fixed by the assessor or by the Board of Review without deducting therefrom the exemptions authorized in Section 6946, Code of 1935."

Senate File 183 amends the soldiers' exemption statute by providing that all persons entitled to the soldiers' exemption, under the provisions of Section 6946 of the 1935 Code, may designate the property upon which they wish the exemption to apply, and in the event no designation is made in writing and filed with the county auditor, then the exemption shall apply on the homestead of the veteran, if any. The force of these two statutes is first, under the provisions of Senate File 182, the assessed valuation for homestead purposes shall be determined without deducting any soldiers' exemption which a veteran might have, and second, under 183 the soldier is now given the right to designate property other than his homestead upon which he desires the soldiers' exemption to apply.

With regard to the homestead exemption, it appears that under Section 5 of Chapter 195, Acts of the 47th General Assembly, the applicant must file his application by June first during the year of the assessment. In other words, all applicants for homestead credit for the tax for the year 1938 payable in 1939 must have made application for this homestead credit by June first of 1938. Senate File 182 is given no retroactive effect and would therefore have no application with regard to homestead credits contained in applications filed on or before June 1, 1938, and we would therefore be of the opinion that Senate File 182 gives to the assessors the rule to be followed in future assessments made for the tax for the year 1939 and future years where homestead credit and soldiers' exemption are involved.

With regards to Senate File 183 we find that under Section 6949 of the 1935 Code the board of supervisors has the power to allow the exemption to the veteran and to make it apply to the tax for the preceding year. In other words, this statute gives to veterans the right to file for soldiers' exemption before September first of 1939 and the board of supervisors may allow this exemption to apply on the 1938 tax. Senate File 183 becomes a law on July 4, 1939. Its only effect is to change the old section, which was Section 6947, by allowing the veteran to designate property other than his home as the property upon which he wishes the exemption to apply. Since he always had the right to file up to and including September 1st and obtain exemption on tax for the previous year, then he is now given merely the additional right to obtain this credit as against property other than his homestead. We have previously rendered an opinion to Charles W. Barlow, county attorney at Mason City, Iowa, upon the question of whether a veteran who has made application for exemption and named his homestead could, after July 4, 1939, when Senate File 183 becomes a law, withdraw his application and make application for exemption on property other than the homestead. In that opinion we held that under the provisions of Section 6949 of the 1935 Code such an exemption could be allowed, and it would lie within the discretion of the board of supervisors whether or not the allowance should be made, and the fact that the veteran was asking the withdrawal of some exemption application already on file would be immaterial.

We are therefore of the opinion that Senate File 182 only applies to assessments made for the purpose of determining the homestead credit on the tax for the year 1939 and future years, and Senate File 183 may, in the discretion of the board of supervisors, be made to apply upon the tax of a veteran for the year 1938.

TAXATION: LANDLORD'S LIEN: The only lien provided for by the Code for stores is upon the stock of goods or merchandise. The landlord taking property by virtue of the foreclosure of his landlord's lien is not personally liable for the delinquent tax, nor can the property itself which the landlord has taken be subject by distress to the payment of this tax.

April 19, 1939. *Mr. Elbert M. Pritchard, County Attorney, Onawa, Iowa:* We are in receipt of your letter of April 13th requesting an opinion from this office with regard to the following matters:

1. Does the lien provided for in Section 7205 of the Code cover a stock of goods, merchandise and fixtures located in a store building? Prior to the amendment of this Section by Chapter 337 of the 37th General Assembly, the Section was 1400 in the Supplement of 1913. As provided in Section 1400 all stocks of goods and merchandise are included and the question is whether or not the amendment limited the scope of the Section or merely enlarged it.

"2. We would also like to know in the event that this Section does apply to such stock of merchandise, whether, in your opinion, it applies where the landlord takes over the stock of goods, merchandise and fixtures in a store for unpaid rent, and whether or not the lien of this Section is prior to the landlord's lien. Also whether or not the landlord, when he takes over such stock of goods, merchandise and fixtures under his lien, becomes personally liable for the payment of the tax under Section 7205. Some of the tax accrued before the rent became delinquent and some of it accrued after the owner was in arrears for some of his rent. Would this situation make any difference?

Section 7205 of the 1935 Code of Iowa reads as follows:

"7205. *Lien follows certain personal property.* Taxes upon stocks of goods or merchandise, fixtures and furniture in hotels, restaurants, rooming houses, billiard halls, moving picture shows and theatres, shall be a lien thereon and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser, or vendee, and such owner, purchaser, or vendee of any such goods, merchandise, furniture or fixtures shall be personally liable for all taxes thereon."

In response to your first question we would be of the opinion that insofar as stocks of goods of merchandise in a store building are concerned the statute as it appears in Section 7205 is the same as the statute in Section 14 of the Supplement of 1913. The applicable parts in Section 14 of the Supplement of 1913 are as follows:

"Taxes upon stocks of goods or merchandise shall be a lien thereon and shall continue a lien thereon when sold in bulk and may be collected from the owner, purchaser or vendee."

It will be noted that the amendment enlarged the scope of the lien to include "fixtures and furniture in hotels, restaurants, rooming houses, billiard halls, moving picture shows and theaters." The amendment did not increase the scope of application of this lien in so far as stocks of goods of merchandise in stores are concerned. In other words, no lien is created for fixtures in stores. The only lien in such stores is upon the stocks of goods or merchandise.

We are therefore of the opinion that the lien provided for in Section 7205 of the Code covers merely a stock of goods or merchandise in the store.

With regard to the second question, we call your attention to the provision that this lien only continues on the property when the property is transferred when such transfer is a sale in bulk. In other words, any purchaser of this stock of goods and merchandise upon which there is a lien for unpaid personal taxes would not be liable for this unpaid tax unless the transfer to him was a bulk sale. In the case you state where the property is taken over by the

landlord in payment of the landlord's lien, we would be of the opinion that this sale would not be a bulk sale. See *Gorman v. Helberg*, 190 Iowa 728.

We are therefore of the opinion that the landlord taking this property by virtue of the foreclosure of his landlord's lien is not personally liable for the delinquent tax, nor can the property itself which the landlord has taken be subject by distress to the payment of this tax.

ENGINEERING EXAMINERS: INVESTIGATIONS: VIOLATIONS: It is not the duty or responsibility of the Board of Engineering Examiners, nor is it prohibited from initiating investigations into competency of registered engineers or of inquiring into violations relating to the practice of engineering without legal authorization. The Board has no authority to employ an investigator to inquire into violations of the Code relating to the practice of professional engineering.

April 19, 1939. *Board of Engineering Examiners. Attention: Berry F. Halden, Sec'y:* Your letter of March 20, 1939, asking our opinion upon the following matters, has come to the writer for attention:

"1. Is the Board of Engineering Examiners responsible for initiating investigations into the competency of registered engineers or other violations of Sections 1872 and 1875-b1 of the 1935 Code?

"2. Is the Board of Engineering Examiners responsible for initiating investigations of violations of Section 1875 of the 1935 Code relating to the practice of engineering without legal authorization?

"3. Does the Board of Engineering Examiners have authority to employ a full or part time investigator to inquire into violations of the Code relating to the practice of professional engineering?"

For the purpose of answering questions 1 and 2 we quote Sections 1872, 1873, 1875 and 1875-b1 of Chapter 101 of the Acts of the 47th General Assembly, as follows:

"1872. *Revocation of Certificate.* The board shall have the power by a four-fifths vote of the entire board to revoke the certificate of any professional engineer or land surveyor registered hereunder, found guilty of any fraud or deceit in his practice, or guilty of any fraud or deceit in obtaining his certificate, or in case he is found by the same vote to be incompetent.

"1873. *Procedure.* Proceedings for the revocation of a certificate of registration shall be begun by filing with the secretary of the board written charges against the accused. The board shall designate a time and place for a hearing, and shall notify the accused of this action and furnish him a copy of all charges at least thirty days prior to the date of the hearing. The accused shall have the right to appear personally or by counsel, to cross-examine witnesses or to produce witnesses in his defense.

"1875. *Injunction.* Any person who is not legally authorized to practice in this state according to the provisions of this chapter, and shall practice, or shall in connection with his name use any designation tending to imply or designate him as a professional engineer or land surveyor, may be restrained by permanent injunction.

"1875-b1. *Violations.* Any person who violates such permanent injunction or presents or attempts to file as his own the certificate of registration of another, or who shall give false or forged evidence of any kind to the board, or to any member thereof, in obtaining a certificate of registration, or who shall falsely impersonate another practitioner of like or different name, or who shall use or attempt to use a revoked certificate of registration, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than one hundred (100) dollars nor more than five hundred (500) dollars, or by imprisonment for three (3) months, or by both such fine and imprisonment."

Chapter 101 of the Acts of the 47th General Assembly does not, by direction

or inference, impose upon the Board of Engineering Examiners the duty and responsibility of initiating investigations into the competency of registered engineers or of inquiring into violations relating to the practice of engineering without legal authorization. These sections contemplate, however, that from time to time complaints will arise as against registered engineers and thus a means is provided by statute whereby such complaints may be initiated and the complaints heard and determined. It was undoubtedly the purpose of the legislature to grant to the public the means of proceeding against registered engineers but in any event there is no provision of law imposing upon the Board of Engineering Examiners the duty of initiating such proceedings. By failing to make this a duty the legislature did not prohibit such action to the board but it is clear that the responsibility in either case does not rest with the board.

In answer to question 3, we quote Section 1862 of Chapter 101 of the Acts of the 47th General Assembly as follows:

"*Organization of the Board—Meetings—Quorum.* The board shall elect annually from its members a chairman and a vice chairman. The secretary of the executive council, or one of his assistants, to be designated by him, shall act as secretary of said board. The board shall hold at least one stated meeting on the first Tuesday of December of each year, and special meetings shall be called at other times by the secretary at the request of the chairman or three members of the board. At any meeting of the board, three members shall constitute a quorum. The board shall have power to employ such additional clerical assistants and incur such office expense as may be necessary to properly carry out the provisions of this chapter."

This section is the only provision of Chapter 101 of the Acts of the 47th General Assembly granting the power of employing assistants to the board and it is to be noted that these employees are restricted to office and clerical help. No provision of law provides for an investigator nor is there any provision designating duties appropriate thereto.

It is, therefore, our opinion that the Board of Engineering Examiners has no authority to employ an investigator to inquire into violations of the Code relating to the practice of professional engineering.

MOTOR VEHICLE: PROPERTY DAMAGE: REPORTING: Accident of whatever nature or type in which there is an apparent property damage of twenty-five dollars ($25.00) or more, must be reported.

April 19, 1939. *Motor Vehicle Department. Attention: Mr. T. H. Vicker:* Your letter of April 14, 1939, in which you ask our opinion upon the following matter, has come to the writer for attention:

"The question has arisen as to whether a person operating his own motor vehicle and who runs into a tree, damaging his motor vehicle to the extent of approximately $125, doing no damage to other property, must report the accident as provided in Section 297."

Section 297 of Chapter 134 of the Acts of the 47th General Assembly is in part as follows:

"The driver of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent of twenty-five dollars or more shall, immediately after such accident, report the accident, * * *."

It will be observed that the statute makes no distinction as to the nature of the property damage concerned. It contemplates that property damage of

whatever nature to an apparent extent of twenty-five dollars ($25.00) or more be reported. Many situations can be conceived where as a matter of protection to the public a property damage to the driver's automobile should be reported. The statute provides for no exceptions and we can see where none should be allowed.

It is, therefore, our opinion that accidents of whatever nature or type in which there is an apparent property damage of twenty-five dollars ($25.00) or more, must be reported.

BEER PERMITS: EMPLOYEES: The holder of a Class "B" permit could not become an employee of a Class "A" permit holder.

April 20, 1939. *Mr. Raymond H. Wright, County Attorney, Burlington, Iowa:* We are in receipt of your letter of April 5th requesting an opinion on the following situation:

"The holder of a Class "B" permit in the city of Burlington has been offered a position by a Class "A" permit holder to act as his agent in selling for the jobber beer in the city of Burlington and surrounding territory.

"This Class "B" permit holder desires to continue the operation of his place of business for which his Class "B" permit was granted by the help he now has and under his supervision. So far as employment under the Class "A" permit holder is concerned, he is not financially interested in the business, and he would merely be employed as a salesman at a weekly salary."

We are of the opinion that under the provisions of Section 1921-f101 the holder of a Class "B" permit could not become an employee of a Class "A" permit holder. This would certainly be a prohibited interest within the provisions of the above mentioned section. To hold otherwise would be to allow Class "A" permit holders, by their employees, to control retail distribution of beer by having their employees secure Class "B" permits.

This is the very evil that the statute was directed against.

HIGHWAY COMMISSION: TRAVELING EXPENSE: Expenses incurred by Highway Commission employees on trips outside the state to secure technical or engineering information will be paid by the Executive Council without permission first having been obtained to make such trip.

April 20, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: F. R. White:* Your request, restated for the sake of brevity, is substantially as follows:

"It is frequently necessary for the Highway Commission to send one or more of its employees outside the state on work for the highway department. This work is for the purpose of testing and inspection of various types of materials to be used in highway work in this state, although occasionally we find it necessary to send one or more employees outside the state to inspect some particular road or bridge construction in some other state.

"In such cases is it necessary to request authority from the Executive Council before claims for expenses therefor may be allowed?"

Section 84-e13, sub-paragraph 2, provides as follows:

"2. *Convention expenses.* No claim for expenses in attending conventions, meetings, conferences or gatherings of members of any association or society organized and existing as quasi-public association or society outside the state of Iowa shall be allowed at public expense, unless authorized by the executive council; and claims for such expenses outside of the state shall not be allowed unless the voucher is accompanied by so much of the minutes of the executive council, certified to by its secretary, showing that such expense was au-

thorized by said council. This section shall not apply to claims in favor of the governor, attorney general, state commerce commissioner, or to trips referred to in section 3284."

The above section applies only to claims for expenses in attending "conventions, conferences or gatherings of members of any association or society outside the state....."

It is quite clear that the section has no application to the allowance of a just claim for expense of a trip outside the state by the Highway Commission, reasonably necessary to secure technical or engineering information to be used in maintenance or construction work within the state, so long as there is no attendance at a "convention, meeting, conference or gathering of members of any association or society" involved in the trip.

Section 3284 of the Code in our opinion applies only to trips by persons in the employ or under the supervision of the board of control and has no application to the highway commission or its employees.

It is well to note, however, that restrictions in the use of state cars on trips outside the state may have to be observed in accordance with the provisions of a pending bill now under consideration by the legislature.

LEGAL SETTLEMENT: OF WIFE LIVING APART FROM HUSBAND: A married woman who lives apart from or who has been abandoned by her husband may acquire a settlement as if she were unmarried.

April 20, 1939. *Mr. Archie R. Nelson, County Attorney, Cherokee, Iowa:* This will acknowledge receipt of your letter of the 6th inst. wherein you ask the opinion of this department relative to the following legal question. You say:

"No. 14 in that series raises the question of a wife who removed from the residence of her husband in Decatur County to her own residence in Appanoose County, and who resided in the latter county for a period of more than a year, and the question as to whether or not she had acquired a legal settlement in Appanoose County, and the opinion that she did.

"We have a very similar case with this additional fact situation, to wit: In the present case the husband has paid to the wife a regular monthly payment for a portion of their support and probably all that he can afford to pay under his own present condition. The wife has suffered ill health in the meantime and has now asked relief from this county under the theory that she has established a legal settlement, she having resided here for more than one year without having notice to depart served upon her.

"Does the fact that the husband has paid to the family some support money alter the settlement proposition or would you hold that, notwithstanding that fact, the wife, who has lived here, has established a legal settlement in this county?"

Section 5311, sub-section 4, Code of Iowa, 1935, provides:

"4. A married woman has the settlement of her husband, if he has one in this state; if not, or *if she lives apart from* or is abandoned by him, she may acquire a settlement *as if she were unmarried.* Any settlement which the wife had at the time of her marriage may at her election be resumed upon the death of her husband, or if she be divorced or abandoned by him, if both settlements were in this state." (Italics ours.)

In our opinion the italicized phrases answer the question propounded by you. A married woman, if she lives apart from her husband, may acquire a settlement as if she were unmarried. An unmarried woman may acquire a settlement anywhere in the state unless a notice to depart is served upon her as by law provided.

We do not believe that the fact that the wife received partial support from her husband while residing in your county alters the situation. Nothing is said in the statute concerning support during the period required by law for the acquisition of legal settlement. The statute seems very clear that a married woman, if she *lives apart from her husband,* may acquire a settlement as if she were unmarried. In the instant case she has *lived apart* from her husband. This seems to be all that is required in order for a married woman to obtain a legal settlement in the county of her residence.

We reach the conclusion, therefore, that the married woman referred to has a legal settlement in your county.

MOTOR VEHICLE: TRAILERS: PULLING AND TOWING: A trailer having three wheels may be pulled or towed; a trailer having more than four wheels may not be pulled or towed, this restriction not applying to semi-trailers; and a trailer with two auxiliary wheels immediately adjacent to the two rear wheels may be pulled or towed.

April 21, 1939. *Motor Vehicle Department. Attention: C. A. Knee:* Your letter of April 19, 1939, in which you ask our opinion upon the following matters, has come to the writer for attention:

"1. May a truck pull or tow a trailer having three wheels, that is, one at the front of the trailer and two at the rear?

"2. May a truck pull or tow a trailer having more than four wheels?

"3. May a truck pull or tow a semitrailer having four wheels?"

For the purpose of this opinion, we quote in part from Section 339-a1, Chapter 134 of the Acts of the 47th General Assembly, as follows:

"* * * No truck shall, after January 1, 1939, pull or tow any four-wheeled trailer, and no semi-trailer shall pull or tow any additional trailer over any of the highways in this state, except in case of temporary movement for repair or emergency, and then only to the nearest town or city where the necessary repairs may be made."

It is to be observed that the statute in question is one designed not only as a police regulation but for the additional purpose of protecting the highways from unusual and exceptional wear. The legislature undoubtedly had in mind removing from the highways four-wheeled trailers, which although serving the purpose of the owner, were of such a make and construction as to be a definite menace to the traveler. At the same time the legislature recognized that a four-wheeled trailer with a wheel at each of its corners was such as to bring a much greater weight and traction upon the highway as a trailer with less wheels or with wheels so arranged as to properly distribute the load.

With the above suggestions in mind, it is evident, in answer to question 1, that the legislature did not intend to prohibit the pulling or towing of trailers having three wheels; and in answer to question 2, it is just as evident that the legislature did intend to prohibit the pulling or towing of trailers having more than four wheels, this restriction not applying, however, to semitrailers.

In regard to question 3, we have a situation where trailers are equipped with an auxiliary set of wheels placed immediately adjacent to the two rear wheels. (See attached exhibit.) Extensive tests have shown that such auxiliary wheels, because of proper weight distribution, save the highway from the wear and tear resulting from rear wheels alone. At the same time

the placing of such auxiliary wheels does not allow of a trailer which could be the menace to the traveler that the trailer with wheels at the four corners became. It is consequently apparent that inasmuch as the adjacent auxiliary wheels serve to protect the pavement from wear and tear and at the same time do not provide the danger of a trailer with wheels at the corners, there are none of the wrongs and injuries present which the legislature sought by statute not only to prevent but to cure.

We are, therefore, of the opinion in regard to question 3, that a trailer with two auxiliary wheels immediately adjacent to the two rear wheels is not such a four-wheeled trailer as to be prohibited by statute.

Illustration A—The above illustration gives a side view of a four-wheel semitrailer.

Illustration B—The above illustration gives a top view showing an axle arrangement found on some four-wheel semitrailers.

Illustration C—The above illustration shows another arrangement of axles on some four-wheel semitrailers.

BOARD OF SUPERVISORS: QUACK GRASS: ASSESSMENT: The board of supervisors is charged with the duty of destroying primary noxious weeds growing in county, trunk and local county roads, and of assessment of costs, such to be made in accordance with the plat made and prepared by the board.

April 22, 1939. *Mr. Mark G. Thornburg, Secretary of Agriculture. Attention: Harry D. Linn:* Your letter of April 18, 1939, asking our opinion upon the following matters, has come to the writer for attention:

"1. Can a landowner require or force the board of supervisors to destroy quack grass along roadsides to prevent its spread to adjoining crop land?

"2. Does an assessment of cost for weed destruction apply to all of the land in a farm or merely to the particular tract involved? For example, suppose we have 160 acres of land under one township operated as a farm unit. There is an infestation of noxious weeds on 40 acres of this land. The county, through its weed commissioners, causes these weeds to be destroyed, and the cost thereof to be assessed against the property. Can the landowner in question allow the 40 acres to revert to the county by tax default, or would the assessment be a lien on the 160 acres?"

For the purpose of answering question 1, we quote in whole or in part Sections 4817, 4827 and 4829-a8 of Chapter 131 of the Acts of the 47th General Assembly.

"4817. The following weeds are hereby declared to be noxious and shall be divided into two classes, namely:

"1. Primary noxious weeds, which shall include quack grass * * *.

"4827. The board of supervisors shall destroy primary noxious weeds growing in county, trunk, and local county roads, and the highway commission shall destroy primary noxious weeds growing on primary roads. Nothing herein shall prevent the landowner from harvesting, in proper season, the grass grown on the road along his land.

"4829-a8. It shall be the duty of the county attorney upon complaint of any citizen that any officer charged with the enforcement of the provisions of this chapter has neglected or failed to perform his duty, to enforce the performance of such duty."

It is to be observed that quack grass is a primary noxious weed and that the board of supervisors is charged with the duty of destroying primary noxious weeds growing in county, trunk, and local county roads, and should

the board fail in its duty any citizen may complain to the county attorney, who shall see that the law is enforced.

For the purpose of answering question 2, we quote in part from Section 4829-a6 of Chapter 131 of the Acts of the 47th General Assembly, as follows:

"When the commissioner, or commissioners, destroy any weeds under the authority of sections four thousand eight hundred twenty-nine-a three (4829-a3), or four thousand eight hundred twenty-nine-a four (4829-a4), after failure of the landowner responsible therefor to destroy such weeds pursuant to the order of the board of supervisors, the cost of such destruction shall be assessed against and collected from the landowner responsible in the following manner:

"2. Before making any such assessment, the board of supervisors shall prepare a plat or schedule showing the several lots, tracts of land or parcels of ground to be assessed and the amount proposed to be assessed against each of the same for destroying or controlling weeds during the calendar year."

The statute specifically provides that before an assessment is made against the land, the board of supervisors must prepare a plat or schedule showing the several lots, tracts of land or parcels of ground to be assessed and the amount proposed to be assessed against each. The assessment depends entirely upon the platting as it is prepared by the board and the amounts accordingly must be assessed against each lot, tract or parcel in accordance with the platting. The statute makes no provision as to whether an entire farm or the particular plat involved shall be assessed, the legislature leaving the duty to make such assessment clearly and solely with the board of supervisors, such to be made in accordance with the plat made and prepared by the board.

MOTOR VEHICLE: DEALER'S LICENSE: CONTRACT: Ninety (90) days must elapse between the final termination of a contract with manufacturers or distributors of motor vehicles and the date of the new application before such new applicant can be granted a dealer's license.

April 22, 1939. *Motor Vehicle Department. Attention: C. G. VanVliet:* Your letter of April 19, 1939, asking our opinion as to the following matter, has come to the writer for attention:

"Is it within the province of this department to take into account any factory or distributor's action with its dealers and assume that the 90-day period applies from the date of such cancellation; or, does the 90-day period apply if we do not recognize the factory or distributor's cancellation and it becomes operative from the 'termination' of the cancellation period, or does the 90-day period apply from the date of application of the new contracting dealer?"

For the purpose of this opinion, we quote in part Section 6 of Chapter 135 of the Acts of the 47th General Assembly:

"*Denial of license.* The department shall deny the application of any person for a license as a motor vehicle dealer and refuse to issue a license to him as such, if, after reasonable notice and a hearing, the department determines that such applicant:

"7. Has a contract or agreement with any manufacturer or distributor of motor vehicles or is about to enter into a contract or agreement with any manufacturer or distributor of motor vehicles, who without just, reasonable and lawful cause therefor, has terminated within ninety days from the date of application a contract or agreement with a motor vehicle dealer in any county of the state in which the applicant proposes to engage in business."

It is to be observed that the statute provides that for certain reasons the Motor Vehicle Department may deny to an applicant a license as a motor vehicle dealer. The legislature determined that at times motor vehicle dealers

places the burden of the expense of prosecution of the violation of city ordinances upon the city.

In view of these statutes we believe it was the intention of the Legislature to impose upon the county all expenses incident to prosecutions for violations of state laws. We therefore reach the conclusion that Lee County should pay for the long distance telephone and telegraph charges reasonably incurred in the apprehension of criminals charged with the violation of state laws, and any other expenses reasonably incurred in such apprehension or attempted apprehension.

You have furnished us with a very good brief and you will notice that we have adopted the major parts thereof. We are abidingly convinced that the opinion rendered by you to the Board of Supervisors is in all respects correct and we unhesitatingly affirm the same.

CONTROL OF RECORDS: HEALTH DEPARTMENT: VITAL STATISTICS: All records of vital statistics are a part of the records of the State Department of Health and rests solely under the control, supervision and direction of the Commissioner of Public Health, who is the State Registrar, and the sole duty of the curator is to properly house such records for their protection, preservation, and safekeeping.

February 22, 1939. *Dr. Walter L. Bierring, Department of Health:* Your letter of February 6, 1939, asking our opinion on the following matter, has come to the writer for attention.

"Under the provisions of Section 4531 of the 1935 Code of Iowa, the State curator has assumed the responsibility of supervising, preserving and certifying all vital statistic records deposited by this department under the provisions of paragraph 6, Section 2393 of the Code. It would appear to me that the intent of the law governing vital statistics would be that the State Registrar (Commissioner of Public Health) should certify all records passing through the vital statistics division even though the same are deposited for safekeeping in the Historical Building. I would appreciate an opinion from your department as to whether or not vital statistic records deposited in the Historical Building become archives under Section 2548 and whether or not the State Registrar loses control of these records once they have been deposited in the Historical Building."

For the purpose of this opinion, the statutes applicable have been set out in whole or in part as follows:

"2384. *Definitions.* For the purpose of this chapter:

2. "State registrar" shall mean the state registrar of vital statistics.

2387. *State Registrar.* The commissioner of public health shall be the state registrar.

2393. *Duties of state registrar.* The state registrar shall:

1. Have general supervision of the registration of vital statistics.

6. Systematically arrange, bind, and deposit in the state historical building at the seat of government, the original certificates of births, deaths, and marriages for the preceding calendar year.

2426. *Certified copies.* The state registrar shall, upon request, supply to any applicant for any proper purpose, a certified copy of the record of any birth, death, or marriage registered under the provisions of this chapter, for the making and certifying of which he shall charge a fee of fifty cents."

Section 4525 defines the duties of curator, none of which directly or by reference affect the records of vital statistics.

"4528. *Archives.* The curator shall be the trustee and custodian of the archives of Iowa and of such county and municipal archives as are voluntarily deposited. The term 'archives' shall mean those manuscripts and materials originating under or passing through the hands of public officials in the

regular course and performance of their duties, over ten years old, and not in current use; but the executive council shall have power and authority to order the transfer of such archives or any part thereof at any time prior to the expiration of the ten years, or cause them to be retained in the respective offices beyond such limit if in its judgment the public interests or convenience shall require it.

4531. *Certified copies—fees.* Upon request of any person, the curator shall make a certified copy of any document contained in such archives, and when such copy is properly authenticated by him it shall have the same legal effect as though certified by the officer from whose office it was obtained or by the secretary of state. Said curator shall charge and collect for such copies the fees allowed by law to the official in whose office the document originates for such certified copies, and all such fees shall be turned into the state treasury."

Reviewing the above statutes, it is to be observed that the legislature sought to provide a central depository where all documents of a public nature might be safely kept and preserved. It is therefore provided by statute that all such records not in current use and over ten (10) years old should be deposited with the custodian of the archives and from time to time as certified copies might be requested, such custodian was directed by law and provided with a means of supplying them.

The legislature recognized in addition to general documents, manuscripts and materials, that records of vital statistics were of such unusual importance that these should receive particular attention and it therefore proceeded to provide special legislation.

The legislature realized that records of vital statistics never grow old, that they are in continual use and are searched and handled constantly, and appreciated in addition, that they are of such importance and of such volume that a depository was needed for their safekeeping. The legislature further recognized that such records of vital statistics are not in the nature of archives, that they are not of a historical interest primarily but are of a present and material usability to the State Department of Health and for that reason, although the State Historical Building was designated as the proper depository for their safekeeping, the Commissioner of Public Health was appointed as State Registrar of vital statistics and was vested with certain duties and responsibilities.

That records of vital statistics are continually in current use would remove them from the definition of archives and therefore from the direction and control of the curator, his duties being only those required of him by law—to maintain a place for the safekeeping of such records and nothing more.

The actual control and supervision of the records is vested in the State Registrar and with him rests the sole responsibility of certifying such records. It was with this intent that the legislature provided special legislation relative to vital statistics and it is, therefore, our opinion that all records of vital statistics are a part of the records of the State Department of Health and rests solely under the control, supervision and direction of the Commissioner of Public Health, who is the State Registrar, and that the sole duty of the curator is to properly house such records for their protection, preservation and safekeeping.

FIRE DEPARTMENT: RETIREMENT BENEFITS: TEMPORARY FIREMEN: Temporary firemen may not share in the retirement benefits as provided in Chapter 322-F1 and date of original appointment governs as to the age of a permanent appointee for the purpose of determining the contributions to be made under the provisions of this chapter.

February 23, 1939. *Mr. J. Vincent Pyle, State Fire Marshal*: Your letter of February 21, 1939, asking the opinion of this office relative to the following matters, has come to the writer for attention.

"We will appreciate it very much if you will give us a written opinion on whether or not a man appointed as temporary fireman to a fire department would be entitled to share in the benefits of Chapter 322-F1, 1935 Code of Iowa, in case of injury or death.

"Does the date of original appointment or the date of the expiration of the probationary period govern as to the age of a permanent appointee for the purposes of determination of contributions to be made by such appointee under the provisions of Chapter 322-F1?"

For the purpose of this opinion, your attention is directed to the following statutes:

"6326-f1. *Definitions controlling.* The following words and phrases as used in this chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

"3. 'Fireman' or 'firemen' shall mean only the members of a fire department who have passed a regular mental and physical civil service examination for fireman and who shall have been duly appointed to such position. Such members shall include firemen, probationary firemen, lieutenants, captains, and other senior officers who have been so employed for the duty of fighting fires.

"8. 'Membership service' shall mean service as policemen or firemen rendered since last becoming a member, or where membership is regained as provided in this chapter, all of such service.

"6326-f3. *Membership.* 1. All persons who become policemen or firemen after the date such retirement systems are established by this chapter, shall become members thereof as a condition of their employment. Such members shall not be required to make contributions under any other pension or retirement system of city, county, or state of Iowa, anything to the contrary notwithstanding."

From an examination of these statutes, it would appear that a fireman must, in order to share in the retirement benefits of the Chapter, have been duly appointed to the position of fireman. It is a recognized practice to maintain a list of those applicants for a position of fireman or as a member of a fire department who have passed the physical and civil service examination, but who have not received regular appointments to the fire department, and from this list are drawn those who are to act in the capacity of temporary firemen or for regular appointment. It was the evident intention of the legislature that only regularly appointed firemen should share in the retirement benefits of Chapter 322-F1 and inasmuch as such temporary firemen are not appointed as regular firemen, they are prohibited from sharing in such benefits.

For the purpose of retirement benefits, probationary firemen are defined as firemen and are, therefore, entitled to the full benefits of the Chapter. This being true, they must, in order to enjoy such benefits, make the regular, proper and usual contributions to the retirement fund as provided by law from the date of their appointment. The one right implies the other duty and there is no distinction so far as Chapter 322-F1 is concerned, between regular firemen and probationary firemen.

It is therefore, our opinion that temporary firemen may not share in the retirement benefits as provided by Chapter 322-F1, and further that the date of original appointment governs as to the age of a permanent appointee for the purpose of determining the contributions to be made under the provisions of that Chapter.

MOTOR VEHICLE DEPARTMENT: SAFETY GLASS: DEALER: A dealer is prohibited from installing in the owner's car glass that does not meet the provisions of Section 469, Chapter 134 of the Acts of the 47th General Assembly, but is not forbidden by statute to sell other than safety glass.

February 23, 1939. *Motor Vehicle Department. Attention, Mr. Tate:* We are in receipt of your letter of February 22, 1939, asking our opinion as to the following matter.

"Is a dealer liable for selling or selling and installing in the owner's car glass that does not meet the provisions of Section 469, Chapter 134 of the 1935 Code of Iowa?"

We quote the following sections of Chapter 134 of the Acts of the 47th General Assembly, for the purpose of this opinion.

"Sec. 468. *Safety glass.* No person shall sell any new motor vehicle nor shall any motor vehicle, manufactured since July first, 1935, be registered, or operated unless such vehicle is equipped with safety glass wherever glass is used in doors, windows, and windshields. Replacements of glass in doors, windows, or windshields shall be of safety glass.

"Sec. 500. *Penalties for misdemeanor.* It is a misdemeanor for any person to do any act forbidden or to fail to perform any act required by any of the provisions of this chapter unless any such violation is by this chapter or other law of this state declared to be a felony. Chapter one hundred eighty (180) of the code shall have no application in the prosecution of offenses committed in violation of this chapter.

"Every person convicted of a misdemeanor for a violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days."

It is clearly the intention of the legislature that new motor vehicles must be equipped with safety glass of the approved type and that all replacements of glass shall be of safety glass in accordance with such intention.

The phraseology of the statute does not indicate nor do we think it was the intent of the legislature to place a penalty upon those who sell other than safety glass. This is a police measure made for the purpose of protecting the occupants of motor vehicles and it is the replacing of the glass by other than that properly prescribed which the statute seeks to prevent. The word "replacement" in the statute is of a limiting nature. In accordance with such requirement, the legislature has provided a suitable penalty.

We are, therefore, of the opinion that a dealer is prohibited from installing in the owner's car, glass that does not meet the provisions of Section 469, Chapter 134 of the Acts of the 47th General Assembly, but that he is not forbidden by statute to sell other than safety glass.

PAROLES: JUSTICE OF PEACE: Justice of peace has no right to suspend sentences or grant paroles. Sections 3800, 3801 and 3802 apply only to Courts of Record.

February 24, 1939. *Mr. William M. Spencer, County Attorney, Oskaloosa, Iowa:* We have your letter of the 21st inst. wherein you ask the opinion of this department as to the interpretation of Section 3800, Code of Iowa, 1935, which relates to paroles by court.

Section 3800 reads as follows:

"The trial court before which a person has been convicted of any crime except treason, murder, rape, robbery, arson, second or subsequent violation of any provision of title 6, or of the laws amendatory thereof, may, by record entry, suspend the sentence and parole said person during good behavior:

1. If said person has not previously been convicted of a felony.
2. If said person is shown to be free from venereal disease.
3. If said person, if an adult and able to labor, has obtained apparently permanent employment for a reasonable time."

Section 3801 reads as follows:

"When a parole is granted under section 3800, the court shall order said person committed to the custody, care, and supervision:
1. Of any suitable resident of this state; or
2. Of the board of parole."

Section 3802 reads as follows:

"The board of parole shall have and exercise over said parolee all the powers possessed by said board over prisoners paroled by it."

It is our opinion, reading these three sections together, that under them a justice of the peace has no power of parole. These sections apply only to courts of record, as we view it. Nowhere in the chapter relating to justice of the peace is there any provision giving the justice a right to suspend sentences or grant paroles.

HOSPITAL FUND: ERECTION OF COUNTY HOSPITAL: BOARD OF SUPERVISORS: Hospital trustees have no greater power in erection of county buildings than board of supervisors. Board shall not order erection of any building costing more than $5,000.00 until submitted to legal voters of county and carried by majority vote.

February 24, 1939. *Mr. Richard A. Stewart, County Attorney, Washington, Iowa*: We have your letter of the 21st inst. wherein you ask our opinion on the following proposition. You say:

"We have a county hospital in Washington County and there is at the present time a surplus of about $14,000.00 in the general hospital fund. There is a balance of approximately $200.00 in the building fund.

"The hospital trustees desire to transfer the surplus from the general fund to the building fund and they desire to build a small addition to the hospital * * *."

Your question is, may the hospital trustees expend the $14,000.00 for said addition without submitting the proposition to the vote of the people of your county.

Section 5348, Code of Iowa, 1935, substantially provides that a county public hospital may be established upon submitting the proposition of issuing bonds for such purpose to the electors, provided that the amount of the bonds must be specified and that in no event shall this exceed $100,000.00.

Section 5355 makes provision for the appointment of seven trustees. Section 5358 provides that the county treasurer *shall* receive and disburse all funds under the control of said trustees the same to be paid out only upon warrants drawn by the county auditor *by direction of the board of supervisors* after the claim for which the same is drawn has been certified to be correct by the trustees.

Section 5359 sets out the duties of said trustee and among these are the following:

"1. To purchase, condemn, or lease a site for *such* public hospital, and provide and equip suitable hospital buildings.
2. Cause plans and specifications to be made and adopt for all hospital buildings and equipment, and advertise for bids, as required by law for other county buildings, before making any contract for the construction of any such building or the purchase of such equipment."

Section 5261 provides that the board of supervisors shall not order the erection of any building when the probable cost will exceed $5,000.00 (court house, jail, or county home, $10,000.00) until a proposition therefor shall have been first submitted to the legal voters of the county and carried by a majority vote.

We construe Section 5359 to refer to the building authorized by the voters. You will notice that in sub-section 2 under Section 5359 is found this clause: "of any such building." We believe that "such building" refers to "such public hospital," referred to in sub-section 1. It seems to us that this refers to the building authorized by the vote of the people and by virtue of which affirmative vote the hospital trustees were appointed.

We are constrained to hold that the hospital trustees have no greater powers in the erection of county buildings than the board of supervisors, under Section 5261. This seems to be especially true in view of the fact that the expenditures of the board of trustees must be made under the direction of the board of supervisors as provided in Section 5358. It is our thought that these various sections must be construed together and when this is done we reach the conclusion that the addition should be erected only if and when approved by the voters.

BOARD OF CONTROL: RHODES CASE: SUPPORT: WORK: Until the District Court obtains jurisdiction of the Rhodes case for retrial or other disposal, the State must pay for his keep. It is within the discretion of the warden as to whether or not he should be put to work.

February 24, 1939. *Board of Control. Attention, G. S. Wooten:* In the absence of Judge Rankin, your letter of February 21st, 1939, asking our opinion on the following matters, has come to the writer for attention.

One Walter H. Rhodes was received at the Iowa State Penitentiary April 15th, 1937, under sentence to be hanged April 29th, 1938. Upon appeal, the Supreme Court reversed the lower court and there is now pending before the Supreme Court a petition for rehearing. The warden of the penitentiary has not been advised of the rehearing and is keeping Rhodes in the condemned cell.

"1. Should Johnson County pay for his support from the time of the Supreme Court ruling to the time he is taken out for a new trial?

2. Should Rhodes be assigned to work pending a rehearing of his case by the Supreme Court?"

For the purpose of this opinion, your attention is directed to the following sections of the 1935 Code of Iowa:

"14013. *Reversal—effect.* If a judgment against the defendant is reversed, such reversal shall be deemed an order for a new trial, unless the supreme court shall direct that the defendant be discharged and his bail exonerated, or if money be deposited instead, that it be refunded to him.

14016. *Decision recorded and transmitted.* The decision of the supreme court, with any opinion filed or judgment rendered, must be recorded by its clerk, and, after the expiration of the period allowed for a rehearing, or as ordered by the court or provided by its rules, a certified copy of the decision and opinion shall be transmitted to the clerk of the trial court, filed and entered of record by him, and thereafter the jurisdiction of the supreme court shall cease, and all proceedings necessary for executing the judgment shall be had in the trial court, or by its clerk."

It is the recognized rule that when a prisoner is under the jurisdiction of the District Court whether confined in the state penitentiary or elsewhere, such county shall pay for his keep and when the jurisdiction of the District Court

ceases, then the duty of providing the keep of the prisoner becomes that of the State.

There is no question but that it was the duty of the State to keep Rhodes from April 15, 1937, as the jurisdiction of the District Court ceased as of that date and on the filing of the appeal the jurisdiction became that of the Supreme Court. Upon reversal of the District Court by the Supreme Court, the statute provides that procedendo shall not issue until after the expiration of the period allowed for rehearing. It was clearly the legislature's intent that should a petition for rehearing be filed within that period, then the Supreme Court would retain jurisdiction until the disposal of such petition. There can be no division of jurisdiction and so long as the Supreme Court retains such jurisdiction, the District Court is without it, and when the District Court is without jurisdiction, the county is not liable for the prisoner's keep. The Supreme Court still retains jurisdiction over Rhodes whether the warden has received notice or not and until the District Court obtains jurisdiction by procedendo or by relinquishment otherwise by the Supreme Court, it is the duty of the State to pay for his keep.

Whether or not Rhodes should be removed from the condemned cell and put to work is clearly within the discretion of the warden, although it should be remembered that Rhodes' status as a condemned prisoner is not changed so long as the Supreme Court retains jurisdiction and he is clearly not in the position of a prisoner awaiting final determination of his appeal to the Supreme Court.

We are, therefore, of the opinion that until the District Court obtains jurisdiction of the Rhodes case for retrial or other disposal, either by the issuance of procedendo, by the determination of the petition for rehearing or by other relinquishment by the Supreme Court of jurisdiction, the State must pay for his keep, and further that though Rhodes' status remains unchanged, it is within the discretion of the warden as to whether or not he should be put to work.

LOTTERY: DRAWING CONDUCTED BY AMERICAN LEGION: Drawing of tickets to give away automobiles, regardless of how conducted—a violation of lottery statutes.

February 25, 1939. *Mr. Melvin L. Baker, County Attorney, Humboldt, Iowa:* Received your letter of the 23rd inst. asking our opinion as to whether or not the following scheme violates the lottery laws of Iowa:

"For the past fifteen years the American Legion Post has put on a Play Day celebration on July 4th. For the past several years they have given away an automobile to the party holding a stub of a ticket bearing a certain number. As soon as the tickets are printed and before they are put on sale ten or fifteen numbers are drawn and the numbers are sealed and placed in a vault in one of the local banks. The tickets are then sold and at the celebration the ten numbers drawn are announced and the party having the first number is given 24 hours to present the same and claim the automobile. In case the ticket stub is not presented the same procedure is followed down through the ten numbers until the car is finally claimed."

It is our opinion that this is clearly a violation of our lottery statutes.

The case of *State v. Hundling*, 220 Iowa 1369, laid down the rule that a lottery is any scheme where one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing, as some formula or chance may determine.

Thirty-eight *Corpus Juris*, page 286, defines lottery as follows:

"A species of gambling which may be defined as a scheme for the distribution of prizes or things of value by lot or chance among persons who have paid or agreed to pay a valuable consideration for the chance to obtain a prize; or as a game of hazard in which small sums of money are ventured for the chance of obtaining a larger value, in money or other articles."

The case of *Brenard Manufacturing Company vs. Jessup et al.*, 186 Iowa 872, lays down the rule that a lottery has three elements: (1) consideration, (2) chance, (3) prize. The holding in this case was affirmed in the *Hundling case, supra.* Clearly the proposed scheme of the American Legion Post violates in letter and in spirit the pronouncements contained in the above decisions.

We are constrained to hold, therefore, that the scheme in question violates our lottery laws.

COSMETOLOGISTS: ITINERANTS: In determining whether or not certain cosmetologists are itinerants, each individual case must be considered upon its own particular facts, such case to be determined largely by the degree of permanence of the business in question.

February 27, 1939. *Alice C. Graf, Executive Sec'y, Division of Cosmetology:*

Your letter of February 23, 1939, asking our opinion as to the following matter, has come to the writer for attention.

"Will you kindly give this department an opinion on Section 2511 of the Iowa cosmetology law, regarding itinerants."

Section 2511 of the 1935 Code of Iowa is as follows:

"*Defined.* "Itinerant physicians," "itinerant osteopath," "itinerant chiropractor," "itinerant optometrist," or "itinerant cosmetologist" 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, or cosmetology, 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."

It is clearly the intention of the legislature that a cosmetologist who by himself or his agents or employers, goes from place to place or from house to house or who solicits persons to meet him for professional treatments at places other than his office, is itinerant. The Supreme Court has frequently considered the nature of an "itinerant" and in the case of *Town of Scranton vs. Hensen*, 151 Iowa 221, 130 NW 1079, it takes occasion to define it. We quote from the court's opinion:

"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. If the business was, or was intended to be, intermittent in character, and not permanent, then the seller was an itinerant vendor, and not a permanent tradesman. As said in *City of Ottumwa v. Zekind*, 95 Iowa 622, we do not understand that the term "transient merchant" has reference to the residence of the individual. It more properly relates to the business carried on by him."

See also:

Snyder vs. Closson, 84 Iowa 184, 50 NW 678;
Iowa Commission vs. Gauss, 85 Iowa 21, 51 NW 1147;
State vs. Logsdon, 215 Iowa 1297, 248 NW 4.

Whether or not certain cosmetologists are itinerants must be considered in the light of the statute and the above criteria. Each individual case must be considered upon its own particular facts, such case to be determined largely by the degree of permanence of the business in question.

SCHOOL BOARD MEMBER: MANAGER OF FARMS: IOWA FALLS, IOWA: ELLSWORTH COLLEGE: The director of the school board in question may not be appointed as manager of the farms under the conduct of the board of directors of which he is a member.

February 27, 1939. *Jessie M. Parker, Supt. Public Instruction. Attention, R. A. Griffin:* In the absence of Judge Rankin, your letter of February 22, 1939, requesting an opinion as to the following matter, has come to the writer for attention.

"Some years ago the school board at Iowa Falls, Iowa, entered into a written contract with the trustees of Ellsworth College whereby the independent school district of Iowa Falls assumed the management of twenty-three hundred acres of land belonging to the college, the net proceeds from such land to be used for the maintenance of the college building and the junior college operated in that school district.

"....the board at Iowa Falls hired a manager to look after these farms. The term of this manager will soon expire.

"....may a member of the school board serve as manager of these farms and receive compensation therefor without violating the law?"

For the purpose of this opinion, your attention is directed to the following statutes of the 1935 Code of Iowa:

"4239-a3. (As amended) *Compensation of officers.* The board shall fix the compensation to be paid the secretary. No member of the board or treasurer shall receive compensation for official services, except that in school townships, rural or village independent districts, and in consolidated districts that contain a city or town having a population less than one thousand, the board may pay a legally qualified school treasurer a reasonable compensation.

"4468. *Officers as agents.* It shall be unlawful for any school director, teacher, or member of the county board of education to act as agent for any school textbooks or school supplies during such term of office or employment, and any school director, officer, teacher, or member of the county board of education who shall act as agent or dealer in school textbooks or school supplies, during the term of such office or employment, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than ten dollars nor more than one hundred dollars, and pay the costs of prosecution.

"13301. *Accepting reward for public duty.* If any state, county, township, city, school, or other municipal officer, not mentioned in this chapter, directly or indirectly accept any valuable consideration, gratuity, service, or benefit whatever, or the promise thereof, other than the compensation allowed him by law, conditioned upon said officer's doing or performing any official act, casting an official vote, making or procuring the appointment of any person to a place of trust or profit, or using his official influence or authority to give or procure for any person public employment, or conditioned upon said officer's refraining from doing or performing any of the foregoing acts or things, he shall be imprisoned in the penitentiary not exceeding two years, or in the county jail not exceeding one year, or fined in any sum not less than twenty nor more than three hundred dollars."

It has long been the policy of the legislature and the courts to prohibit and discourage relationships on the part of public officers and public boards which might lead to fraud as against the public. The courts have applied the direction of the following statute in liberally construing the statutes above cited.

"64. *Common-law rule of construction.* The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

An early case is that of *State vs. Wick*, 130 Iowa 31, 106 NW 268. The court clearly seeks to establish the interpretation of Section 4468 as well as to determine a proper criterion for future policy. We quote from the court's opinion:

"Defendant as a member of the board, therefore, had a personal pecuniary interest distinct from the interests of the patrons of the school...., and it is evident that the very purpose of the section of the Code already quoted was to prevent any dealer who should have such personal interest in the action of the board in this matter, from being a member of the board....."

"We think that the policy of the statutory provisions as well as their specific language make them applicable to a dealer such as the defendant is conceded to have been and prohibit such dealer from being a member of a school board of directors."

That the member of the school board proposed for such position of trust would have a personal pecuniary interest distinct from the interest of the patrons of the school must be admitted. It is probable that the member of the board who seeks such position would perform his duties in good faith but the opportunity for personal gain as against the public good is present and it is such possibility of fraud that the statute and the policy announced in *State vs. Wick* seeks to prevent.

Reading the three statutes together, it is evident that members of the school board are public officers of a definite public trust, that as members of their community their service is donated to promote the public interest and it was not intended by the legislature that directors of school boards should so use their positions as to foster their own personal interest. Such must be true here if the director were to be appointed to such managerial position as proposed.

We cite for your information the opinion of the Attorney General on a similar matter, this being quoted at length at page 660 of the 1936 opinions of the Attorney General.

We are, therefore, of the opinion that a director of the school board in question may not be appointed as manager of the farms under the conduct of the board of directors of which he is a member.

INSURANCE COMPANIES: FUNDS: F. H. A. MORTGAGES: ADMITTED ASSETS: Insurance companies in question may invest their funds in National Housing Act insured loans and in so doing they may take credit for the investments as an admitted asset for the full value of such investments.

February 28, 1939. *Chas. R. Fischer, Commissioner of Insurance, Des Moines, Iowa. Attention: C. C. Kirkpatrick:* In the absence of Judge Rankin, your letter of February 22, 1939, asking our opinion as to the following matter, has come to the writer for attention.

"May insurance companies organized under Chapter 404 of the 1935 Code of Iowa, invest their funds in F. H. A. mortgages, and if so, may such companies take credit for the same as admitted assets for their full value."

For the purpose of this opinion, we quote the following statutes:

"12786-g1. *Federal insured loans.* Insurance companies and building and loan associations, (1) may make such loans and advances of credit and pur-

chases of obligations representing loans and advances of credit as are eligible for insurance pursuant to Title I, Section 2, of the national housing act (12 USCA, Secs. 1701-1732) and may obtain such insurance, (2) may make such loans, secured by real property or leasehold, as the federal housing administrator insures or makes a commitment to insure pursuant to Title II of the national housing act, and may obtain such insurance.

"It shall be lawful for insurance companies, building and loan associations, trustees, guardians, executors, administrators, and other fiduciaries, the state and its political subdivisions, and institutions and agencies thereof, and all other persons, associations and corporations, subject to the laws of this state, to invest their funds, and the moneys in their custody or possession, eligible for investment, in bonds and notes secured by mortgages or trust deed insured by the federal housing administrator, and in the debentures issued by the federal housing administrator pursuant to Title II of the national housing act, and in securities issued by national mortgage associations or similar credit institutions now or hereafter organized under Title III of the national housing act.

"12786-g2. *Inapplicable statutes.* No law of this state requiring security upon which loans or investments may be made, or prescribing the nature, amount or form of such security, or prescribing or limiting interest rates upon loans or investments may be made, shall be deemed to apply to loans or investments pursuant to Section 12786-g1."

The National Housing Act was passed by Congress as emergency legislation and at that time the statutes of Iowa relating to insurance companies other than life were not adjusted to such legislation but in fact prohibited to insurance companies the right to invest their funds in loans of the nature provided by the Act. In order to remedy this situation, to allow the National Housing Act to become as beneficial as possible and to permit such insured loans to become a field for the investment of funds of the insurance companies, special permissive legislation was passed by the Iowa legislature and this is set out in full above.

The effect of such legislation is to permit insurance companies to invest their funds in bonds and notes secured by mortgage and trust deeds and insured by the Federal Housing Administrator, as well as debentures issued by him in accordance with the National Housing Act. The statutes are clear and unambiguous and in granting the ability to the insurance companies to acquire and own such mortgages, there is the implied right that the insurance companies take credit for such investments as admitted assets of the full value. The one right granted by the legislature necessarily implies and includes the other. It is evident and the statute makes it so, that any law seeking to prohibit the investment of the funds of insurance companies in National Housing Act insured loans must, so far as such prohibition exists, become a nullity.

It is, therefore, our opinion that the insurance companies in question may invest their funds in National Housing Act insured loans and that in so doing they may take credit for the investments as an admitted asset for the full value of such investments.

BLANKET BOND: DEALERS: BIOLOGICAL PRODUCTS: (Section 2710, 1935 Code) Bond required by Section 2710 of the 1935 Code of Iowa must be provided by each dealer in biological products and it may not be a blanket bond to cover several such dealers.

February 28, 1939. *Mr. Mark G. Thornburg, Secretary of Agriculture:* Your

letter of February 25, 1939, asking our opinion upon the following matter, has come to the writer for attention.

"Would a blanket bond filed by a manufacturer of serum to cover several dealers in Iowa, meet the provisions of Section 2710 of the 1935 Code of Iowa requiring a bond."

For the purpose of this opinion, the following statutes of the 1935 Code of Iowa are set out at length:

"2710. *Dealer's permit.* An application for a permit to deal in biological products shall be accompanied by a bond, with sureties to be approved by the department, in the sum of five thousand dollars, which bond shall be conditioned:

"1. To faithfully comply with all laws governing the warehousing, sale, and distribution of biological products, and with all the rules of the department relating to such biological products.

"2. To indemnify any person who uses any such biological products sold by the principal and is damaged by the negligence of the principal, or any of his agents, in the warehousing, handling, sale, or distribution of such biological products.

"3. To pay to the state all penalties which may be adjudged against the principal.

"2711. *Liability on bond.* The principal on such bond shall be liable to every person for any damage caused by the negligence of the principal or of his agents notwithstanding the execution of the bond.

"2712. *New or additional bond.* When judgment is rendered on such bond, the principal shall immediately execute and file with the department a new or additional bond, conditioned as the original bond, and in an amount to be fixed by the department, which shall furnish the same amount of security that was furnished before the original bond was impaired."

To determine the intention of the legislature, the above statutes must be read together. It is clear that the legislature saw serious abuses and injuries that might arise should dealers in biological products not be obliged to provide a bond. It is recognized that unjust hardships might be worked from time to time not only upon private persons and their agents, but upon the State because of the acts of such dealers and to save such parties harmless, as well as to oblige the dealers to comply with the laws of the State, legislation was provided requiring a bond of dealers in biological products. A $5,000.00 liability is not unusual and it is to be conceived that individual dealers might become liable for this or larger amounts from time to time. The statute recognizes this in requiring new and additional bonds when a liability attaches to the original bond. The purpose of the statute is to protect those with whom the dealer transacts business and in addition to require him to obey the laws governing biological products and inasmuch as the bond was set at a minimum figure of $5,000.00, then it was clearly the legislature's intention to require a liability bond of each individual dealer. Should this bond be construed to be blanket in nature, then it would neither serve the purpose of the statute nor the intent of the legislature.

It is, therefore, our opinion that the bond required by Section 2710 of the 1935 Code of Iowa must be provided by each dealer in biological products and that it may not be a blanket bond to cover several such dealers.

LANDLORD'S ATTACHMENT: LEVY: DEFENDANT AS BAILEE: Defendant acknowledged property was seized under a writ of attachment and agreed to hold said property, as bailee of the sheriff, and subject to his

orders. If the defendant then sells any items listed on receipt, he may be prosecuted under Section 13017, Code, 1935.

February 28, 1939. *Mr. Clarence A. Kading, County Attorney, Knoxville, Iowa:* Your letter of the 24th inst. at hand. You ask the opinion of this department on the following proposition:

A started action against his tenant, B, for his rent, and aided said action by a landlord's attachment which was delivered to the sheriff with a dictation from A's attorney listing certain livestock, and also informed him orally that it would be satisfactory to leave the same with the judgment debtor as bailee.

The sheriff went to B's premises and informed him that he was going to attach and remove the livestock designated. There was no actually taking of the custody or removal of the livestock from the premises, however, as the sheriff then presented to B the following receipt for personal property which was duly signed by B:

"A, Plaintiff,
vs. Receipt for Personal Property.
B, Defendant.

Received this 1st day of December, 1938, of S, Sheriff of Marion County, Iowa, the following described personal property seized under a Writ of Landlord's Attachment in the above entitled cause, to-wit: (description of livestock) to hold the same as Bailee of the Sheriff and subject to his orders.

Executed the day and date above written.

Witness S. (Signed) B"

There was no arrangement made as to compensation for holding said property, neither was there any re-delivery bond executed and given to the sheriff.

It now definitely appears that B has sold and disposed of several items which were listed on the receipt, part of which, however, was subject to a mortgage superior to the landlord's lien.

The question is: Has B committed a crime under the provisions of Sections 13016 and 13017, Code of Iowa, 1935?

We are of the opinion that the defendant may be successfully prosecuted under Section 13017, Code of Iowa, 1935. We are hereinafter setting out our reasons for so holding.

Section 12102 provides:

"Property capable of manual delivery, and attached otherwise than by garnishment, is bound thereby from the time manual custody thereof is taken by the officer under the attachment."

Under this section the Court held in *Crawford vs. Newell*, 23 Iowa 453, that to constitute a valid levy, even between the parties, the officer should do that which would amount to a change of possession, or something equivalent to a claim of dominion, coupled with a power to exercise it.

In the body of the opinion in the *Crawford vs. Newell case*, it is said:

"To constitute a valid, operative attachment levy under the provisions of the statute, the officer should do that which would amount to a change of possession, or something that would be equivalent to a claim of dominion, coupled with a power to exercise it."

In *Allen vs. McCalla*, 25 Iowa 464, it was held that the officer must do such acts as that, but for the protection of the writ, he would be liable in trespass therefor. This was also the holding in *Hibbard vs. Zenor*, 75 Iowa 471.

In the case of *Hamilton vs. Hartinger*, 96 Iowa 7, the claim was made that there was no valid levy of attachment because, among other things, the sheriff failed to take any of the property into his custody. The property involved was both real and personal and the question arises on the validity of the attachment in so far as the personal property is concerned. It appears further

that the sheriff gave the defendant personal notice by word of mouth of said levy and informed him that he would place the same in the hands of the defendants's son, as bailee, that the sheriff did not remove any of said property from the building in which the defendant, Hartinger, was doing business but placed the same in the possession of Charles Hartinger, son of defendant, as bailee, and so informed said defendant, to which he assented. The bailee receipted for all of the property. James Hartinger, defendant, was in possession of the property levied upon and the sheriff gave him notice that he would not only make said levy but told defendant that he had made the levy. The Court held that this was a proper levy.

In the case of *First Nat. Bank vs. Schram*, 202 Iowa 791, it appears that action upon certain promissory notes was aided by attachment upon certain grain and live stock of defendants'. Defendants filed counterclaim for damages on account of the alleged wrongful suing out of the attachment. Verdict and judgment in favor of defendants upon the counterclaim. It is conceded that an attachment bond was filed, writ issued, and notice of a purported levy served upon appellees. The record also shows the return of the sheriff, which certifies that he levied the writ upon the property in the notice attached thereto. The property included corn, hay, oats, horses, cattle and hogs. The sheriff did not take physical possession of the property, nor did he cause it to be segregated on the premises or removed therefrom. He did take an invoice thereof, all of which was pointed out to him by the defendant, Schram, in whose custody the property was left. Schram gave the sheriff a receipt for the property, the final sentence of which was as follows:

"And I hereby agree to preserve and to hold said property and deliver the same to said sheriff upon demand."

The Supreme Court held that this was a valid levy. In the syllabus it is said:

"A sufficient levy is made by the act of the officer in invoicing the property and leaving it in the possession of his agent."

In 17 *R. C. L.* 181, paragraph 78, it is said:

"He (the officer in levying attachment) must do that which would amount to a change of possession, or which would be equivalent to a claim of dominion, coupled with a power to exercise it."

Under this text *Hibbard vs. Zenor*, *supra*, is cited. In the instant case, as shown by the receipt, the defendant acknowledged that the property was seized under a writ of attachment and agreed to hold said property, as bailee of the sheriff and subject to his orders. Thus it would appear that the action of the sheriff was equivalent to a claim of dominion, coupled with a power to exercise it.

We, of course, assume that the sheriff performed his duty, as required by law, and gave to the defendant notice of levy. It appears that B, after said levy, disposed of some of the property levied upon.

We reach the conclusion, therefore, that B has violated the provisions of Sections 13016 and 13017, and that he may be successfully prosecuted thereunder.

EMBEZZLEMENT OF GUARDIANSHIP FUNDS: STATUTE OF LIMITATIONS: Statute of limitations starts to run as to offense of embezzlement in a guardianship matter on date ward becomes 21 years of age. As to executors or administrators the statute commences to run upon the settlement of the estate. Section 13036.

March 2, 1939. *Mr. Walter W. Selvy, Assistant County Attorney, Des Moines, Iowa:* This is in answer to your letter of the 1st inst., requesting our opinion relative to the interpretation of Section 13036, Code of Iowa, 1935.

It appears that Mrs. Hall was appointed guardian of Hazel Hall in 1920 and received money monthly until Hazel acquired her majority. That all of the money that came into the guardian's hands was received prior to the ward's majority. Hazel married in 1928, but did not become twenty-one until 1930. The guardian never made an accounting of the money and the guardianship has not been closed. In 1938 the guardian filed a report stating that she did not have any of the money.

The question is: When did the statute of limitations start to run as to the offense of embezzlement?

Section 13036, Code of Iowa, 1935, provides:

"If any executor, administrator, or guardian embezzles * * * money or property coming into his possession or under his control by virtue of his said office, he is guilty of larceny and the *statute of limitations shall not begin to run as to such offense until the settlement of the estate or the attainment of majority by the ward, as the case may be.*"

It is our opinion that the statute of limitations began to run on the date that Hazel became twenty-one years of age. We believe that the phrase, "until the settlement of the estate," has reference only to administrators and executors and that, therefore, the fact that the guardianship in question is not closed is immaterial. Inasmuch as the crime of embezzlement is barred by the criminal statute of limitations in three years, as provided in Section 13444, this guardian can not successfully be prosecuted, as we view it.

The word "or," as used in this statute is disjunctive, as we view it, and the phrase, "as the case may be," we think, means that as to executors or administrators the statute commences to run upon the settlement of the estate but in the case of guardianships the statute starts to run when the ward becomes twenty-one years of age.

COUNTY ATTORNEY: SHERIFF: LAW SUITS AGAINST SHERIFF: Law suits against former sheriff or deputies growing out of alleged false arrests, and now pending in Supreme Court, are not within the duty of the county attorney to defend.

March 2, 1939. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:*

This is in answer to your letter of the 27th ult. wherein you request our opinion relative to your duty to appear and defend law suits brought against the former sheriff, former deputy sheriffs and against deputy sheriffs who served under former sheriff and are now serving under your present sheriff. You also ask whether it is your duty to appear in the Supreme Court in an action commenced against the former sheriff, the cases having been defended by the former county attorney in the lower court and are now pending on appeal in the Supreme Court. It appears that these law suits grew out of alleged false arrests and trespass in connection with the service of warrants of arrest.

Section 5180, Code of Iowa, 1935, sub-section 6, provides:

"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."

We have given this matter considerable study and consideration and have finally come to the conclusion that "in his official capacity," as used in said Section 5180, could not be properly construed to require the County Attorney to defend the sheriff in cases of the kind referred to in your letter. We, therefore, hold that it is not your duty to defend the former sheriff and the deputies referred to in your letter, in the cases now pending against them in the district and supreme court.

CERTIFICATES: SECONDARY ROADS: FINANCING PRIMARY AND SECONDARY ROADS: The certificates issued under provisions of Sec. 4644-c48 et seq. are not included in those mentioned in Section 4753-a18.

March 2, 1939. *Mr. Ray G. Walter, County Attorney, Ida Grove, Iowa:* This is in answer to your letter of the 24th ult. requesting our opinion on the following proposition:

"Does the term 'certificate' as used in lines 4 and 6 of Section 4753-a18, Iowa Code 1935, include anticipatory certificates issued under provisions of Sections 4644-c48 to 4644-c57, Iowa Code 1935?"

Section 4753-a18, Code of Iowa, 1935, is contained in Chapter 241. This section, in substance, provides that any member of the board of supervisors or other county officer who authorizes or issues or permits to be issued, any certificate or bond in violation of the requirements *herein* specified, or who diverts, etc., shall be deemed guilty of embezzlement.

The certificates and bonds referred to are those provided for in Section 4753-a9, et seq. Sections 4644-c48 to 4644-c57, Code of Iowa, 1935, are contained in Chapter 240 and have reference to construction of secondary roads and bridges, whereas Chapter 241 provides for the financing of primary and secondary roads.

It is our conclusion that the word "herein", in the 5th line of Section 4753-a18, refers to Chapter 241 and has no reference whatsoever to Chapter 240 and, therefore, the certificates issued under the provisions of Section 4644-c48, et seq. are not included.

The phrase, "in violation of the requirements herein specified" refer, we believe, to the requirements set out in Chapter 241.

COUNTY ATTORNEY: BOARD OF SUPERVISORS: DRAINAGE MATTERS: The board of supervisors may employ the county attorney for compensation other than his salary as county attorney, in drainage matters.

March 2, 1939. *Mr. Arthur J. Braginton, County Attorney, Rockwell City, Iowa:* This is in answer to your letter of the 27th ult. wherein you request our opinion on the following legal question:

"Is it objectionable for the county attorney to be employed by the board of supervisors in drainage matters for compensation other than the salary as county attorney?

"For some twenty or twenty-five years the board has employed a drainage attorney, but because of sickness of the partner of the drainage attorney, this particular attorney desires that I look after some matters in connection with drainage for the time being, and of course I don't want to take on this additional work unless I receive compensation."

It is the opinion of this department that such employment is legally permissible.

Section 5180, Code of Iowa, 1935, provides:

"It shall be the duty of the county attorney to * * * give advice or his opinion in writing, without compensation, to the board of supervisors and other county officers, and to school and township officers, when requested so to do by such board or officer, upon all matters in which the state, county, school or township is interested, or relating to the duty of the board or officer in which the state, county, school or township may have an interest; * * *"

The one quoted is sub-section 7. In all there are eleven sub-sections under Section 5180, in which the various duties of the county attorneys are set out. We, however, have omitted all but the 7th, for the reason that we feel these are not material on the question submitted.

Section 7519, Code of Iowa, 1935, reads as follows:

"In all actions or appeals affecting the district (drainage district), the board of supervisors shall be a proper party for the purpose of representing the district and all interested parties therein, other than the adversary parties, and the employment of counsel by the board shall be for the purpose of protecting the rights of the district and interested parties therein other than the adversary parties."

Section 7585 provides:

"The board is authorized to employ counsel to advise and represent it and drainage districts in any matter in which they are interested. Attorney's fees and expenses shall be paid out of the drainage fund of the district for which the services are rendered, or may be apportioned equitably among two or more districts. Such attorneys shall be allowed reasonable compensation for their services, also necessary traveling expenses while engaged in such business. * * *"

In view of the express provisions of the two sections last quoted, authorizing the employment of counsel, we incline to the view that it was not the intention of the legislature, under Section 5180, to impose upon the county attorney the duties now customarily performed by drainage attorneys.

In 18 C. J. 1309, paragraph 32, it is said:

"It is not a part of the official duty of a county attorney to prosecute for and defend a drainage district located in his county."

This was the holding in *Lincoln County vs. Robertson*, 35 Okla. 616, 130 Pac. 947.

We reach the conclusion, therefore, that your county has the legal right to employ you to act as drainage attorney.

LIEUTENANT GOVERNOR: POSTAGE: The lieutenant governor may be supplied and furnished postage by the state in his official capacity.

March 3, 1939. *Mr. Berry Halden, Sec'y, Executive Council:* Your letter of February 15, 1939, asking our opinion as to whether or not under Section 303 of the 1935 Code of Iowa, postage should be furnished to the lieutenant governor, has come to the writer for attention.

Section 303 of the 1935 Code of Iowa, is as follows:

"*Postage.* Postage shall not be furnished to the general assembly, its members, officers, employees, or committees."

To construe this statute, we must examine it in the light of the instruction supplied us by the legislature in Section 64 of the 1935 Code of Iowa, which is as follows:

"*Common-law rule of construction.* The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this

code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

With this in mind, it is evident that the legislature intended by Section 303 to end and avoid the abuses which might and could arise through the granting to the legislative body of the use of postage furnished by the state. The statute undoubtedly was intended, because of its language, to embrace the members, officers, employees and committees of the general assembly.

The lieutenant governor is a duly elected officer of the State of Iowa and as such is delegated many of the powers, rights and duties of the sovereignty of the state. Among such duties is that of presiding officer of the senate. To determine that because of such office the lieutenant governor is prohibited by statute from the use of postage supplied by the state in all of his manifold duties and the required public activity of his office, would clearly be beyond the intention of the legislature and the providing of such postage to the lieutenant governor is manifestly not the evil which the statute seeks to prevent. It is clear that the office of the lieutenant governor, including as it does the duty of presiding over the senate, is not such an office as the statute seeks to include nor for the purpose of the statute is it such a general assembly office as to preclude the lieutenant governor from the use of postage provided by the state in his official capacity.

It is, therefore, our opinion that the lieutenant governor may be supplied and furnished postage by the state.

HIGHWAY COMMISSION: IMPLEMENTS OF HUSBANDRY: MAXIMUM LOAD: Temporary movements of implements upon a highway, when the load exceeds the maximum width of eight feet, must be in accordance with the last clause of Section 476 providing for operation under the terms of a special permit issued in conformity with Sections 491 to 494 inclusive.

March 3, 1939. *Mr. W. H. Root, Maintenance Engineer, Iowa State Highway Commission, Ames, Iowa:* This will acknowledge receipt of your communication of February 20, 1939, with letter attached, in which you request an opinion on the following question:

"Mr. Carl Escher of Bigelow, Minnesota, has recently purchased a farm in Warren County. He expects to operate a farm in Minnesota along with this Warren County farm and in so doing will have occasion to transport a tractor on a Ford truck back and forth about three times during the season. The tractor measures 8½ feet over all width or one-half foot wider than the truck bed.

"Would such transportation, in your opinion, be covered by the exceptions specified in Section 476 of the Motor Vehicle Code with reference to implements of husbandry?"

Section 476 of the Acts of the 47th General Assembly provides as follows:

"Section 476. *Exceptions.* The provisions of this chapter governing size, weight and load shall not apply * * * to implements of husbandry temporarily moved upon a highway, or to a vehicle operated under the terms of a special permit issued as provided in Sections four hundred ninety-one (491) to four hundred ninety-four (494) inclusive."

It is obvious that the purpose of the section is to permit the temporary movement of those vehicles specified without penalty for failure to conform to the requirements as to maximum size, weight and load. The very nature of an implement of husbandry leads us to conclude that the legislative purpose in providing the exception was because its movement on the highways

is occasional and incidental to the purpose for which it is constructed and used. See *State vs. Griswold*, (Iowa) 280 NW 489.

However, we are confronted here with a question involving the restriction as to maximum width of load, rather than the movement of itself of an implement of husbandry on the highway. The tractor is loaded on a truck for transportation, perhaps over a great distance, in the manner that any other load is transported from one place to another. It thus becomes a question not of the temporary movement on the highway of the tractor as an implement of husbandry, but of the operation of a truck on the highway with a load exceeding eight feet in width, the maximum provided by Section 477 of the act.

This view of the situation leads us to conclude that such transportation does not come within the exceptions specified in Section 476 relating to the temporary movement of implements of husbandry upon a highway, but is governed by the last clause of said Section 476 providing for operation under the terms of a special permit issued in conformity with Sections 491 to 494 inclusive.

LEASE: EXTENSION AGREEMENT: RETRENCHMENT AND REFORM COMMITTEE: The execution of the extension agreement was a leasing of office space for state purposes and should be submitted to the Committee on Retrenchment and Reform for approval or disapproval.

March 3, 1939. *Mr. C. Fred Porter, Acting State Comptroller:* We are in receipt of your letter of March 1st requesting an opinion upon the following proposition:

House File 550, Acts of the 47th General Assembly, provides that the Retrenchment and Reform Committee must approve leases for office space at the seat of government. It appears that a certain lease was made by the executive council for office space in the Des Moines Building on November 16, 1934, and thereafter this lease and certain agreements covering additional space were extended to December 31, 1938.

Thereafter, on the 28th day of November, 1938, the executive council entered into an extension agreement with the lessors, extending the lease of November 16, 1934, together with supplemental agreements for the space now occupied by the Board of Assessment and Review to the 31st day of December, 1941, under the same terms and conditions as set forth in the lease dated November 16, 1934, together with supplemental agreements.

The question is whether the extension of the old lease and supplemental agreements constitutes a new lease within the provision of House File 550, Acts of the 47th General Assembly requiring the approval of the Retrenchment and Reform Committee.

It is to be observed here that neither the original lease nor any supplemental agreement contained any renewal option clause.

The extension agreement was signed by the lessor and the secretary of the executive council. It answers every definition of a lease in that it is signed by the parties and it is a conveyance or grant of an estate in real property for a limited term. The original instruments are made part of the extension agreement by reference and this reference defines the terms and conditions that will govern during leasehold period created by the extension agreement. See 35 Corpus Juris 1037, Sec. 178, which is as follows:

"4. *Effect of renewal or extension*—a. *As new lease or continuance of old.* In point of legal operation each renewed lease is a new lease, and the taking of it operates as a surrender of the old one. * * *"

Section 2 of House File 550 provides as follows:

"All leases leasing any building or office space for state purposes hereafter executed or leased shall be subject to the approval of the state executive council and the joint legislative committee on retrenchment and reform."

For the reasons stated, we are of the opinion that the execution of the extension agreement described herein was a leasing of office space for state purposes and the same should be submitted to the committee on retrenchment and reform for approval or disapproval.

BONDS: SURETY: DEALERS: The State Treasurer must approve bonds of cigarette dealers, gasoline dealers and other dealers required by law to give bond.

March 3, 1939. *Mr. W. G. C. Bagley, Treasurer of State:* You have requested an opinion of this office in regard to the following proposition:

Is it mandatory upon the state treasurer to accept as surety, on bonds required from cigarette dealers and gasoline dealers and other dealers who are compelled by law to give bond, a bonding company which is duly organized under the laws of this state and which now holds the certificate of the Commissioner of Insurance authorizing it to do business in this state?

We are of the opinion that under the provisions of Section 12763 of the 1935 Code of Iowa the treasurer must approve such a bond. This section requires the treasurer to approve such a bond as respects the qualifications of the surety. It of course does not require the officer to accept and approve a bond which would be insufficient in amount, even though given by such a surety, but when such a bond is presented and in form it complies with statutory requirements, then the treasurer need inquire no further as to the financial responsibility of the guarantor or bondsman, and if in a sufficient amount the bond should be approved. See *C. M. & St. P. R. Co. vs. Drainage District*, 197 Iowa 131.

STATE AUTOMOBILES: SUPERINTENDENTS OF STATE INSTITUTIONS: Under no circumstances may superintendents of state institutions use state owned automobiles for private or personal use.

March 8, 1939. *Mr. G. S. Wooten, Board of Control of State Institutions:* Your letter of the 2nd inst. addressed to Honorable John M. Rankin, First Assistant Attorney General, has been handed to the writer for attention, Judge Rankin being absent from the city on official business.

In this communication you ask the opinion of this department relative to the casual use of state automobiles for private and personal use by superintendents of state institutions.

It is our opinion that under no circumstances may superintendents of state institutions use state owned automobiles for private or personal use.

Such use is expressly prohibited by Section 13316-e1, which reads as follows:

"No public officer, deputy or employee of the state or any governmental subdivision, having charge or custody of any automobile, machinery, equipment or other property owned by the state or a governmental sub-division of this state, shall use or operate the same or permit the same to be used or operated for any private purpose."

Section 13316-e3 provides that a violation of said Section 13316-e1 shall be punishable as a misdemeanor.

We do not find that Attorney General Edward L. O'Connor rendered an opinion to the effect that the use of state automobiles for private purposes was legal and proper.

NUNC PRO TUNC ORDER: PRISONER'S SENTENCE: PAULSON—THE PRISONER: Nunc pro tunc order can not fix prisoner's sentence to commence for any period prior to commission of crime, even though prisoner may be serving sentences previously imposed. Nunc pro tunc order entered in Paulson case without force and effect.

March 8, 1939. *Mr. E. H. Felton, Member Board of Control of State Institutions:* Your letter of the 1st inst., written to Honorable John M. Rankin, First Assistant Attorney General, and wherein you request an opinion on certain legal questions raised in a letter from the warden of the penitentiary, has been handed to the writer for attention, Judge Rankin being absent from the city on official business.

For a full understanding of the legal questions involved, we quote from the warden's letter as follows:

"With reference to our conversation of recent date we are again submitting the legal questions of the above named case to be presented to the Attorney General's office for an opinion. The facts of the case are as follows:

"Paulson was received here Jan. 30, 1936, from Black Hawk County with sentence of ten years for the crime of breaking and entering. While serving this sentence he was taken to the University Hospital for medical treatment from which he escaped May 24, 1937. He was apprehended at Nora Springs, Iowa, and returned to this institution June 19, 1937. He was tried and convicted in the District Court of Lee County for the crime of escape and on Sept. 28, 1937, was sentenced by Judge John R. Leary to a term of five years in the penitentiary. Said sentence to commence at the expiration of his present sentence. On October 5, 1937, Paulson was transferred to the insane ward at the Anamosa reformatory.

"While Paulson was an escape from the University Hospital the local officers in Iowa City attempted to capture him, at which time Paulson, I understand, fired at them with a pistol. He was indicted in Johnson County and taken from the reformatory, by order of Court, to Iowa City in January, 1938, where he was tried and convicted for the crime of assault with intent to commit murder. On January 20, 1938, he was sentenced to a term of thirty years in the men's reformatory, said sentence to run concurrently with the sentences imposed in Black Hawk County for breaking and entering and in Lee County for escape. On January 21, 1938, he was returned to the reformatory, together with the mittimus issued by the District court of Johnson County and he was entered on the records at the reformatory as having started serving his thirty year sentence on that date. This record entry was made in accordance with Section 3773 of the Iowa Code which states, in part:

" 'He shall be deemed to be serving his sentence from the date on which he is received into the institution.'

"On March 27, 1938, Paulson and all records pertaining to his case were transferred from the reformatory back to this institution.

"On or about August 15, 1938, we received a nunc pro tunc order from the District Court of Johnson County, Honorable H. D. Evans, presiding judge, directing the thirty year sentence imposed in that county to commence January 29, 1936, instead of January 21, 1938. This nunc pro tunc order raises two legal questions. Can a prisoner's sentence be so directed that it will start almost two years before the crime was committed, or should Section 3773 of the Iowa Code be the governing factor?

"If the nunc pro tunc order is upheld and his thirty year sentence ordered to commence January 29, 1936, when and how will he serve the sentence for escape? The sentence for escape was imposed September 28, 1937, and, in

accordance with Section 13351 Iowa Code, was directed to commence from and after the expiration of the term of his previous sentence. Therefore, if his thirty year term is to commence January 29, 1936, it will be previous to his sentence for escape, so the escape sentence must commence after the thirty year term is completed. And, if this is the case, the original order of the District Court of Johnson County directing the thirty-year sentence to run concurrently with the other two sentences cannot be complied with.

"We have not changed our records in this case as yet. We entered him as serving his ten year sentence on the day he was received, January 30, 1936. At the expiration of this sentence he will be recommitted to serve the five years for escape. We entered the thirty year term from Johnson County to commence January 21, 1938, the date the mittimus was received at the reformatory, and to run concurrently with the other two sentences."

The principal question in the case, it seems to us is whether or not the *nunc pro tunc* order entered by Judge Evans is valid and legal.

It is our opinion that this order is without force and effect.

Section 12915, Code of Iowa, 1935, provides:

"If any person assault another with intent to commit murder, he shall be imprisoned in the penitentiary not exceeding thirty years."

The effect of the nunc pro tunc order, in our opinion, is to reduce the punishment for Paulson's crime of assault with intent to commit murder by approximately two years. We think it very clear that a sentence for a crime can not, even by a court's order, be fixed to commence for any period prior to the commission of the crime, as this would have the effect of rendering nugatory the sentence fixed by the legislature. It is our opinion that this is so, even though the defendant may be serving sentences previously imposed.

We have made diligent search for authorities to sustain our position but have been unable to find any.

As we view it, your record should contain the following entries with reference to the commencement of Paulson's three sentences:

1. Breaking and entering—January 30, 1936.
2. Escape—To commence at the expiration of sentence for breaking and entering.
3. Assault with intent to commit murder—January 21, 1938. The court having provided that this sentence be served concurrently with that of breaking and entering and escape.

Under this record Paulson will serve all but about two years of his breaking and entering sentence and all of his escape sentence, while he is serving his sentence for assault with intent to commit murder.

This latter statement is made particularly for the purpose of answering your inquiry as to when Paulson will serve the sentence for escape.

I hope this fully answers your inquiry.

HIGHWAY COMMISSION: ROAD CONSTRUCTION PROGRAM: SECONDARY ROAD DISTRICTS: Several continuous miles of road cannot be separated or divided into separate projects for the purpose of grading and surfacing. Roads necessary as connecting links should first be established as highways before incorporated in the final road construction program. A new secondary road district must be established in order to assess 25% of the cost of resurfacing against benefited property.

Ames, Iowa, March 8, 1939. *Harry E. Coffie, County Attorney, Esthervile, Iowa.* This will acknowledge receipt of your request for opinion on the following questions:

"1. In Emmet County's proposed road construction program, Armstrong Grove Twp. has two miles between Sec. 2 and Sec. 3 and Sec. 10 and Sec. 11 listed as No. 1 project for grading. Iowa Lake Twp. has a mile between Sec. 34 and Sec. 35 listed as No. 1; a mile between Sec. 26 and Sec. 27 listed as No. 2; a mile between Sec. 22 and Sec. 23 listed as No. 3. This is one continuous section of five miles. Can this be split into four different projects as designated? Lincoln Twp. has the same set up having four continuous miles listed as No. 1, No. 2, No. 3 and No. 4 successively.

"2. In Estherville Twp. one half mile between SW¼ Sec. 23 and NW¼, Sec. 26, and in Twelve Mile Lake Twp., two miles on south side of Sections 34 and 35 are designated as part of the grading construction program. There are no established or traveled highways on any of the above proposed projects. Can these be made a part of the construction program before they are established as highways?

"3. About 50% of the proposed program is regrading of secondary roads which were established as secondary road districts for the purpose of assessing 25% of the cost of the surfacing to adjacent property.

"In case of surfacing the road following the rebuilding of the grade, will a new secondary road district have to be established and regular procedure carried out in order to levy 25% of the costs of surfacing to the adjacent property?"

Answer to your first two questions can only be accomplished by reference to the underlying purpose of the provisions of Chapter 240 of the Code under the sub-head "Construction Program, particularly those sections from 4644-c24 to 4644-c42 inclusive.

A study of these statutes shows that the fundamental purpose of the legislature was to provide a comprehensive program or project based upon one general unified and uniform plan.

Section 4644-c27 provides in part that careful consideration shall be given, "(1) to the location of primary roads, and of roads heretofore improved as county roads, (2) 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 roads of the county."

It is obvious that no rule of thumb can be observed in the selection or division of projects. It is also clear that a comprehensive plan embodying all the provisions heretofore set forth will in all likelihood necessitate the inclusion of connecting links not heretofore established or traveled. Responsibility for the preparation of the program in conformity with the general statutory requirements is placed upon the Board of Supervisors, Board of Approval and the County Engineer, subject to final approval by the State Highway Commission.

"The question of what is to be considered a project in connection with grading construction work is quite different from that in connection with bridge construction work. The board, of course, has some discretion as to just what shall be considered a project, but the board cannot arbitrarily cut the work up into projects so as to avoid complying with the provisions of Section 43, Chapter 20, Acts of the 43d General Assembly.

"Where there is a five mile stretch of road which is to be graded the board could not in good faith and without violating the provisions of Section 43, Chapter 20, Acts of the 43d General Assembly, divide the five mile stretch up into five different projects, no one project to cost in excess of $1,500.00. This would be a direct attempt to avoid the provisions of Section 43, would be bad faith, and unlawful."

The above quotation from the report of the Attorney General, 1932, at page

99, concisely sets forth one of the underlying purposes of the legislature in providing for such a comprehensive and unified program.

However, we find no provision in the law which anticipates that the final program as adopted shall provide for the separation or division into enumerated priorities of several continuous miles of road into separate projects for the purpose of grading and surfacing. Enumerated priorities are limited to the tentative plans submitted by the townships under the provisions of Section 4644-c25. The final plan as adopted should include work actually to be done accompanied by detailed estimates of the county engineer covering each project. To hold otherwise would open the door to the various abuses the law is designed to eliminate.

Our answer therefore to your first question is in the negative.

With respect to your second question we find no provision expressly prohibiting the expenditure of funds, available for construction of local county roads on connecting links in the secondary road system when no established or traveled road has been in existence.

Section 4745 defines the secondary road system as embodying, "(1) County roads which now exist of record, or which may hereafter exist of record by additions from the township roads, . . . and (2) township roads, which shall embrace all other roads not included within cities and towns."

Sections 4644-c4, 4644-c5 and 4644-c10, provide as follows:

Section 4644-c4. *Designation of roads.* The roads which are now designated as county roads by the plans and records now on file in the office of the county auditor of each county and in the office of the state highway commission shall hereafter be known as county trunk roads. All other roads of said secondary system shall be known as local county roads."

"Section 4644-c5. *Modification of trunk roads.* The mileage of the present county trunk roads shall not be materially increased until the construction work thereon is substantially completed except that the board may modify, relocate or make additions to said roads. All increases, additions, modifications or relocations shall be subject to the approval of the state highway commission."

"Section 4644-c10. *General pledge.* The balance of said secondary road construction fund shall be used for any or all of the following purposes at the option of the board of supervisors to:

"1. The payment of the cost of constructing the roads embraced in the *existing* county trunk road system.

. . . . . ."

An interpretation of these and allied provisions leads us to the conclusion that subject to the minor changes provided for by Section 4607 which may be made in the interest of safety, economy and utility the program of construction is limited to existing roads. Roads necessary as connecting links should first be established before incorporation in the final program. They may then be included in that portion of the plan devoted to construction of local county roads.

With respect to your third question, Chapter 241 contains no provision to perpetuate the district organization, either for purposes of maintenance—as in the case with drainage districts—or for further construction after the original project is completed for which the 25 per cent assessment against benefited property is made.

It is our conclusion therefore that a new secondary road district will have

to be established in order to assess 25 per cent of the cost of hard surfacing against benefited property following rebuilding of the grade.

DRIVER'S LICENSE: BANKRUPTCY: REPEAL: (Section 5079-c4, Code; Sec. 306, Chap. 134, 47th G. A.) Neither the repeal of the Act under which the judgment was taken, nor the discharge in bankruptcy of such judgment so lifts the bar of the statute by virtue of which the driver's license was revoked and is retained, that the Motor Vehicle Department should return such license to the claimant. (Lent Heggen.)

March 9, 1939. *Motor Vehicle Department. Attention: Clair Beattie:* Your letter of February 27, 1939, requesting an opinion as to the following matter, has come to the writer for attention.

The driver's license of one Lent Heggen was revoked in 1934 under Section 5079-c4 of the 1931 Code of Iowa. Does a subsequent discharge in bankruptcy of the judgment resulting from the automobile accident and because of which accident Heggen's driver's license was revoked oblige the Department to return such driver's license?

For the purpose of this opinion, Section 5079-c4 of the 1935 Code of Iowa, which was Section 5079-c4 of the 1931 Code of Iowa, is set out in part as follows:

"*Suspension of license.* Whenever a final judgment is recovered in any court of record of this state in an action for damages for injury to or death of a person or for injury to property caused by the operation or ownership of any motor vehicle on the highways of the state, and such judgment shall remain unsatisfied and unstayed for a period of sixty days after the entry thereof, a transcript of such judgment duly authenticated may be filed with the county treasurer and thereupon the county treasurer shall forthwith suspend the license, if any, of the judgment debtor or debtors, as the case may be, to operate a motor vehicle on the highways of the state and shall forthwith suspend the registration of any and every motor vehicle registered in the name of such judgment debtor or debtors, and the county treasurer shall forthwith notify such owner or owners by registered mail of such cancellation and the owner or owners so notified shall within ten days of the date of mailing such notice surrender to the county treasurer all license plates so suspended, and such suspension shall not be removed nor such license plates returned by the county treasurer nor shall a license to operate a motor vehicle thereafter be issued to such judgment debtor or debtors, nor shall a motor vehicle be registered in the name of such judgment debtor or debtors until proof that such judgment has been stayed, satisfied or otherwise discharged of record shall be filed with the county treasurer."

Section 306 of Chapter 134 of the Acts of the 47th General Assembly is as follows:

"*Suspension of licenses.* Whenever a final judgment is recovered in any court of record of this state in an action for damages for injury to or death of a person or for injury to property caused by the operation or ownership of any motor vehicle on the highways of the state, and such judgment shall remain unsatisfied and unstayed for a period of sixty days after the entry thereof, a transcript of such judgment duly authenticated may be filed with the commissioner and thereupon the commissioner shall forthwith suspend the license, if any, of the judgment debtor or debtors, as the case may be, to operate a motor vehicle on the highways of the state and shall forthwith suspend the registration of any and every motor vehicle registered in the name of such judgment debtor or debtors, and the commissioner shall forthwith notify such owner or owners by registered mail of such cancellation and the owner or owners so notified shall immediately upon receipt of such notice surrender to the county treasurer all registration plates so suspended, and such suspension shall not be removed nor such registration plates returned by the county treas-

urer nor shall a license to operate a motor vehicle thereafter be issued to such judgment debtor or debtors, nor shall a motor vehicle be registered in the name of such judgment debtor or debtors until proof that such judgment has been stayed, satisfied or otherwise discharged of record shall be filed with the county treasurer."

Section 5079-c4 remained intact until the 47th General Assembly enacted the new motor vehicle law, the same act repealing the old motor vehicle statutes and among them Section 5079-c4.

Analyzing the problem, it is to be observed that its solution depends upon the answer to the following questions:

1. The judgment and consequent license revocation having occurred prior to the passage of Section 306, and Section 5079-c4 having been repealed, does such repeal remove the bar of the statute so that the license must be returned, assuming that Section 306 may not be retroactive?
2. Is a discharge in bankruptcy such a stay, satisfaction or other discharge of record as to satisfy the requirement of Section 306?

Considering the first question, it is to be noted that the general rule of statutory construction provides that upon the repeal of an act and a simultaneous reenactment of a law substantially the same, then the old act shall be deemed to be of continuing nature.

The Iowa rule has been definitely determined by the Iowa Supreme Court in several decisions. An early case is that of *Hancock vs. District Township of Perry*, 78 Iowa 550, 43 NW 527, in which opinion the court quotes with approval from the case of *United Hebrew Association vs. Benshimol*, 130 Mass. 327, ... NE ...:

"When statutes are repealed by acts which substantially retain the provisions of the old laws, the latter are held not to have been destroyed or interrupted in their binding force. 'In practical operation and effect, they are rather to be considered as a continuance and modification of old laws, than as an abrogation of those old, and the re-enactment of new, ones.'"

And the court said in *State of Iowa vs. Prouty*, 115 Iowa 657, 84 NW 670:

"The repeal and simultaneous re-enactment of substantially the same statutory provisions is not to be construed as an implied repeal of the original statute, but as a continuation thereof, so that all interests, under the original statute, remain unimpaired."

And again in *Robinson vs. Ferguson & Son*, 119 Iowa 325, 93 NW 350:

"The repeal of the prior tax laws and the simultaneous re-enactment of substantially similar ones is not to be construed as relieving defendants from any duty under the old law."

The above decisions state the Iowa rule and this is true generally.

Amerpohl vs. Wisconsin Tax Commission, 272 NW 472 (Wis.);
Schneider vs. Davis, 192 NW 230 (Nebr.).

Applying the rule to the facts at hand, we find that the new act, Section 306 of Chapter 134 of the Acts of the 47th General Assembly, was a simultaneous reenactment of Section 5079-c4 of the 1935 Code of Iowa, and as such the binding force of Section 5079-c4 was continuous and was never destroyed or its effect interrupted.

We therefore conclude that the bar of the statute has never been lifted because of the repeal and reenactment and claimant may not, therefore, require the return of his driver's license for that reason.

Turning to the second question, it will be observed that an adjudication in bankruptcy is not a satisfaction of the debt but the creation of a bar only to the enforcement of the debt. This is the general rule and is recognized by the

Supreme Court of Iowa, the court stating in *Harding vs. Quinlan*, 209 Iowa 1190, 228 NW 672:

"The force and effect of a discharge in bankruptcy is to place in the hands of the bankrupt a complete and perfect defense to an action on the debt barred thereby; but, when recovery is sought on this debt in another action, the discharge in bankruptcy avails nothing, unless it is set up and pleaded as a defense. . . . In other words, the fact that the plaintiff knows that the defendant has a legitimate defense to his claim cannot be made the basis of a charge of fraud in the taking of a judgment by default."

And again in *Pierce vs. Fleming*, 205 Iowa 1281, 217 NW 806:

"In the first place, the appellants, in no way pleaded that the note of $2,850 had been canceled and satisfied by their discharge in bankruptcy, and it is quite elementary that, in order for the appellants to avail themselves of the claimed satisfaction of the note by virtue of their discharge in bankruptcy, such fact must be pleaded and proved as a defense."

Applying these rulings, we find that in order to lift the bar of the statute, the judgment debt must be stayed, satisfied or otherwise discharged of record. We fail to see how a discharge in bankruptcy could meet any of such three requirements. On its face it is not a stay and the rulings of our court are clear that it cannot be a satisfaction, and since an adjudication in bankruptcy clearly does not affect the judgment entry or its record it does not constitute a discharge of record.

We consequently reach the conclusion that because an adjudication of bankruptcy merely sets up a bar to the collection of the judgment debt, but in no way stays, satisfies or discharges such judgment debt of record, that the bar of the statute is not lifted by such adjudication.

It is, therefore, our opinion that neither the repeal of the act under which the judgment was taken nor the discharge in bankruptcy of such judgment, so lifts the bar of the statute by virtue of which the driver's license is retained, that the Motor Vehicle Department is obliged to return such license.

BEER PERMITS: Class "A" beer permit holders cannot sell beer to Fort Des Moines Army Post Exchange and the Civilian Conservation Corps Exchange who hold no beer permits.

March 9, 1939. *Mr. W. G. C. Bagley, Treasurer of State. Attention: E. F. Rahm:* Receipt is acknowledged of your request for an opinion with regard to the right of a holder of a Class "A" Beer Permit to make sales of beer at wholesale to the Fort Des Moines Army Post Exchange and the Civilian Conservation Corps Exchanges.

Section 1921-f105 of the 1935 Code of Iowa provides as follows:

"*Authority under class "A" permit.* Any person holding a class "A" permit issued by the treasurer of state, as in this chapter provided, shall be authorized to manufacture and sell, or sell at wholesale, beer for consumption off the premises, such sale or sales within the state to be made only to persons holding subsisting class "A", "B" or "C" permits issued in accordance with the provisions of this chapter."

You will note that under the above section the holder of a Class "A" Beer Permit can only make sales of beer within the state to persons holding subsisting Class "A," "B" or "C" permits. We understand that the Fort Des Moines Army Post Exchange and the Civilian Conservation Corps Exchanges do not hold such beer permits. We do not feel that the fact that these exchanges are branches of the Federal Government is material on the question here in-

volved, and we are, therefore, of the opinion that the Class "A" Beer Permit holders in Iowa cannot legally make sales of beer to these exchanges who do not hold Class "A," "B" or "C" Permits.

We have examined the case of *United States vs. Query*, 21 Fed. Supp. 784 (S.C.), which seems to have been cited as authority for the proposition that sales could be made in this state as above outlined. We do not feel that this case is such authority, for in the Query case the tax imposed by South Carolina was on the privilege of engaging in the business of selling certain articles such as cigars, cigarettes, chewing tobacco, etc., and the court held that the Civilian Conservation Corps Exchange was an instrumentality of the United States Government and being such was exempt from the tax. This case can be distinguished from the Iowa situation for the opinion we are now rendering shall not be construed as in any way interfering with the operation of the exchanges. We only hold that the Class "A" Beer Permit Holders cannot sell to such exchanges who hold no beer permits.

MATTRESS FACTORIES: FEE: REGISTRATION: The Department of Agriculture may charge a $10.00 inspection fee and require the registration of mattress factories making new or remake mattresses, excepting only such factories which remake mattresses but do not sell them to the public or offer them for sale.

March 10, 1939. *Mark G. Thornburg, Secretary of Agriculture:* Your letter of March 1, 1939, asking our opinion upon the following matters, has come to the writer for attention.

May the Department of Agriculture charge a $10.00 inspection fee in the case of factories making no new mattresses but doing strictly remake work?

Does the law require that a factory doing only remake work register with the Department of Agriculture?

For the purpose of this opinion, the following Sections of the 1935 Code of Iowa, are set out:

"3223. *Registration of manufacturers.* Every manufacturer of mattresses or comforts shall register with the department of agriculture and be assigned by it a factory number, which shall show on each label as required by Section 3222.

"3224. *Factory inspection—fees.* Each factory in the state, where mattresses or comforts are made, shall be inspected at least once each year, for which inspection a fee of ten dollars shall be paid to the state by the owner of the factory inspected, but no owner shall be required to pay fees in excess of twenty dollars for any one calendar year.

"3226. *Exceptions—remade mattresses.* This chapter shall not apply to any mattress or comfort made by any person for his individual or family use, nor to the remaking of any mattress or comfort not thereafter to be sold or offered for sale."

Viewing the sections together, there is no doubt but what the legislature intended that all factories making mattresses of any kind or nature, shall be obliged to register with the Department of Agriculture, and in addition to pay an inspection fee of $10.00 annually. It is to be conceived that certain mattress factories engage either in whole or in part in remaking mattresses and without statutory exception such factories would unquestionably be subject to the same requirements as those confining their activities to making new mattresses. The only method by which factories engage in the manufacture of remake mattresses would escape the statutory requirement must,

therefore, be by exception. Section 3226 does provide an exception as to remake mattresses but excepts from the general provisions only those remake mattresses which are not to be sold or offered for sale. We consequently conclude that mattress factories of whatever type or kind, whether they make new or remake mattresses, must be registered and required to pay the inspection fee, excepting only those which remake mattresses not to be sold or offered for sale. This is the only possible exception and all other combinations of whatever nature or kind are subject to registration and license.

It is, therefore, our opinion that the Department of Agriculture may charge the $10.00 inspection fee and require the registration of mattress factories making new or remake mattresses, excepting only such factories which remake mattresses but do not sell them to the public or offer them for sale.

PARDONS: GOVERNOR: LEGISLATURE: RESTRICTIONS PRECEDING ISSUANCE OF PARDON: Legislature is without power to in any manner suspend, restrict or limit Governor's right to grant pardons after conviction; Legislature may pass law requiring notice by publication in county where sentence was imposed prior to granting pardon, or may enact other reasonable rules and regulations relative to exercise of Governor's pardoning power.

March 11, 1939. *The Honorable G. R. Hill, State Senator:* This will acknowledge receipt of your letter of recent date, wherein you ask the opinion of this department relative to the two following propositions:

1. Can the Legislature restrict the power of the Executive in the issuance of pardons or commutations of sentences?
2. Can the Legislature impose any restrictions or requirements preceding the issuance of a pardon or commutation of sentences?

Answering your first inquiry, it is our opinion that the Legislature is without power to in any manner suspend, restrict, or limit the Governor's right to grant reprieves, commutations and pardons after convicition.

Section 16, Article IV, Constitution of the State of Iowa, provides:

"The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. * * * He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the General Assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and the reasons therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted."

In 46 *Corpus Juris*, page 1187, paragraph 18, it is said:

"By reason of express constitutional provisions the pardoning power of the executive in a number of states is subject to such regulations as may be imposed by law. (Iowa has regulation provisions in Constitution) * * * It has been held that such a provision does not authorize a restriction of the pardoning power, except that the legislature may by law provide how applications may be made, and consequently that a statute is invalid where it provides that the executive shall not grant a pardon until he has obtained the advice of the board of pardons, or where it prohibits the exercise of the power without the previous concurrence and recommendation of a board."

In the case of *Re William Ridley*, Okl. C. R. 106, Pac. 549, 26 L. R. A. (ns) 110, the Court said:

"There are many reasons why a power of this kind should be confided to the highest executive officer. It involves a wide discretion. The proceedings upon the trial may be reviewed. New evidence may be taken upon which to rest the pardon, thus, in effect, granting a new trial. It may be *ex parte*, after

the witnesses have disappeared or are dead. It may and often is based upon an alleged reform of an offender. * * * The office of governor seems to be generally considered the proper one with which to lodge such responsibility, and the public have the right to insist upon his performance of the duty. Not only is it beyond the power of the legislature to impose the duty upon others, but it should not in any way lessen his responsibility to the public, when he sets aside the judgment of court and jury by opening the doors of a prison to a convicted felon."

This case further holds:

"Under Section 10, Art. 6, of the Constitution, the pardoning power is vested exclusively in the governor of the state, and any law which restricted this power would be unconstitutional and void. Held that Article 26, Chap. 89, Snyder's Comp. Stat. 1909, being Chapter 62, p. 576, Session Laws 1907-1908, entitled 'An Act relating to the granting of pardons; creating a board of pardons, and defining its duties,' in conferring pardoning powers upon other state officers, and restricting the governor in the exercise of the pardoning power, is an unconstitutional infringement and interference upon the executive power. The Constitution only vests in the legislature the power to provide by law regulations relative to the manner of applying for pardons."

The Oklahoma Constitution had the following provision:

"The governor shall have power to grant, after conviction, reprieves, commutations, paroles, and pardons for all offenses except cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, *subject to such regulations as may be prescribed by law.*

Note similarity of italicized phrase to the Iowa Constitution. In this connection we call your particular attention to the fact that in the Iowa Constitution there is no provision to the effect that the governor's pardoning power may be exercised upon such conditions and with such restrictions and limitations as *he* may deem proper. The phraseology employed in our Constitution is, "subject to such regulations as may be provided by law."

Courts have differentiated between the word "restriction" and the term "regulation." In the case of *Laird vs. Sims*, 16 Ariz. 521, this pronouncement is illustrated.

The Arizona Constitution contains this provision:

"The governor shall have power to grant reprieves, commutation, and pardons, after convictions, * * * upon such conditions and with such restrictions and limitations as may be provided by law." (Article V, Section 5)

It was contended in that case that the above words bear upon and qualify the pardon itself. It was said:

"The attorney general would paraphrase it thus: 'The governor shall have power, upon such conditions and with such restrictions and limitations as may be provided by law, to grant pardons.'

"And appellant would have it read: 'The governor shall have power to grant conditional pardons; that is, pardons containing conditions, restrictions, and limitations upon the conduct of the grantee thereof.'

"Neither contention is unreasonable; both are plausible. The legislature evidently took the former view. At its first session it passed, over the governor's veto, an act that was subsequently referred to the people, and by them approved * * * which undertakes to limit and restrict the governor's pardoning power. We conceive it to be the duty of this court to sustain such law if possible."

The law in question created a board of pardons and provided that the governor had the right to exercise his right of pardon only upon recommendation of said board. As has been indicated, this law was upheld under the constitutional provision above set out. Such a law, however, would not, in our opinion, be upheld under the provisions of our constitution, which vests the

pardoning power in the governor, *subject only to such regulations as may be provided by law.* See *Ridley case, supra.*

In 46 *Corpus Juris*, 1187, paragraph 17, it is said:

"Where the pardoning power is vested in the executive without express or implied limitations, the legislature cannot interfere with or control the proper exercises thereof, * * * and in such case it has been held that a pardon granted by the pardoning power without compliance with a statute regulating the manner of application is valid and effectual."

See *People vs. Cummings*, (Mich.), 50 N. W. 310.

The provision in the Michigan Constitution, and which is similar to our own, is as follows:

"The governor may grant reprieves, commutations and pardons after convictions, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to regulations provided by law, relative to the manner of applying for pardons."

See also *People vs. Marsh, et al.*, 84 N. W. 472 (Mich.).

The legislature enacted a statute requiring the governor to obtain the recommendation of the advisory board prior to granting the pardon. The supreme court held that the pardon was valid, notwithstanding the fact that the governor had not obtained the recommendation of the advisory board.

We reach the conclusion, therefore, as to your inquiry number one, that the legislature can not constitutionally enact a law that would in any manner suspend, restrict, or limit the pardoning power of the governor.

Answering your second inquiry, it is our opinion that the legislature may constitutionally pass a law requiring notice by publication in the county where the sentence was imposed prior to the granting of executive clemency.

See 46 *Corpus Juris*, 1187, paragraph 18, quoted under first division of this opinion.

In the case of *Horton vs. Gillespie*, 170 Ark. 107, the prisoner was pardoned by the governor without complying with a certain statute requiring that certificate of publication of an application for pardon be filed in the governor's office before application may be considered. The court held that the pardon was invalid because of failure to comply with this statute.

The Arkansas Constitution provides:

"In all criminal and penal cases, except in those of treason and impeachment, the governor shall have power to grant reprieves, commutations of sentences and pardons after convictions, and to remit fines and forfeitures, under such rules and regulations as shall be prescribed by law." (Note similarity to Iowa Constitution.)

Among other things, the court said:

"It is apparent, of course, that the power to pardon is conferred on the governor by the Constitution except in cases of treason and impeachment, and it was not essential that any legislation be passed to make this power effective. In the absence of legislation the governor might have exercised the power conferred in any manner he pleased, and might have prescribed any rules or regulations concerning its exercise which he thought would be helpful to him. But the governor was not given the absolute power to grant reprieves, commutations, or pardons, but was given this power 'under such rules and regulations as shall be prescribed by law.'

"Legislation which denied the right to pardon except in cases of treason and impeachment, or which so hampered the right as to make the power substantially unavailing, would be void as an abridgment of the power conferred.

But the very sentence of the Constitution which conferred the power also gave the legislature the right to regulate its use.

"This limitation has been frequently recognized and declared. At page 161 of Cooley on Constitutional Limitations (7th ed.) there is a note which reads: 'The power to pardon offenders is vested by the several state constitutions in the governor. It is not, however, a power which necessarily inheres in the executive. *State vs. Dunning*, 9 Ind. 20. And several of the state constitutions have provided that it shall be exercised under such regulations as shall be prescribed by law. There are provisions more or less broad to this purport in those of Kansas, Florida, Alabama, Arkansas, Texas, Mississippi, Oregon, Indiana, *Iowa* and Virginia.' "

It is further said:

"It is apparent that the regulations of the Act of 1903 are simple and can be easily complied with. An analysis of the act readily demonstrates this.

"By Section 1 of the Act the governor is prohibited from granting pardons until there is filed in his office a certificate showing that the application for the pardon has been published as in the Act provided.

"By Section 2 it is provided that applications for pardons in cases of conviction for felony, wife-beating, carrying weapons, and the unlawful sale of liquor, shall be published for two insertions in a weekly newspaper, * * *.

"By Section 3 it is provided that in all cases of conviction for offenses other than those mentioned in Section 2 of the Act the publication may be made by posting * * *."

Further quotations could be made from this decision with benefit, but what we have set out above sufficiently indicates the holding of the court. Other cases in which the decisions are of like import could be cited.

We have given the matter careful study and attention and are abidingly convinced that the legislature may legally enact reasonable rules and regulations relative to the exercise of the governor's pardoning power.

FAIRS: IOWA STATE FAIR: The word "fair" as used in Section 2902-d1, refers only to county fairs.

March 14, 1939. *Mr. Walter W. Selvy, Assistant County Attorney, Des Moines, Iowa:* This is in answer to your letter of the 1st inst., wherein you ask our opinion as to whether the word "fair" appearing in line eight of Section 2902-d1, includes the Iowa State Fair held annually in Polk County, Iowa.

It is our opinion that the word "fair," as the same appears in line eight of said Section 2902-d1, does not apply to the State fair.

There are, of course, no supreme court decisions construing this word but this is the conclusion we come to from reading this section together with the other sections relating to it. You will also note that this section is a part of Chapter 136, which is entitled, "County and District Fairs."

It is our conclusion, therefore, that the word "fair," as used in said section, refers only to county fairs.

JUVENILE COURT: JURISDICTION OF DISTRICT COURT: CRIME OF GRAND LARCENY: District court had jurisdiction to accept plea of guilty of boy sixteen years of age. Or court may transfer case to the juvenile court.

March 15, 1939. *Mr. Pearl W. McMurry, County Attorney, Corydon, Iowa:* Received your letter of the 14th inst. wherein you ask our opinion on the following proposition:

Suppose a boy, sixteen years of age, is accused in county attorney's information of the crime of grand larceny and when brought before the district court

enters a plea of guilty to the crime charged in the county attorney's information, does the court have authority and jurisdiction to accept the plea of guilty from a boy of sixteen, and to pass sentence?

It is our opinion that under Section 3636, Code of Iowa, 1935, the district court has jurisdiction to accept the plea of guilty and to pass sentence thereon.

Section 3636 reads as follows:

"When there is a conviction in the district court of any delinquent child of an indictable offense, the district court may enter judgment thereon, or, if the punishment be not imprisonment for life, or death, it may transfer the cause to the juvenile court. The juvenile court shall have power to proceed with such child under the alternative of mandatory commitments provided in this chapter; but if the results, in the opinion of the court, be not conducive to the public interest and the welfare of the child, it may at any time revoke such orders of commitment and enter such judgment of conviction as the district court might have entered."

In *State vs. Reed*, 207 Iowa 557, the court said:

"We do not hold that discretion lodged in the juvenile court can be disturbed by the district court, but we do hold that, where the district court has the usual indictment returned, or county attorney's information filed, even where the child is under the statutory age, it is not necessary to its jurisdiction that it refer or submit the matter to the juvenile court before proceedings under the indictment; for, as we view it, Section 3636 covers this very situation, and after the trial on a return of a verdict of guilty, then, in the prescribed cases, the district court has discretion to determine whether or not the punishment shall be inflicted, or whether the matter shall be returned to the juvenile court for disposition in accordance with the proceedings therein."

We reach the conclusion, therefore, that the district court has jurisdiction to accept the plea and pass sentence thereon. In his discretion he may transfer the case to the juvenile court for such disposition as might have been made by the juvenile court had the prosecution been commenced upon juvenile complaint.

ELEVATORS: INSPECTION: BUREAU OF LABOR: (Chapter 83, 1935 Code) Repeal of Section 1684 of the 1924 Code of Iowa and its re-enactment does not relieve the Bureau of Labor of its duty of inspection and consequently enforcement of Chapter 83 of the 1935 Code of Iowa.

March 16, 1939. *Mr. Milton Peaco, Labor Commissioner:* Your letter of March 15, 1939, requesting our opinion on the following matter, has come to the writer for attention.

"It has always been the undisputed function of this department to enforce regulations relating to passenger and freight elevators. . . . However, in view of the repeal of the violation and enforcement clause of the Code by the 41st General Assembly, the question arises as to whether or not by such repeal this department was relieved of jurisdiction or whether under general jurisdiction this department is empowered to continue the enforcement and inspection of equipment and maintenance of freight and passenger elevators."

For the purpose of this opinion, we quote the following:

Section 1684 of the 1924 Code of Iowa is as follows:

"*Violations.* Every person, firm, or corporation operating an elevator in violation of any of the provisions of this chapter or in violation of the code of standards, rules and regulations adopted by the board, or who resists or interferes with any official or agent of the bureau of labor statistics in the enforcement of the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars or by imprisonment in the county jail not to exceed thirty days or by such fine and imprisonment."

Section 1679 of the 1935 Code of Iowa is as follows:

"*Violations.* Every person, firm, or corporation operating an elevator in violation of any of the provisions of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars or by imprisonment in the county jail not to exceed thirty days or by both such fine and imprisonment."

Section 1514 of the 1935 Code of Iowa is in part as follows:

"*Other duties—jurisdiction in general.* The commissioner shall have jurisdiction and it shall be his duty to supervise the enforcement of:

"1. All laws relating to safety appliances and inspection thereof and health conditions in manufacturing and mercantile establishments, workshops, machine shops, and other industrial concerns within his jurisdiction."

It will be observed that the 41st General Assembly revised Chapter 83 of the 1924 Code relating to passenger and freight elevators by repealing Section 1684 of the 1924 Code and such section with certain omissions became Section 1679 of the 1935 Code of Iowa. The primary alteration was the removal of the limitation that the penalties imposed must be because of the resistance or interference by any person with the Labor Bureau inspector or agent enforcing the provisions of the chapter. A careful reading of the statute will disclose that the penal provision as in the 1924 Code is very limiting in nature and because of such limitation many abuses could conceivably arise which the penal provision did not cover but which the chapter evidently was designed to prevent and for which, because of such limitation, there could be no penalty. The statute, it will be noted, does not, except by inference, give the Bureau of Labor authority to act.

By revising the penal provision, the legislature broadened it to the point where it embraced and provided a proper penal provision for all requirements or prohibitions contained in the entire chapter.

The duty of the Bureau of Labor to enforce the regulations as contained in the chapter comes from the general provision above set out and this has been recognized by the legislature through the original elevator law, its revisions and reenactments. The legislature clearly contemplates the enforcement of this chapter and surely it is a matter of safety appliance and inspection and we feel that such duty is therefore embraced within the contemplation of Section 1514 of the 1935 Code of Iowa.

It is, therefore, our opinion that the repeal of Section 1684 of the 1924 Code of Iowa and its reenactment does not relieve the Bureau of Labor of its duty of inspection and consequently enforcement of Chapter 83 of the 1935 Code of Iowa.

CONSTITUTIONALITY: BILL: SCHOOL FUNDS: LOSSES: The entire intention of the Constitution is that the school fund must remain whole and inviolate and should a loss as suggested in the proposed bill be removed from the county, it must necessarily attach to the school fund. Therefore, because of such loss to such fund which the proposed enactment would provide, such enactment would be clearly unconstitutional.

March 16, 1939. *Senator Hugh W. Lundy:* Your letter requesting our opinion as to the following matter, has come to the writer for attention.

Would an enactment exempting counties from the loss of school funds occasioned by the resale of lands taken under foreclosure action be unconstitutional?

For the purpose of this opinion, we quote the following. Article IX, Paragraph 2, Section 1 of the Constitution of the State of Iowa:

"*Control—management.* The educational and school funds and lands, shall be under the control and management of the General Assembly of this State."

Article IX, Paragraph 2, Section 3 of the Constitution of the State of Iowa:

'*Perpetual support fund.* The General Assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement. The proceeds of all lands that have been, or hereafter may be, granted by the United States to this state, for the support of schools, which may have been, or shall hereafter be sold, or disposed of, and the five hundred thousand acres of land granted to the new states, under an Act of Congress, distributing the proceeds of the public lands among the several states of the Union, approved in the year of our Lord one thousand eight hundred and forty one, and all estates of deceased persons who may have died without leaving a will or heir, and also such per cent as has been or may hereafter be granted by Congress, on the sale of lands in this state, shall be, and remain a perpetual fund, the interest of which, together with all rents of the unsold lands, and such other means as the General Assembly may provide, shall be inviolably appropriated to the support of the common schools throughout the state."

Article VII, Section 3 of the Constitution of the State of Iowa:

"*Losses to school funds.* All losses to the permanent, school, or university fund of this state, which shall have been occasioned by the defalcation, mismanagement or fraud of the agents or officers controlling and managing the same, shall be audited by the proper authorities of the state. The amount so audited shall be a permanent funded debt against the state, in favor of the respective fund, sustaining the loss, upon which not less than six per cent annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized by the second section of this article."

Section 4485 of the 1935 Code of Iowa:

"*Liability of county.* Each county shall be liable for all losses upon loans of the school fund, principal or interest, made in such county, unless the loss was not occasioned by reason of any default of its officers or by taking insufficient or imperfect securities, or from a failure to bid at an execution sale the full amount of the judgment and costs."

Section 4505 of the 1935 Code of Iowa:

"*Excess—loss borne by county.* Any excess over the amount of the unpaid portion of the principal, costs of foreclosure, and interest on the principal as above provided, shall inure to the county and be credited to the general county fund. If the lands shall be sold for a less amount than the unpaid portion of the principal, the loss shall be sustained by the county, and the board of supervisors shall at once order the amount of such loss transferred from the general fund of the county to the permanent school fund account."

You will observe that the Constitution contemplates that the school funds shall remain inviolate. There is every indication that the school fund is of such an important nature that it is to receive every conceivable attention from those who control it. It is their positive duty not only to attend to its increase, but at the same time to prevent under all circumstances, its diminishment.

In order to promote the former and in accordance with the direction of Article IX, Paragraph 2, Section 1 of the Constitution, the larger part of Chapter 232 of the 1935 Code of Iowa, entitled "School Funds," provides a means whereby properly secured loans might be made to other than certain county officers. Appreciating that upon resale such foreclosed properties might bring less than the judgment, interest and costs, the legislature in its wisdom provided that such loss must be borne by the county.

An early case declaring the inviolability of the fund is that of *The County of Des Moines vs. Harker*, 34 Iowa 84, in which the court states:

"The grant of the lands out of which this school fund has been realized, was *to the State.* The State has recognized its right to the fund, and has solemnly pledged itself to maintain it intact and inviolate for the purpose to which it has been dedicated. The fact that the State has constituted certain of its officers as its agents for the maintenance of the school fund, does not, by any means, tend to negative the ownership of the State, but rather to establish it. Nor does the fact that by legislative enactment, such agents or the counties of which they are officers, are made liable for losses of the fund, in any way militate against the ownership of the State, but it rather shows a purpose to protect itself from damage by losses to the fund which the State has pledged itself to make good.

In other words, it seems to us that the State has the legal title and right to the school fund, that the agents it has, by law, constituted with a view to the successful management of the money and the accommodation of the people of the whole State therewith and thereby, are, in no proper sense, the owners of the money or parties in interest to the actions, although, by statute, the actions may be brought in the names of such agents. . . . The State being the legal owner of the school fund, and by the constitution pledged to keep it good against all losses, it is but just, that in controversies concerning it the State should have the benefit of the rules of law attaching to its sovereignty."

It is to be observed that the entire intention of the Constitution is that the school fund must remain whole and inviolate and should a loss as suggested in the proposed bill be removed from the county, it must necessarily attach to the school fund.

It is, therefore, our opinion that because of such loss to such fund which the proposed enactment would provide, that such enactment would be clearly unconstitutional.

HIGHWAY COMMISSION: FOUR-WHEEL TRAILERS: Mechanical devices permanently mounted on wheels so that they may in reason be looked upon as an integral whole, and are not otherwise equipped with facilities for carrying persons or additional property to that permanently mounted on the chassis, are not trailers within the prohibition of Section 339-a1.

Ames, Iowa, March 17, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: Mr. W. H. Root:* This will acknowledge receipt of your request for an opinion on the following questions:

"Sec. 339-a1 of the motor vehicle code prohibits the operation of four-wheel trailers after January 1st, 1939.

"1. Does this section prohibit our trailing machines such as air compressors and mud pumps which are mounted on four wheels?

"2. Is there any provision of law which would allow us to issue permits for the operation of four-wheel trailers such as Mr. Nash proposes to move?"

Sec. 339-a1 of the Motor Vehicle Act provides as follows:

"Sec. 339-a1. * * * No *truck* shall, after January 1st, 1939, pull or tow any four-wheeled trailer, and no semi-trailer shall pull or tow any additional trailer over any of the highways of this state, except in case of temporary movement for repair or emergency, and then only to the nearest town or city where the necessary repairs may be made."

Sec. 1 of the Motor Vehicle Act defines trailers and semi-trailers as "every vehicle without motive power *designed* for carrying persons or property and for being drawn by a motor vehicle * * *."

Sec. 1 also provides, "Wherever the word 'trailer' is used in this chapter, same shall be construed to also include 'semi-trailer.'

In order to determine if the instrumentalities referred to in your first question are "trailers" depends upon whether or not they are "designed for carrying * * * property," for obviously they are intended to be "drawn by a motor vehicle," and they are clearly not designed for carrying "persons."

Our supreme court has recently had occasion to interpret the phrase "designed or used primarily for the transportation of persons and property" in connection with the exemption of special mobile equipment from registration requirements. *State vs. Griswold*, ... Ia. ..., 280 N. W. 489.

In ruling that a feed grinder affixed permanently to the chassis of a truck was not designed or used "primarily for the transportation of * * * property," the court said:

"We are inclined to think, however, that the picture to be envisioned from the definition is that of a vehicle that is specially equipped in such manner and with such permanency that the vehicle and the equipment is in reason to be looked upon as constituting an integral whole. After the vehicle and the special equipment have been thus incorporated into one apparatus possessing the characteristics mentioned, we have what the legislature mentions, that is, a special equipment that is mobile. We do not agree with appellant, that, by way of argument, the thing may *then be dissected and its various parts separately viewed as property that is being transported*, when the apparatus is driven on the highways."

In the light of this recent interpretation it is the opinion of this department that air compressors, mud pumps and like mechanical devices permanently mounted on wheels so that they may in reason be looked upon as an integral whole, and are not otherwise equipped with facilities for carrying persons or additional property to that permanently mounted on the chassis, are not "designed for carrying persons or property" and are therefore not trailers within the prohibition of Section 339-a1.

Attention should here be directed to our previous opinion of January 25, 1939, to Mr. Tate of the Motor Vehicle Department, concerning well drilling equipment "mounted on a four-wheel trailer." Mr. Tate's question assumed that the vehicle was a "trailer" as contemplated by the definition thereof in the motor vehicle act. The former opinion is qualified hereby to the extent only that the facilities of the vehicle may exclude it from classification as a "trailer."

Your second question, and letter attached, does not describe in detail the character of the vehicle other than that it is a contractor's field office eight feet wide, sixteen feet long and ten feet high. From this general description we assume that it has facilities for carrying persons or property, which, in the light of our opinion on your previous question, would classify it as a trailer.

"Sec. 491. *Permits for excess size and weight.* The state highway commission with respect to highways under its jurisdiction and local authorities with respect to highways under their jurisdiction may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in this chapter *or otherwise not in conformity with the provisions of this chapter* upon any highway under the jurisdiction of the party granting such permit and for the maintenance of which said party is responsible."

The section quoted and allied provisions relating to the issuance of special permits are found among the provisions of the motor vehicle act concerned primarily with "size, weight and load" of vehicles.

Sec. 491 is entitled, *"Permits for size, weight and load."* This has given rise to the assumption, which seems to have been general, that the issuance of special permits was limited to the operation or movement of vehicles exceeding the permitted maximum as to size, weight of vehicle and load. Had this been the intention of the legislature it seems reasonable to us there would have been no occasion for the inclusion in Section 491 of the phrase, "or otherwise not in conformity with the provisions of this chapter."

Where a statute is plain, clear and unambiguous there is no room for construction or a necessity for applying rules.

State vs. Griswold, 280 N. W. 489 (Ia.);
State vs. Best, 280 N. W. 551 (Ia.).

We find no ambiguity in the phrase above quoted. It expressly includes those vehicles or combinations of vehicles which fail to conform to the provisions of the chapter in particulars other than those relating to size, weight of vehicle and load. To hold otherwise would entirely prohibit the movement on the roads and highways of vehicles which by reason of their use, size or weight require, for example, four-wheel support, and must be towed from place to place. Neither does it seem logical to us to assume the legislature intended that a vehicle such as that of which special inquiry is made should be ineligible for issuance of a special permit solely because it does not exceed the permitted maximum as to size, weight of vehicle and load.

We therefore conclude that Sections 491 to 494 of the Act cover the type of vehicle referred to in your second question; that it is within the discretion of authorities designated in Section 491 to issue special permits for the operation of all types of vehicles or combination of vehicles, as defined in Section 1 of the Act, under proper restrictions, after due consideration for the hazards and inconvenience to the traveling public and to the protection from damage to highways and structures thereon.

OLD AGE ASSISTANCE: FUNDS: REQUISITIONS: Inasmuch as old age assistance and aid to the blind funds are special funds, no requisitions under Section 84-e24 would be required except as to administrative expenses.

March 18, 1939. *State Board of Social Welfare, Iowa Building, Des Moines, Iowa:* Receipt is acknowledged of your request of March 18th for an opinion from this office with regard to the following situation:

Special funds were created for old age assistance and aid to the blind divisions of the State Department of Social Welfare under Section 5296-f34 of the 1935 Code of Iowa, as amended by the 47th General Assembly and Section 22 of Chapter 144, Laws of the 47th General Assembly. The question is whether quarterly requisitions, mentioned under Section 84-e24 of the 1935 Code, would be required for all or any part of the above mentioned funds.

Section 84-e24 provides in the first paragraph as follows:

"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."

Inasmuch as the old age assistance and aid to the blind funds are special funds, we are of the opinion that no requisitions under the above section would be required except as to administration expenses.

This has been the interpretation placed on similar situations by the comptroller for many years. Other departments of government expending special funds created by statute have long been held exempt from the provisions of Section 84-e24 in so far as requisitions for expenditures other than administration expenses are concerned.

SCHOOLHOUSE SITE: REVERSION OF SCHOOLHOUSE SITE: Schoolhouse site does not revert back to owner of tract from which same was taken merely because school is "temporarily closed" and should not be sold or disposed of except under provisions of Section 4217, Code, 1935. Where district is in existence and necessity for opening school may arise in any year by children in sufficient number moving into district, this would constitute a "temporary closing," even though not used for a number of years.

March 21, 1939. *Mr. Wm. C. Hanson, County Attorney, Jefferson, Iowa:* This will acknowledge receipt of your letter of the 11th inst., requesting an opinion as to the interpretation of Sections 4379 and 4385, Code of Iowa, 1935.

It appears that a schoolhouse site in your county, located wholly outside of a city or town and not adjacent thereto, has not been used for any school purposes for a period of approximately twenty years continuously. *You state that this has been occasioned by lack of pupils.*

The question is: Does the schoolhouse site in question revert to the owner of the tract from which the same was taken, or does the last paragraph of Section 4385 apply and consequently make operative Section 4217, which empowers the voters at the regular election to "direct the sale, lease or other disposition of any schoolhouse or site or other property belonging to the corporation and the application to be made of the proceeds thereof?

We are of the opinion that your board should proceed under Section 4217, as we reach the conclusion that Section 4379 does not apply in this case.

We hereinafter give our reasons for so holding.

One of the early cases dealing with this question is that of *Independent District of Oak Dale vs. Fagen,* 94 Iowa 676. This was a quiet title action. Plaintiff was a corporation of Polk County, Iowa, organized and existing for school purposes. It claimed to be the owner of certain real estate which was commonly known as the Oak Dale schoolhouse and lot. The lot was once owned by Hezekiah Fagen. Plaintiff claims a predecessor of plaintiff purchased the lot in 1861 and that it was used and occupied for schoolhouse purposes since that time. Defendants denied alleged ownership and claimed to be the owners of the property as heirs of Hezekiah Fagen.

It appears that no formal conveyance of the lot was made, but that possession of it was taken and held by the district until about 1878 when it was reorganized as the Independent District of Oak Dale. At that time the lot passed into the possession of the district township of Valley. There was a small building on it, which was used as a schoolhouse for a time and then a larger building was erected. The occupation and use of the lot for school purposes was continuous from the year 1861 until two years before this action was commenced. A larger schoolhouse having been erected near the lot, it had not been needed for school purposes nor used for any purpose since the year 1889, but had not been otherwise abandoned by the plaintiff.

The court said:

"The evidence shows without conflict that the lot in controversy was occu-

pied and used by the district township of Valley and by plaintiff, openly, continuously, and exclusively, for nearly thirty years, and that the occupation and use were adverse, and for purposes authorized by law."

The court held that actual adverse possession of land by the school district for ten years under a claim of absolute ownership created a title by prescription which would support an action to quiet title.

The court further said:

"The next section contains the following: 'The title acquired by said school districts in and to said real property shall be for school purposes only, and in case the same should cease to be used for said purpose for the space of two years, then the title shall revert to the owner of the fee, upon the repayment by him of the principal amount paid for said land by said districts, without interest, together with the value of any improvements thereon erected by said districts.' It is claimed that, under this provision, the title to the property in question has reverted to the defendants, for the reason that it has not been used for school purposes for more than two years. If it be true, as claimed by the appellants, that the provision applies to sites obtained through a sale by the owner voluntarily made, as well as by condemnation proceedings—a question we do not decide—it does not follow that the defendants are entitled to recover in this action. The title in question would not revert to them, in any case, before the payment to the plaintiff of the principal amount, if any, paid for the property, together with the value of the improvements erected thereon by the district.

"The defendants have neither paid nor tendered anything to the plaintiff on account of this property, and for that reason, if for no other, cannot recover. *It is not necessary to determine whether the plaintiff has ceased to use the property for school purposes, within the meaning of the statute.*"

Another case which it is necessary to consider in reaching a conclusion on the question here involved is that of *Hopkins vs. School District*, 173 Iowa 43. This was a suit in equity to declare a forfeiture and to recover an acre of ground and to quiet the title. There was a decree for the plaintiff. The land in question comprises the schoolhouse lot of the defendant school district. It was acquired by the defendant school district in 1877, by deed from one Flickinger. The deed contained a provision that the land should revert to the grantor whenever it should cease to be used for school purposes. Subsequently, Flickinger sold to the plaintiff, Hopkins, the quarter-section farm, out of which the acre was carved, and later conveyed to him his reversionary interest in the schoolhouse lot. A schoolhouse was built on the property and school maintained for many years. From March, 1909, to March, 1912, no school was held upon said property nor in said school district. The reason for this was that there were few children in the district and such as were in the district attended school in other localities. During the period of three years, *no director was elected.* The building was greatly dilapidated and had been so for several years. The plaintiff claimed the reversion. Thereupon, a school was again opened with four or five scholars, *only one or two* of whom actually lived in the district. Plaintiff claimed his reversion on the then Section 2816, which now, with modifications, is Section 4379. These modifications, however, we will later discuss.

The court held that the lot reverted to the owner. The court said:

"It is argued that the closing of the school was with the consent and by the order of the county superintendent, and that this was equivalent to using the property for school purposes. * * * We know of no provision which authorizes the county superintendent to permit a school district to hold no school whatever. We think, therefore, that the order of the county superintendent furnishes no aid to the defendant."

The court further said:

"It is further urged that the forfeiture provisions of the statute must be *strictly construed*, and that no greater relief should be awarded to the plaintiff than the strict terms of the statutory requirement. *This contention may be conceded.* * * * We are unable to see any possible construction of the statute in question which will save this property to the defendant. There was a non-user for more than two years, beyond all question. The statute itself is supported by reasons of sound public policy. Unused school grounds and buildings present a degree of menace to the neighboring property. *As might well be expected in such a case, this property was abandoned to tall weeds.* The house could not be or was not kept locked. It was frequently occupied by tramps. Danger of fire was always imminent. * * * We think the finding of forfeiture is unavoidable, and the decree entered below is therefore —*Affirmed.*"

Another case dealing with this subject, and which should not be ignored in our discussion, is that of *Waddell vs. Board of Directors*, 190 Iowa 400. This was a suit in equity to enjoin the school board of a rural district from selling to others than the plaintiffs five certain schoolhouse sites, in violation of the rights of the respective plaintiffs under the provisions of Section 2816 of the Code, Section 2816 being, with certain modifications, the same as Section 4379, Code of Iowa, 1935. Defendant claimed that the school district held an absolute fee title to its school sites and that, therefore, Section 2816 and its parent statute were not applicable. There was a decree for the plaintiffs.

The facts in the case were all stipulated. It appears that defendant district had abandoned five rural schoolhouse sites. Plaintiffs are the several owners, respectively, of the farms from which said sites were respectively taken. Plaintiffs claimed the right, under provisions of Section 2816, to accept the option provided in such section and take the respective sites on the conditions therein specified. The trial court followed the holding in *Hopkins vs. School District, supra*, and the court said:

"In that case (Hopkins case), we held that the provisions of Section 2816 were applicable to 'any real estate' held by a rural school district for schoolhouse purposes, regardless of the method of acquiring title."

The writer pauses to observe at this time that the parent statute was in the Code of 1873, when it read as follows:

"The title acquired by said school districts in and to said real property, shall be for school purposes only, and in case the same should cease to be used for said purpose for the space of two years, then the title shall revert to the owner of the fee, upon the repayment by him of the principal amount paid for said land by said districts, without interest, together with the value of any improvements thereon erected by said districts; provided, that during the time said site is used for school purposes, the owners of the fee shall not injure or remove the timber standing and growing thereon."

Continuing, the court said:

"There is no question but that this rural school district acquired by its warranty deeds as absolute a title as it was in the power of the grantor to convey, and in the corporate capacity of the grantee to take. The difference, if any, between a fee-simple title acquired by an individual grantee for private uses and the fee-simple title acquired by a public corporation for public uses sometimes involves nice distinctions. * * *

"Whether the limitation in such case is upon the *title* conveyed to the public corporation, or whether it is a limitation upon the right and capacity of the corporation to continue in the exercise of the grant after its public uses have ceased, is a fair field of debate, and we need not enter upon it.

"Which statute, if either, must be deemed applicable herein? It will be noted that the principal difference between these statutes, in their reversion provisions as we have above set them forth, that is, under the first one, the so-called reversion went to the 'owner of the fee,' whereas, under the present statute, the reversion goes to the 'owner of the tract' from which the site was taken. Both the parent statute and the present statute appear by their terms to be applicable to rural school districts only. * * * It will be seen that there is no substantial difference in the two statutes, so far as the rights of the school district are concerned. They might bear different constructions as to the beneficiaries of the reversion. The contention of the defendant is that, under the old statute, the grantor was the 'fee owner,' within the contemplation thereof. The plaintiffs herein are not original grantors. They are simply the owners of the respective tracts from which the sites were taken, * * * Likewise, the argument that the rights of the parties having been settled and vested by the warranty deeds, no subsequent legislation could impair such vested rights, because of constitutional inhibition. But this loses sight of a fundamental fact in this case. The defendant is a school corporation. It is a legislative creation. It is not organized for profit. It is an arm of the state, * * * * It is not a 'person,' within the meaning of any bill of rights or constitutional limitation. * * * The legislative power is plenary. * * * It may confer or withhold power to take title to real estate. Conferring such power, it may qualify it, both as to the title and tenure of the real estate. * * *

"If any rights arose out of any conveyance at the time thereof to any *person* other than the district township such rights could not be impaired by subsequent legislation. As to the rights of the school corporation, these *could* be impaired and diminished by subsequent legislation. *The legislature could thereafter have repealed the provision for reversion, without violating the rights of anyone.* It could have again enacted different provisions pertaining to reversion, without violating the rights of anyone. In other words, no one then had a vested right in the future operation of the statute. * * *

"We think, therefore, that, as a matter of law, the existing statute is controlling.

"Likewise, if one of these sites had been acquired by grant, with a reservation of reversion when the school use had ceased; and if such grantor were now claiming such reversion under his deed, as against the owner of the tract from which the land was taken, then constitutional questions might easily be involved; *but we have nothing of that kind.* Confessedly, the grantors parted with everything. Any future claim for them by reversion must rest, not upon their deeds, but upon the statute, if any. *While the right to take these school sites is denominated in the statute a right of reversion, it is not strictly such, in a legal sense.* It is simply a statutory right of purchase, upon certain specified condition. * * *

"It is further argued that Section 2749 of the Code was wholly overlooked by us in the consideration of the *Hopkins* case, and that its provisions are such as to wholly negative the construction which we put upon Section 2816 in the *Hopkins* case.

"The portion of such section thus relied on is Subsection 2, which is as follows:

" 'Sec. 2749. The voters assembled at the annual meeting shall have power:
* * *

" '2. To direct the sale or make other disposition of any schoolhouse or site * * *.'

"The argument is that this subsection confers upon the voters the power to direct the sale of school sites; that this implies that the district townships own school sites which they have a right to sell; and that this implication is contradicted by the construction adopted by us in the *Hopkins* case. It will be noted that the power conferred upon the voters is to 'direct the sale or make other disposition'—what other disposition than a sale could be contemplated by the statute? Surely, no power of barter or trade for cattle or horses was contemplated. The 'other disposition' may have been the very provisions of the statute pertaining to reversion. What are these provisions?

Do they cast title upon the claimant as a matter of law? Not at all. They amount simply to an option to him to purchase the school site for the original purchase price, on condition that he will pay also for the improvements at their value.

"Moreover, if every school site of every district township in the state had been subject to option, and every option had been accepted by the appropriate person, so that no sale of the school sites could take place by vote of the electors, this would not render Section 2749 contradictory to the construction which we put upon Section 2816 in the *Hopkins* case. The legislature could not foresee whether all such options would be thus taken or not, and it was appropriate and consistent that it should make provision for either contingency. We think, therefore, that there is no contradiction between our construction of the statute and Section 2749. Such section has its appropriate field of operation upon either construction of Section 2816.

"In conclusion, we may summarize: No contractual rights of persons are involved herein; the rights of the plaintiffs are purely statutory; and the obligation of the school district to respond to the statute rests upon the legislative supremacy over the school district and its property. The judgment entered below must be—*Affirmed.*"

A dissenting opinion was written by Salinger, J. We quote therefrom to indicate what a justice of the supreme court, even in those days, thought in reference to the application of Section 2749 (powers of electors to sell schoolhouses). He says, on page 413:

"I think the provisions of Section 2749 are highly significant. They give the electors the power 'to direct the sale or make other disposition of *any* schoolhouse or site * * * and the application to be made of the proceed of such sale.' The grant of power is in broad language. Ordinarily, the word 'any' in statutes means 'any.' On the reasoning of the majority, however, there is scarcely a thing on which this broad power may operate. I commend the courage of the declaration that, even if no condition could be imagined under which a sale of school sites could be ordered by vote of electors, that then the statute which gives the power to sell would still not be an argument for the proposition that the reversion statute was not operative in case of a full sale like the one at bar. But it seems clear rather than sound. Usually, the power to sell implies something to sell. Be that as it may, I am unable to see that on the theory of the majority, the selling statute has anything tangible to operate on. The appellees say its sole field of operation is school sites that were acquired prior to 1870, before the present law existed, and at a time when they concede absolute title could be obtained. I think that is too narrow a field for a statute giving power to sell 'any' school site. * * *

"It is said the words 'other disposition' found in the selling statute may have reference to the very provisions of the statute which pertain to reversion. The trouble is that, for the purposes of the reversion statute, there is no disposition to make, and nothing for the electors to do. When the use is abandoned, then, in all the cases where there is a right to reversion, it is automatic. The former owner has the absolute right, by making a stated payment, to have the title, and whether to give it to him or not is not a matter that can ever come before the electors at their meeting.

"I would reverse."

We also want to call attention to the case of *Independent School District vs. Smith*, 190 Iowa 929. In this case the plaintiff school district brought an action to quiet title to a schoolhouse site. Decree for plaintiff. Defendant and intervenor appeal. The case was affirmed. The facts were these, quoting from the opinion:

"The plaintiff, an independent school district, acquired the real estate described in its petition for school purposes, and has occupied and used the same for such purposes ever since. It consists of one-half of a city block, and is occupied by a large school building, which is now used as such. The plaintiff district is extensive in its area, comprising the entire city of Des Moines.

The shifting of school population has been such in recent years as to render the location of the school property involved herein highly inconvenient, and the school population now served by such school property is far below its capacity. At the same time, the business area of the city has so extended itself toward and about this particular property as to render the property valuable in the market for commercial uses. It is the tentative purpose, therefore, of the school board to dispose of this property, and to use its proceeds for school purposes to better advantage than the use of the property itself now affords. Its power to so dispose of it has been questioned. * * *

"The plaintiff acquired its property by purchase and by warranty deed, with full covenants, * * * in the years 1865, 1866 and 1867, respectively. Since that time, the so-called 'reversion statute' was enacted."

The court said:

"One of the questions raised by the appeal is whether this 'reversion statute' created a vested interest in any beneficiary, so as to divest the legislature of the power to repeal the reversion statute or to amend it and direct other disposition. In *Waddell vs. Board of Directors*, 190 Iowa 400, we held that it did not, and that the reversioner named in the statute took by statutory grace, and not as a matter of vested right." (Then follows quotation from Waddell opinion.)

Continuing, the court said:

"We need not repeat the argument. We hold that there was no impediment in the way of the legislature to amend the statute, and that the rights and duties of the school corporation are to be determined under the statute now in force.

"A further question presented by the appeal is: If the school district should now cease to use the property in question for school purposes, will it thereby forfeit its title thereto, or will it subject it to the right of a reversioner to take the same on the terms stated in the reversion statute? *It is doubtless a sufficient answer to this query to say that the reversion statute in its present form creates no right in favor of any person to take such property upon any terms. We held in the Waddell case that it was in the power of the school corporation to purchase from a grantor and to take full title by warranty deed, and that such a conveyance left no vested reversion to the grantor, or to any person claiming through him. It is only necessary to say now that, under the statute in its present form, no person has any interest, vested or contingent, in such school property, except the school corporation; nor has any person a vested right of reversion therein.* The school corporation by such a conveyance takes a title which is subject to no other limitation than the continuing power of the legislative body over the corporation and its property. *The power of the school corporation to hold or to dispose of its property is always to be determined by the present state of legislation, in the absence of vested rights in third persons.* If, under existing legislation, the school corporation has power to dispose of its property, and if, in conformity to such legislation, it *does* dispose of it, then it has disposed of it. In such a case, we can see no reason why its disposition of its property does not carry to its grantee the complete title which it itself had. Under the present state of the law this school corporation does have power, pursuant to specified statutory methods, to dispose of its property. As to what it may do hereafter with the fruits of its disposition, it will be subject to the same supervision of legislation as it is in the exercise of any other statutory power. It is natural equity that the financial benefit of such disposition shall, so far as possible, inure to those who bore the burden of its acquisition; * * * In brief, we see nothing in the present state of legislation that should be deemed a cloud upon the title of plaintiff to its property, or that challenges its power to dispose of the same by proper *statutory course.* The decree of the district court will, accordingly, be affirmed."

We now desire to quote the section of the law which we think is controlling:

"4385. Sale of unnecessary schoolhouse sites. Schoolhouses and school sites no longer necessary for school purposes, because of being located in consoli-

dated school districts, may be sold immediately after the organization of such consolidated school districts, in the manner above provided.

"During the use of such premises, no person owning a right of reversion shall have any interest in or control over the premises.

"This and sections 4379 to 4384, inclusive, shall not apply to cases where schools have been temporarily closed by law on account of small attendance."

The section relating to the closing of schools for lack of pupils is Section 4231 and reads as follows:

No contract shall be entered into with any teacher to teach an elementary school when the average daily attendance of elementary pupils in such school the last preceding term therein was less than five such pupils * * * resident of the district * * * nor shall any contract be entered into with any teacher to teach * * * for the next ensuing term when it is apparent that the average daily attendance * * * will be less than five or the enrollment less than six * * * unless the parents or guardians of seven or more such elementary children prescribe to a written statement sworn to before the county superintendent or a notary public certifying that such children will enroll in and will attend such elementary school if open and secure from the county superintendent written permission authorizing the board to contract with a teacher for such school for a stated period of time not to exceed three months."

Then follows a provision that under certain conditions the county superintendent may authorize the board to contract with a teacher, even though less than the required number of pupils will attend.

The last paragraph of Section 4385 and Section 4231 first appeared in the 1924 Code and this must be borne in mind when reading the *Hopkins*, *Waddell* and *Smith* cases. Nothing therein said attempts to construe either of the sections last above referred to. It is very clear that the phrase "temporarily closed," found in the last paragraph of said Section 4385, contemplates a period commencing after the two-year period provided in Section 4379, because until the two-year period therein referred to has expired there is no occasion for protecting the school patrons against the loss of their school property. In other words, it is clear that Section 4385 has removed from the operation of Section 4379 all schools which have been temporarily closed by law on account of small attendance.

What is meant by "temporarily closed"? Clearly this refers to a period beginning after the two-year period referred to in Section 4379 and it is then pertinent to inquire how long it continues. Let us suppose that because of the removal from the district of two tenant farmers who had large families, the school could not be opened because of the provisions of Section 4231. Let us further suppose that this occurred at the beginning of 1937. The condition with reference to lack of pupils continued, let us assume, until February 1, 1939, or in other words two years and one month. Can anyone logically contend that in this case the schoolhouse and school site reverts to the owner? We think not. The phrase, "temporarily closed," as we view it, should be given a broad interpretation in order that the plain objectives of the statute may be attained. This section was incorporated into the statute to limit the operation of Section 4379 and must be so construed as to make its application logical and reasonable. "Temporarily closed" certainly can not refer to any portion of the two-year period referred to in Section 4379, for until such period has expired the school corporation can not lose its property, so it would be meaningless to enact a statute looking to the protection of such property during said period. Hence we say that it manifestly refers to a

period commencing after the two-year period has expired, and as to how long it continues is a matter not necessary to decide except to say it should be liberally construed to effect the beneficent purposes of the statute. So long as there is a reasonable likelihood that the school may again be needed for the education of the youth that may move into the district, such schoolhouse and site should be retained by the board of directors of the corporation. Should it be deemed advisable to dispose of the property, this can be accomplished by following the simple provisions of Section 4217.

As we view it, Section 4385 was passed for a purpose and this purpose, we contend, was to limit the operation of Section 4379. If it does not place a limitation upon said section then it would be immaterial whether the schoolhouse in question had been vacant for two years or twenty. If section 4379 is the only section to be considered in deciding this question then, of course, it reverts as effectively at the end of two years as at the end of the twenty-year period.

In this connection let us bear in mind that the *Hopkins*, *Waddell* and *Smith* cases were decided prior to the enactment of Section 4385 and Section 4231.

We also desire to call to your attention another statute which we think makes inoperative Section 4379, under the facts as set out in your letter. We refer to the statute which bars recovery of real estate after ten years. Under this section the reversionary option was barred after the lapse of ten years and title may be quieted in the school district.

This was the holding in *School District vs. Hanson*, 186 Iowa 1314, and *School District vs. Thompson*, 194 Iowa 662. In the *Hanson* case the court said:

"But plaintiff also alleged in its answer, as above stated, that more than ten years elapsed after plaintiff ceased to use the premises for school purposes and after cross-petitioner, if she at any time was the owner thereof, might recover possession under the statute relied upon by her by the payment of the original purchase price, together with the value of the improvements; and that her cause of action is, therefore, barred by the statute of limitations. Actions for the recovery of real property must be brought within ten years after the cause of action accrued. Section 3447, Code, 1897.

"Cross-petitioner's cause of action accrued when, by paying the original purchase price, together with the value of the improvements thereon, she became entitled to the possession of the tract. If, therefore, the cause of action pleaded in her cross-petition is one for the recovery of real property, the answer stated a good defense."

The court further said:

"The court, in *Tilton vs. Bader*, 181 Iowa 473, which was a suit in equity, held that the action was one for the recovery of real property, * * *.

"It follows from the above holding that the cause of action set up in defendant's cross-petition is one for the recovery of real property and, therefore, the plea of the statute of limitations was a proper one, and, if sustained by the proof, would constitute a good defense."

In this case defendant appeals from the judgment of the court below overruling a demurrer to plaintiff's answer to defendant's cross-petition. The holding of the court is to the effect that:

"Where a school district went into possession of land under a deed providing that it should revert to the grantor when used for other than school purposes, the right of the grantor or his successor to bring an action to compel the district to reconvey would, under Section 3447, Code Supp., 1913, be barred within 10 years after the district had ceased to use said land for school purposes, such

an action being one for the 'recovery of real property,' within that statute." (Above quotation from syllabus.)

In the *Thompson case, supra,* the holding was to the same effect as in the Hanson case. Quoting from the syllabus:

"The right of a property owner to a reversion of a schoolhouse site which has been carved out of his farm may be forfeited by a failure to meet the statutory conditions to such reversion."

Quoting from the opinion itself, we find this language:

"Actual adverse possession of real estate for ten years, under a claim of absolute ownership, creates a title by prescription, not merely for defensive, but for all practical purposes, upon which an action to quiet the title may be maintained."

We also want to call your attention to a case tried in the district court of Boone County in 1928 and decided by Honorable Sherwood A. Clock, the title of which is *Pleasant Hill School District, et al., vs. Wissler.* This was an action involving the same factual situation as the instant case. The schoolhouse had not been used for approximately ten years, although directors had been elected and the school organization maintained. One Vannatta was the owner of the land out of which the school site had been carved. The court granted an injunction restraining the county superintendent and Vanatta "from in any manner proceeding any further in causing the reversion of the schoolhouse site and from having the said schoolhouse appraised and from any sale of said schoolhouse site or the schoolhouse located thereon and from taking any steps whatsoever as provided for in Sections 4379 to 4384, inclusive."

We want it clearly understood that this opinion is based upon the premise that the schoolhouse in question has not been used for school purposes on account of small attendance, as provided in Section 4231. We can conceive of situations where the school might be "temporarily closed" where the nonuse of the school continued for a number of years. When the school district is in existence and the necessity for opening the school may arise any year by children in a sufficient number moving into the district, this, we believe, would constitute "temporarily closed."

We reach the conclusion, therefore, that in view of Section 4385 and other statutes set out and referred to herein, the schoolhouse in question should not be sold or in any manner disposed of, except under the provisions of Section 4217, Code of Iowa, 1935.

TAXATION: SOLDIER'S EXEMPTION: A soldier veteran would not be entitled to his soldier's exemption on assumed 1939 real estate taxes on a property purchased in January, 1939.

March 22, 1939. *Mr. Robert A. Knudson, County Attorney, Fort Dodge, Iowa:* We are in receipt of your request for an opinion upon the following situation:

A soldier veteran who would be entitled to reduction on his real estate taxes under the provisions of Section 6947 of the 1935 Code of Iowa purchased a house and assumed the taxes for 1938, although the property was not purchased until January of 1939. The question is whether or not he is entitled to a soldier's exemption on the 1938 taxes which he assumed in the purchase transaction.

There is no doubt but that he would not be entitled to such an exemption. The exemption is based on ownership, and he did not own the property for the period for which the tax was assessed.

TAXATION: INCOME TAX: MONEYS AND CREDITS: The payer of a State Income Tax on an income of $10,000 net does not need to pay a moneys and credits tax.

March 22, 1939. *Mr. Robert A. Knudson, County Attorney, Fort Dodge, Iowa:* Receipt is acknowledged of your request for an opinion upon the following set of facts:

If "A" pays Iowa income tax upon an income of $10,000 net and does not return in any report on moneys and credits, is the net income above referred to subject to tax as moneys and credits in addition to the State Income Tax?

The money and credit tax is a property tax. Sometimes there is some difficulty in determining whether or not the tax is being levied on property or being levied on income, but your question dissolves all doubt for us as you specifically ask whether the income upon the $10,000 shall be subject to this money and credit tax. The answer of course is that such income would never be subject to a money and credit tax. For a good discussion of some of the cases on this question, we refer you to *City of Dubuque vs. Northwestern Life Insurance Company*, 29 Iowa 9; *Hale vs. Board of Assessment and Review*, 223 Iowa 321, U. S. Supreme Court Reports, 72 L. Ed.

SINKING FUND: CLAIMS: RESOLUTION: It is not necessary for the resolution authorizing and directing the deposit in some designated bank to be subsequent to the passage of the State Sinking Fund Law in order to allow participation in the provisions of that law.

March 22, 1939. *Honorable W. G. C. Bagley, Treasurer of State. Attention: Edmund L. Brown, Superintendent State Sinking Fund:* We are in receipt of your request for an opinion upon the following question:

"What bearing, if any, does a resolution adopted prior to the enactment of the State Sinking Fund Law have in connection with payment of claims now filed against the State Sinking Fund? In other words, is it not necessary for a resolution to be adopted designating a depository subsequent to the enactment of the State Sinking Fund Law in order to participate in the provisions of this law?"

Section 7420-a2 of the 1935 Code of Iowa, found in the State Sinking Fund Chapter 352-A1, contains the following provision:

"7420-a2. *Purpose of fund.* The purpose of said fund shall be to secure the payment of their deposits to state, county, township, municipal, and school corporations having public funds deposited in any bank in this state, when such deposits have been made by authority of and in conformity with the direction of the local governing council or board which is by law charged with the duty of selecting depository banks for said funds."

It will be noted by the above section, which was passed by the 41st General Assembly and which became a law on April 2, 1925, that there is no specific manner or means indicated by which the direction of the governing council or board shall be expressed. The statute merely requires that this deposit of public funds must be by the authority and in conformity with the direction of the local council or board. Of course this authority and direction would necessarily have to be given before the deposit is made and it would seem that that would be the only requirement as to the time when the authority or direction must be given. The fact that the school board gave the authority and direction prior to the passage of Section 7420-a2 of the Code would, we feel, be immaterial. The deposit is no less a deposit made in conformity with the direction and authority of the board if the direction and authority

were given prior to the passage of the Act. The case of *Andrews vs. Iowa Savings Bank of Estherville*, 203 Iowa 1089, is, at least by analysis, authority for this proposition. It does not appear that this question was ever raised in the case, but an examination of the facts places the case squarely within the submitted question. In that case we find that on March 4, 1925, the board of supervisors of Emmet County adopted a resolution designating the Iowa Savings Bank of Estherville as depository of county funds and fixed the maximum deposit in the sum of $84,000. It will be noted that this resolution dated in March of 1925 was passed about ten days before Section 7420-a2 became a law on April 2, 1925. In that case the court stated:

"The original authority of the board of supervisors in the instant case authorized the deposits of public funds by the county treasurer in the bank in question to the amount of $84,000.00. The deposit involved in this action was originally made under this resolution and was then a legal deposit."

We are therefore of the opinion that it is not necessary for the resolution authorizing and directing the deposit in some designated bank to be subsequent to the passage of the State Sinking Fund Law in order to allow participation in the provisions of that law.

EXPENSES: CONFERENCE: SECRETARY (Roy B. Martin): The expenses of the executive secretary (Roy B. Martin) of the Iowa Emergency Relief Association incurred when attending the American Public Welfare Conference in Washington, D. C., should not be allowed.

March 22, 1939. *Honorable George A. Wilson, Governor of Iowa:* We have received a request for an opinion with regard to the right to pay Roy B. Martin for expenses incurred when attending the American Public Welfare Conference in Washington, D. C. We understand that Roy B. Martin was executive secretary of the Iowa Emergency Relief Association and that his expenses were never authorized by the Executive Council.

Under the provisions of Section 84-e13 of the 1935 Code, paragraph 2, there is an express prohibition against the allowance of claims for expenses in attending conventions. We feel that this claim falls within this section of the Code and that the claim should not be allowed, for even though the Iowa Emergency Relief Association is a private corporation, it does in fact expend public funds and the prohibition in the statute specifically states that the claims shall not be allowed when the attendance is at "public expense."

TAXATION: INHERITANCE TAX: MONEYS AND CREDITS: Inheritance taxes due the State of Iowa may not be deducted by the executor of an estate in listing moneys and credits for taxation.

March 22, 1939. *Mr. Shirley A. Webster, County Attorney, Winterset, Iowa:* Receipt is acknowledged of your letter requesting an opinion on the following question:

Can inheritance taxes due the State of Iowa be deducted by the executor of an estate in listing moneys and credits for taxation?

Section 6993 of the 1935 Code of Iowa provides that an administrator in listing moneys and credits is entitled to deductions as prescribed in Sections 6988 to 6992 inclusive. The deductions allowed in Section 6998 are, "the gross amount of all debts."

Under our inheritance tax statutes the tax is upon inheritance and is in

no sense a debt of the estate. Perhaps the best discussion of this is contained in *Bailies vs. City of Des Moines*, 127 Iowa 121, at page 126, where the court in discussing a similar deduction of real estate taxes stated:

"The general tenor of the authorities is to the effect that a tax in its essential characteristics is not a debt, but an impost levied by authority of government upon its citizens or subjects for the support of the State. It is not founded on contract or agreement, but operates in *invitum*. Whereas a debt is a sum of money due by certain and express agreement, and originates in or is founded upon contracts express or implied. In Meriweather vs. Garrett, 102 U. S. 472 (26 L. Ed. 197), it is said: 'A tax is a charge imposed by the legislature for the purpose of revenue. It is not founded upon contract, and does not establish the relation of debtor and creditor. It is an enforced proportional contribution levied by authority of the State.' See, also, the long collection of cases in Vol. 2, Words and Phrases, page 1883. It must be remembered that in the absence of statute there can be no deduction on account of debts, and he who would have such exemption must be able to point out a statute which gives it to him. We are not justified in extending such a statute beyond its express terms. There is nothing in the spirit of the Act which suggests a liberal interpretation thereof."

We feel that the reasoning in the above case is applicable to the situation of inheritance taxes. Such taxes do not create any debtor and creditor relationship and since the exemption only goes to debts, then clearly such inheritance taxes are not credits.

TAXATION: CONSTITUTIONALITY: (Senate File 227.) A bill for an Act to create an agricultural land credit fund whereby the owners of agricultural land lying within an Independent School District and which is not platted into city or town lots and is used exclusively for farm and agricultural purposes can receive a tax credit paid from the general fund of the State of Iowa, is constitutional.

March 22, 1939. *Honorable Charles B. Hoeven, Senate Chamber:* Your have requested an opinion from this office with regard to Senate File 227 and the facts are as follows:

Senate File 227 appears to be an Act to create an agricultural land credit fund whereby the owners of agricultural land lying within an Independent School District and which is not platted into city or town lots and is used exclusively for farm and agricultural purposes can receive a tax credit paid from the general fund of the State of Iowa.

We are of the opinion that this bill would be constitutional. In the preamble it is stated that this tax upon land lying in independent school districts is exorbitant and is confiscatory. Of course the State of Iowa is vitally interested in equalizing the burden of taxation to be borne by agricultural lands in the state and it is also equally concerned in the matter of education and the taxes levied for said purpose. The bill would not violate the Constitution by reason of the fact that it is giving tax credit to one certain class. Perhaps the best quotation from the Iowa cases on this subject is contained in *Gano vs. Minneapolis & St. Louis Ry. Co.*, 114 Iowa 713, at page 726, where the court in discussing inequality as a basis of unconstitutionality stated:

"Classification is certainly permissible in granting the power of eminent domain, and it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality. A law which is confined in its operation to a particular class is not void as unequal class legislation if the differentiation is based on some reason of public policy, and applies to and embraces all persons alike under similar circumstances. The legislature may, in its discretion, classify persons, corporations and associations, and im-

pose on them as a class duties and liabilities, or confer upon them privileges not conferred on the whole people of the State. This is, of course, subject to the supreme condition that the classification shall not be arbitrary."

We might also cite the Homestead Exemption Law which is almost identical in principle to the law herein discussed, and the constitutionality of the Homestead Exemption Law has never been assailed in Iowa.

NOTICE: POSTAL CARD: BOARD OF SUPERVISORS (Chapter 247, Code): Notice given by postal card sent through United States mail by the board of supervisors ordering the cutting back of hedges and trees along public highways when the owner of abutting land fails to observe the board's order, is not sufficient.

March 23, 1939. *Mr. John L. Duffy, County Attorney, Dubuque, Iowa:* Receipt is acknowledged of your letter of March 17th requesting an opinion from this office on the following statement of facts:

In Chapter 247 of the 1935 Code of Iowa provision is made for the board of supervisors to order the cutting back of hedges and trees along public highways when the owner of abutting land fails to obey the board's order in this regard.

In Section 4831 of the Code provision is made for notice as follows:

"The board of supervisors shall cause notice in writing to be served upon any owner of any hedge or trees described above, to destroy or trim the same, * * *."

The section then goes on to provide for the board's causing the destruction or trimming of the hedge or trees and the assessment of costs against the land. The question is whether the printed postal card which you submitted, which is addressed "To the owners of hedges and trees growing in the public highways—Dubuque County" and which in substance notifies the receiver of the postal card to cut and destroy shrubbery and hedges growing in the public highway, adjacent to the addressee's premises, and which calls attention to Chapter 247 of the 1927 Code, is a sufficient notice under the above section when deposited in the United States Post Office for transmission through the United States mail.

We are of the opinion that the notice given would be insufficient under Section 4831 of the Code. It will be noted that this section provides that the board "shall cause notice in writing to be served upon any owner, etc." Such a deposit, of a postal card addressed in general to all owners of hedges, in the United States mail would not be a service within the provisions of the above section. Undoubtedly the section contemplates personal service, and even though it does not expressly state "personal service," still the using of the words "notice shall be served" indicates that personal service was contemplated. As a general rule, service can never be made by mail unless there is direct statutory or court order authority for such service. The following quotation from 46 *Corpus Juris* 557, Section 65, is a good statement of the rule to be followed in the construction of such a statute:

"65. *Personal service—a. In general.* As a general rule, unless otherwise provided by law, the service of a notice must be personal. Notice other than personal is countenanced by law only as a matter of necessity or extreme expediency. Where a statute requires the giving of notice and there is nothing in the context of the law or in the circumstances of the case to show that any other notice was intended, personal notice must always be given, * * *"

We can also refer you to the case of *Ellis vs. Carpenter*, 89 Iowa 521, where the court construed a statute containing this clause:

"* * * notice of such appeal must be served on the county auditor within twenty days after the decision is made. If the highway has been established on condition that the petitioner therefor pay the damages, such notice shall be served on the four persons first named in the petition for the highway * * *."

The case involved an appeal from a damage award in a highway establishment proceedings and the court there held that the provisions in this statute did not even allow substituted service, and held, "when service is required, it means personal service."

For the foregoing reasons, we are of the opinion that your notice in this case is defective.

OLD AGE ASSISTANCE: LEGAL SETTLEMENT: All recipients of old age assistance cannot gain legal settlement irrespective of whether or not they are receiving their assistance by an original certificate or a renewal thereof.

March 23, 1939. *Mr. Chas. W. Barlow, County Attorney, Mason City, Iowa:* Receipt is acknowledged of your request for an opinion upon the following facts:

Under Section 5296-f20 of the 1935 Code of Iowa certificates for assistance are issued to recipients of old age assistance for two year periods and upon expiration a new certificate is issued. Previous opinions of this office have held that recipients of old age assistance gain no legal settlement while receiving assistance. The question is whether the recipient of old age assistance who continues to reside in a new county for more than one year after his certificate has been renewed could gain legal settlement.

Section 5311, Par. 3, provides as follows:

"3. Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any institution supported by charitable or public funds in any county in the state, or any person who is being supported by public funds shall not acquire a settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county."

It will be noted that under the provisions of the above section the prohibition against gaining a settlement is based, in so far as the facts involved here are concerned, upon whether or not the person is being supported by public funds. In the case of the renewal of the certificate of a recipient of old age assistance, there is no change in that person's status in so far as the question of whether or not he is being supported by public funds is concerned. The person receiving old age assistance could not gain legal settlement so long as he receives this old age assistance. He must be in the position of being supported by public funds, for if he had sufficient individual support, he would not be entitled to receive old age assistance.

We are therefore of the opinion that all recipients of old age assistance cannot gain legal settlement irrespective of whether or not they are receiving their assistance by an original certificate or a renewal thereof.

TAXATION: MOTOR FUEL: REFUND: CCC CAMP: No refund could be allowed on gasoline and diesel fuel oil for tractors and machinery used for repair work in a county drainage district by CCC camp, the gas and fuel being purchased by the county but delivered direct to the bureau of agricultural engineering in connection with the camp.

March 23, 1939. *Mr. L. A. Winkel, County Attorney, Algona, Iowa:* We are in receipt of your letter requesting an opinion on the following statement of facts:

In the CCC camp operated in Kossuth county there is used a large amount of gasoline and diesel fuel oil for tractors and machinery in repair work in a certain county drainage district. The gasoline and fuel oil are purchased by the county, but is delivered direct to the bureau of agricultural engineering in connection with the camp.

The question is whether a refund of the motor fuel tax can be obtained.

In view of the fact that this is a plain purchase by the county, we are of the opinion that under the provisions of Section 5093-f29 of the 1935 Code of Iowa, no refund could be obtained. That section provides in part as follows:

"No tax refund shall be paid to any person, firm, or corporation on any motor vehicle fuel used in any construction or maintenance work which is paid for from public funds."

Clearly in this case the motor vehicle fuel tax is being paid by public funds. The work is maintenance work and it falls squarely within the provisions of the above section. The fact that the consumption is in work performed by an instrumentality of the Federal Government is immaterial for this instrumentality does not pay this tax.

HOMESTEAD EXEMPTION: SOLDIERS' EXEMPTION (S. F. 182-183): Under the above Senate Files the soldier's exemption provided for in Sections 6946 and 6947 of the Code has been extended to enable a veteran to claim exemption on property other than a homestead. After July 4th when such senate files become law, the veteran may withdraw his application already filed on his homestead and make application for exemption on property other than his homestead. It would lie within the discretion of the board of supervisors whether such exemption be allowed.

March 23, 1939. *Mr. Chas. W. Barlow, County Attorney, Mason City, Iowa:* We are in receipt of your request for an opinion with regard to the following situation:

Under Senate Files 182 and 183 the soldiers' exemption provided for in Sections 6946 and 6947 of the Code has been extended to enable a veteran to claim exemption on property other than homestead. The question is whether a veteran who has made application for exemption and named the homestead could, after July 4, 1939, when the above senate files become law, withdraw his application and make application for exemption on property other than the homestead.

Section 6949 of the Code provides that the board of supervisors may allow the exemption if a written statement is filed before September 1st of the year following the year for which the exemption is claimed. In other words, there would be a period from July 4, 1939, until September 1, 1939, when the exemption may be allowed by the board of supervisors.

We would be of the opinion that under the provisions of the above section such an exemption could be allowed and it would lie within the discretion of the board of supervisors whether or not the allowance should be made. The fact that the veteran was asking the withdrawal of some exemption application already on file would, we feel, be immaterial. All we hold is that the matter lies within the discretion of the board. We do not feel that this would be giving the law any retroactive effect. The veteran had the exemption prior to the passage of Senate Files 182 and 183. Those statutes merely extended the

veteran's right to name the property against which he wished the exemption to apply. Since Section 6949 of the Code gives him the right to make application up to September 1, 1939, then the application that he makes after July 4, 1939, and before September 1, 1939, would certainly be valid if advantage were taken of the right granted by Senate Files 182 and 183.

SENATE FILE 320: IOWA UNEMPLOYMENT COMPENSATION COMMISSION: RAILROAD UNEMPLOYMENT FUND: Senate File 320 was introduced for purpose of complying with provisions of the Railroad Unemployment Insurance Act. It is our opinion that this bill, if enacted, will be in harmony with constitutional and statutory provisions of our state.

March 24, 1939. *Mr. Claude M. Stanley, Chairman, Iowa Unemployment Compensation Commission, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 16th inst. thereto attached Senate File 320 and on which you ask our opinion.

For an understanding of the question involved, we quote from your letter:

"I am herewith submitting to you a copy of Senate File 320, a bill for an act to transfer from the Iowa unemployment compensation fund to the railroad retirement board certain funds that have been collected from the railroad employers for services performed for them by their employees in the State of Iowa. This transfer is made necessary by the Act of Congress creating the railroad unemployment compensation division within the railroad retirement board. For the years 1936, 1937 and 1938 we have collected contributions from the railroads upon their payrolls within this state. This money is now held in the Iowa unemployment compensation trust fund. The money after being collected by the commission is deposited with the state treasurer who transfers this money to the unemployment compensation trust fund created by the social security board in certain banks within the United States, and the money is held until such time as it is needed for the purpose of paying benefits.

"Beginning on the 1st day of July, 1939, all railroad employees will thereafter be paid by the railroad retirement board. A plan of transfer of the funds from the various states to the railroad retirement board has been worked out by the social security board and the railroad retirement board and Senate File 320 contains the necessary changes in Chapter 102 of the Acts of the 47th General Assembly to effectuate this change of funds.

"Therefore, an opinion from your department is requested as to whether or not there are any constitutional provisions, statutory limitations or court decisions that would prevent this commission transferring from the unemployment compensation fund to the railroad retirement board as of July 1, 1939, such an amount of the contributions paid by the railroad companies less the amount assumed to have been paid to their employees."

Senate File 320 is:

"A Bill for an Act to amend the law as it appears in Chapter 102 of the Acts of the 47th General Assembly, relating to unemployment compensation, so as to make the provisions thereof conform to the provisions of the railroad unemployment insurance act of the United State of America; providing for the transfer of the contributions collected under the provisions of Chapter 102 of the Acts of the 47th General Assembly from employers, as the term employer is defined in Section 1-a of the Railroad Unemployment Insurance Act, and credited to the unemployment compensation fund, from the account of the State of Iowa in the unemployment trust fund established and maintained pursuant to Section 904 of the Social Security Act as amended, to the railroad unemployment insurance account established and maintained pursuant to Section 10 of the Railroad Unemployment Insurance Act; * * * providing for cooperation between the Iowa Unemployment Compensation Commission and the railroad retirement board with respect to the Iowa Unem-

ployment Section 12g of the Railroad unemployment office; * * * providing for the exclusion from the benefits of the Iowa unemployment compensation law individuals eligible for benefits under the Railroad Unemployment Insurance Act; providing for the exclusion of individuals covered by the Railroad Unemployment Insurance Act from coverage under the Iowa unemployment compensation law; and providing for the termination of benefit rights on July 1, 1939, under the Iowa unemployment compensation law of individuals covered by the Railroad Unemployment Insurance Act."

The Railroad Unemployment Insurance Act was passed by Congress during the last session. Section 363, sub-section (c) of said act provides:

"(c) The social security board shall withhold from certification to the secretary of the treasury for payment the amounts determined by it pursuant to Section 502 (a) of Title 42 to be necessary for the proper administration of each state's unemployment compensation law, until an amount equal to its 'preliminary amount' plus interest from July 1, 1939, at 2½ per centum per annum on such portion thereof as has not been used as the measure for withholding certification for payment, has been so withheld from certification pursuant to this paragraph: Provided, however, *That if a state shall, prior to whichever is the later of (1) thirty days after the close of the first regular session of its legislature which begins after the approval of this chapter, and (2) July 1, 1939, authorize and direct the secretary of the treasury to transfer from its account in the unemployment trust fund to the railroad unemployment-compensation account in the unemployment trust fund an amount equal to its 'preliminary amount', no amount shall be withheld from certification for payment to such state pursuant to this paragraph.*

"The social security board shall withhold from certification to the secretary of the treasury for payment the amounts determined by it pursuant to Section 502 (a) of Title 42 to be necessary for the proper administration of each state's unemployment compensation law, until an amount equal to its 'liquidating amount' plus interest from January 1, 1940, at 2½ per centum per annum on such portion thereof as has not been used as the measure for withholding certification for payment has been so withheld from certification pursuant to this paragraph: Provided, however, *That if a state shall, prior to whichever is the later of (1) thirty days after the close of the first regular session of its legislature which begins after the approval of this chapter, and 2 January 1, 1940, authorize and direct the secretary of the treasury to transfer from its account in the unemployment trust fund to the railroad unemployment compensation account in the unemployment trust fund an amount equal to its 'liquidating amount', no amount shall be withheld from certification for payment to such state pursuant to this paragraph.*

"The withholdings from certification directed in each of the foregoing paragraphs of this sub-section shall begin with respect to each state when the social security board finds that such state is unable to avail itself of the condition set forth in the proviso contained in such paragraph.

Senate File 320 was undoubtedly introduced for the purpose of complying with the above provisions of the Railroad Unemployment Insurance Act. We have carefully considered the various constitutional provisions which might effect said Senate File and have been unable to find any which, in our opinion, renders said Senate File unconstitutional. We have also examined the various statutes which have a bearing on this legislation and have been unable to find any law which, in our opinion, prohibits the passage of said Senate File.

We reach the conclusion, therefore, that said Senate File 320, if enacted into law, will be in harmony with the constitutional and statutory provisions of our state.

MOTOR VEHICLE: SCHOOL BUS: CHAUFFEUR'S LICENSE: The driver of a privately owned motor vehicle used exclusively, and exclusively means for the children of his family alone in the transportation of the children

of the immediate family of the driver, is not the operator of a school bus and may not, therefore, be required to secure a chauffeur's license.

March 28, 1939. *Motor Vehicle Department. Attention, Don E. Hutchings:* Your letter of March 21, 1939, asking our opinion upon the following matter, has come to the attention of the writer.

"The department has been requested to furnish an opinion on the question as to whether or not a person operating a motor vehicle to drive his own children from one district school to another because the school in his district is closed, and who receives compensation for this work from the school district, must secure a chauffeur's license."

For the purpose of this opinion, we quote the following sections of Chapter 134 of the Acts of the 47th General Assembly:

"Section 1. *Definitions of words and phrases.* The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

"24. *School bus* means every vehicle operated for the transportation of children to or from school, except privately owned vehicles, not operated for compensation, or used exclusively in the transportation of the children in the immediate family of the driver.

"Sec. 402. *License and written permission.* The driver of every motor vehicle in use as a school bus shall have a regular chauffeur's license issued by the department of motor vehicles and, in addition thereto, each such driver shall secure permission in writing signed by the president and secretary of the board of the school district for which he serves, and made a part of the minutes of said board; except that in the case of a driver under the age of eighteen only a limited chauffeur's license may be issued, which limited license shall be valid for the purpose only of operating a motor vehicle to transport pupils to and from school. Such limited license shall be valid for the school year beginning July 1 and ending June 30, and shall be issued under the same requirements, except as to age, as apply to the issuance of regular chauffeurs' licenses to those eighteen years of age or over."

It is to be observed that the solution to the problem presented depends upon a proper analysis and the proper construction of paragraph 24 of Section 1. It must be construed in accordance with the direction of the legislature.

Section 64 of the 1935 Code of Iowa is as follows:

"*Common-law rule of construction.* The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

It will be noted in addition, that the definition of a school bus and the sub-chapter relating to school buses and containing Sections 397 through 406 are designed as safety measures, their purpose being solely to protect the school children being conveyed to and from school in as great a measure as it is possible to do so. The legislature in order to provide a maximum of safety required by definition that all motor vehicles transporting children to or from school are school buses. It necessarily follows that the exclusion of a motor vehicle so transporting children must be provided by exception and the legislature, appreciating that certain exceptions should be recognized, did in the definition of school bus except two: 1. Privately owned vehicles not operated for compensation. 2. Privately owned vehicles used exclusively in the transportation of the children in the immediate family of the driver.

Examining the situation in question in the light of the exceptions and as directed by Section 64 as above set out, it is clear that the motor vehicle

operated by its owner in transporting the children of his immediate family to school, does not constitute a school bus. It clearly falls within exception 2 of the definition. That the driver and owner receives compensation is not controlling, it being reasonable to conclude that the safety factor is the paramount criterion in addition to the statutory exception.

We are, therefore, of the opinion that the driver of a privately owned motor vehicle used exclusively, and exclusively means for the children of his family alone in the transportation of the children of the immediate family of the driver, is not the operator of a school bus and may not, therefore, be required to secure a chauffeur's license.

CHAUFFEUR'S LICENSE: DELIVERY TRUCK: BAKERY: The owner of a bakery, who operates a retail store in the front of said bakery and who also sells and delivers his bakery goods to other merchants, making such deliveries in a truck owned and operated by him, is not a chauffeur within the meaning of statute or within the intention of the legislature and may not be required to secure a chauffeur's license in order to operate such truck.

March 29, 1939. *Mr. Weston E. Jones, County Attorney, Charles City, Iowa:* Your letter of March 24, 1939, asking our opinion as to the following matter, has come to the writer for attention.

"B owns and operates a bakery. In conjunction with said bakery he operates a retail store for his bakery and his bakery products in the front of the building. B owns a panel delivery truck which he uses for the purpose of transporting his bakery goods from the bakery to certain stores who purchase the said products at wholesale. Practically every day B receives orders for his products from the said merchants by telephone and B in turn delivers the products ordered from his bakery to the said stores. In making these deliveries B personally drives his own truck. Is B required under these facts to obtain a chauffeur's license in order to operate his delivery truck?"

For the purpose of this opinion, we quote from Chapter 134 of the Acts of the 47th General Assembly:

"Section 1. *Definitions of words and phrases.* The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

"40. *Chauffeur* means any person who operates a motor vehicle in the transportation of persons or freight, except school children, and who receives any compensation for such service in wages, commission or otherwise, paid directly or indirectly, or who as owner or employee operates a motor vehicle carrying passengers for hire or freight for hire, commission or resale, including drivers of ambulances, passenger cars, trucks, light delivery, and similar conveyances except when such operation by the owner is occasional and merely incidental to his principal business."

Analyzing the provisions of paragraph 40, it will be observed that such paragraph may be readily divided into three parts, to-wit:

1. "Chauffeur means any person who operates a motor vehicle in the transportation of persons or freight, except school schildren, and who receives any compensation for such service in wages, commission or otherwise, paid directly or indirectly, * * *." The owner of the delivery truck in question is not such person who operates a motor vehicle in the transportation of freight who receives compensation for such service. In other words, it is our thought that the word "service" was intended by the legislature to mean that such operation in the transportation of persons or freight for hire must be for third persons or other parties, but was not intended to include the conveying of the

owner's own particular property and this being true it is clear that in the present case this owner may not come under subdivision 1.

2. " * * * or who as owner or employee operates a motor vehicle carrying passengers for hire or freight for hire, commission or resale, including drivers of ambulances, passenger cars, trucks, light delivery and similar conveyance * * *." It is obvious that the owner in question may not be said to come under this subdivision for the very apparent reason that he is not such owner who carries passengers for hire or freight for hire, commission or resale.

3. "* * * except when such operation by the owner is occasional and merely incidental to his principal business." The factual situation as it exists is manifestly one which may not bring this owner under the exception of number 3. The operation of the truck is a daily continuous procedure with the owner and because of this it cannot be said that such operation is occasional or incidental.

Reviewing Sections 205 through 235 of Chapter 134 of the Acts of the 47th General Assembly, the intention of the legislature is evident in that the legislature sought to protect the property being carried by the chauffeur, as well as the owner of said property by requiring a chauffeur's license.

Because of the above reasons, we are of the opinion that the owner here, as operator of the truck referred to, is not chauffeur within the meaning of the statute or within the intention of the legislature and may not, therefore, be required to secure a chauffeur's license in order to operate such truck.

EXECUTIVE COUNCIL: VALUATION WITHOUT APPRAISAL: CAPITAL STOCK: The executive council shall make investigation under such rules as it may prescribe, and ascertain the real value of the property or other thing which the corporation is to receive for the stock. It may properly be made and value ascertained without causing an appraisal to be made.

March 30, 1939. *Mr. Berry F. Halden, Secretary Executive Council of Iowa:* We have your letter of March 29 requesting an opinion as to whether the following application can be granted without an appraisal by the Executive Council:

"Application is hereby made to issue in shares of $100.00 par value according to our new charter of December 21, 1938, 772½ shares to take the place of 618 shares of $125.00 par value each existing and issued before our charter expired December 21, 1938. The stock being of the same value before and after the charter was reissued in amount $77,250 par. The reason for the change in number of shares is because the par value of $125.00 was an inconvenient amount per share."

Section 8414 of the 1935 Code of Iowa, provides:

"8414. Executive council to fix amount. The executive council shall make investigation, under such rules as it may prescribe, and ascertain the real value of the property or other thing which the corporation is to receive for the stock. It shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed."

We are of the opinion that under the foregoing section, an *investigation under such rules as it may prescribe* may properly be made and value ascertained without causing an appraisal to be made.

PEDDLER'S LICENSE: GROCER TRUCK: TRUCK: A grocer running a truck through the country calling at the farm homes and making retail

sales of his full line of grocery stock would be subject to the provisions of Section 7174 and therefore must secure a peddler's license.

March 30, 1939. *Mr. Earl H. Fisher, County Attorney, Rock Rapids, Iowa:* We are in receipt of your letter of March 21st requesting an opinion from this office on the following situation:

"A local grocer runs a truck through the country calling at the farm homes and making retail sales of his full line of grocery stock. The question is whether or not he should obtain a peddler's license under the provisions of Section 7174 of the 1935 Code of Iowa."

A "peddler" has been defined to mean a small retail dealer who carries his merchandise with him traveling from place to place or from house to house exposing his, or his principal's goods for sale and selling them. See 29 *Corpus Juris*, 219. There are many other definitions, but they are all to the same effect. Section 7176 of the Code undertakes to define the word "peddler" as used in the statute, Section 7174 and the definition is as follows:

"*'Peddlers' defined.* The word 'peddlers' under the provisions of Sections 7174 and 7175, and wherever found in the Code, shall be held to include and apply to all transient merchants and itinerant vendors selling by sample or by taking orders, whether for immediate or future delivery."

The above definition of the word "peddler" does not purport to be all embracing, but merely a definition extending the ordinary definition of a peddler, for at common law, a person who sold by sample or by taking orders was not considered a peddler. It is only by virtue of Section 7176 that such persons are included in the peddlers' statute, so this statute must be construed as extending and not limiting the definition of a peddler. Undoubtedly the grocer in the question submitted would be a peddler under the general definition of that term, for he carries his merchandise with him, travels from place to place and from house to house and sells at retail to consumers.

The next question is whether or not such a grocer falls within any of the exceptions enumerated in Section 7177 of the Code. This section is as follows:

"*Exceptions.* The provisions of Sections 7174 to 7176, inclusive, shall not be construed to apply to persons selling at wholesale to merchants, nor to transient vendors of drugs, nor to persons running a huckster wagon, or selling and distributing fresh meats, fish, fruit, or vegetables, nor to persons selling their own work or production either by themselves or employees."

By applying the facts in this case to the exceptions enumerated above, we find this grocer is not included within any of the enumerated exceptions. He does not sell at wholesale. He does not sell drugs. He does not run a huckster wagon. He does not sell only fresh meat, fish, fruit or vegetables. He does not sell his own work or production.

For the foregoing reasons, we would be of the opinion that such a grocer would be subject to the provisions of Section 7174 and therefore must secure a peddler's license.

JUSTICE OF PEACE: WARRANT: TRAFFIC VIOLATOR: The justice of the peace should not issue a warrant in a case where the accused has already been arrested and is before the court.

March 30, 1939. *Honorable Chet B. Akers, Auditor of State:* You have requested an opinion upon the following question:

"Where a traffic violator is brought into a justice of the peace court by a highway patrolman and said patrolman files information against the violator,

is it then proper or necessary for the justice to issue a warrant and charge as cost in the case, the 50-cent fee for said warrant?"

The applicable statutes are Sections 13460 and 13562 of the 1935 Code. In Section 13460 it is provided that after the preliminary information is filed the justice of the peace "may issue a warrant for the arrest, etc." In Section 13562 it is provided that immediately upon the filing of the information "the justice may in his discretion issue a warrant for the arrest of the defendant, etc."

The above two quotations indicate that the decision of whether or not a warrant shall issue lies in the sound discretion of the justice of the peace. Ordinarily a warrant directs the doing of the act of arrest. In the case you describe, the arrest has already been made, and it is therefore difficult to see how a justice of the peace, if he is exercising his sound discretion, could direct the doing of an act which has already occurred. The issuance of a warrant in such a case would amount to the issuance of a superfluous process. Some authority for our position is contained in 16 *Corpus Juris* 298, Section 514, as follows:

"*Preliminary Warrant or Other Process. General Character.* A warrant is a written mandate in the name of the state, based upon a complaint or affidavit, or upon an indictment, proceeding from the court and directed to an officer or other proper person, commanding him to arrest and return before the court the person named in it. Its purpose is to bring accused before the court, but jurisdiction does not necessarily depend upon the warrant."

Since the warrant is not necessary in order to confer jurisdiction on the justice of the peace to hear the case and it is not necessary in order to bring the accused before the court in the question you submit, we would be of the opinion that the justice of the peace should not issue a warrant in such cases where the accused has already been arrested and is before the court.

JUVENILE COURT: JURISDICTION OF JUVENILE CASES: MAYOR: Neither justice of peace nor mayor has jurisdiction to hear and determine juvenile cases.

March 31, 1939. *Mr. Richard A. Stewart, County Attorney, Washington, Iowa:* This will acknowledge receipt of your letter of the 29th ist., wherein you ask our opinion on the following question:

Does Section 3634 of the 1935 Code of Iowa require the mayor of a city or town to transfer to the juvenile court a case in which a minor under 18 years of age is charged with a violation of a city ordinance or does a mayor have the right to proceed under Section 5732, hear the case in the mayor's court and fine or commit said minor to a proper jail cell?

Section 3634, Code of Iowa, 1935, reads as follows:

"Any child taken before any justice of the peace or police court charged with a public offense shall, together with the case be at once transferred by said court to the juvenile court."

This statute, we think, answers the question propounded by you. We believe that a fair interpretation of the words "police court" includes mayor's court.

State vs. Reed, 207 Iowa 557, supports the above opinion while it is not direct authority.

We, therefore, reach the conclusion that neither the justice of the peace nor the mayor has jurisdiction to hear and determine juvenile cases.

HIGHWAY COMMISSION: SECONDARY ROAD CONSTRUCTION; TRANSFER OF ROAD FUNDS: Before proceeding with secondary road construction work, the board of supervisors shall adopt a program. All contracts for construction work and materials exceeding $1,500 shall be advertised and let at public letting. Secondary road construction or maintenance funds cannot be transferred for any purpose other than as provided by Section 4644-c17 of the Code.

March 31, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: C. Coykendall:* This will acknowledge receipt of your communication of March 20, 1939, in which you request our opinion on the following questions:

1. *Secondary road construction programs.* What is the position of county boards of supervisors—(a) that do not have a meeting of the board of approval for the purpose of approving a secondary road construction program for local county roads, does not formulate any definite program for approval by the commission, but simply goes ahead and does construction work at the discretion of the board of supervisors on local roads; (b) that without the formality of adopting any construction program for county trunk roads, and without the state highway commission's approval, proceeds to expend construction funds on county trunk roads at the discretion of board members; (c) in lieu of formulating any construction program whatsoever, transfers all construction funds to maintenance funds and proceeds to do construction work anywhere board members see fit, and pay for same out of maintenance funds?

"The above listed three methods of procedure constitute the violation which we find in connection with the secondary road law requirements as to the formation of construction programs.

"2. *Material Purchases.* What is the position of a county board of supervisors that purchases materials used on construction work without an advertised letting. Materials commonly purchased are lumber, both treated and untreated, culvert material such as corrugated metal culverts, reinforced concrete pipe culverts and laminated wood box culverts, second-hand bridges and various other materials used in culvert construction such as cement, reinforcing steel and concrete aggregate.

"In some cases, single orders placed will exceed the $1,500 limitation prescribed by law. In most instances, however, the orders placed at one time for any particular kind of material do not involve an expenditure of more than $1,500.00, although total expenditures for such materials through the year may run as high as $10,000 or $12,000.

"The purchase of construction materials, without an advertised letting, is one of the most common violations of the law. Board members are frequently encouraged by salesmen of various kinds of material to avoid the routine of a letting, and to simply place private orders for such materials as they are needed.

"3. *Construction Lettings.* What is the position of a board of supervisors that proceeds to do thousands of dollars worth of construction work of various classes with day labor forces without advertising for bids? The method of procedure followed varies somewhat. In some counties projects will be divided into sections such that the cost of any one section or project is not estimated to amount to more than $1,500.00. In other counties, apparently no attention whatsoever is paid to this requirement of the law, and the board of supervisors calmly proceeds to spend all of their construction funds on a day labor basis without holding any advertised lettings whatsoever.

"4. *Expenditures.* Is it legal for boards of supervisors to incur obligations against the secondary road funds in any one calendar year greatly in excess of the amount of money that will be available to meet such obligations in that year? We find various subterfuges practiced. In some counties materials will be purchased from mid-summer on with the understanding that no bill of any kind is to be presented until after January 1st of next. In other counties, county officials proceed very calmly to overdraw secondary road funds and to show substantial overdrafts in such funds at the end of the year. In many other counties we find equipment purchased on some kind

of a rental arrangement, not of record, whereby certain rentals are paid each month or each year, and after while the equipment seems to become the property of the county.

"5. *Transfers.* Can boards of supervisors legally and permanently transfer road funds to other funds, such as county funds, court expense funds, poor funds, bovine tuberculosis fund, and other funds quite foreign to road work? We find that this is occasionally done."

Briefly, and in the order in which your questions are submitted, the facts as above set forth are violative of the following provisions:

1. (a) Constitute a violation of the mandatory provisions of Sec. 4644-c24 of the 1935 Code, which provides as follows:

"4644-c24. Construction program or project. *Before proceeding with any construction work* on the secondary road system for any year or years, the board of supervisors *shall*, subject to the approval of the state highway commission, adopt a comprehensive program or project based upon the construction funds estimated to be available for such year or years, not exceeding three years."

1. (b) Constitute a violation of the provision above referred to, and under certain circumstances may also violate the provisions of Sec. 4644-c42 relating to advertisement and letting and of which you are familiar.

1. (c) Constitute a violation of the provisions above referred to and under certain circumstances may violate pledges of construction levies to local county roads and county trunk roads as outlined in Secs. 4644-c9 and 4644-c10.

2. Constitute a violation of the provisions of Sec. 4644-c42, and under certain circumstances Sec. 4644-c44.

3. Constitute a violation of the sections above quoted, and with respect to the splitting of projects in evasion of the statute requiring advertisement and letting you are referred to previous opinions of the Attorney's General's office as contained in the following reports:

Report of Attorney General, 1938, page 29;
Report of Attorney General, 1934, page 81;
Report of Attorney General, 1932, pages 11 and 206.

Quoting from an opinion rendered on April 21, 1937, our predecessors said:

"This department is of the opinion that the board of supervisors has no authority to split a major project, that, according to the engineer's estimate would exceed $1,500.00, into a number of smaller projects none of which exceed $1,500.00 in cost. The intent of the law is that these major projects exceeding $1,500.00 in cost should be subject to letting on sealed bids." Citing State vs. Garretson, 208 Ia. 627.

Report of Attorney General, 1938, page 179.

To your fourth question our answer is in the negative, providing the same do not come within the exceptions provided in Sec. 5259 of the Code.

Section 5258 of the Code of 1935 provides as follows:

"5258. 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 revenue in said fund for said year, plus any unexpended balance in said fund for any previous years."

Section 1168 provides as follows:

"1168. Unauthorized contracts. Officers empowered to expend, or direct the expenditure of, public money of the state shall not make any contract for any purpose which contemplates an expenditure of such money in excess of that authorized by law."

With respect to your fifth question, Section 388 of the Code of 1935 provides as follows:

"388. Transfer of active funds— * * * Upon the approval of the comptroller, it shall be lawful to make temporary or permanent transfers of money from one fund of the municipality to another fund thereof; *but in no event*

*shall there be transferred for any purpose any of the funds collected and received for the construction and maintenance of secondary roads. * * *.*"

It is quite clear that under no circumstances may secondary road construction or maintenance funds be transferred for any purpose other than as provided by Section 4644-c17 of the Code, which reads as follows:

"4644-c17. Transfers generally. The board may make a permanent or temporary transfer of funds from the secondary road construction fund to the secondary road maintenance fund, or from the latter fund to the former fund."

We deem it appropriate at this point to refer to the fact that your questions are general in character and assume certain facts which may or may not exist in a given case. In some cases penalties are provided for specific violation; in other cases there is no specific penalty; in all cases involving county officials the provisions of Chapter 56 of the Code relating to removal from office may be invoked by the proper authority when the violation falls within the purview of Section 1091 thereof.

Chapter 10 of the Code places responsibility for annual examination of transactions of county officers upon the state auditor. The method and scope of such examination is clearly defined therein.

Section 122 provides the procedure to be followed by the auditor of state in the event his examination discloses any grounds which would be grounds for removal from office.

Chapter 56 provides for procedure to be followed in proceedings for removal of county officers where there is justification therefor.

Section 1091 outlines reasons justifying such removal proceedings, including:

"1. For wilful or habitual neglect or refusal to perform the duties of his office.

"2. For wilful misconduct or maladministration in office.

"3. For corruption."

Section 1093 prescribes who may initiate such proceedings. With respect to county officers this must be accomplished by the attorney general, by the county attorney, or by "five electors of the county," as designated by this section.

As a general proposition it is apparent that the specific acts complained of are illegal, and in those cases where the legislature has provided a penalty for a specific violation the same may be invoked by proper authority. As to whether or not they constitute "wilful or habitual neglect or refusal to perform the duties of his office," "misconduct or maladministration," or "corruption," are factual questions to be investigated by the state auditor's department and authorities prescribed by Section 1093, heretofore referred to, whose duty it is to initiate removal proceedings when the facts warrant such action.

The extent to which such breaches of duty may invalidate contracts or render the same voidable, are likewise factual questions to be ironed out between litigants, with respect to which we venture no opinions.

FUEL LICENSE FEE: MOTOR VEHICLE: REFUND: A refund of motor vehicle fuel license fee may be made to a construction company who constructs a bridge and receives pay from the customers who use the bridge.

March 31, 1939. *Mr. W. G. C. Bagley, Treasurer of State. Attention: Leslie T. Freese:* We are in receipt of your request for an opinion on the following situation:

"Would it be within the law for a refund of the motor vehicle fuel license fee to be paid to a company constructing a bridge where the payment for said bridge is made solely from the net revenue to be derived from the operation of said bridge, and not otherwise, where the bonds issued will form a part and not constitute an indebtedness of said city and neither the taxing power nor the general credit of the city is pledged to the payment of said bonds or the interest thereon?"

We assume that the only question is as to whether or not the refund should be made in the above situation under the provisions of Section 5093-f29 and the particular paragraph of said above section which provides as follows:

"No tax refund shall be paid to any person, firm, or corporation on any motor vehicle fuel used in any construction or maintenance work which is paid for from public funds."

Under the facts stated in the question it is apparent that the construction of the bridge will be paid for out of the income derived from the customers who use the bridge. Since the construction is not to be paid for from public funds, we believe that the above quoted paragraph of Section 5093-f29 would not prohibit the granting of a refund in this instance.

MOTOR VEHICLE COMMISSIONER: CERTIFICATE: FORM: It is the duty of the commissioner of motor vehicles to prescribe the form, which includes the determining and selecting of the kind of certificates to be issued. but because of the exception as to printing, such certificates shall be provided by the state printing board in accordance with Chapter 14 of the 1935 Code of Iowa.

April 3, 1939. *Mr. Earl G. Miller, Secretary of State:* Your letter of March 20, 1939, asking our opinion upon the following matter, has come to the writer for attention.

"I would like to be advised especially as to whether or not it shall be left to the discretion of the commissioner of motor vehicles to select the kind of certificate to be furnished by the State of Iowa and also as to whom shall have the authority to designate where the same shall be purchased."

For the purpose of this opinion, we quote from Chapter 134 of the Acts of the 47th General Assembly as follows:

Sec. 16. *Powers and Duties of Commissioner.* Subject to the approval of the secretary of state, the commissioner is hereby vested with the power and is charged with the duty of observing, administering, and enforcing the provisions of this chapter and of all laws regulating the operation of vehicles or the use of the highways the enforcement or administration of which is now or hereafter vested in the department. For the purposes of this chapter he shall be deemed a peace officer.

Sec. 20. *Commissioner to Prescribe Forms.* The commissioner shall prescribe and provide suitable forms of applications, registration cards, operators' and chauffeurs' licenses, and all other forms requisite or deemed necessary to carry out the provisions of this chapter and any other laws, the enforcement and administration of which are vested in the department.

Sec. 194. *Contracts for Plates.* The commissioner shall, subject to the approval of the executive council, purchase all number plates, containers, and other supplies required by this chapter, *except printing* and except expenditures of less than one hundred (100) dollars, after receiving competitive bids under open specifications. The bidders shall be required to furnish samples of such supplies and in awarding the contract the commissioner may consider the quality and suitability of the samples submitted as well as the price quoted. A record of all bids submitted shall be kept and the samples submitted shall be preserved until the next subsequent letting."

Section 183 of the 1935 Code of Iowa, is in part as follows:

REPORT OF THE ATTORNEY GENERAL

December 31, 1940.

HONORABLE GEORGE A. WILSON,

Governor of Iowa.

My Dear Governor Wilson:

In accordance with Section 249 of the 1939 Code of Iowa, I have the honor to submit herewith the biennial report of the Attorney General, covering the period of his regular term beginning January 1, 1939, and ending January 1, 1941.

Fred D. Everett of Albia, Iowa, became Attorney General January 1, 1939, and served until his death, which occurred June 10, 1940. On June 17, 1940, the undersigned was appointed to fill the unexpired term of Attorney General.

Having served as First Assistant Attorney General, and being acquainted with the conduct of the office by the late Mr. Everett, I wish to give expression to the sentiment of each and every member of this Department of the high regard in which he was held. He was an outstanding lawyer, an upright gentleman, a conscientious and faithful public servant. The State of Iowa suffered a distinct loss at his passing.

Chapter 12 of the 1939 Code of Iowa provides:

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

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

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

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

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

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

6. Report to the governor, at the time provided by law, the

condition of his office, opinions rendered, and business transacted of public interest.

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

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

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

10. Perform all other duties required by law.

It being the duty of the Attorney General to prosecute and defend all causes in the Supreme Court, in which the state is a party or interested, and prosecute and defend in any other court or tribunal all actions civil or criminal in which the state may be a party or interested, it is appropriate to review the activity of the Department relative to criminal matters.

One of the first major tasks of the criminal division of this department was to prepare, file and argue a petition for rehearing in the case of State v. Rhodes. This was a Johnson County murder case where the sentence of death has been imposed on the defendant. A few weeks prior to this administration taking office this case had been reversed and remanded by the Supreme Court, the Court dividing six to three. The above petition for rehearing was argued during the month of January and was granted on April 7, 1939. The parties were ordered to reargue the case which was done during September, 1939 term, resulting in an affirmance of the lower court's decision. Petition for rehearing filed by the defendant was overruled. An unsuccessful attempt was made to appeal the case to the United States Supreme Court upon petition for writ of certiorari. Shortly after entry of the order of the Supreme Court denying this petition, the sentence of the court was carried out, your Excellency having in the meantime denied application for commutation of sentence.

During the two-year period covered by this report, the criminal division of this department has handled ninety-six criminal cases in the Supreme Court, with the following results: Sixty-seven cases affirmed; ten cases reversed; eleven cases dismissed. In the cases dismissed the major portion were on motion by the State; the remainder were on defendant's motion. One criminal case, to-wit: State v. Bradley, which was an appeal by the defendant, abated because of the death of defendant after submission and before decision.

In eighteen criminal cases affirmed by the court where the defendant was appellant, the appellant filed petition for rehearing. These were resisted by the state with the result that all but one petition were overruled.

The criminal division also handled the case of Harris v. Rankin, which was submitted to the Supreme Court on a writ of certiorari, resulting in the annulment of the writ.

The State has taken an appeal in six cases with the result that four have been reversed and two affirmed. Four of these cases, to-wit: State v. Wiotha, State v. Hardy, State v. Talerico, and State v. Dietz, involved constitutional questions, the lower court having held the statute under which the defendant was prosecuted, unconstitutional on various grounds. These four cases were reversed by the Supreme Court and the challenged statutes are now cleared of any suspicion of invalidity. In the Talerico case the lower court held certain important provisions of the beer law unconstitutional. The Wiotha and Hardy cases involved the constitutionality of the gasoline price posting law. State v. Dietz, another case won upon appeal by the state also involved the constitutionality of the chapter relating to the sale of beer. The two remaining cases where the State appealed were affirmed. These were State v. Schreck and the habeas corpus case of Ross v. Alber. In the Schreck case the court refused to review the decision because only a fact question was presented, in the opinion of the court. This case is now pending on petition for rehearing.

The assistant in charge of criminal matters has assisted in the trial of four criminal cases in the district court, resulting as follows: State v. Palmquist—guilty; State v. John Agnew—acquitted on direct verdict because of absence of material witness; State v. Rose Agnew—guilty; State v. Schreck—acquitted on direction of the court.

The assistant in charge of criminal matters has also had charge of disbarment cases. Seven petitions for disbarment have been filed during the two-year period. Of these, five were actually tried with the following results: Two disbarments and three suspensions; one for one year, one for three years and one for eighteen months. In the remaining two, one surrendered his certificate and the same has not been restored, and in the other the accusation was dismissed upon recommendation of this department.

By reason of the action of the Federal Government to improve navigation along the Mississippi River, authority was given this department to employ a special attorney to represent the state in condemnation proceedings.

The special attorney appeared in all the cases initiated, with the result that the Conservation Commission has collected $19,495.47, several thousand dollars have been paid in satisfaction

of Old Age Assistance liens and a judgment for $7,000.00 due the Highway Commission has been obtained. There are sixteen condemnation cases yet to be tried.

For the work above outlined, there was allocated the sum of $5,500.00 of which there remains the sum of approximately $1,100.00 for the completion of the work.

During the biennium, nine cases were tried for the Conservation Commission. These constituted primarily condemnation suits for the establishment of state parks and the straightening out of boundary lines. Two of such suits were quiet title actions. The case of State of Missouri vs. State of Iowa was also disposed of. Representatives of the Attorney General of Missouri and of the Attorney General of Iowa met at Keokuk and agreed by stipulation as to the location of the proper boundary line. Thereafter the stipulation was submitted to Samuel Williston, special referee, and upon his approval was then submitted to the Supreme Court of the United States. The Supreme Court entered their order approving the stipulation theretofore approved by Mr. Williston and in accordance with the stipulation the legislatures of Iowa and Missouri approved the boundary as set forth in the stipulation. This, by joint resolution, was thereafter approved by the Congress of the United States, the new boundary becoming effective as of midnight December 31st, 1939.

The sixteen cases tried for the Department of Health may be subdivided as follows: For the Board of Chiropractic Examiners, 2; for the Board of Dental Examiners, 2; for the Board of Optometry Examiners, 1; for the Board of Cosmetology Examiners, 3; for the Board of Barber Examiners, 2; for the Board of Medical Examiners, 4; for the Board of Embalmer Examiners, 2. These constituted primarily suits to revoke or suspend the licenses of individuals practicing under the Practice Acts, the balance being suits to enjoin unlawful practice and to punish for contempt for violation of such injunctions.

This department tried three suits for the Adjutant General, being actions because of death or injury of members of the Iowa National Guard while on duty.

Several cases were tried for the Department of Agriculture, being primarily the determination of constitutional questions in regard to the duties of the Secretary of Agriculture.

During the period covered by this report, nine cases were tried for the Department of Public Safety. These were damage suits brought against the Commissioner of Public Safety because of the revocation of driver's licenses, as well as suits against the Department to require the issuance of driver's licenses after suspension or revocation.

Six suits were brought against the Secretary of State seeking

to restrain the calling and holding of the primary and general election in the year of 1940, until a redistricting of the senatorial districts was accomplished. By agreement one of these suits was tried, the district court denying the restraining order and the balance are now pending awaiting the action of the legislature in regard to the redistricting concerned. An additional suit was tried for the Secretary of State which concerned the Trade Name law.

An action which concerned the suppression of the narcotic trade, was tried for the Board of Pharmacy Examiners, as well as a number of suits before the Industrial Commissioner relating to Workmen's Compensation, and one action before the Board of Engineering Examiners which sought to revoke or suspend the license of a registered engineer.

In the year 1939 the Attorney General appeared for the State of Iowa in 452 foreclosure and partition actions and in the year 1940, appeared for the State of Iowa in 270 foreclosure and partition actions. In these actions, the state was made a party defendant by reason of old age assistance liens or old age taxes. In each instance, the petition was checked to make certain the state's interest was protected and an appearance or answer was filed and if requested, decree was approved.

During each year of the biennium, several hundred old age recipients have died leaving an estate which must be probated. The Attorney General appears in each one of these estates to protect the interest of the state's claim for reimbursement for old age assistance. In approximately 100 cases per year, settlements have been effected or hearings in district court have been held to safeguard the interest of the state.

In 1939, five appeals from the decisions of the State Board of Social Welfare were taken by applicants for, or recipients of old age assistance to the district courts, and during the year, 1940, two such appeals were taken to the district courts.

In 1940, three foreclosure actions were commenced in district courts by the Attorney general for the State Board of Social Welfare, to foreclose the liens held by the State Board of Social Welfare against real estate of old age recipients.

In 1940, two actions were commenced in district courts by the Attorney General for the State Board of Social Welfare against beneficiaries of insurance benefit policies which had been assigned to the State Department of Social Welfare.

In 1940, the State of Iowa, through the Attorney General commenced a mandamus action against the school district with reference to tuition of children under the jurisdiction of the Child Welfare Department. There are three cases now pending in the supreme court.

Among the more important cases handled by this Department for the State Tax Commission are the following:

John Eysink v. Board of Supervisors of Jasper County, Iowa—Homestead Tax Exemption case—Pending in Iowa Supreme Court.

Havel v. State Tax Commission—Action by Tax Commission to collect sales tax on sale of used cars. Closed—collected full amount of tax—$521.59 and costs. Black Hawk County.

Jasper County Savings Bank v. Herbert Pett, et al.—Income tax case, pending in Jasper County Court.

Josten Company v. State Tax Commission—Use tax case, pending in Polk District Court.

Donald R. Lynch v. State Board of Assessment and Review—An action by plaintiff Lynch to restrain the Board of Assessment and Review from collecting additional income tax on distribution of capital assets. Judgment for plaintiff in Linn District Court—The Board of Assessment and Review appealed to Iowa Supreme Court—Decision of district court affirmed.

John Morrell & Company v. State Tax Commission—Sales tax case—Pending in Wapello District Court.

Ray E. Pawley v. State Tax Commission—Sales tax case—Decree entered in Cerro Gordo County Court—Tax paid—Closed.

State of Iowa, ex rel. v. Local Board of Review of City of Des Moines—An action by the state to compel the Local Board of Review to reconvene. The Polk District Court held for the Local Board of Review. The state appealed to the Iowa Supreme Court where the decision of the district court was reversed.

Grace S. Wooster v. State Tax Commission—Inheritance tax case from Boone County—Pending in Iowa Supreme Court.

Zoller Brewing Company v. State Tax Commission—Use tax case—Pending in Scott District Court.

Montgomery Ward & Co. v. Louis E. Roddewig, et al.—An action by plaintiff to restrain defendants from collecting use tax on mail order sales to Iowa residents. Pending in United States Supreme Court.

Sears, Roebuck Company v. Louis E. Roddewig, et al.—An action by plaintiff to restrain defendant from collecting use tax on mail order sales to Iowa residents. Pending in United States Supreme Court.

(The above two cases involve over one million dollars in back taxes.)

Standard Oil Company v. State Tax Commission—This was an action brought by the Standard Oil Company, with thirteen major oil companies as interveners, to enjoin the State Tax Commission from the threatened act of including their bulk plant operations within the provisions of the Iowa Chain Store Tax Act. Settlement was had by means of a consent decree in the United States District Court for the Southern District of Iowa with all of the companies with the exception of Phillips Petroleum Company. In this decree the court held the oil companies' bulk plants were stores within the meaning of the act and the companies paid the tax on their operation of bulk plant units for the years 1935 to 1939 inclusive, or a total sum of $576,165.00.

Thereafter hearing was had with regard to the Phillips Petroleum Company, the evidence being taken in the form of depositions and when submitted to the Federal District Court for the Southern District of Iowa that court ruled that bulk plants where deliveries were not made upon the premises were not chain stores within the meaning of the Act. Appeal was taken to the Circuit Court of Appeals for the Eighth Circuit where the action is now pending.

For other branches of state government, the following cases were handled:

During the past two years the department has appeared in four cases by reason of the escheat statutes of the State of Iowa. The appearance in all these cases was for the purpose of protecting any interest the state might have. It has been the policy of this department to protect the state's interest in every possible way, at the same time recognizing that the escheat statutes exist only for the purpose of providing for disposition of property in case of intestacy and there are no legal heirs, and not for the purpose of enrichment of the state at the expense of lawful heirs.

Appearance in mortgage foreclosure actions have been largely by reason of some lien which the state might have inferior to the lien of the mortgage foreclosed, but in all such cases careful investigation has been made in order that the rights and interests of the state might be fully protected.

In the past two years four Soldier's Preference cases have been tried wherein the defendant was the Auditor of State, and three of these are now pending on appeal to the supreme court.

Some seven or eight cases have been handled in connection with the motor vehicle fuel license law, most of these having to do with the collection of unpaid taxes, and one having to do with the assessment of motor vehicle fuel tax, on motor fuel brought into the state and upon which no tax was paid, and which is commonly classed as an "evasion" case. This case involved some 80,000 gallons of motor fuel, and it is now pending in the supreme court.

Two actions have been brought against foreign corporations for penalty for having failed to qualify in Iowa. In both these instances the corporations qualified and made an offer of settlement which was accepted by the Executive Council as provided by Section 288, Code, 1939.

No litigation has been entered for the insurance department except two receiverships, which are still pending.

In addition to the foregoing two cases have been handled for the State Board of Appeal, composed of the state comptroller, state treasurer, and state auditor, one of which is now pending in the supreme court.

Three cases have been handled for the state comptroller involving various questions, one of which was the constitutionality of the agricultural land credits act passed by the 48th General As-

sembly. This case was carried to the supreme court and the supreme court (Fred Keefner v. C. Fred Porter, Comptroller, 293 NW 501) held the act unconstitutional.

One case was handled in the supreme court for the executive council, same being W. Scott Davies vs. George A. Wilson, Governor, which was a mandamus action requiring the executive council, sitting as a state Board of Canvass to declare the plaintiff the Republican nominee for attorney general. The relief prayed for by the plaintiff was denied and the same was affirmed in the supreme court.

The case of Snyder vs. Murtagh was an action in mandamus to compel the comptroller to issue a warrant to plaintiff for attorney's fees claimed under a contingent contract made with the executive council of the State of Iowa in 1937 under the former administration. The court denied the relief and the case was not appealed.

In connection with the matters handled for the Banking Department this department handled the case of Oliver C. Miller vs. Schuester, D. W. Bates, Superintendent of Banking, et al. This action attacked the constitutionality of the Small loan Act. Both the lower court and the supreme court sustained the constitutionality of the act.

A great part of the litigation, except as hereinafter noted, had to do with the routine handling of receivership matters.

Special attention is called to the cases of D. W. Bates vs. Johnson County Savings Bank, and D. W. Bates vs. Iowa City Savings Bank, and D. W. Bates vs. Farmers Loan & Trust Company. These were bank receiverships pending in the district court of Iowa in and for Johnson County. In June, 1939, it was brought to the attention of this department the possibility of some irregularities in connection with the conduct of these receiverships by the examiner in charge. A representative of this office went to Iowa City, taking with him an auditor from the office of the auditor of state, who was installed in the receivership office. Following a preliminary report made shortly after the department went to Iowa City a conference was held with D. W. Bates, superintendent of banking, who was then acquainted with the situation as it was being developed. The superintendent of banking placed the facilities of his office at the disposal of this department and as a result certain litigation was instituted against the examiner in charge. This litigation involved a proceeding to reopen the receivership of the Farmers Loan & Trust Company which had been closed in April, 1939. Roscoe P. Thoma, attorney at law of Fairfield, Iowa, was, with the approval of the Executive Council, appointed special assistant attorney general to aid in the litigation. One matter in connection with the reopening of the Farmers Loan & Trust Company was taken to the supreme court. Following the decision of the Supreme court negotiations were entered into whereby a substantial amount was paid by the former examiner in charge in

settlement of the litigation, the result being that substantial additional amounts were recovered for the benefit of the depositors of the three banks.

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

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

I appreciate the loyalty always shown by all members of this Department.

Respectfully submitted,

JOHN M. RANKIN,

Attorney General of Iowa.

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

January 1, 1939, to December 31, 1940, inclusive

APPEALS FROM CONDEMNATION

Appeals pending January 1, 1939	14
Appeals instituted during above period	51
Old appeals tried or settled during above period	37
New appeals tried or settled during above period	13
Condemnation appeals pending December 31, 1940	15

FORECLOSURE PROCEEDINGS

Foreclosures pending January 1, 1939	10
Foreclosures instituted during above period	2
Old foreclosures disposed of during above period	8
New foreclosures disposed of during above period	1
Foreclosures pending December 31, 1940	3

MISCELLANEOUS CASES

(Injunctions, Mandamus, Damage, Workmen's Compensation, Guardianships)

Miscellaneous cases pending January 1, 1939	13
Instituted during above period	18
Old miscellaneous cases disposed of during above period	16
New miscellaneous cases disposed of during above period	5
Miscellaneous cases pending December 31, 1940	10

RETAINED PERCENTAGE CASES

(On Contractor's Contracts)

Percentage cases pending January 1, 1939	6
New cases instituted during above period	17
Old cases disposed of during above period	4
New cases disposed of during above period	10
Percentage cases pending December 31, 1940	9

Total number of all cases pending December 31, 1940 37

Condemnation proceedings instituted during above period	202
Condemnations held—number of parcels	156
Number purchased or dismissed before condemnation held	46
Number of acres condemned	351.63
City lots and parts of lots condemned, including two buildings	54

Appeals pending in Supreme Court 4

SOME OF THE

IMPORTANT OPINIONS

OF THE

ATTORNEY GENERAL

FOR

Biennial Period
1939-1940

OPINIONS OF THE ATTORNEY GENERAL

ORGANIZATIONS SOLICITING PUBLIC DONATIONS: Section 1921-b1, relative to permit, refers particularly to foreign organizations, institutions, or charitable associations, and to other such bodies whether domestic or foreign which do not come within the exceptions noted in Section 1921-b4.

January 5, 1939. *Mr. M. E. Rawlings, County Attorney, Sioux City, Iowa:* Your letter of December 27, 1938, asking an opinion relative to the construction of Chapter 93 of the 1935 Code of Iowa, and particularly Section 1921-b1 thereof, has been received.

Section 1921-b1, so far as material to the question submitted, reads:

"No organization, institution, or charitable association, either directly or or through agents or representatives, shall solicit public donations in this state, unless it be a corporation duly incorporated under the laws of this state or authorized to do business in this state; has first obtained a permit therefor from the secretary of state; and has filed with the secretary of state a surety company bond in the sum of one thousand dollars, * * *."

We have read and re-read this section, and have searched for authorities that might throw light on its proper interpretation. We have been unable to find any decisions. It is our opinion, however, that the word "unless" in the fourth line should be interpreted to mean "except". In other words, we believe that the section should be interpreted to read as follows:

"*Except* corporations duly incorporated under the laws of this state, or authorized to do business in this state, no organization, institution, or charitable association, either directly or through agents of representatives, shall solicit public donations in this state without first having obtained a permit therefor from the secretary of state."

We are of the opinion that it was not the intention of the legislature, in passing this particular statute, to require corporations, duly incorporated under the laws of this state, or authorized to do business in this state, to obtain the permit referred to. We believe that this section refers particularly to foreign organizations, institutions, or charitable associations, and to other such bodies whether domestic or foreign which do not come within the exceptions noted in Section 1921-b4. If the word "unless" is not construed to be an exception, the whole section becomes meaningless as we view it.

OFFICIAL NEWSPAPERS: The fact that two newspapers are published by the same publisher, and may have the same staff work on both papers, is immaterial, and will not disqualify these papers from being selected as official newspapers, providing they meet other requirements of the law.

January 5, 1939. *Mr. Clinton H. Turner, County Attorney, Clarinda, Iowa:* Your letter of January 3, 1939, addressed to this office, asking for an opinion in reference to the question hereinafter set out, has been handed to me for attention. The following are the facts involved as we understand them:

The following newspapers have filed certified subscription lists in the auditor's office, and have petitioned that they be designated as official newspapers:

Clarinda Herald Journal
Shenandoah Gazette
Shenandoah Evening Sentinel
Essex Independent

The board of supervisors have encountered difficulty in making its selection for the reason that the Shenandoah Gazette and the Shenandoah Evening Sentinel are published by practically the same staffs. It appears that these two Shenandoah papers are published in the same newspaper office, and probably the same set-up of type is used for printing both papers. The question appears to be as to whether both of the Shenandoah papers are entitled to selection, providing that they can otherwise qualify.

After reading the statutes, and giving the matter careful consideration, it is the opinion of this office that the fact that the two Shenandoah newspapers are published by the same publisher, or that the same staffs work on both papers, is immaterial and will not disqualify these papers from being selected as official newspapers for your county.

Section 5398 of the 1935 Code of Iowa provides:

"Such selection shall be from newspapers published, and having the largest number of bona fide yearly subscriptions, within the county. * * *"

You will note that the only qualification is that the publication be newspapers published * * * within the county. That the Shenandoah papers are "newspapers" published within your county, there can be no doubt. In our opinion, the law requires that the board proceedings etc. shall be published in newspapers having the largest number of bona fide yearly subscriptions. This provision is for the benefit of the general public in order that it may be apprised of the various actions taken by the public officials elected to handle the business of the county. The fact that two or more newspapers are published by the same publisher, or even from the same office, in our opinion, does not disqualify such newspapers. The law is concerned with giving the widest possible publicity to the official business of the county. We regret that this may seem as a hardship on the other newspapers, but, under the law, as it now exists, we see no escape from the conclusion thtt the two Shenandoah papers are entitled to be selected, providing they can otherwise qualify.

TAXATION: NOTICE, TERMINATING RIGHT OF REDEMPTION: DELINQUENT TAX AGREEMENT, S. F. 167. Even though a notice of the termination of the right of redemption was served prior to the agreement, still a new notice must be served in accordance with the provisions of Section 4 of the Act when default occurs in the payments to be made under the agreement.

January 6, 1939. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa. Attention: E. A. Fordyce, Assistant County Attorney.* Your letter of December 23, 1938 has been turned over to us by our predecessors in office. In this letter you reqhest an opinion upon the following statement of facts:

"Under the provisions of Senate File 167, 47th General Assembly, if the owner of property sold at tax sale enters into a contract therein providing for the payment of delinquent taxes in installments, and makes default in the payment of an installment on the contract for sixty days then the Auditor shall 'forthwith serve notice of the termination of the right of redemption'. The question is, if the regular notice terminating the right of redemption has been served before the contract is entered into, then must a new notice be served after default in making payments on the contract, or will the notice already served be effective under the provisions of Section 4, that 'in the event of default occurring in the payments to be made * * * the lands described in such agreement snall thereupon be subject to such action as might have been had thereupon before filing of said agreement.'"

We believe a correct interpretation of Section 4 of this Act requires that a notice of the termination of the right of redemption must be served in all cases

of default occurring in the payments to be made under an agreement entered into pursuant to this Act. The fact that a notice of the termination of the right of redemption had been served prior to entering into the agreement would be immaterial, for under Section 2 of the Act the force of this notice was suspended by the execution of the agreement and that portion of Section 4 that reads:

"In the event of default * * * the lands described in such agreement shall thereupon be subject to such action as might have been had thereon before the filing of said agreement",

must be read with what follows in that section to obtain the legislative intent, to-wit:

"And if payment of the installment due is not made within sixty days after default, the county auditor shall forthwith serve notice of the termination of the right of redemption."

A reading of the entire section shows that the Legislature did not intend that a default under this agreement should work an instant forfeiture of all of the rights of the party in default. The Act provides that he shall have sixty days to pay a delinquent installment before the notice of the termination of redemption can be served and this grace period is not confined to the cases where no notice of termination was served before entering into the agreement. It extends to all who enter into an agreement pursuant to the provisions of this Act.

We believe the answer to your question is that even though a notice of the termination of the right of redemption was served prior to the agreement, still a new notice must be served in accordance with the provisions of Section 4 of the Act when default occurs in the payments to be made under the agreement.

COUNTY ATTORNEY: EXPENSES IN EXTRADITION PROCEEDINGS: County attorney within right to accompany deputy sheriff on instant trip, and expenses incurred should be audited, allowed and ordered paid by board of supervisors.

January 6, 1939. *Mr. Luther M. Carr, County Attorney, Newton, Iowa:* This acknowledges receipt of your letter of January 5, 1939, requesting our opinion as to your right to payment from the funds of your county, of expenses incurred by you in accompanying to California, R. E. Barber, deputy sheriff of your county, appointed by Governor Kraschel as agent to return from said state one Otto B. Kayser under extradition proceedings.

It appears from your letter that it was your judgment that it was necessary for you, as prosecuting attorney of your county, to accompany your deputy sheriff in order to represent him in any proceedings that might be instituted in the asylum state to prevent return of said fugitive.

Section 5180, Code of Iowa, 1935, provides:

"*Duties.* It shall be the duty of the county attorney to:

1. Diligently enforce or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or prosecuted in the name of the state of Iowa, or by him as county attorney, except as otherwise specially provided.

* * *"

It is our opinion that this section vests in the county attorney a broad discretion as to the manner in and the means by which the laws of the state shall be enforced. He is an elected official accountable to no one except the electorate.

Section 5228, in the last paragraph thereof, provides:

"The county attorney shall also receive his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat, which shall be audited and allowed by the board of supervisors of the county."

It is our opinion that the county attorney must be the judge as to whether or not the official duty in question justifies him in incurring expenses in travelling to a place outside of the county seat. We find no decisions of our own court interpreting the statutes above cited. In the case of *People ex rel. Gardenier v. Board of Supervisors of Columbia County*, 134 N. Y. 1, 31 N. E. 322, some light is shed upon this question. This was an action by the people on the relation of Aaron B. Gardenier against the board of supervisors of the county of Columbia. From a judgment entered on the order of the general term reversing an order and judgment sustaining demurrer to the alternative writ of mandamus, and directing that a peremptory writ issue, defendants appealed. The facts were these:

It appears that John H. W. Cadby was indicted for the offense of forgery in April, 1886. He fled from the county prior to the return of the indictment to the dominion of Canada. The relator was district attorney of that county, and having learned that Cadby was in Hamilton, in the province of Ontario, went there in March, 1886, for the purpose of instituting proceedings in the courts of that dominion to secure his apprehension with a view to extradition. The relator had with him a warrant against Cadby.

However, shortly after the relator reached Ontario, and prior to the arrest of Cadby, the latter fled to Nova Scotia, to which place the relator pursued him, and there caused his arrest with a view to having him taken to Hamilton. But the defendant sued out a writ of habeas corpus and was discharged from custody. New proceedings were instituted and the defendant was thereunder imprisoned.

Later the district attorney made application to the governor of the state of New York for extradition of Cadby, pursuant to a treaty between the United States and Great Britain. Proceedings were taken by the executive department of the United States, and Cadby was, upon requisition of said governor, removed from the dominion of Canada to the jail of Columbia County, New York.

The relator's claim for expenses on his trip to Canada was filed with the proper officer in Columbia County, which claim the board of supervisors of Colhmbia County refused to audit or allow. The mandamus action was thereupon commenced.

In sustaining the lower court's ruling in directing that a peremptory writ issue, the appellate court said:

"The question is whether or not his official relation to Columbia county of district attorney enabled the relator legitimately to charge the county with expenses incurred and paid by him in the dominion of Canada, in the proceedings taken there with a view to extradition of the person who had committed an extraditable offense in such county, and fled to that dominion. The expenses in question were for that purpose wholly incurred prior to the time of making application through the governor to the president of the United States, with a view to such proceedings, pursuant to the treaty with Great Britain, as were necessary to place the fugitive from justice within the jurisdiction of the courts of the county in which the crime had been committed."

Quoting further from said opinion, we find this illuminating language:

"The question here, therefore, relates to his powers in his official relation to his county, in respect to the prosecution of those charged with the commission of crime there. The theory adopted by the statute of this state is that criminal offenders be tried in the county where the crime is committed, and that the expense of the prosecution be borne by the county; and it is also provided that 'it shall be the duty of every district attorney to attend the

courts of oyer and terminer and jail delivery and general sessions, to be held from time to time in the county for which he shall have been appointed, and to conduct all prosecutions for crimes and offenses cognizable in such courts.' 1 Rev. St. p. 383, paragraph 89. It thus appears that the duty of prosecution for criminal offenses committed in his county is devolved upon the district attorney. And in respect to the expense incurred by county officers it is provided that 'the following shall be deemed county charges:' '(2) All expenses necessarily incurred by the district attorney in criminal cases arising within the county.' '(9) The moneys necessarily expended by any county officer in executing the duties of his office in cases in which no specific compensation for such services is provided by law.'"

Continuing, the opinion states:

"This statute charges upon a county the expenses, and those only, which are legitimately incurred for purposes within the powers or duties of those who have some official or representative relation to it. The district attorney is a county officer, and has been such since 1818. * * * The responsibility is upon him to conduct all prosecutions for crimes triable in his county. It may be assumed that he was charged with the duty of prosecuting Cadby * * * and for that purpose it would seem that, unless the performance of that duty is restricted by some other statute, it was, by virtue of that before mentioned, within his power to do that which was essential to such prosecutions; and that is a matter necessarily, to a great extent, dependent upon his judgment. * * *

"While it must be conceded that he has only such powers as are conferred upon him by statute, and such as are essentially incident to the powers so expressed, we think the provisions before mentioned of the Revised Statutes embraced, within those given, the power from the exercise of which the alleged claim of the relator for expenses arose. The conclusion follows that the judgment should be affirmed."

See also 15 *Corpus Juris* 505, paragraph 172.

The statutes of New York and Iowa, providing for the payment of expenses to the prosecuting attorney, are very similar in their provisions, and we are, therefore, constrained to hold that the Gardenier case is applicable to the question presented in your letter.

It follows from what we have said that it is the opinion of this office that it was within your right in exercising your duties as county attorney, to accompany the deputy sheriff to California on the trip in question, and that the expenses incurred by you in so accompanying said deputy sheriff should be audited, allowed and ordered paid by the supervisors of your county.

While, as we have above indicated, the county attorney may go to places outside of the county seat, including trips to foreign states, at the expense of the county, in the performance of his official duties, we cannot too strongly urge that this right should be exercised in cases only where absolutely necessary, and care should be taken by the county attorney to prevent the general public obtaining the impression that the trip was made primarily for pleasure.

SUIT CLUB: LOTTERY: GAMBLING: It has frequently been determined and it is the rule that because no member has the opportunity to lose, the scheme is no less a lottery. The possibility for gain brings the proposition squarely within the definition of a lottery.

January 9, 1939. *Mr. Paul L. Kildee, Assistant County Attorney, Waterloo, Iowa:* The receipt of your request for an opinion as to whether the following state of facts constitute a lottery is herewith acknowledge.

A merchant proposes to organize a suit club having fifty participants. Each

member is to pay $2.00 per week and upon the receipt of the $2.00 the merchant delivers to him a slogan card upon which he writes a slogan. The member presenting the best slogan each week receives a suit of clothes, forfeits the money he has paid in and withdraws permanently from the club. At the end of the fourteenth week each member who has not received a suit for his slogan will receive a $28.00 suit of clothes regardless.

The constitution and statutes of Iowa forbid lotteries generally. Section 28, Article III of the Constitution of Iowa is as follows:

"No lottery shall be authorized by this State; nor shall the sale of lottery tickets be allowed."

Section 13218 of the 1935 Code of Iowa is as follows:

"Lotteries and lottery tickets. If any person make or aid in making or establishing, or advertise or make public any scheme for any lottery; or advertise, offer for sale, sell, negotiate, dispose of, purchase, or receive any ticket or part of a ticket in any lottery or number thereof; or have in his possession any ticket, part of a ticket, or paper purporting to be the number of any ticket of any lottery, with intent to sell or dispose of the same on his own account or as the agent of another, he shall be imprisoned in the county jail not more than thirty days, or be fined not exceeding one hundred dollars, or both."

Our statute makes no attempt to define a lottery. However, the Supreme Court of Iowa states in the case of *State vs. Hundling* (1936) 220 Iowa 1369 at 1370, 264 NW 608, as follows:

"It is quite generally recognized that there are three elements necessary to constitute a lottery: First, a prize to be given; second, upon a contingency to be determined by chance; and, third, to a person who has paid some valuable consideration or hazarded something of value for the chance."

Brenard Mfg. Co. vs. Jessup & Barrett Co. (1919) 186 Iowa 872; 38 C. J. 286.

Under the facts presented there is no question here as to there being both a prize and a consideration, the former being in the nature of a suit and the latter being the $2.00 per week which each member pays in consecutive weekly payments until a suit is received or the cycle terminates.

More particularly to be considered is whether the remaining element, that of chance, is present. It is proposed that each week during the operation of the cycle, each member will submit upon a card, a slogan, the best of which will determine the winner for that week. The leading authorities on what may or may not constitute chance and the general rule as it has developed in England, Canada and the United States, together with their distinguishing features are collected in the recent case of *State Ex Rel. McKittrick vs. Globe-Democrat Pub. Co.* (Missouri 1937) 110 SW (2d) 705, 113 A. L. R. 1104, as follows:

"In England and Canada where the "pure" chance doctrine prevails, a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize, unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the dominant factor. 38 C. J. p. 291, par. 5; 17 R. C. L. p. 1223, par. 10, 11 L. R. A. (NW) 609, 12 Ann. Cas. 319. Hence a contest may be a lottery even though skill, judgment or research enter thereinto in some degree, if chance in a larger degree determine the result.

In *People v. Rehm* (1936) 13 Cal. App. (Supp.) 2d 755, 57 P. 238, 239, a contest substantially like the present one was adjudicated. Cartoons were printed in a newspaper with a list of suggested titles and the contestants were to select therefrom the best or most appropriate title. The first prize was

$25,000. The California Court of Appeals held the contest was a lottery "because the elements of a bona fide contest of skill are not present. . . . There is no standard by which one title can be said to be either 'best' or 'more appropriate' than all others. It follows that some one of the many contestants will receive first prize, his selection depending not on his skill in picking titles, but upon the chance that the six he selected happened to be also the six that the judges selected.

The same thought is reflected in *Eastman v. Armstrong-Byrd Music Co.*, supra, where it was stated that, if a contest "rests upon a determination in whole or in part by chance", it is a lottery; and in *Commonwealth v. Theatre Advertising Co.*, 286 Mass. 405, 410, 190 N. E. 518, 520, which proceeds on the theory that the true inquiry is whether chance inheres in the contest, or whether it is merely incidental; and in *Horner v. United States*, 147 U. S. 449, 459, 13 S. Ct. 409, 413, 37 L. Ed. 237, where a scheme for selling bonds was held a lottery because "the element of certainty goes hand in hand with the element of lot or chance, and the former does not destroy the existence or effect of the latter".

The Court continues with its opinion and states that the general rule regarding the elements of skill as opposed to the element of chance is as follows:

"As was said in *People ex rel. Ellison v. Lavin*, supra, if a contest were solely between experts, possibly elements affecting the result which no one could foresee might be held dependent upon judgment; but not so when the contest is unrestricted. What is a matter of chance for one man may not be for another. And as Mr. Justice Holmes said in *Dillingham v. McLaughlin*, 264 U. S. 370, 373, 44 S. Ct. 362, 363, 68 L. Ed. 742, 'what a man does not know and cannot find out is chance as to him, and is recognized as chance by the law.' Obviously, if some abstruce problem comparable to the Einstein theory were submitted to the general public in a prize contest on the representation that no special training or education would be required to solve it, the contention could not be made, after contestants had been induced to part with their entrance money, that the element of chance was absent because there were a few persons in the world who possessed the learning necessary to understand it."

A case close in point is that of *People vs. Wassmus*, 214 Mich. 42, 182 NW 66-67, where each week a suit was discounted or given to one of the customers selected by the management in order to induce the customer selected to use his influence in securing new accounts and allow the use of his name as having received one of the garments. The court said:

"There need be no question under this scheme about the element of consideration or prize, but it is contended that there is no element of chance in the transaction; that one buys a suit for $48.00 and gets it, and, besides, he may get his suit discounted before he makes 48 payments. Herein lies the element of chance. By purchasing a suit for $48.00 one gets the chance of acquiring it before he pays for it, or before he pays the $48. This chance is the seductive thing about the scheme, and it is this which attracts the investor. But it may be said that there is no element of chance because there is no drawing; that the management itself selects the beneficiary; but this fact does not purge the transaction of all element of chance. To the purchaser it is uncertain as to him it is chance."

"In *State vs. Lipkin*, 169, N. C. 265, 84 S. E. 340, 341, L. R. A. 1915F 1018, Ann. Cas. 1917D 137, the contract required the customer to make weekly payments of 25 cents until the sum of $17.50 was paid or until his name was selected by the company as an advertising medium. The contract stated, 'No method of any kind dependent upon or connected with chance in any form whatsoever, enters into this contract' ".

The Court said:

"The same contention was made there, that the choice of persons to receive the furniture was not by lot or chance, but by the judgment of the company

which proposed to sell; but the court rejected it, and thus showed its fallacy: 'With the purchaser, what prize he might obtain was a mere matter of lot and chance. The scheme involved substantially the same sort of gambling upon chances as in any other kind of lottery. It appealed to the same disposition for engaging in hazards and chances with the hope that luck and good fortune may give a great return for a small outlay, and as we think within the general meaning of the word lottery, and clearly within the mischief against what the statute is aimed.'"

Under the facts as presented the element of chance is clearly present. The incentive for each member to join the club is not that he might win a suit because of his peculiar ability or skill in conceiving a slogan better than his fellows but because of the chance for gain, in other words, that he might obtain something for less. There is apparently to be no judge to select the winning slogan other than the merchant himself and the element of chance present therefore becomes greater than it might be otherwise. The "slogan" scheme is merely a subterfuge, as was said in the case of *People vs. McPhee* (Mich) 103 NW 174:

"The word 'lottery' is generic. No sooner is it defined by a court than ingenuity evolves some scheme wherein the mischief discussed, but not quite within the letter of the definition given. This is made very apparent in the large number of cases . . . in which various methods of distributing money or goods by change are examined and discussed."

The evil which the statutes of Iowa seek to prevent is clearly present under the proposed facts.

It has frequently been determined and it is the rule that because no member has the opportunity to lose, the scheme is no less a lottery. The possibility for gain brings the proposition squarely within the definition of a lottery.

38 C. J. 299, and cases cited thereunder.

It is, therefore, the opinion of this office that the proposed facts constitute a lottery.

JAILBREAKING: FINE: After the service of the one year for jailbreaking and escape, the Warden has the authority to hold prisoner until fine is paid but not to exceed one day for each $3.33⅓ for the fine remaining unpaid.

January 10, 1939. *Board of Control of State Institutions, Des Moines, Iowa:* Under date of November 19, 1938, you requested an opinion based upon a letter you received from W. H. Frazer, Warden of the Men's Reformatory at Anamosa, which is as follows:

"Please find enclosed herewith a copy of all mittimus papers in the case of prisoner No. 16788 Woodrow Hall, who was received here November 17, 1938 from the District Court of Jefferson County.

"We have entered this man for safekeeping under the 307 days remaining on the sentence on which he was serving at the time he escaped from jail, for the crime of Concealing Mortgaged Property, under the provisions of Section 13358 of the 1935 Code of Iowa and under the sentence of one year in the County jail, which was imposed December 30, 1937 and will charge Jefferson County for his maintenance, when the above sentence is completed we will recommit him on the sentence of one year for jail breaking and escape under Section 13358 of the 1935 Code of Iowa.

"We would like to have an opinion from the Attorney General as to whether or not we have proceeded in the right manner in this case, owing to the fact that if this man should have been committed for the crime of Concealing Mortgaged Property, we would be compelled to enter him under the Indeterminate Sentence law which would call for five years instead of the one year in the

County jail. Also would like an opinion as to whether or not this man can be or should be held for ninety days at the expiration of his sentence for Jail Breaking and Escape in case the fine is not paid at that time."

Referring to the second paragraph of the Warden's letter in which he says the prisoner has been entered for safe keeping under the 307 days remaining on the sentence he was serving when he escaped, we are of the opinion that the part of the Record Entry of November 17, 1938, which reads:

"That he be further committed and sentenced to serve remaining period of original sentence in the State Reformatory at Anamosa, Iowa"

is a nullity.

"A provision in a judgment sentence to the county jail to the effect that the sentence shall be served in the penitentiary is a nullity even though the defendant consents thereto." *State of Iowa v. A. M. Herzoff*, 200 Iowa, 889.

In the above cited case, the defendant was taken to the penitentiary at Fort Madison and delivered to the Warden. Upon his arrival, defendant was placed in the receiving cell but was not accepted as an inmate of the institution for the reason that no proper or legal warrant of commitment accompanied the defendant. The County Attorney was notified of the situation by the Warden and thereupon the matter was called to the attention of the judge.

Paragraph 13358, Code of Iowa 1935, provides:

"If any person confined in any jail upon any criminal charge, either before or after conviction for a criminal offense, breaks jail and escapes therefrom, or escapes from the custody of the officer charged with his keeping, he shall be guilty of a felony and shall be imprisoned in the state penitentiary or reformatory not exceeding one year, and fined not exceeding three hundred dollars; but when such jail breaking, or escape from custody, occurs during incarceration after conviction, or before trial for a criminal offense whereof he is afterward convicted, in either of such cases the sentence to commence from and after the expiration of the sentence upon the original charge."

In view of the above provision, we are inclined to the opinion that the prisoner must first serve the sentence provided in the Record Entry of December 30, 1937, which is as follows:

"* * * and it is hereby ordered that the defendant be imprisoned in the County Jail of Jefferson County, Iowa, at hard labor for a term of one year and pay the costs of prosecution."

and at the expiration of this sentence he should be delivered to the Warden under Record Entry of November 17, 1938, after it has been properly amended.

It is our opinion that after the service of the one year for jail breaking and escape, the Warden has the authority to hold the prisoner until the fine is paid but not to exceed one (1) day for each three dollars and thirty-three and one-third cents ($3.33⅓) for the fine remaining unpaid.

MONEY ORDER FOR PRISONER: PRISONER: Money order placed in Warden's hands for prisoner is held by him as agent for sender and if sender demands return of it while still in his hands, it is his privilege to return it to sender.

January 10, 1939. *Board of Control of State Institutions, Des Moines, Iowa:* We have your favor of November 1st, enclosing a letter from the Warden at Fort Madison, as follows:

"On September 8th a money order made payable to the Warden for fifty dollars was received which had been purchased here in Fort Madison and signed by Dortha Smith. Accompanying the money order was a note requesting the Warden to give the money to James Parker No. 17111. * * *

"I interviewed Parker and asked him if anyone inside the prison owed him any money and he stated that they did not. I then asked him if he was expecting any money and he stated that he was not with the exception of on September 6th, his sister from California was here and said she was going to send him some money and he gave the name of the sister. I then told Parker that I had received a fifty dollar money order from a Dortha Smith with instructions to give it to him. He claimed he could not imagine who this person was unless his sister had left the money with someone to send him. I then told him McNelly No. 18193 had given sixty-five dollars to his wife and that I suspected had had his wife purchase the money order for fifty dollars and send to him. He denied that he had ever talked with McNelly about his case or agreed to render any assistance legally or otherwise and that he knew nothing about it. * * *

"I called McNelly into the office this morning and he finally admitted that he had instructed his wife to send Parker the fifty dollars. He stated Parker told him he would get him a lawyer but it would be necessary to get fifty dollars before he could do so. He claimed at that time he offered to go to the Deputy's office and get the transfer made but that Parker told him that would not do and for him to have his wife send the money to him.

"McNelly's wife is now requesting that the money be returned to her if she can be identified by the local post office employee who issued the money order. * * *

"I then sent for Parker and he again denied that he knew anything about it but claimed the fifty dollars. He stated that if someone desired to send him fifty dollars and it was received here it belonged to him and that I had no authority whatever to not give it to him, at least when he goes out. He denied that he had made any arrangements with McNelly to have the money sent him and claimed he did not know why he should send money to him but insisted that he be credited with the money and if he was not so credited he would bring suit in the civil court. In the conversation I told him that he was entirely mistaken, that the sender of the money whoever it was had control of the money until it was delivered to him and that under no circumstances would I pay him the money and that my intention was, as soon as this woman had identified herself at the post office, to give it back to her and this is what I propose to do. Since he has raised the question however, I thought it might be just as well that we got an opinion from the Attorney General before doing anything at all with the money and I am requesting that you take the matter up with the Attorney General for his opinion."

It is our opinion that the money order placed in the Warden's hands by Dortha Smith is held by him as agent for her and if she demands return of it while still in his hands, it is his privilege to return it to her.

FEES: REFEREE IN PROBATE: DEPUTY CLERK AS REFEREE IN PROBATE: Deputy Clerk appointed referee in probate matters should report and pay to county any fees received by him for such services.

January 10, 1939. *Mr. R. A. Knudson, County Attorney, Fort Dodge, Iowa:* In your letter of January 7, 1939, you request the opinion of this department as to the legality of the deputy clerk of the district court retaining fees as referee in estates.

The authorization for the appointment of a referee in probate matters is contained in Section 12041 of the 1935 Code of Iowa, which reads as follows:

"*Reference—examination of accounts—fees.* In matters of accounts of executors and administrators, the court may appoint a referee, which referee, in all counties having a population of less than one hundred thousand shall, whenever in the opinion of the court it seems fit and proper, be the clerk of the district court of the county in which the estate is being probated, as referee, who shall have the powers and perform all the duties therein of referees appointed by the court in a civil action. All fees received by any county officer as such

referee shall become a part of the fees of his office and shall be accounted for as such."

It will be noted that the court is given a discretion in selecting the referee, the matter of the choice of such referee being for the court to determine.

It will be further observed that under the foregoing section "all fees received by any county officer as such referee shall become a part of the fees of his office and shall be accounted for as such." The requirement that such referee's fees shall become a part of the fees of the office is not limited to fees received by the clerk in such matters as he is appointed referee in, but applies to any county officer who receives such appointment. Section 5238 of the statute reads as follows:

"*Appointment.* Each county auditor, * * * clerk of the district court * * * may, with the approval of the board of supervisors, appoint one or more deputies or assistants, * * *."

The above section of the statute provides for authorizing the appointment of a deputy clerk. The rule is that where the statute makes provision for the position of a deputy, such deputy is a county officer. The deputy who received his appointment from his principal acts for and on behalf and instead of his principal. His acts are those of the principal. One appointed or elected to a county office is not entitled to any compensation or emolument for such office save and except that provided for by statute.

Section 5245 of the Code is as follows:

"*Fees belong to county.* Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county."

It is therefore the opinion of this department that where the deputy clerk is appointed referee in probate matters, any fee received by him for such services should be reported and paid over to the county.

TAXATION: HOMESTEAD EXEMPTION: State Board of Assessment and Review is given full and complete jurisdiction over collection of funds that make up the Homestead Exemption fund and full and complete jurisdiction over the payment of the funds collected to the agencies and persons entitled thereto. The Homestead credit placed on the tax list by the Auditor was based on an estimate and this is subject to change or correction by the Board and this change can be made after the tax lists have been certified to the Treasurer. It is not necessary to return the tax list to the County Auditor to revise them where homestead credits are concerned.

January 10, 1939. *Mr. H. Wayne Black, County Attorney, Audubon, Iowa:* Receipt is acknowledged of your letter of January 4, 1939 requesting an opinion upon the following statement of facts:

The county auditor in preparing the tax lists, in accordance with instructions, has so prepared the lists as to show the maximum amount of homestead credit and these lists were certified to the county treasurer. The State Board of Assessment and Review has by letter notified the county treasurer of the possibility that there might be insufficient funds to allow the full homestead credit and instructed the treasurer not to allow the full credit to persons who desire to pay their taxes for the full year, but that the tax should be computed with the homestead credit for the first half year, but without the homestead credit for the second half and when the funds are available for the second half then a refund check for the actual amount of the credit available should

be given to the person who has paid his tax for the full year. We understand your inquiry to be:

1. Should the county treasurer accept the tax lists as they are and proceed to collect the taxes and where homestead credits are concerned allow the credit for the first installment but collect the second installment in full from those who desire to pay the full year's tax?

2. Has the county auditor certified the proper amounts to the county treasurer to be collected by him in the case of the homestead credits?

3. Should the county auditor be compelled to revise his tax lists where homestead credits are concerned?

At the outset it is well to examine the statutes involved. The credit upon homesteads is paid out of the fund derived from the income, corporation and sales tax collected under the provisions of Chapter 329-F1 as amended by Senate File 184 Acts of the 47th General Assembly. It is not necessary to quote from these statutes, but it is sufficient to say that supervision over the collection of this tax and distribution of the funds collected is placed in the State Board of Assessment and Review. It is only the residue remaining after the payments to the general fund, the old age pension fund and the emergency relief fund that is made available for the homestead credit fund.

The State Board of Assessment and Review is given full and complete jurisdiction over the collection of the funds that go to make up the homestead exemption fund and full and complete jurisdiction over the payment of the funds, so collected, to the agencies and persons entitled thereto.

By the provisions of Section 6943-c27 this Board is also given powers and duties "to have and exercise general supervision of the administration of the assessment and tax laws of this State, of boards of supervisors and all other officers or boards of assessment and review in the performance of their official duties in all matters relating to assessment and taxation, * * *".

Thus we see that the Board of Assessment and Review has complete supervision over the homestead exemption fund and complete supervision over the officers whose official duty it is to turn over this fund to the homestead owners in the form of tax credits. It might be said, in passing, that this express power of supervision which lies in the State Board of Assessment and Review has recently been upheld in the case of *State of Iowa, ex rel. Iowa State Board of Assessment and Review, et al. v. The Local Board of Review of the City of Des Moines, et al.*, decided on December 30, 1938 by the Supreme Court of Iowa.

Senate File 184 of the Acts of the 47th General Assembly provides that the auditor's entry of the homestead credit on the tax lists shall be based on an estimate of the amount that will be available in the homstead credit fund, but if this estimate falls short of expectation, then clearly the Board of Assessment and Review, having supervisory powers over both the homestead credit fund and the county treasurer engaged in allowing the credits, can act to the end that the credits allowed to owners of homesteads shall not exceed the amount of the homestead credit fund. This, the Board of Assessment and Review has done by directing the treasurer to allow one-half of the twenty-five mill estimated credit on the first half of the 1938 tax and further directing the county treasurer to collect the second half without credit allowance for homesteads from persons who pay the second half at the time the first half is due. A later credit for the second half year based on a new estimate of the

size of the homestead credit fund will be given and this will take the form of a credit on unpaid second installments or a refund check to those homestead owners who have paid their second installments. We feel that this direction by the State Board of Assessment and Review is a proper exercise of the supervision granted to the Board, and therefore are of the opinion that the first inquiry should be answered in the affirmative.

With regard to the second question, we are of the opinion that compliance with the instructions of the State Board of Assessment and Review will not involve any breach of the treasurer's statutory duty to collect the tax in the amounts as certified to him on the lists by the auditor. The full tax was actually certified to the treasurer on the tax lists. The homestead credit placed on the tax lists by the auditor was based on an estimate and this is subject to change or correction by the Board of Assessment and Review for the reasons heretofore stated, and this change can be made after the tax lists have been certified to the treasurer by proper direction and instructions to that officer.

With regard to the third and last question, we are of the opinion that it should not be necessary to return the tax lists to the county auditor to revise them where homestead credits are concerned. Insofar as these homestead credits are concerned, the county treasurer is under the supervision of the State Board of Assessment and Review and the present credit now on the tax lists coupled with the instructions from the State Board of Assessment and Review with regard to the second installment constitute sufficient guidance for the county treasurer and further direction, with regard to the credit for the second installment, will be made by the State Board of Assessment and Review when the fund available for homestead credit can be more accurately determined.

DEPUTY CLERK: SALARY: Deputy should be paid salary provided by law (Section 5231, 1935 Code). Even if deputy consents to work at reduced rate of pay, would not preclude him from later suing for the full compensation entitled to.

January 11, 1939. *Mr. Ralph C. Jones, County Attorney, Bedford, Iowa:* In your letter of January 10, 1939, you ask our opinion on the following question:

May a clerk of the district court appoint a deputy under an arrangement whereby such deputy agrees to work for less than the salary provided by law, and under such circumstances, may the board of supervisors approve such appointment?

Section 5231, Code of Iowa, 1935, provides:

"Each deputy clerk shall receive as his annual salary, in counties having a population of:

1. Less than fifty thousand, one-half the amount of the salary of the clerk, * * *".

After giving the statute careful study, and the question as a whole thorough consideration, we are of the opinion that such appointment would be illegal. The statute contains the word "shall", and this is generally, if not always, construed to be mandatory. Permitting a clerk or other public officer to appoint deputies at a salary less than provided by law would be an unsound and dangerous practice. Our conclusion, therefore, is that even if the deputy consents to work at the reduced rate of pay, this would not preclude him or her from later suing for the full compensation.

We are, therefore, of the opinion that the deputy should be paid the salary provided by law.

DRAINAGE: REPAIR: DITCHES: IMPROVEMENTS: Closed tile drain can be converted into open ditch or larger tile substituted to increase efficiency under repair provisions of Section 7556, 1935 Code.

January 11, 1939. *Mr. Gaylord D. Shumway, Lawyer, Algona, Iowa:* This is in answer to your letter of January 9, 1939, wherein you ask our opinion as to

(1) Whether or not a closed tile drain can be converted into an open ditch, under the repair provisions of Section 7556 of the 1935 Code of Iowa, and

(2) Whether, in a closed drain, under the provisions of said section, twenty-four inch tile may be taken out and thirty inch tile substituted therefor, in order to increase its efficiency.

We are of the opinion that both of these inquiries should be answered in the affirmative.

You will note that Section 7556 is very broad in its provisions. It provides, among other things, that:

"When any levee or drainage district shall have been established and the improvement constructed the same shall be at all times under the supervision of the board of supervisors except as otherwise provided for control and management by a board of trustees, and it shall be the duty of the board to keep the same in repair and for that purpose it may cause the ditches, drains, and watercourses thereof to be enlarged, reopened, deepened, widened, straightened or lengthened, or the location changed for better service, or may cause any part thereof to be converted into a closed drain when considered for the best interest of the public, and in connection with said work may construct settling basins."

Section 7557 provides:

"Said repairs shall be paid for out of the funds of the levee or drainage district in the hands of the county treasurer, if there be any."

Section 7558 provides:

"If such funds are not sufficient and the cost thereof does not exceed ten per cent of the original cost of the improvements in the district a new assessment shall be made on the basis of the old apportionment and no notice of such assessment shall be necessary."

The term "repair" has been several times defined by our appellate court insofar as such term relates to levee or drainage districts. Among the cases that shed light on a proper interpretation of this term are the following:

Yeomans vs. Riddle, 84 Iowa 147;
Walker vs. Joint Drainage District, 197 Iowa 351;
Mathwig vs. Drainage District, 188 Iowa 267;
Peterson vs. Sorenson, 192 Iowa 471;
Kelly vs. Drainage District, 158 Iowa 735;
Smith vs. Monona-Harrison Drainage District, 178 Iowa 823.

In the *Yeomans case, supra*, the court said:

"The reopening and repairs are really contemplated when the ditch is originally ordered. Unless the ditch be reopened when filled by the action of the frost and water or other cause, and repaired when injury has been sustained by floods or other causes, the original outlay would be wholly lost. The law contemplates, what is familiar in the experience of all, that improvements of this kind require constant watchfulness and care to preserve them and their usefulness. It was not the purpose of the law to authorize the construction

of the ditch without conferring authority and providing a manner of pursuing it."

Reading further we find:

"The law intended that the ditch should be permanent and enduring, and that its preservation should not depend upon the acquisition of jurisdiction by the supervisors through a petition which might never be presented * * *. It did not intend that a part of the landowners, after having been heavily assessed for benefits, should lose their outlay by reason of the ditch becoming filled up, and their reclaimed land again become a bond, for the reason that the other landowners had changed their views as to the utility of the ditch, and therefore refused to sign a petition for making repairs."

We cite this case to show what the attitude of our supreme court has been in reference to the repair of drains and levees when once established. We believe that the statute itself, and the decisions under it, clearly show that it was the legislative intent to give to the board of supervisors almost unlimited power to maintain the efficiency of the drain, by causing necessary repairs to be made from time to time, be these ever so extensive, if the same do not amount to the actual establishment of a new drain.

In the case of *Walker vs. Joint Drainage District, supra*, the court said:

"As to the work on Branch 118, an entirely different situation is presented. Under the record, the work done on this branch may properly be regarded as work of 'repair.' The evidence shows that on a portion of this branch the tile were poorly laid, and that they were washed out in several places, and were first on one side of the ditch and then on the other, * * *. An examination of the tile disclosed that some were broken and could not be relaid. It was also found to be impracticable to take up all of the old tile, and that this could not be done without breaking them. About 200 feet of the old tile were taken up and relaid; then new tile were purchased. Then, for a distance of 1,400 feet, the line of the old tile was abandoned, and new tile laid close to and parallel with the old tile. This connected with the original tile of Branch 118 at each end * * *.

"We think that all of this work came properly within the authority to 'repair'. In order to make the branch 'whole' or to 'restore' it, it was not absolutely necessary that all the defective and broken tile should be removed and others laid in their place. This was done in this instance, so far as it was practicable to do so. * * * It was simply a more efficient and expeditious manner of repairing the old line than to have actually dug it up and replaced it. * * * No new lands are drained. We think that such a method of repair is clearly within the powers of the board of supervisors. * * *"

In *Mathwig vs. Drainage District, supra*, the court said:

"The drainage district in question is No. 29, in Emmet County, and consists of a main, open ditch, several miles in length, and numerous laterals. The town of Huntington, which is included within the boundaries of the district, lies north of a public highway near the north line of the district. From the highway referred to, extending in a south and southeasterly direction for approximately 3,953 feet, there is a 12-inch tile, which is a part of the drainage system, which empties into the open ditch. Several laterals are connected therewith. It appears without dispute * * * that large quantities of surface water accumulate in the vicinity of Huntington, which the tile in question, on account of its size, is incapable of discharging into the open ditch, and that, as a result, a large pond covering several acres formed * * *. An engineer was appointed by the board of supervisors to examine into the proposition and report a plan for improving the outlet at this point. He recommended that the drain referred to be enlarged by the construction of another tile of equal capacity parallel therewith, and that the intake at the highway be enlarged. * * * The board of supervisors levied an assessment equal to 6 per cent * * *."

Holding that this constituted "repair", the court said:

"It is contended by counsel for appellee * * * that the proposed improvement is not in the nature of a repair of the improvement, but amounts to the construction of a new drain * * *.

"It appears from the evidence that a considerable part of the district is improperly drained, because the tile is too small * * *.

"Section 1989-a21, Code Supplement, 1913, authorizes the board of supervisors, after the completion of a drainage improvement, 'to keep the same in repair and for that purpose they may cause the same to be enlarged, re-opened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby.'

"* * * The effect of the proposed improvement is to enlarge this outlet, and, it seems to us, it clearly comes within the provisions of Section 1989-a21." Continuing, the court cites with approval from *Kelly v. Drainage District, supra:*

"Whether such enlargement of the outlet be effected by widening and deepening the existing ditch or excavating another parallel with it, or whether this be done by removing tile and replacing it by that of larger size, or by laying another tile drain parallel with that already laid, can make no difference * * *."

The above quotation from the *Kelley case*, it seems to us, is *stare decisis* on the second inquiry in your letter.

Other cases could be cited of similar import, but what we have herein said, and the decisions from which we have quoted, in our opinion, disposes of the question. As we view it, in light of the statute, and the decisions thereunder, when a drain has once been legally and properly established, the board of supervisors has the authority, under the repair section, to take such action in reference to the repair of the drain as may to it seem necessary, providing that it does not actually amount to the establishment of a new drain. As to what constitutes a new drain, see *Walker vs. Joint Drainage District, supra.*

It is our conclusion, therefore, that your board has the legal authority, under the repair section, to-wit: 7556, Code of Iowa, 1935, to convert a closed tile drain into an open ditch. We are also of the opinion that under said section a twenty-four inch tile may be taken out and a thirty inch tile substituted therefor.

NONRESIDENT BROKER'S LICENSE: BROKER'S LICENSE: FEE FOR NONRESIDENT BROKER'S LICENSE: It appears that the nonresident should be issued but one license, that for the nonresident. Section 1905-c45 contemplates that but one license shall be issued for each place of business within the State and as the nonresident has but one place of business within the State of Iowa, he is not entitled to nor does he require a duplicate license.

A nonresident should be charged the regular $10.00 fee for the issuance of the broker's license.

January 12, 1939. *Department of State. Attention: James R. Leverett, Sec'y.* We are in receipt of your letter of January 7th inquiring as to whether a nonresident real estate broker maintaining an office in Iowa to which he gives his personal attention, should (1) be issued two licenses, one to his nonresidence address and the other to his Iowa address or whether one will suffice, and (2) to advise you of the fee for such license or licenses.

The State of Iowa requires that before a person shall act as a real estate broker, he shall first obtain a license.

Section 1905-c23, 1935 Code of Iowa, is as follows:

"License required. It shall be unlawful for any person, copartnership, association or corporation, to act as a real estate broker or real estate salesman, or to advertise or assume to act as such real estate broker or real estate salesman, without a license issued by the Iowa real estate commissioner."

Section 1905-c57 provides that nonresidents shall be issued such license:

"Nonresidents. A nonresident of this state may become a real estate broker or a real estate salesman by conforming to all of the conditions of this paragraph and this chapter * * *"

Section 1905-c45 provides for the issuance of duplicate licenses:

"Place of business. Every real estate broker shall maintain a place of business in this state. *If the real estate broker maintains more than one place of business within the state, a duplicate license shall be issued to such broker for each branch office maintained.* Provided, that if such broker be a copartnership, association or corporation, a duplicate shall be issued to the members or officers thereof, and a single fee of one dollar in each case shall be paid for each duplicate license."

Examining these statutes it appears that the nonresident in question should be issued but one license, that for the nonresident, for the reason that Section 1905-c45 contemplates that but one license shall be issued for each place of business within the State and as the nonresident has but one place of business within the State of Iowa, he is not entitled to nor does he require a duplicate license. It is within the contemplation of the statute that a nonresident doing business in the State and having a place of business so located, shall display his license in such place of business to indicate to the general public that as a nonresident he is entirely within his legal right to operate as a real estate broker in the State of Iowa.

It is our opinion in addition that inasmuch as the State of Iowa has no jurisdiction over the place of business of the nonresident broker outside of the State of Iowa, then the statute can contemplate nothing more than that the broker be required to display his license, whether a nonresident or a resident, in the place of business which he maintains within the limits of this State, unless as a matter of fact he maintains one or more branch offices for which he should then receive a duplicate license upon application.

Section 1905-c40 provides for annual fees:

"Annual fee. The annual fee for each real estate broker's license shall be ten dollars. The annual fee for each real estate salesman's license shall be five dollars. Provided that when a copartnership, association or corporation shall have paid an annual fee of ten dollars, and shall have designated one of its members or officers as hereinafter provided in Section 1905-c41, the annual fees payable by any other member or officer actively engaged in the real estate business of such copartnership, association, or corporation shall be five dollars, for which a salesman's license shall be issued, but any such member or officer shall be entitled to a broker's license upon the payment of the usual fee therefor."

In accordance with the foregoing, the nonresident should be charged the regular $10.00 fee for the issuance of the broker's license.

ABSENT VOTER'S BALLOT: CITY ELECTION: Conflict between Sections 928 and 655-a14, 1935 Code should be construed together. Voter cannot make application for absent voter's ballot more than 20 days prior to election day, providing ballots have been printed, pursuant to law.

January 13, 1939. *Mr. Roy C. Smith, City Clerk, Albia, Iowa:* Your letter of January 12, 1939, wherein you ask our opinion concerning the apparent conflict between Section 655-a14 and Section 928 of the 1935 Code of Iowa, is at hand.

The question is, as we understand it:

Under Section 928 of the 1935 Code of Iowa, has a voter the right to vote by absent voter's ballot in a city election prior to the expiration of the time for filing nomination papers?

It is our opinion that this answer is in the negative, as, of course, it is impossible to vote before the ballots are printed, and the clerk cannot, of course, print the ballots until the time for filing nomination papers expires. We think Section 928 should be constructed as if it read as follows:

"Any voter, under the circumstances specified in Section 927, may, on any day not Sunday, election day, or a holiday and not more than twenty days prior to the date of election, make application to the county auditor, or to the city or town clerk, as the case may be, for an official ballot to be voted at such election, providing that such ballots have, under the provisions of law, then been printed."

It is our opinion that Section 655-a14 has the effect of suspending the right to vote by absent voter's ballot in a city or town election for a portion of the period set out in Section 928. We believe that the two sections must be construed together, and when this is done, I believe you will have no difficulty in reconciling them.

PEACE OFFICERS: CONSTABLES: POLICEMEN: *Policemen* may refuse to leave territorial limits of their city to execute a warrant and this would be breach of their duty. *Constables* have right to serve anywhere in county, search warrant or other criminal process issued by justice of the peace.

January 16, 1939. *Mr. John L. Duffy, County Attorney, Dubuque, Iowa:* This is in answer to your letter of January 12, 1939, wherein you ask our opinion as to the following questions:

1. Whether a policeman in a city or town has the authority under the law to serve a search warrant outside of the incorporated limits of the city or town but within the same county that the city or town is located.

2. Whether a constable in one township in a county has a right to serve a search warrant in another township located in the county.

It is our opinion that question No. 1 should be answered in the negative. We believe that Section 13405-b1 of the 1935 Code of Iowa supports our opinion. You will note that it is therein said:

"It shall be the duty of a peace officer and his deputy, if any, throughout the county, township, or municipality of which he is such officer, to preserve the peace, to ferret out crime, to apprehend and arrest all criminals * * *."

The concluding sentence in said section is:

"Nothing herein shall be deemed to curtail the powers and duties otherwise granted to or imposed upon peace officers."

Section 13405 provides that the following are peace officers:

"1. Sheriffs and their deputies.
2. Constables.
3. Marshals and policemen of cities and towns. * * *"

Section 5657 provides:

"The marshal shall be ex officio chief of police and may appoint one or more deputy marshals, who may perform his duties * * *. He shall attend

upon the sittings of the mayor's and police court, execute within the county and return all writs and other process directed to him from the mayor's and police court, suppress all riots, disturbances, and breaches of the peace, and *arrest all disorderly persons in the city or town and all persons committing any offense* against the ordinances thereof * * *."

"He shall pursue and arrest any persons fleeing from justice * * *."

Section 5658 provides:

"The officers and members of the police force shall have such powers and perform such duties as may be provided by law or ordinance, and shall have the same powers as marshals to make arrests and suppress riots, disturbances, and breaches of the peace."

It is our conclusion that it is because of the statutes last above quoted that the last section in 13405-b1 was inserted. We note that you refer to Section 13441-g5, relating to search warrants. Quoting from the statute, you italicized "to any peace officer in the county." Our opinion is that this phrase refers to one who has the authority under Section 13405-b1 to execute said warrant.

We are clearly of the opinion that not only may policemen refuse to leave the territorial limits of their city or town for the purpose of executing a warrant, except as provided in Section 5657, with reference to persons fleeing from justice, but we go farther and say that this would be a breach of their duty, and contrary to the spirit of the statute outlining their duties.

Wih reference to constables, however, we have a different situation. Section 523, Code of Iowa, 1935, provides:

"In all townships, except such as are included in the territorial limits of municipal courts, there shall be elected, biennially, two justices of the peace and two constables who shall hold office for two years and be county officers."

Section 10502 provides that:

"Jurisdiction of justices of the peace, when not specially restricted, is coextensive with their respective counties * * *."

Section 10629 provides:

"Constables are ministerial officers of justices of the peace, and shall serve all warrants, notices, or other process directed to them by and from any lawful authority, and perform all other duties now or hereafter required of them by law."

Section 10630 provides:

"The constable is the proper executive officer in a justice's court, but the sheriff may perform any of the duties required of him * * *."

You will note that, by virtue of the provisions of Section 10502, the jurisdiction of justices of the peace is coextensive with their respective counties, and you will observe also that, under Section 10629, constables are ministerial officers of justices of the peace and shall serve all warrants, notices, or other process directed to them by and from any lawful authority.

Reading Section 10630, we find that:

"The constable is the proper executive officer in a justice's court."

In 57 *Corpus Juris*, 775, wherein the rights, powers, and duties of constables are discussed, it is said, in paragraph 126, that:

"It has been held that a constable, in the absence of constitutional or statutory authority, cannot act outside of his own district, precinct, or town. But the legislature may determine the area within his county in which a precinct constable may or must officially act, and it has been held that, under express or implied statutory provisions, the authority of a constable may be coexten-

sive with the limits of the county to which his precinct, district, or town belongs."

It was held in

Allor v. Wayne Co., 43 Mich., 76, 4 NW, 492,

that a constable of the city of Detroit has power to execute the criminal process of a justice of the peace of such city for offenses committed in the county of Wayne and outside of the city.

Our own supreme court has not spoken directly on the subject, but see

State v. Bevans, 37 Iowa, 178.

In view of the statutes hereinabove quoted from and in the light of the decisions set out above, it is our opinion that a constable has the right to serve, anywhere in the county, a search warrant or any other criminal process issued by a justice of the peace.

STERILIZATION: OPERATION: County may legally pay for sterilization operation, with consent of wife and husband, performed in any hospital within or without the state.

January 16, 1939. *Mr. Ralph C. Jones, County Attorney, Bedford, Iowa*: This is in answer to your letter of the 13th inst., wherein you asked our opinion as to the following question:

"May Taylor County legally pay for a sterilization operation performed on an indigent mother in a St. Joseph, Mo., hospital?"

It is our opinion that Taylor County may, with the consent of the wife and her husband, cause this operation to be performed in any hospital within or without the state. We know of no statute, or decisions construing any statute, that would limit the right to pay for such operations only when performed within our own jurisdiction.

CORONER: COMPENSATION: DEATH CERTIFICATE: Coroner's legal compensation for making report as in Section 5214-c1; coroner under legal obligation to investigate only violent deaths in his county; physician has right to sign death certificate even though he arrives after person's death and made examination of body—may give his opinion as to the cause of death.

January 17, 1939. *Mr. C. Morse Hoorneman, County Attorney, LeMars, Iowa*: This is in answer to your letter of the 13th inst., wherein you ask our opinion relative to certain duties of the county coroner, his compensation, etc.

As to the right of the coroner to receive compensation for making the report required by Section 5214-c1, we have to say that it is our opinion that this is a part of his duties compensation for which is provided by Section 5237, Code of Iowa, 1935. This Section specifically provides the compensation which the coroner is entitled to charge and receive, and is, in our opinion, the only compensation that can be lawfully paid.

As to the second inquiry, it is our opinion that the coroner is not under any legal obligation to investigate all accidents within the county, but only such as can properly be classified as violent deaths; in other words, it is our view that the coroner is concerned only with cases wherein a person is supposed to have died by unlawful means, as referred to in Section 5200.

As to whether a physician has a right to sign a death certificate when he

was not in attendance at the time of the person's death, but arrived afterwards and made an examination of the body, we are clearly of the opinion that such certificate may be executed by said physician. Numerous cases hold that a physician, after having made an examination of a dead body, may give his opinion as to the cause of death.

TUITION: SCHOOL DISTRICTS: Minors who have been sent to make their home with relatives in order to have a woman's care and home comforts, who have brought property with them, which is taxable in the county of new residence; who have a legally appointed guardian in new residence and express intention of remaining there until their majority, are entitled to claim its school privileges.

January 17, 1939. *Mr. J. Berkley Wilson, County Attorney, Indianola, Iowa:* We are in receipt of your request for an opinion, as follows:

"A and his wife live in the Indianola School District, and have several children, and one of the girls of high school age (we will call her B) has been sent by her parents to live with her grandmother, and work for her room and board, and the grandmother, who is old and needs her has been appointed as her guardian; she lives in Liberty Center School District, and the girl wishes to go to school there and finish, A having lived near there before. (The matter of eligibility for basketball also comes up, but A insists that basketball is offered, and he is not placing her under guardianship for that purpose only.)

"He also claims he is unable to clothe and school her in Indianola, without relief aid, as he has other children. Liberty Center insists on tuition. A claims she is also in effect emancipated. *Question:* Does the fact that B is working for room and board in L. C. School District, and under guardianship there, and indicates no intention of returning to Indianola, before she becomes of age entitle her to schooling free of tuition? My answer was that she was entitled to go to school at L. C. District without tuition. Enclosed find my brief on the matter, for your benefit. I would like a decision on this as soon as conveniently possible as there are several similar cases to this pending here."

The Supreme Court, in the case of *Mt. Hope School District vs. J. C. Hendrickson, Auditor, et al.*, 197 Iowa 191, found that:

"Minors who have been sent by their father to make their home with relatives, in order that they might have a woman's care and home comforts, and who have brought property with them, which is taxable in the county of their new residence; who have a legally appointed guardian in said new residence; and who express their intention of remaining there until their majority, are 'residents' of the school district to which they have removed, and entitled to claim its school privileges."

From the above and foregoing, it is our opinion that the child "B" you are inquiring about is entitled to attend school in the Liberty Center District without paying tuition.

COUNTY: LIABILITY INSURANCE BY COUNTY: NEGLIGENT OPERATION OF COUNTY AUTOS: LIABILITY OF COUNTY: County not liable for damages caused by operation of its trucks. Liability insurance by county invalid. If employee of county operates county truck which operation results in injury or damage such employment will not afford him immunity.

January 17, 1939. *Mr. Edw. C. Schroeder, County Attorney, Boone, Iowa:* This will acknowledge receipt of your letter of the 14th inst., wherein you ask our opinion on the following propositions:

1. Could the county, as a municipal body, be held liable if one of their cars was involved in an accident while, at the time, it was engaged in some use that would not be construed as governmental functions?

2. Would the expenditure, by the County Board, for the purchase of liability insurance be permitted?

3. Is it not true that a County employee operating a county truck could always be held liable for his negligence?

It is our opinion that the county, as a municipal body, could not be held liable if one of its cars was involved in an accident while, at the time, it was engaged in some use that would not properly be classified as a governmental function.

The case of *Hibbs v. Ind. School District*, 218-841, wherein is collected numerous cases of our own and other courts dealing with this question, in our opinion disposes of your inquiry. While the Hibbs case was recently overruled, as to the liability of the employee of the incorporation, this case should always be consulted for the purpose of determining the liability of the municipal corporation itself. (The recent case referred to having to do with the liability of the employee is *Montanich v. McMillin*, 280 NW, 608.)

The long list of cases found in the Hibbs case all lay down the rule that there is no liability on the part of the municipal corporation for any tort committed by its employees. You will discover by reading these cases that there are no exceptions to this rule. If the truck in question was operated without the consent of the proper authorities, there would clearly be no liability for, in that case, even were the vehicle owned by a private individual, a suit for damages against him could not be successfully prosecuted.

Section 499 of Chapter 134, Laws of the 47th G. A. provides that:

"Whenever such driver is not the owner of such vehicle, object, or contrivance, but is so operating, driving, or moving same with the express or implied permission of said owner, then said owner and driver shall be jointly and severally liable for any such damage."

Thus we find that even an individual would not be liable, unless the vehicle was operated with his express or implied consent.

You do not set out in your letter what you have reference to when you say: "that would not be construed as governmental functions."

We can conceive of no use to which this truck could be put that would not constitute a governmental function, if the truck was operated with the consent of the proper officers of the county.

It is our opinion, therefore, that a county, as a municipal body, could not be held liable for any damage caused by the operation of any of its trucks. We believe the following are just a few of the many cases that support our view:

Smith v. City of Iowa City, 213-391
Calwell v. City of Boone, 51-687
Packard v. Voltz, 94-227
Snethen v. Harrison Co., 172-81
Post v. Davis Co., 196-183

Your second inquiry is:

"Would the expenditure, by the county board, for the purpose of liability insurance be permitted?"

We have been unable to discover any decisions by our court on this subject, but we are abidingly convinced that, inasmuch as there is no liability on the part of the county arising from the negligent operation of its vehicles, the expenditure for liability insurance would be improper. See *Wheeler v. City of Sault Ste. Marie*, 129 NW, 685.

Among other things, it is therein said:

"It would likewise compel the city to carry a personal indemnity risk for the employees while engaged in the work. The carrying of casualty and indemnity risks for individuals or other corporations is clearly beyond the power of the defendant city."

See also 35 Iowa, 416, wherein it is said:

"The contract of guaranty was, therefore, *ultra vires* and not binding upon the city. A municipal corporation can exercise only such powers as are expressly granted and such incidental powers as are necessary to the proper exercise thereof."

In the case of *DeVotie v. Iowa State Fair Board*, 249 NW, 429, our court held that the fair board could not be sued and, at page 430, stated:

"The society is an arm or agency of the state, organized for the promotion of the public good, and for the advancement of the agricultural interests of the state. It would be manifestly wrong to permit its funds to be used to pay damages arising out of the commission of wrongful acts of its officers and servants, and which are in no wise connected with the object and purpose of the society's creation."

See also

Long v. State Highway Commission, 204 Iowa, 376
Hibbs v. Independent School District, 251 NW, 606.

Many other cases could be cited the holdings of which are to the effect that a county is not liable for the torts of its officers, servants, or employees or agents.

The purchase of liability insurance, therefore, would be not for the protection of the county, as a municipal corporation, but solely for the benefit of the particular employee who happens to be operating the vehicle at the time of the accident. The effect of the purchase of such liability insurance would be the use of public funds for the protection of private individuals. Municipal corporations possess only those rights which are expressly given them by statute, being an arm of and creature of the state. No statute has conferred upon counties the right to purchase public liability or property damage insurance for its employees. Clearly, therefore, such a contract between the county and the insurance carrier would be *ulta vires* and, consequently, invalid.

As to the third inquiry in your letter, we refer you to the case of

Montanick v. McMillin, 280 NW, 608.

In our opinion, this fully and completely answers your questions. We, however, desire to say that the Montanick case refers only to negligent acts of misfeasance. The Hibbs case may still be the law in this state with reference to negligent omission. On page 616 the court said:

"The distinction between acts of nonfeasance and misfeasance has been pointed out by this court. In the recent case of *Smith v. Iowa City*, 213 Iowa, 391, at page 395, this court said: 'It is a general rule that the neglect of a public officer to perform a public duty will constitute an individual wrong, only when the person complaining is able to show that the act of the officer involved a duty owing him as an individual * * *. The negligence, if any, of the individual members of the park board was the failure on their part to maintain the device or instrumentality in question in repair * * *: that is, they are guilty, if at all, of nonfeasance only.' ".

Other pronouncements could be referred to from the Montanick case to show that it was the intention of the supreme court of our state to overrule the Hibbs case only in so far as it relates to the acts of misfeasance of employees of municipal corporations.

As to your inquiry No. 3, in the form stated, we are of the opinion that, if

the person operates a county truck and such operation results in injury or damage, the fact that he is the employee of a municipal corporation will afford him no immunity.

COUNSEL FOR SCHOOL DISTRICTS: SCHOOL DISTRICTS: In all cases where actions may be instituted by or against any school officer to enforce any provision of law, the board may employ counsel, for which the school corporation shall be liable.

January 18, 1939. *Miss Jessie M. Parker, Supt. of Public Instruction, Des Moines, Iowa*: The letter of January 13, 1939, from G. Belvel Richter, Attorney of Waukon, relative to the suit pending there, to-wit: *Leroy Foels, by his next friend v. Independent School District of Postville, R. J. Carroll, Superintendent of Schools of Independent School District of Postville, et al.*, for injuries suffered while attending a basketball game, has been handed us with request for an opinion.

Mr. Richter says:

"Since this action was instituted, R. J. Carroll has resigned and has accepted a position as superintendent of High School in Oskaloosa.

"Can the Independent School District of Postville now legally, properly and justifiably continue to bear the expense of the defense in this litigation on behalf of the former superintendent R. J. Carroll?

Section 4245, Code of Iowa 1935, provides:

"In all cases where actions may be instituted by or against any school officer to enforce any provision of law, the board may employ counsel, for which the school corporation shall be liable."

The Supreme Court of Iowa, interpreting the above section of the Code, made use of this language in the case of *Cowles v. Independent School District of Rome*, 204 Iowa, 689:

"A school board has legal authority to employ an attorney, at the expense of the district, to defend the action of the board in contracting with one teacher and in refusing to contract with another, even though the actions in which the issue directly or indirectly arises are actions in form personally against the teacher and individual members of the board."

Considering the wording of the Code, and the holding of the Supreme Court above, we arrive at the conclusion that, regardless of the fact that R. J. Carroll is no longer Superintendent, the board is within its rights in defending him.

BEER PERMIT, CLASS "A": TAX ON BEER: A Class "A" permit holder should, in addition to any tax that might be payable under Section 1921-f118, be required to pay a tax on beer as a stock of merchandise under the provisions of Chapter 331.

January 18, 1939. *Mr. Edward J. Grier, County Attorney, Ottumwa, Iowa*: Receipt is acknowledged of your letter of January 14th requesting an opinion from this department on the following matter:

Should the holder of a Class "A" Beer Permit be required to pay a tax on beer, as a stock of merchandise under the provisions of Chapter 331, in addition to the barrel tax mentioned in Section 1921-f118?

The classes of property that are exempt from taxation are set forth in Section 6944. An examination of the twenty-two classes of exempted property listed in that section does not disclose any classification that could even re-

motely embrace a stock of beer. As was stated in *Grand Lodge A. O. U. W. v. Madigan*, 207 Iowa 24 at page 27:

"* * * a grant of exemption from taxation by virtue of a statute is never presumed, and a claim of exemption thereunder is construed *strictissimi juris*. The claim must rest upon language in regard to which there can be no doubt as to the meaning, and the grant must be in terms too plain to be mistaken. In other words, taxation is the rule, and an exemption is the exception."

The fact that a stock of beer held by a Class 'A' dealer might be subject to a barrel tax, under the provisions of Section 1921-f118, is immaterial. The barrel tax is not in lieu of the personal property tax. It is in the nature of a sales tax for it is imposed on beer manufactured or imported "for sale" in Iowa. Sales to consumers outside the State of Iowa and to other Class 'A' dealers in the State of Iowa are exempt from the barrel tax.

We are therefore of the opinion that the Class 'A' Permit holder should, in addition to any tax that might be payable under Section 1921-f118, be required to pay a tax on beer as a stock of merchandise under the provisions of Chapter 331.

PERSONAL TAXES, DELINQUENT: MONEYS AND CREDITS: MORTGAGE INDEBTEDNESS: The 5 per cent penalty added by virtue of Section 7215 is added to the tax by the treasurer when the tax is delinquent. The 5 per cent tax penalty that is added under Section 7223 is added by the tax collector. One penalty does not supplant the other. The tax collector should collect the full 5 per cent penalty under each of the two sections.

A mortgage indebtedness is a valid deduction on an assessment of moneys and credits if based on actual consideration. (Section 6989)

January 18, 1939. *Mr. George H. Struble, County Attorney, Toledo, Iowa:* We are in receipt of your letter of January 16th requesting an opinion from this department with regard to the following questions:

1. In the collection of delinquent personal taxes is the collector to collect five per cent penalty as provided in Section 7215, Code of 1935, and also the five per cent penalty under Section 7223 of the Code of 1935?
2. Is a person entitled to deduct from his assessment on moneys and credits mortgage indebtedness existing at the time of the assessment?

The five per cent penalty that is added by virtue of Section 7215 is added to the tax by the treasurer, when the tax is delinquent, after the first Monday in December and when collected this money is paid to the treasurer. The five per cent penalty that is collected by virtue of Section 7223 Code of 1935, is added to the tax by the tax collector and this statute contemplates that this five per cent penalty shall be received by the collector "for his services and expenses." Thus we see that the ultimate destination of the funds collected under the two penalty statutes is different. Under the one statute the county receives the money. Under the other statute the tax collector receives the money. In this situation there could be no interpretation that one penalty supplants the other and it would be the duty of the collector to collect not only the penalty which is to go to the treasurer, under Section 7215, but also the penalty which is to be received by him for his services and expenses.

It is therefore the opinion of this department that a tax collector should collect the full five per cent penalty under each of the two foregoing sections.

In answer to the second question we can state that under the provisions of Section 6989 only a good faith debt is required to constitute a deduction. A

mortgage indebtedness would probably be a good faith debt and this would be true even though the mortgage note was not signed by the person claiming the deduction, if in fact an existing mortgage obligation had been assumed by said person. The burden is on him who asserts the deduction to prove that said deduction is a good faith debt founded on actual consideration. See *Vanderpluijm v. Morris*, 200 Iowa 776 where the court stated:

"He makes this claim, and therefore the burden of proof is on him to establish it as a valid subsisting indebtedness."

We are therefore of the opinion that a mortgage indebtedness is a valid deduction if it is founded on actual consideration within the provisions of Section 6989 and this would be true even though the indebtedness arose by virtue of the purchaser of real estate assuming and agreeing to pay an existing mortgage indebtedness.

BEER PERMIT: RESIDENCE: REQUIREMENTS CLASS "B" (Section 1921-f103): Under the statute there is no requirement that the applicant be a resident of the county in which the business is conducted. It seems to be sufficient if the applicant is a resident of the State.

January 18, 1939. *Mr. Wallace F. Snyder, County Attorney, Belle Plaine, Iowa*: We are in receipt of your letter requesting an opinion on the following question:

Must the holder of a Class "B" Beer Permit issued by the Board of Supervisors of Benton County for a business located in the unincorporated Town of Walford be a resident of Benton County?

We have examined the statutes as to the requirements for applicants for Class 'B' Permits and we can find no statute that requires such an applicant to be a resident of the county in which the business is to be conducted.

Section 1921-f103 of the 1935 Code sets forth the form of application for such Class 'B' Permits and under this section it seems to be sufficient if the applicant is a resident of the State of Iowa.

MEDICAL AID TO PERSONS ON RELIEF, OR WPA EMPLOYEES: COUNTIES: A county is not legally obligated to furnish medical aid to anyone. The statutes recognize the moral obligation to render this medical relief, and merely sanction the payments therefor, in the amounts the board of supervisors find, in their discretion to be just and necessary.

January 18, 1939. *Honorable Lester S. Gillette, State Senator:* This department is in receipt of your request for an opinion based upon the following questions:

"Is the county obligated to furnish any certain amount of medical care to people working under the WPA or who are on relief? Is there any limit so far as the expense is concerned to the responsibility to which the county may have in that connection?

Medical care may be furnished by a county to poor persons under the provisions of Chapter 267 of the Code. This Chapter enumerates the form of relief that a county may render to the poor and includes medical attendance (Section 5322) which may be afforded at public expense, Sections 5328 and 5329.

It will be noted that these statutes are all permissive and not mandatory and no legal obligation is created on the board to give relief including medical attendance. As said in a previous opinion of this department involving these statutes:

"The matter is left within the discretion of the board of supervisors to give or deny relief as they find cause." (Attorney General's opinions, 1936, page 345.)

Under the provisions of Chapter 199 providing for treatment at the University Hospital of indigent persons, we do find mandatory provisions and under Section 4018-f1 there is a possibility that the county that exceeds its quota will have to pay for the treatment. But, subject to the exception of the University Hospital cases under Chapter 199, the answer to your question is that a county is not legally obligated to furnish medical aid to anyone. The statutes recognize the moral obligation to render this medical relief, and merely sanction the payments therefor, in the amounts the board of supervisors find, in their discretion to be just and necessary.

TAXATION: EXEMPTION FROM TAXATION: PROPERTY OWNED BY TRUSTEES OF PENSION FUND FOR TEACHERS: Property owned by the trustees of a teachers' pension fund does not fall within the exemption section of the statute and would, therefore, be taxable.

January 19, 1939. *Mr. Shirley A. Webster, County Attorney, Winterset, Iowa:* Receipt is acknowledged of your letter of January 12th requesting an opinion from this department with regard to the following situation:

The Independent School District of Des Moines has established a pension fund for the purpose of providing a pension for the teachers in the Des Moines schools. Part of this fund was invested in mortgages on real estate in Madison County, Iowa, and the mortgagee has since obtained title to the real estate. The question is whether or not this property is exempt from taxation in Madison County.

In the first place, it will be borne in mind that taxation is the rule and exemption the exception. As was said in *Grand Lodge A. O. U. W. v. Madigan*, 207 Iowa 24 at page 27:

"* * * a grant of exemption from taxation by virtue of a statute is never presumed, and a claim of exemption thereunder is construed *strictissimi juris*. The claim must rest upon language in regard to which there can be no doubt as to the meaning, and the grant must be in terms too plain to be mistaken. In other words, taxation is the rule, and an exemption is the exception."

The classes of property that are exempt from taxation are listed in Section 6944. The only section that could even remotely apply to this situation is Section 2 of the exemption statute which is as follows:

"6944. *Exemptions.*

* * *

2. Municipal and military property. The property of a county, township, city, town, school district, or military company, when devoted to public use and not held for pecuniary profit."

Thus it will be seen that property, in order to be exempt from taxation must first be owned by the school district.

Under Section 4346 of the Code of 1935 we find that the pension fund is derived from the proceeds of an assessment of the salaries of the teachers in an amount not exceeding one per cent of such salary and from the proceeds of an annual tax levy not exceeding the amount produced by the assessment of the teachers' salaries and the interest on any permanent fund which may be created by gift or bequest. Under Section 4347 of the Code of 1935 we find the following:

"4347. *Management.* The board of directors of the independent school district shall constitute the board of trustees and shall formulate the plan of the retirement; and shall make all necessary rules and regulations for the operation of said retirement system."

Under this latter Section it will seem that the property is not owned by the school district, but the directors of said school district are merely the trustees for the benefit of the teachers included in the retirement plan. Moreover, we find under Section 2 of the exemption statute that the property must be devoted to a public use. Obviously this property will not be devoted to a public use. It is true that in many cases where the property is owned by a municipal corporation it may be rented to private persons, but the test of whether or not the property is devoted to a public use seems to be whether or not rentals or income therefrom are paid into public funds. Here, the rental and income from this property will not be paid into the public funds but into a private fund for the use and benefit of the teachers who are the beneficiaries of the fund. Moreover, the property will be used for pecuniary profit. The duty of the trustees of this fund would certainly be to endeavor to accumulate as much profit as possible from the use of the property in order to increase the fund.

So it would seem that such property owned by the trustees of the pension fund could not under any interpretation be brought within the exemption contained in Section 2 of the exemption statute.

There does not seem to be any decision directly on this question by the Supreme Court of Iowa, but we find a discussion of some of the clauses in *Fort Des Moines Lodge No. 25 I. O. O. F. v. The County of Polk, et al.*, 56 Iowa 34 and also *Town of Mitchellville v. Board of Supervisors, et al.*, 64 Iowa 554. In this latter case the court held that where property was devised to trustees in trust for the Town of Mitchellville with the provision that the rents and profits should be applied to ornamenting a park that the property was subject to taxation. It was said in that opinion:

"To be exempt, the property in question in this case must be devoted entirely to public use, and not held for pecuniary profit. Now, it appears that the property is not devoted to public use, but the profit arising therefrom shall be. It is therefore obvious that a pecuniary profit is derived from the property.

"It is therefore, not exempt. It is true, the profits are devoted to public use, but the statute does not, because of this fact, provide that the property is exempt from taxation. The judgment of the circuit court is, therefore, Affirmed."

Since we find no other section in the exemption statute which would have any application to the property involved, it is the opinion of this department that such property is taxable.

Since this answers both of your questions, we do not at this time pass on the question of whether or not property that is owned by the Independent School District of one county and located in another county could be taxed by the latter county.

COUNTY ROADS: NOTICES—Sec. 4644-c25: If notices sent out not later than February 1, and meeting held not later than March 1, action of Board of Supervisors would be legal as if meeting had been held on February 1 per notices sent out not later than January 1. Statute should be construed to be directory only.

January 19, 1939. *Mr. H. Wayne Black, County Attorney, Audubon, Iowa:* This is in answer to your letter of the 16th inst. wherein you ask our opinion on several questions relating to road construction. Inasmuch, however, as our opinion hereinafter set out, with reference to Question No. 1, makes an opinion on Nos. 2, 3, and 4 moot, we therefore deem it unnecessary to give our views as to the latter questions.

Your Question No. 1 reads as follows:

"1. Can the notices as required in the cited section be sent out now; and, if so, will any of the acts of the board of approval be legal?"
(Section referred to is 4644-C25, Code of Iowa, 1935.)

It is our opinion that this question should be answered in the affirmative. We believe the statute should be construed to be directory only. We can see no jurisdictional question involved in the section. Therefore, it is our conclusion that, if the notices were sent out not later than February 1, and the meeting held not later than March 1, the action of he board of supervisors would be as legal and binding as if the meeting had been held on February 1, pursuant to notices sent out not later than January 1.

In 59 *Corpus Juris*, 1078, Par. 634, it is said:

"A statute specifying a time within which a public officer is to perform an official act regarding rights and duties of others, and made with a view to the proper, orderly and prompt conduct of business, is usually directory, unless the phraseology of the statute, or the nature of the act to be performed, and the consequence of doing or failing to do at such time is such that the designation of time must be considered a limitation of the power of the officer. So a statute requiring a public body, merely for the orderly transaction of business, to fix the time for the performance of certain acts which may as effectually be done at any other time, is usually regarded as directory."

See numerous cases cited under said note.

We particularly call your attention to *State ex rel. Kobes, et al., v. Grimm, et al.*, 212 NW 437, in which the court cited with approval from *McCrary on Elections:*

"In general, where a statute requires an official act to be done by a given day, for a public purpose, it must be construed as merely directory in regard to the time. Accordingly, it is uniformly held that a statute requiring an officer or board to certify the result of an election, or in any way to make known the result, or to issue a commission on or before a given day, or within a given number of days, after the election, is directory and not mandatory. Such acts are valid though performed after the expiration of the time. This doctrine has been uniformly maintained by the courts, and nothing is better settled."

As has hereinbefore been indicated, it is our conclusion that the notices required in the cited section may be sent out now and that the action taken by the Board pursuant to such notices will be legal and binding.

ROADHOUSE LICENSE: BEER PERMIT: TOWNSHIP TRUSTEES: A club located outside of an incorporated town where food and beer are served and public dancing held, must secure a roadhouse license from the township trustees under Chapter 285.

January 20, 1939. *Mr. Burr C. Towne, County Attorney, Waterloo, Iowa. Attention: Mr. Paul L. Kildee, Assistant County Attorney:* Reference is made to your letter of January 17th and the letter of Mr. Burr C. Towne, County Attorney of Black Hawk County, dated January 7th, wherein an opinion is requested of this department upon the following situation:

The Picadillie Club holding a beer license from the Board of Supervisors of Black Hawk County and located in said county and outside an incorporated town is now engaged in operating a public dance in the same building, but in a room outside of the room where beer is sold. We also understand that this club is engaged in selling food generally to the public. The township trustees have refused the Picadillie Club a roadhouse license and the question is whether this club can be prosecuted for operating without such a license under the provisions of Chapter 285 of the Code of 1935.

For the purpose of the question herein, we assume that dancing and food service are open to the public and the beer sales are confined to bona fide club members. At the outset it is a little strange to us how this Picadillie Club received a beer permit. It must be a golf or country club or else located in a village platted prior to January 1, 1934, or else the Board of Supervisors had no power to issue the beer permit. Assuming, however, that the issuance of the beer permit was legal and within the authority of the Board of Supervisors to issue, then the next question is: Must this club secure a road house license from the township trustees under the provisions of Chapter 285 in order to carry on a public dance and/or the business of serving food to the public generally?

We are of the opinion that the club must secure such a license. The Board of Supervisors can issue the permit to sell beer and can make certain regulations with regard to dancing, see Section 1921-g5 of the Code of 1935, but the permit or license to operate a public dance or place where prepared food or drink is sold generally to the public must be obtained from the township trustees under Chapter 285.

The township trustees have broad powers in regard to the granting or withholding such a license. Section 5583 expressly states:

"The granting of a license shall be discretionary with the trustees; * * *."

The trouble that the trustees might have experienced because of the operation of such a place in the past and the difficulty of adequately policing such a place outside a city or town would be ample reason, under the discretion lodged in said Board of Trustees, for the refusal of the road house license.

PRISONERS: JAIL EXPENSE: County may legally pay city for expense of temporarily detaining county prisoners in City Jail.

January 23, 1939. *Mr. E. A. Fordyce, Assistant County Attorney, Cedar Rapids, Iowa:* This is in answer to your letter of the 16th inst., wherein you say:

"It has been the practice of the police of the City of Cedar Rapids to make quite a number of arrests each month of persons charged with offenses against the state, and lodge them temporarily in the City Jail until formally arraigned. The City has rendered the county a bill for the keep and meals of these prisoners. The Board has on occasion paid these bills because the bills rendered to the county for the keep in the City Jail were less than the prisoners could have been kept in the County Jail. However, we do not find any authority for taking prisoners arrested upon county charges to the City Jail. Will you kindly advise us if in your opinion it is permissible for the county to pay the city for the keep of these prisoners in the City Jail?

Section 5511, Code of Iowa, 1935, provides:

"All charges and expenses for the safe keeping and maintenance of persons shall be allowed by the Board of Supervisors * * *."

Chapter 281, Code of Iowa, 1935, provides that the jails in the several counties in the state shall be used as prisons and for the following purposes, among others:

"For the detention of persons charged with an offense and committed for trial or examination."

Section 5772 provides:

"Cities of the first class shall have power to erect, lease, establish and maintain station houses for the detention of persons arrested."

Section 5511 provides:

"All charges and expenses for the safe keeping and maintenance of prisoners shall be allowed by the Board of Supervisors * * *."

We are, therefore, of the opinion that the county may rightfully and legally pay the City of Cedar Rapids for the expenses incurred in temporarily detaining county prisoners in the city jail.

RECEIVER IN FORECLOSURE ACTION: FEE OF RECEIVER: CLERK DISTRICT COURT: Clerk of District Court may retain fees as receiver in real estate foreclosure actions where continuations have been granted under the moratorium statutes, when approved by the Court and parties litigant.

January 24, 1939. *Mr. Hubert H. Schultz, County Attorney, Primghar, Iowa:* This is in answer to your letter of the 13th inst., wherein you ask our opinion relative to the right of Mr. W. A. Hoeven, Clerk of the District Court, to retain fees as receiver in real estate foreclosure actions where continuances had been granted under the moratorium statutes. You state in your letter that in every case in which Mr. Hoeven acted as such receiver, his fees were approved and ordered paid by the Court. I understand also from what you say that the amount of the fee and the payment thereof to Mr. Hoeven was approved by the parties litigant.

While we do not approve of the Clerk of the District Court assuming duties inconsistent with those which he is elected to perform, we are of the opinion that the fees referred to, having been approved by the Court and by the parties in litigation, the clerk is entitled to retain these fees.

The case of *Burlingame v. Hardin County*, 164 NW 115, sheds considerable light on this subject. Among pertinent statements in the opinion is the following:

"The right of the county to demand and recover money received by the Clerk depends solely upon the question whether such money has been received by him in his official capacity. A county official does not contract to give all his time to the public service in any such sense that all money he may earn or receive from any and every source during his term of office must be accounted for to the county."

It is our conclusion, therefore, that Mr. Hoeven may retain the fees in question.

NOMINATIONS: PARK COMMISSIONER: PRIMARY ELECTION: CITIES UNDER COMMISSION GOVERNMENT: Candidates for office of Park Commissioner may be nominated upon affidavit and nominating petition—complying with Sections 6495, 6496 and 6497—under commission form of government.

January 24, 1939. *Honorable Edward Breen, State Senate, Des Moines, Iowa:* On January 6th you wrote a letter asking the opinion of this department

relative to the manner in which candidates for park commissioner are to get their names on the ballot at the forthcoming primary election. The City of Fort Dodge is operated under a commission form of government, according to your letter.

Section 6495 provides:

"Any person desiring to become a candidate for mayor or councilman shall, at least ten days prior to said primary election, file with the city clerk a statement of such candidacy in substantially the following form, (here the form is set out)."

Under Chapter 326, which contains the various provisions with reference to the government of cities by a commission, no provision is made for the nomination of Park Commissioner. Chapter 174, Laws of the 47th General Assembly, amended Section 6564 by inserting at the end of said section, after the word "created", the following words:

"except as such power and duties may be changed or modified by subsequent sections of this chapter."

Section 2 of Chapter 174 amended Section 6578, providing that the provision of Chapter 293 should be applicable to and be in force in cities and towns organized under the commission plan. Chapter 293 has to do with the election and appointment of park commissioners in cities and towns. The question which you have submitted is not without difficulty. The law, as amended by Chapter 174, provides that the provisions of Chapter 293, relating to parks and park commissioners, shall be applicable to cities under the commission plan. It goes on to say:

"to the same extent and effect that such provisions are applicable to and in force in cities and towns of the same class organized under the general laws of the state."

Section 639 provides for primary elections in cities of the first class, with certain exceptions.

After reading the above statutes and giving this matter careful consideration, we are constrained to hold that candidates for park commissioner may have their names printed on the primary ballot by complying with Sections 6495, 6496 and 6497. Chapter 174 of the 47th General Assembly creates a new office in cities acting under the commission form of government. Manifestly, there must be a way in which candidates for this office may be nominated and elected and, in as much as the officers which the law originally provided for are nominated by affidavit and nominating petition, we feel that by implication these same statutes set out the manner in which any officers subsequently provided for are to be nominated and elected.

It is our conclusion, therefore, that candidates for the office of park commissioner may be nominated upon affidavit and nominating petition.

COUNTY ATTORNEY: BOARD OF SUPERVISORS: OFFICE EXPENSE: Board of Supervisors may pay portion of rental for office where county attorney carries on his private practice; also Board may pay part of stenographic hire, light, telephone, etc. and may furnish reasonable amount of supplies such as paper, etc.

January 24, 1939. *Mr. Dudley Weible, County Attorney, Forest City, Iowa:* This is in answer to your letter of the 18th inst., wherein you ask our opinion relative to the legal rights of the Board of Supervisors to pay a claim in the sum of $624.00 for stenographic help for your predecessor, Mr. Hill, during

his four years incumbency of the County Attorney's office. Section 5133 provides:

"The Board of Supervisors shall furnish the clerk of the district court, sheriff, recorder, treasurer, auditor, county attorney * * * with offices at the county seat * * *."

Manifestly, this means an office equipped with the ordinary furniture, equipment and supplies. Certainly this does not mean that the duty of the Board ends when they have assigned to the County Attorney, a room.

We are, therefore, of the opinion that when the County Attorney has an office of his own, properly equipped, that the Board may, in its discretion, allow to the County Attorney a reasonable rental for the use of such office and may furnish him with a reasonable amount of supplies, such as paper, carbon paper, ink, pencils, telephone, etc. This has been the opinion of this office through several administrations.

Section 5130, Code of Iowa, 1935, sub-section 6, provides that the Board of Supervisors shall have power to represent its county and have the care and management of the property and business thereof in all cases where no other provision is made. We also call your attention to the following decisions by our own court:

Wilhelm v. Cedar County, 50 Iowa 254
Dishbrow v. Board of Supervisors, 119 Iowa 538
Call v. Hamilton County, 62 Iowa 448.

Under the statute and these decisions, the Board of Supervisors is given broad powers as to the conduct of the business of the county and are clothed with a wide discretion as to the manner in which and the method whereby their duties shall be exercised. It, of course, is a matter of common knowledge that stenographic help is supplied for the other officers enumerated in Section 5133.

We have given this matter careful consideration and we are clearly of the opinion that it is a matter resting within the sound discretion of the Board of Supervisors as to just what the size of allowance shall be to the county attorney for the use of his office in which this official pursues his private practice of law.

It is our conclusion that, under the statutes hereinabove cited and in light of the decisions in the cases above referred to, the Board may pay a portion of the rental for the office in which the county attorney carries on his private practice. We believe also that the Board has a right to pay a part of the stenographic hire, light, telephone, and may in addition thereto furnish him with a reasonable amount of supplies such as paper, pencils, pens, ink, carbon paper, etc.

As to Mr. Hill's claim, we have to say that the validity thereof depends on so many facts not in our possession that we feel we should express no opinion thereon. Our conclusion is that the matter of the allowance or disallowance of this claim should be left to the sound discretion of the Board.

NEWSPAPERS: BOARD OF SUPERVISORS: SUBSCRIBERS: In Section 5402-a, as amended, the phrase, "at least three consecutive months prior to date of application" has reference to subscribers and not to recognition by the post office department.

January 24, 1939. *Mr. Paul L. Kildee, Assistant County Attorney, Waterloo, Iowa:* This will acknowledge receipt of your letter of the 18th inst., wherein

you ask our opinion as to the proper interpretation of Section 5402-a, as amended by Chapter 145, Laws of the 47th General Assembly of Iowa.

Section 5402-a, as amended, reads as follows:

"The Board of Supervisors shall determine the bona fide yearly subscribers of a newspaper within the county as follows:
1. Those subscribers listed by the publisher in accordance with the postal laws and regulations, and who have been on the list at least three consecutive months prior to date of application."

We are of the opinion that the word "who" has as its antecedent "subscribers", in the first line of said sub-section. Under this interpretation a newspaper is required to prove that every subscriber listed has been such in good faith for at least three months. We do not believe that sub-section 1 has any reference to the recognition by the post office department as a newspaper. If a newspaper has the required number of subscribers who have been such for the required length of time, we fail to perceive why such publication is not equally as effective a vehicle for the dissemination of information one day after it has been recognized by the post office department as it would be three months later. It is evident that the amendment in question was passed to prevent a newspaper from going out and obtaining spurious subscribers within a few days prior to the hearing as to its qualification before the Board of Supervisors. At such a time temptation to falsify and to resort to various types of chicanery would be great. This is the evil that, in our opinion, the amendment sought to eliminate.

Under Chapter 4, Code of Iowa, 1935, relating to construction of statutes, we find several rules. Among these are the following:

"Words and phrases shall be construed according to the context and the approved usage of the language."

Section 64 under this chapter provides:

"The rule of common law, that statutes in derogation thereof are to be strictly construed, has no application to the Code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects * * *."

This is a new statute and in construing new statutes the rule was laid down in a leading English case, decided in 1584 and referred to in 25 R. C. L., pp. 1015-1016, paragraph 254, Hayden case, 3 Coke, 70, 14 English R. C. L. 714, wherein it was resolved by the Barons of the Exchequer that for the sure and true interpretation of all statutes in general, four things are to be discerned and considered:

"1. What was the common law before the making of the Act?
2. What was the mischief and defect for which the common law did not provide?
3. What remedy the Parliament hath reserved and appointed to cure the diseases of the commonwealth.
4. And the true reason of the remedy."

It is our conclusion, therefore, that the phrase, "at least three consecutive months prior to date of application" has reference to subscribers and not to recognition by the post office department.

LARCENY: CRIMINAL PROCEEDINGS: County Attorney, under certain circumstances, would be fully justified in initiating criminal proceedings against a husband for larceny of wife's property, upon complaint of the wife.

January 24, 1939. *Mr. Robert S. Bruner, County Attorney, Carroll, Iowa:* This will acknowledge receipt of your letter of the 20th inst., wherein you ask an opinion of this department on the question of whether a husband can be guilty of larceny of his wife's property. This question has never been passed upon by the Supreme Court of our state and, in view of the conflict in the decisions of courts of several other states, we, of course, can only speculate on what the holding of our court will be. Section 10446 provides:

"A married woman may own in her own right real and personal property acquired by descent, gift or purchase and manage, sell and convey the same * * *."

Section 10447 provides:

"When property is owned by a husband or wife, the other has no interest therein which can be the subject of contract between them, nor such interest as will make the same liable for the contracts or liabilities of the one not the owner of the property, except as provided in this chapter."

Section 10448 provides:

"Should the husband or wife obtain possession or control of property belonging to the other before or after marriage, the owner of the property may maintain an action therefor, * * * in the same manner and extent as if they were unmarried."

Section 10449 provides a conveyance by either husband or wife to or in favor of the other, shall be valid.

In common law, under the theory of unity of husband and wife, a wife could not be guilty of stealing the goods of her husband. This was also true as to the husband committing larceny in respect of his wife's property.

Under the married women's property acts, however, the courts have repudiated the common law doctrine, and we have had laid down the rule that a husband may be guilty of larceny in respect of his wife's property and vice versa. A distinction is made, however, even by some of these courts, between cases where the husband and wife live together and where they are separated, although still married to each other. In the case of *State v. Parker*, 3 Ohio 551, and in *Thomas v. Thomas*, 51 Illinois 162, the respective supreme courts of these states held that the married women's property acts were not intended to sever the unity of person and community of property existing between the spouses and does not change the common law rule, that the taking of the wife's property by the husband is not larceny.

The State of Arkansas has a statute very similar to our own. As a matter of fact, some clauses therein are identical to ours. Under this statute it was held in *Hunt v. State*, 72 Ark. 241, that a husband could be guilty of larceny from his wife. To the same effect is the holding in *Beasley v. State*, 138 Ind. 552. Under the English married women's property act of 1882, it was held that a husband might be convicted of larceny from his wife if the spouses are living apart or if the husband has deserted or is about to desert his wife. *Lemon v. Simmons*, 57 L. J. Q. B. N. S. 260.

An annotation on the subject may be found in 55 A. L. R. 558.

I do not believe that we can do more than to call your attention to the various holdings of the courts on this subject. To say, for example, that in our opinion a husband may be guilty of larceny in respect of his wife's property, would be merely an expression of a guess as to what our Supreme Court will finally hold. Such a guess on our part would be of no value to you. We will have to leave the matter of this prosecution to your sound judgment.

We might say, however, that the decisions in the Hunt and Beasley cases would undoubtedly constitute persuasive argument in favor of the adoption by our court of a rule consistent with these decisions. We are inclined especially to this view in view of the similarity of the Arkansas and Indiana married women's acts. Because of these cases we feel that a county attorney, under certain circumstances, would be fully justified in initiating criminal proceedings against a husband for larceny upon complaint of the wife.

BOARD OF SUPERVISORS: LAND FOR POOR FARM: CONTRACT TO PURCHASE LAND BY BOARD OF SUPERVISORS: Board of Supervisors can not legally enter into contract to purchase lands (see Section 6238)—contract providing for payment over period of years or providing for lease with an option to purchase.

January 24, 1939. *Mr. Clarence A. Kading, County Attorney, Knoxville, Iowa:* This is in answer to your letter of the 18th inst., wherein you inquire whether or not, in our opinion, the Board of Supervisors may rightfully purchase additional land to the existing poor farm which already exceeds some 200 acres. You say that the county has not sufficient funds on hand to pay the purchase price. A plan has been proposed that the additional land be purchased under contract providing for payment of a certain amount annually, over a period of ten years. It has also been suggested that the Board may enter into a lease with an option to purchase, agreeing upon an annual rental sufficiently large to cover the taxes and expenses of upkeep and with a provision in the lease that when the Board so desired it could exercise its option to purchase for the amount of the last annual rental or for $1.00 and other consideration.

You state also that "A further examination shows that this county has reached its limit on bonded indebtedness." You say, "I would greatly appreciate an opinion from your department as to whether or not the Board can legally enter into either of the contracts above referred to".

It is our opinion that neither of the contracts suggested may be legally entered into. The Constitution of this state provides in Article XI, Section 3:

"No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum on the value of the taxable property * * *."

Section 6238 provides:

"No county * * * shall become indebted in any manner for its general or ordinary purposes to an amount exceeding in the aggregate one and one-fourth per cent of the actual value of the taxable property with such corporation. * * *"

Said section further provides:

"Indebtedness heretofore or hereafter incurred by a county for poor relief purposes shall not be construed or regarded as having been incurred for its general or ordinary purposes in so far as said indebtedness may be incurred *solely for poor relief purposes.*

Inasmuch as your county has reached its constitutional and statutory limit of indebtedness, we fail to see how you can legally enter into either of the contracts proposed. You will notice that in the Constitution and in the statute, the phrase employed is "shall not become indebted". That either of the contracts in question would constitute an indebtedness, no one, we think, could

deny. The fact that bonds are not proposed to be issued is, in our opinion, immaterial.

The following cases, to-wit:

Grant v. Davenport, 36 Iowa 396;
French v. Burlington, 42 Iowa 614;
McPherson v. Foster, 43 Iowa 48.

hold that the constitutional inhibition applies to indebtedness incurred in any manner or for any purpose. It applies to indebtedness already due as well as that to become due. We also have definition of "indebtedness", *Swanson vs. Ottumwa*, 118 Iowa 161.

Other reasons could be given why the contracts in question would not be legal but we believe that what we have said disposes of the question and furnishes an ample reason why your county could not adopt either of the plans proposed.

In view of the financial condition of your county, we believe that there is no way by which your Board could legally acquire the land in question.

RABBITS: DOMESTIC ANIMALS: (Chapter 277, 1935 Code of Iowa) Although domestic rabbits may be personal property from the standpoint of tax assessment, they are not such domestic animals as to come within the meaning of Chapter 277 of the 1935 Code of Iowa.

January 25, 1939. *Mr. E. A. Fordyce, Assistant County Attorney, Cedar Rapids, Iowa:* Your letter of January 23rd, inquiring as to whether domesticated rabbits are such domestic animals as to come within the provision of Chapter 277 of the 1935 Code of Iowa, has come to the writer for attention.

Section 5452 to which you refer, is as follows:

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

Our Supreme Court for the purpose of this chapter, has never defined "domestic animal". It is, therefore, necessary that we look to the statute to determine what the legislature had in mind, together with the wrong they sought to correct, as well as the customary and ordinary usage of the language.

Animals may be divided into two groups:

1. "*Domestic animals* include those which are tame by nature, or from time immemorial have been accustomed to the association of man, or by his industry have been subjected to his will, and have no disposition to escape his dominion."
2. "*Wild animals* comprehend those wild by nature, which, because of habit, mode of life, or natural instinct, are incapable of being completely domesticated, and require the exercise of art, force, or skill to keep them in subjection."

3 C. J. S. 1084, Par. 2.

Under the common law, in the absence of negligence, no liability attached unless the dog had vicious propensities of which the owner had knowledge and for the damage of wolves there was, of course, no recovery. Our statute is designed to alter and extend the common law rule of liability by setting up a domestic animal fund by virtue of which those whose domestic animals were killed by wolves or dogs could have a suitable remedy by filing their claim in accordance with the statute against the county. The extension of the common law by legislation was undoubtedly for the purpose of protecting

the owners of domestic animals as defined above as a matter of public responsibility and policy for the reason that in an agricultural community such domestic animals have a very definite and necessary place, whereas, on the other hand, domesticated wild animals need no other protection than that provided by the common law.

It is, therefore, our opinion, that although domestic rabbits may be personal property from the standpoint of tax assessment, they are not such domestic animals as to come within the meaning of Chapter 277 of the 1935 Code of Iowa.

TRAILERS: TOWING: A well drill, mounted on a four-wheeled trailer, being pulled by a truck, cannot now be operated.

January 25, 1939. *Mr. Horace Tate, Deputy Commissioner, Motor Vehicle Department:* In your letter of January 14, 1939, to this department you ask an opinion on the following question:

"Whether a well drill mounted on a four-wheeled trailer under Section 155 of the Motor Vehicle Laws, can now be operated being pulled by a truck * * *."

It is our opinion that this question should be answered in the negative.

Chapter 134 of the Laws of the 47th General Assembly in so far as it is directly applicable here is as follows:

"Section 339-a1. *Towing.* * * *. No truck shall, after January 1, 1939, pull or tow any four-wheeled trailer, * * * except in case of temporary movement for repair or emergency, and then only to the nearest town or city where the necessary repairs may be made."

The language of the section above is plain and it is difficult to recognize any other construction than that it was the intent of the Legislature to deny use of the highways to a truck pulling or towing a four-wheeled trailer, except in case of temporary movement for repair or emergency. It is also apparent that the Legislature intended that persons possessing and using such equipment should have until January 1, 1939 after enactment to accomplish a conversion in conformity with the statutory requirement.

Section 155 of the chapter, while it specifically refers to well drilling equipment mounted on a trailer equipped with solid rubber or pneumatic tires, does not except such classified equipment from the operation of Section 339-a1 prohibiting the use of four-wheeled trailers pulled or towed by a truck.

LIQUOR COMMISSION: FUND: TEMPERANCE: MODERATION: Iowa Liquor Control Commission may not legally use a portion of its funds in a campaign to promote temperance and moderation in the use of alcoholic liquors.

January 25, 1939. *Mr. Bernard E. Manley, Iowa Liquor Control Commission, Des Moines, Iowa:* Your letter of January 16, 1939, requesting our opinion on the following question has come to the writer for attention.

"Can the Iowa Liquor Control Commission legally use a portion of its funds in a campaign to promote temperance and moderation in the use of alcoholic liquors?"

In order to properly determine this question, it is necessary that Title VI of the 1935 Code of Iowa be carefully examined and particularly Chapter 93-F1 contained in that title.

Section 1921-f1 declares the policy of the act and broadly defines the limits within which the Liquor Control Commission may act:

"PUBLIC POLICY DECLARED. The chapter shall be cited as the Iowa liquor control Act, and shall be deemed an exercise of the police power of the state, for the protection of the welfare, health, peace, morals and safety of the people of the state, and all its provisions shall be liberally construed for the accomplishment of that purpose, and it is declared to be the public policy that the traffic of alcoholic liquors is so affected with a public interest that it should be regulated to the extent of prohibiting all traffic in them, except as hereinafter provided for in this chapter *through the medium of an Iowa liquor control commission by this chapter created, in which is vested the sole and exclusive authority to purchase alcoholic liquors, as defined herein, for the purpose of resale.*

Section 1921-f16 prescribes the functions, duties and powers of the commission, setting them out in eleven (11) paragraphs, paragraph 11 being the only one which is pertinent here:

"11. To establish and maintain in its own name in the state treasury a special account, hereinafter known as the liquor control act fund, in an amount necessary for use of the commission, said amount to be determined by the state comptroller."

Section 1921-f17 delegates to the commission the right to make rules and regulations not inconsistent with the chapter.

Section 1921-f50 provides an appropriation and a resulting fund to be used by the Commission for the purpose of carrying out the provisions of the chapter:

"FUND. For the purpose of enabling the commission to carry out the provisions of this chapter, there is hereby appropriated from the funds of the state treasury not otherwise appropriated the sum of five hundred thousand dollars and the state comptroller shall set aside from the appropriation the amount necessary to be used by the commission for the purchase of alcoholic liquors and payment of such other expenses as may be necessary to establish and operate state liquor stores and special distributors in accordance with the provisions of this chapter and to perform such other duties as are imposed upon it by this chapter.

All money hereafter received by the commission, including any money received under the appropriation herein made, shall constitute what shall hereafter be known as the liquor control act fund. Whenever said liquor control act fund shall have a balance in excess of the amount necessary to carry out the provisions of this chapter as determined and fixed from time to time by the comptroller, the comptroller shall transfer such excess to the general fund of the state treasury, which amount shall be used to reduce the general state tax levy against real estate."

It is elementary law that a commission or board may not exercise authority other than that delegated to it by the legislature. From the statutes and portions of those set out (they being the only ones in the title pertinent), it is to be observed that the powers and duties of the liquor control commission are defined and limited and in no sense can they be construed to include the expenditure of any part of its fund for a campaign to promote temperance. In addition Article III, Section 24 of the Constitution of Iowa, provides as follows:

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

An appropriation may be defined as follows:

"* * * A setting apart from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the govern-

ment are authorized to use that money and no more for that object, and for no other; * * *"

4 C. J. 1460

State vs. Moore (Nebr.) 69 NW 373.

Section 1921-f50, supra, provides for an appropriation and for a liquor control act fund. It is again elementary that in the absence of a specific appropriation made by law to authorize the expenditure of public funds the executive officers have no power to make such expenditure.

State vs. Moore, supra.

Nowhere in the title does the legislature provide that any part of the appropriation or that any part of the liquor control act fund, either by direction or inference, shall be used for the purpose of campaigning for temperance.

It is, therefore, our opinion that the Iowa Liquor Control Commission may not legally use a portion of its funds in a campaign to promote temperance and moderation in the use of alcoholic liquors.

TAXATION: COUNTIES: TAX DEED. After a county has received a tax deed, the property should not be assessed for taxation. Section 6944 exempts the property of a county when devoted to public use and not held for pecuniary profit.

January 26, 1939. *Mr. Wallace F. Snyder, County Attorney, Belle plaine, Iowa:* Receipt is acknowledged of your letter of January 19th requesting an opinion from this department on the following situation:

After the county has received a tax deed should the property be assessed for taxation while it is in the name of the county?

We are of the opinion that this property should not be assessed for taxation. Paragraph 2 of Section 6944 exempts "the property of a county * * * when devoted to public use and not held for pecuniary profit."

In the case of *Gibson v. Howe*, 37 Iowa 168 the court had occasion to interpret this section and held that the land that was purchased by a county for its own protection upon a judgment in its favor to protect the county from loss from a defaulting officer was exempt from taxation. In that opinion the court stated as follows:

"But there is another view of the law, in which the plaintiffs are entitled to the relief sought in this action, so far as the taxes for the year subsequent to 1863 are concerned. The property of a county, 'when devoted entirely to the public use, and not held for pecuniary profit, is exempt from taxation.' Rev., Section 711. The land in question was not acquired for pecuniary profit, but to secure a debt due the county. It was not purchased or held to rent, or for its probable increase in value. It was acquired and held, that the just amount due the county, from a defaulting officer, might be realized. This was the object to which it was devoted, and was, undoubtedly, a public use. It was not, therefore, taxable, while the county held title, either legal or equitable, thereto."

Therefore, as heretofore stated, we are of the opinion that the property in question should not be assessed for taxation.

TAXATION: AGRICULTURAL PRODUCTS: CORN. Corn purchased by a farmer for feeding purposes is assessable, and corn that was harvested more than one year previous to the listing is also assessable.

January 26, 1939. *Mr. Wm. C. Hanson, County Attorney, Jefferson, Iowa:* Receipt is acknowledged of your letter of January 18th requesting an opinion with regard to the following questions:

What old corn is assessable, and when a farmer seals his own corn and purchases other corn for his feeding, is that corn assessable?

Under Section 6944, paragraph 13, Code of 1935, the exemption applies to:

"The agricultural produce harvested by or for the person assessed within one year previous to the listing, * * *."

Under this statute, it would seem that all corn harvested more than one year prior to the listing would be assessable, and moreover, corn purchased by a farmer for feeding would be assessable even though the sealed corn which was harvested less than one year prior to the listing would be exempt.

This department had occasion to answer some of the questions contained in your letter in an opinion dated April 12, 1927, found in the 1928 Report of the Attorney General on page 98. There, it is stated:

"It is apparent that agricultural produce must have been harvested by or for the person assessed within one year previous to the listing to entitle the owner thereof to the exemption of such property from taxation. If such property is sold on or before the first day of January of the year in which the same is to be assessed, it must be assessed to the owner thereof, notwithstanding the fact that it was raised or grown within the year. Any other construction would do violence to the language used in the statute."

We are, therefore, of the opinion that corn purchased by a farmer for feeding purposes is assessable and that corn that was harvested more than one year previous to the listing is also assessable.

HOSPITAL: TAXATION: EXEMPTION: The hospital in question (Sheldon, Iowa) should be declared exempt from taxation under the provisions of paragraph 9, Section 6944 of the 1935 Code of Iowa.

January 26, 1939. *Mr. E. A. Jinkinson, County Attorney, Primghar, Iowa:* We understand that you have written a letter to this department requesting an opinion on the following question:

Is the hospital at Sheldon, Iowa owned by the Evangelical Lutheran Good Samaritan Society subject to taxation?

In the file that was turned over to us by our predecessors, we do not find your letter, but we do find some reference to it in a letter from Mr. Hagemann of Waverly, Iowa. We have had some further correspondence with Mr. Hagemann and he has sent us a copy of the Articles of Incorporation of the Evangelical Lutheran Good Samaritan Society.

We have examined these Articles and the statements made by Mr. F. R. Knautz, the general manager, and we believe that this property falls within the exemption of paragraph 9 of Section 6944 of the 1935 Code of Iowa, which reads as follows:

"6944. *Exemptions.* The following classes of property shall not be taxed: * * *

9. Property of religious, literary, and charitable societies. All grounds and buildings used by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects * * * and not leased or otherwise used with a view to pecuniary profit. * * *"

The Articles of Incorporation of this Society state that the incorporators have associated themselves together "for the purpose of forming and organizing a religious corporation" and "the purpose of the organization shall be to open and maintain Christian homes for epileptics, cripples and other defectives, and to engage in other work of charity and benevolence."

Mr. Knautz states that the general plan of running these hospitals that they own is as follows: There is a charge made for services and an attempt made to collect, but a good many of the patients do not pay their bills, and in many cases where it is known that the patient could not afford to pay for the services rendered, the bill is charged off immediately. In other words, they are run as general hospitals affording hospital care to anyone in the community regardless of financial condition. The officers and directors of the Society receive no salary whatever nor are they in any way reimbursed for the time and expense they give to their work as directors. They are in no sense a corporation for pecuniary profit and exist mostly by gifts and donations.

The fact that the hospital makes a charge does not destroy the character of the institution as charitable and benevolent. We quote from 61 Corpus Juris 456:

"To be charitable and benevolent, an institution should be operated without any element of private profit. But if an institution is essentially a public charity, free from the element of private or corporate gain, its character as such is not affected by the fact that it receives some revenue from the recipients of its bounty, which is devoted to the maintenance of the institution or purposes of its charity."

We feel that this case can be distinguished from the recent case of *Readlyn Hospital v. Hoth*, 272 N. W. 90. In that case the private hospital was used for personal and private gain by the physician, who formerly owned the hospital, as his residence and it was used in his private practice. The court held there that the property was taxable, but specifically stated that the decision was based upon the peculiar facts of that case and seemed to recognize the general rule that such a hospital, if there were no intermingling of private gain, would be declared exempt. We quote the following from that case:

"We do not hold that a hospital for charitable or benevolent purposes must be exclusively and permanently used for such purposes, and it may be that where a hospital is primarily used for charitable or benevolent purposes, that it may be exempt under our statute. Our holding is limited to the facts in this case which show that part of the property sought to be exempt from taxation is exclusively and permanently used by Dr. Osnes in his private practice and for his personal and private gain, and not solely for charitable and benevolent purposes. One of the buildings on said property is used in part exclusively by Dr. Osnes as his residence, and part of the hospital building is also used exclusively by Dr. Osnes as and for his private offices; it necessarily follows that all the property is not used solely for charitable and benevolent purposes."

For the foregoing reasons, we are of the opinion that the hospital in question should be declared exempt from taxation under the provisions of paragraph 9, Section 6944 of the 1935 Code of Iowa.

CERTIFICATES OF ADMISSION: SCHOOLS: COUNTY SUPERINTENDENT: Private or parochial schools may be within the confines of the public school district but it does not follow that they are in the same corporation. The County Superintendent must be convinced of the pupil's qualification before issuing the certificate provided for by law, whether it be by examination or otherwise.

January 27, 1939. *Miss Jessie M. Parker, Superintendent Public Instruction:* Replying to your request of January 25, 1939, for an opinion interpreting Section 4276, Code of 1935, in which you ask:

First: Does the power of the county superintendent to grant certificates

of admission to the high school under this section extend to those who complete the eighth grade in private and parochial schools without examination?

Second: Does a private or parochial school located in a school district maintaining an approved public high school constitute a school corporation of that district within the meaning of paragraph two of this section? Or is the county superintendent required to give the regular examination before granting high school admission certificates to pupils who complete the grade work in these private and parochial schools?

Answering your first question, permit us to observe that were it not qualified by the second paragraph of Section 4276, Code of 1935, no pupil would be admitted to any high school unless he presented a certificate, signed by the county superintendent, showing proficiency in the common school branches, etc.

However, paragraph two of said section does qualify the first paragraph by providing that "No such certificate or affidavit shall be required for admission to the high school in any school corporation, when he has finished the common school branches in the same corporation." Pupils in private or parochial schools are not those who have "finished the common school branches in the same corporation".

The private or parochial school may be within the confines of the public school district but it does not follow that they are in the same corporation.

We assume that the county superintendent must be convinced of the pupil's qualifications before issuing the certificate provided for by law, whether it be by examination or otherwise.

SOLICITING: CARNAL KNOWLEDGE: Section 13174, Code 1935, is not limited to three party transaction, but may also include two parties only.

January 27, 1939. *Mr. Harold F. McLeran, County Attorney, Mount Pleasant, Iowa:* This is in answer to your letter of the 9th inst. in which you ask our opinion relative to whether one Melvin Oge may be legally prosecuted for soliciting under Section 13174, Code of Iowa, 1935. It appears that Oge wrote a letter to a lady at New London soliciting carnal knowledge with her. The question is, as you state it:

"Did the Legislature intend this section to apply to only a three party transaction viz.: when one person solicits another person to have sexual relations with a third person or did the Legislature also intend that this section should cover a two party transaction such as a man or woman directly soliciting another person to have sexual relations with them."

We have given this matter careful consideration because we realize that the question is not free from doubt. We have been unable to find any decisions to aid us in properly interpreting this statute. However, it is our conclusion that this statute is not limited to a three party transaction and we are, therefore, of the opinion that it applies to the factual situation outlined in your letter.

SHERIFF: COUNTY OFFICERS: COMPENSATION: Sheriff and deputies are not entitled to compensation for services performed by them, January 1 and 2, 1939, after expiration of term, as annual salary is paid sheriff and deputies and this is in full compensation for all services to be rendered by them until their successors take office.

January 27, 1939. *Mr. John L. Duffy, County Attorney, Dubuque, Iowa:* This is in answer to your letter of the 26th inst., requesting our opinion as to whether the former sheriff of your county and his deputies are entitled to

compensation for services performed by them for the first two days, namely, January 1 and January 2, of 1939.

Our answer to this question is in the negative. County officers are not paid on a per diem basis. The sheriff receives an annual salary, the amount thereof depending upon the population of the county. This is also true of the deputy sheriffs. In other words, the salary provided for the sheriff and his deputies is a certain amount for each of the two years for which they are elected. Our conclusion, therefore, is that when the annual salary has been paid to the sheriff and his deputies this is in full compensation for all services to be rendered by them until their successors take office.

BOUNTIES: EUROPEAN STARLINGS: FUND: Upon proper claim and proof presented to the County Auditor, bounties must be paid for European Starlings.

County general fund is only fund from which claims payments appointed to come from the "county treasury" may be allowed.

January 27, 1939. *Mr. Waldo E. Don Carlos, County Attorney, Greenfield, Iowa:* Your letter of January 25th requesting an opinion as to the following matters, has come to the writer for attention.

Must Adair County pay bounties for European Starlings under the provisions of Section 5413 of the 1935 Code of Iowa as amended when due claims and proof have been presented to the County Auditor?

If so, then from what fund should such payments be made?

Section 5413 of the 1935 Code of Iowa, as amended by the 47th General Assembly, is as follows:

"*Certain animals.* The board of supervisors of each county shall allow and pay from the county treasury bounties for wild animals caught and killed within the county as follows:

For each adult wolf, five dollars.
For each cub wolf, two dollars.
For each lynx, fifty cents.
For each wildcat, fifty cents.
For each pocket gopher, five cents.
For each crow, ten cents.
For each European starling, ten cents."

It is evident that the legislature intended that upon proper claim and proof presented to the County Auditor, bounties must be paid for European Starlings. The italicized portions of the section are those parts included by amendment, and it was undoubtedly an oversight that the context was not amended to include with the words "wild animals" such birds. Nevertheless, for the purpose of the statute, "wild animals" may be construed to include the crow and European Starling. The legislature is in this manner seeking to supply a remedy against an evil for which the common law does not provide.

Although the statute does not state from which fund such bounties shall be allowed, it is our opinion that these may be paid from the county general fund.

Section 5130 of the 1935 Code of Iowa, delegating broad powers to the County Board of Supervisors, is, in part, as follows:

"5. To examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle, and allow all claim against the county, unless otherwise provided by law."

This section supports Section 5413, supra.

It is contemplated by Chapter 254, entitled Powers and Duties of Board of Supervisors, and succeeding chapters, that where the county is required gen-

erally to pay from its treasury, and the Board of Supervisors is directed to make such payment, then, in the absence of statutory provisions to pay said claim from a specified fund, it shall be allowed from the county general fund, and no other.

Section 5165 is in part as follows:

"*Fund—separate account.* The treasurer shall, for each term of his office, keep a separate account of the several taxes for state, county, school, highway, or other purposes, and of all other funds created by law, whether regular, temporary, or special, and no moneys in any such fund shall be paid out or used for any other purpose, except as specially authorized by law * * *."

The County Board of Supervisors is by this section prohibited the use of any county special fund unless the use of such fund is specifically authorized by law, and the county general fund is therefore the only fund from which claims payments appointed to come from the "county treasury" may be allowed.

BOARD OF SUPERVISORS: CONTRACT LETTING FOR ROAD CONSTRUCTION: SECONDARY ROAD CONSTRUCTION: No duty upon Board to advertise for bids prior to purchase of road machinery. Word "contracts" in Section 4644-c42 synonymous with "projects" and for any particular job—should cost of materials exceed $1,500.00—Board should advertise for bids. Contract should not be "split up" to evade provision of law. This applies only to expenditures from secondary road construction fund and not from maintenance fund.

January 30, 1939. *Mr. H. Wayne Black, County Attorney, Audubon, Iowa:* This is in answer to your letter of the 23rd inst., wherein you ask our opinion relative to a number of matters involving the interpretation of Section 4644-c42, Code of Iowa, 1935. It appears that your Board of Supervisors has adopted the policy of purchasing various kinds of materials used in bridge and road construction on a month to month basis, without an engineer's estimate, the amount of each purchase, however, not exceeding $1,500.00. It appears that there was expended for lumber and culvert material for the year 1937, approximately $39,000.00. Nearly all of this amount was paid out of the secondary road construction fund, the balance out of the maintenance fund.

Your first question is:

"Where the purchase to be made is payable from the maintenance fund, such as machinery, and it can be estimated in advance by the county engineer as to the probable amount that will be needed for the year, is it necessary to advertise as called for in Code Section 4644-c42, granting that the total cost will exceed $1,500.00?"

It has been held by previous administrations of this department that it is a question of policy for the board to determine as to whether or not it will advertise and receive bids for the purchase of road equipment and machinery.

See Report of Attorney General, 1932, pp. 98, 100.

We have been unable to discover any statutory requirement imposing upon the Board of Supervisors the duty of advertising for bids prior to the purchase of road machinery and equipment. The opinion referred to, we think, is correct and we adopt what is therein said insofar as question number one in your letter is concerned.

Your second question has to do with lumber. We know of no statute that requires the Board of Supervisors to anticipate its annual needs so far as lumber is concerned and that would require the Board to advertise for bids and let the contracts pursuant thereto. We do believe that Section 4644-c42

can be construed to cover a situation of this kind. You will notice that this section provides:

"All contracts for road or bridge construction work and materials * * *." The word "contracts" in said section should be construed as if it were synonymous with projects. In other words, if the Board desires, let us say, to construct a road five miles long and the engineer's estimate is in excess of $1,500.00, it would clearly be the duty of the Board to comply with said section. And if for any particular job, according to the engineer's estimate, the cost of the materials would exceed $1,500.00, this section would have to be complied with. We might add that in either of these instances it would be clearly improper to "split up" the contract and thereby evade the provision of this law.

One of the purposes of statutes requiring competitive bidding for municipal contracts is to obviate the necessity of any inquiry into the question of whether fraud or collusion was in fact resorted to.

See *Johnson County Savings Bank v. City of Creston*, 212 Iowa 929.

Section 4644-c42 was passed to bring about better county government and was also designed to permit improvements under the direction of the Board of Supervisors on the most economical basis. The object of such statutes is beneficent and should, of course, be complied with both in letter and in spirit.

What we have said above expresses our opinion, we think, as to your third inquiry relative to "split up" projects in an attempt to circumvent the requirements of the above section. Certainly such "splitting" is in direct violation of this statute.

See *State v. Garretson*, 223 NW 390.

It is therein said:

"The arrangement was made to split up the order so that each represented a separate and distinct transaction although, in truth, and in fact, it was all one deal. No record of this action of the Board was kept. Apparently appellant and his co-supervisors did not desire the public to know about the affair. Griffith, the county engineer, said he made no estimate for the lumber. DeWitt, the county auditor, stated that there were no advertisements for bids * * *."

The Court further says:

"When explaining the apparent illegality relating to the purchase of materials without complying with the statute, appellant suggests that the oil, for instance, was bought on an option contract * * *."

Further on it is said:

"Explanations offered by appellant are such as to arouse the suspicion of attempted evasion. The illegality complained of did not occur once, but continually and repeatedly * * *."

Again it is said:

"Manifestly, the statute is for the public benefit, and when wilfully violated 'with a bad or evil purpose contrary to known duty', the offender can be removed from office. * * * Repeatedly, the appellant persisted in letting public contracts without the engineer's estimate and advertisement, in direct violation of Sections 4647 and 4648."

In the concluding paragraph of the opinion, it is said:

"Conclusion is then drawn by him that, although a specific contract for lumber exceeds $1,000.00, there is no statutory violation if it is placed in the lumber yard and divided into portions each less than $1,000.00 in value, to be used on separate repair projects from time to time.

"Very evidently such interpretation of the statutory requirements is erroneous. Sections 4647 and 4648 supra, both contemplate an engineer's estimate, regardless of whether or not the repair work is more or less than $1,000.00. It is the engineer's estimate that determines the value in this regard."

Since the Garretson case we desire to call your attention to the fact that the statutes therein referred to have been repealed and amended and this should be kept in mind when the decision is read. Much, however, therein said by the Court is applicable to the questions propounded by you in your letter.

It is difficult to lay down a hard and fast rule for the interpretation of this statute, for it is obvious that the facts and circumstances vary. We are constrained, however, to say that the statute was enacted by the Legislature in the furtherance of economy and honesty in government and should be observed and applied in good faith.

We believe that what we have herein said disposes of your fourth inquiry. We certainly agree with your statement, as follows:

"It seems to me that it is the intent of the statute that the Board of Supervisors should comply with the same wherever possible rather than seek to evade the same by subterfuge."

It is our opinion, answering the second paragraph on page three of your letter, that Section 4644-c42 applies only to expenditures made from the secondary road construction fund and that it does not apply to those items which are payable out of the maintenance fund.

Answering your inquiry in the third paragraph of page three of your letter, have to say that it is our opinion that purchasing construction materials in the proper manner for a certain project does not relieve the board of advertising for bids insofar as the construction contract itself is concerned, assuming that the engineer's estimate exceeds $1,500.00. Manifestly, however, it would be preferable to include both the material and the construction contracts in one advertisement and have the letting at the same session. We do not believe that a project, calling for expenditures for labor and material, can be "split up" so as to reduce the estimated cost thereof below $1,500.00 and thereby avoid the requirements of the section in question.

Your letter is a long one and many questions are submitted. We have attempted, to the best of our ability, to render you an opinion that will be helpful to you in properly advising the Board of Supervisors of your county. If any portion of our opinion is not clear, feel free to communicate with us further.

SOLDIERS' RELIEF: LEGAL RESIDENCE: NOTICE TO DEPART: HOSPITALIZATION FOR POOR WITHOUT LEGAL SETTLEMENT: Legal Residence should not be interpreted as meaning "Legal Settlement". Chapter 273 —soldiers' relief—says "legal residence". No statute prohibits service of notice to depart on World War Veterans however, Section 5315 contemplates soldier shall obtain relief from soldiers' relief commission and does not become a county charge. Section 4005 re: hospitalization uses "legal resident".

January 31, 1939. *Mr. J. F. Wilson, County Attorney, Sac City, Iowa:* This is in answer to your letter of the 25th inst. asking the opinion of this department relative to the interpretation of Chapter 273, relating to soldiers' relief. Briefly stated, your question is:

"Whether or not X, a World War Veteran, or members of his family may be relieved by the Soldiers' Relief Commission of your county, X and his family not having a legal settlement in your county but being residents thereof."

It is our opinion that Chapter 267, relating to the support of the poor, has no application insofar as the legal settlement of soldiers or their families is concerned. Section 5385 provides:

"* * * to create a fund for the relief of, and to pay the funeral expenses of honorably discharged, indigent United States soldiers, marines and nurses * * * and their indigent wives, widows, and minor children, not over fourteen years of age if boys, nor sixteen if girls, *having a legal residence in the county.*"

We think that the employment of the term "legal residence" means exactly what it says. It should not be interpreted as meaning "legal settlement". The chapter relating to the support of the poor was in the 1851 Code, whereas the chapter pertaining to relief of soldiers, sailors and marines first appeared in the Code of 1897. In Chapter 267 (poor relief generally) the term, "legal settlement" was employed and it was specifically pointed out in the statutes as to the manner in which such legal settlement was acquired. Nothing is said in Chapter 273 (soldiers' relief) about legal settlement. The term employed is "legal residence". Inasmuch as the Legislature had used the term "legal settlement" prior to the adoption of Chapter 273, we think that the omission of this term in the statute relating to soldiers' relief is significant and that it was the intention that if a soldier or his family were actual bona fide residents of a county they were entitled to relief whether or not such residence had continued for one year. For definitions on what constitutes legal residence, see "Words and Phrases", volume 3, page 77.

In reference to the matter of X's child, a boy under fourteen years of age, having been sent to the state hospital at Iowa City, while your county's quota was not filled, have to say that medical and hospital care at this hospital is not dependent upon legal settlement. The statute clearly contemplates that if you are a resident of a certain county you are entitled to be sent there, notwithstanding the fact that you have not, as yet, obtained a legal settlement. See Section 4005, wherein it is said:

"Any adult resident of the state may file a complaint in the office of the clerk of any juvenile court, charging that any legal resident of Iowa residing in the county where the complaint is filed * * * is suffering from some malady * * *."

With reference as to whether or not a notice to depart may be legally served on a World War Veteran or members of his family, have to say that we know of no statute that prohibits such service. We call your attention, however, to Section 5315, wherein is said:

"Persons coming into the state * * * who are county charges or are likely to become such, may be prevented from acquiring a settlement by the authorities of the county * * * in which such persons are found warning them to depart * * *."

You will note that the statute contemplates that the notice should be served on those who are likely to become county charges. A soldier does not become a county charge, as that term is usually employed. The law contemplates that he shall obtain his relief from the Soldiers' Relief Commission, a sort of dignified relief because of having served his country. We hope this will be an adequate answer to your question.

Your third question has to do with what procedure should be followed in recovering certain money paid out by mistake by your county. It appears that A had a legal settlement in Ida County and moved to Sac County. Notice to depart was served on him and, as we understand it, he did not obtain a legal settlement in your county. He was then sent to the Oakdale Sanitarium and, through an error in the certification as to his residence by the physician

who examined him, the sanitarium sent bills for his care to your county auditor, who paid same by mistake.

You suggest that the money should be repaid your county by the state and then file its claim against Ida County. We feel that, inasmuch as this involves purely a matter of what procedure is to be followed in recovering this money, it is not a legal question and we, therefore, feel that any opinion we may express thereon would be of no value. We think this is a matter which may be safely left to the sound discretion of yourself and your Board of Supervisors.

APPOINTMENTS: INSPECTORS: CLERICAL ASSISTANTS: COSMETOLOGY EXAMINERS: All prospective appointments of inspectors and clerical assistants shall first be submitted to the cosmetology examiners and upon such approval being given, the commissioner may then make such appointment or appointments.

January 31, 1939. *Mrs. Mayme Madden, Chairman, Board of Cosmetology Examiners, Davenport, Iowa:* We are in receipt of your letter of January 28, 1939, requesting an interpretation of that part of Section 2585-b9, which is as follows:

"The commissioner of public health, with the approval of the cosmetology examiners shall appoint such inspectors and clerical assistants * * * as may be necessary * * *."

In interpreting this statute, it is necessary to look to the rules of construction of statutes. Section 63, paragraph 2 of the 1935 Code of Iowa is as follows:

"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:

2. *Words and phrases.* 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."

Construing this statute in accordance with the above rules, it is the apparent intention of the legislature, by including the phrase "with the approval of the cosmetology examiners" that all prospective appointments of inspectors and clerical assistants shall first be submitted to the cosmetology examiners for their approval, and upon such approval being given, the commissioner may then make such appointment or appointments. The language and phraseology is clear and unambiguous and the statute contemplates that all such appointments must be approved by the cosmetology examiners before such appointments are made.

CAPITAL STOCK TAXES: REFUND OF ILLEGAL TAXES: TAXATION: Under the positive direction of the Federal Statute, shares of capital stock of both state and national banks owned by the Reconstruction Finance Corporation were not taxable. Any tax levied, assessed or collected on these shares of stock was absolutely void and the act of collecting such tax was an illegal act by the officer collecting same. Section 7235 states in plain language that it is the duty of a Board of Supervisors to direct the treasurer to refund any tax illegally exacted or paid.

February 1, 1939. *Mr. Oliver J. Reeve, County Attorney, Waverly, Iowa:* We are in receipt of your letter of January 24th requesting an opinion from this department with regard to the following question:

"Is it the duty of a county board of supervisors under Section 7235 of the 1935 Code of Iowa to refund taxes voluntarily paid without protest by banks,

both state and national, upon the capital stock of said institutions owned by the Reconstruction Finance Corporation when said taxes were paid both before and after the enactment of Section 51-D, Title 12 of the Second Supplement to the United States Code containing the laws of the Seventy-fourth Congress of the United States?"

That portion of Section 51-D of Title 12 of the Second Supplement to the Code of the United States of America which is pertinent to the inquiry here is as follows:

"Notwithstanding any other provision of law or any privilege or consent to tax expressly or impliedly granted thereby, the shares of preferred stock of national banking associations, and the shares of preferred stock, capital notes, and debentures of State banks and trust companies, acquired before or after March 20, 1936 by Reconstruction Finance Corporation, and the dividends or interest derived therefrom by the Reconstruction Finance Corporation, shall not, so long as Reconstruction Finance Corporation shall continue to own the same, be subject to any taxation by the United States, by any Territory, dependency, or possession thereof, or the District of Columbia, or by any state, county, municipality, or local taxing authority, whether imposed, levied, or assessed on, before or after March 20, 1936, and whether for a past, present, or future taxing period."

It will be noted that the effective date of this act is March 20, 1936. It is retroactive and bars any taxation of these shares of stock and nullifies any assessment made before March 20, 1936. This act has been held constitutional. See *State Tax Commission of Maryland v. Baltimore Nat. Bank*, 199 Atl. 119. (Appeal dismissed in the Supreme Court, 296 U. S. 538.)

Section 7235 of the 1935 Code of Iowa provides as follows:

"7235. *Refunding erroneous tax.* The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid, with all interest and costs actually paid thereon."

We will not attempt in this opinion to review the many Iowa cases involving tax refund actions brought under the above statute. The best review of the Iowa cases that are in point can be found in *Commercial National Bank of Council Bluffs, et al. v. Board of Supervisors, et al.*, 168 Iowa 501, and the more recent case of *Charles Hewitt & Sons Co. v. Keller*, 275 N. W. 94.

In the Commercial National Bank case the action was in mandamus to compel the Board of Supervisors to direct the treasurer to refund taxes previously collected under a statute that had been held unconstitutional. The lower court granted the writ and on appeal the judgment was affirmed, the court stating:

"The manifest design of this statute is that the board of supervisors first ascertain whether the taxpayer is entitled to be reimbursed for taxes illegally or erroneously exacted and if so, that the treasurer be directed to repay the same from the several funds to which these have passed."

On the issue raised of voluntary payment the court stated:

"The taxes were voluntarily paid as contended, but this furnishes no objection to refunding under this statute. *Lauman v. Des Moines Co.*, 29 Iowa 310; *Richards v. Wapello Co.*, 48 Iowa 507; *Isbell v. Crawford Co.*, 40 Iowa 102."

Upon the general rule that taxes paid under a mistake of law cannot be refunded the court stated:

"Counsel argue that inasmuch as the taxes were paid under mistake of law, the suit cannot be maintained. That this is the general rule goes without saying. *Ahlers v. City of Estherville*, 130 Iowa 272. But Section 1417 of the Code heretofore quoted expressly declares that if illegally or erroneously exacted or paid, the treasurer shall be directed to refund. Surely if the assessment of the property and levy of taxes thereon was contrary to law, because

not authorized by a valid statute, the exaction of the taxes so levied would be illegal, and so regardless of the view thereof entertained by public officers."

(Note: Section 1417 mentioned in the above quotation is now Section 7235.)

Upon the point raised that the bank had voluntarily furnished the assessor with the information on which the assessment was based, the court stated:

"Counsel contend that because of having listed the bank stock with and furnishing the assessor the information exacted by Section 1322 of the Code without objection, the plaintiff is estopped from asserting the illegality of the taxes subsequently paid. That such is the rule where the owner voluntarily lists taxable property for assessment and taxation appears from *Slimmer v. Chickasaw County*, 140 Iowa 448. But such a submission of property not taxable confers no authority on the taxing officers to assess or levy a tax thereon, and being without authority so to do, the taxpayer cannot be estopped by such listing from asserting such want of authority or the illegality of taxes levied and collected thereon. In such a case, the taxing officers cannot be said to have been misled by what the taxpayer may have done, for they are chargeable with knowledge of the law and must be assumed to have been aware of the invalidity of the taxing statute."

Many other Iowa cases are reviewed in this case and the court distinguished the cases where refunds were refused under the statute. The distinction indicated is that in those cases where the property is assessable or where the tax payer paid under a mistake of law that he made, then he could not invoke this statute, but where the error or illegality was of the taxing officer, then relief under this statute was sustained. In the Hewitt case the action was also in mandamus to secure a refund under Section 7235 for a portion of a tax claimed to have been levied and collected illegally by reason of the auditor's failure to comply with the statute requiring a deduction from the budget requirements. The lower court granted the writ and on appeal the judgment was affirmed. Upon the argument that the remedy for the illegal assessment was an appeal to the Board of Assessment and Review, the court stated:

"The appellant board next complains that appellee's remedy was not to proceed by application to the district court, but that its remedy should have been by way of appeal to the state board of assessment and review. In support of this view appellants call attention to Section 6943-c27 of the Code. A reading of this section, subdivision 9a, is sufficient to show the fallacy of this contention. The part of the section bearing upon the question before us reads: 'To correct errors, irregularities, or omissions in assessments of individual taxpayers by adding to the tax list any omitted property or by raising, lowering, or abating an assessment found to be erroneous or excessive.' In the instant case there is no question of error in the assessment, and the board in no event could have acted to correct the admitted failure of the county auditor to compute the taxes or assessments already made and against which there had been no objection or protest."

The court also in the Hewitt case reviewed a number of Iowa decisions and arrived at the same conclusion that under Section 7235 of the Code it was the duty of the Board of Supervisors to order the treasurer to make the refund for the taxes illegally exacted by the taxing officer.

Under the positive direction of the Federal Statute, these shares of stock were not taxable. Any tax levied, assessed or collected on these shares of stock was absolutely void and the act of collecting the tax was an illegal act by the officer collecting the same. Section 7235 states in plain language that it is the duty of a Board of Supervisors to direct the treasurer to refund any tax illegally exacted or paid.

There is no question but that any tax collected after the effective date of this act should be refunded.

TAX DEED: REDEMPTION: NOTICE: Notice of the termination of the right of redemption is necessary even though the county held tax deed prior to entering into the contract and it should be within 60 days after default. After the service of the notice of the right of redemption, the contract cannot be reinstated by paying the delinquent installment.

February 1, 1939. *Mr. Chet B. Akers, Auditor of State:* You have requested an opinion from this office with regard to the following situation:

In the event of a default occurring in the payments to be made under an agreement entered into under Chapter 191, Acts of the 47th General Assembly, can the signer of the agreement pay up the delinquent payment

1. When more than sixty days have elapsed since the default and no notice, as provided by Section 4, has been served and thereby reinstate the agreement?
2. After the notice of the termination of the right of redemption has been served, but before the right of redemption has been cut off and thereby reinstate the agreement?

Chapter 191 of the Acts of the 47th General Assembly provided for a method whereby the owner of property could, within a six-month period in the year 1937, enter into an agreement for yearly installment payments for the payment of delinquent real estate tax where the real estate was sold to the county. The agreement provided for the payment of one-tenth of the delinquent tax, excluding penalties and interest with interest at 6 per cent per annum for ten years on or before the anniversary date of such agreement.

Section 2 of such act provides:

"Upon the filing of said agreement, all the accrued penalties and interest on the taxes embraced within said agreement shall be waived and further proceedings shall be suspended as long as no default exists. Upon the payment in full of the amounts required to be paid under the said agreement, the county auditor shall issue the certificate of redemption provided for in section seventy-two hundred seventy-six (7276), Code, 1935."

Section 6 of such act provides for the same agreement in cases where the period of redemption has expired upon a tax sale certificate held by the county but no tax deed has been taken and also where the period of redemption has expired and the county has taken tax deed. In the first instance the period of redemption is extended and the owner can pay the tax less the accumulated penalties and interest and in the second instance the contract contemplates the owner can re-purchase the property (where tax deed has been issued) for the amount of the taxes less the accumulated penalties and interest "as though said period of redemption had not expired or said tax deed had not been issued."

Summarizing these sections they provide for the installment agreement when the county has purchased the property at tax sale

1. When the period of redemption has not expired;
2. When the period of redemption has expired and the county has not taken a tax deed;
3. When the period of redemption has expired and the county has taken a tax deed.

Obviously the Legislature intended by the provisions of this act to enable the owner to enter into the installment agreement whenever the county was the purchaser at the tax sale and still held either the tax sale certificate or tax deed.

Section 4 of said act provides:

"In the event of default occurring in the payments to be made, under any agreement entered pursuant hereto, the penalties and interest waived under

the terms of section two (2) and/or section six (6) of this act shall be reinstated and the lands described in such agreement shall thereupon be subject to such action as might have been had thereon before the filing of said agreement, and if payment of the installment due is not made within sixty (60) days after default, the county auditor shall forthwith serve notice of the termination of the right of redemption."

This office has already ruled that under the above section a notice of termination of the right of redemption must be served in all cases of default occurring in the payments to be made under the agreement entered into pursuant to this act, even though notice of termination of right of redemption was served prior to entry into the agreement. We are enclosing herewith copy of opinion rendered to G. K. Thompson, County Attorney, Cedar Rapids, Iowa.

At that time we did not have before us the situation where the tax deed had been issued prior to entering into the agreement, but we believe such a situation would not change our opinion. In such a situation it was clearly the intent to treat the deed as not issued. The owner, under Section 6, is given the same rights "as though such tax deed had not been issued."

Section 4 describes the procedure in case of default on agreements made under Section 2 or Section 6 of the act and further provides that notice of termination of tenancy *shall* be served if payment of installment due is not made within 60 days. The procedure is the same in all cases no matter what situation existed before the entering into the contract as to whether the redemption period had or had not expired or whether the county had or had not taken tax deed.

We hold, therefore, that notice of the termination of the right of redemption is necessary under Section 4 of this act even though the county held tax deed prior to entering into the contract. As further authority for our position we call attention to the provisions of Section 7 of the act where it is provided:

"* * * if said owner or owners shall fail to pay any installment or installments provided for in any contract entered into with the county under the provisions hereof, the county at any time after the expiration of ninety (90) days after the service of notice of the termination of the right of redemption as provided herein may sell for cash and assign such certificate of sale for not less than the full amount of the purchase price of such certificate."

We do not have much difficulty with the first question where the default is made good and the delinquent payment is made before any notice is served as provided in Section 4 above. The sixty-day period is a grace period but if the county auditor has not served the notice of expiration of the period of redemption, then certainly the owner can reinstate the contract by paying the delinquent installment. The general rule of law against forfeitures when no harm results and a reasonable rule of construction, with consideration given to the object of the statute, is sufficient authority for our holding that the contract would be reinstated if the delinquent installment is paid more than 60 days after default but before notice of expiration of the right of redemption has been served. We do not mean, however, that anything in this opinion should be construed as holding the auditor should not serve the notice 60 days after the default. The statute is mandatory that he *shall forthwith serve*, etc.

In arriving at an answer to the second question, we must look at the wording of the statute. It will be noted that Section 4 provides all penalties and interest shall be reinstated after the default and "the lands described shall be subject to such action as might have been had thereon before the filing

of said agreement. * * *" This is modified somewhat by the later section that gives a 60-day grace period when the default can be paid and further modified by our interpretation that the default can be paid any time before the notice is actually served. We can go no further. The notice that is served is the notice provided for in Section 7279 of the 1935 Code. It must provide that a tax deed will issue unless redemption is made. The redemption contemplated is the full payment of the tax, interest, cost and penalties. The obvious intent of the Legislature was that upon the service of the notice of expiration of the right of redemption, the procedure shifted to Chapter 348. The auditor must follow the provisions of those sections and the statutes applicable in Chapter 349 in order to have the tax certificate ripen into a tax deed. It is reasonable to assume that the Legislature intended the owner, too, must make any redemption from the sale under the redemption statutes as found in those chapters, if he desires to prevent the tax sale from being complete.

The language in Section 7, previously quoted, giving the county 90 days after the service of the notice the right to sell and assign the certificate of sale "for not less than the full amount of the purchase price of such certificate," indicates the intent that the service of the notice should terminate the agreement.

It is therefore our opinion that after the service of the notice of the right of redemption, as outlined in Section 2, the contract cannot be reinstated by paying the delinquent installment. To hold otherwise would do violence to the language and intent of the act and the owner could, each year, gain an additional grace period of three months in addition to the 60 days granted by the statute. This he could do at no expense to him, while the county would be required to pay the cost of the service of each notice of expiration of redemption.

LIBRARY FUND: TAXATION: Purchases of library books under the provisions of Section 4323 of the Code would be subject to tax.

February 2, 1939. *State Board of Assessment and Review, Des Moines Building, Des Moines Iowa: Attention, Mr. D. L. Murrow*: Receipt is acknowledged of your letter of January 27th requesting an opinion upon the following situation:

Section 4322 of the Code of 1935 provides:

"*Library fund.* The auditor of each county in this state shall withhold annually from the money received from the apportionment for the several school districts, fifteen cents for each person of school age residing in each school corporation, as shown by the annual report of the secretary, for the purchase of books, as hereinafter provided."

Section 4323 provides in substance that the money so withheld shall be expended by the county board of education in the purchase of library books. Some provision is made under part 2 of Article IX of the Constitution of the State of Iowa with regard to the permanent school fund.

The question is whether or not, under the above statutes and the provisions of part 2 of Article IX of the Constitution of the State of Iowa, the board of education when expending this library fund in the purchase of books, is required to pay the sales tax or the use tax.

There is no question but that under the Iowa Sales Tax Act and Use Tax

Act the purchases of tangible personal property by schools are subject to the sales tax or use tax. We find no prohibition in the second part of Article IX of the Constitution of the State of Iowa. Section 1 of the second part of Article IX provides as follows:

"The educational and school funds and lands, shall be under the control and management of the General Assembly of this State"

The following sections provide that it shall be the duty of the General Assembly to encourage intellectual improvement, and so forth, and further provides that certain money collected by counties from persons as an equivalent for exemption from military duty and collected by way of fines shall be exclusively applied "to the support of Common Schools, or the establishment of libraries, as the Board of Education shall, from time to time provide." This does no more than direct the destination of certain funds collected by the county. The fact remains that the school is tax supported, and under Section 4322, the auditor, in withholding fifteen cents for each person of school age *from the apportionment* is not withholding any "earmarked" part of the apportionment. Under this Section it would be the duty of the auditor to withhold this sum even though the money paid from fines or by reason of exemptions of persons from military duty would be insufficient.

We are therefore of the opinion that purchases of library books under the provisions of Section 4323 of the Code would be subject to tax.

INSURANCE: CITIES AND TOWNS: MOTOR VEHICLES: A city may be held liable for the negligent operation of a motor vehicle used in ministerial functions and can lawfully insure this liability, but no liability exists when the operation of a motor vehicle is used in governmental functions, such as vehicles in the police and fire departments, and the premiums for liability insurance covering such vehicles would be an unwarranted expenditure of funds.

February 2, 1939. *Honorable Chet B. Akers, Auditor of State*: We have received a request from your office for an opinion upon the question of liability insurance for city owned motor vehicles, which question is stated as follows:

Is a city entitled to purchase liability insurance upon city owned motor vehicles?

Section 5738 of the 1935 Code provides as follows:

"Cities and towns * * * shall have the general powers and privileges granted * * * for the protection of their property and inhabitants, and the preservation of peace and good order therein, * * *."

Under this general grant of power we would be constrained to hold that the question of whether cities and towns could carry this insurance would depend on the answer to the question: Is the city liable in the case of the negligent operation of a motor vehicle? If the city is liable, then certainly the liability can be insured. If the city is not liable, then clearly the expenditure of money for this insurance would be an unauthorized expenditure.

It thus becomes pertinent to examine the Iowa law with regard to a city's liability. In all of the cases the widely recognized and firmly established rule is that a city is only liable for the negligent acts of its employees when it acts in a ministerial or corporate capacity, and the city is never liable for negligent acts involving the exercise of governmental power.

The difficulty arises out of the application of the rule. The line of demarcation between whether an act is ministerial or governmental in nature is not

clear. With regard to the operation of a city's motor vehicles, we have enough decisions in Iowa to indicate that a city would not be liable for the negligent operation of fire trucks, police patrols, police cars and ambulances. See *Leckliter v. City of Des Moines*, 211 Iowa 251. Here the plaintiff was injured when struck by a police car that was transporting policemen to their beats. The judgment against the city was reversed, the court stating:

"It will not be questioned but that, in establishing and maintaining a police department in a city, such city is acting for the public good, on behalf of the state, rather than for itself. The legislature clothed the city with power to maintain such an organization as a convenient method of exercising a function of government. By this means the state intends to establish and maintain peace, security, health, and the general welfare. * * * Whether a city shall have a police department or what shall be its character and extent is governmental. Members of the police department are not agents and servants of the city in the sense that the city may be liable for wrongs committed by them in the discharge of their duties in that regard. Certainly, if, as is held in the Bradley case, a city is exercising its governmental functions when a fire engine is returning to the garage after a fire, a city is, in the same way, and to a much more definite extent, exercising its governmental function when, under the order of the chief of police, its police patrol wagon is being driven by a police officer, in uniform, under orders, in service, in transporting other officers who had reported for duty in uniform and responded to roll call and were being conveyed from the police station to their respective beats. As was said in the Bradley case:

'The defendant city is merely an arm of the sovereign state, and in the exercise of its governmental functions its agents and servants, through negligence either of omission or commission, do not cast upon the municipality a civil liability unless the same is imposed by statute.'"

The Bradley case mentioned in the foregoing quotation is *Bradley v. City of Oskaloosa*, 193 Iowa 1072. The case indicates that the rule with regard to fire trucks is the same as the rule with regard to police cars.

The case of *Jones v. City of Sioux City*, 185 Iowa 1178 is sometimes cited for authority that a city is liable for the negligent operation of a police patrol, but that case again went to the Supreme Court and is reported in 192 Iowa 99 and there the case was remanded on the ground that the defective condition of the street issue should have been submitted to the jury. The irrelevant dicta in the first opinion with reference to liability of cities in transporting policemen when they were not answering riot calls is the subject of rather caustic comment by Justice Grimm, the writer of the Leckliter opinion.

The case of *Groves vs. Webster City*, 222 Iowa 849 is a case where a judgment was obtained against a city for the negligent operation of a streets department truck. The driver of the truck was in the act of driving the truck to the street commissioner's home at the time of the accident. It is significant that in this case the question of governmental function was never raised. The city neither pleaded governmental function nor made any attempt to establish this defense and the opinion is only significant because of the dicta included in the opinion:

"It, therefore, appears that one of the driver's first duties in the morning was to get his immediate boss, the street commissioner. This was one of the duties connected with his work in the streets department, and he was performing that duty on the morning in question.

"*While this evidence shows almost conclusively that the driver was engaged in a ministerial capacity, it is not necessary to determine that question here*, * * *." (Italics ours)

Other cases have held that cities engaged in operating electric light plants, water works or gas plants are acting in a ministerial capacity. Giving due weight to these decisions, we believe that there is a chance that a city might be held liable in tort for the negligent operation of motor vehicles that might be used in its ministerial functions, and that, therefore, a city can lawfully insure this liability. No liability would exist from the operation of motor vehicles used in governmental functions, such as vehicles in the police and fire departments, and insurance premiums for liability insurance covering such vehicles would be an unwarranted expenditure of funds.

SALES TAX: GASOLINE PUMPS: SCALES: The sale of scales or gasoline pumps are subject to the sales tax act as other tangible personal property and no credit should be allowed for prior license fees obtained under Section 3259 of the Code.

February 2, 1939. *State Board of Assessment and Review, Des Moines Building, Des Moines, Iowa: Attention, Mr. D. L. Murrow*: Receipt is acknowledged of your letter of January 27th requesting an opinion upon the following question:

Is the sale of a scale or gasoline pump upon which a license fee has been paid under the provisions of Section 3260, within the provisions of Section 4, Chapter 196, Acts of the 47th General Assembly providing for a credit allowance upon sales of personal property upon which the state now imposes a tax?

Section 3259 of the 1935 Code provides as follows:

"*License.* Every person who shall use or display for use any public scale or gasoline pump shall secure a license for said scale or pump from the department."

It will be noted that the license fee under the above Section is a personal license imposed upon the user of certain personal property, namely, scales and gasoline pumps and the use contemplated is public use. A person needs no license under this Section to use the scale or pump for private use. It is only the public scale or pump that requires the license. In other words, it is the nature of the use that determines whether or not a license must be secured. The license must be obtained by the person conducting the public use and under this Section the pumps or scales could be owned by "A" and rented to "B" and the latter, if he conducted the public use, would be the person who would have to secure the license in his name.

The license imposed under this Section is the ordinary license frequently imposed upon those who engage in a business of serving the public where the rights of the public can be best preserved by regulations. It is not unlike the hotel, restaurant, bakery or bottling works licenses and many other licenses on business of a public nature where the ordinary rule of *caveat emptor* is not a sufficient guarantee of the rights of the public who deals with them.

Because of the nature of the business, the license fee is determined by the number of scales or pumps, but that does not alter the fact that it is the nature of the business rather than the scale or pump that determines the license. The number of rooms in a hotel determines the amount of a hotel keeper's license. The operator of a chain of restaurants must secure a license for each one.

In the last analysis, it is a personal license to conduct a public business and therefore not within the provisions of Section 4 which allows a credit upon *property* upon which the State has already imposed a tax.

We are therefore of the opinion that sales of scales or gasoline pumps are subject to the sales tax act as other tangible personal property and no credit should be allowed for prior license fees obtained under Section 3259 of the Code.

HUCKSTER WAGONS: LICENSE FEE: Immunity from license granted by statute to huckster wagons is not such class legislation as to render the law relative thereto and set out in Section 7174 to 7178 unconstitutional.

February 2, 1939. *Mr. O. J. Wordwell, County Attorney, Northwood, Iowa*: The request from the committee of lawyers of your county, of which Mr. E. M. Sabin, Jr. is chairman, for an opinion regarding the following question, has come to the writer for attention.

"Does the exception of huckster wagons by Section 7177 of the 1935 Code of Iowa from the license fee as provided in Section 7174 render Sections 7174 to 7178 unconstitutional?"

For the purpose of this opinion, Sections 7174 to 7178 of the 1935 Code of Iowa, are set out in whole or in part as follows:

"7174. *Peddlers.* Peddlers plying their vocation in any county in this state outside of a city or incorporated town shall pay an annual county tax of twenty-five dollars for each pack peddler or hawker on foot, fifty dollars for each one-horse or two-wheeled conveyance, and seventy-five dollars for each two-horse conveyance, automobile, or any motor vehicle having attached thereto or made a part thereof a conveyance for merchandise or samples."

Section 7175 provides the means and method of licensing.

Section 7176 defines peddlers.

"7177. *Exceptions.* The provision of Sections 7174 to 7176, inclusive, shall not be construed to apply to persons selling at wholesale to merchants, nor to transient vendors of drugs, nor to persons running a huckster wagon, or selling and distributing fresh meats, fish, fruit, or vegetables, nor to persons selling their own work or production either by themselves or employees."

Section 7178 provides a violation penalty.

Amendment 14, paragraph 1 of the Constitution of the United States, is as follows:

"* * * No State shall make or enforce any law which shall * * * deny to any person within its jurisdiction the equal protection of the laws."

Section 6 of the Constitution of the State of Iowa, is as follows:

"All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."

It is first to be determined whether the privilege of immunity granted to huckster wagons is such class legislation as to render the law unconstitutional.

It is to be observed.

"(2) Courts are reluctant to declare legislative enactments unconstitutional, and will do so only when the violation is clear, palpable, and practically free from doubt. *State v. Fairmont Creamery Co.*, 153 Iowa 702, 133 N. W. 895, 42 L. R. A. (N. S.) 821; *Lee v. Hoffman*, supra; *Munn v. Ind. School District*, supra; In re Pedersen's Estate, 198 Iowa 166, 196 N. W. 785; *Loftus v. Dept. of Agriculture*, 211 Iowa 566, 232 N. W. 412.

Necessarily, therefore, the legislature exercises a wide discretion in the determination of classifications as a basis of legislative enactments. A careful reading of the cases cited will disclose that this court will not set aside a statute upon the ground that it is in violation of the article of the Constitution under consideration, unless the invalidity is clear and practically beyond doubt. This is a concession due to the co-ordinate branch of the government, and has always been recognized and followed by this court. Therefore, is the classifica-

tion in the present instance so arbitrary and unreasonable as to violate Section 6, Article I, of the Constitution of this state?"

State ex rel. Welsh v. Darling, (1933) 216 Iowa 553, 556; 246 NW 390.

The case of *Berg vs. Berg*, 221 Iowa 326, 332; 264 NW 821, sets out the rules by which class legislation is to be tested:

"The Supreme Court of the United States has laid down the applicable rules, so far as the equal protection clause is concerned, in *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 S. Ct. 337, 340, 55 L. Ed. 369, Ann. Cas. 1912C, 160, as follows:

'The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:

'1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

'3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

'4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' "

And further quotation from *Wooster vs. Bateman*, 126 Iowa 552, 102 NW 521, as follows:

"The classification must be based upon apparent natural reason; some reason suggested by necessity, by such difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity of the propriety of different legislation with respect to them."

In order to determine the intention of the legislature, Sections 7174 to 7178 must be read together.

Because of the large license fees required, it is manifestly the intent of the legislature to prohibit merchants and itinerant vendors from distributing their wares from county to county through the rural sections of the State, with the usual consequent injurious results to the populace, because of the very nature of the transient business. Such resulting prohibition is in effect a police regulation.

It is evidently that such law without a saving clause would severely penalize those in rural communities who are not only often obliged to rely upon the purchase of supplies of one kind or another from local huckster wagons, but often engage in the practice of purveying fresh vegetables and other farm products as a very natural consequence of their farming activity. Such huckstering can be and is easily controlled by local police regulations.

Section 7177 excepting huckstering wagons secured to local vendors the usage which has been theirs from time immemorial, that is to say, the acquired right to take their farm produce and sell it about to friends, neighbors and other local buyers, and to say that the legislature intended to penalize this group would be reading into the law that which the privilege of immunity from licensing seeks to prevent.

Testing the above situation by the rules as set forth in *Berg vs. Berg*, supra, we reach the conclusion that legislation favoring huckster wagons for the purpose of the statutes concerned, is founded upon a natural and reasonable

basis and not upon an arbitrary classification. The state of facts because of which such law was passed can easily be sustained by virtue of public requirement, practice and policy.

It has been said:

"Peculiar circumstances which surround particular persons or corporations are ample grounds for holding laws which discriminate for or against them valid, * * *."

12 C. J. 1131, para. 856.

And again from *Berg vs. Berg*, supra:

"It is well recognized in this state, as elsewhere, that in order to justify the court in declaring an act of the legislature violative of the constitution, such violation must be clear and palpable. In case there be doubt, the rule is to resolve the doubt in favor of the validity of the legislation."

Smith vs. Thompson, 219 Iowa 888; 258 NW 190.

The rule which applies to the instant situation is clearly stated in *State of Iowa vs. Garbroski*, 111 Iowa 496; 82 NW 959, the court quoting from *Nichols vs. Walter*, 37 Minn. 262; 33 NW 800.

"The true, practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason—some reason suggested by necessity; by such a difference in the situation, and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them."

22 A. L. R. 755;
50 A. L. R. 1518;
53 A. L. R. 272.

We have such an apparent natural reason here, a reason suggested by necessity that local operators of huckster wagons, whereby they administer to the rural wants of the community or dispose of their locally raised goods to those in the neighborhood, are protected by statute and these are to be differentiated from those who travel through country communities disposing of wares of doubtful value and whose vending and peddling it is the evident intention of the legislature to regulate.

We are, therefore, of the opinion, in view of the interpretation of the statutes, the apparent legislative intent, and after having applied the test as required in *Berg vs. Berg*, supra, that the immunity from license granted by statute to huckster wagons is not such class legislation as to render the law relative thereto and set out in Sections 7174 to 7178 unconstitutional.

COUNTY ATTORNEY: COMMISSIONS TO COUNTY ATTORNEY: FEE FOR COLLECTION OF FINE: County Attorney in office at time fine is actually paid in is entitled to commission on same.

TAX: MONEYS AND CREDITS TAX ON MORTGAGE: Individual whose mortgage has been assessed as moneys and credits and subsequently becomes owner of property covered by mortgage would still owe money and credits tax.

February 6, 1939. *Mr. C. Morse Hoorneman, County Attorney, LeMars, Iowa*: This is in answer to your letter of the 30th ult. wherein you ask our opinion relative to the following question:

"Does the former County Attorney continue to receive his 10 per cent of the fines which are paid in after he is out of office despite the fact that the sentences invoked and the fine enacted were cases which he prosecuted?"

It is our opinion that the county attorney in office at the time the fine is actually paid in is entitled to the commission.

Parenthetically, may we say that the commission is not ten per cent but is the amount allowed on promissory notes and other instruments of like character, i. e. 10 per cent on the first $200.00; 5 per cent on the next $300.00; 3 per cent on the next $500.00 and 1 per cent on the balance. I say this because you state in your letter, "Does the former County Attorney continue to receive his 10 per cent of the fines." Perhaps you do not entertain this notion, but in view of your phraseology we thought it pertinent to call the matter to your attention.

Going on with the opinion, we cite you *Story County vs. Hansen*, 178 Iowa 452, wherein we think there is language indicating the opinion herein expressed is a proper interpretation of the statute. The statute in question is 5228, Code of Iowa, 1935, wherein it says:

"* * * in addition to the salary above provided, he shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected where he appears for the state, * * *"

We are constrained to say that this language means that the fee is for the efforts expended in bringing about the actual payment of the fine. Obtaining the defendant's conviction upon plea or after trial is included in the duties for which the salary provided for compensates the county attorney. The commission on fines, we believe, was provided for to stimulate a special effort on the part of the county attorney to see to it that any fines assessed be promptly paid in. Our conclusion, therefore, is that the county attorney in office at the time the fine is paid in is the one who "collects" the fine and is, therefore, entitled to the commission.

Your inquiry in the last paragraph of your letter has to do with the proposition of whether or not an individual who holds a mortgage against a farm and has declared this to the assessor and the same has been assessed as moneys and credits, and the mortgagee subsequently becomes the owner of the premises covered by the mortgage by virtue of a deed to the property, would such mortgagee still owe the moneys and credits tax.

Our answer to this inquiry is in the affirmative. We are constrained to hold that this is elementary and we, therefore, deem the citation of authorities unnecessary. Your opinion on this question, expressed in your letter is, we think, correct.

TAXATION: POLL TAX: The failure of the City Clerk to certify delinquent poll tax to the County Auditor by December 1st, does not mean that the lien is lost, but they should immediately be placed on the tax list by the County Auditor.

February 7, 1939. *Mr. Robert S. Bruner, County Attorney, Carroll, Iowa:* We have your letter of February 2nd requesting an opinion from this department upon the following situation:

The City Clerk of Carroll failed to certify the delinquent poll tax to the county auditor by December 1st as required by Section 6236 of the 1935 Code, and in fact did not certify this list until January 13, 1939. The question is whether the lien is lost when these taxes are not certified to the county auditor before December 1st and whether the county auditor should make a correction in his tax list now in the county treasurer's office to include the delinquent poll taxes.

It is our opinion that the lien is not lost and that the correction should be made on the tax list now in the county treasurer's office to include these

delinquent taxes. Section 6236 which provides that this certification of delinquent poll taxes should be made by December 1st is directory only and should be so construed. In 59 Corpus Juris at 1078 it is said:

"*Time for performance of duties.* A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer. So a statute requiring a public body, merely for the orderly transaction of business, to fix the time for the performance of certain acts which may as effectually be done at any other time is usually regarded as directory. * * *"

We believe that under no circumstances should these delinquent road poll taxes be carried over until the end of next year, but they should immediately be placed on the tax list by the county auditor.

ATTORNEY GENERAL'S OPINIONS: CHARGE AGAINST COUNTY FOR OPINIONS: Opinions of Attorney General, sent out by State County Attorneys Association for charge of $2.00 is a proper charge against the county.

February 7, 1939. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa*: We have your request for the opinion of this department with reference to whether or not the $2.00 charge for Attorney General's opinions, mimeographed and sent out by the opinions committee of the State County Attorneys Association, is a proper and legal charge against the county.

In as much as these opinions pertain to county administration and are designed to make the county attorney more efficient in the performance of his duties, we are of the opinion that this is a legal and proper charge against the respective counties and that the Board of Supervisors, when a bill for this service is filed, should allow the same and order it paid.

CIVIL SERVICE COMMISSION: MINE EXAMINING BOARDS: The office of President of the State Mining Examining Board is of such a public trust that it will prohibit the holder from being at the same time a member of the Civil Service Commission.

February 7, 1939. *Mr. Charles L. Johnston, County Attorney, Centerville, Iowa*: Your letter of January 31st, 1939, asking our opinion on the following matter, has come to the writer for attention.

"Is Mr. Jacob Ritter, now President of the State Mine Examining Board and who has recently been appointed as one of the Civil Service Commissioners of the City of Centerville, eligible to qualify for the latter position under Section 5690 of the 1935 Code of Iowa?"

Section 5690 is as follows:

"*Qualifications.* The commissioners must be citizens of Iowa and residents of the city for more than five years next preceding their appointment, and shall serve without compensation. No person while on said commission, shall hold or be a candidate for any office of public trust."

The question, therefore resolves itself to the proposition of whether or not membership on the State Board of Mine Examiners is such a position of public trust as to prohibit to such member an appointment as a Civil Service Commissioner.

The court, in the case of *Kimbrough vs. Barnett*, 93 Texas 301, 55 SW 120, quotes with approval Mechem on Public Officers, as follows:

"The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions or government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive, or judicial, attaches for the time being, to be exercised for the public benefit."

And again in *United States vs. Schlierholz*, 137 Fed. 616, it is said:

"The officer is distinguished from the employe in the greater importance, dignity, and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the liability of being called to account as a public offender for misfeasance or nonfeasance in office and usually, though not necessarily, in the tenure of his position."

Section 1226 provides for the appointment of the board of examiners.

Section 1227 is as follows:

"*Qualifications—malfeasance—removal.* No member of said board shall be interested in or connected with any school, scheme, plan, or device having for its object the preparation, education, or instruction of persons in the knowledge required of applicants for certificates of competency. Any member of said board shall be summarily removed from office by the executive council, upon due notice and hearing, for violation of the law, misfeasance or malfeasance in the performance of his duties, or for other sufficient cause and his successor shall thereupon be appointed by the said executive council for the unexpired term."

Section 1228 is in part:

"*Mine inspectors—examinations.* The board shall meet in the office of the state mine inspectors at the seat of government on the first Monday in March of each even-numbered year for the examination of applicants for certificates of competency for mine inspector, and at such other times and places as shall be necessary in the discharge of its duties. It shall adopt rules and regulations and prescribe and conduct such examinations of applicants as shall carry out the purpose and intent of this chapter in relation to the qualifications of mine inspectors."

It is to be observed that the members of the board of examiners are clothed with the authority and conferred with the power to examine mine inspectors for certificates of competency. This is a clear delegation of a part of the sovereign functions of the Government to be exercised for the public benefit.

There is, in addition, a possibility recognized by statute of misfeasance or malfeasance in office and this alone would indicate an acknowledgment by the legislature of a public trust of a nature against which all such violations should be legislated.

It is, therefore, our opinion that the office of President of the State Mine Examining Board is of such a public trust that it will prohibit the holder from being at the same time a member of the Civil Service Commission.

ACCRETION LAND: CONVEYANCE: Upon the majority recommendation of the Conservation Commission, State owned lands undesirable for conservation purposes may be sold by conveyance executed in the name of the State signed by the Governor and the Secretary of State with the great seal of the State of Iowa attached.

February 8, 1939. *Executive Council of Iowa*: Your request, through Mr. David F. Loepp, Mayor of Sioux City, Iowa, for an opinion relative to the following matter, has come to the writer for attention.

"Accretion land adjoining certain privately owned property lies within the corporate limits of Sioux City. The State Conservation Commission advises

that this property is undesirable for conservation purposes and recommends conveyance. May the Executive Council legally convey such accretion land to the City of Sioux City?"

Your attention is directed to the following statutes of the 1935 Code of Iowa:

"1812. *Jurisdiction.* Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon, not now used by some other state body for state purposes, is conferred upon the commission. The commission, with the approval of the executive council, may establish parts of such property into state parks, and when so established all of the provisions of this chapter relative to public parks shall apply thereto."

"1824. *Sale of Park Lands.* The executive council may, upon a majority recommendation of the commission, sell or exchange such parts of public lands under the jurisdiction of the commission as in its judgment may be undesirable for conservation purposes, excepting state-owned, meandered lands already surveyed and platted at state expense as a conservation plan and project tentatively adopted and now in the process of rehabilitation and development authorized by a special legislative act. Such sale or exchange shall be made upon such terms, conditions or considerations as the commission may recommend and that may be approved by the executive council, whereupon the secretary of state shall issue a patent therefor in the manner provided by law in other cases. The proceeds of any such sale or exchange shall become a part of the funds to be expended under the provisions of this chapter."

"1825. *Form of Conveyance.* Conveyances shall be in the name of the state, signed by the governor and secretary of state, with the great seal of the state attached."

For the purpose of this opinion, we must assume that the title to the land in question lies in the State of Iowa.

It is to be observed from the context of the above statutes, that the State Conservation Commission has jurisdiction of all meandered streams and lakes and of State lands bordering thereon, and should it be thought advisable to sell State owned lands considered undesirable by the Commission for conservation purposes, such sale may be made upon the majority recommendation of the Commission and the conveyance made in the name of the State, this to be signed by the Governor and the Secretary of State with the great seal of Iowa attached. The language of the statute is clear and unambiguous, and there is no question but that the legislature intended such properties under such conditions to be conveyed in this manner.

It is, therefore, our opinion that upon the majority recommendation of the Conservation Commission, State owned lands undesirable for conservation purposes may be sold by a conveyance executed in the name of the State signed by the Governor and the Secretary of State with the great seal of the State of Iowa attached.

CONSERVATION COMMISSION: LEDGES STATE PARK: ANIMALS: The Iowa Conservation Commission has full authority to trap, turn loose or kill whatever animals they may consider advisable.

February 8, 1939. *Iowa State Conservation Commission, Des Moines, Iowa; Attention, Mr. Hutton*: Your letter of February 6th, 1939, requesting our opinion on the following situation, has come to the writer for attention. (Quoting from your letter.)

"We have been removing animals from the Ledges in the past by trapping them, turning them loose and shooting them. In some cases they have been released elsewhere, and in some instances sold dead or alive, depending upon the factors inherent in each case and the management problem involved.

Specifically we desire to know whether we have been wrong in our past

and established practice as indicated in the foregoing paragraph, which we have assumed Section 1703-d12 gave us authority to follow."

For the purpose of this opinion, Section 1703-d12 of the 1935 Code of Iowa, as amended, is set out in part:

"*Specific Powers.* The commission is hereby authorized and empowered to:
4. Capture, propagate, buy, sell, or exchange any species of fish, game, fur-bearing animals and protected birds needed for stocking the lands or waters of the state, and to feed, provide and care for such fish, animals and birds.
5. The commission is hereby authorized to adopt and enforce such departmental rules governing procedure as may be necessary to carry out the provisions of this chapter; also to carry out any other laws the enforcement of which is vested in the commission."

The legislature has by law delegated to the Iowa Conservation Commission a certain part of its sovereignty within which limit of authority the Commission may pursue its duties and these may be either express or those necessarily to be implied.

It is said by the court in *Ford vs. Board of Park Commissioners*, 148 Iowa 1, 126 NW 1030, and this is the general rule:

"The board as such, was an instrumentality of government, having such powers and such only as were granted or necessarily implied, * * *."

It is to be observed that the Commission is granted the full power and authority to capture and propagate any species of game needed for stocking the lands of the State and to provide and care for such animals, and it is especially provided that such Commission may adopt and enforce such departmental rules as may be necessary to carry out the provisions of the Chapter.

Clearly it is the intent of the legislature that the Conservation Commission shall manage and control such animals as within their discretion it shall seem for the best interest of the State and for the animals concerned. It is necessarily to be implied that all requirements of whatever nature necessary to the care, control and management of such animals, was within the intent of the legislature in delegating such powers to the Commission. Without such authority it would be impossible for the Commission to carry out the conservation program as such program was within the contemplation of the legislature.

It is to be conceived that at times the destruction of animals is required in order that the welfare of others may be preserved and if this becomes necessary, it is clearly within the discretion of the Conservation Commission to direct such extermination. The Conservation Commission is, therefore, clothed with full authority to destroy such animals as in its discretion it may consider for the best interest of the conservation program or for the welfare of other animals concerned.

It is, therefore, our opinion that the Iowa Conservation Commission, by virtue of its power both express and necessarily implied as delegated by the legislature, has full authority to trap, turn loose or kill as the case may be, whatever animals they may consider advisable.

SWIMMING POOLS: CITY COUNCIL: PARK BOARDS: The Park Board of the City is not obligated to enter into an agreement with the City Council with respect to the operation and management of the pool.

February 8, 1939. *Mr. Charles L. Johnston, County Attorney, Centerville, Iowa:* Your letter requesting an opinion as to the following matter, has come to the writer for attention.

"A swimming pool was recently constructed in the City of Centerville, Iowa in the City Park, the funds for the construction of the pool coming partly from the City and partly from W. P. A. The pool itself is located in the City Park. The City Council now desires to turn the pool over to the Park Board for operation and management, but desires the Park Board to enter into an agreement with the City containing a number of conditions attendant upon its operation. The question is whether or not the Park Board of the City of Centerville is obligated to enter into an agreement with the City Council with respect to the operation and management of the pool."

For the purpose of this opinion, we quote the following statutes:

"5745. *Power to Regulate, License, or Prohibit.* They (the municipal corporation) shall have power to * * * regulate * * *
1 * * * swimming pools * * *."

"5746. *Power to Establish and Regulate.* They shall have power to establish and regulate:

4. *Swimming pools.* Swimming pools and to build or to purchase the same."

"5798. *General Powers.* It may sell, subject to the approval of the city council, exchange or lease any real estate acquired by it which shall be found unfit or not desirable for park purposes; shall keep a report of all transactions; except as otherwise provided in this chapter it shall have exclusive control of all parks and pleasure grounds acquired by it or of any other ground owned by the city and set apart for like purposes; and may make contracts, sue and be sued, but shall incur no indebtedness in excess of the amount of taxes already levied and available for the payment thereof, except bonds hereby authorized."

"5805. *Jurisdiction.* The jurisdiction of such board shall extend over all lands used for parks within or without the corporate limits, and all ordinances of such cities and towns shall be in full force and effect in and over the territory occupied by such parks."

"5807. *Rules and Regulations.* The board may in writing prescribe rules and regulations for the government of the parks or public grounds under their control and persons resorting thereto, which rules and regulations shall be in force when entered in the record of the proceedings of the board, and a copy thereof signed by the commissioners has been posted at each gate or principal entrance to any such park or public grounds, and a wilful violation thereof shall be a misdemeanor, punishable by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding thirty days."

It is to be observed that:

"* * * the board of park commissioners is a corporation or quasi corporation having power to contract, to sue and to be sued, and to condemn property for public purposes * * * The board as such, was an instrumentality of government, having such powers and such only as were granted or necessarily implied, * * *."

Ford vs. Board of Park Commissioners, 148 Iowa 1; 126 NW 1030

It is evident from a review of the statute and from the pronouncement of the Supreme Court that the legislature intended the Board of Park Commissioners to have a full and an exclusive control of all lands used for parks and pleasure grounds within or without the limits of the municipal corporation.

The words of delegation and authority are clear and unambiguous and the extent and limit of such authority is well defined.

The Board of Park Commissioners must, as a matter of law, have exclusive control of all of the parks and pleasure grounds within its jurisdiction and this necessarily implies that there need be no agreements or conditions of any kind which may serve to bind the board in the exercise of its duties.

It is true that the municipal corporation has the power to build, regulate and control swimming pools but when it is the desire of the City Council that the Park Board shall operate and manage such swimming pool, the Board, upon

accepting the pool shall thereupon, in view of the authority conferred upon it by statute, have sole and exclusive control.

We are, therefore, of the opinion that the Park Board of the City of Centerville is not obligated to enter into an agreement with the City Council with respect to the operation and management of the pool.

COUNTY FUNDS: EXPENDITURES OF COUNTY OFFICIALS: SHERIFF: Auto and criminal expense and expenses incurred in connection with operation of courts may, if proper, be legally paid by Board of Supervisors. Insane commitments can be paid only to extent of amount remaining in insane fund and claim of motorcycle expense can be paid only to extent of money remaining in county fund, at close of year.

February 8, 1939. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa*: This is in answer to your letter of the 28th ult. wherein you ask our opinion relative to the following proposition:

"I will submit here the facts surrounding the situation, together with various provisions of law relative to the situation. As you possibly know the first of this year the Sheriff's office in Polk County changed hands by election. On the 3rd day of January, 1939, the outgoing Sheriff, Charles F. Keeling, filed with the Auditor of Polk County, Iowa, three claims, one in the sum of $291.64 for insane commitments. This bore the notation that it was to be charged against the County Insane Fund. Another in the sum of $722.81 for criminal expense, this with the notation to be payable from the Court fund. The third one in the sum of $1,204.59 for auto expense, likewise chargeable against the Court Fund. They likewise filed a fourth bill on the 5th day of January, 1939, in the sum of $585.55 for motorcycle expense, bearing the notation chargeable to the County Fund.

"From the time the original budget was set up in the month of January, 1938, the Sheriff had a fixed budget upon which to operate. During the year by proper application under the statute when it became necessary application was made by the said Sheriff for transfers which were properly handled to the various fund to cover his necessary expenditures and during the year everything was paid except the last four items which I have herein set out."

The funds on the 31st day of December, 1938, had budget balances as follows:

Insane Fund	$128.07
Court Fund	165.88
County Fund	161.00

The Sections having bearing on the question involved are the following.

Section 5258, Code of Iowa, 1935, provides:

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

"Any officer allowing a claim, issuing a warrant, or making a contract contrary to the provision of this section, shall be held personally liable for the payment of the claim or warrant, or the performance of the contract."

Section 5259, provides, so far as is material:

"Section 5258 shall not apply to:

2. Expenses incurred in connection with the operations of the courts.

4. Expenditures for the benefit of any person entitled to receive help from public funds."

Section 5260-c10 provides:

"It shall be unlawful for any county official, the expenditures of whose office comes under the provisions of this chapter, to authorize the expenditure of a sum for his department larger than the amount which has been appropriated by the county board of supervisors.

"Any county official in charge of any department or office who violates this law shall be guilty of a misdemeanor and punished accordingly."

Section 5260-c11 provides:

"Nothing in this chapter shall be construed as affecting the provisions of Section 5259, and provisions of this Chapter with reference to the penalty, shall be in addition to the provisions of Section 5258."

It is our opinion that the claim filed by the sheriff for insane commitments can be allowed only up to the amount remaining in the fund on the 31st day of December, 1938, to-wit: the sum of $128.07. You will note that Section 5259 provides that Section 5258 shall not apply to "Expenditures for the benefit of any person entitled to receive help from public funds." We do not believe that insane commitments come within this exception. This provision, we think applies to poor relief, soldiers' relief, widows' pensions, etc.

Our conclusion is that a person who becomes insane and is taken to the state insane hospital is not receiving a "benefit from public funds" as used in sub-section 4 of Section 5259; therefore, the insane commitment claim does not come under the exception in Section 5260-c11. We see no escape from the conclusion that the board of supervisors has no right to allow this claim in excess of the amount remaining in the fund on December 31, 1938.

On the two other claims, namely the one for $722.81 for criminal expense and the one for $1,204.59 for auto expense, both payable from the court fund, we think a different situation is presented. Section 5258, above cited, provides that expenditures must be confined to collectible revenues, but you will observe that under Section 5259, sub-section 2 there is excepted from the provisions of Section 5258 "expenses incurred in connection with the operation of the courts." If, therefore, the two claims in question come properly within the classification of expenses incurred in connection with the operation of the courts then neither Section 5258 nor Section 5260-c10 would legally prevent the payment of these claims, for it is said in Section 5260-c11 that nothing in Section 5260-c10 shall be construed as affecting the provisions of Section 5259. Our conclusion, therefore, is that these two claims may be legally paid.

As to the last claim, namely, one in the sum of $585.55 for motorcycle expense chargeable against the county fund, it is our opinion that same can be paid only to the extent that there was money remaining in the fund at the close of the year. This amount, as stated in your letter, was $161.00. This claim clearly does not come within any of the exceptions hereinabove referred to. We, of course, are unable to cite you any authorities because there are none. We have attempted to construe these sections in light of their correlated provisions and hope that this opinion will be of some value to you in disposing of this very difficult problem.

MOTHER'S PENSION: LEGAL SETTLEMENT: POOR RELIEF: Widow may be prevented from obtaining a legal settlement by service of notice provided for in Chapter 267, but this would not prevent her from obtaining a widows' pension providing notice was not served on her each year.

February 8, 1939. *Mr. E. B. Shaw, County Attorney, Oelwein, Iowa*: This is in answer to your letter of the 6th inst. wherein you ask our opinion relative to the interpretation of the statute pertaining to mothers' pension. In your letter you refer to an opinion written November 29, 1938 by Charles W. Wilson, then Assistant Attorney General. We have read the opinion and we concur therein. The effect of the opinion, in so far as the question relating to mothers'

pension is concerned, is that a notice to depart must be served on the widow each year in order to prevent her from receiving a mothers' pension in the county of her legal residence. Section 3641 provides:

"*Aid to Widow in Care of Child.* If the juvenile court finds of record that the mother of a neglected or dependent child is and has been a resident of the county for one year preceding the filing of the application, * * * it may * * * by proper order determine the amount of money * * * necessary to enable said mother to properly care for said child. * * * No payment shall be made * * * after she (the mother) has acquired a legal residence in another county, * * *.

"No person on whom the notice to depart provided for in Chapter 267 shall have been served within one year prior to the time of making application, shall be considered a resident so as to be allowed the aid provided for in this Section."

It is our conclusion, therefore, that a widow may be prevented from obtaining a legal settlement by the service of the notice provided for in Chapter 267, but this would not prevent her from obtaining a widow's pension providing the said notice was not served on her each year.

We purposely make our opinion brief for the reason that we fully agree with the conclusion reached in the opinion above referred to.

COUNTY ATTORNEY: COPY FEES: COMPENSATION OF COUNTY ATTORNEY: Copy fees due county attorney who received salary of $5,000 must be paid to county for court expense fund.

February 8, 1939. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa*: This is in answer to your letter of the 30th inst. wherein you ask our opinion on the question of whether a county attorney in a county where he receives a salary of $5,000.00 may legally retain copy fees in cases where pleadings are filed by him.

It is our opinion that such fees must be paid to the county for the benefit of the court expense fund. Section 5228 provides:

"In counties having a population of sixty thousand or over * * * the annual salaries as herein provided shall be the full and only compensation of the county attorney and all fees and commissions in this chapter or elsewhere by law provided which may be lawfully taxed in favor of county attorneys *shall if and when taxed and collected be paid by the county attorney to the county for the benefit of the court expense fund.*"

This section, you will observe, is very broad in its terms and we feel that it was the intention of the Legislature that under no circumstances should the county attorney receive any compensation other than the $5,000.00 salary provided for. Particular attention is called to this phrase: "all fees and commissions in this chapter or elsewhere by law provided."

This, we believe, is a significant provision and from it and the other general provisions of the Section, we are constrained to hold that the copy fees in question should be paid to the county.

TAXATION: PERSONAL PROPERTY TAX: DISTRESS WARRANTS: Personal property taxes are a personal obligation and there is no limitation in the law with regard to the number of years of delinquent personal property tax that can be collected by distress warrants.

February 8, 1939. *Mr. George H. Struble, County Attorney, Toledo, Iowa*: You have asked for an opinion upon the following question:

"How many years back can personal property taxes be collected by levy of distress warrants?"

Personal property taxes are a personal obligation and there is no limitation in the law with regard to the number of years of delinquent personal property tax that can be collected by distress warrants.

The case which you cite, *Collins Oil Co. vs. Perrin*, 188 Iowa 295, is not in point on the question asked.

TAXATION: SCAVENGER SALE: When the first year's tax has been paid before scavenger sale, then clearly at the time of the sale there are not then two years' delinquent taxes against the property and the property should not be sold at the scavenger sale.

February 8, 1939. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa*: We have your letter of February 2nd requesting an opinion upon the following situation:

"At a recent tax sale there was bid for a tract, subject to sale at scavenger sale, approximately double the amount of taxes, penalties, interest and costs against the tract. The question has arisen what is the highest bidder within the meaning of Section 7255. If a bidder wishes to bid more than the amount of the delinquent taxes, penalties, interest and costs, should he increase the amount of his bid in dollars and cents or should he bid the total amount of the taxes, penalties, interest and costs for an undivided portion of the tract?

"If the purchaser properly bids more in dollars and cents than the total amount of taxes, penalties, interest and costs what shall the Treasurer do with the overplus?"

Quite obviously your treasurer made a mistake when he accepted a bid for a tax sale for more than the amount of delinquent taxes. The provisions of Section 7253 are plain, and the highest bidder at a tax sale is the person who bids the full amount of the taxes, penalty, interest and costs for the smallest portion of the property against which the taxes were a lien. There is no authority that would enable a treasurer to accept more than the amount of delinquent taxes, and our only suggestion is that the treasurer, in this instance, refund the excess money to the purchaser.

You ask for a construction of Section 7255 and your question is:

"Under the above Section, can a person, whose property has been advertised for the scavenger sale provided for in said Section 7255, stop the sale of his property by paying up the first year's delinquent tax?"

Section 7255 provides as follows:

"The treasurer shall * * * sell * * * real estate * * * which * * * shall have previously been advertised and offered for two years or more and remained unsold for want of bidders, * * *."

When this first year's tax has been paid before the scavenger sale then clearly at the time of the sale there are not then two years' delinquent taxes against the property and the property should not be sold at the scavenger sale.

The county loses nothing by following this practice for the taxpayer must pay all of the delinquent tax and the penalty, interest and costs.

BEER PERMITS: ROADHOUSES: The fact that a person secured a beer license from the Board of Supervisors in a village platted prior to January 1, 1934, would not mean that such a person could conduct an establishment which is within the definition of a roadhouse without first obtaining a roadhouse license under the provisions of Chapter 285. Such a permit holder would first have to obtain the roadhouse license, and the fact alone that such a person did obtain a beer permit would not mean that the township board would be compelled to issue the roadhouse license.

February 9, 1939. *Mr. Charles L. Johnston, County Attorney, Centerville, Iowa:* You have requested an opinion from this department upon the following questions:

1. Does Section 5583 of the 1935 Code of Iowa give to the Township Trustees the arbitrary right to refuse to grant a license to a roadhouse without the assignment of any reason whatsoever for its refusal?

2. Does Section 5583 of the 1935 Code of Iowa give to the Township Trustees a right to grant a license for a roadhouse to one applicant and refuse to license another, where both applicants possess the same qualifications?

3. Does Section 1921 F99 of the 1935 Code of Iowa, which authorizes the Board of Supervisors to issue Class B and C beer permits in villages platted prior to January 1, 1934, give to the holder of such a permit the right to operate without also securing a roadhouse license in a case where the building or establishment where the beer is sold also comes within the definition of a roadhouse, as defined by Section 5582 C1 of the 1935 Code of Iowa?

4. Can the Township Trustees refuse arbitrarily to issue a license for a roadhouse where the Board of Supervisors of that county has already issued to the applicant a beer license under Section 1921 F99 of the 1935 Code of Iowa?

In answer to all four of the questions we will say that Section 5583 of the 1935 Code of Iowa gives to the township trustees discretion in the matter of granting a roadhouse license. Like all officers having a discretion to do or not to do a certain act, the discretion cannot be abused so as to work an injury, but certainly the township trustees could refuse to grant a license to a person they deemed unfit, and moreover, they could grant one applicant a license and refuse another applicant a license who perhaps might possess the same qualifications if, in their opinion, the licensing of a number of roadhouses in the township presented a difficulty in the matter of policing and would not be a good thing for the township. In other words, the township trustees should exercise their discretion in the matter of granting such licenses with a view toward law and order in the township and the general welfare of the citizens residing therein. These roadhouses located far removed from the headquarters of any peace officer usually present problems of adequate policing. Under this Section, the Board might, in the exercise of their sound discretion, grant one or two licenses, but they could also refuse to grant more, even though the applicants did possess the same qualifications, if they felt that a larger number could not be properly supervised by police officers.

The fact that a person secured a beer license from the Board of Supervisors in a village platted prior to January 1, 1934 would not mean that such a person could conduct an establishment which is within the definition of a roadhouse without first obtaining a roadhouse license under the provisions of Chapter 285. Such a permit holder would first have to obtain the roadhouse license, and the fact alone that such a person did obtain a beer permit would not mean that the township board would be compelled to issue the roadhouse license.

SUPPLIES: EQUIPMENT: UNEMPLOYMENT COMPENSATION COMMISSION: STATE EMPLOYMENT SERVICE: It is discretionary with the Executive Council as to whether they should approve the supplies and equipment purchased by the Unemployment Compensation Commission and the State Employment Service or should allow the Commission to purchase its own supplies.

February 9, 1939. *Executive Council, State of Iowa. Attention: Mr. Ross Ewing.* Receipt is acknowledged of your letter of February 7th requesting an opinion on the following question:

"Should supplies and equipment purchased by the Unemployment Compensation Commission and the State Employment Service be approved by the Council?"

Under the provisions of Section 296 of the 1935 Code of Iowa the Executive Council "may contract for the supplies * * * for the various departments of the State Government * * *." It would appear from this statute that the matter of purchasing the supplies and equipment for the Unemployment Compensation Commission and the State Employment Service would be discretionary with the Executive Council. The Council could, if it desired, by appropriate resolution, allow the Commission to purchase its own supplies, or it can require the Council's approval for such purchases.

The Unemployment Compensation Commission is a "department of the State" within the purview of the above section and the State Employment Service is merely a division of said department. We find nothing in Chapter 102, Acts of the 47th General Assembly that created this department and division and outlined the powers and duties of the Commissioners that would exempt the department from the provisions of Section 296 of the 1935 Code of Iowa.

EXTENSION: SALE: SCHOOL FUND MORTGAGE: FORECLOSURE: Extension of time of sale on property acquired through the foreclosure of a school fund mortgage would be direct violation of the statute.

February 9, 1939. *Executive Council, State of Iowa. Attention: Ross Ewing, Secretary.* Receipt is acknowledged of your letter of February 7th referring to us the request for an opinion received from the Auditor of Wright County.

Section 4503 of the 1935 Code provides as follows:

"*School Funds.* All lands now acquired under permanent school fund foreclosure proceedings shall be resold within six years from January 1, 1934, and lands acquired after such date shall be resold within six years from date of foreclosure. Such land shall be appraised, advertised, and sold in the manner provided for the appraisement, advertisement, sale and conveyance of the sixteenth section or lands selected in lieu thereof."

"Would it be possible, under the above section to secure an extension of the time of sale beyond January 1, 1940 on property acquired through the foreclosure of a school fund mortgage prior to January 1, 1934?"

We are of the opinion that under the provisions of Section 4503 no extension of the time of sale of the property so acquired could be obtained. The statute is clear and direct. It may be true that if the sale is held before January 1, 1940 a lower price than the price received if the property is held longer would be obtained. But this is all merely speculative, and the evident intention of the Legislature was to prevent the speculative holding of school fund property for higher prices. It may well have been the intent of the Legislature to force sales of such property, even at reduced prices, in order to return the property to taxable status. At any rate, we feel that any extension of the time of sale of such property beyond January 1, 1940 would be direct violation of this statute.

BOARD OF SUPERVISORS: EQUIPMENT FOR SHERIFF: Board can not lawfully equip sheriff with laundry equipment, refrigeration for food, household furnishings, etc. even though used for boarding and washing for prison-

ers in jail. May in some instances buy stove and cooking utensils to be used as *Jail Equipment.*

February 9, 1939. *Mr. John L. Duffy, County Attorney, Dubuque, Iowa.* This is in answer to your letter of the 7th inst., requesting our opinion on the following four propositions:

1. Is it the duty of the Board of Supervisors to furnish the Sheriff with laundry equipment to wash and launder prisoners' clothes, or does same have to be furnished by the Sheriff out of his salary and fees?
2. Can the Supervisors furnish the Sheriff with an ice box and ice, for refrigerating food of the prisoners in the jail, or does the Sheriff have to furnish same out of his salary and fees?
3. Dubuque County furnishes the residence for the Sheriff to live in. Can the Board of Supervisors legally buy and furnish carpets and other floor coverings for rooms which Sheriff occupies for himself and family?
4. Can Supervisors furnish cook stove and cooking utensils for prisoners in the county jail, or does the Sheriff have to furnish same out of his salary and fees?

We shall consider them in their order.

As to number one, it is our opinion that the Board of Supervisors cannot legally furnish the Sheriff with laundry equipment to wash and launder prisoners' clothes. This must be furnished by the Sheriff.

Section 5191, Code of Iowa, 1939, provides:

"The sheriff shall charge and be entitled to collect the following fees:
* * *

11. For boarding a prisoner, a compensation of twenty cents for each meal, and not to exceed three meals in twenty-four consecutive hours; and fifteen cents for each night's lodging. * * *
12. For waiting on and washing for prisoners, the sum of five cents per prisoner per day."

This statute, which is the only enactment providing for compensation to the Sheriff for "waiting on and washing for prisoners", could not, as we see it, be construed to authorize the purchase of laundry equipment. Section 5130, Code of Iowa, 1935, enumerates the powers granted to boards of supervisors. We have carefully read this section and we come to the conclusion that under none of the various provisions therein would the board be authorized to purchase the equipment in question. We could set forth many reasons why such purchase would be a very unwise policy.

As to question number two, we are abidingly of the opinion that the Board of Supervisors cannot legally furnish the Sheriff with an ice box and ice for refrigerating food for the prisoners. We are constrained to hold that the opinion of May 21, 1937, rendered by the then Attorney General, is correct. We agree with the reasoning therein and also to the conclusion reached. We, therefore, refrain from an extended discussion of the legal principles involved.

As to number three, which has to do with the question of whether the Board of Supervisors may legally furnish carpets and other floor covering for rooms the Sheriff occupies for himself and family, may we say that the legal question involved is so elementary that an opinion thereon, we think, should not be necessary. Clearly the Board of Supervisors cannot furnish the Sheriff's residence.

This brings us down to your question number four, which involves the right of the Board of Supervisors to furnish cook stove and cooking utensils for prisoners in the county jail. As we understand it, this cook stove and the

cooking utensils are used by the prisoners in preparing their meals, thus relieving the Sheriff's employees of considerable work. We can conceive of a situation where it might be to the best interests of the county to provide the prisoners with the articles in question. We, therefore, hold that the purchase of such stove and cooking utensils as jail equipment may be, in some cases, legal and proper. We think it is a matter that may be safely left to the sound discretion of your board.

COUNTY BOARD EMPLOYEES: STATE WELFARE BOARD: BOARD OF SUPERVISORS: COMPENSATION COUNTY BOARD EMPLOYEES: County Board employees are paid by State Board from funds made available for that purpose, and Board of Supervisors would have no legal right to further compensate employee of county board.

February 9, 1939. *Mr. Carroll Johnson, County Attorney, Clinton, Iowa:* This is in answer to your letter of the 4th inst., wherein you ask our opinion relative to the following proposition:

"The State Welfare Board has approved a monthly salary for one Aroline Fellows in the amount of $40.00, she being unable at this time to qualify for a $60.00 a month state salary. Could our Board of Supervisors, without entering into a contract with her, approve a further salary to her in the amount of $35.00 per month, the $40.00 salary being totally insufficient for the amount of work this employee is doing."

Section 14, Chapter 151, Acts of the 47th General Assembly, provides:

"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 state board of supervisors."

We are of the opinion that this section answers your question. You will note that therein specific provision is made that county board employees shall be paid by the state board from funds made available for that purpose. The Board of Supervisors can allow and order paid only such claims as are legally payable by the county. We think it clear that the said section fourteen provides that the employee in question shall be paid from state funds. Therefore the Board of Supervisors would have no legal right to compensate this employee.

BOARD OF SUPERVISORS: COMPENSATION TO FIRE DEPARTMENT: Board of Supervisors may compensate fire department in a reasonable amount for extinguishing fire which threatened to destroy valuable county property.

February 9, 1939. *Mr. Woodford R. Byington, County Attorney, Malvern, Iowa:* This is in answer to your letter of the 4th inst., wherein you ask our opinion as to whether the Board of Supervisors may legally pay the Henderson Volunteer Fire Department for its services in extinguishing a fire which threatened to destroy one of your county bridges.

We have given this matter careful study and have consulted numerous legal reference works. We have been unable to find any cases on this subject. We are, however, of the opinion that if the Board observed this bridge burning, certainly it would have power to engage the services of a fire department to extinguish the fire. Therefore, we feel that the fact that the fire department went out and extinguished the fire without any arrangement with the Board would not legally preclude the county from paying for the service after it was rendered.

Under Section 5130, Code of Iowa, 1935, the Board of Supervisors is given power "to represent its county and have the care and management of the property and business thereof in all cases where no other provision is made". This gives to the Board broad powers and we think that thereunder may be implied the right to engage the services of a fire department to extinguish a fire which threatens the destruction of valuable county property. Manifestly, if it has the right to contract for such services while the fire is in progress, it would have a right to reimburse a fire department who, without such arrangement, rendered this service.

It is our conclusion, therefore, that the Board of Supervisors may pay the Henderson Volunteer Fire Department a reasonable sum for the service rendered by it in extinguishing the fire referred to.

MOTOR VEHICLE DEPARTMENT: TRAILERS: LICENSING: WEIGHT: Trailers with a weight of 1,000 pounds or more, regardless of loading capacity, should be licensed.

February 9, 1939. *Motor Vehicle Department. Attention: Mr. Vicker.* Your letter of February 4, 1939, presenting the following matter for our opinion, has come to the writer for attention:

"Our particular problem at this time is the maximum weight of trailers coming under this classification. (Section 154, Chapter 134 of the Acts of the 47th General Assembly.) We have been asked to license free a trailer weighing 1,100 pounds and it is our opinion that the maximum weight should be 1,000 pounds."

For the purpose of our opinion, Section 154 of Chapter 134 of the Acts of the 47th General Assembly is set out in part as follows:

"*Trailers.* Trailers weighing less than one thousand (1,000) pounds, or with a loading capacity of less than one thousand (1,000) pounds, shall not be subject to a registration fee."

In construing the statute, it is necessary that we determine as nearly as possible the intent of the legislature. An early English case sets forth certain rules by which new statutes may be construed:

"This is a new statute, and in construing new statutes the rule was laid down in a leading English case decided in 1584, and referred to in 25 R. C. L. pp. 1015, 1016, Section 254, Hayden Case, 3 Coke, 70, 14 English R. Case Law 714, which last citation is erroneous. It was resolved by the barons of the exchequer that for the sure and true interpretation of all statutes in general, four things are to be discerned and considered:

1. What was the common law before the making of this act?
2. What was the mischief and defect for which the common law did not provide?
3. What remedy the Parliament hath reserved and appointed to cure the disease of the commonwealth.
4. And the true reason of the remedy.

This was pointed out on page 718, second column, of the opinion in this case printed in 260 N. W. beginning at page 717. The doctrine therein stated has been followed ever since. It is common sense applied to these conditions."

It is evident that under the common law all trailers might remain unlicensed. The statute requiring their licensing, however, is in the nature of a police regulation and grants to the user the privilege of operating trailers upon the public highway. It is well recognized that the heavier and larger the trailer, the more consequent damage to the highway, as well as danger to the traveller and it is for these reasons, among others, in addition to the police regulations

that graduated fees are required of trailers of greater or lesser size or weight.

It is the manifest intent of the legislature that the public, as well as public property, be protected by the license requirements and that it is a privilege accorded by statute and not a right for the user to operate a trailer upon the highway of the State on the payment of the license fee provided by statute unless the trailer be of such minor size or weight as to be negligible.

It is, therefore, our opinion that the legislature clearly intended that trailers with a weight of 1,000 pounds or more, regardless of loading capacity, be licensed.

MOTOR VEHICLE DEPARTMENT: GOVERNOR'S PARDON: (Section 3812) Power of pardon granted to the Governor by the statutes, does not extend to any power of suspension provided by the Legislature.

February 9, 1939. *Motor Vehicle Department. Attention: Mr. Tate.* Your letter of February 7, 1939, requesting an opinion as to the following matter, has come to the writer for attention.

"We would like an opinion as to whether a Governor's pardon would relieve this department of the responsibility of Section 243 of Senate File 181 Acts of the 47th General Assembly."

Section 243 of Chapter 134 of the Acts of the 47th General Assembly, is as follows:

"*Period of Suspension or Revocation.* The department shall not suspend a license for a period of more than one year and upon revoking a license shall not in any event grant application for a new license until the expiration of one year after such revocation."

Section 16 of Article IV of the Constitution of Iowa, provides:

"*Pardons—Reprieves—Commutations.* The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. Upon conviction for treason, he shall have power to suspend the execution of the sentence until the case shall be reported to the General Assembly at its next meeting, when the General Assembly shall either grant a pardon, commute the sentence, direct the execution of a sentence, or grant a further reprieve. He shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law; and shall report to the General Assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and the reasons therefor; and also all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted."

Section 3812 of the 1935 Code of Iowa, is as follows:

"*Reprieves and Pardons.* Nothing in chapter 188 shall be construed as impairing the power of the governor under the constitution, to grant a reprieve, pardon, or commutation of sentence in any case."

Reviewing the Governor's power of pardon, it is to be observed that he may remit fines and forfeitures. It has been held that under a provision such as this, the revocation or suspension of a license is not a forfeiture.

"A proceeding, authorized by Acts 31st Leg. c. 17, for the revocation by the Comptroller of Public Accounts of liquor licenses for violations of the law by liquor dealers is not a suit by the state for a 'forfeiture' or 'penalty', within Const. art. 5, Sec. 8, * * *"

2. Words and Phrases, Second Series, p. 613

The words of the Constitution, to-wit, "remit * * * forfeitures" indicate that such forfeitures are in the nature of refunds of money, and it has been so held in the case of bondsman *State vs. Beebee*, 87 Iowa 636.

Section 3812 is a statute properly passed by the Legislature and its intent is clear. A license shall be suspended or revoked and a new license may not be issued until one year after its revocation. Our Supreme Court in the case of *State of Iowa vs. Forkner*, 94 Iowa 1, speaks very clearly upon the Governor's power by pardon to interfere with the Legislature's power of suspension.

"The power to pardon must not be confounded with the power of dispensation or suspension. The former is undoubtedly a prerogative of the executive, while the latter must be exercised by the legislative department of the government. The student of history will remember that one of the main causes for the English revolution of 1688 was the unlawful and corrupt assumption by James II of the power of dispensation or suspension of the test-oath statutes. In order that his course might receive judicial sanction, he corrupted his courts by the removal of those judges whom he could not control, and appointed in their places hirelings who would do his bidding. The people rebelled, and one of the first statutes passed after the revolution (1 W. & M. St. II. c. 2) declared that the pretended power of suspending or dispensing with laws, or the execution of laws, by legal authority, without the consent of parliament, is illegal. See 1 Blackstone Comm., p. 142. Blackstone declares that 'not only the substantial part of judicial decisions of the law, but also the formal part, or method of procedure, cannot be altered but by parliament; for, if once these outworks were demolished, there would be an inlet to all manner of innovations in the body of the law itself.' In view of these historical facts, it certainly cannot be contended that the executive has power to bar proceedings under, or suspend the operation of, any of our laws. Should he attempt to exercise such powers, it would as certainly lose him his title as it did James II his crown."

We therefore reach the conclusion that the power of pardon granted to the Governor by the statutes does not extend to any power of suspension provided by the legislature. It is, consequently, our opinion that Section 3812, being a power of suspension, will not by the governor's pardon, relieve the Motor Vehicle Department of the responsibility imposed by Section 243, Chapter 134, of the Acts of the 47th General Assembly.

CONSERVATION COMMISSION: PUBLICATION OF NOTICE: NOTICE: DAMS OR SPILLWAYS: (Chapter 87-E1) Notice by publication of sufficient time to apprize the parties of the hearing is all that is necessary in an action in rem. Section 1828-e3 of Chapter 87-E1 of the 1935 Code of Iowa is constitutional in that it is proper notice for a matter in rem, provides sufficient time for all parties to be prepared to be heard, is within the contemplation and authority of the legislature and is, therefore, sufficient to meet the definition of due process of law.

February 9, 1939. *Iowa State Conservation Commission, Des Moines, Iowa. Attention: Mr. Hutton.* Your letter of January 27th relative to the following matter has come to the writer for attention.

"We would appreciate it very much if you would review this Chapter (87-E1 and particularly Section 1828-e3) and advise us whether you think the provisions set forth therein would be constitutional."

For the purpose of this opinion, those parts of Chapter 87-E1 of the 1935 Code of Iowa pertinent to the question, are set forth as follows:

"1828-e1. *Resolution of Necessity.* Whenever, in the opinion of the state conservation commission, it is necessary and desirable for it to erect a dam or spillway across a stream or at the outlet of a lake, or to alter or reconstruct an existing dam or spillway, so as to increase or decrease its permanent height, or to permanently affect the water level above the structure, it shall proceed with said project by first adopting a resolution of necessity to be placed upon its records, in which it shall describe in a general way the work contemplated."

"1828-e3. *Hearing—Damages.* After said approval the commission, if it wishes to proceed further with the project, shall, with the consent of the execu-

tive council, fix a date of hearing not less than two weeks from date of approval of the plan. Notice of the day, hour and place of hearing, relative to proposed work, shall be provided by publication at least once a week for two consecutive weeks in some newspaper of general circulation published in the county where the project is located, or in the county or counties where the water elevations are affected, under the tentative plan approved. The last of such publication or publications shall not be less than five days prior to the day set for hearing. Any claim by any persons whomsoever, for damages which may be caused by said project shall be filed with the commission at or prior to the time of the hearing provided herein."

Is the notice as provided in the latter section, constitutional?

Amendment 5 to the Constitution of the United States is in part as follows:

"No party shall * * * be deprived of * * * property, without due process of law; * * *"

Section 9, Article I of the Constitution of Iowa provides:

"* * * but no person shall be deprived of * * * property, without due process of law."

Due process of law has been defined as follows:

"The constitutional guaranty of 'due process of law' * * * is not intended to interfere with the government in determining by what remedies or process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for this purpose gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

2 Words and Phrases, Second Series, 167

In re Francis, 136 Fed. 912, citing *Iowa Central Railroad Co. vs. Iowa*, 16 Sup. Ct. 334, 160 U. S. 389, 40 L. Ed 467

The Supreme Court of Iowa has never passed upon the notice in question here, Chapter 87-E1 and the provisions thereunder being of comparatively recent origin. A direct analogy, however, can be drawn between the notice in question and Section 7441 of Chapter 353 of the 1935 Code of Iowa relating to drainage districts. Section 7441 is as follows:

"*Service by Publication—Proof.* The notice provided in Section 7440 shall be served, except as otherwise hereinafter provided, by publication thereof once each week for two consecutive weeks in some newspaper of general circulation published in the county, the last of which publications shall be not less than twenty days prior to the day set for hearing of the said petition. Proof of such service shall be made by affidavit of the publisher, and be on file with the auditor at the time the hearing begins."

It is to be observed that both sections provide for notice by publication once each week for two consecutive weeks in a newspaper of general circulation in the County, Section 1828-e3 providing, however, that the final notice may not be less than five (5) days prior to the hearing, whereas Section 7441 provides that final notice shall not be less than twenty (20) days prior to the hearing.

Both Chapter 87-E1 and Chapter 353 provide for proceedings against the property and are, therefore, in rem.

34 Corpus Juris 1171, p. 1660.

We consequently have in the notice required by Section 7441 a direct parallel to the notice required by Section 1828-e3, both providing a like notice by publication for a like proceeding in rem.

The general rule is:

"While actual notice or personal service of process is not required, yet in the absence of actual notice, there must be such published or constructive notice or proclamation as the law requires in the particular case, by which persons having interests to be affected are supposed to be informed of the proceeding."

34 Corpus Juris 1172, paragraph 1661.

The Supreme Court has passed upon the constitutionality of the notice provided in Section 7441. *Johnson vs. Story County*, 148 Iowa 539, is an early case:

"The one question presented for our consideration is whether the statute referred to is unconstitutional because it provides for notice by publication only even as against residents of the county who are available for personal service. We can not hold an enactment of the Legislature unconstitutional unless it is plainly and palpably so * * * we have never placed a limitation upon the power of the Legislature to prescribe the kind of notice and method of service. In the matter of assessment of benefits for such improvements, notice by publication has been the usual method prescribed by statute, and the power of the Legislature to prescribe such method for such purpose has seldom been questioned. On that particular question the authorities are quite universal in support of a notice by publication."

The Court in *Taylor vs. Drainage District No. 56*, 167 Iowa 43, in reviewing the authorities at length, states:

"The main question involved is whether the notice by publication was sufficient to meet the requirements of the Constitution in exacting that the property of plaintiffs might not be taken without due process of law * * *.

The main contention of appellants is that the notice was not adequate. That notice by publication is sufficient in cases like this was determined in *Johnson vs. Story County*, 148 Iowa 539, and also in *Collins vs. Board of Supervisors*, 158 Iowa 322. These decisions are in harmony with those of other states, and the Supreme Court of the United States. *Wright vs. Davidson*, 181 U. S. 371.

As said in *Tyler vs. Judges of the Court of Registration*, 175 Mass. 71 (55 N. E. 812, 51 L. R. A. 433):

'Looked at either from the point of view of history or of the necessary requirements of justice, a proceeding in rem * * * may be instituted and carried to judgment without personal service upon claimants within the state, or notice by name to those outside of it, and not encounter any provision of either Constitution. Jurisdiction is secured by the power of the court over the res.'

The Legislature having been given the power by the Constitution to appropriate property for the public use, upon the payment of adequate compensation, the authority to authorize the proceedings by which such appropriation shall be made necessarily is implied. Whatever these may be, the owners from whom the appropriation is to be made must have notice sufficient to apprise them what is to be done, and for sufficient time to afford them the opportunity to have a hearing before a competent tribunal. Such notice may be by publication, but for how long a time before the hearing? This is largely a matter of legislative discretion * * *

It follows that the statute quoted is not in conflict with that portion of the fourteenth amendment of the Constitution of the United States, guaranteeing to every citizen equal protection, and prohibiting the taking of property without due process of law.

And this ruling was affirmed by the United States Supreme Court in the case of *Emma Taylor, Administratrix of Frank Taylor, Deceased, and John P. Kirby, Plaintiffs in Error, v. Drainage District Number Fifty-six of Emmet County, Iowa, et al.*, 244 U. S. 644.

Goeppinger vs. Boards of Supervisors, et al., 172 Iowa 30, again affirms the rule as follows:

"Appellants' third point, that the statute providing for the establishment of drainage districts upon notice by publication is unconstitutional, as authorizing the taking of property without due process of law, has been determined against appellants' contention and is not now an open question of this state."

The Court in *Board of Supervisors vs. Incorporated Town of Dakota City, et al.*, 194 Iowa 1113, states:

"It is contended that the notice was not served *personally* on the town clerk. Section 1989-a3 (Now Section 7441) provides:

'Which notice shall be served, except as otherwise hereinafter provided, by publication thereof once each week for two consecutive weeks in some newspaper of general circulation published in the county.'

The notice was served in accordance with the statute. No other provision is made for service than by publication, and that method was pursued. Personal service is not required."

There can be no question in view of the above decisions that the requirement of due process of law is met by the notice provided in Section 1828-e3. It is clearly the rule in Iowa, as elsewhere, that a notice by publication of sufficient time to apprize the parties of the hearing, is all that is necessary in an action in rem.

We are, therefore, of the opinion that Section 1828-e3 of Chapter 87-E1 of the 1935 Code of Iowa, is constitutional in that it is proper notice for a matter in rem, provides sufficient time for all parties to prepare to be heard, is within the contemplation and authority of the legislature and is, therefore, sufficient to meet the definition of due process of law.

INSURANCE PREMIUMS: WORKMEN'S COMPENSATION INSURANCE PREMIUMS: The premiums paid for compensation insurance are for the protection of the county as a whole and can legally be paid only from the General Fund.

February 9, 1939. *Hon. E. B. Shaw, County Attorney, Oelwein, Iowa:* We have your letter of February 6 in which you ask for an opinion from this Department on the following:

"The writer has been asked by the County Engineer and Board of Supervisors of this County for an opinion on the question of whether the cost to Fayette County of Workmen's Compensation Insurance on employees working for the County on Road Construction and Maintenance should be paid out of the County Road Fund or out of the County General Fund.

"At times in the past, the cost of such insurance has been paid by this County out of the Road Fund, and the State checkers have protested and have compelled the County to make transfer of the amount of the premium so paid from the General Fund to the Road Fund to reimburse the Road Fund."

In Chapter 24 of the Code of Iowa 1935, as amended, Section 369 provides:

Definition of terms. As used in this Chapter and unless otherwise required by the context:

1. The word "municipality" shall mean the county, city, town, school district and all other public bodies or corporations that have power to levy or certify a tax or sum of money to be collected by taxation, but shall not include any drainage district, township, or road district.

Section 370 provides:

No municipality shall certify or levy in any year any tax on property subject to taxation unless and until the following estimates have been made, filed and considered, as hereinafter provided:

1. The amount of income thereof for the several funds from sources other than taxation.
2. The amount proposed to be raised by taxation.
3. The amount proposed to be expended in each and every fund and for each and every general purpose during the fiscal year next ensuing.
4. A comparison of such amounts so proposed to be expended with amounts expended for like purposes for the two preceding years.

Section 380 provides that:

No greater tax than that so entered on the record shall be levied or collected for the municipality proposing such tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any

specific purpose than the amount estimated and appropriated therefor, except as provided in Sections 373, 381 and paragraph 4 of Section 5259.

Section 382 provides that:

The cost of publishing notices and estimates required by this Chapter, and the actual and necessary expense of preparing the budget shall be paid out of the general funds of each municipality respectively.

From a perusal of the foregoing sections, it appears to us that special funds must be created for special purposes and can be used for nothing else so long as it remains a special fund.

The premiums paid for compensation insurance are for the protection of the county as a whole and can legally be paid only from the general fund.

JURISDICTION OF SAC AND FOX INDIANS: CRIMES COMMITTED BY TRIBAL OR OTHER INDIANS: PROSECUTION OF SAC AND FOX INDIANS: District court of Tama County has jurisdiction to hear cases against these Indians. Treaty does not prevent state courts from exercising jurisdiction of crimes either by said Indians or others, committed in any part of the state.

February 10, 1939. *Mr. George H. Struble, County Attorney, Toledo, Iowa:* This is in answer to your letter of the 8th inst. wherein you ask our opinion relative to state courts exercising jurisdiction of crimes committed by Indians off the Tama Indian Reservation. It appears that one Sam Peters and William Snow had possession of 73 catfish and some carp, such number being in excess of the limit provided by law. These fish were in Peters' Ford sedan in back of the front seat in burlap sacks and baskets. The car containing the fish was parked in front of the Beehive Store in Tama, Iowa, the said town being located off the reservation. It appears further that the fish showed evidence of having been recently speared. We are abidingly of the opinion that these two Indians may be prosecuted in the state courts of your county.

Chapter 110, Acts of the 26th General Assembly, provides:

"Jurisdiction of the Sac and Fox Indians residing in Iowa * * * be and the same is hereby tendered to the United States * * *".

Said chapter further provides:

"Nothing contained in this act shall be so construed as to prevent on any of the lands referred to (Indian reservation) * * * courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon, either by said Indians or others, or of such crimes committed by said Indians in any part of this state. * * *"

In Volume I, "Indian Affairs" by Klapper, we find on page 598 the following:

"That the United States hereby accepts and assumes jurisdiction over the Sac and Fox Indians of Tama County in the State of Iowa, and of their lands in said state as tendered to the United States by the act of the Legislature of said state, passed on the 16th day of January, 1896, subject to the limitations therein contained. * * *"

(Act of Legislature referred to is Chapter 110, hereinabove quoted from.)

In 31 Corpus Juris 539, in paragraph 130 it is said:

"The state courts have exclusive jurisdiction over crimes committed by tribal or other Indians within the state and outside the limits of any Indian reservation where there are no statute or treaty provisions granting or retaining jurisdiction in favor of the United States." (Read also the remainder of this paragraph.)

In the United States Code, Ann. Title 18, Criminal Code and Criminal Procedure, paragraph 541 to end, it is said in paragraph 548, sub-section 9, dealing with offenses by Indians outside of reservations:

"State courts have jurisdiction to punish an Indian for an offense committed off the reservation. Citing the following cases:

People ex rel. Schuyler v. Livingstone, 205 N. Y. S. 888;
State v. Little Whirlwind, 22 Mont. 425;
State v. Big Sheep, 243 Pac. 1067;
Pablo v. People, 46 Pac. 636 (Colo)."

We have made diligent search and can find no treaty or statute militating against the opinion hereinabove expressed. We reach the conclusion, therefore, that the District Court of Tama County has jurisdiction to hear and determine the case against the two Indians referred to.

HOSPITALIZATION OF INDIGENT PATIENTS: LEGAL SETTLEMENT: County would be liable for care of a patient at university hospital (even though patient has not a legal settlement in that county) in event such county's quota was exhausted in excess of ten per cent.

February 13, 1939. *Mr. J. F. Wilson, County Attorney, Sac City, Iowa:* This will acknowledge receipt of your letter of the 9th inst., requesting our opinion on the following proposition:

If a patient is sent to the Iowa City State Hospital and the quota is exhausted in excess of ten per cent as referred to in Section 4018-f1, is the county, wherein the patient is actually residing but wherein he has not a legal settlement, liable to the state for such care?

Our answer to this inquiry is in the affirmative. Nowhere in Chapter 199 (providing for medical and surgical treatment of indigent persons) is the term "legal settlement" employed. Reading Section 4018-f1, we find that the same provides:

"Subject to subsequent qualifications in this section, there shall be treated at the university hospital during each fiscal year a number of committed indigent patients from each county which shall bear the same relation to the total number of committed indigent patients admitted during the year as the population of such county shall bear to the total population of the state * * *. If the number of patients *admitted from any county* shall exceed by more than ten per cent the county quota * * *, the charges and expenses of the care and treatment of such patients in excess of ten per cent of the quota shall be paid from the funds of such county * * *."

You will note that this section contains this phraseology, "If the number of patients admitted from any county". Thus you will notice that the county from which the patient was admitted is the one clearly referred to when it is said in the next sentence, "shall be paid from the funds of such county". From the funds of what county is a pertinent inquiry. Clearly "such county" refers to the county from where the patient was admitted. This becomes particularly clear when we read Section 4005, wherein it is said:

"Any adult resident of the state may file a complaint in the office of the clerk of any juvenile court, charging that any legal resident of Iowa residing in the county where the complaint is filed * * *."

This chapter has decidedly humane and beneficent purposes and we believe it was the intention of the Legislature that indigent persons should receive both medical and surgical care and were not to be subjected to controversy in relation to legal settlement. Many cases could well be imagined where, if the question of a person's legal settlement were to be determined before he could be sent to the university hospital, the malady with which he was afflicted would cause his death long before any relief could be given him.

It is our conclusion, therefore, that in the case referred to your county would be liable for the care of a patient at the university hospital in the event that your county's quota was exhausted in excess of ten per cent.

LIABILITY OF COUNTY FOR CARE OF PATIENT: LEGAL SETTLEMENT: LEGAL RESIDENCE: The county of patient's legal settlement is liable for the expenses of care and support of patient in Oakdale Sanatorium regardless of his legal residence.

February 13, 1939. *Mr. J. F. Wilson, County Attorney, Sac City, Iowa:* This will acknowledge receipt of your letter of the 9th inst. requesting the opinion of this department relative to the liability of Sac County for the expense incident to the care of one X in the Oakdale Sanitarium, said X being a legal resident of Sac County but having a legal settlement in Ida County.

It is our opinion that Ida County, the county of his legal settlement is liable for the expenses of care and support of this patient in the Oakdale Sanatorium.

Section 3399, Code of Iowa, 1935, provides:

"Each county shall be liable to the state for the support of all patients from that county to the state sanitarium. The amounts due shall be certified by the superintendent to the state comptroller who shall collect the same from the *counties liable*, at the times and in the manner required for the certification and collection of money from counties for the support of insane patients."

Therefore, in order to answer this question it is necessary to consult Chapter 178, relating to the support of insane. Reading Section 3582 of said chapter, we find that the commission of insanity shall determine and enter of record whether the legal settlement of said person is in the county of the residence of said commissioners; in some other county of the state; in some foreign state or country; or unknown. Section 3583 provides:

"If such legal settlement is found to be in another county of this state, the commission shall, as soon as said determination is made, certify such finding * * *, and thereupon said superintendent shall charge the expenses * * * to the county so certified * * *."

Section 3592 provides for the determination of the legal settlement of the patient. Section 3593 provides that when such legal settlement is determined in said action, judgment shall be entered against the county of such settlement in favor of any other county. Section 3600 provides that each superintendent of a state hospital shall certify to the state comptroller the amount not previously certified by him due the state from the several counties having patients chargeable thereto.

In the case of *State v. Story County*, 207 Iowa 1117; 224 NW 232, it was held that a resident of a county who has no legal settlement therein continues, in case of his commitment to a state hospital for insane, a legal charge upon that particular county of the state wherein he has such legal settlement and such charge continues until, by the lapse of one year without notice to depart, his residence ripens into a legal settlement after which he becomes a legal charge upon the county wherein he has both his residence and legal settlement, (under new law only one notice being necessary and affidavit is filed with Board of Supervisors).

See *Iowa County v. Amana Society*, 243 NW 299; 214 Iowa 893. In the Annotations of the Code of Iowa, 1934, this case appears under Chapter 169, State Sanatorium. While it involves the liability of the Amana Society for

the care of an insane person, we think it supports our opinion that the county of legal settlement is liable for the care of patients at Oakdale.

It follows, from what we have said, that we reach the conclusion that the county of legal settlement is liable for the care of patients at the tuberculosis sanatorium.

TRUCKS: NONRESIDENTS: SIGNS: LICENSE: A Nebraska Company engaged in the business of sign erection and servicing thereof in Iowa, although authorized to do business in Iowa, is required to pay the same license fee for their trucks as is required of like vehicles owned by residents of the State.

February 16, 1939. *Motor Vehicle Department. Attention: Mr. Tate.* Your letter of January 30, 1939, with enclosure and in which you inquire as to the following matter, has come to the writer for attention.

A Nebraska Company authorized to do business in Iowa erects road signs in towns along the highways of Iowa. These signs are manufactured in Nebraska and brought into Iowa and erected from motor trucks maintained in Nebraska and owned by the Company. Such trucks are also used for servicing such signs after their erection. Must such trucks be licensed in Iowa?

For the purpose of this opinion, Section 86, Chapter 134 of the Acts of the 47th General Assembly is set out in full:

"*Nonresidents employed in state.* Every nonresident, including any foreign corporation, engaged in remunerative employment or carrying on business within this state and owning and operating any motor vehicle, trailer, or semi-trailer 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."

It is to be observed that the words of the statute are free from ambiguity and it is clearly the intention of the Legislature that any person or foreign corporation who receives remuneration because of the operation of their motor vehicles in Iowa shall pay the same fee as residents of the State. It is clear that this Company is authorized to do business in Iowa and does perform such business, as well as receive remuneration by virtue of the operation of its motor trucks within the State. Surely such business and its remuneration falls within the contemplation of the statute and it is manifestly not such interstate commerce as to remove it from the operation of the law.

We are, therefore, of the opinion that the motor vehicles engaged in such sign erection business must pay the same fee as required of like vehicles owned by residents of the State.

HOSPITAL: TRUSTEES: ELECTION: (Clarinda Hospital) In view of the fact tnat the next election is on March 27, 1939, although the hospital is not to be completed until June 18, 1939, it would seem that it would be a needless expense to require a special election for the purpose of electing trustees for the hospital, as such special election would follow the regular election by but a few months. In addition, we can find no authority for the appointment of hospital trustees by the City Council pending their election. As a practical solution, the hospital trustees should be chosen at the March, 1939 election.

February 16, 1939. *Mr. Homer S. Stephens, City Attorney, Clarinda, Iowa:* Your letter of February 15, 1939, requesting an opinion as to the following matters, has come to the writer for attention.

The Clarinda Hospital is now being built and will be completed about June 18, 1939, and ready for operation July 1, 1939.

"We would like to have a legal opinion on the following questions:

1. Can the City Council operate this hospital for a period of six months, and then appoint a board of trustees to manage the hospital until the next municipal election, which will be in March, 1941.

2. Is it required that the City Council call a special election for the selection of these trustees after the completion of the hospital, or could the trustees be appointed by the council to serve until the next subsequent municipal election, which would be in March, 1941.

3. Is the council required to call an election for trustees at the coming election to be held on March 27, 1939. (This date, of course, will be prior to the completion of the hospital.)"

Chapter 300 of the 1935 Code of Iowa, is entitled Municipal Hospitals and relates specifically to their operation by boards of trustees. Section 5867 of such chapter is as follows:

"*Trustees.* Cities may by ordinance provide for the election, at a general, city or special election, of three hospital trustees, whose terms of office shall be six years; but at the first election, three shall be elected and hold their office, respectively, for two, four, and six years, and they shall by lot determine their respective terms."

Reviewing Chapter 300 and the decisions relative thereto, we find no indication as to a solution of the problems you present. It is, therefore, necessary that we look to the intent of the Legislature for the purpose of construing such chapter and particularly Section 5867.

Section 64 of the 1935 Code of Iowa, provides:

"*Common-law rule of construction.* The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

With this instruction in view, it is necessary that we inquire as to the practical solution which might be made in conformity with the statute.

The statute clearly contemplates that a board of three trustees shall be available to operate the hospital from time it is completed, as in this case June 18, 1939. Such trustees may be chosen at either a general, city or special election and act without compensation or bond. Inasmuch as you may make the selection of the hospital trustees at the March, 1939 election, it is reasonable to interpret the Legislature's intention to be that the trustees be chosen at such election, they to undertake their duties immediately upon the completion of the hospital and its availability for use. It is our thought that it would be a needless expense to require a special election for the purpose of selecting such trustees and such special election would follow the regular election by but a few months at the most. In addition, we can find no authority in a situation of this kind for the appointment of hospital trustees by the City Council pending their election nor do we feel that there is any necessity for such procedure.

We are, therefore, of the opinion that in conformity with statute and as a practical solution to the problem you present, the hospital trustees should be chosen at the March, 1939 election.

TAXATION: BANK: CAPITAL STOCK: (Section 7004-g1) Under Section 7004-g1 of the 1935 Code of Iowa, taxes on the capital stock of a bank closed and liquidated without receivership under the management of the Federal

Deposit Insurance Corporation, should be remitted by the Board of Supervisors.

February 16, 1939. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* We have received your letter of February 1st requesting an opinion upon the following proposition:

"The Home Savings Bank of Des Moines, Iowa was closed and liquidated to a large extent by the Federal Deposit Insurance Corporation making arrangements under which the Capital City State Bank took over certain assets and assumed the deposit liability. There was no receivership and the liquidation of the bank was under the management of the Federal Deposit Insurance Corporation. The question is whether or not, under Section 7004-g1 of the 1935 Code, taxes on the capital stock of the Home Savings Bank should be remitted by the Board of Supervisors."

Section 7004-g1 of the 1935 Code provides as follows:

"*Stock of insolvent bank—remission.* Whenever a bank operated within the state has been heretofore or shall hereafter be closed and placed in the hands of a receiver, the board of supervisors shall remit all unpaid taxes on the capital stock of said bank."

Section 63, subsection 2 of the 1935 Code reads as follows:

"*Rules.*

* * *

2. *Words and phrases.* 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."

In applying the above rules to the construction of the words and phrases of Section 7004-g1, we should first define the phrase, "whenever * * * a bank * * * shall be closed. * * *" Obviously, the Legislature meant the word "closed" in the sense of terminated. It meant when the bank would cease carrying on a banking business, or when its affairs would be wound up, or when it would be liquidated. *Words and Phrases*, Vol. 2, page 1231.

The next clause, "and placed in the hands of a receiver", is descriptive of the kind of closing that will warrant the remission of the capital stock tax. Quite obviously, the closing of a solvent bank by a sale to another banking institution, or in any other manner that would not involve liquidation, was not contemplated here. By the same reasoning, the intent of the Legislature was to provide for the remission of the tax in all cases of a closing and liquidation. It was a closing of a bank because of insolvency that warranted the remission of the capital stock tax on the theory, no doubt, that this stock, although assessed for taxes, was actually valueless. Although the conjunctive "and" is used, it is a familiar rule of statutory construction that this can be changed to "or" if thereby the intent of the Legislature is carried out.

In *State v. Brandt*, 41 Iowa 593 at page 637 it is said:

"It is conceded by the petition for rehearing, and the authorities cited prove it, that when it is necessary to harmonize the provisions of a statute, the word 'or' may be changed to 'and'—that is, that the conjunctive may be changed for the disjunctive, and *e converso*. Now, by making this change the whole section becomes harmonious, and effect is given to all its language.

In the case of *Eisfeld v. Kenworth, et al.*, 50 Iowa 389 such a construction was made. In that case a statute provided that stockholders could be held liable whenever "there is a failure to comply substantially with the requisitions of the statute in regard to organization and publicity." The petition merely

showed failure to comply with the statute in regard to publicity. The court easily read the word "and" and "or" in interpreting the statute and stated:

"As to the first question we have to say that it seems to us unreasonable to hold that the Legislature intended that the corporators might, with impunity, omit either organization or publicity, and would be liable only in case they omitted both. The use of the word 'and,' if taken in its grammatical sense, as a conjunctive, would favor the construction for which the appellees contend. But the word 'and' may be read as 'or,' if other considerations sufficiently potent require it. *State v. Brandt*, 41 Iowa 593 (615); *State v. Smith*, 46 Iowa 670. We think it should be so read in this case."

Applying these rules of construction to the statute in question we would be of the opinion that any closing of an insolvent bank followed by liquidation would be sufficient for the remission of the tax. It is the destruction of the value of the assessed stock that warrants remission of the stock tax and obviously, there was no intent on the part of the Legislature to make the right to secure the remission of the tax contingent upon the manner of liquidation. We think the word "and" in this statute could be construed as "or" and the closing of the bank or the receivership would warrant the remission of the tax.

This seems especially true because under the Iowa statute a bank could be closed and the bank liquidated by the Superintendent of Banking without any receivership, see Section 9238, also *Leach v. The Exchange State Bank*, 200 Iowa 185. To hold that receivership was necessary before Section 7004-g1 could operate would cause a discrimination between the banks being liquidated by a court receiver and those being liquidated by a liquidating agent under Section 9238.

For the foregoing reasons, we are of the opinion that the word "and" in this Section 7004-g1 can be interpreted as the disjunctive "or" and a closing that results in liquidation by a liquidating agent or agency other than a receiver would be within the provisions of this act and the tax should be remitted.

TAXATION: REFUND: REAL ESTATE ASSESSMENT: No refund should be made to the claimant asking for a refund of tax on the ground that real estate assessment was raised without notice to claimant as provided in Section 7111 of the Code of 1935.

February 16, 1939. *Mr. Glenn L. Eichhorn, County Attorney, Montezuma, Iowa:* You have asked for an opinion from this department with regard to the claim of Bessie Vest who bases her claim for a refund of tax on the ground that her real estate assessment was raised without notice to her, as provided in Section 7111 of the Code of 1935.

We are of the opinion that this tax should not be refunded, under the provisions of Section 7235, as "erroneously or illegally exacted or paid." Your own excellent analysis of the proposition and the cases you cite support the conclusion that no refund should be made under Section 7235.

The case of *In Re Kauffman's Estate*, 104 Iowa 639 disposes of the claimant's point that the refund should be made because she did not receive notice. There the court said:

"It is true, that Section 1356 of the Code provides that the person assessed shall be informed in writing of the valuation placed upon his property, and that he may appear before the board of review if aggrieved. This imposes a duty on the assessor. Its omission, however, will not invalidate the assessment. The owner is not prejudiced unless the valuation is excessive, or property is erroneously included. Mere irregularities, not resulting in injury, will not be permitted to defeat the collection of taxes justly due."

The case of *McDonald v. Clarke County*, 196 Iowa 646 is directly in point. The following quotations state the facts, and holding of the court in that case:

"According to the allegations of the petition, the assessed property was worth not to exceed $1,000, whereas it was assessed by the assessor at a valuation of $4,000. The assessor did not call upon the plaintiff, nor did he notify the plaintiff in any manner of the assessment. The plaintiff accordingly did not sign the assessment roll, nor did the assessor give her a written notice thereof, both as required by statute. Plaintiff did not discover the fact that she was thus assessed until after the meeting of the board of review, and until after the assessment had been returned to the auditor and entered upon his books."

"The mere fact, of itself, that the assessment is erroneous or excessive does not entitle the complainant to relief in equity. We have held, in effect, that the foregoing requirements of the statute are directory, rather than mandatory, and that the breach of these requirements does not, of itself, render an assessment void, *in the absence of actual prejudice*."

On the authority of the above cases, which were cited in your brief, we are of the opinion that no refund of the complainant's taxes should be made.

OLD AGE ASSISTANCE: CASKETS: BURIAL EXPENSES: Rule 3 made by the State Board of Social Welfare on July 8, 1938, regarding standard burial casket, in so far as it attempts to provide maximum specifications, is an illegal exercise of power by the Board and it should be amended by appropriate action and reference to maximum specifications eliminated.

February 16, 1939. *State Board of Social Welfare, Iowa Building, Des Moines, Iowa. Attention: Byron G. Allen, Superintendent Old Age Assistance Division:* You have asked this department to render an opinion with regard to a rule made on July 8, 1938, by the State Board of Social Welfare, which is described as rule 3, as follows:

"3. A standard burial casket, the specifications for which shall be—octagon end, three-panel, flat top, built of cypress, California redwood, or cedar lumber, covered with American or English crepe cloth, fully upholstered and fully lined, and trimmed with six short-bar handles; for the purpose of providing uniform services and merchandise, the specifications as herein fixed, are maximum as well as minimum, and funeral claims will not be approved or paid where any other type of merchandise is used."

Granting the Old Age Assistance Commission had authority to adopt rules and regulations to carry out the provisions of the act, still these rules must be reasonable and they should fairly reflect the legislative intent in the enactment of the law.

It is difficult to see how the above rule, in so far as it seeks to provide maximum specifications, could ever be successfully defended. What possible argument could be made to uphold the board's right to do anything more than prescribe minimum specifications. If the family of the deceased pensioner can secure better than the minimum specifications for $100.00, then surely the board should not complain. Under this rule the board could refuse to pay a claim on the ground that a better casket than the one described in Rule 3 was obtained. Such a result would be absurd.

We are of the opinion that Rule 3, in so far as it attempts to provide maximum specifications, is an illegal exercise of power by the Board and it should be amended by appropriate action and reference to maximum specifications eliminated.

MOTOR VEHICLES: DELINQUENT AUTO LICENSE: Should the Sheriff be unable to get a bid large enough to pay costs and the owner of truck not

be willing to waive the right to sale, on a truck to be sold for delinquent license fees and penalties, until waiver can be obtained there is nothing Sheriff can do.

February 17, 1939. *Mr. E. A. Fordyce, Assistant County Attorney, Cedar Rapids, Iowa*: This is in answer to your letter of the 28th ult., wherein you ask our opinion as to what procedure may be followed when a certain truck is sold for delinquent license fees and penalties, under the provisions of Sections 166 to 173, inclusive, of Chapter 134 of the 47th General Assembly, but are unable to get a bid sufficiently large enough to pay the costs and the owner not being willing to waive the right to sale, as provided in Section 174 of said chapter.

We are of the opinion that until the waiver provided for can be obtained there is nothing the sheriff can do. However, we call your attention to Section 163, Chapter 134, Laws of the 47th General Assembly, wherein it is said:

"The collection of all fees and penalties may be enforced against any motor vehicle or they may be collected by suit against the owner who shall remain personally liable therefor * * *".

BOARD OF SUPERVISORS: COUNTY ROAD FUND: CITY ASSESSMENT AGAINST COUNTY FOR IMPROVEMENT OF INTERSECTION: Oral statement of member of board does not bind county to pay assessment against county for intersection improvement out of county funds. Claim of Kanawha against county should be disallowed.

February 20, 1939. *Mr. Clark E. Lovrien, County Attorney, Britt, Iowa:* We have received your letter of the 15th inst., wherein you request our opinion relative to whether or not the town of Kanawha has a valid claim against Hancock County in the sum of $709.40, such sum being the cost of paving an intersection within said town, the said intersection being the one formed by primary highway III and Fifth Street. It appears that said highway runs down Main Street and the town, by levying a special assessment, paved from the edge of the state slab to the curb line.

The special assessment district runs from the north rail of the M. & St. L. railroad north on Main Street to the north boundary of Fifth Street, which crosses Main Street at right angles. Fifth Street is a Hancock County trunk highway, constructed and maintained by the county through the town of Kanawha.

It appears further that when the proposed improvement of Main Street was under consideration by the Council of Kanawha, one of the members of the Board of Supervisors orally told the Council that the county would pay for the intersection at Fifth Street with the exception, of course, of the state slab. The Council, relying upon this oral statement, proceeded with the improvement and levied an assessment against Hancock County for the intersection in the sum hereinbefore indicated.

The question is: May the Board of Supervisors legally pay this assessment out of the county road fund?

Our answer to this inquiry is in the negative. We find no statute that authorizes the payment for the improvement in question out of the county funds, and in any event the oral promise of one member of the board would not bind the county. The Board of Supervisors can act only as a unit. This was the holding in the case of *Emmet County v. Dally*, 216 Iowa 166. On page 169 it is said:

"That the act of the individual members of a public body, even though concurred in by a majority of its members, is not official or binding upon the municipality which they represent, is too well settled for doubt or debate."

See also *Young v. Black Hawk County*, 66 Iowa 465; *Rice v. Plymouth County*, 43 Iowa 136; *Ind. Dist. v. Wirtner*, 85 Iowa 387.

We, therefore, reach the conclusion that the claim of Kanawha against your county should be disallowed.

SHERIFF'S FEES: FEES FOR LODGING PRISONERS: Sheriff may not retain fees for lodging city and federal prisoners in excess of limitation of $250.00, fixed by law, and must account for any sum in excess of $250.00 to county.

February 20, 1939. *Mr. R. N. Johnson, Jr., County Attorney, Fort Madison, Iowa:* This is in answer to your letter of the 16th inst. wherein you ask the opinion of this department on the following proposition:

May the sheriff retain fees for *lodging* city prisoners and United States prisoners in excess of the limitation of $250.00 as fixed by Section 5191, sub-section 11, Code of Iowa, 1935.

Section 5191, sub-section 11, provides as follows:

"11. For boarding a prisoner, a compensation of twenty cents for each meal, and not to exceed three meals in twenty-four consecutive hours; and fifteen cents for each night's lodging. But the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of two hundred fifty dollars for any calendar year. * * *"

Section 5497, Code of Iowa, 1935, provides, in substance, that the jails in the several counties in the state shall be in charge of the respective sheriffs and used as prisons for the confinement of all persons committed for any cause authorized by law.

Sub-section three of said Section 5497, provides specifically that "The provisions of this section extend to persons detained or committed by authority of the courts of the United States, as well as of this state.

Section 5511 provides:

"All charges and expenses for the safekeeping and maintenance of prisoners shall be allowed by the board of supervisors, except those committed or detained by the authority of the courts of the United States, in which cases the United States must pay such expenses to the county."

Section 13965, Code of Iowa, 1935, permits a court of one county to commit a prisoner to the jail of another county at the expense of the first county.

Section 5772, Code of Iowa, 1935, permits cities and towns to commit prisoners to the county jail but they shall pay the county the cost of keeping such prisoners.

Code Section 5498 requires the sheriff to receive those lawfully committed and keep them until discharged by law. Section 5511 charges the Board of Supervisors and the county with the cost of maintaining prisoners, except United States prisoners.

It is a recognized rule of law that a public officer is entitled to only such compensation as the statute provides. The statute, 5191, allows the sheriff a maximum of $250.00 annually for *lodging* prisoners and as viewed this includes all prisoners committed, irrespective of from where or by which court these are committed. It is also a well settled rule of law that a public officer who demands compensation for public duty or official services must point out the law authorizing such payment. We find no statute authorizing the sheriff

extra compensation for *lodging* "foreign" prisoners. Section 5511 provides that the United States shall pay to the county the expense incident to the care of federal prisoners. Section 5772 provides that cities or towns shall pay to the county the expense of caring for city prisoners. There is no provision that such payment shall in any case be made to the sheriff. Under Section 5511, we believe it is contemplated that the United States Government should make payment of the expenses incident to the care of federal prisoners direct to the county auditor.

It follows from what we have said that we reach the conclusion that your sheriff may not legally retain the $600.00 for *lodging* city and federal prisoners, such sum being in excess of the $250.00 allowed by Section 5191. It is our opinion that your sheriff must account for these fees to Lee County.

DENTAL EXAMINERS: MEMBERSHIP: NATIONAL ORGANIZATION: FEE: Board of Dental Examiners may in its discretion maintain a membership in its National organization and such fee may be allowed, providing it does not exceed the sum of $200.00.

February 20, 1939. *Dr. Hardy F. Pool, Sec'y, Board of Dental Examiners, Mason City, Iowa:* Your letter of February 10, 1939, asking our opinion as to the following matters, has come to the writer for attention.

1. Does Section 2465-b1 of the 1935 Code of Iowa permit the Board of Dental Examiners to maintain a membership in its national organization?
2. Does such statute provide an appropriation for the membership fee providing such fee is not in excess of $200.00?

Section 2465-b1 of the 1935 Code of Iowa to which you refer is in part as follows:

"*National organization.* Each examining board may maintain a membership in the national organization of the state examining boards of its profession. There is hereby annually appropriated out of the funds in the state treasury not otherwise appropriated a sum sufficient to pay the fees necessary for each such state examining board to maintain membership in its national organization, but such sum shall not exceed two hundred dollars for any year * * *."

The Supreme Court has never interpreted this statute and it is necessary, therefore, that we examine it as directed by the legislature in Section 64 of the 1935 Code of Iowa.

"*Common-law rule of construction.* The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice."

Examining Section 2465-b1, it is clear that the legislature intended to extend to each examining board the privilege of maintaining a membership in its national organization. There can be no other possible construction of the statute and the first question must, therefore, be answered in the affirmative.

Reading the paragraphs of the section together, there can be no doubt but that the legislature recognized the advisability of the professional examining boards maintaining memberships in their national organizations and the benefits accruing to each board and its profession because of such membership, although the maintenance of such membership was placed in the discretion of the board. The language of the statute indicates that the legislature realized that the national organizations of professional boards provided certain benefits and services necessary to the efficient operation of the state boards and to the suitable performance of their duties. The legislature in delegating this

authority undoubtedly appreciated that such membership required certain fees and that such fees, though nominal and because of the natural resulting benefit of such membership, should be paid by the State. Because of the several boards of examiners which might maintain such memberships, it is readily to be seen that the legislature could not reasonably intend that the total of membership fees of all such professions should be included within the $200.00 limit, but it was their obvious purpose that such sum was intended to be a limit upon the fee any one profession should be granted for its membership fee.

We are, therefore, of the opinion that the Board of Dental Examiners may in its discretion maintain a membership in its national organization, and that such fee may be allowed, providing it does not exceed the sum of $200.00.

CERTIFICATE OF REGISTRATION: MOTOR VEHICLE ACT: It is legal to attach the certificate of registration and its container to the windshield in the upper right-hand corner but it is neither mandatory on the Motor Vehicle Department nor is it within their discretion to require its display in such position.

February 20, 1939. *Mr. Earl G. Miller, Secretary of State, Building:* Your letter of February 17, 1939, asking our opinion as to the following matters, has come to the writer for attention.

"Is it legal under the new Motor Vehicle Act, to attach the certificate and container referred to in Sections 63 and 203 thereof, to the windshield of the motor vehicle as provided in Section 462 thereof.

If it is legal to do so, is the duty of the Secretary of State and/or Commissioner of Motor Vehicles to enforce such provisions of the Act discretionary or mandatory."

For the purpose of this opinion, the following sections of Chapter 134 of the 1935 Code of Iowa, are set out:

"Sec. 63. *Registration card signed, carried, and exhibited.* Every owner upon receipt of a registration card shall write his signature thereon with pen and ink in the space provided. Every such registration card shall at all times be carried in the vehicle to which it refers and shall be displayed in the container furnished by the department. Such certificate container shall be attached to the vehicle in the driver's compartment so that same may be plainly seen without entering the car.

Sec. 462. *Windshields unobstructed.* No person shall drive any motor vehicle with any sign, poster or other nontransparent material upon the front windshield of such vehicle other than a certificate or other paper required to be so displayed by law, which shall be displayed in the upper right-hand corner."

Reviewing the above sections in the light of the legislature's intent, it is apparent that certificates of registration may be and all other papers required to be displayed by law must be placed in the upper right-hand corner of the windshield. Certain certificates, stickers and legal papers, other than certificates of registration, are required from time to time to be exhibited in the automobile by its owner and it is the apparent intention of the legislature that all such instruments must be displayed in the upper right-hand corner of the windshield. It was not the purpose of the legislature, however, to require that certificates of registration be placed there, and as long as such certificates of registration are plainly visible without entering the car they are legally displayed. Such certificate of registration could be displayed in the upper right-hand corner of the windshield at the discretion of the owner but it is not mandatory nor is it within the discretion of the Motor Vehicle Department to require it.

The statutes are designed to require all legal instruments requiring display except certificates of registration, in the right-hand corner of the windshield in order that the view might not be obstructed as a public safety measure. They do not prohibit the display of the certificate of registration there, nor do they require anything more than the attachment of such certificate somewhere within the car so that it may be plainly visible from the outside.

It is, therefore, our opinion that it is legal to attach the certificate of registration and its container to the windshield in the upper right-hand corner, but that it is neither mandatory on the Motor Vehicle Department, nor is it within their discretion to require its display in such position.

TOWNSHIP TRUSTEES: QUALIFICATION OF TOWNSHIP TRUSTEES: Trustees must qualify by subscribing to oath as provided by law within ten days—Section 1052, otherwise offices vacant, and proper officer or officers should forthwith fill same.

February 21, 1939. *Mr. Charles L. Johnston, County Attorney, Centerville, Iowa:* This is in answer to your letter of the 16th inst. wherein you ask whether two of your three trustees of Vermillion Township, now assuming to act as such, have legally qualified or whether there is a vacancy because of their failure to qualify by subscribing to the oath provided by law within ten days as provided by Section 1052.

It appears that two trustees were not candidates for re-election and that two other persons were elected for these two offices. The two persons elected, however, failed to qualify before noon of the second secular day in January and have since failed to take any steps to qualify under Section 1045. The incumbents have also failed to qualify within the time prescribed by law, the only qualification attempted being that of taking an oral oath before the chairman of the board of township trustees at their February meeting.

Section 1145 provides:

"Except when otherwise provided, every officer elected or appointed for a fixed term shall hold office until his successor is elected and qualified * * *."

Section 1146 provides:

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

1. * * *

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

Section 1052 provides:

"Persons elected or appointed to fill vacancies, and officers entitled to hold over to fill vacancies occurring through a failure to elect, appoint, or qualify, as provided in Chapter 59, shall qualify within ten days from such election, appointment, or failure to elect, appoint, or qualify, in the same manner as those originally elected or appointed to such offices."

In view of Section 1052 and Section 1146, sub-section 2, we are of the opinion that the two township trustees offices in question are vacant. We see no escape from the direct and positive provisions of Section 1146, sub-division 2.

We are aware of what has been said in many judicial pronouncements with reference to the acts of de facto officers, but with this question we feel we are not concerned.

It is our conclusion, therefore, that the offices in question are vacant and that the proper officer or officers should forthwith fill the same.

BOARD OF SUPERVISORS: CHIEF OF POLICE: EXPENSE INCIDENT TO APPREHENSION OF CRIMINALS: County should pay long distance telephone and telegraph charges and other expenses reasonably incurred by chief of police in apprehension of criminals charged with violation of state laws.

February 21, 1939. *Mr. John F. Burrows, Deputy County Attorney, Keokuk, Iowa:* This is in answer to your letter of the 14th inst. wherein you ask the opinion of this department relative to the following legal question.

The fact situation, as we understand it, is that for a number of years the chief of police of the City of Keokuk filed with the Lee County Board of Supervisors claims for long distance telephone and telegraph charges incurred in the apprehension of criminals in serving warrants on charges involving a violation of the state law. You advise us that the checkers have held that this is not a proper charge against the county. The City of Keokuk has a Superior Court. Under Section 10748, Code of Iowa, 1935, the expense of the salary of the Judge of said court is borne equally by the City of Keokuk and Lee County, Iowa.

Section 10719, Code of Iowa, 1935, provides:

"The city marshal shall be the executive officer of said (Superior) Court and his duties and authority in Court and in executing process shall correspond with those of the Sheriff of the county in the district court and with process from that Court * * *."

Section 10750, Code of Iowa, 1935, provides:

"The marshal shall receive the same fees and compensation for serving the process of said court and for other services required of the sheriff in the district court as the sheriff receives for like services, but in all criminal cases in said court the marshal shall receive the same fees for his services as are paid to the constable in Justice Court."

Section 13479, Code of Iowa, 1935, provides:

"Every officer or person who shall arrest anyone with a warrant or order issued by any court or officer or who shall be required to convey a prisoner from a place distant from the county jail to such jail on an order of commitment, shall be allowed the same fees and expenses as provided for in case of such services by the sheriff."

Section 5191, Code of Iowa, 1935, provides:

"The sheriff shall charge and be entitled to collect the following fees:
1. * * *
2. For each warrant served, two dollars, and the repayment of necessary expenses incurred, in executing such warrant, as sworn to by the sheriff; if service of the warrant cannot be made, the repayment of all necessary expenses actually incurred by the sheriff while attempting in good faith to serve such warrant."

Section 5191-a, Code of Iowa, 1935, provides:

"In all criminal cases where the prosecution fails, or where the money cannot be made from the person liable to pay the same, the facts being certified by the clerk or justice as far as their knowledge extends, and verified by the affidavit of the sheriff, the fees allowed by law in such cases shall be audited by the county auditor and paid out of the county treasury."

Section 10722, Code of Iowa, 1935, provides:

"In sections for the violation of city ordinances, if unsuccessful, the city shall pay all costs, the same as provided by law for the county in criminal actions prosecuted in the name and on behalf of the state."

Section 5191-a, cited above, places the burden of the expense of criminal prosecutions upon the county, subject to the limitation of Section 10722, which

might enter into contracts with manufacturers or distributors of motor vehicles who have unjustly terminated previous contracts with others in the county wherein such dealer proposes to do business. As a prohibition against this practice the legislature provided that no license may be issued to a motor vehicle dealer who has terminated a contract without just, reasonable and lawful cause unless ninety (90) days from the date of application for the contract have expired. It is clear that there must have elapsed a full ninety (90) days between the date of the application for the new contract and the final date of the cancellation period. If the dealer applicant desires to operate prior to the expiration of the ninety (90) day period, he may appear and show that the termination of the contract of the previous dealer was just and for cause, and the Motor Vehicle Department may therefore, in their discretion, issue a dealer license.

It is, therefore, our opinion that the ninety (90) days must elapse between the final termination of the contract and the date of the new application before such new applicant can be granted a dealer's license.

ASSESSMENT: FORECLOSURE: The holder of a mortgage turned in for assessment before foreclosure proceedings were commenced, should make his appeal to have the assessor remove it from his books to the board of review. In failing to get results he should then take his appeal to the district court as the board of supervisors has no jurisdiction to review an individual assessment.

April 24, 1939. *Mr. Ned B. Turner, County Attorney, Corning, Iowa:* We are in receipt of your letter of April 13th requesting an opinion on the following question:

"One John Anderson had a mortgage on certain real estate and the interest was in arrears during the year 1938. He turned the mortgage in to the assessor in March, but before the assessor's reports were completed, he was informed that the mortgagors did not intend to make any attempt to keep up the interest or pay the principal, so he commenced foreclosure action. At this time he tried to get the assessor to remove it from the books, failing which, he took it up with the local board of review and failing to get any action from them has now taken it up with the board of supervisors, contending that since he has started foreclosure he should not be assessed on the mortgage itself."

Under the provisions of Section 7132 of the 1935 Code of Iowa the person aggrieved by the actions of the assessor can appeal to the local board of review. It appears in the statement of facts that this is what Mr. Anderson did. He failed to get relief. His appeal should then be to the district court and not to the board of supervisors, so we feel that your opinion to the board of supervisors that they should take no action in the matter is correct as the board of supervisors would have no jurisdiction to review this individual assessment.

MOTOR VEHICLE: LICENSE: SUSPENSION: The Motor Vehicle Department has authority to suspend licenses upon recommendation of court even though the violation is not expressly set forth in Section 241; the court may not forward to the department the license of the person against whom it is making the recommendation of suspension as provided in Section 238, but may make recommendation or remove a stub from the license, but may not do both.

April 24, 1939. *Motor Vehicle Department. Attention: Mr. T. H. Vicker:* Your letter of April 14, 1939, asking our opinion upon the following matters, has come to the writer for attention:

"We would appreciate an opinion on these two points:

"1. Does the department have authority to suspend the license upon recommendation of the court, if the violation for which suspension is recommended is not expressly set forth in Section 241, Chapter 134?

"2. May the court forward to the department the license of the person against whom it is making the recommendation of suspension, as provided in Section 238, Chapter 134, and if not, may the court remove a stub and still recommend a suspension upon which the department may take favorable action."

For the purpose of this opinion, we quote at length Sections 237, 238 and 241 of Chapter 134 of the Acts of the 47th General Assembly, although it is to be observed that Section 232 to and including Section 246 of the sub-chapter entitled "Cancellation, Suspension or Revocation of Licenses" must be read together.

"Sec. 237. *Surrender of license—duty of court.* Whenever any person is convicted of any offense for which this chapter makes mandatory the revocation of the operator's or chauffeur's license of such person by the department, the court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses then held by the person so convicted and the court shall thereupon forward the same together with a record of such conviction to the department.

Sec. 238. *Record forwarded.* Every court having jurisdiction over offenses committed under this chapter, or any other law of this state regulating the operation of motor vehicles on highways, shall forward to the department a record of the conviction of any person in said court for a violation of any said laws, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted, and the department shall thereupon consider and. act upon such recommendation in such manner as may seem to it best. Upon conviction in all cases where recommendation of suspension or revocation is not made or is not mandatory, every court shall detach one stub of the license of such operator or chauffeur and forward same to the department.

"Sec. 241. *Authority to suspend.* The department is hereby authorized to suspend the license of an operator or chauffeur without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

"1. Has committed an offense for which mandatory revocation of license is required upon conviction;

"2. Is an habitually reckless or negligent driver of a motor vehicle;

"3. Is an habitual violator of the traffic laws;

"4. Is incompetent to drive a motor vehicle;

"5. Has permitted an unlawful or fraudulent use of such license; or

"6. Has committed an offense in another state which if committed in this state would be grounds for suspension or revocation."

Preliminary to a discussion of the matters concerned, it will be noted that to the Motor Vehicle Department is delegated the exclusive right of the revocation or suspension of operator's or chauffeur's licenses. No court upon conviction may revoke or suspend a license but under certain circumstances defined by statute, the department must upon conviction revoke a license and may under other circumstances prior to conviction or when the licensee is not before the court, suspend the license. It is the duty of the court in all cases involving the violation of motor vehicle law to forward a copy of the record to the department. Should the conviction be one for which mandatory revocation is required, the court must in addition obtain the license of the operator and forward it with a copy of the record. Otherwise the court

may recommend suspension, but if neither of two such situations prevail, then it becomes the duty of the court to remove a stub from the license and forward it to the department.

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, recommendations or stubs as the case may be so that the department may act as prescribed by law.

In answer to question 1, it will be observed that the department, by Section 241, is authorized to suspend a license "without preliminary hearing upon a showing by its records or other sufficient evidence." It is intended that this Section shall be a catch-all for that great class of offenders who never come before the court, at the same time not excluding those who have come before the court and those records are a part of those of the Motor Vehicle Department. Section 238 provides that the court "may recommend the suspension of the operator's or chauffeur's license of the person so convicted, and the department shall thereupon consider and act upon such recommendation in such manner as may seem to it best." It will be noted that because of the hearing and the conviction upon which the recommendation of the court is made, the matters under consideration do not necessarily come under Section 241, yet at the same time are not excluded from it and it is mandatory upon the department to consider the recommendation of the court in the light of its findings. It is, therefore, our opinion that the department has authority to suspend the license upon the recommendation of the court even though the violation is not expressly set forth in Section 241.

In answer to question 2, Section 237 expressly provides that the court must upon conviction forward the license of the operator to the department in all matters in which the license must be mandatorily revoked. However, in all other matters the court may not take the license from the operator and forward it to the department. This in effect works a suspension and this authority rests solely with the department. On the other hand it is the duty of the court, after a conviction for which revocation is not mandatory and upon which no recommendation of suspension or revocation is made, to detach a stub from the license and forward the stub to the department. It is therefore our opinion, in answer to question 2, that the court may not forward to the department the license of the person against whom it is making the recommendation of suspension as provided in Section 238, but that it may make a recommendation or may remove a stub, but may not together remove the stub and still recommend a suspension of the license.

LEGAL SETTLEMENT OF MINOR: MINOR—SETTLEMENT OF: Legal settlement of a child is the same as that of his guardian, even though his parents are living, when all matters pertaining to the welfare of said child are to be decided by the person in whose custody said child is placed by judicial decree.

April 25, 1939. *Mr. Archie R. Nelson, County Attorney, Cherokee, Iowa:* This is in answer to your letter of the 6th inst. wherein you ask the opinion of this department relative to the following proposition:

"A" had a legal settlement in Cherokee County and his wife "B" was committed to the State Hospital for the Insane at Cherokee during that time. There were two minor children. In February of 1938, at a hearing in the district court, custody of one of the minor children was given to the maternal grandmother, and "A" was ordered to pay a stipulated amount per month for the care and keep of the child. "A" had removed his residence from Cherokee County to Woodbury County in 1937. He was employed by the Illinois Central Railway Company, and no notice to depart was served upon him. He continued to reside in Woodbury County until March of 1938 and died there.

Question: Where is the legal settlement of the child who was by order of court placed in the custody of the maternal grandmother?

In the same case the other minor child of "A" and "B" has, since late infancy, made its home with the paternal grandparents in Waterloo, Iowa, and my information is that the father contributed spasmodic support to his parents for that child, although the total amount was undoubtedly very small.

Question: Does the child in Waterloo have the legal settlement of its grandparents or would its legal settlement be in Woodbury County or in Cherokee County?

Subsection 5, Section 5311, Code of Iowa, 1935, provides:

"Legitimate minor children take the settlement of their father, if there be one, if not, then that of the mother."

Section 3638, Code of Iowa, 1935, provides:

"In case the court commits said child to the custody of some proper person or institution, such person or institution shall, by virtue of such custody, be the legal guardian of the person of such child and may be made a party to any proceedings for the legal adoption of such child, but any such adoption shall be approved by the court."

Thus we find that under Section 3638 the maternal grandmother mentioned in the first paragraph above quoted from your letter is the legal guardian of the person of her grandchild and under the court's order she can hold the custody of said child as against the father.

Does Section 3638 in any way limit the provisions of Subsection 5, Section 5311? We think it does.

It was held in *In re Waite Guardianship*, 190 Iowa 189; 180 N. W. 159, that the guardian of the person of an infant stands in loco parentis and may, if for the best interests of the infant, change his residence from one state to another.

In 28 *Corpus Juris* 1112 the following text is found:

"It is very generally held that any guardian appointed in the state of the ward's domicile has power to change the ward's domicile from one county to another within the same state and under the same law."

Under this text is cited *Smidt vs. Benenga*, 140 Iowa 399. In the *Benenga case, supra*, the court said:

"Generally speaking the natural parents are entitled to the care, custody and control of their minor children but they may by agreement or conduct deprive themselves of this natural right and confer it upon others. And when the scales are equally balanced or the court is in doubt about the abstract right of control, the interests of the child are paramount and will prevail."

The decision in *Vanderwarker's Estate, Hicks vs. Fox*, 83 N. W. 538, in our opinion, throws considerable light on the difficult question here under discussion. It was there said:

"The most difficult question arises from the determination of the domicile of Ethel at the time of her death, and this perplexity is occasioned by the artificial rules which have long been recognized concerning the subject in analogous cases. It is contended by counsel for respondent that the domicile of a child is that of its father, and that notwithstanding the legal separation

of father and mother, *or the guardianship imposed by the courts upon the mother* (italics ours), the domicile of the father is imputed, as a matter of law, to the child, * * *. The theory that the domicile of the father continues until the majority of the child, without reference to the residence of the child and the real custody and control by the mother, is one of our inheritances from the common law, which merged the legal entity of the wife in that of her paramount lord, and recognized no separate right of property in her, free from the control of her husband. The wife formerly had no separate legal existence, and until the recent enabling statutes, recognizing her independent right to control and manage her property, had swept away this unjust relic of antiquity, it followed as a logical necessity that the residence of the wife and mother, * * * did not control and fix the domicile of the marriage offspring. * * * *It has been held that the legal guardian of the child may fix its domicile, and that the domicile of such guardian draws to it that of the child* (italics ours). This is obviously the necessary rule, and in such cases secures the best interests of the child. *Story, Confl. Laws*, Sec. 506; *Pedan vs. Robb*, 8 Ohio 227; *Wood vs. Wood*, 5 Paige, 596; *Townsend vs. Kendall*, 4 Minn. 412. It has also been held that there is a modification of the rule that arbitrarily attaches the domicile of the father to the child, and give it to the mother when the father has abandoned it. * * * where the latter (mother) is endowed with the legal custody of the child, there is no reason or justice to support the rule that the legal residence of the mother and child does not control the domicile of the latter."

It has also been held that abandonment by the father prevents domicile of the child from following that of the father. *In re Vance*, 92 Cal. 195, 28 Pac. 229; *People vs. Dewey*, 50 NYS 1013. It has also been held that if a child is emancipated by its parents the general rule does not apply. *Carthage vs. Canton*, 97 Me. 473.

It will be noted that under the provisions of Section 3638, Code of Iowa, 1935, when a child is committed to the custody of some proper person, such person becomes by virtue of such custody the legal guardian of the person of such child and in such case the child may be adopted without the parents' consent.

See Section 10501-b3, which reads:

"* * * The consent of both parents shall be given to such adoption unless * * * one or both of the parents have been deprived of the custody of the child by judicial procedure because of unfitness to be its guardian."

As we view it, the general rule that the settlement or domicile of a child is that of its father is bottomed upon the theory that he is the natural guardian and the legal custodian of the child and, therefore, should have the right to determine the legal settlement and domicile of said child. When the right to custody is taken away, however, by judicial proceedings, we see no reason why the general rule should obtain. It would be a strange doctrine indeed, so it seems to us, to hold that the settlement of the father is that of the child when he has not the right to the custody of said child and when such child may be adopted without his consent and when all matters pertaining to the welfare of said child are to be decided by the person in whose custody said child is placed by judicial decree.

As will be noted, it has been generally held that a guardian has the right to change the domicile of his ward and we have also learned that when the custody and guardianship of a child is given to the mother in case of separation that the general rule is abrogated.

We reach the conclusion, therefore, that the settlement of the child living in your county is in Cherokee County, where he has resided for a number

of years with his grandmother, who obtained his custody by judicial decree and who, as a legal consequence of such court decree, became the child's legal guardian.

As to the child at Waterloo, before expressing an opinion on his legal settlement, will you kindly furnish us with additional facts. We shall appreciate receiving an answer to the following questions. Has the custody of this child been abandoned to the grandparents with an understanding that they are to rear, support and educate said child? Was this child given to said grandparents by order of court? We assume not, but this is not quite clear from your letter.

COUNTY RECORDER: INSTRUMENTS OF RECORD: CHATTEL MORTGAGES, ETC.: County recorder may destroy chattel mortgages and other instruments of record per Section 10030 only when such instruments have been properly released of record and not returned to mortgagor.

April 26, 1939. *Mr. E. B. Shaw, County Attorney, West Union, Iowa:* This will acknowledge receipt of your letter of the 24th inst., wherein you ask our opinion as to the proper interpretation of Section 10030, Code of Iowa, 1935.

The question is as to whether or not the county recorder may destroy chattel mortgages or conditional sales contracts in his possession at any time after five years from the date of maturity of the debt secured thereby.

Your interpretation is to the effect that no such right is given the recorder by said section, except as to instruments released of record. We agree with your interpretation and will hereinafter give our reasons therefor.

Section 10028, Code of Iowa, 1935, provides:

"Any mortgage or pledge of personal property may be released of record by filing with the original instrument a duly executed satisfaction piece or release of mortgage; or by the mortgagee or his authorized agent indorsing a satisfaction of said mortgage on the index book under the head of 'remarks' * * *."

Section 10029, Code of Iowa, 1935, provides:

"When any unrecorded chattel mortgage or other instrument of writing or indebtedness * * * shall have been satisfied, it shall be the duty of the recorder, * * * to return the original instrument, with any extension, assignment or release thereto attached, to the mortgagor or person executing the same, upon request therefor."

Section 10030, Code of Iowa, 1935, provides:

"In case such unrecorded instrument, with the extension or release thereof, if any, *be not returned as hereinbefore provided* (italics ours), after the expiration of five years from the maturity thereof * * * the recorder shall destroy such mortgages with the extension or release thereto attached * * * by burning the same in the presence of the board of county supervisors or a committee appointed by the board of supervisors * * *."

In order to construe Section 10030, as we view it, the three sections above quoted must be read and considered together. You will note that Section 10030 provides: "In case such unrecorded instrument, with the extension or release thereof, if any, be not returned as hereinbefore provided" it may be destroyed. In other words it is the instruments that have not been returned to the mortgagor that may be destroyed and we have learned by the reading of Sections 10028 and 10029 that the instruments that may be returned are those released of record. Therefore, it is very clear that it is only instruments properly released of record that may be destroyed.

Section 11007, Subsection 6, Code of Iowa, 1935, provides that written instruments are barred by the statute of limitations ten years from the date of maturity. Section 11023 provides that chattel mortgages, etc., shall be void as against creditors of the person making the same or as against subsequent purchasers or mortgagors in good faith after the expiration of five years. Such instrument, however, as between the parties, is not void. It follows, therefore, that if the interpretation of the state checkers is correct, the recorder would have a right to destroy an instrument which, as between the parties, was a valid and enforceable obligation. This would reduce the law to an absurdity and is clearly not a proper interpretation of this section.

We reach the conclusion, therefore, that Section 10030, Code of Iowa, 1935, has reference only to instruments properly released of record. In other words, it refers to instruments only that are not enforceable against the mortgagor or vendee in case of conditional sales contract.

FEE FOR BLOOD TEST EXAMINATION: POLICE OFFICER: SHERIFF: A sheriff may incur a reasonable expense in determining whether a person is intoxicated when charged with the crime of driving while intoxicated and this would be a charge against the county. City police officers would not have this power. Nor can the cost of this examination be taxed as "costs" against the defendant.

April 26, 1939. *Mr. Luther M. Carr, County Attorney, Newton, Iowa:* This is in answer to your letter of the 17th inst., asking our opinion as to whether or not the $10.00 fee charged by the doctor for the blood test examination in drunken driving cases, at the request of the city police officer or at the request of any other peace officer, is a proper charge against the county and, secondly, whether or not this charge can be taxed up against the prisoner as part of the costs in the case.

We are of the opinion that the cost of such examination can not be charged as a part of the costs. The statute is very clear as to what constitutes "costs." Such an examination is not included.

The most difficult question is as to whether or not an officer may incur this expense without authority from the governing body. As to a police officer, we think it quite clear that he being employed by the city can not on his own authority cause a blood test to be made and bill the county therefor, and such is our holding. As to the sheriff, however, we reach a different conclusion. He is a county officer and he is invested with some discretion in the enforcement of the state laws.

Section 5184, Code of Iowa, 1935, provides:

"The sheriff shall, whenever directed so to do in writing by the county attorney, make special investigation of any alleged infraction of the law within his county * * *. When such investigation is made the sheriff shall file * * * a detailed, sworn statement of his expenses, * * * and the board shall audit and allow only so much thereof as it shall find reasonable and necessary."

Section 5185, Code of Iowa, 1935, provides:

"Nothing in sections 5182, 5183, and 5184 shall be so construed as to relieve any peace officer from the full and faithful discharge of all the duties now or hereafter enjoined upon him by law."

Thus it appears that when ordered by the county attorney, the sheriff may incur reasonable expenses in investigating crime and you will note that under

Section 5185 he is not relieved from the faithful discharge of all the duties enjoined upon him by law, notwithstanding that he has received no direction from the county attorney.

It will be observed that the sheriff is vested with some discretion in incurring expenses while discharging his duties and these should be allowed if reasonable.

It is, therefore, our opinion that the sheriff may incur reasonable expenses in determining whether a person is intoxicated when charged with the crime of operating a motor vehicle while intoxicated.

OFFICIAL PUBLICATIONS: BOARD OF SUPERVISORS: NEWSPAPER: Member of board of supervisors may legally accept fees for legal publications in his newspaper, if such newspaper qualifies and has been selected as one of the official newspapers for such county.

April 26, 1939. *Mr. Robert N. Johnson, Jr., County Attorney, Fort Madison, Iowa:* This will acknowledge receipt of your letter of the 25th inst., wherein you request the opinion of this department on the following legal question, as contained in your letter:

"Can a member of the Lee County board of supervisors own an official newspaper in the county and accept money for official publications therein of the board's proceedings?"

We are of the opinion that a member of the board of supervisors may legally accept the publication fees for publications published in his own newspaper.

Section 13327, Code of Iowa, 1935, provides:

"Members of boards of supervisors * * * shall not buy from, sell to, or in any manner become parties, directly or indirectly, to any contract to furnish supplies, material or labor to the county * * * in which they are respectively members of such board of supervisors * * *."

This is the only section that could possibly bar the supervisor in question from accepting the publication fees referred to. We do not, however, believe that this section has any application to the instant case.

Chapter 145, Laws of the 45th General Assembly, provides that:

"In counties having a population of less than fifty thousand (50,000), divided into two divisions for court purposes, two such newspapers in each division,"

shall be selected as official newspapers. This applies to Lee county. Thus in your county four official newspapers must be selected and the law provides that in such official newspapers proceedings of the board of supervisors must be published. This is mandatory. The law further provides that the papers having the largest number of bona fide subscribers shall be selected as the official newspapers. Thus we find that the selection of these papers is not in any manner a matter of contract. It results by operation of law specifying the paper to be selected. Thus when a member of the board of supervisors owns a newspaper and such newspaper qualifies, it must be selected. The law does not provide that such paper must be selected unless the owner thereof is a member of the board. No exception appears.

The question arises, does a member of the board, when his newspaper is selected as an official newspaper, "buy from, sell to, or in any manner become a party, directly or indirectly, to any contract to furnish supplies, material, or labor to the county". We think not.

We reach the conclusion, therefore, that a member of the board of supervisors may legally accept fees for legal publications in his newspaper, if such

newspaper qualifies and has been selected as one of the official newspapers for such county.

TAXATION: CEMETERY: It is legal for the township trustees to make tax levy for the support and maintenance of a cemetery, said levy covering both property in the township and within the town, even though the cemetery is located outside the incorporated town.

April 26, 1939. *Mr. Waldo E. Don Carlos, County Attorney, Greenfield, Iowa:* We are in receipt of your request for an opinion on the following situation:

"The incorporated town of Greenfield is situated entirely within Greenfield Township. There are agricultural lands lying in Greenfield Township, not within the incorporated town.

"A public cemetery is maintained by the Greenfield Township trustees, within Greenfield Township, but outside the incorporated town of Greenfield. The town neither has nor uses any other public burying ground but this cemetery.

"For many years past the township trustees have made a tax levy for the support and maintenance of this cemetery, said levy covering both property in Greenfield Township and within the town, this under 1935 Code Section 5563. No cemetery tax was levied by the town council."

We understand the specific question to be whether the method of levy for the cemetery under the above is legal or whether the town should make its own cemetery levy under Sections 5750 and 6211, par. 14 of the 1935 Code.

We are inclined to agree with the opinion of your town attorney that either method is legal. Section 5563 of the 1935 Code provides as follows:

"*Scope of levy.* The levy authorized in sections 5560 and 5562 may be extended to property within the limits of any city or town so far as same is situated within the township, unless such city or town is already maintaining a cemetery, or has levied a tax in support thereof. The said tax may be so expended for the support and maintenance of any such cemetery after the same has been abandoned and is no longer used for the purpose of interring the dead."

Reference is made in the above section to Section 5560 which provides for the levy for cemetery tax. Section 6211, par. 14 of the 1935 Code provides as follows:

"Sec. 6211. *Taxes for particular purposes.* Any city or town shall have power to levy annually the following special taxes: * * *

"14. *Cemetery fund.* Any city, not to exceed one-fourth mill, and any town, not to exceed three-fourths mill, which shall be used only for the care, preservation, and adornment of any cemetery owned or controlled by the city or town, or owned and controlled by any private or incorporated cemetery association, township, or other municipality, even though situated in an adjoining county, if actually utilized for burial purposes by the people of the city or town. Said tax may be so expended for the support and maintenance of any such cemetery after it is no longer used for the purpose of interring the dead."

An analysis of the above quoted sections indicates that the town or township can follow either course provided. Neither statute is mandatory, and you have followed the first course, or Section 5563.

We are of the opinion that under the facts stated in your question the course you followed was legal.

ASSESSMENT: MISTAKE: CORRECTION: The auditor should first determine in his own mind whether or not a mistake has been made in the assessment, and if so and the assessment as shown on the tax list is not the true and correct assessment, then and in that event he would have the power to correct the assessment.

April 26, 1939. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* Receipt is acknowledged of your request for an opinion upon the following situation:

The city assessor of Des Moines, through his deputy, called on a Des Moines attorney who acted as agent for an Iowa taxpayer who was absent from the state. The assessor made out the assessment roll when the facts were given to him by the attorney and amongst the items listed were stocks in foreign corporations and the value given was $8,500.00. When the deputy assessor made up the roll and gave the attorney his copy, after the same was duly signed by the attorney as agent for the taxpayer, neither the deputy assessor nor the attorney noticed that the figure was put in at $85,000.00. There was no appeal taken to the city council, sitting as a board of review, and the mistake was not discovered until time for paying the tax. The deputy assessor who made the assessment roll and had Mr. Stewart sign it has made an affidavit stating that it was an error and it should have been $8,500.00 rather than $85.000.00, and you also state that you personally believe that a mistake was made and that the attorney at the time he signed the roll thought he was signing it for $8,500.00 rather than $85.000.00.

The question now is whether this assessment can be corrected by the auditor under the provisions of Section 7149 of the 1935 Code of Iowa.

Section 7149 provides as follows:

"7149. *Corrections by auditor.* The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property."

Under the above section, it would seem that it is the duty of the auditor to first determine in his own mind whether or not a mistake has been made in the assessment. If he is of the opinion that a mistake has been made and that the assessment as shown on the tax list is not the true and correct assessment, but is a mistaken assessment, then and in that event, he does have the power to correct the assessment.

In this case, the very statement of the facts proves conclusively that a mistake was made. If the auditor is of the same opinion, then clearly, under the above quoted section he would have authority to make the correction.

We can refer you to an earlier opinion rendered by this department appearing in the 1925 Report of the Attorney General at page 134 where a number of cases are cited which we believe would be authority for our position in this instance, although we do wish to state that opinions rendered under this section are closely confined to the individual fact situation contained in each request for opinion.

WEED COMMISSIONERS: Weed commissioner has right to enter a field and destroy weeds, even if, as a result of such destruction, the grain growing among the weeds is also thereby destroyed. Chapter 131, 47th G. A.

April 26, 1939. *Mr. Edward C. Schroeder, County Attorney, Boone, Iowa:* This is in answer to your letter of April 19, wherein you request the opinion of this department relative to the right of weed commissioner to destroy weeds growing in an oat field and as a result of which the oats would be simultaneously destroyed, the oats and the weeds growing together.

We are of the opinion that Chapter 131, 47th General Assembly, gives the commissioner a right to enter a field and destroy weeds even if, as a result of such destruction, the grain growing among the weeds is also thereby destroyed.

Section 4829-a2 of said chapter, provides:

"The loss or damage to crops or property incurred by reason of such destruction shall be borne by the title holder of said real estate, unless said real estate shall be sold under contract whereby possession has been delivered to the purchaser, in which event such purchaser shall bear such loss or damage, excepting where a contract has been entered into providing a different adjustment for such loss or damage."

Section 4821 of said chapter provides:

"In the event it becomes necessary for a weed commissioner to enter upon any land within his jurisdiction to destroy or keep from seeding any noxious weeds growing thereon, he shall apply the best known methods and use the utmost diligence in eradicating such weeds, but he shall not expend in labor and materials more than twenty-five dollars ($25.00) on any one infested tract, without the advice and consent in writing of the board of supervisors."

Section 4829-a3 of said chapter provides:

"In case of a substantial failure to comply with such order, the weed commissioner, * * * shall forthwith cause such weeds to be destroyed, and the expense of such destruction and the costs of any special meetings, if any, shall be paid from the county general fund, and recovered later by an assessment against the property owner, * * *."

It seems to us that we can not, under the provisions of these sections, escape the conclusion that the weed commissioner has the authority to destroy weeds, notwithstanding the fact that in so doing damage or loss results to crops.

You say in your last paragraph:

"I am under the impression that the weed commissioners could not destroy a complete field but that they could control the disposition of the oats. In other words, if they could prevent the particular farmers from marketing this grain and also require these farmers to clean the threshing apparatus so that the seeds from the weeds would not be carried to other farmers' places."

The writer was born and grew up on the farm and has had considerable experience with weeds, particularly Canadian thistle. From this experience I learned that Canadian thistle is spread by the downy seed being carried by the wind and by birds from one farm to another. This, as we view it, is what the legislature had in mind when it provided that the weeds should be destroyed prior to the maturing of the seed. Under your interpretation the law would be absolutely ineffective insofar as the weed spreading from farm to farm by the seed being carried by the wind or the birds.

We will admit that as a practical matter it is difficult to enforce the weed laws, but we think it very clear that the sections above referred to contemplate the destruction of the weeds in a growing field of grain and that such destruction may be legally accomplished, notwithstanding that as a result the grain also is destroyed. Any other construction, as we view it, would render the statute practically nugatory, for it is a matter of common knowledge that the greater percentage of weeds grow in ground on which crops are raised.

LEGAL SETTLEMENT: SETTLEMENT OF WIFE: The legal settlement of wife is same as her husband and her children by a previous marriage have the same legal settlement as their mother, if they are left in her custody.

April 27, 1939. *Mr. John E. Cherny, County Attorney, Independence, Iowa:* This is in answer to your letter of the 25th inst., wherein you request our opinion on the following proposition:

"A," the present husband of "W," is a legal resident of Buchanan County and has his legal settlement in that county. Six years ago "W" procured a

divorce in Fayette County from "F," her former husband, who still remains a resident of Fayette County. By the divorce decree "W" was awarded custody of the minor children, "D" and "E," and alimony. "W" continued to reside in Fayette County with "D" and "E," until six months ago, when she married "A" and came to live with him in Buchanan County. "D" and "E" have been living with relatives of "E" in a third county during the past six months.

Quarere: Have "D" and "E" legal settlement in Fayette or Buchanan County? Has "E" a legal settlement in Buchanan or Fayette County for relief purposes?

Sub-section 4, Section 5311, Code of Iowa, 1935, provides:

"A married woman has the settlement of her husband, if he has one in this state * * *."

We are of the opinion that under this sub-section the legal settlement of "W" is now in Buchanan county, where she is residing with her second husband, who has had a settlement in your county for a number of years.

Many reasons could be given why it would not be logical or reasonable to hold that the husband's settlement is in one county and the wife's in another. It is true that sub-section 2 of Section 5311 provides that:

"Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year without being warned to depart as provided in this chapter."

This, however, as we view it, is the general rule and is modified in its operation by sub-section 4.

As to the legal settlement of the children of "W", we hold that the same is in Buchanan county, that being the legal settlement of their mother. She has been awarded the custody of the children by judicial decree and we, therefore, are of the opinion that sub-section 5 has no application.

We are attaching hereto an opinion on this proposition written to Archie R. Nelson, dated April 25, 1939, and released simultaneously herewith, which sets out fully our reasons for holding that custody is the essential thing in the matter of determining settlement so far as minor children are concerned.

SALARY: CLAIM: Entire claim for the examiners' reports, including typing can be allowed without the approval of the city council or school board.

May 1, 1939. *Honorable Chet B. Akers, Auditor of State. Attention: Mr. T. E. DeHart:* Receipt is acknowledged of your request for an opinion on the following situation:

"On assuming office this administration took over between two and three hundred school and city reports which had not been typed. These reports are typed by stenographers in this office, and the cost of the typing is included as part cost of the examination.

"In view of the recent legislation regarding city and school audits (Senate File No. 2), we would like to know whether or not it is necessary to have the approval of the local governing board on these typing claims where the examinations were made prior to March 30, 1939, but where the claims for typing would be after this date."

We are of the opinion that in view of the fact that all of the actual examining work was done prior to the effective date of Senate File No. 2, and in view also of the fact that the work to be done is merely the typing of the examiners' reports, that it would not be necessary to have the bill for typing approved, under the provisions of Senate File No. 2.

The only way the report of the examiners can be made effective is by having

it typed so that copies of the report can be sent to the city or school district examined. The claim for the examination is a claim under the law that was in force prior to the passage of Senate File No. 2, and it is no less a claim for such examination even though the actual copy work was performed after that law ceased to be effective, and we are of the opinion that the entire claim for the report, including typing can be allowed without the approval of the city council or school board.

BOARD OF CONTROL: VACATION: PAY: Under the circumstances that they have been relieved from duty, no claim for vacation pay should be allowed members of the Board of Control.

May 3, 1939. *Mr. C. Fred Porter, State Comptroller:* Receipt is acknowledged of your request for an opinion upon the following situation:

"I have filed with me payroll for each of the three members of the Board of Control for vacation pay in the amount of $160.42. In all probability, this is filed under Chapter 1, Section 57, of the 47th General Assembly.

"Will you please give me an opinion as to whether or not under the circumstances that they are relieved from duty that they would be entitled to vacation pay?"

We understand your question to mean that the payroll includes the regular monthly payroll for the board members for the month of April, 1939, and in addition includes what amounts to a claim in the sum of $160.42 for vacation pay for each of the members of the board of control. We also understand that these board members were relieved from duty on May 1, 1939.

No doubt this payroll claim is based on Section 3299 of 1935 Code and Chapter 1, Section 57, Acts of the 47th General Assembly, but those sections of the Iowa law merely allow the officer or employee to receive a vacation with pay with the length of the vacation based on the length of service as such officer or employee. The vacation contemplated is one that takes place during the period of employment. These statutes cannot be construed to give an employee more compensation than they would otherwise have or compensation beyond the period of employment. The most that can be said is that they have the force of giving the regular compensation for less actual work. If the officer or employee for any reason did not take advantage of the allowable vacation, then no additional compensation can be paid for any period of time when he would not have been compelled to work had he sought a vacation.

Some discussion of this point is had in the case of *Cross vs. Donohoe*, 202 Iowa 484. This was a suit against the superintendent of a state institution by an employee for wages and the suit included one count for vacation pay. Although the decision holding the employee could not recover was based largely on the ground that the action was one against the state, still there was some discussion of the allegation in the petition with regard to vacation pay. The court said:

"Appellant alleged in Count 2 of his petition that appellee refused for five successive years to grant him a vacation. Apparently, although the allegations of the petition are not quite clear on this point, appellant claims damages on the basis of the salary which he would have earned while in the enjoyment of the period allowed each year for a vacation. We infer from the allegations of the petition that appellant's salary was paid him, and that he has no claim against the state therefor, or for additional compensation. His cause of action on this count is, therefore, not against the state. Except as it negatively appears from the allegations of the petition, it is not alleged

that appellant at any time requested a vacation, or that some good reason might not account for his failure to obtain the same, if this is in any way material. Upon just what theory the separate amounts claimed as wages could be treated as presenting a valid claim, or as constituting a measure of recovery on this count, is not designated by counsel. Appellant earned his salary by working. This is as much as the salary he could have earned while on vacation. Whether he had some arrangement by which he could have earned additional compensation is not disclosed by the petition. The demurrer was properly sustained to this count."

For the reasons herein stated, we are of the opinion that no claim for vacation pay should be allowed members of the board of control.

TAX: DEED: COSTS: The general fund should bear the expense of securing a tax deed.

May 3, 1939. *Mr. John E. Miller, County Attorney, Albia, Iowa:* We are in receipt of your request for an opinion upon the following situation:

Can the county auditor, before making the distribution provided for in Section 10260-g1, deduct the costs of securing a tax deed and refund that amount to the general fund from which it was originally paid?

Section 10260-g1 provides that when the county acquires title to real estate by virtue of tax deed the county may sell the same for cash "and for a sum not less than the total amount stated in the tax sale certificate including all endorsements of subsequent general taxes, interest and costs". Said section further provides that the money shall be apportioned to the tax levying and certifying bodies in proportion to their interest in the tax for which the real estate was sold. In other words, the sale, if made without the consent of the tax levying bodies, must be for the full amount of the tax lien, including interest and costs. We feel that costs includes the costs of securing the tax deed. When the sale is made, then clearly the fund that first advanced the costs for obtaining the tax deed, should be reimbursed from the purchase money received.

In any event, whenever a sale is made under the provisions of this section for less than the full amount of the tax lien with the consent of the tax levying bodies, then such consent should be obtained that will allow the general fund to be reimbursed for all costs of securing the tax deed.

There is no reason why the general fund should bear the expense of securing the tax deed, and if the procedure herein outlined is followed, then the general fund will in all instances be reimbursed for advancements made for securing the tax deeds.

SOLDIER'S RELIEF: LEGAL SETTLEMENT: HOSPITALIZATION OF INDIGENT SOLDIER: Indigent soldier with bona fide residence in county is entitled to relief from Solders' Relief Commission, whether or not his legal settlement is in such county. Term "relief" means relief of all types, including medical care and hospitalization.

May 3, 1939. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* This is in answer to your letter of the 28th ult. wherein you ask our opinion as to the legal question involved in the following letter received by you from the Broadlawns Polk County public hospital:

"I wish you would give us an opinion on this matter. The statutes seem to indicate that relief is to be afforded through the Soldiers' Relief Commission in the county in which the patient is making his or her home. The question is, does this apply to medical care?

"In other words, if the person has not established legal settlement in Polk County as provided in the Poor Law is the county in which he does have legal settlement liable to Polk County for such medical relief as is given.

"This matter should be definitely determined as we have numerous cases of this kind. Invariably we are not able to collect this from the county in which the patient has settlement owing to the claim that aid is to be given by the Soldiers' Relief Commission in the county in which the patient happens to be at the time. However, the Soldiers' Relief Commission will not pay for medical care.

"My own idea is that we are justified in refusing aid at our hospital for cases of this kind until the matter is definitely determined.

"I suggest that as this is a state-wide proposition in addition to your own opinion you refer the matter to the attorney general in order that our Iowa Hospital Association may have the information."

Section 5315, Code of Iowa, 1935, provides:

"Persons coming into the state, or going from one county to another, who are county charges * * * may be prevented from acquiring a settlement by the authorities * * * warning them to depart therefrom. After such warning, such persons cannot acquire a settlement * * *."

Section 5316, Code of Iowa, 1935, provides how notice to depart shall be served.

Section 5317, Code of Iowa, 1935, provides:

"When relief is granted to a poor person having a settlement in another county, the auditor shall at once by mail notify the auditor of the county of his settlement of such fact, and, within fifteen days after receipt of such notice, such auditor shall inform the auditor of the county granting relief if the claim of settlement is disputed. If it is not, the poor person, if able, may be removed to the county of his settlement, * * *."

Section 5318, Code of Iowa, 1935, provides that when the settlement is disputed there may be a trial to determine the same.

Section 5325, Code of Iowa, 1935, provides:

"No person who has served in the army or navy of the United States, or their widows or families, requiring public relief shall be sent to the county home when they can and prefer to be relieved to the extent above provided, * * *."

Section 5385, Code of Iowa, 1935, provides:

"A tax not exceeding one-fourth mill on the dollar may be levied * * * to create a fund for the relief of, and to pay the funeral expenses of honorably discharged, indigent United States soldiers, sailors, marines * * * having a legal residence in the county."

It is clear that under the provisions of Section 5385, Code of Iowa, 1935, an indigent soldier having a bona fide residence in the county is entitled to relief from the funds under the control of the Soldiers' Relief Commission, irrespective of whether or not his legal settlement is in such county. Upon this proposition there seems to be no dispute.

The next question that confronts us is, what is included in the term "relief", as used in said Section 5385. It is our opinion that this contemplates relief of all types, including expenses incident to medical care and hospitalization. We do not believe that the statute should be construed as relating merely to furnishing of food, clothing and shelter. It was undoubtedly the purpose of the framers of this legislation to place the soldier and his dependents in a privileged class because of the service which such soldier has rendered to his country, and we can not believe that it was the intention of the legislature that a soldier suffering from disease should seek relief from the overseer of the poor and thereby put him in the classification of a pauper.

It will be observed that nowhere in Chapter 273 are the words "poor person" or "pauper" used. The term, "indigent" is used instead. It will be observed that in Section 5317 it is provided that "when relief is granted to a poor person" there may be a contest between counties as to liability. This, as we interpret it, has no application to honorably discharged soldiers, sailors, marines or nurses. If recovery is to be sought by the county granting relief to a soldier from the county of the soldier's legal settlement, the action would have to be bottomed on the provisions of Sections 5317 and 5318, Code of Iowa, 1935. This would subject the soldier, as we see it, to humiliation and embarrassment, which we believe Chapter 273 was enacted to avoid.

We reach the conclusion, therefore, that the soldiers' relief commission should furnish not only food, shelter and clothing to an indigent soldier, but also medical and hospital services and if the county pays the medical services out of the poor fund no recovery can be had from the county of the soldier's legal settlement for, as we construe the law, a soldier is not a "poor person" and Sections 5317 and 5318 clearly have application only to relief given to paupers.

We have made diligent search and have been unable to find any authorities deciding this question but what we have herein said, in our opinion, is a proper construction of the statutes, bearing in mind the evident purpose for the passage of Chapter 273, dealing with relief for soldiers, sailors and marines.

HIGHWAY COMMISSION: FARM-TO-MARKET ROAD BILL: HOUSE FILE 114: If county desires to acquire right-of-way under Section 22 of House File 114, the same may be paid for out of its allotment of the Farm-to-Market Road Fund. Board may request the State Highway Commission to acquire right-of-way.

Ames, Iowa, May 3, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: Mr. H. O. Hickock:* This will acknowledge receipt of your request for an opinion on the following questions:

"Section 22 of House File 114, known as the Farm-to-Market Road Bill, provides in part that right-of-way for this act may be acquired by the county.

"1. Under this provision, in the event the county desires to acquire such right-of-way, may it pay for the same out of its allotment of the Farm-to-Market Road Fund?

"2. In the event it is necessary for the county to institute and maintain condemnation proceedings for the condemnation of necessary right-of-way for the maintenance, relocation, establishment or improvement of farm-to-market roads, may it proceed under the provisions of the law relating to the condemnation of land for public state purposes?"

Section 4 of said Act provides as follows:

"Said farm-to-market road fund is hereby appropriated for and *shall* be used in the establishment, construction, reconstruction or improvement of the farm-to-market road system, *including* the drainage, grading, surfacing, construction of bridges and culverts, the elimination, protection, or improvement of railroad crossings, *the acquiring of additional right-of-way* and all other expenses incurred in the construction, reconstruction or improvement of said farm-to-market road system under this act."

Section 22 of said Act provides as follows:

"Right-of-way for farm-to-market road projects under this act may be acquired by the county. However, the county board may request the state highway commission to acquire such right-of-way and in such event such right-of-

way shall be paid for out of the county's allotment of the farm-to-market road fund."

Our answer to your first question is in the affirmative. It is obvious that the legislature intended by its inclusion of the provisions of Section 4 in the Act that the acquisition of right-of-way, specifically referred to, should be paid for out of the farm-to-market road fund. The use of the words italicized in said section as above quoted seems to us to clearly indicate this legislative intent.

Our answer to your second question is in the negative. Section 22 of the Act, heretofore quoted, provides that the county board may request the State Highway Commission to acquire right-of-way for farm-to-market road projects.

Section 23 in effect provides that in the event such request is made the Highway Commission "*shall* have authority to purchase or to institute and maintain proceedings for the condemnation of the necessary right-of-way therefor * * *."

This section is devoted to the procedure to be followed only in event the request is made by the board as provided in Section 22.

Section 23 further provides in part as follows:

"All the provisions of the law relating to the condemnation of land for public state purposes, shall not apply to the provisions hereof.

"The provisions of chapter two hundred thirty-seven (237), of the Code of 1935, shall not apply to the establishment, vacation, alteration or improvement of secondary roads under this section."

The two paragraphs above quoted of Section 23 were apparently copied from like provisions contained in Section 4755-b27 of the Code, with one noteworthy exception, i. e., the word "secondary" was substituted for the word "primary" in the last line of Section 4755-b27, and added thereto we find the words "under this section."

It seems clear to us that the addition at the end of Section 23 of the words of limitation last quoted evidences an intention on the part of the legislature not only that the provisions of Chapter 237 should not apply where right-of-way is acquired by the Commission, but that that they deemed it inadvisable to alter or disturb the procedure by which counties have in the past acquired right-of-way for secondary road purposes.

Had the legislature intended otherwise we are justified in assuming they would have substituted the word "act" for the ward "section" in paragraph three of Section 23. The use of the word "hereof" at the end of paragraph two of Section 23 obviously limits the provisions of said paragraph to Section 23 rather than to the entire act.

It is our opinion therefore that in the event it is necessary for the county to institute and maintain condemnation proceedings for the acquisition of right-of-way for farm-to-market roads, they must follow the procedure prescribed by Chapter 237 of the Code.

TAXATION: ASSESSMENT: SALE: When a property is assessed in separate parcels, then the sale must be consistent with the assessment and a sale en masse is void.

May 4, 1939. *Mr. Carl V. Burbridge, County Attorney, Logan, Iowa:* We have received your request for an opinion with regard to the following situation:

It appears that two parcels of land in Harrison County were assessed separately and advertised separately for delinquent taxes for the years 1931 to 1934 inclusive and thereafter at a tax sale sold under Sections 7246 and 7255-b1 to Harrison County, but it appears they were not sold in separate parcels but *en masse* for a gross sum and the certificate issued to the county contained a description of both parcels and a total for the tax for both parcels. Thereafter the county sold the certificate to L. H. Ireland of Logan for the full amount shown due by the certificate. Mr. Ireland is now claiming his money back on the ground that the tax sale was void for the reason that the property was sold *en masse* and not in separate parcels or tracts and for the further reason that the description, although it is the same description that appeared on the tax list, is vague and indefinite in that it merely states, "3 feet 7 inches of Lot 'C' and 24 feet 5 inches of Lot 'D' in Block 21." The objection as to the description is that the wording does not show what portion of said lots was assessed and sold for taxes.

We do not answer the second objection as to the description for the reason that we are of the opinion that the first objection is sound and Mr. Ireland did not receive a valid certificate of sale under the record stated.

Section 7252 of the 1935 Code provides that the treasurer shall on the day of sale offer for sale "separately each tract or parcel of real estate advertised for sale on which the taxes and costs shall not have been paid."

Section 7263 of the 1935 Code provides that the treasurer "shall deliver to the purchaser * * * a certificate of purchase describing it as shown in the record of sale giving the part of each tract or lot sold, the amount of each kind of tax, interest and costs, etc., * * *not more than one such parcel or description shall be entered upon each certificate of purchase.*"

When the property is assessed in separate parcels, then the sale must be consistent with the assessment. Many Iowa cases have held that such a sale *en masse* is void. We also feel there is authority in the Iowa cases authorizing the county to return the money and we quote from the syllabus of *Corbin vs. The City of Davenport*, 9 Iowa 239:

"The purchaser at an invalid sale of property by a city, for taxes, may recover of the city the amount of purchase money paid, with interest at the rate of six per cent, from the date of payment."

See, also, *Schoenwetter vs. Oxley*, 239 N. W. 118 (Iowa), where the court said:

"The plaintiff paid his money for the tax sale certificate but acquired no lien or right in the land which the treasurer undertook to sell to him. His cause of action accrued when he took money for the certificate."

We quote from the syllabus of the case of *The Storm Lake Bank vs. Buena Vista County*, 66 Iowa 128:

"Where by mistake of the treasurer land is sold for taxes which have been previously paid, the purchaser may at any time within five years after he discovers the mistake, maintain an action against the county for the money paid by him on such sale."

For the foregoing reasons we are of the opinion that the money paid by Mr. Ireland should be returned to him.

BOARD OF SUPERVISORS: ASSESSOR: CLAIM: As the Board of Assessment and Review has general supervision over assessors, the expense of a deputy assessor in attendance at a school of instruction called by the Board of Assessment and Review, is a legal payment by the county.

May 4, 1939. *Honorable Chet B. Akers, Auditor of State. Attention: L. I.*

Truax: We have received your request for an opinion on the following matter:

A claim for $15.55 was approved by the board of supervisors and paid by Des Moines County for the expense of Deputy Assessor E. P. Weinstein who attended a "school of instruction" meeting in Des Moines which was called by the State Board of Assessment and Review. Is this a legal payment by the county?

A somewhat similar situation arose with regard to the right of the board of supervisors to pay the expenses of a sheriff in attending a school of instruction for sheriffs held at Des Moines. This office, in an opinion rendered on April 13, 1927, held that such reasonable and necessary traveling expenses for a sheriff in attendance at said school in Des Moines should be paid by the board of supervisors.

Section 4 of Chapter 188, Acts of the 47th General Assembly, provides as follows:

"To have and exercise general supervision over the administration of the assessment and tax laws of the state, over boards of supervisors and all other officers or boards of assessment and levy in the performance of their official duties, in all matters relating to assessments and taxation, to the end that all assessments of property and taxes levied thereon be made relatively just and uniform in substantial compliance with the law."

Since the meeting in Des Moines was called by the State Board of Assessment and since the State Board of Assessment and Review does have general supervision over such assessors, we believe that the board of supervisors would have authority to pay the expenses of such deputy assessor.

CERTIFIED COPIES: BILLING: DEPARTMENTAL: The Board of Social Welfare should pay to the secretary of state for certified copies on a basis of the cost of material, but that insofar as the charge is made for certificates and seals of the secretary of state's office they should be relieved of the payment of such items.

May 4, 1939. *State Board of Social Welfare, Des Moines, Iowa. Attention: Mr. A. C. Campbell:* You have requested an opinion from this office on the following situation:

It seems that the secretary of state's office is billing your department for certified copies of papers and records and you desire to know whether or not such bills should be paid when furnished by the secretary of state's office for another state government department.

We are of the opinion that you should pay for such certified copies on a basis of the cost of material, but that insofar as the charge is made for certificates and seals of the secretary of state's office that you should be relieved of the payment of such items. It has not been the practice to charge for such certificates and seals, even though a statutory fee is provided by statute, when the request is made by another state department, and we feel that such items should be eliminated when payments are made to the secretary of state of such bills.

COUNTY ATTORNEY: COMMISSIONS ON FINES: In the event a county attorney does not appear, either physically or by some form of an entered appearance, he is not entitled to the commission on the fine.

May 5, 1939. *Honorable Chet B. Akers, Auditor of State. Attention: Mr. Truax:* We are in receipt of your request for an opinion as to whether, under

the provisions of Section 5228 of the 1935 Code, a county attorney should be allowed commissions on fines when the county attorney is not physically present in court at the time of the hearing or trial of the defendant in a criminal action.

Section 5228 provides that the county attorney in certain counties shall "receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected where he appears for the State, but not otherwise, * * *."

We do not believe it necessary for the county attorney to be physically present in the court on all occasions at the hearing or trial if he has by some other manner entered his appearance in the case. If the case is pending in the district court, the situation of the county attorney not being present would probably seldom occur, but certainly in every district court action the county attorney's appearance in the case is in some way entered. If it is a justice court case, then quite frequently the county attorney may not be physically present, and if his appearance as counsel for the State is not entered in any manner, then we would be of the opinion that the county attorney would not be entitled to the commission on the fine.

Some indication of what the legislature perhaps meant by the clause, "where he appears for the State," might be gained by reading Section 11087 of the 1935 Code which undertakes to describe the mode of appearance of parties to actions generally. There we find that an appearance may be made by a party to an action by delivering a written memorandum, to the effect that the defendant appears, to the clerk, or by merely entering an appearance in the appearance docket or judge's calendar.

We would be of the opinion that the phrase in Section 5228, "where he appears for the State," does not mean that the county attorney must be physically present in the court, but it does mean that he must either be physically present in the court or he must have in some manner entered his appearance in the action, and if he has done neither, then he would not be entitled to a commission on a fine collected.

Section 12554 provides that fines collected shall go into the treasury of the county and it is significant that in this statute the statement is made, * * * after deducting therefrom court costs and fees of collection, *if any* * * *." Evidently it was contemplated that fees of collection, which have meant the fees to the county attorney, would not be present in every case.

We are not unmindful of the fact that Section 5180 of the Code provides that it is the duty of the county attorney to appear for the State in all cases and proceedings in the courts in his county. We feel that this is only an outline of the duties, and in the event he does not appear, either physically or by some form of an entered appearance, he is not entitled to the commission on the fine.

"BANK" TERM: DISPLAY: The use of the word "bank" on the windows of a closed bank now used as an office for a private loan business, is a display prohibited by Section 9151 of the 1935 Code of Iowa.

May 8, 1939. *Mr. Weston E. Jones, County Attorney, Charles City, Iowa:* We are in receipt of your request for an opinion on the following situation:

For a number of years last past the Farmers Trust and Savings Bank in Charles City has been out of business. However, one of the officers of the

former bank purchased the building wherein the bank was located and has continued to use the bank rooms for the purpose of carrying on a private loan business and also for the purpose of conducting his own personal business.

There remains certain words and figures on the windows of said building, such as "Farmers' Trust and Savings" and then the word "bank" which latter word is blotted out by white paint, and on another window there the word "bank."

The question is whether under the provisions of Section 9151 of the Code the present occupant of the building is using prohibited bank terms in his display.

Section 9151 of the 1935 Code of Iowa provides as follows:

"9151. *Use of banking terms prohibited.* It shall be unlawful for any individual, partnership, or unincorporated association, or corporation, other than national banking associations, not subject to the supervision or examination of the banking department, to make use of any office sign bearing thereon the word 'bank,' 'banking,' 'banker,' or any derivative, plural or compound, of the word 'banking,' or word or words in a foreign language having the same or similar meaning, or to make use of any exterior or interior sign bearing thereon such word or words whatsoever to indicate to the general public, or to any individual, that such place or office is the place or office of a bank, nor shall such person or persons, partnership, unincorporated association, or corporation, make any use of or circulate any letterheads, billheads, bank notes, bank receipts, certificates, circulars, or any written or printed, or partly written, or partly printed, papers whatever having thereon any other word or words indicating that such business is the business of a bank."

Insofar as the use of the word "bank" is concerned, then clearly this a violation of the above provision, and we also feel that the use of the other words such as "Farmers' Trust & Savings" falls within the prohibition of the above statute as they are words indicating that the place is the place or office of a bank. They do not reflect the private loan business carried on by the occupant, and their presence on the windows of the building would certainly indicate that the place was some form of bank.

It is therefore our opinion that both of the windows of the building contain a display prohibited by Section 9151 of the 1935 Code.

LEGAL SETTLEMENT: WIDOW'S PENSION: NOTICE TO DEPART: WPA WORKER: Person receiving pension from one county and living in another does not acquire legal settlement in the resident county. Service of notice to depart each year is mandatory, except in above situation. *WPA employee does not become county charge* of county wherein he is assigned work unless he has legal settlement there. Married woman has legal settlement of her husband.

May 9, 1939. *Mr. Maurice E. Rawlings, County Attorney, Sioux City, Iowa:* This will acknowledge receipt of your letter of the 3rd inst., wherein you ask the opinion of this department relative to the following propositions:

"A widow, originally residing in Cherokee County, makes application for and is granted a widow's pension. Later, she moved to Woodbury County and shortly thereafter received a non-resident notice served upon her by the authorities of the last mentioned county. Following that, a period of approximately fifteen months is allowed to elapse during which time the woman continued to receive the pension allowance from Cherokee County. Thereafter, the officials in Cherokee County terminate the pension allowance declaring that the woman is a resident of Woodbury County and that such county is responsible for the future maintenance of the woman and her family.

"At least two questions present themselves in connection herewith:

"First: When a person receiving a pension allowance moves from one county to another and continues to receive payments from the original county of

residence, is it necessary that the receiving county serve non-residence notice upon such person in order to prevent the establishment of residence?

"Second: If such notice is given to the recipient of any pension allowance upon moving into any county, is it necessary that such notice be renewed or that the person be again served each succeeding year? Specifically, would you be of the opinion that Cherokee County has been relieved of its responsibility in the above case and Woodbury County must assume the responsibility of maintenance?

"It would appear that any decision upon the matter above outlined would apply with equal force as concerns the recipient of any pension allowance such as Old Age Assistance and other similar grants.

"As a companion question we are also faced with a decision concerning WPA employees. In this instance, let us assume that a person while employed under the WPA moved from one county to another. That the county of original residence then requests that direct relief be granted for which the county or original residence will assume responsibility. That thereafter, the receiving county certifies this same person for WPA employment in the receiving county and such employment is granted. In this instance, is the county of original residence thereby relieved of further responsibility as concerns any such person?

"As another companion question we find many problems arising in connection with those employed in CCC camps. In this connection, let us assume that a boy, originally a resident in Woodbury County, is granted employment in a CCC camp in another and separate county. That while so employed he marries a girl, resident in the county in which the CCC camp is located and then, after such marriage, attempts to return to Woodbury County with his family, making request for relief and WPA employment. In such a situation, is Woodbury County obliged to maintain and provide for this family?"

We are of the opinion, as to the first question, that subsection 5, Section 5311, Code of Iowa, 1935, applies. This subsection reads:

"Any such person who is an inmate of or is supported by any institution * * * or 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."

"Public funds," as we construe it, refers to any fund raised by taxation. This is our holding.

We therefore hold that so long as a mother receives a widow's pension she can not obtain a legal settlement in the resident county.

Answering your second inquiry, we are of the opinion that subsection 1 of Section 5311, relating to the filing of an affidavit with the board of supervisors "stating that such person is no longer a pauper and intends to acquire a settlement in that county," does not apply to mothers who make application for widow's allowance.

Section 3641, Code of Iowa, 1935, provides:

"No person on whom the notice to depart provided for in chapter 267 shall have been served within one year prior to the time of making the application, shall be considered a resident so as to be allowed the aid provided for in this section."

It has been the opinion of this office for some time and still is, that the clause, "within one year," in said Section 3641, makes the service of a notice to depart each year mandatory. Of course, this would have no application, as we have stated in our answer to question one, if the mother receives a widow's pension from the county from which she removed.

As to the WPA employee, we are of the opinion that the county of the employee's residence, if he has not a legal settlement therein, does not become liable for his support from the poor farm merely because he has been assigned

to WPA work in your county. It is a well known principle of law that public officers can not waive any rights arising by operation of law in favor of the municipality represented by them. Likewise in this case we do not believe that merely because a person, who has not a legal settlement in your county, may become a county charge in your county where he resides by being assigned to work relief under the WPA.

Your last question has to do with CCC members. It is our opinion that the CCC employee who marries a girl, resident in another county, that your county, upon his return, and in which he has a legal settlement, becomes liable for the support, not only of the man but also of his wife.

Subsection 4, Section 5311, Code of Iowa, 1935, provides: "A married woman has the settlement of her husband, if he has one in this state."

We do not believe that the courts would hold that the legal settlement of the wife may be in one county while that of the husband is in another. This, as we view it, would be contrary to public policy.

BUILDING AND LOAN: EXAMINERS: Building and loan examiners are not included in the provisions of Senate File 2 and Senate File 478.

May 9, 1939. *Hon. Chet B. Akers, Auditor of State. Attention: F. M. Hanson:* Your letter of May 8, 1939, asking our opinion upon the following matter, has come to the writer for attention:

"Are building and loan examiners included in the provisions of Senate File 2 and Senate File 478?

"If in your opinion the building and loan examiners are included under the provisions mentioned in the above bills would it be possible for the state auditor or the Executive Council to provide a revolving fund of $1,000.00 for the building and loan examiners?"

For the purpose of this opinion, we quote in whole or in part the following.

Section 113 of the 1935 Code of Iowa as amended by Senate File 2:

"The auditor of state shall cause the financial conditions and transactions of all county and city offices including cities acting under special charter, and all town or school offices including rural and independent districts and school townships, to be examined upon application to the auditor of state by the governing board or city or town council of such city, town or school district or corporation; * * *."

Senate File 478, Section 1:

"Where the examination is made by the state auditor under the provisions of this chapter, each examiner shall, on the completion of any such examination, file with the local governing body and also with the auditor of state a detailed, itemized and sworn voucher of his per diem and expense, which expense shall not exceed the sum of three dollars ($3.00) per day for the time such examiner is actually engaged in such examination. The said statement or voucher shall be subject to approval by such governing body and when so approved shall be forwarded to the auditor of state."

Section 7 (a), Senate File 147:

"The supervisor shall, at least once in each year, without previous notice, examine or cause examination to be made, into the affairs of every association subject to this act."

Section 8 (b), Senate File 147:

"The supervisor of savings and loan associations shall have general supervision of all savings and loan associations doing business in this state. He may, with the approval of the auditor of state, appoint examiners and assistants necessary to properly execute the duties of his office."

Section 9356 of the 1935 Code of Iowa:

"If the examination is made by the auditor in person, he shall receive his actual expenses. If by another, his actual expenses and the per diem fixed by law, which in either case shall be paid by the association examined."

It will be observed that Section 113 as amended by Senate File 2 and Senate File 478 are both under Chapter 10 of the 1935 Code of Iowa entitled "Auditor of State" and are under the subchapter entitled "Audit of Counties, Cities, and School Districts." Sections 7 (a) and 8 (b) of Senate File 147 and Section 9356 of the 1935 Code of Iowa are, however, all under Chapter 417 entitled "Building and Loan Associations."

From a reading of Senate File 2 and Senate File 478 it is clear that these are intended to apply to counties, cities and school districts, or in other words public corporations. A building and loan association may at the best be said to be quasi-public in nature and cannot be said to be governed by the laws, rules and regulations relating to public corporations unless particularly included. Chapter 417 of the 1935 Code of Iowa and acts amendatory thereto provide the law for building and loan associations. Among the statutes included in this chapter are the amendments and sections herein set out. These provide a means for the appointment and pay of examiners under the supervision of building and loan associations and these in no way can be said to be included in the provisions of Senate File 2 and Senate File 478. The provisions of such Senate Files relate solely to the public corporations enumerated and building and loan associations not being included and not being a public corporation and in addition having its own applicable law may not be properly included in such Senate Files.

It is, therefore, our opinion that building and loan examiners are not included in the provisions of Senate File 2 and Senate File 478.

Because the answer to the first question is in the negative, the second question becomes moot and requires no answer.

CITY OFFICERS: CONTRACTS WITH MUNICIPALITY: Members of one department of city may not legally be interested in contracts entered into with city through members of other departments. Park Board member violates Section 5673 in selling material to municipal light and water commissioners.

May 9, 1939. *Mr. Roscoe S. Jones, County Attorney, Atlantic, Iowa:* This is in answer to your letter of the 5th inst. wherein you ask the opinion of this department as to the following proposition:

"Mr. Harold Shrauger was elected as a member of the City Park Board in the spring of 1933, qualified, and took office and served for a six-year term and at the regular city election in March, 1939, was again elected, qualified and continued in office.

"At the city election in March, 1935, there was submitted to the voters of the city of Atlantic, the proposition of placing the municipal light and water plant under the control of a Light and Water Commission. The proposition carried and as a result, three members were appointed to that commission, to wit: D. E. Shrauger, W. H. Lindeman, and E. H. Busse. The term of D. E. Shrauger expired in 1937 and upon his re-appointment by the mayor, the city council refused to confirm his appointment, but he continued to serve as one of the members. After the election in 1939, nomination was again placed before the council and at that time Mr. Shrauger's nomination was confirmed for the remaining four years of the six-year term to which he was appointed in 1937.

"By way of further explanation it should be added that Harold Shrauger, the member of the City Park Board, is a son of D. E. Shrauger, who is a member of the Light and Water Commission and during all of the times hereinafter referred to the above parties were all occupying the positions above set forth."

It appears that Harold Shrauger, the Park Board member, sold certain materials to the commissioners of the municipal light and water plant.

The question is: Was the act of Harold Shrauger in violation of Section 5673, Code of Iowa, 1935, which provides:

"No officer, including members of the city council, shall be interested, directly or indirectly, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the city or town."

It is our opinion that Harold Shrauger was an officer of the City of Atlantic by virtue of his membership on the City Park Board. See *Marxer vs. City of Saginaw*, 258 N. W. 627, 270 Mich. 256. See also *State vs. York*, 109 N. W. 122, 131 Iowa 635. In the latter case a member of the township board of trustees was indicted for having an interest and receiving compensation for work performed for the township. The supreme court held the indictment sufficient and the evidence to take the case to the jury.

We reach the conclusion, therefore, that a member of the City Park Board violates Section 5673, Code of Iowa, 1935, when he sells materials to the municipal light and water plant commissioners. Any other construction of this statute, as we view it, would not be sustainable. The object of the statute was to remove the temptation to make unconscionable contracts with the municipality represented by the officer.

A case directly in point is *Farele vs. City of Lansing and Rickerd Lumber Co.*, 189 Mich. 501, 155 N. W. 591, L. R. A. 1917 C, 1096. The Michigan statute is almost identical to our own. It provides:

"No member of the city council, nor any person holding any elective or appointive office under the city government shall be interested in any contract with the city, * * * Any member of the city council or other officer violating the provisions of this section shall be punished * * *."

Among other things, the court said:

"The first question discussed by counsel is whether under this charter one department of the city government may make purchases of a corporation when an officer in another and distinct department is also an officer or a stockholder or both of such selling corporation. * * * By its terms it prohibits every contract made with the city in which any officer thereof, or member of its common council, has a private interest, and it is immaterial whether such officer, or his department has any part in the making of the contract, or could have."

In the *Lansing case, supra*, the Rickerd Lumber Co. sold certain lumber to the city. H. W. Rickerd was a stockholder of said lumber company and was its vice president and manager and was also, at the time of the sale, an officer of the city, namely a member of the board of police and fire commissioners. Let us here note that the members of the council made the contract and that Mr. Rickerd, as a member of the board of police and fire commission, had nothing whatsoever to do with the making of the contract or approving payment of the bill for the lumber delivered pursuant thereto.

We have read the case of *People vs. Stull*, 152 N. E. 259, 242 N. Y. 453, and do not believe that the same is in point and that it, therefore, does not conflict with the opinion herein expressed. In the *Stull case* the statute differed materially from our own. Under it prosecution could be had only in the event

that the officer was interested in the making of the contract and the decision was based upon this specific provision, the same being in italics in the court's opinion.

In a note found at page 1099, L. R. A. 1917 C, reference is made to the *Farele case, supra,* and it is there said:

"This decision is in accord with the general holding that contracts between a public corporation and a private corporation, of which a public officer is a stockholder, or stockholder and officer, and within the prohibitions of the provisions forbidding public officers to be interested, directly or indirectly, in public contracts."

We, therefore, reach the conclusion that the member of the Park Board referred to in your letter has violated Section 5673, Code of Iowa, 1935, in selling materials to the trustees of the light and water commission.

BOARD OF ENGINEERING EXAMINERS: INVESTIGATORS: Under no provision of law is it possible for the Board of Engineering Examiners to employ either a full time or part time investigator and that the only possibility of bringing about such employment is by virtue of an amendment to the present laws which govern the activities of the Board of Engineering Examiners.

May 9, 1939. *Board of Engineering Examiners. Attention: Berry F. Halden:* Your letter of May 6, 1939, making inquiry as to the following proposition, has come to the writer for attention:

"It is the wish of Mr. Miller and the other members of the board that your opinion be of such nature as you suggested in the recent conversation Mr. Miller and myself had with you, setting out that under no provisions of the Code is it possible for the board to employ either a full-time or part-time investigator. * * * He would appreciate your including a statement to the effect that the only possibility of bringing about employment of such investigator is through amendment to the present laws which govern the activities of the Board of Engineering Examiners by the legislature, as you also suggested"

For the purpose of this opinion, we quote in part Section 1862 of Chapter 101 of the Laws of the 47th General Assembly:

"* * * The board shall have power to employ such additional clerical assistants and incur such office expense as may be necessary to properly carry out the provisions of this chapter."

Chapter 101 is entitled "Civil Engineers" and revises, amends and codifies Chapter 89 of the 1935 Code of Iowa relating to the practice of professional engineering. Section 1862 refers specifically to the organization of the board including the powers and duties delegated to the board insofar as employing assistants of any nature are concerned. No other part of the chapter has any reference to such employees as the board may have power to employ. From a reading of the statute it will be noted that there is no provision for the employment either of a full time or part time investigator, the board being limited in its authority to the employment of clerical assistants.

Inasmuch as there is no provision for the employment of such investigator, there is no means by which the board may make such employment possible, first, because there is no such authority delegated to the board, and second, because there is no means provided for the payment of such employee. Should it be deemed desirable by the board to have an investigator in their employment, there is no way which such employment may be accomplished except

by a special delegation by the legislature and an amendment to that effect would thereupon be necessary as an addition to the present law.

It is, therefore, our opinion that under no provision of law is it possible for the Board of Engineering Examiners to employ either a full time or part time investigator and that the only possibility of bringing about such employment is by virtue of an amendment to the present laws which govern the activities of the Board of Engineering Examiners.

MUNICIPAL HOSPITAL: HOSPITAL: CLARINDA: The hospital does not need a special charter; the records are subject to audit; it is discretionary with the board as to whether or not it should adopt a constitution and by-laws; and medicine and surgery, osteopathy and surgery and chiropractic constitute schools of medicine for the purpose of practicing in a municipal hospital.

May 10, 1939. *Mr. Clinton H. Turner, County Attorney, Clarinda, Iowa:* Your letter of May 1, 1939, referring to us the following questions asked by the board of trustees of the Clarinda Municipal Hospital is herewith acknowledged.

1. Does the hospital need any special charter?
2. Do the records of receipts and expenditures have to be kept in any special manner and are they subject to state checkers?
3. Will this hospital be subject to any special rules and regulations?
4. Should the board adopt a constitution and by-laws or only by-laws?
5. Are there any special specifications that should go into these by-laws, or rules or regulations that the board might adopt?
6. I am informed that it states in the law that we shall not bar any physician of any school of medicine licensed to do business in the State of Iowa from operating herein. Will you kindly advise us what is meant by "school of medicine" in this connection?

For the purpose of this opinion, reference is made to Chapter 300 of the 1935 Code of Iowa, entitled "Municipal Hospitals" and more particularly to Section 5871 thereof:

"*Management.* Said board of trustees shall be vested with authority to provide for the management, control, and government of such city hospital and shall provide all needed rules and regulations for the economic conduct thereof. In the management of said hospital no discrimination shall be made against practitioners of any school of medicine recognized by the laws of the state."

Chapter 163 of the Acts of the 47th General Assembly, Section 1, amends Section 5869 of the 1935 Code of Iowa, as follows:

"Treasurer. The city treasurer shall be the treasurer of said board of trustees, and shall receive and disburse all funds under the control of said board as ordered by it, but shall receive no additional compensation for his services."

Senate File 2 is in part as follows:

"Section 113. The auditor of state shall cause the financial condition and transactions of all county and city offices including cities acting under special charter, and all town or school officers including rural and independent districts and school townships, to be examined upon application to the auditor of state. * * *."

From a review of Chapter 300, it is apparent that no special charter is needed for the hospital. Full authority is vested in the board of trustees. Question 1 may, therefore, be answered in the negative.

In answer to question 2, it is clear that in accordance with Section 5869 as amended, it is the duty of the city treasurer to receive and disburse all funds as ordered by the board of trustees. Because of such requirement the

city treasurer maintains a record of receipts and expenditures, and although there is no specific direction such records should be kept in a manner consistent with good bookkeeping. Inasmuch as these are a part of the city treasurer's records, they are subject to audit the same as other records he maintains in accordance with Senate File 2.

Answering question 3, Section 5871 requires that the board of trustees shall provide all needed rules and regulations for the economic control of the hospital and shall provide for its management, control and government. It is, therefore, discretionary with the board what rules and regulations it should make but these should be reasonable and should be designed to serve and promote the interests of the hospital.

In regard to question 4, it is discretionary with the board as to whether or not it should adopt constitution and by-laws. It is not manadatory that either be done.

As to question 5, it is our thought that in preparing by-laws, rules or regulations for the hospital it would be well to consult the State Department of Health. Their advice and cooperation relative to proper specifications should prove very helpful. Special spcifications as to rules and regulations are clearly discretionary with the board.

Answering question 6, it will be observed that the Iowa law recognizes at present three schools of healing art, namely, medicine and surgery, osteopathy and surgery, and chiropractic. That part of Section 5871 prohibiting discrimination against practitioners of any school of medicine by the laws of Iowa was passed by the 31st General Assembly in 1906 and first appeared in the revision of 1913. The 29th General Assembly provided the laws relative to osteopathy and surgery and the 39th General Assembly those of chiropractic. It will be noted that osteopathy was recognized by the Code at the time Section 5871 became law but that chiropractic had not as yet become a part of the Iowa statutes. Since the enactment the laws relative to both such practices have, with various amendments, come down to and are included in the present Code.

Inasmuch as the present law includes the three methods of healing and inasmuch as the statute in question seeks to prevent discrimination against any recognized school of medicine, it seems that a practitioner of any of the schools must be allowed to practice in the hospital. Osteopathy was recognized at the time the statute was passed and at the time the legislature passed the act recognizing chiropractic, it had the power to prohibit chiropractic from practice in municipal hospitals, but it did not see fit to do so. In addition to the above, both schools are allowed methods of practice which frequently demand hospitalization, and this being true, in the absence of statute to the contrary, neither school should be denied the use of a municipal hospital. In answer to question 6, therefore, it is our opinion that medicine and surgery, osteopathy and surgery, and chiropractic constitute schools of medicine for the purpose of practicing in a municipal hospital.

Attached hereto is a memorandum brief upon which we predicate our conclusion.

Memorandum in Re "Schools of Medicine" as Defined by Section 5871 of the 1935 Code of Iowa

Section 5871 of the 1935 Code of Iowa, is as follows:

"*Management.* Said board of trustees shall be vested with authority to provide for the management, control, and government of such city hospital and shall provide all needed rules and regulations for the economic conduct thereof. In the management of said hospital no discrimination shall be made against practitioners of any school of medicine recognized by the laws of the state."

It will be noted that the management of a municipal hospital is prohibited from discriminating against practitioners of any school of medicine recognized by the laws of the state.

The question thereupon presents itself as to what constitutes a school of medicine or a practitioner thereof.

" 'Medicine' may mean not only a drug, but also a science or profession indicating an art of healing or science which has for its province the treatment of diseases generally. The latter meaning has much the wider and more comprehensive significance, and while, as so used, it may be in a sense technical, yet the wider is the popular sense in which it is employed and understood. * * * As a science or profession, it is variously defined as the art of healing; * * *."

40 C. J. 627, paragraph 3.

(The term physician is defined as) "one who practices the art of healing disease and preserving health; * * * It is not limited to the disciples of any particular school; but is of very wide significance, and may include dentists, * * *."

48 C. J. 1063, paragraph 4.

"The legislature conceived that it was dealing with the entire class of persons known as physicians, in the broadest sense of the term, not in any narrow sense, which would favor those claiming, and perhaps entitled to superior distinction. The purpose was very far from that of creating a monopoly in favor of special schools of medicine. The term was evidently used in its proper sense, that of including any person of whatsoever school, and whether belonging to any known school, engaged in good faith, in treating human ills by any remedy, or remedies, however simple, so as to be known among the people as a physician."

State vs. Schmidt, 138 Wisc. 53, 119 NW 647.

"In cases where the statute merely uses the words 'practice of medicine' without further definition or explanation, the courts are at a loss as to the exact meaning of the expression. Generally and historically the practice of medicine means the exercise of any of the healing arts. Further, the usual purpose of a legislature in passing such a statute is to deal with healing in a broad sense, to protect the public fully from the danger attendant on the ignorant and unskilled dealing with diseases. On this reasoning there would be and have been included, by what is probably the weight of authority, drugless healers such as osteopaths in the list of unlicensed practitioners of medicine. * * * Osteopathy is a well recognized school of healing which does not require just the same kinds of knowledge as do surgery and materia medica. * * *

"The same reasoning that applies to the classification of osteopaths as persons who engage in the practice of medicine would apply to the similar classification of chiropractors and masseurs. Here, though, perhaps because these schools are not s o widely followed and recognized as is the school of osteopathy, * * *."

21 R. C. L. 370, paragraphs 17 and 18.

In regard to the definition and treatment of "Schools of Medicine" by the textbook writers on medical jurisprudence, we quote from Medical Jurisprudence Forensic Medicine and Toxicology, Witthaus & Becker, Volume 1, page 15:

"No particular schools recognized by the courts—The general trend of the decisions in all the states, whenever any questions in reference to schools of medicine have been before our courts, is to avoid recognizing any particular system of school. The theory of the New York courts upon this subject is well expressed * * * in the case of Corsi vs. Maretzek, 4 E. D. Smith, 1-5. * * *.

"The court said: 'The system pursued by the practitioners is immaterial. The law has nothing to do with particular systems. Their relative merit may become the subject of inquiry, when the skill or ability of a practitioner in any given case is to be passed upon as a matter of fact. But the law does not, and cannot, supply any positive rules for the interpretation of medical science. * * * No one system of practice has been uniformly followed, but physicians from the days of Hippocrates have been divided into opposing sects and schools. The sects of the dogmatists and the empirics divided the ancient world for centuries, until the rise of the methodics, who, in their turn, gave way to innumerable sects. Theories of practice, believed to be infallible in one age, have been utterly rejected in another. For thirteen centuries Europe yielded to the authority of Galen. * * * And yet, in the revolutions of medical opinion, the works of this undoubtedly great man were publicly burned * * * and for centuries following, the medical world was divided between the Galenists and the Chemists, until a complete ascendency over both was obtained by the sect of the Vitalists. * * * I am far from undervaluing the great benefits conferred upon mankind by the study of medicine, and have no wish to minister to any vulgar prejudice against a useful and learned profession, but it is not to be overlooked that, as an art, it has been characterized, in a greater degree, by fluctuation of opinion as to its principles and the mode of its practice, than, perhaps, any other pursuit. * * *.

" 'The popular axiom, that "doctors differ," is as true now as it ever was, and as long as it continues to be so, it is impossible for the law to recognize any class of practitioners, or the followers of any particular system or method of treatment, as exclusively entitled to be regarded as doctors. In adverting to the conflicting views and differences of opinion, that exist and have ever existed in the practice of the healing art, it is not to call in question the value of learned, skillful and experienced physicians, but merely to show the error of attempting, in the present state of medical science, to recognize, as a matter of law, any one system of practice, or of declaring that the practitioner who follows a particular system is a doctor, and that one who pursues a different method is not.' "

The same authority lists under Schools of Medicine, the following: Allopathic, Homscopathic, Eclectic, Botanic, Thompsonian, Hydropathic, Osteopathy, Chiropractic, and other known systems of healing.

The text devotes much attention to the following matters:

"A board may not promote the interests of a particular school."—California.

"All schools need not be equally represented on the board."—Colorado.

"Comparative merits of different schools not considered in action for malpractice."—Connecticut.

"Board cannot discriminate against."—Missouri.

"State's power cannot be used to build up particular school."—Nebraska.

"Board's power cannot be used to build up particular school."—Nebraska.

"The law recognizes none exclusively."—New York.

"The legislature cannot prescribe that particular one is orthodox."—N. Car.

"Not necessary that board shall have representative of each or any special school as member."—N. Car.

"Legislature cannot establish state system."—N. Car.

"Legislature cannot discriminate against and every school need not be represented on board."—Ohio.

"Board cannot determine which school is right."—Pennsylvania and R. I.

"Board may be composed solely of Allopaths."—Texas.

"Legislature cannot discriminate."—Washington.

We quote further as to the definition of Schools of Medicine from the Textbook of Legal Medicine and Toxicology, by Peterson & Haines, Vol. 2, page 177, as follows:

"According to the well considered case of Nelson vs. Harrington, 72 Wis., 591, to constitute a school of medicine within the rule relieving from liability in cases of alleged malpractice, it must have rules and principles of practice for the guidance of all its members, as respects principles, diagnosis, and remedies, which each member is supposed to observe in any given case. So called clairvoyant physicians, who have no recognized method of treatment, were in this case held not to constitute a school of medicine within the above rule;...."

In the case of *State vs. Edmunds*, 127 Iowa 333, the Iowa court indicates that any method of healing art recognized by the statute may be construed to be a school of medicine.

"Our legislature evidently intended to prohibit the practice of the healing art by the use of medicine or any kind of appliance or methods, except upon certain named conditions. The language used is very broad and comprehensive, and covers any and every kind of public profession to cure and heal by the use of any method or device. It confines the practice of medicine to the school or schools regarded as lawful, and does not permit quacks and charlatans to impose upon the public."

The case of *State vs. Collins*, 178 Iowa 73, supports the view of State vs. Edmunds, supra, as follows:

"We agree with appellant that statutes regulating the practice of medicine and providing penalties for failure to comply with conditions imposed upon such practice include all who practice the art of healing whatever the therapeutic agencies employed and that therefore one practicing osteopathy is at least for the purpose of such statutes, practicing medicine."

See also in regord to the practice of chiropractic, *State vs. Corwin*, 151 Iowa 420; *State vs. Boston*, (Iowa) 284 NW 143.

The State of Illinois has definitely determined that schools of medicine mean any science of preserving health and this is not limited to any particular means. We quote from *People vs. Seman*, 278 Ill. 356, as follows:

"A physician is one versed in or practicing the art of medicine, and the term is not limited to the disciples of any particular school. The term 'medicine' is not limited to substances supposed to possess curative or remedial properties, but has also the meaning of the healing art, the science of preserving health and treating disease for the purpose of cure, whether such treatment involves the use of medical substances or not. In common acceptation, anyone whose occupation is the treatment of diseases for the purpose of curing them is a physician, and this is the sense in which the term is used in the Medical Practice act."

The above decisions was to require the practitioners of the various schools to register under the Vital Statistics Act as physicians. The West Virginia case in *State vs. Morrison*, 127 SE 75, states:

"An excellent definition as to what constitutes the practice of medicine is contained in the opinion of the Massachusetts supreme court in the case of Commonwealth vs. Zimmerman, 221 Mass. 184, 108 NE 893, Ann. Cas .1916A, 858, wherein the court, in considering whether or not the practice of the chiropractic science came within the meaning of the practice of medicine, said: 'Medicine relates to the prevention, cure and alleviation of disease, the repair of injury, or treatment of abnormal or unusual states of the body and their restoration to a healthful condition. It includes a broad field. It is not confined to the administering of medicinal substance or the use of surgical or other instruments. It comprehends 'a knowledge, not only of the functions of the organs of the human body, but also of the diseases to which these organs are subject, and if the laws of health and the modes of living which tend to avert or overcome disease, as well as of the specific methods of treatment that are

most effective in promoting cures.' The weight of authority is to the effect that one who practices the chiropractic art or science comes within the provisions of a statute regulating the practice of medicine."

In the case of *Waldo vs. Poe, Collector of Internal Revenue*, 14 Fed. Rep. (2nd) 749, the court recognized the osteopath to be such a physician as to require him to register under the Harrison Narcotic Act, and stated in its opinion:

"The appellate court, in Howerton vs. District of Columbia, 53 App. D. C. 230, 289 F. 628, recognized an osteopath as a physician, saying: 'The science of osteopathy has become sufficiently established to justify the classification of its practitioners within the exception to the act, 'regular practicing physicians'.

"In Bandell vs. Department of Health of the City of New York, 193 N. Y. 133, 85 NE 1067, in considering a New York statute requiring that every physician in the city shall register his or her name and address in the office of the bureau of records of the health department, the appellate court says: 'The controlling question presented by this appeal is whether a person duly licensed by the state to practice osteopathy is a physician....We think it is manifest that a duly licensed osteopath is a physician. The statute declares that a physician is 'a practitioner of medicine,' and that 'a person practices medicine' who holds himself out as being able to or offers or undertakes 'by any means or method to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition.' Clearly one who practices osteopathy holds himself out and offers to diagnose and treat some of the ailments mentioned in the statute, and he is not required to treat all in order to be a physician within the meaning of the statute.'

"In State vs. Schmidt, 138 Wis. 53, 119 NW 647 the supreme court of Wisconsin said: "It is a waste of time in our judgment, to view the term 'physician,' from the standpoint of members of the profession belonging to the few great schools. It may be admitted that many, and perhaps most of them, think that no other healer should be known as a 'physician' or should be allowed to treat human ills for pay. Neither need we go to the lexical definitions, where we would find a wide range, down to the simple definition, 'one who administeers medicine to cure disease.' That medicine includes anything, however simple, 'administered in the treatment of disease,' and that disease includes any kind of disorder of the human system, needs no support other than our common knowledge.'

"In Towers vs. Glider & Levin, 101 Conn. 169, a 'physician' is held to include an osteopath where a statute provided that an injured employee may hire a competent physician or surgeon at the expense of his employer."

Because of the foregoing citations, definitions, constructions and rulings as to what constitutes a school of medicine, there can be no doubt but that a school of medicine is any system or science of the healing art and that our statute prohibiting discrimination against any practitioner of any school of medicine recognized by statute prohibits a discrimination against all systems of the healing art recognized by our statute, to wit: Medicine and Surgery, Osteopathy and Chiropractic.

MOTOR VEHICLE: LICENSE APPLIED FOR CARDS: A vendor or dealer may not issue "License Applied For" cards until an application for registration has been properly made and unless the purchaser, either by mail or otherwise, makes application as required by statute, the dealer may not issue such cards for operation during the evening or over Saturday and Sunday for use until the Treasurer's office again opens.

May 10, 1939. *Motor Vehicle Department. Attention: C. A. Knee:* Your letter of May 3, 1939, asking our opinion upon the following matter, has come to the writer for attention:

"After the treasurer's office in the county court house has closed for the day

or week end, a dealer in automobiles sells a used car that has not been registered for the current year. May the dealer put "Registration Applied For" cards on this car, and may the purchaser operate the car bearing the "Registration Applied For" cards until such time as the treasurer's office in the court house is again open for business?"

For the purpose of this opinion, we quote the following sections from Chapter 134 of the Acts of the 47th General Assembly:

"Sec. 56. *"Registration-Applied-For" cards.* Upon the sale of a motor vehicle by a manufacturer or dealer, the vendee shall at once make application by mail or otherwise, for registration thereof, after which he may operate the same upon the public highway without its individual number plate thereon for a period of not more than five days, provided that during such period the motor vehicle shall have attached thereto, in accordance with the provisions hereof, both on the front and rear of such vehicle, pasteboard cards bearing the words, "registration applied for" and the registration number of the dealer from whom the vehicle was purchased together with the date of purchase plainly stamped or stenciled thereon.

Sec. 57. *Card Issued Conditionally.* No manufacturer or dealer shall permit the use of such card until an application for a registration has been made, as herein provided, by the person to whom it is issued."

From an examination of these statutes, it is evident that the intention of the legislature was to provide a means for those who had made proper application for registration to operate their motor vehicles in the five-day interim between the application for registration and the time the registration might reasonably be expected to arrive or be completed.

Viewing the question as it arises, it seems that the intent of the purchaser is to operate his newly purchased motor vehicle with "License Applied For" cards during the evening or during Saturday and Sunday until he can make proper application on the following Monday morning. This the statute expressly forbids. The vendor or dealer may not issue "License Applied For" cards until an application for registration has been properly made and unless the purchaser, either by mail or otherwise, makes application as required by statute, the dealer may not issue such cards for operation during the evening or over Saturday and Sunday for use until the treasurer's office again opens.

RECORDS: COPYING: BEER LICENSE: If a request to copy records for commercial purposes should be granted to one, then such requests must be granted to all, and if the granting of such requests would affect the efficiency of the office, then you can refuse the request.

May 10, 1939. *Honorable W. G. C. Bagley, Treasurer of State. Attention: Mr. Dailey:* We have received your oral request for an opinion as to whether or not it would be within your discretion as superintendent of the cigarette and beer tax department to refuse to allow persons to copy the records pertaining to the sale of beer by individual license holders in the State of Iowa, for commercial purposes. We understand the specific question involves the copying of the records showing the name of the holder of a beer license, the monthly sales by such licensee, and the amount of tax paid monthly by such licensee.

We are of the opinion that such records as indicated above are what might be termed quasi public in nature. Such records should be available to any individual who would have some interest in the facts disclosed by the record. We have in mind perhaps a prospective buyer who might desire to purchase the business of some licensee and he might wish to know whether or not the

beer license had been paid. We do feel, however, that you would be within your rights in the conduct of your office if you refused to allow anyone, who failed to show any specific interest, to come into your office and make copies of the records. We certainly feel that if you have knowledge that the records are to be used for a commercial purpose, for instance as a part of a service to be furnished to brewers, you would be within your rights to refuse to grant permission to copy the records.

If a request to copy the records for commercial purposes should be granted to one, then such requests must be granted to all, and if in your opinion the granting of such requests would affect the efficiency of your office, then we are of the opinion that you can refuse the requst.

TAXATION: OLD AGE PENSION: PENALTY: LIEN: Insofar as there is no limitation in the statute with regard to the penalty on old age pension tax, the 1% a month will go on until paid or until some change is made in this statute by the legislature, and the tax becomes a lien the same as other personal taxes.

May 10, 1939. *Honorable Chet B. Akers, Auditor of State. Attention: Mr. Truax:* We have received your request for an opinion on the following questions:

1. "When will we reach the saturation point of collecting penalty on the 1934 and 1935 old age pension tax? Shall the county treasurer carry forward to the delinquent personal tax list all items pertaining to the old age pension tax levy that remain unpaid?
2. "Does old age pension tax when unpaid, become a lien upon real estate the same as other personal tax as set out in Section 7203 of the 1935 Code of Iowa?"

Section 5296-f34 provides for the levy of old age pension tax upon all persons residing in this state who are citizens of the United States and over 21 years old. The annual tax was $2.00 which was levied for the years 1934 and 1935 with a delinquent date of July 1st and after that date a penalty of 1 per cent a month was provided, and further that "the county treasurer shall charge any unpaid tax and/or penalty against the property owned by the person by whom said tax is payable; or said county treasurer, when such delinquent person is not the owner of real estate, shall cause to be served a notice, which shall be served in the same manner as an original notice, upon the delinquent taxpayer's spouse or employer, if either, of the amount of the tax and penalties due * * *." Further provision is made for the collection from the employer.

In response to the first question, we would be of the opinion that insofar as there is no limitation in the statutes with regard to the penalty that the penalty of 1 per cent a month will go on until paid or until some change is made in this statute by the legislature. This tax does become a lien against real estate, for the word "charge," in the clause stating that it shall be the duty of the treasurer to charge this tax against the propery of the taxpayer, means that the tax shall become a lien. In the sense in which the word "charge" is herein used, it means "lien"; see *Words and Phrases*, Vol. 1 (2nd) 637, where the word "charge" is defined as follows:

"A lien, incumbrance, or claim which is to be satisfied out of the specific thing or proceeds thereof to which it applies."

This would mean that the tax herein provided does become a lien the same

as other personal taxes, which is the answer to question No. 2. Inasmuch as this tax does become a lien, similar at least in its lien feature to the personal property tax, then it would be the duty of the treasurer to carry it forward to the delinquent personal property list.

BANKING: VICE PRESIDENT: (Section 9169) The officer or officers holding the title of vice president must be elected from the board of directors.

May 10, 1939. *Department of Banking. Attention: Mr. R. L. Bunce:* We are in receipt of your letter requesting an opinion from this office on the following situation:

"Does the language, in Section 9169 of the 1935 Code, 'They shall elect from their number a president and one or more vice presidents for the ensuing year' prevent the election of any individual with the title of vice president who is not a member of the board of directors or, second, does the language 'and appoint a treasurer or cashier and such other officers and employees as may be required' give the directors authority to employ additional officers holding the title of vice president?

"It has been a practice of many banks for years to elect at least one vice president from among the members of the board of directors but to also elect additional employees who serve as officials with a title of vice president and the question has been presented to us by two or three banks as to whether or not such procedure is duly authorized under the Code of Iowa."

A reading of Section 9169 indicates that the vice president elected for the ensuing year must be one of the directors. The statute is plain and it states that the directors shall elect one or more vice presidents *from their number.* The latter part of the statute gives the directors the right to appoint a treasurer, cashier or other officers, but in view of the specific direction that the officer, or officers, holding the title of vice president must be first elected from the board of directors, we are of the opinion that no one can be elected vice president who is not a director. To hold otherwise would mean that even the president of a bank could be one who was not a director. It is quite clear that the statute contemplated that insofar as the offices of president and vice president are concerned, they should be directors.

SOLDIER'S RELIEF: WIDOW'S SUPPORT: It is the duty of the Soldiers' Relief Commission to render whatever aid is needed to the family of an insane war veteran.

May 10, 1939. *Mr. Frank H. Lounsberry, County Attorney, Nevada, Iowa:* We are in receipt of your letter of recent date requesting an opinion from this office upon the following situation:

Mrs. Louise Paulson, the wife of a war veteran received a widow's pension while the husband was confined as an insane person at the State Hospital at Mt. Pleasant. He recently escaped from that institution and is now living in Minnesota. The widow's pension has been discontinued, and the question now is whether the rendering of aid to Mrs. Paulson and her small children is an obligation of Story County to be paid from the poor fund, or whether it is an obligation of the Soldiers' Relief Commission.

We understand that the Soldiers' Relief Commission has a balance of something over $5,000.00.

We feel that this an obligation for the Soldiers' Relief Commission of your county and we adopt the language and reasoning of your excellent opinion to Mr. Byrl D. Houck, rendered in answer to this same question, as follows;

"The facts are quite clear that this is the wife and family of an honorably discharged veteran of the World War. Section 5385 of the 1935 Code of Iowa provides that a tax may be levied on all the taxable property within the county to be used to create a relief fund for the purpose of paying funeral expenses of honorably discharged indigent United States soldiers, sailors, etc., and that said fund be used for the relief of the indigent wives, widows and minor children of honorably discharged veterans who served the United States in any war.

"Under Chapter 273 of the 1935 Code, a commission is set up for the purpose of disbursing the funds collected by said tax in the form of relief to the persons named above.

"The question is: Is it the duty of this relief commission to furnish relief to this family from the funds collected through the tax for the benefit of soldiers, sailors, marines and their wives and minor children? It is my opinion that this family is entirely the responsibility of the Soldiers' Relief Commission and that under the provisions of Chapter 273 of the 1935 Code of Iowa, the Commission is required to furnish this family such relief as may be necessary to sustain them.

"It is, therefore, my opinion that the widow's pension now granted by Story County, Iowa, to this family should be discontinued and the relief commission required to pay whatever benefits this family is entitled to from the fund in their control for such purposes.

BEER PERMIT: LIQUOR NUISANCE: REVOCATION: The city council has a large discretion in determining whether the permit should be granted. It should be refused by the city council unless the applicant has a good moral character; the application is made in good faith and not for the purpose of continuing the applicant in the beer business; and the granting of the permit will not be inimical to the purpose of the beer law in granting a beer permit in the same location where one was just revoked.

May 11, 1939. *Mr. Charles I. Joy, County Attorney, Perry, Iowa:* We are in receipt of your letter of May 5th requesting an opinion upon the following situation:

"The holder of a beer permit was convicted of the crime of 'Maintaining a Liquor Nuisance' on February 13, 1939. He and his wife had been active in the management and were jointly interested in the ownership of the beer parlor and cafe for several years prior to the date of his conviction. At the time of the raid by the sheriff the wife of the beer permit holder was behind the bar where a quantity of alcoholic liquors were found in pitchers. The permit holder was advised that his beer permit was to be revoked so he turned in his permit and asked that it be cancelled. The town council of Adel ordered the permit cancelled upon its surrender by the permit holder. The place of business has a cafe in the front part next to the street and a large room adjoining it at the back which is used for dining and dancing. The wife of the permit holder has now applied to the city council asking for a Class "B" beer permit for the sale of beer in the room to the rear of the cafe. The former permit holder will continue to operate the cafe.

"The question has arisen as to whether the council has the power to grant a beer permit to the wife, or whether they have the power to refuse a license and what conditions should they find before issuing a license or refusing a license."

In answer to the above question we can do no better than to quote from your own opinion to the town council under date of April 14, 1939, in answer to this same question, as follows:

"In determining the qualifications of a beer permit holder your attention is called to Section 1921-f103 of the Code of Iowa, 1935. One of these qualifications is that the person is of good moral character and the Supreme Court of Iowa in the case of Madsen vs. Town of Oakland, 257 NW 549 held that in determining the good moral character of an applicant evidence is admissible to show

the nature of the business in which applicant has been engaged, the manner in which it was conducted and his or her habits as to observance or violation of the law. In view of the facts and in view of the discretion allowed the council in determining the moral character of an applicant the council could well refuse the applicant in this case a permit on this ground.

"Section 1921-f123, Code of Iowa, 1935, provides for the mandatory revocation of permits and provides that when a permit has been revoked, under this provision, no permit shall again be granted to that person. In this case J. E. McCleary was the holder of the beer permit and under the law he cannot again secure another beer permit. It may be that the court would hold in this case that where the wife is part owner of the business and active in its management and operation that she would have such an interest in the permit so as to come within the provisions of this section. I am not prepared, however, to go that far in the interpretation of this statute and my opinion would be that this particular provision applies to the permit holder only and that this section has no application to the instant case.

"Section 1921-f126 provides that: 'Any permit revoked, as in this chapter provides, shall not be renewed or a permit shall not be granted to the same person for a period of one year from the date of revocation; further, the governing body may refuse to issue a permit effective on the same premises to any other person for a period of one year from the date of revocation.' Under this section the attorney general, under an opinion dated March 12, 1934, held that the wife of one convicted of selling beer should not be issued a permit in her own name if application is not made in good faith but for the purpose of allowing the husband to continue in business. Whether or not the application in this case is made for the purpose of allowing the husband to continue in business is a matter for the council to determine, for, as I understand it, Mr. McCleary will continue actively in the operation of Mac's Cafe. The latter part of the above quotation gives the council specific power to refuse to issue a permit on the premises covered by the permit which has been revoked. This is not a mandatory requirement but gives the council the right to refuse the issuance of the permit for the period of one year. I have been advised that the present application will cover only the rear part of the cafe which is sometimes known as the 'Silver Moon', however, if the beer permit which was revoked covered the rear part of the cafe known as the 'Silver Moon', then the council would have the power to refuse the issuance to the present applicant for at least one year.

"In conclusion, let me sum up my opinion as follows: The council has a large discretion in determining whether the permit shall be granted. It should be refused by the council unless the following things are clearly established in the minds of the members of the council: (1) that the applicant has a good moral character; (2) that the application is made in good faith and not for the purpose of continuing J. E. McCleary in the beer business; and, (3) that the granting of the permit will not be inimical to the purposes of the beer law in granting a beer permit in the same location where one was just revoked.

"If your minds are satisfied that the above requirements are met, then, you should issue a beer permit to the applicant."

We agree with the reasoning in your opinion and adopt it as the opinion of this office.

FIRE CHIEF: REPORTING FIRES: A fire chief who receives full time pay is not entitled to receive a fee of 50c for reporting fires.

May 11, 1939. *Mr. John W. Strohm, State Fire Marshal:* Your letter of May 9, 1939, asking our opinion upon the following matter, has come to the writer for attention:

"A fire chief is serving in the capacity of chief of the fire department, and chief of police, his salary being paid from the fire department fund, and the police fund, giving him a full time salary from the two positions.

"Would this fire chief be entitled to receive the regular fee of 50 cents paid by this office for reporting fires, or would he be classified as a "paid fire chief?"

For the purpose of this opinion, we quote Section 1654 of the 1935 Code of Iowa as amended by Section 61, Senate File 379:

"*Fees for Fires Reported—Payment.* There shall be paid to the chief of the fire department, and to mayors of incorporated towns, and to the township clerk of every township, who are by this chapter required to report fires to the state fire marshal, the sum of fifty cents for each fire so reported to the satisfaction of the state fire marshal and in addition thereto there shall be paid to township clerks mileage at the rate of ten cents per mile for each mile traveled to and from the place of fire. Said allowances shall be paid by the state fire marshal out of any funds appropriated for the use of the office of said state fire marshal, provided that such fees shall not be paid to any full-time salaried public official who is paid for full time at such duties."

The facts in the situation proposed indicate that the fire chief in question is being paid a full time salary. This being true, by virtue of Section 1654 as amended, this fire chief is a paid fire chief and is not entitled to receive the regular fee of fifty cents (50 c) paid by your office for reporting fires. Under the statute the fire chief in question, because he receives a full time salary for full time employment as such fire chief may be said to be a full time public official who is paid for full time at his duties as fire chief and it is, therefore, our opinion that such fire chief is not entitled to receive the fee of fifty cents (50c) for reporting fires.

RETAIL BUYERS ASSOCIATION: LOTTERY: The attached contract itself is lawful and not in violation of our lottery laws. However, method of distributing dividends will determine whether lottery is involved.

May 15, 1939. *Mr. O. E. Anderson, County Attorney, Creston, Iowa:* Received your letter of the 25th ult., therewith enclosed proposed contract between Browns' Clothiers of Afton, Union County, Iowa, and Retail Buyers Association, and also proposed subscription blank for each individual member of the Retail Buyers Association, a copy of which contract and subscription blank are herto attached. You ask our opinion as to whether or not the scheme imposed in this contract and subscription blank constitutes a lottery.

It is our opinion that the contract itself is not a lottery. The test will come, however, when the members of the Retail Buyers Association meet to determine who shall receive the merchandise dividend. If such dividends are distributed by any method involving chance the same would constitute a lottery. We, of course, at this time do not know what method will be adopted and we, therefore, cannot determine that question. All we hold at this time is that it is manifestly lawful for a group of citizens to form a retail buyers association for the purpose of buying needed merchandise in larger quantities, thus enabling them to buy merchandise at a reduced price because of the quantity bought.

Our conclusion then is that the proposed contract itself is lawful and not in violation of our lottery laws. As to what the situation will be when the whole plan is put in operation, we can not at this time determine. If the method by which the merchandise dividend is distributed to the various members constitutes a lottery and a merchant has full knowledge of the means to be adopted for such distribution, he would be equally guilty as the members themselves.

Contract

It is hereby agreed between Browns' Clothiers of Afton, Union County, Iowa, first party, and the Retail Buyers Association, second party, that:

For and in consideration of the payment of the sum of twenty-one hundred ninety-nine and no/100 ($2,199.00) dollars by second party to first party, first party hereby sell and agree to deliver in their store in Afton, Iowa, merchandise consisting of clothing, shoes, furnishings, haberdashery and accessories in the amount and value of twenty-five hundred ($2,500.00) dollars retail value in the vicinity of Afton, Iowa.

Second party agrees to pay one hundred ($100.00) dollars of said consideration at first party's store in Afton, upon the signing of this agreement and a like amount one week thereafter, and the balance in twenty-three weekly installments, each of which shall be on ($1.00) dollar less than the preceding weekly payment, which will result in the twenty-fifth and last weekly payment being in the amount of seventy-seven ($77.00) dollars.

Second party is a group of people, one of whom has signed this agreement, and the rest of whom have subscribed on separate instruments, for their mutual advantage in the purchase of merchandise. Each of the second parties restricts their personal liability for the payment of the above consideration to the sum of twenty-five ($25.00) dollars.

Second party may select merchandise from first party's store during the term of this contract in an amount equal to the part of the consideration that has been paid to first party, such merchandise not to exceed the value of twenty-one hundred ninety-nine and no/100 ($2,199.00) dollars.

First party further agrees to keep record for the second parties showing the amount of the consideration that each person of the second party has paid and will afford a depository at its store at Afton, Iowa, at which second party may collect the payments due from its several co-parties. Such records and money shall be the property of the second party and the first party shall have no interest therein until the same is paid over to first party in the weekly installments above provided.

In consideration whereof first parties agree to turn over and deliver to second parties additional merchandise of the retail value of three hundred one ($301.00) dollars, hereafter referred to as merchandise dividends, at the times and in such amounts as second party shall direct, excepting only that such delivery shall not exceed a proportionate amount in excess of the proportion of the consideration that second party has paid on this contract. This excess merchandise which is given for the purpose of stimulating business and in lieu of other methods of advertising, shall become the property of the second party and shall be apportioned and divided among the several persons comprising second party as they shall mutually agree among themselves.

Second party represents that it has co-signers in sufficient number that their separate obligations to pay twenty-five ($25.00) dollars each, equal or exceed the total consideration provided for in this contract.

Second party agrees among themselves that they will meet at the office of the Crandall Insurance Agency at Afton, one week from the date hereof to determine the manner and method in which the said merchandise dividends shall be apportioned among the several persons comprising the second party hereto.

Second party signing this agreement does so for himself and all of his co-signers who have subscribed hereto on separate instruments.

In Witness Whereof we have set our hands this.....day of....., 1939.

.....
First Party

.....
Second Party

Retail Buyers Association

I hereby subscribe as one of the second parties to a contract dated April ....., 1939, between the Brown Clothiers of Afton, Union County, Iowa, first party, and the Retail Buyers Association, second party, the same as though all of its terms and conditions were printed herein.

My liability to pay shall not exceed twenty-five ($25.00) dollars of the consideration therein contained.

I take notice that a meeting of the Retail Buyers Association will be held at the office of the Crandall Insurance Agency in Afton, Iowa, at 7:00 o'clock P. M. on the.....day of....., 1939, and agree that a majority of the subscribers there and then present may determine the manner and method of the distribution of merchandise dividends among the subscribers hereto.

.....
Subscriber-Second Party

SCHOOL DISTRICT: LIABILITY OF SCHOOL CORPORATION: INDEPENDENCE TWP. SCHOOL BOARD: Use of schoolhouses by grange is authorized by law and does not change the function of the school corporation from governmental to proprietary.

May 15, 1939. *Mr. Luther Carr, County Attorney, Newton, Iowa:* Received you letter of the 10th ist., asking our opinion on the following proposition:

"The Independence Township School Board allows the Baxter Grange to use a rural school building for Grange meetings without compensation.

"A short time ago, Mr. Ralph Sparks, Master of the Jasper County Pomona Grange was invited to the meeting of the Baxter Grange by one of its members, in the evening. Upon leaving the meeting instead of going off the front porch at the front side where the steps were located, he turned to the left and fell off the porch, breaking his arm.

"The porch is possibly three or four feet high according to my information and has no railing nor is there any light on the said porch. Mr. Sparks through the pastor of his church has taken the matter of damages up with the Independence township school board on the theory that the porch was unprotected by bannister or railing and constituted a defective and dangerous condition."

The question is: May damages be recovered from the Independence Township school corporation?

We reach the conclusion that there is no liability on the part of the said school district.

Authorities:

Larson vs. Independent School Dist., 272 N. W. 632; 223 Iowa 691;
Kincaid vs. Hardin County, 53 Iowa 430;
Miller Grocery Co. vs. City of Des Moines, 195 Iowa 1310;
Smith vs. Iowa City, 213 Iowa 391, 239 NW 29;
Wilson vs. Wapello County, 129 Iowa 77;
Snethen vs. Harrison County, 172 Iowa 81.
Post vs. Davis County, 196 Iowa 183;
Lane vs. District Township of Woodbury, 58 Iowa 462;
Section 4371, *Code of Iowa*, 1935.

In the *Larson case, supra,* the court said:

"So we think, from the decisions of the courts of Iowa, that there is a line of distinction between incorporated cities and towns and such corporations as counties and school districts, the latter being what are known as quasi corporations, and only for governmental purposes. *A school district is an organization simply for the purposes of carrying on the schools, for that and for nothing else.* It is only a quasi organization and * * * it would be very disregardful of the law for the court to hold * * * that the school district is liable."

In the *Lane case, supra,* it was said:

"A school corporation, or quasi corporation, is created by statute for the purpose of executing the general laws and policy of the state, which require the education of all its youth. It is a branch of the state government, an instrument for the administration of laws and so far as the people are concerned, an involuntary organization."

In the *Iowa City case, supra*, the court held that:

"* * * a city in exercising its governmental power through a park board to acquire and maintain public parks is not liable for damages consequent on the negligent failure to keep the instrumentalities in said parks in repair; *nor are the members of the park board individually liable for such nonfeasance on their part.*

Section 4371, Code of Iowa, 1935, provides:

"The board of directors of any school corporation may authorize the use of any schoolhouse * * * for the purpose of meetings of granges, lodges, agricultural societies, * * * such use to be for such compensation and upon such terms and conditions as may be fixed by said board for the proper protection of the schoolhouse and the property belonging therein, including that of the pupils."

Thus we find that the use by the grange of schoolhouses is authorized by law and, as we view it, does not change the function of the school corporation grom governmental to proprietary.

As to the distinction between proprietary and governmental functions of a municipal corporation see *Miller Grocery Co. vs. City of Des Moines, supra.*

BOARD OF SUPERVISORS: PETITION TO DECREASE NUMBER OF SUPERVISORS: QUALIFIED ELECTORS: Petition to decrease number of supervisors is valid if signed by ten per cent of the persons who voted at last general election, as shown by poll books. Section 5108, 1935 Code.

May 17, 1939. *Mr. C. Morse Hoorneman, County Attorney, Le Mars, Iowa:* Received your letter of the 11th inst. wherein you ask our opinion as to the interpretation of Section 5108, Code of Iowa, 1935, which reads as follows:

"In any county where the number of supervisors has been increased from five to seven, the board of supervisors, on the petition of one- tenth of the qualified electors of the county, shall submit to the qualified voters of the county, at any regular election, one of the following propositions, as the same may be requested in such petition:

"1. Shall the proposition to reduce the number of supervisors to five be adopted?

"2. Shall the proposition to reduce the number of supervisors to three be adopted?

"If a majority of the votes cast shall be for the decrease, then the number of supervisors shall be reduced to the number indicated by such vote."

The question is as to the validity of the petition in this case.

It appears that ten per cent of the persons who voted at the last general election, as shown by the poll books, signed the petition. The question now is as to whether this petition is legally sufficient. You raise the question as to whether ten per cent of the qualified electors of your county signed the petition as contemplated by said section. It appears further that the election was held and that the proposition carried by the requisite vote.

We are of the opinion that the petition was, in all respects, legal and proper; that the election was valid and that the mandate of the electors must be carried out.

"Qualified electors" refers to residents of the county eligible to vote but, as we view it, there is only one way to determine who these are and that is by consulting the poll books of the last general election. It is true that the petition may not in fact have had ten per cent of the persons eligible to vote, but if this is required then there would be no way to determine the number

of such qualified voters in your county, except to hold a census. Manifestly this was not the intention of the legislature.

We reach the conclusion, therefore, that in passing this statute the legislature intended that in determining the ten per cent in question, the poll books of the previous general election should be consulted and that when ten per cent of the persons who voted at such general election sign the petition, the same is in all respects legally suffcient. In view of our holding, it is not necessary for us to determine as to whether the sufficiency of the petition may at this time be questioned because of waiver, as suggested in your letter.

SCHOOL DISTRICT: PARTIAL HIGH SCHOOL: Public school district cannot establish a part time, partial high school for the accommodation of three classes of the parochial school.

May 17, 1939. *Miss Jessie M. Parker, Superintendent of Public Instruction:* We have your request for an opinion on the questions involved in the following letter:

"Am writing you relative to our opening of the public school here as the superintendent of the parochial school has requested that we take over about 20 high school pupils for manual training, agriculture and mathematics, and arrange to employ a teacher and conduct it in the high school, as they are not equipped with teachers, equipment, nor room in the school.

"We have corresponded with a man that is now principal in high school, that finished at State Teachers College and got his degrees at Ames, and has very fine recommendations, and we have tendered him a contract.

"What we want to know is, if pupils from outside the Earling Independent School District take these subjects, if we can bill the district for tuition, for at present time they are attending parochial school but on account of this being a denominational school, no tuition can be charged. But if we open the public school, which we will in September, and we employ the teacher and pay him from public funds, and they take part of their subjects in the parochial school, and the three subjects above mentioned in our public school, if we can collect proportionate tuition from district where they come from.

"It would be impossible for us to have all the high school subjects, as we only have a two-room public school, and it has not been opened for twenty years or longer, but we have always kept it in first class condition, same as if we were conducting school, and we would have to build a school to accommodate them, and levy quite heavy taxes, and the demand is only for these additional subjects, as many of them after graduation find out these subjects are necessary and they are adding home economics in parochial school and we could not get any space there for pupils desiring to take the above subjects in high school.

"Would appreciate hearing from you and to get your opinion as we want to know just where we stand and what estimate of expenses will be for next year, and if we can expect any outside tuition, as long as we don't carry full high school course, and by the district only having to take over three subjects will be a great help on our local taxes, than if they threw the entire high school over on us."

It is the policy of this state that neither the public property nor credit nor money may be used directly or indirectly in the aid of any school, wholly or in part under the control of any religious denomination.

The whole set-up, as outlined in the above quoted letter, is to have the public school district establish what seems to be a part time partial high school for the accommodation of three classes of the parochial school.

While the law provides in Paragraph 4267 of the 1935 Code of Iowa:

"4267. Higher and graded schools. The board may establish graded and high schools and determine what branches shall be taught therein, but the course of study shall be subject to the approval of the superintendent of pub-

lic instruction. Whenever the board in a school township establishes a high school, such high school can be discontinued only by an affirmative vote of a majority of the votes cast for and against such proposition at an election which may be called by the county superintendent of schools upon a petition for such election being presented signed by twenty-five per cent of the electors in such township."

It must be observed that "the course of study shall be subject to the approval of the superintendent of public instruction," and it is extremely doubtful that such a course could be approved.

Section 3, Article I of the Constitution of Iowa provides:

"Religion. Sec. 3. The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry."

In view of the foregoing, we arrive at the conclusion that the scheme proposed cannot be accomplished under the Constitution and the laws of Iowa.

HIGHWAY COMMISSION: PLANNING PROJECT: PRIMARY ROAD FUND: Expenditure from the primary road fund for state-wide planning is authorized.

Ames, Iowa, May 17, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: Mr. C. Coykendall:* This will acknowledge receipt of your letter of May 9, 1939, requesting our opinion on the following proposition:

"In our 1940 Federal Aid highway program we are proposing the expenditure of $50,000.00 for a state-wide highway planning project.

"Of this $50,000.00, $25,000.00 is payable from Federal funds and the remaining $25,000.00 is proposed for payment from the primary road fund.

Under this project it is contemplated that information heretofore developed through our first state-wide highway planning survey will be expended and kept current. Such information consists primarily in determining the volume and nature of the traffic that uses the various parts of the highway system of this state.

"Federal laws and regulations permit the use of Federal Aid funds for this purpose, and the Bureau of Public Roads has been quite insistent that continuing program of this kind be carried on by each of the states. Our Commission has felt that it was advisable and desirable to keep our traffic information up-to-date and we have not questioned the advisability of spending a reasonable amount of money to accomplish this.

"We now desire an opinion as to whether we can properly spend primary road funds for this purpose, in view of the action of the last General Assembly in placing the State Highway Commission on a budget in so far as engineering and maintenance expenditures are concerned. We have not heretofore considered the work done under these highway planning surveys as engineering work in the ordinary sense of the term, and of course in no way can the work be considered a maintenance activity. The project has been considered a fact-finding project for the development of information for the use of the State Highway Commission, county officials and Federal officials in planning highway construction programs, and for the determination of the type of improvement that will meet the requirements of traffic.

"We will appreciate an opinion on this matter."

In addition to the above you verbally informed me that the amount anticipated to be expended for state-wide highway planning has not heretofore been classified as engineering, inspection, administration or maintenance and was therefore not included in the budget estimate submitted to the legislature under the requirements of Senate File 268 passed by the 48th General Assembly.

Incidentally, neither has this item been included as "construction."

Senate File 268 provides as follows:

"After June 30, 1939, expenditures by the state highway commission under the preceding section for the support of the commission and for engineering, inspection and administration of highway work and maintenance of the primary road system shall be only on authorization by the General Assembly.

"The highway commission shall biennially on or before September first of even numbered years submit to the comptroller for transmission to the General Assembly a detailed estimate of the amount required by the highway commission during the succeeding biennium for the support of the commission and for engineering, inspection, and administration of highway work and maintenance of the primary road system. Such estimate shall be in the same general form and detail as may be required by law in estimates submitted by other state departments.

"Any unexpended balance at the end of any year in the amount so authorized for said year shall revert to the primary road fund. If the amount authorized by the General Assembly for any year shall prove to be not sufficient to meet the commission's needs during said year, the executive council may on proper showing by the commission authorize such additional amount for said year as may appear to the council necessary to meet the commission's needs for the remainder of said year."

Pursuant to this requirement Section 59 of Senate File 479 fixed the *amount* authorized to be expended for the items mentioned within the classifications, i. e., engineering, inspection, administration and maintenance.

It will be noted that the legislature has not attempted to change the Commission's list of items included in such budget classifications. Expenditures made for "state-wide highway planning" having been heretofore treated as a separate classification in itself, and not included in the Commission's estimate submitted to the legislature, are clearly not prohibited by reason of such exclusion.

The information gained from this survey plays a vital part in the determination and preparation of proper plans and specifications for improvement of our highways; continued expenditures therefore are certainly advisable to keep current information heretofore obtained. The necessity of compiling this information is recognized by the Federal Bureau of Roads, hence their seeming insistence that at least $25,000 of the amount annually allotted to the State of Iowa be devoted to this purpose.

By the provisions of Section 4755-b1 of the Code, 1935, the Highway Commission is "* * * empowered to enter into any arrangement or contract with or required by the duly constituted federal authorities, in order to secure the full cooperation of the government of the United States and the benefit of all present and future federal allotments *in aid of* highway construction, reconstruction, improvement or maintenance. * * *"

In view of the broad provisions of the section last quoted we conclude that the proposed expenditure from the primary road fund for state-wide highway planning is authorized in the amount contemplated.

COUNTY ENGINEER: TRANSMISSION LINES: County engineer should not be paid extra compensation for locating transmission lines. Expense incident to location of transmission lines may not be collected from the owner of transmission lines.

May 17, 1939. *Mr. Donald P. Chehock, County Attorney, Osage, Iowa.* This is in answer to your letter of the 13th inst., wherein you ask our opinion relative to who shall bear the expense of locating electric transmission lines.

You say that the Co-op. Electric Company of Osage, a REA project, is about to start construction of electric transmission lines in your county. Demand has been made that the lines be located pursuant to Section 4838, Code of Iowa, 1935.

It is the opinion of this department that this is a part of the duties of the county engineer and that no extra compensation may be allowed therefor.

Section 4644-c20, Code of Iowa, 1935, provides:

"The board shall fix the compensation of said engineer * * *."

Section 4644-c21, Code of Iowa, 1935, provides:

"Said engineers shall, in the performance of their duties, work under the directions of said board (of supervisors) and shall give bonds for the faithful performance of their duties * * *."

Section 4838, Code of Iowa, 1935, provides:

"New lines, or parts of lines hereafter constructed, shall, in case of secondary roads, be located by the county engineer upon written application filed with the county auditor, and in case of primary roads, by the state highway engineer upon written application filed with the state highway commission, * * *. If there be no county engineer, the board of supervisors, in case of secondary roads, shall designate said location."

We find, therefore, that locating the lines in question is one of the duties of the county engineer. His salary as provided by Section 4644-c20 is fixed by the board of supervisors. Manifestly, if a charge were to be made for the services of the engineer in locating these lines, the engineer could not retain as a part of his compensation such fees. The question then would arise in what fund would such fees be placed. Other questions would arise.

In your second paragraph you say: "The question we would like to have answered is whether the expenses of the county engineer locating these road lines should be borne by the county or by the Cooperative."

Nothing is said in the statute relative to locating road lines. Section 4838 refers to "New lines or parts of lines hereafter constructed * * *." This, of course, refers to transmission lines. In writing this opinion, therefore, we assume that when you use the phrase, "locate the road line," you have reference to location of transmission lines. We make this explanation in order that our opinion may not be misunderstood.

From these considerations and having in mind various fundamental principles in the construction of statutes, we reach the conclusion that the expense incident to the location of these lines may not be collected from the owner of the transmission lines—in your case the Co-op. Electric Company.

TAXATION: DRAINAGE DISTRICT: REDEMPTION: DELINQUENT TAXES: Special taxes in the nature of drainage or other special assessments do not take precedence over general taxes. There is no constitutional prohibition in the method of apportionment whereby the general taxes were paid in full. It was the legislative intent in Section 7590-c2 to so apportion the money that the first application would be on the general taxes.

May 18, 1939. *Honorable Chet B. Akers, Auditor of State:* We are in receipt of your request for an opinion in regard to an inquiry from the county treasurer of Louisa County and we have been furnished with the county treasurer's letter of May 10th and the file containing agreements and board proceedings in connection with Drainage District No. 13 of Louisa County.

The resolutions and contracts are too long to set forth in this opinion, but we will briefly state that the file discloses that certain lands in Drainage

District No. 13 were sold for delinquent general and special taxes and thereafter the certificates were purchased by the board of supervisors of Louisa County in behalf of Drainage District No. 13 under the provisions of Section 7590-c4 of the Code of Iowa, and on May 2, 1938, the land owner, John L. Blaul, made redemption under the provisions of Section 7590-c2 by tendering to the board the sum of $2,500.00, which sum was agreed to represent one-half the value of the real estate. By resolution adopted May 2, 1938, the sum of $2,500.00 was accepted and redemption certificates were issued to John L. Blaul. There is nothing stated in this resolution with regard to any apportionment by the county treasurer of the $2,500.00 so received, although the tax certificates show that $1,899.02 of the unpaid tax was general tax.

Thereafter, on September 2, 1938, the board of supervisors, acting as trustees for the Drainage District No. 13, John Blaul, the landowner, F. O. Block, by his attorney, John A. Dailey, who represented the holders of unpaid warrants upon this drainage district, and D. W. Bates, receiver of the First Iowa State Trust and Savings Bank at Burlington, who acted by his attorney, Charles L. Bosier, and who represented all of the bondholders, signed an agreement purporting to provide for the apportionment of the $2,500.00 which had been received the previous May, as before set out. This agreement provided that a priority warrant of C. A. Mainwaring be first paid, and though the amount of said warrant is not set forth, it is stated to be a warrant for the purpose of acquiring title to the tax sale certificates and further provision is made for the division of the balance between the general tax fund and other drainage funds in the proportion of the unpaid taxes due these funds. Although this agreement recites, "Whereas no distribution has as yet been made of the said sum of $2,500.00, etc.," it appears by another resolution dated September 2, 1938, that apportionment was actually made by the treasurer when the sum of $2,500.00 was so paid to him and he applied the sum so received, first to the payment of delinquent general taxes in the sum of $1,899.02 and apportioned the same amongst the various tax funds comprising this delinquency. In this resolution of September 2, 1938, marked Exhibit "A" in the file, and which will be distinguished from the agreement previously described, dated September 2, 1938, the board of supervisors, now apparently acting as a board of supervisors, and not as trustees of the drainage district, undertook to apportion the fund of $2,500.00 in accordance with the agreement of September 2, 1938, and by this resolution declared that the division heretofore made by the county treasurer was erroneous and the resolution ordered the county treasurer to recover the money, so distributed, from the various funds and make a redistribution in accordance with the agreement of September 2, 1938.

The present inquiry is from the treasurer who seeks an opinion as to whether or not the procedure outlined in the resolution of September 2, 1938, is legal.

Section 7590-c2 provides as follows:

"7590-c2. *Terms of redemption.* Redemption from said tax sale shall be made on such terms as may be agreed upon between the such* board of supervisors or such trustees and the owner of the land involved; but in any case in which the owner of said land will pay as much as fifty per cent of the value of the land at the time of redemption he shall be permitted to redeem. If the parties cannot agree upon such value, either of them may bring action against the other in the district court of the county where the land is situated, and the court shall determine the matter. The proceeding shall be triable in equity."

*According to enrolled bill.

It will be noted that in the resolution of May 2, 1938, when the $2,500.00 was accepted in redemption of the outstanding certificates, no mention is made of any agreed apportionment of the funds so received. It was not until September 2, 1938, that the proposed plan of apportionment of the $2,500.00, which had been received the previous May, became the subject of a written agreement. In view of our holding herein, perhaps this is not so significant, for we are of the opinion that the apportionment made by the county treasurer was the correct and lawful apportionment, and the only apportionment which he could make under the laws of Iowa, any resolution of the board of supervisors or any agreement between interested parties thereto to the contrary notwithstanding. Under the Iowa laws the general tax is a first, prior and paramount lien against the property. Special taxes, in the nature of drainage, or other special assessments, do not take precedence over general taxes. The holders of obligations to be paid for from special assessments must, in many instances, in order to protect their security, pay the prior lien in the comparable situation of where a second mortgage holder must, in some instances, pay the first mortgage in order to protect his security. Provision is made by statute for deficiency special assessments when the funds raised by the original special assessment are insufficient to pay the obligation created at the time the special assessment was levied.

We find no constitutional prohibition of the method of apportionment whereby the general taxes were paid in full, and it seems to us that the legislative intent in Section 7590-c2 was to so apportion the money that the first application would be on the general taxes.

We are, therefore, of the opinion that the county treasurer should not recover from the general fund, or any of its component parts, any of the $1,899.02 previously apportioned to the general fund and that the treasurer's application of the funds whereby the general taxes were first paid was correct.

TAXATION: DRAINAGE BONDS: BONDS: It would seem that the numbers on the drainage bonds in question do not denote priority but are for the purpose of identification and consequently the bond should be received and applied upon the payment of taxes upon the land located in the said district even though certificates with preceding numbers are out.

May 18, 1939. *Mr. Ralph C. Jones, County Attorney, Bedford, Iowa:* We are in receipt of your request for an opinion with regard to the following situation:

Drainage bond No. 18, series "C" of the Plat River Drainage District No. 4 in the principal amount of $1,000.00, and on which there is now due $1,400.30, has been presented to you in part payment of taxes upon land located in said drainage district under the provisions of Section 7495-e1 of the 1935 Code of Iowa. We understand that there were 20 bonds numbered from 1 to 20 inclusive in this series; that all of the bonds bear interest at the same rate; that they were all dated the same day and the maturity date on all the bonds was May 1, 1939.

The question is whether or not you can receive bond No. 18 to apply on taxes when bonds bearing lower numbers are as yet unpaid.

Section 7495-e1 provides as follows:

"7495-e1. *Bonds received for assessments.* Bonds issued for the cost of construction, maintenance or repair of any drainage or levee district, or for the refunding, of any obligation of such district, may be acquired by any taxpayer or group of taxpayers of such district, and applied at their face value in the order of their priority, if any priority exists between bonds of the same issue, upon the payment of the delinquent and/or future assessments

levied against the property of such taxpayers to pay off the bonds so acquired; the interest coupons attached to such bonds, may likewise be applied at their face value to the payment of assessments for interest accounts, delinquent or future."

It will be noted from the foregoing section of the Code that such bonds are to be applied on the taxes "at their face value in the order of their priority, if any priority exists between the bonds of the same issue." It would seem from the fact statement that no priority exists between the bonds of this issue. The numbers on the bonds would not denote priority in favor of the holders of the lower numbers. Priority would be determined by the maturity date. The numbers are for the purpose of identification and obviously for no other purpose. The bond is due and should be received by you and applied upon the payment of taxes upon the land located in said district.

TAXATION: PUBLIC FUNDS: FUEL OIL: Fuel oil may be sold by a licensed distributor to a contractor to be used in stationary diesel engines and paid for from public funds, without collecting the tax. No refund should be made where such tax was paid voluntarily to a distributor and not paid under protest and later remitted to the state treasurer.

May 18, 1939. *Honorable W. G. C. Bagley, Treasurer of State. Attention: Mr. Freese:* You have requested an opinion from this office upon the following questions:

1. Should a fuel oil distributor within the provisions of Section 5093-f14 of the 1935 Code of Iowa collect a motor fuel tax from a contractor who buys the fuel oil to use in stationary diesel motors in connection with construction or maintenance work that will be paid for from public funds?
2. In the event that the holding in answer to question No. 1 is that no tax should be collected, should the treasurer refund a tax collected by a distributor and remitted to the treasurer and not paid under protest?

Without citing the different sections of Chapter 251-f1, it is sufficient to state that an Iowa distributor handling motor vehicle fuel must report imports on the 20th of each month and at that time pay to the treasurer the tax on the amount received by said distributor for the preceding thirty days.

Section 5093-f14 provides in substance that a distributor handling fuel oil may receive it tax free and sell it under certain circumstances without collecting a tax. If, however, the distributor knows that the fuel oil is to be used in a motor vehicle, he must collect the tax unless it is for the purpose of operating a tractor used for agricultural purposes.

The conclusion we reach, therefore, is that under the foregoing statutes fuel oil may be sold by a licensed distributor, when it is to be used in stationary diesel engines, without collecting the tax.

With regard to the second question as to your right to refund such tax collected by a distributor and remitted to the treasurer when the tax was not paid under protest, we are of the opinion that no refund should be made.

We do not feel that Section 5093-f29 has any application here. That statute provides for refunds for motor vehicle fuel taxes which, under the law, is taxed upon its import. The refund in this case is under the general law of refunds and we have been unable to find any authority which would authorize the state treasurer to make any refunds of taxes voluntarily paid. It is true that the right to make such a refund was discussed in the case of *Scottish Union & National Ins. Co. vs. Herriott*, 109 Iowa 606, but there the premium

tax assessed against the plaintiff insurance company, which was the subject of the action for refund, was paid under protest. The court in that case only goes so far as to hold that where a tax is paid under protest, then in the event it is illegal, it can be the subject of a refund action. Many other cases could be cited to the effect that one who makes voluntary payment of taxes cannot recover the payment back. See *Lindsay vs. Boone County*, 92 Iowa 86; *Bibbins vs. Polk County*, 100 Iowa 493; *Ahlers vs. Estherville*, 130 Iowa 272.

We therefore hold, in answer to Question No. 2, that no refund should be made where such taxes are voluntarily paid to a distributor and not paid under protest and later remitted to the state treasurer.

BICYCLE: ORDINANCE: REGISTRATION: FEE: A municipality may by ordinance properly regulate bicycles, but may not license or require a registration fee for suchbicycle.

May 18, 1939. *Iowa State Safey Council. Attention: Mr. P. H. Sproul:* Your letter of May 5, 1939, requesting an opinion upon the following matters is herewith acknowledged.

May a municipality in the State of Iowa enact bicycle control ordinances? Is it proper for such municipality to charge a fee for the registration of such bicycle?

For the purpose ofthis opinion, we quote in whole or in part the following sections of the 1935 Code of Iowa:

"5714. *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 conveniences 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.

"5970. *Conveyances—transportation.* They shall have power:

"1. To regulate, license, and tax all carts, wagons, street sprinklers, drays, coaches, hacks, omnibuses, and every description of conveyance kept for hire.

"5. To require vehicles and bicycles to carry lamps giving sufficient light.

"5971. *Driving or riding.* Cities and towns shall have power to restrain and regulate the riding and driving of horses, live stock, vehicles, and bicycles within the limits of the corporation, and prevent and punish fast or immederate riding or driving within such limits."

In answer to Question 1, it is clear that the legislature has delegated to the municipality by Section 5971 the right to make reasonable rules and regulations for the purpose of governing the operation of bicycles within the municipality. The municipality may, therefore, provide such regulations by the enactment of proper ordinances in accordance therewith.

Answering Question 2 it will be observed that nowhere is there a specific authority granted to a municipality to license or to charge a registration fee for bicycles. If the municipality were to assume such authority, it must do so by virtue of the broad general statute granting to the municipality the power to pass ordinances. The Iowa court has frequently held, however, that unless there is a specific delegation of power to license, the municipality has no authority to license and the broad powers of Section 5714 do not grant to such municipality the right to do other than impose fines.

We quote from *Town of Akron, Iowa, vs. McElligott*, 166 Iowa 297, 147 NW 773:

"It is well settled that the power of a municipal corporation is only such as is conferred upon it by the statutes, and that it has no other powers than are so conferred upon it by express legislative grant, or such as arise by necessary implication as incidental to powers expressly granted, or such as are indispensable to the purpose for which the municipality was created."

The court in interpreting Section 5714 which was Section 680 of the Code of 1897, states in *Bear vs. City of Cedar Rapids*, 147 Iowa 341, 126 NW 324, as follows:

"Whilst this statute is very general in its terms, it does not give the city power to do more than impose fines. Thereunder it can not license or provide any other remedy than that authorized by the statute itself."

It is, therefore, our opinion that a municipality may by ordinance properly regulate bicycles, but that such municipality may not license or require a registration fee for such bicycle.

SCHOOLS: TAXES: BUDGET LAW: Municipal corporations may anticipate taxes and issue warrants against schoolhouse funds.

May 19, 1939. *Miss Jessie M. Parker, Superintendent of Public Instruction:* Agreeably with your request of May 15, we will endeavor to answer your question, which is as follows:

"May a school board in an independent district legally issue warrants against anticipated revenue to be derived from either or both the general fund and the schoolhouse fund, to pay for the services of an architect and to complete the construction of a school building which has been legally authorized by an affirmative vote of the electors of said district?"

In the first place, Section 4217, Code of Iowa, 1935, provides:

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

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

Under the assumption that the above law has been followed payment for the services of an architect is properly included in building costs.

Section 4241, Code of Iowa, 1935, provides:

"If after the annual settlement it shall appear that there is a surplus in the general fund, the board may, in its discretion, transfer any or all of such surplus to the schoolhouse fund."

It must be considered in connection with the local budget law, as set forth in Chapter 24, Section 380, which reads:

"No greater tax than that so entered upon the record shall be levied or collected for the municipality proposing said tax for the purpose or purposes indicated; and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in Sections 373, 381 and paragraph 4 of Section 5259."

This department has heretofore held that a municipal corporation may anticipate taxes levied under the rule that taxes levied are taxes in praesenti, and in answer to your question as to issuing warrants, we are of the opinion that warrants may be issued against the school house fund.

We hope that the above and foregoing will be of some help to you, but confess that it is impossible to cover all contingencies which might well be considered in answering your question.

WORKMEN'S COMPENSATION: RELIEF CLIENTS: INSURANCE: Relief clients who work out their grocery orders on county work for county projects would not be such employees as to require the county to carry workmen's compensation insurance to cover the county's liability.

May 19, 1939. *Mr. W. J. McConnell, County Attorney, Keosauqua, Iowa:* We are in receipt of your recent request for an opinion on the following situation:

"Would relief clients of your county who work out their grocery orders on county work for county projects be such employees as to require the county to carry workmen's compensation insurance to cover the county's liability?

We would be of the opinion that such employment would be casual in nature and thus excluded from the provisions of the Workmen's Compensation Law. In such cases the relief client would probably be paid on the basis of need rather than on the basis of the amount of work done, and in any event, we understand he would not be paid money which of course would leave no basis for figuring compensation payments.

We would therefore be of the opinion that compensation insurance would not be necessary under the facts stated.

TAXATION: HOMESTEAD EXEMPTION: New purchaser of a dwelling can, in the first year of purchase, secure a homestead credit only when the application is filed by June 1st, of that year, with the proper affidavit.

May 19, 1939. *State Tax Commission, Des Moines, Iowa. Attention: Mr. C. F. Green:* We are in receipt of your letter of May 11th requesting an opinion from this office upon the subject of filing for refunds, under the Homestead Exemption Law, by owners in the first year of ownership. You refer to an opinion by Mr. Genung, a former assistant attorney general, to the effect that an owner within the first year of ownership could file for a homestead credit after June 1st of the year in which the tax credit is to apply.

Section 5 of Chapter 195, Acts of the 47th General Assembly, provides that any person who desires to avail himself of the benefits of the act shall, each year commencing January 1, 1938, deliver to the assessor the statement and designation of homestead as claimed and if such statement and designation is not delivered to the assessor, the applicant may, on or before June 1st of any year, file such statement and designation with the county auditor. Section 9 of the Act provides:

"Sec. 9. If any person fails to make claim for the credits provided for under this act as herein required, he shall be deemed to have waived the homestead credit for the year in which he failed to make claim."

Section 19 of the Act provides:

"Sec. 19. For the purpose of this act and wherever used in this act:

"1. The word, '*homestead*,' shall have the following meaning:

"a. The homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under this act actually lives six (6) months or more in the year except that in the first year of ownership it shall be sufficient if the owner is living in the dwelling house at the time the claim for homestead credit is made, and makes an affidavit of his intention to occupy said dwelling house, in good faith, as a home."

We would interpret Section 19 in subsection 'a' where it reads "a homestead must embrace the dwelling in which the owner * * * actually lives six months or more in the year" to mean the dwelling house where the owner's ordinary use involves such six months residence out of a year. We would not interpret this to mean the dwelling house that the owner has already lived in

for six months out of the year in which the credit is to apply. Section 5 of the act gives the owner the right to apply for the credit any time from January 1st to June 1st of the year in which the credit is to apply. Obviously, no owner could qualify for the credit if he had to live in the house six months of the credit year before making application before June 1st. With this interpretation, the situation involving all of the dwelling house owners who owned their homes one or more years was covered. They could qualify under the act if the ordinary use of the dwelling house, based on former years ownership was that of a homestead.

The situation with regard to the owner of the dwelling house in the first year of ownership was still open. He could not say it was a house in which he "actually lives six months or more in the year" for this application must be filed by June 1st and assuming he bought the house the first day of January, still by the time he must make application he only lived in the house five months. The legislature made proper exception for the new purchaser and stated, in his case, "it shall be sufficient if the owner is living in the dwelling house * * * and makes an affidavit of his intention to occupy said dwelling house in good faith, as a home."

This last exception took care of the new purchaser who could not qualify by June 1st, the last date upon which said application must be filed. It was, we feel, enacted solely for the new purchaser who purchased the dwelling on or before June 1st and was actually living therein. There is no good argument for believing the legislature intended this section, which is purely one of definition of what will constitute a "homestead," to modify the other sections of the act which provide that the claim must be filed before June 1st.

If this section which merely undertakes to define the word "homestead" as used in the act is given an interpretation that would allow the new purchaser to file after June 1st, then there is no end to conflicts and inconsistencies in the act.

What is to be done in the case of the purchaser who purchases before June 1st, but does not file until after June 1st?

What is to be done in the case of the purchaser who purchases in August or even December and makes application immediately for credit for the year of purchase?

When is the last date for the new purchaser to file?

What is to be done with Section 5 which provides the application must be made by June 1st and Section 7 which provides the board of supervisors shall certify the list by July 1st?

Once you hold the new purchaser may file after June 1st, then this would include the man who bought before June 1st, as well as the one who purchased after June 1st. Therefore, a new purchaser who purchased the house January 2d would be in the same position as the one who purchased a house December 30th of the same year. To hold that they could both secure a homestead credit for the same year by filing the affidavit of intention would, we feel, be placing a strained construction on the act. And further, to hold that the purchaser who buys the house on January 2d need not file by June 1st, but the claim will be allowed if filed after June 1st, is not warranted by the language of the act.

Just how long after June 1st the new purchaser applicant has to file would

be pure guess work. To say that he has the rest of the year or even until the next June 1st, would be writing something into the statute that is not there.

The conclusion that in no case shall a credit be allowed if filed for after June 1st is, we feel, the only interpretation that gives expression to all the sections of the act. It provides that a "homestead" * * * *"when used in this act"* shall mean, etc. The legislature in effect, merely directed the placing of this definition wherever the word "homestead" appears in the act. Place this definition wherever the word "homestead" appears in Section 5 of the act which provides the claimant must file on or before June 1st, and you give the extent of the legislative intention. To hold that it also nullifies the June 1st expression in that statute is ruling that the legislature sought to accomplish by definition that which should have been done by direct language.

For the foregoing reasons, we are of the opinion that the new purchaser of a dwelling can, in the first year of purchase, secure a homestead credit only when the application is filed by June 1st of that year, with the proper affidavit.

NATIONAL GUARD: LEAVE OF ABSENCE: TRAINING: Employees of the State of Iowa or subdivisions thereof, who attended field training in 1938, may be granted leave of absence under provisions of Section 467-f25 of the 1935 Code of Iowa, for the purpose of attending field training for fifteen (15) days during the month of June, 1939.

May 18, 1939. *Hon. Charles H. Grahl, Adjutant General. Attention: Colonel Lancaster:* Your letter of May 17, 1939, asking our opinion upon the following matter, is herewith acknowledged.

"In 1938 troops of the Iowa National Guard were directed to participate in annual field training by the Secretary of War. All organizations attended a field training period of fifteen days' duration at some time during the months of July and August, 1938.

"Elements of the 34th Division, Iowa National Guard, are to participate in field training during the period June 11-25, 1939.

"An opinion is respectfully requested as to whether or not employees of the State of Iowa or political subdivision therein, who attended the field training of their organizations in 1938, may be granted leave of absence under the provisions of Section 467-f25, Code of Iowa, 1935, for the purpose of attending field training for fifteen days during the month of June, 1939."

For the purpose of this opinion, we quote Section 467-f25 of the 1935 Code of Iowa, as follows:

"*State and municipal officers and employees not to lose pay while on duty.* All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence."

It is to be observed that the evident purpose of the legislature was to recognize the patriotic service of state and municipal employees in the national guard by granting to them certain privileges during their first thirty (30) days of leave because of national guard service. This statute in addition provides a suitable example and precedent for the encouragement of like provisions on the part of private employers under similar circumstances. Although the statute is not explicit upon the matter, the legislature evidently intended that such leave should be annual. We can discover no other reasonable interpretation of the statute. This being true, the state and municipal employees

who are members of the national guard are entitled to the privileges granted by statute if their leave does not exceed thirty (30) days per year.

We are, therefore, of the opinion that employees of the state of Iowa or subdivisions thereof, who attended field training in 1938 may be granted leave of absence under provisions of Section 467-f25 of the 1935 Code of Iowa, for the purpose of attending field training for fifteen (15) days during the month of June, 1939.

LIQUOR CONTROL: WINES: MANUFACTURE: An individual may make wine for consumption upon his own premises, provided it is manufactured from native materials and conforms to the rules, regulations and restrictions of the Iowa Liquor Control Commission.

May 19, 1939. *Iowa Liquor Control Commission, Des Moines, Iowa. Attention: Bernard E. Manley:* This will acknowledge receipt of your letter of May 17, 1939, asking our opinion upon the following proposition:

"A man was in our store today, stating that * * * he desired to make wine at the address of a brother-in-law * * *. He stated that he has containers which will hold up to about 120 gallons of wine and requested information as to whether or not he is permitted by law to make up to about 200 gallons of various wines, such as grape, cherry, and dandelion and stated that such wine would be entirely for his own use, and that he does not intend to sell any of it. He said that he has always made his own wine."

For the purpose of this opinion, we quote Section 1921-f56 of the 1935 Code of Iowa:

"*Native wines.* Notwithstanding anything in this chapter contained, but subject to any regulations or restrictions which the commission may impose, manufacturers of native wines from grapes, cherries, other fruit juices, or honey grown and produced in Iowa may sell, keep, or offer for sale and deliver the same in such quantities as may be permitted by the commission for consumption off the premises.

"A manufacturer of native wines shall not sell such wines otherwise than as permitted by this section or allow any wine so sold, or any part thereof, to be drunk upon the premises of such manufacturer. Notwithstanding anything in this chapter contained, any person may manufacture native wine as herein defined for consumption on his own premises."

It is to be observed that the legislature has specifically excepted to private individuals the right to manufacture native wine for consumption on their own premises providing, however, the restrictions and prohibitions provided by statute are strictly observed. It will be noted that such native wine manufactured by such individual for use on his own premises may not be for sale and must be manufactured from grapes, cherries, other fruit juices or honey grown or produced in Iowa. If the manufacturer desires to make the wines as proposed, there is no prohibition against such manufacture nor in the absence of regulation is there a restriction as to the amount, provided always, nevertheless, that such wine for consumption on the premises of the manufacturer may not be sold and must be manufactured from native products as defined by the statute.

As to whether or not the individual in question may manufacture wine at the address of his brother-in-law lies within the discretion of the Iowa Liquor Control Commission to impose rules and regulations as to that subject.

We are, therefore, of the opinion that the individual in question may make wine in the amount contemplated for consumption upon his own premises,

provided it is manufactured from native materials and conforms to the rules, regulations and restrictions of the Iowa Liquor Control Commission.

CLERK OF DISTRICT COURT: BAIL BOND LIEN—SATISFACTION: Bail bond creates lien on real estate of surety, but is not a judgment and no charge should be made for releasing such lien. Under Section 10837, Code of Iowa, 1935.

May 22, 1939. *Mr. Maurice E. Rawlings, County Attorney, Sioux City, Iowa. Attention: Mr. Tom E. Murray:* This will acknowledge receipt of your letter of the 19th inst. asking our interpretation relative to Section 10837, subsection 20, Code of Iowa, 1935. This subsection provides that the clerk shall charge and collect, "for entering satisfaction of any judgment, twenty-five cents". Section 13625, Code of Iowa, 1935, provides:

"Undertakings of bail, immediately after filing of the clerk of the district court, shall be docketed and entered upon the lien index as required for judgments in civil cases, and, from the time of such entries, shall be liens upon real estate of the persons executing the same, with like effect as judgments in civil actions."

You will note that subsection 20, above quoted, says, "satisfaction of *any judgment*". The question therefore arises as to whether or not the lien provided for in Section 13625 is a judgment. In order to answer this question let us examine the context of the section last referred to. This provides: "Undertakings of bail, * * * after filing * * * shall be docketed and entered upon the lien index *as required for judgments* in civil cases, and * * * shall be liens upon real estate * * * with like effect *as judgments* * * *"

We are of the opinion that Section 13625 creates only a lien upon the real estate of the surety but is not a judgment in the sense that the same is used in Section 10837, subsection 20. If it is not a judgment the clerk is not entitled to charge this fee.

"Judgment" has been defined judicially and we turn now to a few of these pronouncements:

"A judgment is a judicial act, being what is considered and ordered by the court. McKnight vs. Ballif, 100 Pac. 433."

"A judgment is the judicial determination or sentence of a court rendered in a cause within its jurisdiction. Peter vs. Parkinson, 93 N. W. 197."

"The 'judgment' of the court is a pronouncement of the judge on the issue submitted to him; the record being merely historical and evidentiary. Montgomery vs. Viers, 114 S. W. 251."

"A 'judgment' is an adjudication by a court whereby the merits of a cause are determined. Melton vs. St. Louis Railroad Co., 139 S. W. 289, 99 Ark. 433."

We reach the conclusion that a bail bond creates a lien on real estate but is not a judgment and, therefore, no charge should be made for releasing such lien.

SCHOOLS: GRADUATION: School board is without authority to adopt a resolution to bar students from further graduation activities if they absent themselves from one activity.

May 22, 1939. *Mr. J. Paul Naughton, County Attorney, Marengo, Iowa:* We have your letter of May 16 in which you ask for an opinion on the following:

"A certain question has arisen concerning graduation activities in the Williamsburg Independent School upon which I wish to have an opinion from your office. The school board made a resolution to the effect that any student who would absent himself from any one graduation activity would thereby be

barred from all graduation activities. There has been much controversy concerning the legality and constitutionality of this resolution or ruling and we would like to have the same cleared up. The question to be decided as to its legality and constitutionality is the following ruling: 'To bar all students from further graduation activities who absent themselves from any one graduation activity.' "

We think the above question is satisfactorily taken care of in the case of *Valentine vs. Independent School District*, 187 Iowa 555, in which the court said, at page 559:

"The public ceremonial is not a graduation, and is not what entitles a student to a certificate or diploma; but it is the completion of the prescribed course which entitles one to a diploma. The diploma is simply the evidence that this has been done, and evidence of graduation. Without the diploma, no one would be entitled to be called a graduate; and, though one had completed the course, and passed examinations, he would not be permitted to enter college."

We are of the opinion that the school board was without authority to adopt the resolution "to bar all students from further graduation activities who absent themselves from any one graduation activity" if this means that the pupil will be denied a diploma if he absents himself from any one graduation activity.

TAXATION: CORRECTION OF ASSESSMENT: ASSESSMENT: If property comprising a certain number of acres is properly described in a description which merely states the SW¼ of Section 6, there could be no correction on the tax list under the provisions of Section 7149 and recovery for back taxes under the provisions of Section 7155 of the 1935 Code.

May 24, 1939. *Mr. Archie R. Nelson, County Attorney, Cherokee, Iowa:* We are in receipt of your request for an opinion involving the following situation:

Certain lands in Cherokee County have been assessed as containing 167.94 acres, less 4 acres off for road, for a number of years. This property was recently re-surveyed under the direction of the board of supervisors by the county engineer and found to contain actually 263.5 acres. The description of the land on the tax book was the SW¼ of Section 6-90-41, Cherokee County. It appears that the present owner purchased this property in 1931 upon a description by metes and bounds. The question now arises as to whether or not under the provisions of Section 7149 the county auditor may correct the assessment, and also whether under the provisions of Section 7155 the county treasurer could go back five years and collect the additional tax as omitted property.

We are a little at loss to understand how this property, which is described as the SW¼ of a section could contain 263.5 acres. If the property comprising the 263.5 acres is properly described in a description which merely states the SW¼ of Section 6, then we would be of the opinion that there could be no correction on the tax list under the provisions of Section 7149 and no recovery for back taxes under the provisions of Section 7155 of the 1935 Code. This department has previously ruled that where the assessor in assessing real estate has used, for the purpose of computing the value of various tracts of land, a certain number of acres at a price per acre, there can be no refund when it later appears the tract assessed did not actually contain the number of acres the assessor included in his computation for value. See 1932 Attorney General's Report, page 196. In the above opinion we stated as follows:

"You are also referred to Sections 7132-33 of the Code of Iowa, 1931. These

sections provide the taxpayer in each of the cases referred to by you, with a remedy. We are of the opinion that the method of arriving at the valuation of a tract of land is only an incident and detail used by the assessor in determining the total value of the tract. The statute does not direct the method to be used in arriving at the value. It merely commands and directs the assessor to fix the value of the property listed by him. The value arrived at by the assessor, right or wrong, can only be changed by an appeal by the taxpayer to the local board of review."

Although the above opinion involved the question of refund, the reasoning is applicable to this case for the principle involved is the same. The situation here is similar in that the assessor used an acreage basis in his assessment. The former opinion held that if the assessor included too many acres, no refund could be made for it was assumed that he assessed the value of the tract. By the same reasoning, no additional tax should be collected when the assessor includes too few acres for it should still be assumed that the assessor assessed the value of the entire tract.

We wish to be distinctly understood, however, that the opinion herein is based entirely on the fact statement which states that the SW¼ of Section 6 contained 263.5 acres. If properly located in some other section or quarter section or property which would probably be described by some other description is involved in the 263.5 acre tract, then we feel such property bearing some other description might well be classified as omitted property.

The case you cite of *First National Bank of Guthrie Center vs. Anderson*, 196 Iowa 587, 192 NW 6, was reversed by the Supreme Court of the United States in 70 L. Ed. 297. The reversal was probably on a point that does not involve the question under discussion, but that case merely involved the assessment of bank stock, and the court stated:

"The method of assessing the property of national and state banks is wholly distinct and different from that of assessing other property."

In view of the above, we are of the opinion that the auditor would not have the power to correct the tax list and the treasurer would not have the power to collect additional tax on this property as omitted property.

COUNTY ATTORNEY: INSANITY COMMISSION: The county attorney should not be a member of the Insanity Commission.

May 24, 1939. *Honorable Chet B. Akers, Auditor of State. Attention: Mr. Truax:* We are in receipt of your request for an opinion upon the following question:

"Can the county attorney act as a member of the Insanity Commission and draw pay for same?"

We are of the opinion that the two positions are incompatible and that the county attorney should not be a member of the insanity commission. Under Section 3560 of the 1935 Code, provision is made for appeal from the decision of the insanity commission, and there it is also provided that it shall be the duty of the county attorney to prosecute the appeal on behalf of the informant.

Since the county attorney must be a prosecutor in some instances involving insanity proceedings, we would be of the opinion that he could not also act as a member of the commission.

TAXATION: SCAVENGER SALE: REDEMPTION: The redeemer of a parcel of real estate sold at scavenger sale must pay the delinquent special

assessments and all of the delinquent taxes assessed against the property before redemption certificate should issue.

May 24, 1939. *Mr. L. B. Tucker, County Treasurer, Marshalltown, Iowa:* We are in receipt of your request for an opinion upon the following situation:

A parcel of real estate was sold at a scavenger sale to Marshall County for the full amount of the general tax and $1.00 of the special tax. The special tax was in the total amount of $20.93. The owner was allowed to redeem for the amount for which the property was sold plus a subsequent payment and the usual penalties, leaving the delinquent special taxes unpaid. The question is whether this procedure was correct.

We are of the opinion that the redemption in the case of sales made at scavenger sale are made under the provisions of Section 7275 of the 1935 Code. In such a case the redeemer must pay the delinquent special assessments and in fact all of the delinquent taxes assessed against the property before redemption certificate should issue.

Section 7272 of the 1935 Code, while it does in effect state that redemption can be made by paying the amount for which the property was sold, must have reference to general tax sales, for the later provisions of the chapter, or Section 7275, having as it does particular reference to redemptions from sales where only a part of the tax was the sale price, clearly indicates that the redeemer must pay the full amount of the tax. Several Iowa cases, notably, *Soper vs. Espeset*, 63 Iowa 326, and *Everson vs. County of Woodbury*, 118 Iowa 99, have held that under the old law where property could be sold at scavenger sale at less than the full amount of the general tax, the redeemer could not redeem by paying the sale price, but must pay the full amount of the general tax. The reasoning in those cases would be applicable to the situation today where the bid will always be the full amount of the general tax but will frequently not include the special tax. As was said in *Soper vs. Ecpeset*, supra:

"The intent of the legislature seems to have been that a person should not be allowed to redeem from tax sale unless he paid the amount *due* at the time of the sale, * * *."

It is our opinion that the amount due at the time of the sale included the special taxes, and redemption certificate should not have issued without the payment of delinquent special assessments.

NOTARY PUBLIC: TAX REFUND CLAIMS: SENATE FILE 202: Employment as a bookkeeper and office girl for an oil company would prohibit party from acting as a notary public in notarizing claims for refunds.

May 25, 1939. *Mr. Arthur F. Janssen, County Attorney, Maquoketa, Iowa:* We have your letter of May 22, submitting request for an opinion with reference to the application of Senate File 202, Acts of the 48th General Assembly.

Your query is based upon the fact that a young lady, who is a notary public, acts as bookkeeper and office girl for an oil company and has been in the habit of preparing and notarizing tax refund claims under Section 5093-f29. Your question is—would the fact of her employment, as above stated, bar her as a notary public from preparing and notarizing claims for refund?

Senate File 202, Acts of the 48th General Assembly, amended Section 5093-f31 so that that section now reads:

"5093-f31. Certain Acts Made Unlawful. * * * 10. For any person employed or engaged in the sale or distribution of motor vehicle fuel, either di-

rectly or indirectly, to prepare or notarize, for or on behalf of purchasers of motor vehicle fuel, any application for a permit for refunds, as provided in section five thousand ninety-three-f thirty (5093-f30), or for any claim for refund of motor vehicle fuel tax, as provided in section five thousand ninety-three-f twenty-nine (5093-f29)."

It is the opinion of this office that this provision prohibits the party in question for acting as a notary public in notarizing claims for refund.

The legislative history of Senate File 202 discloses that an amendment was filed to strike out the word "person" and insert in lieu thereof the words "tank wagon agent" but this amendment failed of adoption. This very clearly discloses the legislative intent to set up the bar against any person employed in connection with the sale or distribution of motor vehicle fuel and particularly when taken in connection with the words "directly or indirectly."

It is a matter of common knowledge that most, if not all, distribution and sale of motor vehicle fuel is by corporations who can act only through their agents, servants and employees and it was the evident intention of the legislature that no one connected with the sale or distribution of motor vehicle fuel should be permitted to notarize these applications.

COUNTY ATTORNEY: BOARD OF SUPERVISORS: COLLECTION OF CLAIMS: Board of supervisors must direct the county attorney to collect claims owing the county for support of insane persons, etc., and only in event county attorney fails or is unable to discharge his duty may other counsel be employed.

May 26, 1939. *The Honorable Herbert H. Hauge, State Representative, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 3d nst., therewith enclosed copy of H. F. 540 which was passed and enacted by the 48th General Assembly, and asking our opinion as to whether paragraph 3 of Section 4 prevents the board of supervisors from employing outside counsel on its own behalf to collect the claims owing to the county for the support of insane persons, etc.

The paragraph referred to read s as follows:

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

We find, in consulting the legislative history of this act, that the bill originally provided that the duty of collecting said claims was upon the overseer of the poor and he was authorized to employ attorneys to make such collection and to pay for such service ten per cent. This provision of the bill was stricken by amendment and the paragraph above quoted inserted. It therefore appears that it was the intention of the legislature that these claims should be collected without expense to the county and to that end the act provides that the board shall "direct the county attorney to proceed with the collection of said claims."

We, therefore, reach the conclusion that the board of supervisors must direct the county attorney to collect these claims and only in the event that the county attorney fails, or for some reason is unable, to discharge his duty may other counsel be employed.

OLD AGE ASSISTANCE: MEDICAL AID: BOARDS OF SUPERVISORS: County board of supervisors has discretionary power to grant or deny medical assistance to recipients of old age assistance.

May 29, 1939. *Mr. Warren J. Rees, County Attorney, Anamosa, Iowa:* Re: Section 5296-f27, Code of Iowa, 1935. In your letter dated May 16, 1939, you ask the following question:

"In the light of the above cited section (Section 5296-f27) are boards of supervisors bound to furnish medical and surgical assistance and hospitalization to recipients of old age assistance, regardless of the status of the recipient, or is it discretionary with the board of supervisors to grant or deny such assistance in the light of this statute?"

The pertinent section as amended by the 47th General Assembly, is as follows:

"5296-f27. *Recipient not to receive other assistance.* No person receiving assistance under this chapter shall at the same time receive any other assistance from the state, or from any political subdivision thereof, except for fuel, dental, nursing, osteopathic, chiropractic, medical and surgical assistance, and hospitalization.

"This section shall not be construed to exclude the spouse, minor children or other dependents of the recipient of old age assistance, or the members of the same family or household as said recipient from receiving other forms of aid, relief, assistance or pensions handled or paid through the state or any of its political subdivisions. In administering old age assistance or other forms of relief, the officials of this state and its political subdivisions shall assume old age assistance payments to be made for the sole benefit of the aged person to whom the certificate of assistance has been issued."

It is our opinion that the county board of supervisors still has discretionary powers to grant or deny medical assistance and the mere fact that a person is receiving old age assistance does not make it mandatory upon the county board to furnish medical or surgical assistance or hospitalization. There is nothing in the law which would indicate that the legislature intended to curtail the discretionary powers of the boards of supervisors in cases of this character.

POULTRY EXHIBIT: FUNDS: The Committee on Retrenchment and Reform may not legally appropriate any of their funds to pay for a poultry exhibit at the World's Poultry Congress.

May 31, 1939. *Mark G. Thornburg, Secretary of Agriculture:* Your letter of May 24, 1939, asking our opinion as to the following matter, is herewith acknowledged:

"A week ago last Friday, the poultry interests in the State of Iowa met with the Retrenchment and Reform Committee and asked them for an appropriation to pay for an Iowa poultry exhibit at the World's Poultry Congress to be held in Cleveland in August. * * *

"The question that arose at the hearing of the Retrenchment and Reform Committee was whether or not this committee could legally appropriate some of their funds to pay for a poultry exhibit."

As to the formation and duties of the committee on retrenchment and reform, we refer you to Sections 39 to 46 inclusive of the 1935 Code of Iowa.

It will be noted that this committee is a creature of the legislature and like all such creations it is limited in its authority to that specifically delegated by the legislature or that which may be reasonably implied from such delegation.

From an examination of the statutes in question, we are unable to discover any means by which the committee on retrenchment and reform may appropriate a portion of its funds to assist in a matter of this nature regardless of its merits. The poultry interests in question are not an agency or arm of the State of Iowa and if they are in need of state assistance, an appeal to the legislature may be made for that purpose. To allow the committee on re-

trenchment and reform the authority to grant appropriations of such a general nature would be to directly usurp a right which belongs solely to the legislature.

It is, therefore, our opinion that the committee on retrenchment and reform may not legally appropriate any of their funds to pay for a poultry exhibit.

ANTICIPATORY WARRANTS: COUNTY FUNDING BOND FUND: TAMA COUNTY: Even though the county, in issuing anticipatory warrants, has a large balance in its county funding bond fund, it can not purchase its own anticipatory warrants as issued under said Chapter 150, 47th General Assembly.

June 2, 1939. *Mr. George H. Struble, County Attorney, Toledo, Iowa:* This will acknowledge receipt of your letter of the 31st ult., wherein you ask the opinion of this department on the following proposition:

"Tama county is issuing anticipatory warrants as contemplated under Chapter 150, 47th General Assembly. The county has a large balance in its county funding bond fund. Can the county purchase its own anticipatory warrants as issued under said Chapter 150 and use the funds of the county funding bond fund?"

It is our opinion that the county can not legally purchase its own anticipatory warrants and pay therefor from the balance remaining in the county funding bond fund.

The anticipatory warrants referred to are to be issued under Chapter 150, Laws of the 47th General Assembly. Among other things, this chapter provides:

"All anticipatory warrants drawn under the provisions of this act, shall be numbered consecutively, and be registered in the office of the county treasurer and be subject to call in numerical order at any time when sufficient money derived from the sale of such limestone or the payment of a special assessment levied therefor, is in the hands of the county treasurer to retire any of said warrants together with accrued interest thereon."

This chapter also provides:

"* * * provide agricultural lime, and deliver same to farm of applicant, payment for same to be provided for by a special assessment tax levy against the real estate so benefited in the amount of the sales value and transportation of said agricultural lime, which assessment shall be payable at the option of the owner of the farm or his legal heirs or assignees in its entirety on or before December 1st following the receipt of said lime or may be paid in five equal annual installments payable on March 1st of each succeeding year with the ordinary taxes until said special assessment is fully paid. The special assessment shall, by consent, be a lien prior to any lien or liens upon said real estate.

Section 5286, Code of Iowa, 1935, provides as follows:

"The money arising from such levies shall be known as the bond fund, and shall be used for the payment of bonds and interest coupons, and for no other purpose whatever; and the treasurer shall open and keep in his books a separate account thereof, which shall at all times show the exact condition of said bond fund."

Section 5288, Code of Iowa, 1935, provides:

"If after the payment of all bonds and interest as hereinbefore provided, there remains any money in said bond fund, the board of supervisors may by resolution transfer said funds to the particular fund or funds on account of which the indebtedness arose for which said bonds were issued."

Section 5289, Code of Iowa, 1935, provides:

"The board of supervisors may, by resolution, transfer to the general fund any excess remaining from the proceeds of a county bond issue voted by the people, after the full completion of the purposes thereof.

We reach the conclusion, therefore, in view of the statutes quoted, that the county can not legally purchase its own anticipatory warrants, out of bond fund.

UNEMPLOYMENT COMPENSATION LAW: Chapter 102, Section 25, Acts of the 47th General Assembly: Chapter 4, Section 10-d, Acts of the 46th Extra. Section 10d, Chapter 4 of the Acts of the 46th General Assembly Extra Session, was repealed by Section 25, Chapter 102, Acts of the 47th General Assembly because it is inconsistent with the provisions of Chapter 102, Laws of the 47th General Assembly.

June 5, 1939. *Mr. Richard Reichmann, Code Editor, State House, Des Moines, Iowa:* In your letter of May 10, 1939, you ask for an opinion as to whether or not Section 10-d of Chapter 4 of the Acts of the 46th Extra General Assembly should be construed as repealed by Section 25 of Chapter 102 of the Acts of the 47th General Assembly.

Section 10-d of the 46th Extra General Assembly created a board of review consisting of three members. It will be noticed that Section 10 had four divisions in this chapter, viz., a, b, and c, and when the 47th General Assembly re-enacted and amended Section 10 it provided only three divisions, viz., a, b, c, leaving out Section 10-d. The 47th General Assembly re-enacted and amended the whole Unemployment Compensation Law and provided in Section 25, as follows:

"The provisions of Senate File 1 of the 46th General Assembly of Iowa in Extraordinary Session, as amended by Senate File 191 of the 47th General Assembly of Iowa, are hereby amended and re-enacted to conform to the provisions of this act as hereinbefore set out. All acts or parts of acts in conflict herewith are hereby repealed insofar as they are inconsistent with the provisions of this act, and of the provisions of Senate File 1 of the 46th General Assembly of Iowa in Extraordinary Session, as amended by Senate File 191 of the 47th General Assembly of Iowa, as herein amended and re-enacted."

Taking the whole law as a unit, it is our opinion that the legislature intended to do away with any board of review. Section 6-e of Chapter 4 of the 46th Extra General Assembly provided for duties of the board of review in case of an appeal. The corresponding section in Chapter 102, 47th General Assembly, provides for a review by a commission rather than by any board of review. Therefore, if any board of review did exist, it would have no powers at the present time.

It is our opinion that Section 10-d of the 46th Extra General Assembly was repealed by Section 25, Chapter 102, 47th General Assembly, because it is inconsistent with the provisions of Chapter 102, Laws of the 47th General Assembly.

VENDING MACHINES: CIGARETTES: (Senate File 128, Acts 48th General Assembly.) The use of a vending machine for a show case or a place for display of cigarettes would be a violation of Senate File 128, Acts of the 48th General Assembly.

June 5, 1939. *State Tax Commission, Des Moines, Iowa. Attention: Mr. D. L. Murrow:* We are in receipt of your request for an opinion with regard to the following question:

Under Senate File 128, Acts of the General Assembly wherein provision is made that "it shall be unlawful to sell or vend cigarettes by means of a device known as a vending machine", may automatic cigarette merchandising machines

be lawfully used as a show case or container for storing and displaying cigarettes and as a receptacle for money received in payment for cigarettes if the automatic selling mechanism of the mechines is operated only by an attendant employed by the retailer, and purchasers of cigarettes are not permitted to operate the machines so as to themselves make purchases by means of the machine?

It will be noted that the above statute makes both the selling and the vending of cigarettes by means of a vending machine unlawful. Perhaps the usual definition of the word "vend" is to sell. Since, however, the legislature used the word "sell", it is obvious that the intent of the legislature was to give the word "vend" another meaning. There is respectable authority for defining the word "vend" in the sense of offering for sale. In the old English case of *Minter vs. Williams*, 4 Adol. & El. 251, the court had occasion to place a definition upon the word "vend" as used in a patent. In that case Judge Coleridge stated:

"* * * it (vend) means the habit of selling and offering for sale."

Webster's dictionary defines the verb "vend" as follows:

"To transfer to another for a pecuniory equivalent; to make an object of trade * * * to sell."

In Volume 8, Words and Phrases, page 7287, Judge Coleridge's definition in the Minter case is given as one of the definitions for the word "vend" as follows:

"'Vend' means the habit of selling and offering for sale."

In 66 Corpus Juris, 430, under sub-note 6, the case of *Minter vs. Williams* is cited and Judge Coleridge's definition again given as one of the meanings of the word "vend".

In construing the statute prohibiting the vending of cigarettes by means of a device known as a vending machine, we feel that the proper definition to be given to the word "vend" is, "offering for sale." By placing this definition in the statute in the place of the word "vend", we would then have the statute read:

"It shall be unlawful to sell or offer to sell cigarettes by means of a device known as a vending machine."

In the question that is stated, the contemplated use of the vending machine is described to be that of a show case or a place for display of cigarettes. Such a display would, on the part of a retailer, be an offering for sale, for certainly the displaying of merchandise in a retail establishment is an offering to sell that merchandise. If the offer to sell the merchandise is by means of a prohibited machine, then we feel a violation of the statute would occur. In this view we have taken it would be immaterial whether the machine was operated by a customer, the retailer, or one of the retailer's employees. It is the vending or offering to sell by means of the machine that would come within the prohibition of the statute. We are therefore of the opinion that the suggested use of the machine would be a violation of Senate File 128, Acts of the 48th General Assembly.

COMMODITIES: WEIGHING: (Keokuk) A municipality may require commodities to be weighed over scales designated by the city by proper ordinance, providing, however, that it may not require such commodity to be reweighed if once weighed by a state inspected scale.

June 6, 1939. *Mr. Robert N. Johnson, Jr., County Attorney, Keokuk, Iowa.*

Attention: John F. Burrows, Deputy: Your letter of recent date asking our opinion on the following matter, is herewith acknowledged:

"* * * Recently there has been a concerted effort by local coal dealers to obtain the adoption by the city council of an ordinance requiring coal and other commodities sold in the city of Keokuk to be weighed over city scales or scales designated by the city of Keokuk.

"* * * our mayor has requested that I write to you and request an opinion on this question and if you will submit to me an opinion on the right of the city to require commodities to be weighed over scales designated by the city, I will appreciate it very much."

For the purpose of this opinion, we quote the following sections of the 1935 Code of Iowa:

"5768. *Markets.* They shall have power to establish and regulate markets and scales, to build market houses, and establish and regulate the same; to provide for the measuring or weighing of merchandise offered for sale, to prevent forestalling, and regulate or prohibit huckstering in the markets; to prescribe the kind and description of articles which may be sold in the markets, and the stands or places to be occupied by the vendors; to authorize the immediate arrest of any person violating its regulations and the seizure and removal from the market of any article of produce in his possession.

"No charge or assessment of any kind shall be made or levied on any wagon or other vehicle, or the horses attached thereto, or the owner thereof, bringing produce or provisions to any of the markets in the city.

"3255. *Sealer for cities and towns.* A sealer of weights and measures may be appointed in any city or town by the council, who shall hold his office during its pleasure, and may obtain from the department such standard weights and measures as the council may deem necessary.

"3274. *Power of cities and towns limited.* Commodities weighed upon any scale bearing the inspection card, issued by the department, shall not be required to be reweighed by any ordinance of any city or town or city under special charter or under the commission form of government, nor shall their sale, at the weights so ascertained, and because thereof, be, by such ordinance, prohibited or restricted."

Reviewing the statutes quoted, it will be observed that the legislature provided that a municipality may "provide for the measuring or weighing of merchandise offered for sale," and may, in order to make this provision operative provide for a weighmaster. This authority is clearly delegated to the city and it has been held in many cases that such authority rests in the municipality. We quote from *Huss, et al., vs. City of Creston, et al.,* (Iowa 1938) 278 NW 196, wherein the court quotes with approval from *Miller vs. City of Webster City,* 94 Iowa 162, 62 NW 648, as follows:

"The power of cities to enact ordinances of this kind has frequently been before the courts, and we, dealing with the subject, said, in *Miller vs. City of Webster City,* 94 Iowa 162, at page 165, 62 N. W. 648, 649, this: 'As the statute expressly confers upon the city the authority to establish markets and to provide for the weighing of commodities, and contains no limitations upon the powers granted, the time, manner, and expediency of its exercise are left to the discretion of the corporation; and the judgment of its officers upon such matters cannot be controlled by the courts, so long as they act within the scope of their authority."

Nevertheless, it is to be observed that the authority delegated to the municipality is limited in nature, the legislature reserving to the state the superior right to license scales for the weighing of commodities and prohibiting to the municipality the requirement of reweighing by a city scale providing the commodity has been properly weighed by a scale bearing the inspection card issued by the Department of Agriculture.

It consequently becomes apparent that a municipality may provide city scales and require the weighing of commodities but that it may not require the weighing of such commodity if it has been once weighed by a state inspected scale.

We are, therefore, of the opinion that a municipality may require commodities to be weighed over scales designated by the city by proper ordinance, providing, however, that it may not require such commodity to be reweighed if once weighed by a state inspected scale.

SOLDIERS' RELIEF: DISCHARGE: Soldiers' relief fund is for the relief of and funeral expenses of honorably discharged U. S. soldiers, etc., who served in the military and naval forces of the U. S. in any war, irrespective of any future service in a governmental unit such as the CCC camp.

June 6, 1939. *Mr. Henry J. TePaske, County Attorney, Orange City, Iowa:* In your letter of May 31, 1939, you ask for an opinion on the following question:

"A veteran of the World War who was honorably discharged has recently been enrolled in a CCC camp within this state. Because of continued absences without leave, he has been dishonorably discharged from this camp. Is he now entitled to receive assistance from the soldiers' relief commission, under the provisions of Chapter 273 of the Code of Iowa, 1935?"

The section of the code involved in Section 5385, 1935 Code of Iowa, and reads as follows:

"*Tax.* A tax not exceeding one-fourth mill on the dollar may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of, and to pay the funeral expenses of honorably discharged, indigent United States soldiers, sailors, marines, and nurses who served in the military or naval forces of the United States in any war and their indigent wives, widows and minor children, not over fourteen years of age if boys, nor sixteen, if girls, having a legal residence in the county."

It will be noted the fund so provided is for the relief of and funeral expenses of, honorably discharged United States soldiers, etc., who served in the military and naval forces of the United States in any war, * * *. The statute mentions nothing of any subsequent service in the CCC camp or any other similar organization.

It is our opinion that the plain intent of the legislature was to qualify an honorably discharged soldier, sailor or marine for participation in this fund irrespective of any future service in a governmental unit such as the CCC camp. It is our opinion, therefore, that the veteran in the particular case is still eligible to receive assistance from the soldiers' relief commission.

OLD AGE ASSISTANCE: SUSPENSION OF TAXES, INTEREST AND PENALTY: County treasurer shall suspend the collection of taxes assessed against property of persons receiving assistance from old age pension fund, so long as he remains owner or contractually prospective owner, and no penalties should accrue against the property so long as such person lives.

June 6, 1939. *Mr. King Palmer, Chairman, State Board of Social Welfare, Des Moines, Iowa:* In your letter of June 5, you ask for an opinion on Section 6950-g1 and Section 6952, 1935 Code of Iowa, as amended by the 47th General Assembly.

Your first question is as follows:

"Should the county treasurer suspend taxes against an old age recipient's

property that accrue after said recipient receives old age assistance, disregarding the suspension of any taxes which have accrued prior to such time, or should the county treasurer suspend all of the taxes assessed against such property, including any taxes which were due and delinquent before said recipient received assistance?"

Section 6950-g1 as it was originally enacted by the 46th General Assembly, provides as follows:

"*Suspension of taxes:* 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 pension fund, such person shall be deemed to be unable to contribute to the public revenue. The old age assistance commission 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 such person is paying taxes as a purchaser under contract. It shall then be the duty of the board of supervisors so notified to order the county treasurer *to suspend the collection of the taxes* assessed against 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 pension fund." (Italics ours.)

This section was amended by the 47th General Assembly by House File 496, Section 1, to read as follows:

"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 old age assistance commission 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 6950, Code, 1935, to order the county treasurer *to suspend the collection of all 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 contractual prospective owner of such property, and during the period such person received monthly or quarterly payments of assistance from the old age assistance fund." (Italics ours.)

It will be noted in the amended section that the phrase "all of the taxes" was substituted for the phrase "of the taxes".

It is our opinion that by so amending said section, the legislature intended to require the county treasurer to suspend all of the taxes assessed against said property whether such taxes were current or had become due and delinquent prior to the time the old age recipient received assistance. It is our opinion that the purpose of the legislature in so amending this law was to keep the physical control of property in the old age recipient as long as he might live. It is our opinion, therefore, that county treasurers should not sell property at tax sale, the title to which is an old age recipient and it matters not that such proposed tax sale is for taxes accrued before said recipient received old age assistance.

In answer to your second question, Section 6952 as amended by the 47th General Assembly, reads as follows:

"*Grantee or devisee to pay tax.* In the event that the petitioner shall sell any real estate upon which the tax has been supended in the manner above provided, or in case any property, or any part thereof, upon which said tax has been suspended, shall pass by devise, bequest, or inheritance to any person other than the surviving spouse or minor child of such infirm person, the taxes, without any accrued penalty, that have been thus suspended, shall

all become due and payable, with six per cent interest per annum from the date of such suspension, *except that no interest on taxes shall be charged against the property or estate of a person receiving or having received monthly or quarterly payments of old age assistance*, and shall be enforceable against the property or part thereof which does not pass to such spouse or minor child." (Italics ours.)

That part of the above section which is italicized was an amendment to the old law and this amendment was inserted in this section by the 46th General Assembly. It will be noted that the law, both before and after it was amended by the 46th General Assembly, provided that such property should pass "without any accrued penalty." It is our opinion that the law is definite and requires the county treasurer to refrain from assessing a penalty where the taxes have been suspended.

In other words, as soon as any person is certified to receive old age assistance, no penalty should accrue against the property as long as such person should live. Any penalties which may have accrued up until the time such person is certified for assistance will, of course, have to remain on the county treasurer's books and those penalties will become due and payable along with the suspended taxes, either at the death of the old age receipient or at any time prior to his death when he disposes of such property.

It will be noted under the old law, before the 46th General Assembly, that interest at the rate of 6 per cent was charged on suspended taxes. The 46th General Assembly amended this law and provided, "except that no interest on taxes shall be charged against the property or estate of a person receiving or having received monthly or quarterly payments of old age assistance." It is our opinion that by so inserting this amendment in the above section, that the legislature intended that no interest be charged on suspended taxes where such suspension arose from the fact that the owner of the property received old age assistance. As to the interest on unpaid taxes which had accrued prior to that time that such recipient was certified to receive old age assistance, this interest would necessarily have to be carried on the county treasurer's books to become due and payable, either at the death of such old age recipient, or at the time when he disposes of said property.

As an example of the foregoing, let us assume that "A" owns property. The taxes for 1934, 1935 and 1936, together with accrued interest and penalty, have not been paid. In 1937, "A" is certified to receive old age assistance and he does receive monthly payments through 1938 and dies in 1939. At his death, the amount payable to clear the property would be the taxes, the interest and penalty for the years 1934, 1935 and 1936, plus the taxes of 1937 and 1938. In other words, there would be no interest or penalty to be paid for the period when he was receiving old age assistance.

CEMETERY ASSOCIATION: DISINTERMENT: REFUSAL TO BURY: RESALE OF LOT: The fact that the burial association granted the burial would constitute a sufficient license to protect the deceased from disinterment; the cemetery association may refuse to allow any other body to be buried on the lot until it is paid for; the right of sepulture extends to the entire lot, division or subdivision thereof in which the body may be located.

June 7, 1939. *H. Wayne Black, County Attorney, Audubon, Iowa:* Your letter of recent date, asking our opinion as to the following matters, is herewith acknowledged.

A privilege of burial was obtained under promise to pay for the cemetery lot at a future date. The deceased was subsequently buried in such lot and payment for the lot is now refused. The following questions in connection therewith are now confronting the Maple Grove Cemetery Association:

1. Can the cemetery association legally remove the body to a smaller lot in the cemetery without permission of the relatives?
2. Can the cemetery association refuse to allow any other body to be buried on the lot until the lot is paid for?
3. Can the cemetery association sell the unoccupied portion of the lot to another party?

It is needless to suggest that the questions propounded are difficult of solution. No statutory authority or direction exists which is helpful in disposing of the matter.

The Iowa court has, however, had similar situations before it in several instances and as a guide, we quote at length from the decisions in point.

An early case is that of *Thompson vs. Deeds*, 93 Iowa 228, 61 NW 842, from which we quote in part as follows:

"The fact that the plaintiff holds the legal title to the lot wherein rest the remains of her dead father is not, to our minds, of controlling importance, in determining as to the right of the defendant to remove his remains. * * * A proper appreciation of the duty we owe to the dead, and a due regard for the feelings of their friends who survive, and the promotion of the public health and welfare, all require that the bodies of the dead should not be exhumed, except under circumstances of extreme exigency. No emergency exists in this case."

The case of *Anderson vs. Acheson, et al.*, 132 Iowa 744, 110 NW 335, considers the matter at some length:

"A body once buried could not be removed in Rome except by permission of the Pontifical College, and, in the provinces, of the governor. By the canon law, which prevailed in such matters over a large portion of Europe, a body once buried could not be removed without license from the ordinary. * * * Because of the control of such matters by the ecclesiastical courts, the common law in its earlier period did not cover matters with relation to the burial of the dead fully, and the rules with reference thereto have been the result of gradual development, until all courts now concur in holding that the right of possession of a dead body for the purposes of burial belongs to those most intimately and closely connected with deceased by domestic ties, and this is a right which the law will recognize and protect.

"The authorities are equally conclusive that the last resting place of the dead, when in actual or constructive possession of a relative, will be protected from desecration at his instance. * * *

"If any fiction is pardonable in a case of this kind, it would be fitter to hold that the fee in these sacred precincts belongs to the dead. * * *

"The rights of one to the burial place of his dead, in the absence of fee to the soil or right to the exclusive possession thereof, in respect to the maintenance of a civil action for its disturbance, is one of delicate, but not very satisfactory, solution. Because of the respect entertained for the final resting place of the dead, and so little temptation to disturb their repose, disturbances of the same have rarely become the subject of litigation. The adjudications have been sufficient, however, to establish the principle that where one is permitted to bury his dead in a public cemetery, even though this be by license or privilege, he acquires such a possession of the spot of ground in which the bodies are buried as will entitle him to maintain an action against the owners of the fee or strangers, who without right so to do disturb it. * * * The nature of the interest in and the use to which a burial lot is put is such that this should be declared the rule."

In the case of *Carter, et al., vs. Town of Avoca, et al.* 197 Iowa 670, 197 NW 897, the town conveyed the south half of Lot 110 to one Harris and subsequently

Harris, his children and wife were buried in such half lot. Thereafter, in 1919 the town conveyed the southwest quarter of Lot 110 in which the grandchild of Harris was buried to one Kuhl, and this action was brought by the heirs of Harris to obtain an order requiring the removal of the body of Kuhl for the purpose of restoring the ground to its condition prior to such burial. The court said in its opinion:

"The plaintiffs are not claiming title to the quarter lot in question, nor even an easement in it. They claim merely the exclusive right or license to bury their dead there. Since no more is claimed than a mere privilege or license, we have no occasion to consider more than this. It may be said, however, that even under a deed to a cemetery lot absolute in form, it is generally held that no title to the soil is acquired, but merely the privilege or license to make interments in the lot, to the exclusion of all others.

"Our concern is only with the question whether such a license is established, and, if so, whether the court will protect the heirs of one acquiring such a right in its continued enjoyment.

The right to have the graves of the dead kept secure from unwarranted disturbance, though the place of interment be only in the constructive possession of the living, is one that the universal sentiment of all mankind requires should be protected. The difficulty of finding, in the ordinary and established rules for the protection of rights in real property generally, a basis for a civil action for the disturbance of a right of burial in a particular plot of ground is recognized. * * *

"The acquisition of the right of burial in the cemetery in question at an early day seems to have been very much a mere matter of appropriation of a particular plot of ground. The sexton, a witness for the defendants, who had been familiar with the cemetery for forty years, testified that 'they just buried people there; some paid and some didn't.' Although there is no showing that Harris acquired a right of burial in the half lot in any more formal way than by mere selection, it is shown that the entire half lot was marked by visible, and no doubt supposedly permanent, corner stones, and was cared for by the members of his family. The burial of the grandchild in the west portion forty years ago, where the grave was marked in a visible manner for many years, must have been with the tacit, if not expressed, consent of the authorities controlling the cemetery, and in pursuance of the claim on the part of the heirs of Harris to have the right of burial in the entire half lot. The conceded right of burial in the southeast quarter of the lot was acquired in the same manner as that which is claimed in respect to the southwest quarter. * * * The exclusive right of sepulture in the ground so appropriated, marked off and used is one that the courts will protect at the suit of the heirs."

The case of *King vs. Frame, et al.*, 204 Iowa 1074, 216 NW 630, is a late case bearing directly upon the question. The township trustees, among the defendants herein, conveyed Lot 165 in the cemetery in question to King in 1916. Thereafter the township trustees conveyed the same lot to one Elder in 1924 and the husband was thereupon buried in this lot. The plaintiff King brought this action to quiet title to the lot and to obtain an order for the removal of the deceased. The court refused to grant such order and stated in its opinion:

"Cemeteries, as sleeping places of the dead, have existed from the most remote periods. The Hebrews had their public burial grounds, and the Greeks, before they adopted the custom of burning their dead, had their 'sleeping fields' for the sepulture of the dead. In all countries, both ancient and modern, except where cremation is the practice, the first care of the people has always been to select a place for the burial of their dead; and many of these burial places are immense. In all Christian countries, the practice of burial under and around churches has prevailed to a great extent, and the place of burial is often consecrated, in form, by ecclesiastical ceremonies. And the law of burial, in its relation to the place of interment and the protection of

the dead body, has usually been considered as belonging to that class of topics falling under the consideration of the ecclesiastical courts.

"Most people look forward to the proper disposition of their remains, and it is natural that they should feel an anxiety on the subject. And the right of a person to provide by will for the disposition of his body has been generally recognized. By the canon law, a person had a right to direct his place of sepulture. According to the strict rules of the old common law, a dead man could have no rights, but it will soon be seen that they do at least have the right to be protected, and that the law will, towards that end, extend its protecting hand. * * *

"In the case of Gardner vs. Swan Point Cemetery, 20 R. I. 646 (78 Am. St. 897), the court said: 'The principle of all the cases seems to be that the buried body shall remain undisturbed, and that the right and duty falls to the next of kin to see that its repose is duly protected.'

"The depositories of the dead have ever been respected by mankind, whether civilized or uncivilized. Most of the commonwealths, including our own, have made it a felony to unlawfully disinter a dead body or disturb the monument or ornamentation where the body rests; and, as expressed in the Thompson case, heretofore cited, a due respect for the memory of the dead and for the feelings of the living friends and relatives requires that, when a body is once interred, it shall so remain, unless extreme necessity demands its disinterment.

"The evidence in the case shows that, when this difficulty arose, the trustees offered to return King his money that he had originally paid for the lot, and give him another lot in the cemetery. Taking all of these matters into consideration, we conclude that the equities of the case are with the defendant, and that the body of John Elder should not be removed from said lot. 'Let it rest in peace.' "

The criterion, it will be observed, is as to whether there was a license for burial. There is no question but what the burial association did permit and grant the burial in question and this, in view of the Iowa decisions herein referred to and quoted, would constitute a sufficient license to protect the deceased from disinterment. His right to rest in the portion of the lot in which he is buried has become absolute.

In answer to question 2, we are unable to find any decision or rule which extends the right of sepulture to those yet unburied. The rule as announced by our court applies strictly to those interred, and has no application to the living, or the unburied dead. The cemetery association may, therefore, refuse to allow any other body to be buried on the lot until the lot is paid for.

Answering question 3, it would appear from the decision in *Carter, et al., vs. Town of Avoca, et al.*, supra, that the right of sepulture extends to the entire lot, division or subdivision thereof in which the body may be located. If the lots in the cemetery in question are not divided, then the right extends over the entire lot but if such lots are divided in halves or subdivided in quarters, then such right extends over that portion in which the body rests.

EXECUTIVE COUNCIL: STOCK: APPROVAL: Approval of the Executive Council is not necessary when it is proposed to issue stock in exchange for outstanding stock of an equal face value or issue non par value stock in exchange for par value stock.

June 8, 1939. *Hon. Berry F. Halden, Secretary, Executive Council of Iowa:* We have your inquiry for an opinion on the following question:

Must a corporation make application under Sections 8413 and 8414 of the Code when it proposes to:

(1) Issue stock in exchange for outstanding stock of an equal face value, or

(2) Issue non par value stock in exchange for par value stock?

The questions involved here have been the subject of attorney general's opinions in at least three prior instances. In an opinion under date of August 24, 1936 (1936 Report of Attorney General, page 572) it was ruled that approval of the Executive Council was not necessary when it was proposed to issue par value stock in exchange for outstanding par value stock of an equal aggregate amount.

On October 1, 1936, a similar opinion was rendered (1936 Report of Attorney General, page 622) which held that approval of the Executive Council was not necessary when it was proposed to issue an equal number of shares of par value stock in exchange for non par value stock outstanding.

On February 19, 1938 (1938 Report of Attorney General, page 641), a third opinion was rendered which specifically overruled the two former opinions and held *inter alia* that approval of the Executive Council is required under Sections 8413 and 8414 when it was proposed to issue stock in exchange for outstanding stock of equal face value or when it was proposed to issue par value stock for non par value stock or when it was proposed to issue non par value stock in exchange for par value stock.

In view of this history, we have gone into this question with more than ordinary care and it is our conclusion that your inquiry must be answered in the negative—that is, approval of the Executive Council is not necessary when it is proposed to issue stock in exchange for outstanding stock of an equal face value or issue non par value stock in exchange for par value stock.

Sections 8412 and 8413 provide as follows:

"8412. Par value required. No corporation organized under the laws of this state, except building and loan associations, shall issue any certificate of a share of capital stock, or any substitute therefor, until the corporation has received the par value thereof.

"8413. Payment in property other than cash. If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock."

Section 8414 provides the mechanics for carrying this out.

In the case of *First National Bank vs. Fulton*, 156 Iowa 734, in considering these particular sections, the court said:

"The clear purpose of such section of the statute is to protect the corporation as such against the issue of its corporate stock in payment for property or services or other thing at fictitious valuations."

and held that the issuance of stock in exchange for a promissory note in full or partial payment of same, the amount of the note being the same as the par value of the stock purchased, would not constitute a payment of same in property or in any other thing than money, requiring the application of Section 8413 et seq.

This case was followed in the case of *Central Distributing Co. vs. Mulroney*, 196 Iowa 39, where it was held that a promissory note, given to a corporation as the purchase price of stock, need not be appraised by the Executive Council and quoted with approval from the case of First National Bank vs. Fulton, *supra*, and particularly that part of the opinion which we have quoted. To the same effect, see: *Lone Tree Bank vs. Timmerman*, 193 Iowa 1320.

In *Cleveland Provision Co. vs. Weiss*, 4 Federal 2nd, 408, it was held that no par value stock issued by a corporation in exchange for its stock having a par value as authorized by the laws of Ohio, with no change in the capital or assets of the corporation or in the interest of the stockholder is not an original issue and the same are not subject to the Federal stamp tax under the Revenue Act of 1918.

In *American Laundry Co. vs. Dean*, 292 Federal 620, the court held to the same effect where the proposal was to reduce the par value of shares from $100.00 to $20.00 but without changing the aggregate par value of all outstanding stock or the character of the stock and that this was not an original issue. To the same effect, see: *Standard Manufacturing Company vs Heiner*, 300 Federal 252; *West Virginia Pulp & Paper Company*, 293 Federal 144.

In view of the foregoing decisions, it would seem that the purpose of the enactment of Sections 8412 to 8414, together with the following sections, setting up the machinery for determining the value of property paid in for stock, was to prevent capital stock from being issued in the first instance for property or services of doubtful value, as compared with the amount of stock being issued, and therefore impair the capital structure.

We further call attention to the provisions of Chapter 385-c1, which has to do with the issuance of corporate stock without par value. Section 8419-c1 permits the issuance of no par value stock. Section 8419-c4 prescribes the method whereby the consideration for no par value stock may be authorized and its very wording indicates that it is designed to cover both original incorporation and amendments, which might provide for an exchange from par value stock to no par value.

Section 8419-c9 provides that a corporation may, by appropriate amendments to its articles of incorporation, adopted by a two-thirds affirmative vote of each class of stock then issued and outstanding and affected, change its stock from par value to no par value.

Section 84191c10 provides the articles of incorporation may provide for the future convertibility of shares of stock of one class to shares of stock of another class.

It is assumed, of course, that the exchange of stock contemplated in no wise changes the capital structure of the corporation. Such being the case, either of the situations inquired about fundamentally amounts to the exchange of certificates of stock. The stock certificate is not the stock itself but is merely evidence of the individual stockholder's stockholdings in the corporation, and the exchange of certificates in no way changes the interest of the individual stockholders in the capital stock or assets of the corporation.

The payment for the stock which the stockholder has or receives has been made prior to the transaction inquired about, either by the payment of money or by turning over property under prior approval of the Executive Council.

Prior to the enactment of Chapter 385-c1 of the Code there was, of course, no provision for non par stock in an Iowa corporation. However, it is our opinion that even prior to the enactment of this chapter, it was permissible to issue stock in exchange for outstanding stock of an equal value without securing the approval of the Executive Council.

The enactment of Chapter 385-c1 provided for non par stock. Reading Sections 8413 and 8414 in the light of the decisions referred to herein, and taking

into consideration the provisions of Chapter 385-c1, we rule that the exchange of stock contemplated by your inquiry can be made without appraisement and approval by the Executive Council.

The right to make such exchange must, of course, have provision therefor in the Articles of Incorporation or in the event the Articles of Incorporation do not cover it, then proper amendments providing therefor must be adopted.

COUNTY ATTORNEY: INFORMATIONS: MUNICIPAL COURT: County attorney's information may not be filed in the municipal court. Section 13645, Code, 1935, controlling.

June 9, 1939. *Mr. Carroll F. Johnson, County Attorney, Clinton, Iowa:* This is in answer to your letter of the 6th inst. wherein you ask our opinion on the following legal question, as stated in your letter:

"The following question has been raised in this county by the judge of the municipal court relative to the power of the county attorney to file county attorney's true informations in the municipal court on indictable misdemeanors."

Section 10669, Code of Iowa, 1935, provides:

"All criminal actions for the violation of city ordinances shall be tried summarily and without a jury. All other criminal actions shall, except as otherwise provided in this chapter (Chapter 475, Municipal Court), be triable in the same manner as criminal actions in justice of the peace or other courts having jurisdiction thereof. Prisoners may be committed to either the city or county jail. The judges shall have the same powers of parole and suspension of sentences as are possessed by the judges of the district court.

"Misdemeanor cases in which the punishment exceeds a fine of $100.00 or exceeds imprisonment for thirty days shall be tried in the same manner as like cases in the district court."

Section 10669-b1, Code of Iowa, 1935, provides:

"The provisions of chapter 634 shall be applicable to the trial in the municipal court of cases within its jurisdiction." (634 is the chapter on information by county attorney.)

Section 13645 of Chapter 634, Code of Iowa, 1935, provides:

"The county attorney may at any time when the grand jury is not actually in session, file in the district court, either in term time or in vacation, an information charging a person with an indictable offense. *In judicial districts within which a municipal court exists, the county attorney may at any time, whether or not the grand jury is in session, file an information in the district court charging a person with a misdemeanor.*" (Italics ours.)

The italicized portion of the section last above quoted, we think, is decisive of the question. While this statute does not specifically state that county attorney's informations may be filed only in the district court, we feel that this is the fair inference to be drawn from the language employed. The legislature had their attention drawn to the municipal courts and we believe that had they intended that a true information might be filed in municipal court, a specific provision to this effect would have been inserted.

We turn now to Section 10669-b1. It will be noted that this section provides that the provisions of Chapter 634 "shall be applicable to the *trial* in the municipal court." No provision is therein made for the filing of a true information in that court.

We are of the opinion that the provisions of Section 13645, Code of Iowa, 1935, are controlling and we, therefore, reach the conclusion that a county attorney's information may not be filed in the municipal court.

MOTOR VEHICLE: LICENSING: The owner of a specially constructed motor vehicle should be required to meet all of the provisions of the Motor Vehicle Law, including provisions regarding the licensing thereof.

June 10, 1939. *Mr. E. B. Shaw, County Attorney, West Union, Iowa:* Your request of June 7, 1939, inquiring our opinion as to the following matter, is herewith acknowledged.

"The vehicle in question is being run about the streets of West Union by the boy who owns it, and other boys. It is a four-wheeled vehicle. The wheels are about ten inches in diameter and have pneumatic tires. The vehicle is propelled by a one-cylinder air-cooled gasoline washing machine motor. A leather belt transmits the power from the engine to one of the wheels. The vehicle is about eight feet long and four feet wide. It has a steering gear and clutch. * * *

"Will you kindly advise whether in your opinion the owners of this vehicle should be required to meet with all of the provisions of the Motor Vehicle Law including the provisions regarding licensing same?"

For the purpose of this opinion, we quote from Chapter 134 of the Acts of the 47th General Assembly, as follows:

"Section 1. *Definition of words and phrases.* The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

"2. *Motor vehicle* means every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails. The term car or automobile shall be synonymous with the term motor vehicle.

"10. *Specially constructed vehicle* means every vehicle of a type required to be registered hereunder not originally constructed under a distinctive name, make, model, or type by a generally recognized manufacturer of vehicles and not materially altered from its original construction.

"Sec. 54. *Specially constructed, reconstructed, or foreign vehicles.* (1) In the event the vehicle to be registered is a specially constructed, reconstructed, or foreign vehicle, such fact shall be stated in the application and with reference to every foreign vehicle which has been registered heretofore outside of this state the owner shall surrender to the treasurer all registration plates, registration cards, and certificates of title or other evidence of such foreign registration as may be in his possession or under his control except as provided in subdivision (2) hereof.

"(2) Where in the course of interstate operation of a vehicle registered in another state it is desirable to retain registration of said vehicle in such other state, such applicant need not surrender but shall submit for inspection said evidence of such foreign registration and the treasurer upon a proper showing shall register said vehicle in this state."

It is to be observed that the statute is designed to include all vehicles which are self-propelled and by specific provisions recognizes and provides for "specially constructed" vehicles of the nature and kind such as the one in question. No exception or qualification exists which will remove this vehicle from the operation of Chapter 134 of the Acts of the 47th General Assembly and Acts amendatory thereto and we are, therefore, of the opinion that the owner of this vehicle would be required to meet all of the provisions of the Motor Vehicle Law, including provisions regarding the licensing thereof.

TAXATION: COUNTY FUND: POOR FUND: (Senate File 37 and 505.) Senate File 505 was an emergency measure providing for an extra or additional levy and consideration should not be given to the levy provided for in Senate File 505 in arriving at the levy permitted under Senate File 37.

June 10, 1939. *Mr. C. Fred Porter, Comptroller:* We are in receipt of your

request for an opinion with regard to Senate File 37 and Senate File 505, Acts of the 48th General Assembly.

It appears that by the terms of Senate File 37, counties having an assessed valuation of not more than twenty-two million dollars ($22,000,000.00) may levy an additional one and one-half (1½) mills on the dollar of assessed valuation for the general county fund providing the total amount of the tax levy does not exceed the average tax levy for all county purposes for the two preceding years.

Senate File 505 provides for an additional levy of not to exceed one and one-half (1½) mills for poor relief for the years 1939 and 1940 upon proper showing to the comptroller the necessity for the same.

The question is whether in figuring the levy so that it will not exceed the average for the two preceding years, as provided for in Senate File 37, should consideration be given in arriving at the levy to the additional tax provided in Senate File 505.

Senate File 37 was introduced on January 19, 1939, signed and sent to the governor on April 14, 1939, and signed by the governor on April 18, 1939, and it is as follows:

"Section 1. That section seven thousand one hundred seventy-one (7171), Code, 1935, be amended by adding to subsection two (2) the following:

" 'In all counties where a levy of one and one-half (1½) mills on a dollar of assessed valuation will not produce revenue sufficient to equal the budget requirements against the general county fund of such county, such county for the years 1939 and 1940 only is hereby authorized to levy for ordinary county revenue a tax not in excess of three (3) mills on a dollar of assessed valuation, or as much thereof as may be required to meet said budget requirements. Before any such levy is made in excess of one and one-half (1½) mills, a completely itemized statement of expenditures contemplated by such county shall be submitted to the state comptroller for his approval, and no levy in excess of one and one-half (1½) mills shall be made unless so approved by him, and unless the total tax levy for all county purposes will not exceed the average tax levy for all county purposes for the preceding two years.'

"The provisions of this act shall not be applicable to any county having an assessed valuation of twenty-two million dollars ($22,000,000.00) or more."

Senate File 505 was introduced April 20, 1939, sent to the governor April 26, 1939, and signed by the governor on May 10, 1939, and it is as follows:

"Section 2. Section 5337, Code 1935, is hereby amended by adding thereto the following:

" 'Should the one and one-half mill levy fail to provide adequate funds to take care of the poor, then the board of supervisors, with the approval of the state comptroller, shall levy an additional tax of not to exceed one and one-half mills for poor relief to be entered on the tax list and collected as the ordinary county tax. Such additional tax shall be levied only during the years 1939 and 1940. Before any such additional levy is made a showing of the necessity for such additional levy shall be made to the state comptroller and no levy in excess of said one and one-half mills shall be made unless it shall be approved in writing by the comptroller.

" 'Before any county can receive aid from the Iowa Emergency Relief fund for the aid of the poor, such county must have levied the maximum amount authorized by law for poor relief.' "

It will be seen from the legislative history of the above two bills that Senate File 505 was not introduced and was not considered at the time of the passage of Senate File 37. It further appears that Senate File 505 provides by its terms that the supervisors "shall levy an *additional* tax." This must mean a tax in excess of all other taxes which might be levied. Further provision

is made in Senate File 505 that the county must have levied the maximum amount authorized by law for poor relief before any aid can be received from the Iowa Emergency Relief Fund. To give Senate File 505 a meaning that would require the inclusion of the tax provided therein in the computation to be made in arriving at the average tax levy within the provisions of Senate File 37 would, in a great many counties, nullify Senate File 37.

Senate File 505 was an emergency measure providing for an extra or additional levy, and we are therefore of the opinion that consideration should not be given to the levy provided for in Senate File 505 in arriving at the levy permitted under Senate File 37.

TRANSFER: MOTOR VEHICLE DEPARTMENT: LIEN FOR STORAGE: The Motor Vehicle Department may sanction the acceptance of transfer issuance on the part of the county treasurer where a motor vehicle was sold by proper process of law at auctioneer's sale to satisfy lien for storage.

June 12, 1939. *Department of Public Safety. Attention: James Allen:* Your letter of June 7, 1939, inquiring our opinion as to the following matter, is herewith acknowledged:

"A motor vehicle was sold through auctioneer sale to satisfy lien for storage and the matter is being referred to your department for advice as to whether or not this department may sanction the acceptance of transfer issuance on the part of the county treasurer. * * *"

For the purpose of this opinion, we quote from Chapter 457 of the 1935 Code of Iowa:

"10345. *Nature of lien.* Livery and feed stable keepers, herders , feeders, and keepers of stock and places for the storage of motor vehicles shall have a lien on all property coming into their hands, as such, for their charges and the expense of keeping, but such lien shall be subject to all prior liens of record.

"10346. *Satisfaction of lien by sale.* If such charges and expenses are not paid, the lienholder may sell said stock and property at public auction, after giving to the owner or claimant, if found within the county, ten days' notice in writing of the time and place of such sale, and also by posting written notices thereof in three public places in the township where said stock and property were kept or received."

It will be observed that the statutes quoted provide a lien in favor of a garage keeper upon the motor vehicle stored in his garage and provide in addition thereto a means by which this lien may be satisfied.

Section 76 to and including Section 83 of Chapter 134 of the Acts of the 47th General Assembly provide the procedure by which transfers of title of motor vahicles shall be made. These statutes provide no means by which a motor vehicle may be transferred from one to another by process of law, except it be by the proper execution on the reverse side of the registration certificate. The statutes contemplate that the usual transfer shall be made in the latter manner.

Nevertheless, it will be noted that the title to automobile may change in other ways than by the usual sale and trade on the market. A sheriff's sale under proper execution may transfer the title to the judgment creditor or others and as in the instant case, the title may change to third parties by virtue of advertisement and sale for the purpose of satisfying the storage lien.

The legislature contemplates that one law may not act to the detriment of another if such laws can reasonably be construed as harmonious. By fail-

ing to include the right to transfer a motor vehicle, the title of which passes by process of law, the legislature surely did not, by such failure, intend to prohibit such right of transfer. That one may not obtain a transfer to an automobile, the title to which he has acquired by sheriff's sale or under chapter 457, was certainly not within the contemplation of the statute. Any other construction would grant to the debtor a protection which the legislature had no thought of granting and would prohibit to the judgment creditor a suitable means of satisfying his judgment, as well as render the satisfaction of the storage lien statutes unworkable. The buyer by either of these methods could do nothing other than junk his purchase, although the statute contemplates that he shall succeed by the purchase to all of the rights and privileges in the property as the original owner.

By granting the right to transfer the title of motor vehicles, the title of which is acquired by process of law, is to render Chapter 134 of the Acts of the 47th General Assembly and Chapter 457 of the 1935 Code of Iowa, completely harmonious. This at the same time places in the buyer all of the equities to which he is justly entitled.

We are, therefore, of the opinion that the Motor Vehicle Department may sanction the acceptance of transfer issuance where proper sale has been made by process of law.

LEASE: COURT HOUSE: BOARD OF SUPERVISORS: The board of supervisors has no power to lease a portion of the court house to a private company.

June 14, 1939. *Honorable Chet B. Akers, Auditor of State:* You have requested an opinion from this office upon the following situation:

The board of supervisors of Linn County have leased a part of the court house to a private abstract company and in addition to the space leased, the board of supervisors furnishes light, heat and janitor service for the lessee. The lessee pays $1,560.00 annually as rental and it also appears the county pays rental for office space outside the court house in a sum in excess of the amount received from the private abstract company.

The answer to your question is found in the case of *Hilgers vs. Woodbury County,* 200 Iowa 1318. That case involved the right of the board of supervisors to rent a portion of the court house in Sioux City to the American Legion. We quote as follows from that case:

"The statute, Code of 1897, Section 422 (see, however, Code of 1924, Section 5130), provides that the board of supervisors shall have power 'to purchase, for the use of the county, any real estate necessary for the erection of buildings for county purposes.' It also provides that the board of supervisors is 'to build and keep in repair the necessary buildings for the use of the county and of the courts,' and 'to make such orders concerning the corporate property of the county as it may deem expedient,' and 'to have the care and management of the property (of the county) * * * in all cases where no other provisions shall be made.'

"Counties are recognized as quasi corporations, and it is universally held that the board of supervisors of a county has only such powers as are expressly conferred by statute, or necessarily implied from the power so conferred. There is no provision in the statute, as it existed at the time of the accident in question, conferring upon the board of supervisors any express power to rent any portion of the court houses or any other county property for private use. The language of the statute cannot be extended by fair construction to confer such power upon the board of supervisors. Nor is the power to rent a portion of the court house to be implied from the power granted the board of super-

visors to have general management and care of the county property. The board of supervisors is expressly authorized by statute to purchase real estate necessary for the erection of county buildings, and to build and keep in repair the necessary buildings for the use of the county and courts. This is a public purpose. But the board of supervisors has no power to use or lease the court house or any portion thereof for a strictly private purpose, unless the legislature has seen fit by an anactment to grant such power; and no such power has been conferred in this state."

In view of the above pronouncement of the supreme court, this office, in an opinion rendered May 12, 1931, held that the board of supervisors does not have power to so lease a portion of the court house. See Attorney's General's Report of 1932, page 112.

We are therefore of the opinion that the lease to the private abstract company should be immediately cancelled and the company notified to vacate the premises of the court house they are now occupying.

COURT REPORTER: HOUSE FILE 327: A court reporter of a district judge is not a state officer or employee within the purview of House File 327, Acts of the 48th General Assembly, and said Act would not be applicable to him.

June 14, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: Mr. L. I. Truax, Supervisor of County Audits:* We have your inquiry of June 9th as to whether a court reporter for the district court, who receives his compensation and expense from the county treasury, is governed by Section 5 of House File 327, Acts of the 48th General Assembly.

House File 327, Acts of the 48th General Assembly, is an act to transfer to and vest in the governor authority to assign all motor vehicle units owned by the state to state officers and employees, and state departments, etc.; creating the position of state car dispatcher and granting allowances to state officers and employees for the use of their own person motor vehicles operated on state business.

Section 5 of House File 327, provides:

"No state officer or employee shall use any state-owned car for his own personal private use, nor shall he be compensated for driving his own motor vehicle except if such is done on state business and in such case he shall not receive more than four cents (4c) per mile."

The question seems to be as to whether or not a court reporter for the district court is a state officer or employee within the provisions of the foregoing Act.

Section 1045 of the Code of 1935 provides generally that each officer, elective or appointive, shall qualify by taking the prescribed oath and giving, when required, a bond.

Section 1054 provides:

"All other civil officers, elected by the people or appointed to any civil office, unless otherwise provided, shall take and subscribe an oath substantially as follows: (form of oath)."

Section 1055 of the Code provides:

"Every civil officer who is required to give bond shall take and subscribe the oath provided for in section 1054, on the back of his bond, or on a paper attached thereto, to be certified by the officer administering it."

Section 1077 provides:

"The bonds and official oaths of public officers shall, after approval and proper record, be filed:

"1. For all state officers, elective or appointive, except those of the secretary of state, with the secretary of state. * * *"

Section 10807 provides that each judge of the district court shall appoint a shorthand reporter. Section 10808 provides that the reporter shall take an oath, which shall be filed in the office of the clerk.

Section 10810 provides for payment of the court reporter and in the event his per diem for any year does not amount to $2,400.00, that deficiency shall be apportioned by the judge appointing him, among the several counties of the district, and warrants payable to him shall be drawn by the several county auditors, which warrants shall be paid by the county treasurers.

Section 10811 provides for the payment of expenses of the shorthand reporter, which are paid in the same manner as the per diem.

In view of the foregoing provisions of the Code, it is our opinion that a court reporter of a district judge is not a state officer or employee within the purview of House File 327, Acts of the 48th General Assembly, and said Act would not be applicable to him.

SOLDIERS' RELIEF COMMISSION: The Soldiers' Relief Commission cannot turn over its funds to any other relief or welfare agencies.

June 14, 1939. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* One of your assistants, James P. Irish, has requested our opinion on whether or not the local Soldiers' Relief Commission can turn over any of their funds to other relief agencies or welfare agencies in the county.

The pertinent sections of the Code are Sections 5385 and 5386 of the 1935 Code of Iowa. These sections are as follws:

5385. *Tax.* A tax not exceeding one-fourth mill on the dollar may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of, and to pay the funeral expenses of, honorably discharged indigent United States soldiers, sailors, marines, and nurses who served in the military or naval forces of the United States in any war and their indigent wives, widows, and minor children, not over fourteen years of age, if boys, nor sixteen, if girls, having a legal residence in the county.

"5386. *Control of fund.* Said fund shall be expended for the purposes aforesaid by the joint action and control of the board of supervisors and the relief commission hereinafter provided for."

It will be noted that Section 5386 provides that funds available "shall be expended for the purposes aforesaid * * *." The purposes referred to are in Section 5385 which mentions only the relief of soldiers, sailors, marines and nurses who served in the military or naval forces, and their indigent wives, widows and minor children.

It is our opinion that the language of Section 5386 prohibits the use of said funds for any other purpose than those purposes mentioned in Section 5385. We therefore come to the conclusion that the Soldiers' Relief Commission cannot turn over their funds to any other relief or welfare agencies.

TAXATION: PUBLIC BIDDER ACT: REDEMPTION: (Senate File 366.) The owner of a property may not waive his rights under Senate File 366 and allow the county to take title and thereby prejudice the rights of other persons who are given rights under this statute, and particularly under Section 7 thereof.

June 15, 1939. *Honorable Chet B. Akers, Auditor of State. Attention: Mr.*

L. I. Truax: We are in receipt of your request for an opinion upon the following situation:

"Can the owner of property sold under the public bidder act and bid in by the county waive his rights under Senate File 366 and allow the county to serve notice of expiration of right of redemption and take deed to property without waiting for the expiration of the six-month period as provided in said act?"

This office has already ruled that under Senate File 366 the county may not go forward and take tax deed upon property on which the county holds the certificate of tax sale until the expiration of six months from the date of the passage of the act. If a waiver could be secured from all of the persons interested in the property, such as the owner of the legal title and other persons to whom the right to pay taxes has been given by statute, mortgage or agreement such as the class listed in Section 7 of the Act, then we feel the county could go forward and serve notice of the expiration of the right of redemption. However, we do not feel that the owner could waive his rights under Senate File 366 and allow the county to take title and thereby prejudice the rights of other persons who are given rights under this statute, and particularly under Section 7 thereof.

FAIR BOARD: STATE AID: ACHIVEMENT SHOW: It is possible for Polk County to qualify for state aid for its county 4-H Achievement Show. State Fair and Exposition is not within the purview of Section 2894 of the Code. State Fair Board has authority to rent parts of the fair grounds when not needed for State Fair purposes.

June 19, 1939. *Hon. George A. Wilson, Governor of Iowa:* We have your request for an opinion on the following question:

"Is it possible for Polk County to qualify for state aid for its county 4-H Achievement Show provided it can lease building and grounds valued at $50,000.00 from the Iowa State Fair Board?"

Section 2894 of the 1935 Code of Iowa provides:

"For the purposes of this chapter:

"1. 'Fair" shall mean a bona fide exhibition of agricultural, dairy, and kindred products, live stock and farm implements.

"2. 'Society' shall mean a county or district fair or agricultural socity incorporated under the laws of this state for the purpose of holding such fair, and which owns or leases at least ten acres of ground and owns buildings and improvements situated on said ground of a value of at least eight thousand dollars, or any incorporated farm organization authorized to hold an agricultural fair which owns or leases buildings and grounds especially constructed for fair purposes of the value of fifty thousand dollars in a county where no other agricultural fair receiving state aid is held."

The first question with which we are confronted is, does the State Fair and Exposition, which is located within the confines of Polk County, constitute another "agricultural fair receiving state aid"?

In considering this question, let us refer to Section 2873 of the Code, which provides that:

"The Iowa State Fair Board shall consist of:

"1. The governor of the state, the state secretary of agriculture, and the president of the state college of agriculture and mechanic arts.

"2. A president and vice president, and one director from each congressional district, to be elected as hereinbefore provided.

"3. A secretary and treasurer to be elected by the state fair board."

and Section 2875, which provides:

"On or before November 15th of each year the secretary of agriculture shall certify to the secretary of the state fair board the names of the various associations and societies which have qualified for state aid under the provisions of chapters 137 to 143 inclusive, and which are entitled to representation in the convention as provided in section 2874."

Sections 2873 and 2875, above cited, are found in Chapter 135 of the Code, which is entitled, "State Fair and Exposition."

In the case of *Hern vs. The Iowa State Agricultural Society, et al.*, 91 Iowa 97, the court, at page 100, made use of the following language:

"Not being a corporation for pecuniary profit, the defendant society's liability is not controlled by the rules of law applicable to such. The society is an arm or agency of the state, organized for the promotion of the public good, and for the advancement of the agricultural interests of the state."

In view of the above, we are convinced that the State Fair and Exposition, located in Polk County, is not within the purview of Section 2894 of the Code.

Relative to leasing $50,000.00 worth of property from the State Fair Board, we find that Section 2886 provides:

"The state fair board shall have the custody and control of the state fair grounds , including the buildings and equipment thereon belonging to the state and shall have power to:

"1. Erect and repair buildings on said ground, etc."

We are of the opinion that authority to "have custody and control of the state fair grounds" carries with it the authority to rent parts of same when not needed for State Fair purposes. We find no law forbidding such leasing.

OFFICIAL NEWSPAPERS: BOARD OF SUPERVISORS: Because of recent legislation a newspaper, which has not been in existence for two years can not qualify as an official newspaper.

June 20, 1939. *Mr. John E. Miller, County Attorney, Albia, Iowa:* Received your letter of recent date, in which you ask the opinion of this department relative to the followoing proposition:

"Chapter 274 of the Code provides for the selection of official newspapers, and Section 5399 provides that in counties with population of more than 15,000 there shall be three official newspapers, not more than two of which are published in the same city or town. Section 5397 provides the time when the board of supervisors shall select the official newspapers.

"The question now arises, as follows: On January 1st, there were only two newspapers in the county, each being in different towns, and each was selected as official newspapers. Subsequent to that time, another newspaper was started, and has been in existence for more than three months, and has a bona fide subscription list.

"Is it mandatory that the board select the third newspaper as soon as it is qualified to receive the selection or appointment, or is it mandatory that the board wait until January 1st of next year, or is the matter discretionary with the board?"

It is our opinion that because of recent legislation a newspaper which has not been in existence for two years can not qualify as an official newspaper.

FILING FEE: ESTATE PROPERTY: FEES IN ESTATE: "Value of the property" in Chapter 479, Section 10837, paragraph 29, refers only to personal property in estate, and fee to be taxed is based on the personal property only.

June 20, 1939. *Mr. Harry E. Coffie, County Attorney, Estherville, Iowa:* This is in answer to your letter of the 10th inst. wherein you ask the opinion of this department relative to the following question:

Chapter 479, Section 10837, paragraph 29, provides for the taxing of fees in estates that "where the value of the property of the estate does not exceed * * *" certain fees shall be charged. The question arises: What is meant by "value of the property"? Does the value in this case include both the real and personal, or just the personal with reference to determining the amount of the filing fee to be charged in the estate?

We are of the opinion that this clearly has reference only to the personal property. The administrator ordinarily has nothing whatsoever to do with the real estate.

We reach the conclusion, therefore, that the fee to be taxed is based on the personal property only.

MARRIAGE LICENSE: CLERK OF DISTRICT COURT: Clerk of district court may legally issue a license to marry to persons who have been divorced within one year, providing the divorce was not granted in State of Iowa.

June 20, 1939. *Mr. Robert N. Johnson, Jr., County Attorney, Fort Madison, Iowa:* This is in answer to your letter of the 14th inst. wherein you ask our opinion relative to the following question:

A person is divorced within one year in the state of Illinois or Missouri. He comes to Iowa and applies for a marriage license. No permission to remarry within the year was granted in the Illinois or Missouri decree. May the clerk legally issue him a license?

Section 10484, Code of Iowa, 1935, provides:

"In every case in which a divorce is decreed, neither party shall marry again within a year from the date of the filing of said decree unless permission to do so is granted by the court in such decree. Nothing herein contained shall prevent the persons divorced from remarrying each other."

Section 10485, Code of Iowa, 1935, provides:

"Any person marrying contrary to the provisions of section 10484 shall be deemed guilty of a misdemeanor and punished accordingly."

Section 12894, Code of Iowa, 1935, provides for the punishment of one year in the county jail or a fine not exceeding $500.00, or by both such fine and imprisonment.

It will be observed that in Section 10429, there is no prohibition against issuing a license for the reason that the parties have been divorced within the past year.

It is our opinion that our statute applies only to marriages within one year from and after the rendition of a decree in an Iowa court. You will note that Section 10484 provides, "from the date of the filing of said decree." What decree? Clearly the decree handed down pursuant to Chapter 471, Code of Iowa, 1935.

We must also bear in mind that criminal statutes are strictly construed and, in case of doubt, must be resolved in favor of the person accused of the commission of the crime.

We reach the conclusion, therefore, that the clerk of the district court may legally issue a license to marry to persons who have been divorced within one year, providing that the divorce was not granted in the State of Iowa.

TAYLOR COUNTY: BOARD OF SUPERVISORS: FORECLOSURE OF PROPERTY: H. TAMERIUS: Contract between Taylor County board of supervisors and H. Tamerius an unwise procedure. Waiver and estoppel do not apply to public officers; neither can state officials waive legal requirements.

Statute should be complied with, which would involve "doing over" work of previous administration of county attorney's office.

June 20, 1939. *Mr. Ralph C. Jones, County Attorney, Bedford, Iowa:* Received your letter of the 12th inst., asking our opinion as to the following legal question:

"Please find enclosed a copy of a contract entered into between the Taylor County board of supervisors and H. Tamerius. The contract in itself is self-explanatory, and I will try and give you the following facts in regard to the matter.

"The original school loan on this property was $700 and was appraised at $2,000 in the year 1923. In November, 1938, there was a foreclosure action started on this property and it was levied on by special execution on the 31st of December, 1939, and the sheriff's certificate issued.

"The reason the county entered into this contract is that the value of this property has diminished greatly since 1923 and the other reason for the contract was that the county attorney, prior to January 1, 1939, advised the county board on the following theory: That as the county had to pay back the money on this loan to the state that they could go ahead and make a contract, as per copy enclosed, for the reason that after paying back the money to the state, that the property belonged to the county.

"At the present time Mr. Tamerius through his attorney, Frank Wisdom, is demanding that the county give deed to this property.

"After looking up the law on this matter, I am convinced that the county has no right to make this contract on this property as there are several steps in the procedure which were not followed as the laws state must be followed.

"1. After the property is levied on and sold at special execution and the state gets deed, the property must be appraised.

"2. That notice must be given that the property foreclosed on shall be advertised at least 40 days before the sale.

"3. That the property must be sold at public auction to the highest bidder.

"Mr. Tamerius since contracting for this property has made several improvements upon the place and I presume that is the reason that he is asking and demanding the county give him deed; but it will be approximately six months before the state can take deed to this property as the year of redemption in the sheriff's sale will not expire until the 31st day of December, 1939.

"The question that arises here is: Can Taylor County have this contract ratified in any way or must they handle this property as provided by statute, that is, by the appraising, giving notice of sale and selling it at public auction?"

It is the opinion of this department that county officials can not ratify anything that would otherwise be illegal. The courts have frequently held that waiver and estoppel do not apply to public officers and by the same token neither can state officials waive legal requirements. Especially do we think that, in view of the fact that the rights of others are involved, this would be an unwise procedure.

It is our opinion that the statute should be complied with, which, of course, would involve "doing over" the work done by the previous administration of your office.

POOR FUND: HEALTH UNIT: NURSE: The discretion as to the expenditure of monies, providing they come from county funds legally available, is vested in the county board of supervisors and it is clearly within their, power, with the advice of the commissioner of public health, to appoint such public health nurse.

June 21, 1939. *Dr. Walter L. Bierring, Commissioner of Public Health:* Under date of May 26, 1939, the board of supervisors of Des Moines County wrote you inquiring our opinion as to the following matter:

"We, the members of the Des Moines County board of supervisors, hereby notify you that we have today authorized the payment of twenty-two hundred dollars ($2,200.00) from the county "Poor Fund" to the Des Moines County health unit during the fiscal year beginning July 1, 1939, providing we may have, in writing, a favorable opinion from the state's attorney general as to the legality of this procedure under provisions of Iowa Code, 1935, Chapter C1, paragraph 2246-C4; and with the understanding that the above mentioned amount ($2,200.00) is to be used in the maintenance of a whole-time public health nurse in Des Moines County outside the city of Burlington."

For the purpose of this opinion, we call to your attention Chapter 107-c1 of the 1935 Code of Iowa, entitled "County Board of Health," and particularly the following sections thereof:

"2246-c3. *Organization.* The organization of a county health unit plan shall be made only after consultation and after advising with the state commissioner of health or his agent, who is hereby charged with the duty of the investigation of all activities in public health in operation within the county at the time and with the further duty of advising the county board of health and the county board of supervisors toward the correlation and coordination of all public health activities under the county health unit plan. The state board of health shall adopt rules of procedure for the organization of county boards of health, as such, and shall also specify their duties.

"2246-c4. *Expenses.* The expense incurred by the county health unit shall be paid by the county board of supervisors upon their own motion from county funds legally available. Other organizations, including local boards or boards of health, may unite with the county board of supervisors in defraying the necessary expense of such county health unit."

Reviewing these sections, it appears that the county board of supervisors may, upon their own motion, pay expenses incurred by the county health unit from county funds legally available and that the commissioner of public health shall advise and consult with the county board of health as well as investigate their activities, and he shall at all times cooperate with the county board of supervisors toward the correlation and coordination of all public health activities under the county health unit plan. It becomes specifically the duty of the State Board of Health to adopt rules of procedure for the organization of county boards of health as such and he shall at the same time specify their duties.

With this in mind and assuming the approval of the commissioner of public health, it is entirely within the scope of authority of the county board of supervisors to authorize the payment of the sum of twenty-two hundred dollars ($2,200.00) from the poor fund for the maintenance of a whole-time public health nurse in Des Moines County outside the city of Burlington. The discretion as to the expenditure of such monies, providing they come from county funds legally available, is vested in the county board of supervisors and it is clearly within their power, with the advice of the commissioner of public health, to appoint such a public health nurse.

It is to be assumed, however, that by making such appointment, the county health unit plan under which the county board of health is operating, is so organized and conducted that no discrimination will result as against the city of Burlington.

TAXATION: HOMESTEAD CREDIT: Homestead credit is based on six months' ownership and residence in a home by the applicant during taxable year. If the owner dies before six months' occupancy during any taxable year, the right to credit depends on the person to whom the property passes.

If the owner is divested of title or ousted from occupancy by foreclosure or other legal procedure before the six months' ownership or residence has been completed, the credit should be cancelled.

June 22, 1939. *State Tax Commission, Des Moines, Iowa. Attention: Mr. Ben F. Hall:* You have asked us for an opinion with regard to various situations that arise under the Homestead Credit Law and the following is submitted as the ruling of this department supplementing other rulings that have been given in answer to specific inquiries:

The homestead credit is based on six months' ownership and residence in a home by the applicant during a taxable year. Once this period of residence has been completed, the requirements for the credit have been fulfilled. If the owner thereafter alienates the title, the exemption runs with the land. However, if the owner sells the property and transfers to someone other than a spouse, blood relative, or adopted child residing in the homestead property, before six months' residence during the taxable year have expired, the credit should be cancelled.

In the event the owner dies before six months' occupancy during any taxable year, the right to the credit depends on the person or persons to whom the property passes. If it passes to a surviving spouse, child, or blood relative of the deceased within the provisions of Paragraph 2, Section 19, of Chapter 195, Acts of the 47th General Assembly, then the homestead credit will continue if the length of the residence of the deceased and the length of the residence of the person, or persons, who inherit when added together totals the six months' residence required by law. If, however, the property passes to one who is not a surviving spouse or a relative by blood or adoption, then if a credit application has been filed, it should be cancelled.

If the owner is divested of title or ousted from occupancy by foreclosure or other legal proceedings before the six months' ownership or residence has been completed, then the credit should be cancelled.

BOARD OF SOCIAL WELFARE: OLD AGE ASSISTANCE: GUARDIANSHIP: County attorney is under duty to act in guardianship matters concerning old age assistance applicants or recipients and any payment for his services is purely within the discretion of the court.

June 23, 1939. *Lyon County Board of Social Welfare, Rock Rapids, Iowa:* We are in receipt of your letter under date of May 11, 1939, wherein you ask an opinion as to whether or not the county attorney may charge a fee in guardianship matters concerning old age recipients.

Section 5296-f28, Code of Iowa, as amended by the 47th General Assembly, Senate File 376, Section 24, reads as follows:

"*Incapacity of applicant or recipient.* If the person applying for or receiving assistance, on the testimony of reputable witnesses, is thought to be incapable of taking care of himself or his money, the board shall complete the investigation, as provided elsewhere in this chapter, and send such application, investigation and supporting papers to the division. When notified by the division of the conditional approval of said application or the renewal or continuance of a certificate contingent upon the appointment of a legal guardian, *the board shall direct the county attorney to petition the court for such appointment* and shall forward the court record to the division as notice of the person to whom assistance payments shall be made.

"The application of a person who has been adjudged an incompetent shall be honored only when made by a legally appointed guardian as provided for

under the provisions of section 12614, Code, 1935. Upon subsequent investigations all affidavits shall be affirmed by said legal guardian and the person or persons supplying the required information in behalf of said incompetent person.

"All guardianship proceedings in the case of an applicant or recipient shall be carried out without fee or other expense when, in the opinion of the court, the aged person is unable to assume said expense. At the discretion of the court, such a guardian may serve without bond."

This section will appear as Section 3828.035 in the 1939 Code. It will be noted from the Italicized portion of the above section that the board shall direct the county attorney to petition the court for the appointment of the guardian. It is mandatory upon the board to direct the county attorney to so do. If the board can direct the county attorney and only the county attorney to petition the court, it follows that the board can direct no other practicing attorney to perform this service. If we should hold that the county attorney could charge for this service, then we would be in effect holding that he was the only attorney eligible to receive payment and we don't feel that this result was the intent of the legislature. The last paragraph in the above quoted section provides:

"All guardianship proceedings in the case of an applicant or recipient shall be carried out without fee or other expense when, in the opinion of the court, the aged person is unable to assume said expense. At the discretion of the court, such a guardian may serve without bond."

It is our opinion that the words "fee or other expense" includes legal fees for services rendered. This places the payment to the county attorney in the discretion of the court. The legislature has repeatedly enlarged the duties of the county attorney in various matters. We feel that this is one of those instances.

It is, therefore, our opinion that the county attorney is under a duty to act in guardian ship matters concerning old age assistance applicants or recipients and that any payment for his services is purely within the discretion of the court.

BOARD OF SOCIAL WELFARE: OLD AGE ASSISTANCE: DISCHARGE OF EMPLOYEES: The county board of social welfare may act as it sees fit with its employees and may discharge any of its employees for cause or without cause if it so chooses.

June 23, 1939. *Mr. D. W. Harris, County Attorney, Bloomfield, Iowa:* In your letter of June 2, 1939, you requested our opinion on whether or not your local board of social welfare has the right to discharge the investigator of old age assistance for cause or without cause.

Section 13 of Senate File 373, Acts of the 47th General Assembly, provides in part as follows:

"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 power to employ necessarily includes the power to discharge. In view of these circumstances, we feel that the county board of social welfare may act as it sees fit with its employees and may discharge any of its employees for cause or without cause if they so choose.

BOARD OF SOCIAL WELFARE: ASSISTANCE FOR BLIND: RESIDENCE REQUIREMENT: In order to qualify for assistance under the Needy Blind

Act, a person must reside in the State of Iowa for one year immediately preceding application before becoming eligible.

June 26, 1939. *Mr. King R. Palmer, Chairman, State Department of Social Welfare, Des Moines, Iowa:* Under date of June 22, 1939, you asked our opinion as to the interpretation of paragraph 3, Section 3, Senate File 375, Acts of the 47th General Assembly, in the following question:

"The question at hand is whether or not a blind person who became blind while a resident of the State of Iowa and has now been absent from the state for a period of 12 years could return to Iowa and immediately qualify insofar as residence requirements for aid under the Needy Blind Act, or would he have to reside in Iowa for one year before becoming eligible?"

The pertinent section reads as follows:

"Sec. 3. *Eligibility for assistance to the needy blind.* * * *

"3. Has resided in the state of Iowa for at least five years during the nine years immediately preceding the date of application for assistance under the provisions of the act, and has resided therein one year immediately preceding the application for assistance. If, however, such person has become blind while a resident of the state or is blind and a resident of the state at the time of passage of this act, he is eligible even though he has not resided for five years within the state: * * *."

The first sentence in the above quoted section provides that the applicant must have two qualifications, one, residence for five years during the nine years preceding the date of application, and second, residence of one year immediately preceding the date of application. The second and last sentence in said section refers back to the first sentence and refers only to the first of the above named requirements. In other words, although the second sentence qualifies the first, it is silent as to the second requirement. It is our opinion that the legislature did not intend to remove this second requirement as to one year's residence immediately preceding the date of application.

It is, therefore, our opinion that the applicant in your question could not qualify immediately for blind assistance, but would have to reside in the State of Iowa for one year before becoming eligible.

OLD AGE ASSISTANCE: LIABILITY OF GRANDSON: Male grandchildren are not relieved of financial responsibility in the matter pertaining to the support of applicants or recipients of old age assistance.

June 26, 1939. *Mrs. Mary Huncke, Vice Chairman, State Board of Social Welfare, Des Moines, Iowa. Attention: Mr. Frank T. Walton:* Under date of June 24th, you asked our opinion as to whether or not the last General Assembly relieved grandsons of financial responsibility in matters pertaining to the support of applicants for old age assistance.

Section 5298, 1935 Code of Iowa, reads as follows:

"*Parents and children liable.* The father, mother, and children of any poor person, who is unable to maintain himself or herself by labor, shall jointly or severally relieve or maintain such person in such manner as, upon application to the township trustees of the township where such person has a residence or may be, they may direct."

Section 5301, 1935 Code of Iowa, continues the same trend of thought as follows:

"*Remote relatives.* In the absence or inability of nearer relatives, the same liability shall extend to grandparents, if of ability without personal labor, and to male grandchildren who are of ability by personal labor or otherwise."

Section 8, subsection 7 of the Old Age Assistance Law, which will appear in the new 1939 Code as Section 3828.008, reads in part as follows:

"*To whom granted.* Old age assistance may be granted and paid only to a person who at the time of application and during the continuance of a certificate of assistance: * * *

"7. Has no spouse, child, *other person*, municipality, association, society or corporation legally or contractually responsible under the law of this state and found by the division able to support him."

To give effect to the words "other person" in the statute, we must necessarily arrive at the conclusion that these words mean all other persons financially responsible; and giving effect to Section 5301, 1935 Code of Iowa, these words would include male grandchildren.

The next question is whether House File 628, Section 17, 48th General Assembly, which will appear as Section 3828.029 in the 1939 Code, removes the liability of a grandchild. This section reads as follows:

"*When child's liability begins.* The state board or the court in determining the responsibility of a child for the support of a claimant or recipient, shall deem liability to begin when said child is receiving a net income from whatever source, commensurate with that upon which he would make an income tax payment to this state. In no event shall assistance be granted when the contribution made by or required of responsible relatives attains the equivalent of the maximum assistance payable under this chapter."

The first sentence of the above quoted section merely states the measuring rule for use in determining when a child's responsibility begins. The last sentence in said section limits the duty of the State Board to grant old age assistance when any "responsible relative" might be required to contribute. No mention is made specifically relieving grandchildren from liability.

It is, therefore, our opinion that male grandchildren are not relieved of financial responsibility in the matter pertaining to the support of applicants or recipients of old age assistance.

POTTAWATTAMIE COUNTY: COUNTY SEATS: DEPUTY CLERK: Pottawattamie County is not a county with two county seats; therefore, deputy clerk of district court should receive fifty per cent of salary of clerk.

June 26, 1939. *Mr. Roy W. Smith, County Attorney, Council Bluffs, Iowa:* This is in answer to your letter of the 23rd inst. wherein you ask our opinion relative to the following question:

"Is Pottawattamie County a county with two county seats, or is it a county where district court is held in two places, having in mind the construction of Section 5231 and Section 5236 of the 1935 Code of Iowa?"

We are of the opinion that Pottawattamie County is a county where district court is held in two places and consequently is not a county with two county seats. We reach the conclusion, therefore, that the deputy clerk of the district court should receive fifty per cent (50%) of the salary of the clerk and not sixty-five per cent (65%) as provided by Section 5236. It is our thought that Lee County is the only county in the state having dual county seats.

COUNTY RECORDER: GOVERNMENTAL AGENCIES: FEE FOR RELEASING MORTGAGES: County recorder is entitled to charge and collect 25 cents from governmental agencies for releasing mortgages.

June 26, 1939. *Mr. Morse Hoorneman, County Attorney, Le Mars, Iowa:*

This is in answer to your letter of the 21st inst. wherein you ask our opinion relative to the following legal question:

The Conservation Agency is an arm of the Government. This agency takes mortgages from various individuals in your county.

The question is as to whether the county recorder may charge the Conservation Agency twenty-five cents (25c) for releasing the mortgages.

It is our opinion that the general section applies and that the county recorder is entitled to charge and collect the twenty-five cent fee for releasing the mortgages above referred to. We can find no statute that exempts governmental agencies from paying the fee in question.

TAXATION: SPECIAL ASSESSMENT CERTIFICATE: TAX SALE CERTIFICATE: The tender to the county of all the delinquent general tax for which the property was sold and the interest and costs is a payment of the tax by one who has by statute been given the right to pay the taxes and the county auditor should not refuse the tender made by the special certificate holder because of Senate File 366.

June 27, 1939. *Mr. Maurice E. Rawlings, County Attorney, Sioux City, Iowa. Attention: John L. Mulhall, Assistant County Attorney:* We have received your request for an opinion in regard to the following situation:

"'A' holds a special assessment certificate on a lot in Sioux City. Woodbury County holds the tax sale certificate. 'A' tendered Woodbury County the amount of the tax sale plus interest and costs as provided by Section 6041 of the 1935 Code of Iowa. The county auditor refused the said tender because of the bill passed by the last legislature, known as Senate File No. 366."

Section 6041 of the 1935 Code of Iowa provides as follows:

"*Assignment of certificate.* Any holder of any special assessment certificate against a lot or parcel of ground, or any holder of a bond payable in whole or in part out of a special assessment against any lot or parcel of ground, or any city or town within which such lot or parcel of ground is situated, which lot or parcel of ground has been sold for taxes, either general or special, shall be entitled to an assignment of any certificate of tax sale of said property for any general taxes or special taxes thereon, upon tender to the holder or to the county auditor of the amount to which the holder of the tax sale certificate would be entitled in case of redemption."

We find no prohibition in Senate File 366, Acts of the 48th General Assembly, to the continued operation of Section 6041 during the six-month period that this Senate File is in operation.

Senate File 366 merely grants to the owner the right to enter into an agreement to pay the delinquent taxes in ten equal annual installments when the county holds the certificate of tax sale. But the tendering to the county of all the delinquent general tax for which the property was sold and the interest and costs is a payment of the tax by one who has by statute been given the right to pay the taxes.

We are therefore of the opinion that the county auditor should not refuse the tender made by the special certificate holder.

REGISTRATION: MOTOR VEHICLE: BILL OF LADING: FOREIGN LICENSES: SPECIAL MOBILE EQUIPMENT: (1) If a motor vehicle transporting goods is foreign and carries foreign license plates only, it is violating Section 85 and the bill of lading showing intrastate carriage is sufficient evidence to warrant the filing of charges against the operator of the truck. (2) A truck erected with a three-legged derrick and special motor on the rear, used for setting poles and shifting or moving them along the road-

side, comes within the definition of special mobile equipment. (3) Exemption from registration shall only extend to those foreign vehicles which are properly registered and licensed in their own state and if that condition does not exist, then such exemption fails to apply and the foreign motor vehicle is subject to registration in Iowa.

June 27, 1939. *Department of Public Safety, Motor Vehicle Division. Attention: Chief Knee:* Your letter of June 21, 1939, inquiring our opinion on the following matters, is herewith acknowledged.

"1. An officer has occasion to stop a truck, which bears license plates of a foreign state, that is, of some state other than Iowa. The driver of the truck has in his possession a bill of lading, which shows the freight hauled to be an intrastate shipment. Is this bill of lading sufficient evidence for an officer to file charges against the operator of the truck? * * *"

From Chapter 134, Acts of the 47th General Assembly, we quote as follows:

"Sec. 85. *Nonresident carriers.* Nonresident owners of foreign vehicles operated within this state for the intrastate transportation of persons or property for compensation or for the intrastate transportation of merchandise, shall register each such vehicle and pay the same fees therefor as is required with reference to like vehicles owned by residnts of this state."

This section requires that foreign vehicles operated for compensation in intrastate commerce shall be registered and licensed in Iowa. The bill of lading is the document of title to the goods carried and indicates on its face that the shipment is from an Iowa consignor to an Iowa consignee. If the motor vehicle transporting the goods is foreign and carries foreign plates only, it is violating Section 85 and the bill of lading showing intrastate carriage is sufficient evidence to warrant the filing of charges against the operator of the truck.

"2. A truck is adapted to the work of setting poles by erecting a three-legged derrick and special motor on the rear portion of the truck. This truck is used for settling poles and also in shifting or moving them short distances along the roadside. Is this truck 'special mobile equipment'?"

We quote from Chapter 134, Acts of the 47th General Assembly, as follows:

"Section 1. *Definitions of words and phrases.* The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

15. *Special mobile equipment* means every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including road construction or maintenance machinery, ditch-digging apparatus and well-boring apparatus. The foregoing enumeration shall be deemed partial and shall not operate to exclude other such vehicles which are within the general terms of this paragraph."

In view of the definition of special mobile equipment, it is our opinion that the motor vehicle in question comes within the definition of special mobile equipment for the reason that it is not designed or used primarily for the transportation of persons or property and is incidentally operated and moved over the highway. Such a motor vehicle comes within the general provisions of the definition.

"3. An officer of the law stops a truck, which bears license plates of some state other than Iowa, and on investigation finds that the plates, which are on the truck, were not issued for this truck. Further investigation reveals that no application for registration had been applied for, for the truck. Would this be a violation of Section 84, Chapter 134, Acts of the 47th General Assembly, and if so, would the operator of said truck be required to purchase Iowa plates?"

We quote from Chapter 134, Acts of the 47th General Assembly, as follows:

"Sec. 84. *Nonresident owners exempt.* A nonresident owner, except as otherwise provided in sections eighty-five (85) and eighty-six (86) owning any foreign vehicle of a type otherwise subject to registration may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration card and registration plate or plates issued for such vehicle in the place of residence of such owner."

From a review of the above section, it is clearly the intent of the legislature that the exemption from registration shall only extend to those foreign motor vehicles which are properly registered and licensed in their own state and if that condition does not exist, then such exemption fails to apply and the foreign motor vehicle is subject to registration in Iowa.

It is, therefore, our opinin that the truck in question violates Section 84 of Chapter 134 of the Acts of the 47th General Assembly and is subject to registration under the laws of Iowa. May we also in this regard, call your attention to Section 130 of Chapter 134 of the Acts of the 47th General Assembly to the effect that it is a misdemeanor punishable under Section 500 of the same chapter and act to operate on the highways of the state of Iowa, any vehicle required t obe registered under the provisions of Chapter 134 of the Acts of the 47th General Assembly unless such vehicle is properly registered in accordance with said chapter and act.

COUNTY TREASURER: MOTOR VEHICLE DEPARTMENT: NOTARY PUBLIC: OATHS: The county treasurer may administer oaths in connection with matters that come up in his office, including various automobile blanks, unless there is some particular provision qualifying such privilege.

June 27, 1939. *Mr. Harlan J. Williamson, County Attorney, Manchester, Iowa:* Your letter of June 23, 1939, inquiring our opinion as to the following matter, is herewith acknowledged.

"Our county treasurer has been coming to me for advice on the authority of himself and his deputies to administer oaths in connection with matters that come up in his office. He is especially concerned over the various automobile blanks that must be signed and sworn to.

"The treasurer handed me a blank certificate for transfer of automobile, application for automobile registration, blank application for special trailer license and blank claim for refund of registration which are all made to be sworn to before a notary public and a blank application for wagon box trailer registration to be sworn to before a notary or treasurer."

For the purpose of this opinion, we quote from Chapter 66 of the 1935 Code of Iowa, as follows:

"1216. *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 1215."

And from Chapter 134, Acts of the 47th General Assembly, as follows:

"Sec. 21. *Authority to administer oaths.* Officers and employees of the department designated by the commissioner are, for the purpose of administering the motor vehicle laws, authorized to administer oaths and acknowledge signatures, and shall do so without fee.

"Sec. 51. *Application for registration.* Every owner of a vehicle subject to registration hereunder shall make application to the county treasurer, of the county of his residence, for the registration thereof upon the appropriate form or forms furnished by the department and every such application shall bear the signature of the owner written with pen and ink and said signature

shall be acknowledged by the owner before a person authorized to administer oaths and said application shall contain:

"1. The name, bona fide residence and mail address of the owner or business address of the owner if a firm, association or corporation;

"2. A description of the vehicle including, insofar as the hereinafter specified data may exist with respect to a given vehicle, the make, model, type of body, the number of cylinders, the serial number of the vehicle, the engine or other number of the vehicle and whether new or used and if a new vehicle the date of sale by the manufacturer or dealer to the person intending to operate such vehicle.

"3. Such further information as may reasonably be required by the department."

It is to be observed that the matters about which the county treasurer is inquiring clearly pertain to the business of his office. Section 1216, paragraph 3 of Chapter 66 of the 1935 Code of Iowa, grants to county officers the privilege of administering oaths in all such matters and unless there is some particular provision qualifying such privilege, then the county treasurer may in these instances administer the oath.

In this particular, noting that the matters under inquiry fall within the purview of the motor vehicle law, Sections 21 and 51 of Chapter 134 of the Acts of the 47th General Assembly have a bearing. Both of such sections refer to the administration of oaths and both indicate clearly that the legislature had no intention to require documents pertaining to the motor vehicle department be exclusively notarized by notary publics but rather that the oath might be administered by all qualified to administer such oaths.

Since the documents in question are those pertaining to the motor vehicle division, are particularly the business of the county treasurer and may be acknowledged before any person authorized to administer oaths, it is our opinion that the county treasurer may administer the oaths required.

CONSERVATION COMMISSION: ROAD WORK: VOUCHERS: Road claim vouchers may be paid the same as regular conservation claims providing they conform to statute, without the necessity of submitting these to the chief engineer of the Iowa State Highway Commission for approval.

June 27, 1939. *Iowa State Conservation Commission, Des Moines, Iowa. Attention: M. L. Hutton:* Your letter of June 17, 1939, inquiring our opinion as to the following matter, is herewith acknowledged.

"Some years ago it was the custom of the legislature in making appropriations for the Conservation Commission to make a separate appropriation for road work. That occurred during the time when the state park roads, etc., were handled by the former Board of Conservation prior to the creation of the Conservation Commission. Before that, allotments for road work used to come out of the general treasury upon the approval of the Executive Council.

"In more recent years, and particularly since the creation of the Conservation Commission, the biennial appropriations made by the General Assembly have, as a usual thing, been in a lump sum. This sum has included funds for the maintenance of state parks, the improvement of roads and highways in said parks, etc.

"Under the former condition, the chief engineer of the Highway Commission functioned as a supervisor of the various state road districts, and usually assigned a highway engineer from his organization to attend to the details. At the present time no engineer is so assigned, * * *"

"I have discussed this matter with Mr. F. R. White, chief engineer of the Highway Commission, and it is at his suggestion that I am taking up the matter with you to inquire if we may pay the road claim vouchers the same as we do our regular conservation claims."

For the purpose of this opinion, your attention is directed to the following sections of Chapter 239 of the 1935 Code of Iowa:

"4631. *State road districts.* Highways on lands of the state and highways on which such lands abut shall constitute a separate road district for each state institution, or state park, in connection with which such lands are used, and shall be under the jurisdiction of the board in control thereof.

"4632. *Supervisor.* The chief engineer of the state highway commission shall be ex officio general supervisor of said several road districts, and be under the direction of the board in control thereof, and shall have general charge of the maintenance and improvement of said roads, and perform such other duties and make such reports in reference thereto as may be required by said board. Said board may appoint a local supervisor for each district.

"4633. *Maintenance and improvement.* The roads, bridges and culverts within or adjacent to any such district shall be maintained, repaired, and improved under the direction of the board which is in control of said lands, provided said board shall not pave or hard surface such roads unless authorized to do so by the executive council. The costs shall be paid only after certificate of detailed amount due shall have been filed by the said board with the state comptroller, and duly audited as provided by law. This section shall not be construed as preventing the paving or hard surfacing of any such roads under any other proceeding authorized by law."

Reviewing the above statutes, it is to be observed that the chief engineer of the State Highway Commission is vested with certain duties relative to the ex officio general supervision of the maintenance and improvement of highways and roads through public lands. This statute does not require, however, that beyond supervision and maintenance, the chief engineer shall certify and approve expenditures or vouchers for expenditures for such improvements. It is required that the board making such improvements, here the Iowa State Conservation Commission, shall nevertheless file a certificate of the detailed amount due with the state comptroller, this having been properly audited. In addition it is to be noted that such costs are not payable from the primary road fund but from the Conservation Commission appropriation.

Beyond this the statute does not require the board to go. To construe the chief engineer's ex officio general supervision to include the very details of the work is to read into the statute that which was never intended by the legislature. Uniformity of maintenance and improvement of public roads is the basis for the requirement of the general supervision and when this has been achieved, the detail of accomplishing the plans determined upon rests with the board.

For the reasons above stated, namely, that the statute does not require the approval of vouchers of expenses for maintenance and improvement by the chief engineer of the Iowa Highway Commission, because the statutes specifically provide how these shall be presented and paid, because the claims are paid from the Conservation Commission appropriation rather than the primary road fund and because all that is required of the chief engineer is ex officio general supervision, it is our opinion that road claim vouchers may be paid the same as regular conservation claims providing this conforms to the statute as herein set out, and without the necessity of submitting these to the chief engineer of the Iowa State Highway Commission for approval.

MOTOR VEHICLE: TOWING: TRANSPORTER: REGISTRATION: TRUCK: A transporter who is registered under the laws of another state may drive a truck towing another truck in the State of Iowa in the usual course of his business.

June 27, 1939. *Department of Public Safety, Motor Vehicle Division. Attention: Chief Knee:* Your letter of June 15, 1939, in which you inquire our opinion on the following matter, is herewith acknowledged.

"May a transporter, who is registered under the laws of another state, drive a truck towing another truck in the State of Iowa?"

For the purpose of this opinion, we quote from Chapter 134, Acts of the 47th General Assembly:

"Section 1. *Definition of words and phrases.* The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them.

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

"Sec. 339-a1. No person shall pull or tow by motor vehicle another motor vehicle over any highway outside the limits of any incorporated city or town, except in case of temporary movement for repair or other emergency, unless such person has complied with the provisions of sections eighty-eight (88) and eighty-nine (89) of this act. Provided, however, if such person is a non-resident of the State of Iowa, and has complied with the laws of the state of his residence governing licensing and registration as a transporter of motor vehicles he shall not be required to pay the fee provided in Section eighty-nine (89) but only to submit proof of his status as a bona fide manufacturer or transporter as may reasonably be required by the department.

"Every person pulling or towing by motor vehicle another motor vehicle in convoy or caravan shall maintain a distance of at least 500 feet between the units of said convoy or caravan.

"The drawbar or towing arm between a motor vehicle pulling or towing another motor vehicle shall be of a type approved by the commissioner.

"No truck shall, after January 1, 1939, pull or tow any four-wheeled trailer, and no semi-trailer shall pull or tow any additional trailer over any of the highways in this state, except in case of temporary movement for repair or emergency, and then only to the nearest town or city where the necessary repairs may be made."

It will be observed that Section 339-a1 forbids the towing of one motor vehicle by another unless it be in case of temporary movement for repair or because of other emergency, but excepts from this rule manufacturers, transporters and dealers properly registered either in this state or in a foreign state. It therefore follows that a transporter of motor vehicles, who is properly registered in another state may drive a motor vehicle towing another motor vehicle in the state of Iowa for the purposes of his business as such transporter. Had the legislature desired to exclude the transporter of trucks from this privilege, it is evident that it must have done so by specific provision, the definition of motor vehicles including trucks. This, however, the legislature did not see fit to do and, the provision that a truck may not pull or tow certain trailers having no application, a towed truck not meeting the definition of a trailer, it is our opinion that a transporter who is registered under the laws of another state may drive a truck towing another truck in the state of Iowa in the usual course of his business.

CIGARETTES: STAMPS: METERS: COMPTROLLER: The comptroller should have possession and control of the machines the same as he would have possession and control of the stamps; the machines should be set by the comptroller when turned over to the tax commission and the tax commission charged with the number for which the machine is set the same as the charge would be if stamps were delivered by the comptroller to the tax commission.

June 28, 1939. *State Tax Commission, Des Moines, Iowa. Attention: Mr. D. L. Murrow:* We are in receipt of your request for an opinion upon the following question:

Under the provisions of Senate File 128, Acts of the 48th General Assembly, is this commission charged with the duty of the control of the meters which are set and sold the same as stamps to permit holders, or is it the duty of the comptroller, under the law, to retain possession and control of the meters?

Section 3 of the act provides in the case of stamps to be affixed:

"* * * such stamps shall be in the possession of and under the control of the comptroller."

Paragraph 2 of Section 3 of the act further provides with regard to such stamps:

"Upon requisition of the commission, the comptroller shall deliver to it the stamps designated in such requisition, and shall charge the commission with the stamps so delivered, and shall keep an accurate record of all stamps coming into and leaving his possession."

In the last paragraph of Section 8, provision with regard to the stamping machines is as follows:

"All of the provisions of this act relating to the collection of the tax by means of the sale and affixation of stamps shall apply in the use of the stamping machines or devices, including the right of refund as provided herein."

It will be seen from the above that the intent of the legislature was to provide that the comptroller should have custody of the stamps and the statute provides that all of the provisions with regard to stamps should be applicable to stamping machines. This would indicate that the comptroller should have charge of such machines and that requisition for the machines, set by the comptroller for a certain number to be stamped, should be made by the tax commission from the comptroller in the same manner that the tax commission would requisition stamps. The comptroller could then charge this number of machine stamps to the tax commission the same as if requisition for stamps were made.

In view of the specific direction in the statute, we would be of the opinion that the comptroller should have possession and control of the machines the same as he would have possession and control of the stamps; that the machine should be set by the comptroller when turned over to the tax commission and the tax commission charged with the number for which the machine is set the same as the charge would be if stamps were delivered by the comptroller to the tax commission.

TAXATION: FIRE EQUIPMENT: The levying of tax for the purpose of a township and a town joining together in the purchase of fire fighting equipment should be authorized by an affirmative vote of 60 per cent of the total vote cast in the township election.

June 28, 1939. *Mr. William M. Spencer, County Attorney, Oskaloosa, Iowa:* Your letter of June 21, 1939, inquiring our opinion as to the following matters, is herewith acknowledged.

"The trustees of Cedar Township, Mahaska County, Iowa, have considered joining with the town of Fremont, Iowa, which is located within the same township, to purchase fire fighting apparatus and equipment.

"1. Is it required that the levying of the tax be authorized only by an affirmative vote equal to 60 per cent of the total vote cast in the township election?

"2. Since at the general election all residents of the township of Cedar, including the residents of the town of Fremont lying within said township, vote at the poll places in the town of Fremont, how can we possibly determine the 60 per cent total of the votes cast at the last preceding election by the residents of the township which live outside of the corporate limits?

"3. Another question arises in the determination of the 60 per cent of the total vote cast at the last preceding election in determining what the 60 per cent was. In other words does that mean 60 per cent of the citizens voting for any one certain office or 60 per cent of the total number of persons whose names were entered on the poll books as voters at the election.

"4. Is it contemplated that only the voters of Cedar Township living outside of the corporate limits of the town of Fremont vote on this question?

"5. Another question arises under Section 3 of this act which directs that the trustees who submit the proposition of an election when petitioned therefor by 25 per cent of the qualified electors of the township. * * * By what method would you determine the total number of qualified electors within this township so that the trustees could be advised whether the petition requesting the election was, in fact, signed by a total of 25 per cent of the qualified voters?"

For the purpose of this opinion, we quote from House File 71, Acts of the 48th General Assembly:

"Section 1. Sections fifty-five hundred seventy-c one (5570-c1), fifty-five hundred seventy-c two (5570-c2), fifty-five hundred seventy-c three (5570-c3), Code, 1935, are hereby repealed and the following sections are hereby enacted in lieu thereof:

"(2) The township trustees may levy an annual tax not exceeding one mill on the taxable property in the township for the purpose of exercising the powers granted in paragraph one (1) hereof, when so authorized by an affirmative vote equal to at least sixty per cent (60 %) of the total vote cast in the township at the last preceding general election.

"(3) Such proposal to levy the tax provided for in paragraph two (2) hereof may be submitted by the township trustees at any regular election held in the township, or at a special election called for the purpose, and such township trustees shall submit the proposition when petitioned therefor by twenty-five (25) per cent of the qualified electors of said township. Notice of said election shall be given by posting in three public places in said township, not less than ten days before the time of such election."

From an examination of Section 2, it appears from the language used that the legislature intended that the tax in question may only be authorized when sixty per cent (60%) of the vote cast in the township at the last preceding general election is in the affirmative for such tax. Sixty per cent (60%) of such vote must be cast in favor of the project, otherwise it fails. Question 1, therefore, may be answered in the affirmative.

In answer to question 2, the poll books must be examined to determine just what the total vote was that was cast for the township at the preceding general election, exclusive of the town of Fremont. Even though the same polling places are used by groups of voters, both within and without the corporate limits of the town, it happens frequently that at such elections city officers are chosen by the city voters only and township officers by township voters. We would call your attention to Section 855 of the 1935 Code of Iowa which requires that a return shall be made in each poll book giving in words written at length the whole number of ballots cast for each officer and the number of votes given to each person for each different office and which section sets out the form for making such return in the poll book. Section 857 further provides that one of the poll books and the registration book, if any, shall be delivered by one of the judges to the township clerk if the precinct is a town-

ship precinct, which as we understand is the situation here. As bearing upon the problem, see Sections 745, 770 and 794 which provide for separate ballots and separate ballot boxes for township offices under the circumstances as here. If the township clerk has the poll book of the last general election properly made out it may be determined therefrom the total vote that was cast for the township at the preceding general election, exclusive of the town of Fremont.

Answering question 3, sixty per cent (60%) of the total cast means sixty per cent (60%) of the highest number of votes cast by the township voters exclusive of the town of Fremont at the last preceding general election, as shown by the poll books.

In answer to question 4, it is apparent that the tax contemplated is to be levied only on the residents of the township living outside of the corporate limits of the town. This being true, it follows that only such residents of the township may vote at such an election.

Answering question 5, it is clear that only from the poll books may the twenty-five per cent (25%) of the qualified electors of the township be determined. The total number of qualified electors within the township must be found from the total vote cast by the township at the last preceding general election. Twenty-five per cent (25%) of this number requesting an election by proper petition is sufficient.

TAXATION: COUNTY TREASURER: TAX FERRET: DUTIES: (House File 395, Acts of 48th General Assembly.) House File 395, Acts of 48th General Assembly, places no new duty on the county treasurer, and after the effective date of this act no compensation should be paid to any person where personal taxes are collected from the fiduciary of an estate.

June 29, 1939. *Mr. Charles W. Barlow, County Attorney, Mason City, Iowa:* We are in receipt of your request for an opinion with regard to the duties of the county treasurer under House File 395, Acts of the 48th General Assembly, and further whether a tax ferret employed under Section 7161 of the Code will be prohibited from receiving compensation in all cases where the personal taxes are collected from an estate when the above act becomes effective. House File 395, Acts of the 48th General Assembly provides as follows:

"Sec. 1. No final report of a fiduciary shall be approved by any court unless there is attached thereto and made a part thereof, the certificate of the county treasurer of a county in which the estate is held by the fiduciary that all personal taxes due and to become due the county in such estate matter have been fully paid and satisfied.

"Sec. 2. For the purpose of facilitating the speedy settlement and distribution of estates, the county treasurer of such county, by and with the consent of the board of supervisors may compromise and agree upon the amount of personal taxes at any time due or to become due the county from such estate and payment in accordance with such compromise or agreement shall be for the satisfaction of all taxes in such estate matter, and no compensation shall be allowed any person because of such compromise or agreement. Provided, however, where an estate is insolvent the board of supervisors may by proper order certified to the court cancel all unpaid personal property taxes."

It has always been the treasurer's duty to collect the personal taxes (see Sec. 7184 of the Code of 1935). This office cannot list the acts that a treasurer should do in carrying out his duty to collect personal property taxes. It is sufficient to state that under the law (Chapter 346, Code of 1935) the duty

to collect personal taxes is imposed upon the treasurer. If the taxes are not paid, he should have a distress warrant issue, or file suit, and if the owner of the personal property is dead, then collection should be made from the personal representative.

House File 395 places no new duty on the treasurer. Rather it places a burden on the fiduciary of an estate to now come forward and declare and pay taxes. The act is designed to aid the treasurer in carrying out the duty he always had, namely, to collect the personal tax.

With regard to the question of whether or not a tax ferret would be prohibited from receiving compensation in all cases where personal taxes are collected from an estate after this act becomes effective, we must look first to the evident legislative intent.

The act specifically provides that in the event of a compromise allowed under the provisions of Section 2, "no compensation shall be allowed any person because of such compromise or agreement." Clearly no tax ferret could, in the face of this provision, receive any commission upon a compromise payment. Did the legislature mean that when the payment was in full, a commission to a tax ferret could be allowed? We think not. The legislature intended that the fiduciary would come forward and pay delinquent personal taxes on the tax list and declare and pay any tax on omitted property. When the tax payer died, his property when listed in the estate proceedings became a public record in the county. No person need be employed to ferret out the information with regard to this property. With the added duty imposed by this act to pay the tax on this property, no person need be employed to collect the tax.

We are therefore of the opinion that after the effective date of this act no compensation should be paid to any person where personal taxes are collected from the fiduciary of an estate.

BANKS: HOUSE FILE 613: PUBLICATION OF STATEMENTS AND NOTICES OF INCORPORATION: Notice of articles of incorporation of banks are such notices as must be published in a newspaper as defined by House File 613, Acts of the 48th General Assembly, but publication of statement of the condition of banks are not such as need to be published in a newspaper as defined by H. F. 613, but may be published in any newspaper which meets the requirements of Section 9232.

June 29, 1939. *Hon. D. W. Bates, Superintendent of Banking:* We have your letter of June 28 inquiring as to what newspapers banks may publish their call statements and also notices of incorporation and amendments thereto, in view of the enactment of House File 613, Acts of the 48th General Assembly.

Section 9159 of the 1935 Code of Iowa provides for the notice of incorporation, which shall be published upon the organization and incorporation of a savings bank, and is as follows:

"9159. Notice of incorporation. Notice of its incorporation shall be given by publication in some newspaper published in the county wherein the bank is located, once each week, for four consecutive weeks, which notice shall state, in substance, the matters required to be given in the articles of incorporation."

Section 9205 is the section with reference to publication of notices of incorporation for state banks and refers back to Section 9159 for its provisions.

Section 9232 provides for the publication of reports of the condition of banks and is as follows:

"9232. Publication of reports—expense. The said superintendent shall cause said report to be published, except as hereinafter provided, in one regular issue in some daily, semiweekly or weekly newspaper in the city or town where such bank is located, or if there be none in such city or town, then, in one regular issue of some daily, semiweekly, triweekly or weekly newspaper printed in said county or in a newspaper in an adjoining county circulating in the territary served by such bank, and the expense of such publication shall be paid by the bank."

Section 11099-e1 of the Code defines a newspaper for the purposes of publishing legal notices. House File 613, Acts of the 48th General Assembly repealed this section and in lieu thereof enacted the following:

"Newspaper defined. For the purpose of establishing and giving assured circulation to all notices and/or reports of proceedings required by statute to be published within the state, where newspapers are required to be used, newspapers of general circulation that have been established, published regularly and mailed through the post office of current entry for more than two years and which have a bona fide paid circulation recognized by the postal laws of the United States shall be designated for the publication of notices and/or reports of proceedings as required by law.

"The rights of newspapers now legally entitled to publish said notices, or those newspapers of general circulation that are established prior to January 1, 1940, shall not be affected by failure to have completed two years of regular publication at the time this act is passed."

This act was finally passed on April 20, was enrolled on April 21 and was signed by the governor on April 24, and goes into effect on July 4, 1939.

Examination of these provisions of the statutes leads us to the opinion that notices of articles of incorporation and amendments are such notices as must be published in a newspaper, as defined by House File 613, but that the publication of statements of the condition of banks need not be published in a newspaper, as defined by House File 613, but may be published in any newspaper which meets the requirements of Section 9232. The provision for publication of statements of the condition of banks is that they shall be published in a newspaper in the city or town where the bank is located, if there be such, and in addition, the statement of condition of banks is neither a notice or a report of a proceeding as provided for in the new enactment.

It is further our opinion that by reason of the last paragraph of the new enactment, any newspaper which was legally entitled to publish such notice at the time the act goes into effect on July 4 or any newspaper established prior to January 1, 1940, are exempt from the two year qualification provided for in the act.

HIGHWAY COMMISSION: ADVERTISING BIDS: WEEKLY LETTING REPORT: Exclusive publication in the Weekly Letting Report will not meet the requirements of Section 4755-b10 of the Code of 1935 and neither the State Printing Board nor the Executive Council have authority to designate the publication as eligible for the exclusive advertisement for bids on projects.

June 29, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention of Mr. C. Coykendall:* This will acknowledge receipt of your communication requesting the opinion of this department on the following question:

"We have always supposed that compliance with this section of the law might require publication of notice of letting in some newspaper of general state-wide circulation, such as the Des Moines Register, and for years it has been our custom to publish notice of lettings in the Des Moines Register,

"The actual and effective publicity which our lettings receive, however, is secured through our Weekly Letting Report, a publication which is entered as second class matter at the post office at Ames. All persons who are interested in being informed of lettings scheduled, and lettings held, both on state highway work and county highway work, are subscribers to our Weekly Letting Report.

"We wish to inquire as to whether publication in this Weekly Letting Report will meet the requirements of Section 4755-b10, and if not, whether the State Printing Board or the State Executive Council could, by proper action, designate our Weekly Letting Report as a suitable publication for publishing notices of lettings on highway work?

"During the course of a year a substantial amount of money is involved in our official publication of notices in the Des Moines Register, and we do not believe that the value of the publicity thus received is commensurate with the cost, inasmuch as our Weekly Letting Report is a publication that is depended upon by those interested in bidding on our work.

This Weekly Letting Report has been published since June 22, 1921.

"Practically all secondary road lettings are advertised in our Weekly Letting Report. County engineers or county auditors will mail in, or phone in, their copy and we are always glad to give county lettings full publicity, and run their notices just as many insertions as possible prior to the date scheduled for the letting.

"The subscription price for the bulletin is $2.00 per year, payable in advance. In order to simplify accounting, all subscriptions automatically expire on December 1st. After approximately one-fourth of the year has gone, the subscription rate for the remainder of the year is $1.50. After approximately one-half of the year has gone, the subscription for the remainder of the year becomes $1.00. After approximately three-fourths of the year has gone, the subscription rate is reduced to 50 cents.

"Circulation—Paid circulation gets up to between 800 and 900 issues per week toward the last of the year. In addition to this paid circulation, there are some 350 copies mailed free of charge to county officials and to newspapers. Some state and Federal agencies interested in construction work also are on our mailing list to receive free copies of the bulletin.

"The bulletin is published by the State Highway Commission. Frank Howell, of my department, is acting editor, and is responsible for seeing that the bulletin gets out each week on scheduled time."

It is further noted that the contract for the publication is let by the State Printing Board.

Section 4755-b10 of the Code provides as follows:

"As soon as the approved plans and specifications for any primary road construction project are filed with the state highway commission, it shall, if the estimated cost exceeds one thousand dollars, proceed to advertise for bids for the construction of said improvement. * * *"

No specification is made of the method of advertising and we find no general statutory requirement in this regard.

Under such circumstances we are confronted with the problem of determining what the legislature had in mind in its use of the word "advertise". While it may be presumed that the Highway Commission was given a certain discretion in the matter, it could hardly have been intended that any of the numerous methods of advertising might be utilized. Where the word "advertise" is used in connection with public lettings Corpus Juris defines it as "to call to public attention", "to give officially directed public notice" (2 C. J. S. 890)—(see *Arthur vs. City of Petaluma*, 151 Pac. 183, 27 Cal. App. 782).

One of the definitions given by Webster is "to give public notice of".

This would seem to presuppose necessity for "public notice" in such manner

as to give the public generally as well as those likely to bid, notice of such proceedings.

Two characteristics would then seem not only advisable but necessary in determining the proper method of advertising for bids. First, it should be such advertisement as will reach the greatest number of those eligible to bid and thus induce competitive bidding. Second, it should give the public generally information of the proceedings.

This construction we believe more nearly conforms to the legislative intent where the expenditure of public money is involved by an arm of the state government. Of the numerous forms of advertising available, ie., newspapers, circulars, handbills, sign-boards, posters, and even radios—a newspaper of general circulation more nearly conforms to these requirements.

Several provisions of our Code specify that publication of notices or advertisements for bids shall be made in newspapers. Some require newspapers of general circulation in the community or county. This is particularly true with respect to legal notices, which, under the provisions of Sec. 11099-e1 of the Code, where newspapers are required to be used—as distinguished from mere posting of notices—designation shall be made of a newspaper of general circulation that has been established and published regularly for a period of more than a year and shall have a bona fide paid circulation recognized by the postal laws of the United States. Unless specifically set forth in the statute, certainly it does not seem reasonable to say that the legislature intended such requirement could be relaxed in cases of such lettings involving expenditures of the magnitude necessary in the construction of our highways. Sec. 297 of the Code provides that the executive council shall advertise for bids for needed supplies in two newspapers published at the seat of government and in such other newspapers as the council may order. Section 188 provides that the State Printing Board shall advertise for bids on public printing once each week for three consecutive weeks in seven newspapers in seven different counties of the state. The number of bids advertised, of lettings held and amounts involved therein, by the Highway Commission, greatly exceeds those advertised and the amounts involved by either or both of the bodies last above referred to.

The Weekly Letting Report is a meritorius publication. It has many of the characteristics of a newspaper. It may be said to reach a greater number of persons interested in bidding on highway projects, and materials and equipment therefor, than any other publication available. It is lacking, however, in the second characteristic referred to above in that it does not reach the public generally to the extent that a newspaper of general circulation may be said to accomplish. It publishes no news of a "general character". There are many strictly literary, medical, legal, religious and scientific journals which have a large number of subscribers but are not of general circulation being published for the information respectively of such particular classes. (46 C. J. 23); it seems to us that the publication in question falls in this classification. Although it is a valuable supplement to the newspaper publication, and has come to be relied upon by the contractors and those particularly interested in highway construction projects, we are of the opinion that it should not displace the newspaper in the advertisement for bids on public contracts.

To hold otherwise would open the door to advertisements for bids on public

projects in other publications of like character, when no specification to the contrary is made in the provisions of the Code applicable thereto.

It also occurs to us that a question of public policy might well be involved sufficient to render objectionable advertisements for bids in a publication the circulation of which is wholly within the control of the department conducting the letting.

For the reasons stated we conclude that exclusive publication in the Weekly Letting Report will not meet the requirements of Section 4755-b10 of the Code of 1935 quoted above.

It is our further opinion that neither the State Printing Board nor the Executive Council have authority to designate the publication in question as eligible for the exclusive advertisement for bids on projects anticipated in the section last above referred to.

We find no provision whereby the legislature has conferred this authority upon either of these bodies.

MUNICIPAL CORPORATIONS: COUNTY PROPERTY: RENTING COUNTY PROPERTY: There is no statute authorizing county to rent county property for private purposes. Renting by county to farmers of spraying machine would be unauthorized.

June 29, 1939. *Mr. Melvin L. Baker, County Attorney, Humboldt, Iowa:* This is in answer to your letter of the 28th inst. wherein you request an opinion of this department relative to the following proposition:

May the county permit farmers to use county spraying machines for the purpose of destroying weeds providing that a reasonable rental sufficient to pay for depreciation is charged by the county?

It is our opinion that such use of the machine by farmers would be unauthorized. Municipal corporations have only such powers as are expressly granted them by statute or such as may be reasonably implied from the expressed grant. There is no statute authorizing a county to rent county property for private purposes.

We reach the conclusion, therefore, that the proposed use of the spraying machine by farmers would be illegal.

COUNTY RECORDER: INDEXING MORTGAGES, ETC.: PERSONAL PROPERTY—INSTRUMENTS AFFECTING TITLE TO: Law does not require county recorder to keep separate book to index instruments affecting title to or encumbrance of personal property.

June 30, 1939. *Frank H. Lounsberry, County Attorney, Nevada, Iowa:* This is in answer to your letter of the 28th inst., wherein you ask the opinion of this department relative to the following legal question, as stated in your letter:

"Can a county recorder index chattel mortgages, conditional sales contracts and all other instruments affecting personal property in the same index book," and "if so, does it constitute a good and sufficient notice to the public of the recording of such instrument as a conditional sales contract?"

We are of the opinion that the law does not require the county recorder to keep a separate book in which to index the various instruments affecting title to, or encumbrance of personal property, and we hereinafter give our reasons for so holding.

Section 10015 provides:

"No sale or mortgage of personal property where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and such instrument or a true copy thereof is duly recorded by, or filed and deposited with, the recorder of the county where the mortgagor or vendor resides if he be a resident of this state at the time of the execution of the instrument; but if he be not such resident, then of the county where the property is situated at that time."

Section 10016 provides:

"No sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor and vendee, or by the lessor and lessee, acknowledged by the vendor or vendee, or by the lessor or lessee, and recorded or filed and such instrument *or a true copy thereof be deposited the same as chattel mortgages.*" (Italics ours.)

Section 10017 provides:

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

Section 10021 provides:

"The county recorder shall keep an index book in which shall be entered a list of instruments affecting title to or incumbrance of personal property, which may be filed under this chapter. Such book shall be ruled into separate columns with appropriate heads, and shall set out:

"1. Time of reception.
"2. Name of each mortgagor or vendor.
"3. Name of each mortgagee or vendee.
"4. Date of instrument.
"5. A general description of the kind or nature of the property.
"6. Where located.
"7. Amount secured.
"8. When due.
"9. Page and book where the record is to be found.
"10. Extension.
"11. When released.
"12. Remarks and assignments."

Section 10025 provides:

"A duplicate or copy of such mortgage, bill of sale, or other instrument filed under the provisions of this chapter, shall be supplied by the county recorder upon the request of any party in interest, and the payment of fees therefor. Such duplicate or copy shall be duly certified by the county recorder and may be filed in any other counties of the state in the same manner as herein provided."

Construing Section 10021, we can see no reason for holding that this section requires that the county recorder must have a separate book in which to record the various instruments affecting title to, or incumbering personal property.

The statute, as you will note, uses the singular "book," not "books." We must also bear in mind that this is clearly the book in which bills of sale and other instruments affecting title to personal property are indexed, and we therefore incline to the view that this is what is particularly meant by the phrase "affecting title to * * * personal property."

In the case of *Barney vs. Little*, 15 Iowa 527, the court said:

"If the grantor's and grantee's names are given in the index, with the book and page where the instrument is recorded, and if the instrument is there really recorded, we believe that this, so far as the object of the recording is concerned, is a substantial, though it may not be in all respects, as to the index book, a literal compliance with the law. For the record book and the index book are not to be considered as detached and independent books, but related and connected ones, and a party is, where the index makes the requisite reference, affected with notice of any facts which either book contains with respect to the title of his proposed grantor. * * * The proposition is indisputable and clear, founded in reason, and sanctioned by authority, that 'if an ordinarily diligent search of the records will bring to the inquirer knowledge of a prior incumbrance or alienation, he is presumed to know of it.'"

In the case of *White vs. Hampton*, 13 Iowa 259, *Calvin vs. Bowman*, 10 Iowa 529, *Hotson vs. Wetherby*, 60 N. W. 423, 88 Wis. 324, it was held that "see record" in the index under the column for description of the premises conveyer makes the record complete and operative from the time of such insertion.

In *Disque vs. Wright*, 49 Iowa 538, *Peirce vs. Weare*, 41 Iowa 378, *Jones vs. Berkshire*, 15 Iowa 248, it was held that when an imperfect or inaccurate index is of such character as should lead a prudent person to examine the record and he is therefore affected with notice of what the record would have imparted.

In 53 *Corpus Juris*, 613, it is said:

"The proper office of the index is merely to point at the record. It is designed as an additional means or facility for enabling the person interested to make a search of public records and find the object of that search."

We reach the conclusion that it is not necessary for the recorder to keep a separate book for indexing chattel mortgages, conditional sales and other instruments affecting personal property. These instruments, as we view it, may be indexed in the same book.

FROZEN MALTED MILK: IMITATION ICE CREAM: ICE MILK: ICE CREAM: "Frozen malted milk" comes within the definition of "ice milk" or "imitation ice cream" for the purpose of the statute and is subject to the requirements and restrictions of "ice milk" or "imitation ice cream" as provided by Chapter 112 of the Acts of the 47th General Assembly.

July 5, 1939. *Hon. Mark G. Thornburg, Secretary of Agriculture:* Your letter of June 30, 1939, inquiring our opinion on the following matter, is herewith acknowledged.

"1. In the first paragraph (Chapter 112, Acts of the 47th General Assembly) is 'frozen malted milk' placed in a separate classification, or in the same class as 'ice milk' and 'imitation ice cream'? The second paragraph tells how these two products may legally be sold but does not mention 'frozen malted milk.' In other words, would 'frozen malted milk' be exempt from this law?"

For the purpose of this opinion, we quote from Chapter 148 of the 1935 Code of Iowa:

"3058. *Definitions and standards.* For the purpose of this chapter the following definitions and standards of food are established:

"33. *Ice cream.* Ice cream is the frozen product made from pure sweet cream and sugar, with or without flavoring, or with the addition of not to exceed one per cent by weight of a harmless thickener, and containing not less than twelve per cent by weight of milk-fat, with an acidity not to exceed

three-tenths of one percent. A quart of ice cream in factory filled packages shall weigh not less than eighteen ounces. The bacterial count at the factory shall not exceed two hundred fifty thousand to the cubic centimeter."

And from Chapter 112, Acts of the 47th General Assembly, as follows:

"Section 1. Chapter one hundred forty-eight (148), code, 1935, is hereby amended by including therein the following as an additional section:

"The term 'ice milk', 'imitation ice cream', or 'frozen malted milk', shall include all frozen products other than milk sherbet and fruit ice made in semblance of ice cream and containing less than ten per cent of butterfat. It shall be pasteurized at a temperature of one hundred forty-five degrees Fahrenheit for thirty minutes and shall not contain more than two hundred fifty thousand bacteria per cubic centimeter in the manufacturer's package. It shall not contain added color nor fats other than butterfat.

" 'Ice milk', or 'imitation ice cream', shall be sold only in the manufacturer's package or wrapper and shall be labeled in plain legible eight point type with the words 'ice milk', or 'imitation ice cream'. A sign shall be posted in every establishment where 'ice milk', or 'imitation ice cream' is sold, on a white card twelve by twenty-two inches in dimensions with letters not less than three inches in height and two inches in width containing the words, 'Ice Milk Sold Here', or the words, 'Imitation Ice Cream Sold here'."

It will be observed that frozen products are divided, exclusive of milk sherbet and fruit ice, into two groups, one which is defined as "ice cream" and which requires a milk fat content of not less than twelve per cent (12%) and the other defined as "ice milk," "imitation ice cream," or "frozen malted milk," and shall contain ten per cent (10%) or less of butterfat. We are advised that frozen malted milk contains but eight per cent (8%) butterfat.

The legislature evidently intended that the terms "ice milk," "imitation ice cream" and "frozen malted milk" should be used interchangeably for the purpose of its definition, and even though the words "frozen malted milk" are omitted from the second paragraph of Section 1 of Chapter 112, Acts of the 47th General Assembly, "frozen malted milk" would still be subject to all the requirements of "ice milk" or "imitation ice cream" for the reason that it contains but eight per cent (8%) of butterfat, which brings it clearly within the statutory definition of those terms.

For the reasons above stated, it is our opinion that "frozen malted milk" comes within the definition of "ice milk" or "imitation ice cream" for the purpose of the statute and is subject to all the requirements and restrictions of "ice milk" or "imitation ice cream" as provided by Chapter 112, Acts of the 47th General Assembly.

For the reason that this opinion, in answer to your question 1, at the same time answers questions 2, 3 and 4 submitted in your letter of June 30, 1939, we are not specifically answering these.

BOARDS OF HEALTH: NUISANCE: PUBLIC HEALTH: The word "nuisance" as used in Section 2240 refers only to a nuisance affecting public health and by the abatement of which public health might be benefited. If a local board of health acts upon a local matter over which they have jurisdiction and providing they acted in accordance with law, the State Department has no duty in connection with the case.

July 10, 1939. *Dr. Walter L. Bierring, Commissioner of Public Health:* Your letter of July 6, 1939, inquiring our opinion on the following matters, is herewith acknowledged.

"The question which we raise at this time is the interpretation of the word 'nuisance' in Section 2240 of the Code. Obviously, there are many things which might be classed as nuisances under the broad definition of nuisance in Section 12395, Code of Iowa, 1935, which in no possible way could be of any public health significance. It has been the policy of this department in the past to confine its investigations and directions to local boards of health to nuisances which have direct or indirect public health significance. However, this interpretation has on occasions been questioned.

"Another question is involved in this connection. When nuisance complaints are received the usual procedure is to refer such complaints to the local board of health having jurisdiction, and usually the local board of health takes care of the situation. In the event the local board of health fails to take any action, the powers of the State Department of Health I believe are clearly defined in Section 2212.

"If, on the other hand, the local board of health takes action, either declaring a situation a nuisance or not a nuisance, does the State Department of Health, either by inference or otherwise, have any duty in connection with the case?"

For the purpose of this opinion, we quote from Chapter 107 of the 1935 Code of Iowa, as follows:

"2240. *Abatement of nuisance.* The local board may order the owner, occupant, or person in charge of any property, building, or other place, to remove at his own expense any nuisance, source of filth, or cause of sickness found thereon, by serving on said person a written notice, stating some reasonable time within which such removal shall be made, and if such person fails to comply with said order, the local board may cause the same to be executed at the expense of the owner or occupant."

And from Chapter 105 of the 1935 Code of Iowa, as follows:

"2212. *Refusal of board to enforce rules.* If any local board shall fail to enforce the rules of the state department or carry out its lawful directions, the department may enforce the same within the territorial jurisdiction of such local board, and for that purpose it may exercise all of the powers given by statute to the local board, and may employ the necessary assistants to carry out its lawful directions."

It will be observed that Title VII of the 1935 Code of Iowa is entitled "Public Health" and includes Chapters 105 and 107 from which we have quoted. The word "nuisance" being used in the title, chapter and statute in connection with public health must be interpreted in accordance with that connection and as it was evidently intended by the legislature. Surely the Department of Health could not reasonably be vested with authority to remove or cause to be removed any nuisance regardless of its nature. It is therefore apparent that the word "nuisance" as used in Section 2240 refers only to a nuisance affecting public health and by the abatement of which public health might thereupon be benefited. To grant a broader definition would be to allow a construction which would be unreasonable and one which was surely not within the contemplation of the legislature.

In regard to question 2, the statutes grant to the local boards of health broad and extensive powers. These, however, are vested solely in the local board unless and until such local board fails or refuses to act, after which the State Department of Health becomes, for that particular jurisdiction, vested with all the powers of the local board. It would seem to be the intent of the legislature that the local board of health should first solve the problem of local nuisance. This is apparently for the purpose of allowing local authorities to care for their own public health troubles. Nevertheless the legislature seemed to recognize that for various reasons the local board might either

fail or refuse to act and in such a situation the State Department of Health might thereupon proceed with all the powers of the local board of health.

This being true, it is our opinion that if a local board of health had acted upon a local matter over which they have jurisdiction and providing they acted in accordance with law, the State Department has no duty in connection with the case.

TAX LEVIES: SECTION 21, SENATE FILE 255: SECTION 7171, CODE: Levy provided for in Section 21 must be taken into consideration in determining total levy in connection with provisions of Section 7171, Code, 1935, as amended by Senate File 37, Acts of the 48th General Assembly.

July 10, 1939. *Hon. C. Fred Porter, State Comptroller:* We have your request of July 6th as to whether the levy provided for by Section 21 of Senate File 255, Acts of the 48th General Assembly, shall be added to the total levies for the year 1939 in determining whether or not the total tax levy exceeds the average tax levy for all county purposes for the two preceding years, in applying the provisions of Senate File 37, Acts of the 48th General Assembly.

Senate File 255 is the act for the control and eradication of Bang's disease. Section 20 thereof appropriates $100,000 for the use of the Agricultural Department in carrying out the provisions of the act for the period of May 1, 1939, to May 1, 1940, inclusive. However, the operation of the act is not confined to this period. Section 19 of the act provides that the Agricultural Department shall, until May 1, 1940, pay the owner for each animal slaughtered, and after that date shall certify a claim for the owner for each animal slaughtered.

It was the evident purpose of the legislature to set up a fund of $100,000 for the payment of claims for slaughtered animals for the above mentioned period, and until the counties should be able to set up the Bang's disease eradication fund for the purpose of paying claims, which manifestly could not be set up prior to 1940.

Section 21 of the act provides for the eradication fund in the counties of the state, and the subsequent sections provide for the collection of the fund, etc., together with the certification of claims of the respective counties.

The act being of a general and permanent nature, rather than temporary, it is the opinion of this office that the levy provided for in Section 21 of the act must be taken into consideration in determining the total levy in connection with the provisions of Section 7171 of the Code, 1935, as amended by Senate File 37, Acts of the 48th General Assembly.

SOCIAL WELFARE DEPARTMENT: OLD AGE ASSISTANCE: NOTICE OF LIEN AND ORDER FOR ASSISTANCE: FORM NO. OAA-11: (Section 3828.023, 1939 Code.) Certificate and order for assistance and order of lien as provided in Form OAA-11 is sufficient to give notice to the public for all assistance payments granted whether such payments are granted pursuant to one or many orders of the State Board.

July 10, 1939. *Mr. King R. Palmer, Chairman, State Board of Social Welfare:* This is to acknowledge receipt of your letter of July 6, wherein you ask whether your form OAA-11 is adequate to cover the situation you raise in paragraph 3 of your letter, which states:

"Kindly state your opinion as to whether or not one certificate and order for

assistance and notice of lien, properly indexed and recorded in the office of the respective county recorders, as provided by law, is sufficient notice to the public for all assistance payments made under a certificate and order for assistance as above outlined, and further, whether or not at the end of the two-year period, if one certificate and order, together with notice, has been filed, it is necessary to file a new copy of certificate and order, together with notice, upon the issuance of the certificate at the end of the two-year period."

For the purpose of this opinion, we quote you from Section 3828.023, 1939 Code of Iowa, which is in part as follows:

"*Transfer of property to the state.* In any event, the assistance furnished under this chapter shall be and constitute a lien on any real estate owned either by the husband or wife for assistance furnished to either of such persons. Whenever an order is made for such assistance to any person, a copy of such order shall be indexed and recorded in the manner provided for the indexing of real estate mortgages in the office of the county recorder of the county in which the recipient lives and in which the real estate belonging to the recipient or the spouse of such recipient is situated, and such recording and indexing shall constitute notice of such lien. The county recorder shall not charge a fee for such recording and indexing."

Your form OAA-11 consists of two parts, one, a copy of certificate and order for assistance, and two, a notice of lien claim and reads in part as follows:

"This is to certify that the application for assistance of the above named person, as provided for by Chapter 266-f1, Code of Iowa, 1935, as amended by Chapter 137 and Chapter 139, Acts of the Forty-seventh General Assembly, has been approved for a period of two years, and may be renewed or reinstated from time to time.

"Assistance payments to start.....(to be filled in).....

"Amount of each monthly installment.....(to be filled in).....

"Copies of this certificate and order shall be indexed and recorded in the office of the county recorder in the county where the above named person or persons live and in every county where real estate belonging to the recipient or the spouse of such recipient is situated.

"The issuance of this certificate authorizes and instructs the Accounting Section of the Division of Old Age Assistance to order the state comptroller, in the name of the Division, to draw warrants and/or warrant checks against the Old Age Assistance Fund in the State Treasury for any and all assistance payments and other expenditures in behalf of the above named person in the amount set forth herein or subsequently ordered by the Division.

"Continuance of assistance beyond the two-year period will be determined at the end of the period herein provided. However, the continuance of this certificate or order for the full period herein named and the amount herein specified, under the provisions of Section 5296-f20, Code of Iowa, 1935, as amended by Chapter 137, Acts of the Forty-seventh General Assembly, shall be subject to review at any time by the Division and the amount herein awarded may be increased, decreased or discontinued.

"*Notice*

"*To whom it may concern:*

"The assistance and benefits paid under the provisions of Chapter 266-f1, Code of Iowa, 1935, as amended by Chapters 137 and 139, Acts of the Forty-seventh General Assembly, constitute a lien upon all real estate owned by the person named herein as a recipient of old age assistance or by the spouse of such recipient or owned jointly by them.

"You are hereby notified that the exact amount of money paid for benefits to the recipient named in the foregoing certificate may be determined by communicating with the Division of Old Age Assistance, State Department of Social Welfare, State of Iowa, at Des Moines, Iowa."

It will be noted that the first sentence in Section 3828.023 creates a statutory lien on *any* real estate which may be owned by either husband or wife and it is our opinion that this is a general lien covering all real estate owned by

any recipient or his spouse and as such, it is not necessary to describe the real estate upon which said lien attaches. This is consistent with cases which hold that a judgment of record is a lien against all real estate and in these cases, it is not necessary to file the legal description of the land to which it is claimed the lien attaches.

The second sentence in the same section states that "whenever an order is made for such assistance to any person, a copy of such order shall be indexed in a manner provided for the indexing of said real estate mortgages * * *." It is our understanding that your certificates and orders for assistance all have to be renewed at the end of a two-year period and that they may be changed or canceled before the end of the said two-year period. Your certificate and order for assistance so states. It is our opinion that the legislature intended that it be necessary to file and index only one copy of such order and notice of lien and that one is the original order for assistance. To hold otherwise would necessitate the State Board of Social Welfare filing a new certificate and order for assistance every time that any grant of assistance was changed or renewed.

It is our opinion that the words "whenever an order is made" refer only to the first order and not to any subsequent orders made by the department. It is our further opinion that the specific sum of the lien claimed does not have to be included upon the notice of lien which is filed and indexed, but rather, that as long as notice is given that a lien is claimed in any amount, such lien is good and attaches to the property. This is in accordance with cases wherein liens are filed for undetermined amounts or as in cases of costs and attorney's fees arising out of mortgages given on property.

It is, therefore, our opinion that one certificate and order for assistance and notice of lien as provided for in your form OAA-11 is sufficient to give notice to the public for all assistance payments granted, whether such payments are granted pursuant to one or many orders of the State Board of Social Welfare.

SOCIAL WELFARE DEPARTMENT: COUNTY FUNDS: STATE FUNDS: BOARD OF SUPERVISORS: CONSOLIDATION OF RELIEF: All general relief together with old age assistance, aid to blind, aid to dependent children and emergency relief must be consolidated under one head in counties receiving state funds and it is discretionary with the board of supervisors in counties not receiving state emergency relief funds to ask that general relief be administered by the county board of social welfare.

July 11, 1939. *Mr. John L. Mowry, County Attorney, Marshalltown, Iowa:* This is to acknowledge receipt of your letter of June 26th, wherein you ask our opinion on the following question:

"I would be pleased if I may have a word from your office as to any possible changes under any of the new acts whereby the board of supervisors may arrange to have the *general relief*, together with the old age assistance, aid to the blind, aid to dependent children, and emergency relief consolidated under one administrative head. Heretofore, emergency relief and general relief have been handled in this county out of the one welfare office, while the aid to the blind and old age assistance have been handled from another. The board of supervisors advise me that they are contemplating on discontinuing the emergency relief."

For the purposes of this opinion, we quote in part from Senate File 476, 48th General Assembly:

"Section 1. Administration of emergency relief. The State Department of Social Welfare, in addition to all other powers and duties given it by law, shall be charged with the supervision and administration of all funds coming into the hands of the state now or hereafter provided for emergency relief.

"Section 2. Powers and duties. The state board shall have power to: * * *

"4. Determine the need for funds in the various counties of the state basing such determination upon the amount of money needed in the various counties to provide adequate relief, and upon the counties' financial inability to provide such relief from county funds. The state board may administer said funds belonging to the state within the various counties of the state to supplement local funds as needed. * * *

"Section 4. Duties of the county board of social welfare.

"The county board in addition to all of the powers and duties given it by law, *shall have* the following duties:

"1. Cooperate with the county board of supervisors in all matters pertaining to the administration of relief.

"2. At the request of the county board of supervisors, prepare requests for grants of state funds.

"3. At the request of the county board of supervisors, *administer county relief funds.*

"4. In counties receiving grants of state funds upon approval of the comptroller, *administer both state and county relief funds.*

"5. Perform such other duties as may be prescribed by the state board and the county board of supervisors." (Italics ours.)

It will be noted from the italicized portions of the section above quoted that the legislature has made a distinction between county relief funds and state relief funds. The only funds that the state has are those appropriated for so-called emergency relief. It is our opinion that where the legislature has used the words "county relief funds," it refers to the various county poor funds, as the counties have no so-called emergency relief funds. It is our opinion that subsection 3 of Section 4, Senate File 476, means that it is discretionary with the county board of supervisors to turn over the administration of county funds in counties where state funds are not being used. It is our further opinion that subsection 4 of Section 4, Senate File 476, means that the county board of social welfare in counties receiving state emergency relief funds shall administer both state and county relief funds. In other words, in counties receiving state funds, it is mandatory that the county board of social welfare administer all relief funds, both state and county.

It is, therefore, our opinion, in answer to your question, that all general relief together with old age assistance, aid to the blind, aid to dependent children and emergency relief, must be consolidated under one head in counties receiving state funds and it is discretionary with the board of supervisors in counties not receiving state emergency relief funds to ask that general relief be administered by the county board of social welfare.

SCHOOL DISTRICTS: SECTION 4226: HOUSE FILE 358: Section 4226 of the 1935 Code, as amended by House File 358, applies to independent and consolidated school districts alike.

July 11, 1939. *Mr. Harry E. Coffie, County Attorney, Estherville:* In your letter of July 3rd you state:

"I have been requested by the superintendent of schools to secure your opinion as to H. F. 358, as to whether or not the new law effective July 1, 1939, applies as well to independent school districts and consolidated districts."

We beg to advise you that upon the enactment of House File 358, which amends Section 4226 of the 1935 Code of Iowa, said section reads as follows:

"4226. School year. The school year shall begin on the first of July and each school regularly established shall continue for at least thirty-six weeks of five school days each and may be maintained during the entire calendar year."

This is found in Chapter 213, which is entitled, "Directors—Powers and Duties."

Section 4190, Chapter 210, of the 1935 Code of Iowa, provides:

"4190. General applicability. The provisions of law relative to common schools shall apply alike to all districts, except when otherwise clearly stated, and the powers given to one form of corporation, or to a board in one kind of corporation, shall be exercised by the other in the same manner, as nearly as practicable. But school boards shall not incur original indebtedness by the issuance of bonds until authorized by the voters of the school corporation."

In view of the above citations, we are of the opinion that Section 4226 of the 1935 Code of Iowa, as amended by House File 358, applies to independent and consolidated school districts alike.

HOUSE FILE 540: INSANE AND IDIOTIC PERSONS: ASSISTANCE: LIEN ON REAL ESTATE: Assistance furnished prior to June 1, 1939, the effective date of the act, would not be a lien on real estate, but assistance furnished subsequent to June 1, 1939, would be a charge on all real estate owned at the time or thereafter acquired.

July 11, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: Mr. L. I. Truax, Supervisor of County Audits:* I have your inquiry as to the effect of Section 4 of House File 540, Acts of the 48th General Assembly, so far as the extent of the lien therein provided for is concerned.

Section 4 provides as follows:

"Any assistance furnished under this chapter shall be and constitute a lien on any real estate owned by the person committed to such institution, or owned by either the husband or wife of such person."

It is our opinion that assistance furnished prior to June 1, 1939, the effective date of the act, would not be a lien on the real estate, but that assistance furnished subsequent to June 1, 1939, would be a charge on all real estate owned at the time, or thereafter acquired.

SECTION 5296: OLD AGE ASSISTANCE: LIEN ON PROPERTY: Lien attaches to both real estate owned at time old age assistance is granted and real estate thereafter acquired; statute imposes no limitation upon attaching of lien.

July 11, 1939. *Hon. Earl Miller, Secretary of State. Attention: Mr. Tomlinson, Chief Clerk, State Land Office.* I have your request of June 30th for an opinion interpreting Section 5296-f16 of the Code with reference to the lien of old age assistance against real estate owned by one receiving such assistance.

That part of Section 5296-f16 having to do with the matter under consideration and as amended by the 47th General Assembly, reads as follows:

"In any event, the assistance furnished under this chapter shall be and constitute a lien on any real estate owned either by the husband or wife for assistance furnished to either of such persons. Whenever an order is made for such assistance to any person, a copy of such order shall be indexed and recorded in the manner provided for the indexing of real estate mortgages in the office of the county recorder of the county in which the recipient lives,

and in which the real estate belonging to the recipient or the spouse of such recipient is situated, and such recording and indexing shall constitute notice of such lien."

It is our opinion that under this provision which creates the lien, that the lien attaches to both real estate owned at the time the old age assistance is granted, and real estate thereafter acquired.

The statute imposes no limitation upon the attaching of the lien.

HIGHWAY COMMISSION: HAY BALER: IMPLEMENT OF HUSBANDRY: A hay baler is an implement of husbandry if it is designed for agricultural purposes; is used exclusively by the owner in the conduct of his agricultural operations and its movement on the highway must be temporary and no special permit is necessary for its movement on the highway from one job to another.

Ames, Iowa, July 11, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: W. H. Root:* This will acknowledge receipt of your request of June 21st and June 23rd for an interpretation of the provisions of the Motor Vehicle Act with respect to classification of the devices hereinafter described.

For the sake of brevity descriptions of the two devices are restated for the purpose of this opinion.

Your question is whether a special permit is necessary for the movement or operation on the highway of the hay balers described as follows:

One type of hay baler is claimed to be permanently mounted on the chassis of a Ford V8 stub-nosed truck during the hay baling season extending from about June 1st to December 1st of each year. The truck is fully licensed and the combination is approximately 10 feet wide when moved along the highway.

The other type of baler is or may be likewise substantially or permanently mounted on the chassis of a truck. It has detachable pick-up which is attached to the rear of the baler, and the table is elevated for purposes of transportation. The baler is not over 8 feet in width when being transported in the manner described.

Section 476 of the Motor Vehicle Act provides as follows:

"Sec. 476. Exceptions. The provisions of this chapter governing size, weight, and load shall not apply to fire apparatus, road machinery, or to *implements of husbandry temporarily moved upon a highway*, or to a vehicle operated under the terms of special permit issued as provided in sections 491 to 494, inclusive."

Paragraph 14 of Section 1 of the act defines "implement of husbandry" as follows:

"14. Implement of husbandry means every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations."

An implement of husbandry to come within the exception provided by Section 476 must conform to the definition above set forth, and adding thereto the qualification of its temporary movement upon a highway as specified in Section 476, it must meet all the following requirements.

1. It must be designed for agricultural purposes.
2. It must be exclusively used by the owner thereof in the conduct of his agricultural operations, and
3. Its movement upon the highway must be temporary.

The first and third requirements are easily disposed of since it seems clear that both of the devices referred to are designed for agricultural purposes and their movement over the highway between baling operations is temporary and incidental to their use. (See State vs. Griswold, 280 N. W. 489.)

The second requirement is not so easily disposed of. Certainly we must construe the definition of an implement of husbandry to include the entire device as mounted on its chassis. The truck alone is not an implement of husbandry and is separately defined by the act; of necessity therefore, a hay baler must be permanently mounted on its chassis in such a manner as to extinguish the identity and design of the vehicle as a motor truck transporting the baler from place to place as "load." We feel, however, that this is accomplished by substantially mounting the hay baler on such truck and bolting the major portion thereof down with a sufficient degree of permanency that during all the time it is operated as such hay baler it remains so mounted.

Added to the requirement "2" herein is that the device to constitute an "implement of husbandry" must be "*exclusively* used by the *owner* thereof in the conduct of *his* agricultural operations." When operated by the owner in the conduct of his baling operations we conclude that no special permit is necessary for its movement on the highway from one job to another regardless of whether or not it conforms to the statutory requirements as to size, weight and load. The legislature has made no provision however, nor may we supply the same, to cover the operation or movement of such device on the highway from manufacturer to dealer or dealer to purchaser; consequently its movement upon the highways of this state by such manufacturer or dealer will require a special permit if it does not conform to the provisions of the act relating to size, weight, and load.

We deem it advisable to call attention to our previous opinion under date of March 3, 1939, with respect to the necessity for special permit covering transportation of an implement of husbandry over the highway on another vehicle as "load," which we distinguish from its operation or movement over such highway as a single unit under its own *power* or *drawn* by another vehicle.

We trust this sufficiently answers your inquiry.

ITINERANT MERCHANTS LAW: TRUCKER: COAL DEALER: Since the place of business from which the trucker is operating is not operated by him, he is not exempt from the Itinerant Merchants Law and must comply with its provisions.

July 12, 1939. *Mr. W. J. McConnell, County Attorney, Keosauqua, Iowa:* Your letter of July 8, 1939, inquiring our opinion on the following matter, is herewith acknowledged.

"I would like to have an opinion from your office as to whether or not the law applies to a trucker living in the State of Missouri, who buys coal at a certain coal mine in that state and trucks it into Van Buren County. Sometimes the trucker transports the coal to fill an order already made and other times he transports coal into this state without any previous order and sells the coal to any coal dealers who may wish to buy it.

"I believe that paragraph b-2 under Section 1 of the act would apply, as the coal mine would be substantially the same as an established place of business."

For the purpose of this opinion, we quote from House File No. 155, Acts of the 48th General Assembly as follows:

"Section 1. Definition of the included class.

"(a) When used in this act:

"(5) 'Established place of business' shall mean any permanent warehouse, building, or structure, at which a permanent business is carried on throughout the year or usual production or marketing season in good faith, and at which stocks of the property being transported are produced, stored, or kept in quantities reasonably adequate for, and usually carried for the requirements of such business, and which is recognized as a permanent place of business. It shall not mean tents, temporary stands or other temporary quarters.

"(6) 'Itinerant merchant' shall mean any person who transports personal property for sale by him within this state, by use of a motor vehicle, except as herein otherwise provided.

"(b) The term 'itinerant merchant' shall not mean or include the following:

"(2) A person transporting property when such transportation is incident to a business conducted by him at an established place of business operated by him, either within or without this state, and when said property is being transported to or from said established place of business, and when the entire course of such transportation extends not more than three hundred and fifty miles from said established place of business; provided, however, that when the entire course of said transportation is for the purpose of delivery of said property subsequent to sale thereof said three hundred and fifty miles restriction shall not apply."

Section 1 (a) of the act defines the terms used in the act and Section 1 (b) sets forth the exemptions in five paragraphs. Paragraphs 1, 3, 4 and 5 of Section 1 (b) clearly do not exempt this trucker from complying with the law and the question thereupon presents itself as to whether paragraph 2, Section 1 (b) provides such exemption. Paragraph 2 exempts persons transporting property when such transportation is incidental to a business conducted by him at an established place of business *operated by him* either within or without the state.

It will be noted that the trucker in question does not own or operate the coal mine from which he purchases and transports his coal. In order to exempt a merchant under Section 1 (b), paragraph 2, the established place of business must be operated by the merchant transporting the goods therefrom. Otherwise such exemption does not apply.

Inasmuch, therefore, as the place of business from which the trucker is operating is not operated by him, it is our opinion that he is not exempt from the Itinerant Merchants Law, and must comply with its provisions.

HIGHWAY COMMISSION: SPEED LIMITS: Highway Commission has exclusive authority to reduce speed limits below those fixed by Section 316 where, after investigation, it is obvious that the limits therein provided for "at any intersection or other place or upon any part of a highway" is "greater than is reasonable or safe under the conditions found to exist" at such place.

Ames, Iowa, July 12, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: W. O. Price:* This will acknowledge receipt of your request for an opinion on the following questions.

"I have a request from Mr. H. E. Stedman, traffic engineer for the city of Des Moines, for approval of speed restrictions of 15 miles per hour at a number of intersections in the city of Des Moines, most of which at least are not on extensions of primary roads. Mr. Stedman quotes a Des Moines city ordinance which authorizes him to 'erect slow signs at all interesections and curves

where traffic conditions are such that the public safety requires a diminution of speed. At such signs all vehicles shall be slowed down to a speed of fifteen miles per hour until the intersection has been crossed, or the curve passes.'

"Mr. Stedman calls attention to the fact that Section 316 of the Motor Vehicle Law establishes certain maximum speeds. Also Section 324 permits local authorities to raise these limits under certain conditions. Nowhere do we find authority for reducing these limits.

"Section 321 empowers the Highway Commission to determine and declare a safe and reasonable speed at intersections or other places where the specified speeds are greater than seem reasonable and safe. It is under this paragraph that Mr. Stedman is asking approval of the 15 mile per hour restrictions.

"We have not heretofore had this point brought up in so far as I know and I, therefore, request an opinion from you on two points.

"1. Does the Highway Commission have authority to determine and establish these lower speed limits at intersections in cities not on the primary road extensions but where conditions seem to require such reduction of speed as a safety measure?

"2. The same question relative to extensions of primary roads within cities and towns."

Section 316 of Chapter 134, Acts of the 47th General Assembly, as amended by the 48th General Assembly, fixes the lawful speed in certain districts within cities and towns.

We find no authority conferred on cities and towns to reduce speed restrictions below those provided by the section referred to above.

Section 321 of the Act provides as follows:

"Sec. 321. Special restrictions. Whenever the state highway commission shall determine upon the basis of an engineering and traffic investigation that any speed limit hereinbefore set forth is greater than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a highway, said commission shall determine and declare a reasonable and safe speed limit thereat which shall be effective when appropriate signs giving notice thereof are erected at such intersection or other place or part of the highway."

In view of the facilities available to the Highway Commission through its engineering and traffic surveys it was apparently the intention of the legislature to confer on the Highway Commission exclusive authority to reduce speed limits below those fixed by Section 316 where, after investigation, it is obvious that the limits therein provided for "at any intersection or other place or upon any part of a highway" is "greater than is reasonable or safe under the conditions found to exist" at such place. The wording of the statute seems plain and unambiguous and capable of no other construction.

Similar authority is conferred upon the Highway Commission with respect to the diminution of speed over "any bridge or other elevated structure" by Section 326 of the Act.

Answering both of your questions therefore, we conclude that the Highway Commission has authority to determine and declare a reduction of speed below the limits provided by Section 316 at intersections on all streets and highways in cities and towns, as well as outside thereof, regardless of whether or not such intersection is located on an extension of a primary road.

SENATE FILE 227: AGRICULTURAL LAND CREDIT FUND: INDEPENDENT SCHOOL DISTRICT: Senate File 227, Acts of the 48th General Assembly, affecting lands within independent school districts—first affects taxes for 1940, payable in 1941, not taxes for 1939, payable in 1940.

July 13, 1939. *Mr. C. Fred Porter, State Comptroller:* We have your letter

of July 8th requesting an opinion with reference to Senate File 227, Acts of the 48th General Assembly, the same being an Act to create an Agricultural Land Credit Fund and to provide credits on the taxes on agricultural lands within independent school districts.

Your inquiry is directed particularly as to what year's taxes this credit is to be first applied.

Section 1 of the act sets aside for the year 1940, and annnually thereafter, from the general fund of the state, $500,000 to be known as the Agricultural Land Credit Fund, to be used in payment of agricultural land credits. The purpose of this is to give credit against the tax on each eligible tract of agricultural land within independent school districts, the amount of credit to be the amount of taxes levied for the general school fund exceeds the amount of tax which would be levied on such property were the school tax levy for the general school fund 15 mills on such agricultural land.

The act further provides that this fund is to be held by the treasurer of state, designated as the Agricultural Land Credit Fund, and be distributed by the treasurer of state on warrants drawn by the comptroller on September 1st of each year, beginning with the year 1940 and thereafter, and payable to the county treasurer of the several counties of the state in the amounts certified by them as provided in the act.

The act further provides that any person who desires to avail himself of the benefits provided shall, commencing January 1, 1940, deliver to the assessor a certified statement and designation of agricultural land credits as claimed by him, and that if he does not deliver this to the assessor he may, on or before June 1 of any year, file the same with the county auditor, together with supporting affidavits. The board of supervisors in each county shall forthwith examine all such claims and allow or disallow same. All claims which have been allowed by the board of supervisors shall be certified on or before July 1st of each year by the county auditor to the county treasurer, the certificate listing the name of each owner, the legal description of claimed agricultural land, and the assessed value thereof. Forthwith the county treasurer shall certify to the state treasurer the total valuation of all lands upon which a credit is claimed. If any person fails to make claim for the credits provided for, he shall be deemed to have waived the credit for the year in which he failed to make claim.

It is our opinion after examining the act in its entirety, that this act provides a credit on taxes for 1940, payable in 1941, and for the years thereafter, rather than for the 1939 taxes, payable in 1940.

The act did not go into effect by publication, and therefore went into effect on July 4th of this year. When the act went into effect the time had passed within which anyone claiming an agricultural tax credit, as provided therein, could make his statement and designation for the credit, to the board of supervisors of the county, June 1st being the last day on which such statement and designation could be filed. Also the date on which allowed claims shall be certified by the county auditor to the county treasurer, to wit, July 1st, had passed before the act went into effect.

Furthermore the act specifically provides that the first statements and designations for tax credits shall be filed between January 1, 1940, and June 1st of that year.

Section 5 of the act which makes these statements and designations to the assessor, provides that "the assessor shall return said statement and designation with the assessment roll to the county auditor with his recommendation for allowance or disallowance endorsed thereon."

In the period from January 1, 1940, to June 1, 1940, the assessor is making the assessment for the 1940 taxes, payable in 1941, and not the 1939 taxes payable in 1940.

This indicates that the credit is to be allowed for the tax for the year in which the claim is made for it, rather than being allowed for the preceding year. Furthermore, there is no provision in the act for a refund of the amount of any claimed credit in the event the full amount of the tax has been paid. In fact, Section 7 of the act provides that any person failing to make a claim is deemed "to have waived the agricultural land credit for the year in which he failed to make claim."

In view of these considerations we can come to no other conclusion than that the Agricultural Land Credit Act passed by the 48th General Assembly, first affects the taxes for 1940, payable in 1941, and not the taxes for 1939 payable in 1940.

ROAD MAINTENANCE AND CONSTRUCTION MACHINERY: PERMIT: HIGHWAY COMMISSION: A determination of whether a special permit is required for movement over the highways of a dragline, will depend in each particular case on the design and use to which the machinery is put in determining the classification as road maintenance or construction machinery.

Ames, Iowa, July 13, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: W. H. Root:* This will acknowledge receipt of your request of June 29, 1939, for an opinion on the following questions restated to conform to the facts set forth in Mr. Hilton's letter.

"Franklin County owns a Michigan truck dragline with a 30-foot boom. When traveling this boom projects a long way in front of the truck.

"They also have a large number of four to five ton trucks with under body blades for dragging. These blades are 14 feet long. County Engineer Rudisill wishes to know exactly what his obligations are in regard to moving this equipment on the primary roads.

We assume this question relates to whether or not a special permit is required for the movement or operation of such unit on the highway.

Section 476 of the Acts of the 47th General Assembly provides as follows:

"Sec. 476. Exceptions. The provisions of this chapter governing size, weight, and load shall not apply to fire apparatus, road machinery, or to implements of husbandry temporarily moved upon a highway, or to a vehicle operated under the terms of a special permit issued as provided in sections four hundred ninety-one (491) to four hundred ninety-four (494), inclusive."

Section 491 of the act as amended by Senate File 219 of the 48th General Assembly, provides as follows:

"491. Permits for excess size and weight. The state highway commission with respect to highways under its jurisdiction and local authorities with respect to highways under their jurisdiction may, in their discretion, upon application, in writing and good cause being shown therefor, issue a special permit in writing authorizing the applicant to operate or move for a distance not exceeding twenty-five (25) miles, a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in this chapter or otherwise not in conformity with the provisions of this chapter

upon any highway under the jurisdiction of the party granting such permit and for the maintenance of which said party is responsible, provided, however, that the state highway commission or such local authorities may in their discretion issue a special permit for the movement of *road construction machinery* and equipment for a distance exceeding twenty-five (25) miles if such machinery and equipment is to be used upon construction projects within the state of Iowa, or is manufactured within the state of Iowa, and the weight of such machinery and equipment so moved, exclusive of vehicle, does not exceed forty thousand (40,000) pounds."

The exemption of "road machinery" from the provisions of Chapter 134 governing size, weight, and load undoubtedly was intended to apply to road *maintenance* machinery or equipment used by the various authorities whose responsibility it is to maintain our streets and highways.

This interpretation would seem to be reasonable in view of the reference to "road *construction* machinery" in Senate File 219 amending Section 491 of the Motor Vehicle Act. The latter provision contemplates the necessity for issuance of special permits for the movement on the highways of "road construction machinery" and in so doing it does not distinguish between the ownership thereof by the public authorities or a private contractor.

Undoubtedly some maintenance machinery is used for construction purposes, and on occasion certain construction machinery such as the dragline referred to, may be used on a maintenance project. In such event the design and use ordinarily and usually made of the same must be considered in determining whether it is "road construction machinery" requiring a special permit or "road (maintenance) machinery" exempt from such requirement.

The trucks with under body blades would seem clearly to come within the classication of maintenance machinery by Section 476 above, and require no permit. On the other hand, a determination of whether a special permit is required for movement over the highways of a dragline, will depend in each particular case on the design and use to which the machinery is put in determining the classification as road maintenance or machinery or road construction machinery.

FENCE VIEWER: NOTICES BY FENCE VIEWERS: TOWNSHIP TRUSTEE: Not necessary for all fence viewers to sign notice under Section 1831; no legal provision to effect that an interested township trustee may not serve as fence viewer.

July 14, 1939. *Mr. Robert S. Bruner, County Attorney, Carroll, Iowa:* This is in answer to your letter of June 20, 1939, wherein you ask the opinion of this department relative to the following legal questions:

"1. Do notices given by fence viewers under Section 1831 of Chapter 88 have to be signed by all three fence viewers or trustees?

"2. Where one of the fence viewers or trustees is the party whose fence is complained against, do the other two trustees or fence viewers have the authority to decide the dispute or is it necessary that they appoint a third party to act as temporary fence viewer in deciding the dispute?"

It is our opinion that it is not necessary for all of the fence viewers to sign the notice referred to in your question No. 1.

As to question No. 2, we reach the conclusion that there is no legal provision to the effect that an interested township trustee may not serve as fence viewer.

We, therefore, reach the conclusion that the controversy may be determined by the township trustees as presently constituted.

We take it for granted, however, that under the circumstances the interested trustees would probably not want to serve.

MOTOR FUEL OIL: POSTING OF PRICES: SENATE FILE 321: There is no violation of law in the erection of additional advertising signs and banners in connection with price of fuel oil, so long as proper and approved cards are posted.

July 15, 1939. *Hon. W. G. C. Bagley, Treasurer of State:* We have your letter with reference to posting of prices under the provisions of Chapter 136 (Senate File 321) Acts of the 47th General Assembly.

Your specific inquiry is, if the prices are properly and legally posted on approved placards, must the same posting of price, taxes and total appear on other banners or posters which may be set up for advertising purposes?

The provisions of this chapter are as follows:

"Every distributor and other person selling motor vehicle fuel or fuel oil in this state, at wholesale or at retail, shall keep posted in a conspicuous place most accessible to the public at their place or places of business, including bulk plants, serice stations, garages and motor vehicle transports, a placard showing in words and/or figures of the same height and size but not less than one inch in height or size, the price per gallon of each grade of motor vehicle fuel and fuel oil offered for sale, the amount of state license fee per gallon thereon, the federal excise tax per gallon thereon, and the total thereof. If any rebate, discount, commission or other concession is granted by distributors or persons engaged in the sale of motor vehicle fuel or fuel oil of such nature as will reduce the cost or price to any purchaser or consumer of such products, the conditions, quantity and amount of such rebate, discount, commission or other concession shall be posted as a part of the posted price. Provided, however, at all places making wholesale sales only and upon motor vehicle transports, the words or figures shall be of such size as to be plainly legible to the public and as approved by the treasurer. All price placards shall be subject to the approval of the treasurer. Any distributor or person failing to post or keep posted the placard required by this section, or who posts placards not approved by the treasurer as provided by this section, or who sells any motor vehicle fuel or fuel oil at a price which directly or indirectly, by any means or device, deviates from the posted price set forth on the price placard approved by the treasurer, shall be guilty of a misdemeanor and shall be punished by a fine of one hundred dollars or imprisonment in the county jail for thirty days. Nothing contained herein shall prohibit or restrict the distribution of earnings to the members of any distributor or person, nor to the distribution to consumers of road maps, publicity and other advertising media carrying the name of the distributor, person or produce. Each day the required placard remains unposted, or an unauthorized placard remains posted, or each deviation from the posted price, shall be considered a separate offense. In the event of a third conviction for the violation of any of the provisions of this section, the state treasurer may revoke the license of such distributor or person so convicted."

This section provides for posting a *placard* showing in words and/or figures of the same height and size the price per gallon of each grade of motor vehicle fuel or fuel oil offered for sale, the amount of the state tax per gallon and the amount of the federal tax per gallon, and the total.

It further provides that if any rebate, discount, commission or other concession is granted in the sale of the motor vehicle fuel, or fuel oil, of such nature as will reduce the cost to the purchaser, the conditions, quantity and

amount of such rebate, discount, commission, or other concession, shall be posted as a part of the posted price.

All *price placards* shall be subject to the approval of the treasurer.

Failure to keep posted the placards required, or the posting of placards not approved, is subject to a penalty.

It is our opinion that this does not prohibit a person selling motor vehicle fuel or fuel oil from erecting additional price signs or banners, so long as the required and approved placards are posted.

If the legislature had intended to prohibit advertising signs and banners they could very easily have said so in the enactment of this statutory provision.

The title to the act does not indicate that it was the intention of the legislature to outlaw all signs other than those placards approved by the treasurer of state. Furthermore, violation of this provision of the statute is made a misdemeanor and is, therefore, of a criminal nature and must be strictly construed, and omissions cannot be specified by intendment or inference.

For the foregoing reasons we conclude that so long as the proper and approved placards are posted, there is no violation of the law in the erection of additional advertising signs and banners in connection with the price of the product.

SENATE FILE NO. 2: AUDITORS: BOARD OF SUPERVISORS: Auditor of state should audit accounts of all public officers unless specific exception was made, and there is no authority for board to employ independent auditors for purpose of making special audit.

July 15, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: Mr. L. I. Truax, Supervisor of County Audits:* We have your inquiry of July 11th as to whether county boards of supervisors are authorized under the law to pay for the service of an audit and examination of a county officer's accounts, other than those supplied by the office of the auditor of state.

Chapter 10 of the 1935 Code was amended by Senate File No. 2, Acts of the 48th General Assembly. Section 113 of the Code now reads as follows: "The financial condition and transactions of all counties shall be examined once each year by the auditor of state."

Section 3 of Senate File 2, enacted a provision known as Section 124 of the Code, permitting cities and schools to employ independent auditors if they so desire.

There is no provision of the law for special audits. The office of the auditor of state was created by Section 22, Article 4 of the Constitution of Iowa and the auditor of state is a constitutional officer.

In our opinion it was the intent of the framers of the Constitution and of the legislature in enacting the laws and providing for the functioning of the auditor of state, that the auditor of state should audit the accounts of all public officers and public bodies unless specific exception was made.

Specific exception is made in Sections 3 and 4 of Senate File 2, providing for independent audits at the option of the governing bodies of cities and school districts.

It is therefore our opinion that all other audits of the accounts of public officers and public bodies, except those which are excepted in Sections 3 and

4 of Senate File 2, should be made by the auditor of state and not by private auditors hired by the governing body of the particular subdivision to be audited, and that there is no authority in the board of supervisors of a county to employ independent auditors for the purpose of making a special audit.

COUNTY TREASURER: HOUSE FILE 395: FEE FOR CERTIFICATES: The county treasurer is entitled to charge 25-cent fee for issuing certificate that all personal taxes due county in which estate is held by fiduciary have been fully paid.

July 17, 1939. *Mr. Chet B. Akers, Auditor of State. Attention Mr. L. L. Truax:* This is in answer to your letter of the 12th inst., wherein you request the opinion of this department relative to the following legal proposition:

"Under the provisions of House File No. 395, 'no final report of a fiduciary shall be approved by the court unless there is attached thereto and made a part thereof, the certificate of the county treasurer of a county in which the estate is held by the fiduciary that all personal taxes due and to become due the county in such estate matter have been fully paid and satisfied.'

"According to the provisions of paragraph 1 of Section 1220 of the 1935 Code, an officer legally called on to perform any of the following services in cases where no fees have been fixed therefor, shall be entitled to receive, 'for drawing and certifying an affidavit or giving a certificate not attached to any other writing, twenty-five cents.'

"Please advise if it is proper for the county treasurer to charge a fee of twenty-five cents for the certificates issued as stated above."

We are of the opinion that Section 1220, Code of Iowa, 1935, is applicable and that the county treasurer is entitled to charge a fee of twenty-five cents (25c) for issuing the certificate referred to in House File 395. Section 1220, Code of Iowa, 1935, provides, among other things:

"Any officer legally called on to perform any of the following services * * *:

"1. For drawing and certifying an affidavit, or giving a certificate * * *, twenty-five cents."

Clearly the certificate provided for in House File 395 is one that the county treasurer is legally called on to furnish and, therefore, we see no escape from the conclusion that the county treasurer must collect the twenty-five cent fee referred to.

CLERK OF DISTRICT COURT: TRANSCRIPT OF JUDGMENT FROM J. P. COURT: EVIDENCE OF INDEBTEDNESS: Clerk of district court must file transcript of judgment from justice of peace court, whether or not note or notes or other evidence of indebtedness accompanies the same.

July 17, 1939. *Mr. Wm. C. Hanson, County Attorney, Jefferson, Iowa:* This is in answer to your letter of the 11th inst. asking the opinion of this department relative to the following legal question:

Judgments have been obtained in J. P. courts in Greene County upon promissory notes and other written evidence of indebtedness, and said judgments have later been transcripted to the district court. The clerk of the district court does now refuse to spread said judgment upon his records unless the notes or other written evidence of indebtedness are first delivered to him with the transcript.

The question is whether or not the clerk of the district court should demand the original note or notes or other written evidence of indebtedness when a transcript of the judgment is made from the justice's court to be spread upon the district court records, and the note, notes or other evidence of indebted-

ness are not a part of the files in the office of the justice of the peace wherein the judgment was rendered.

We are of the opinion that the clerk of the district court must file the transcript, irrespective of whether or not note, or notes, or other evidence of indebtedness accompanies the same.

Section 10536 (part of Chapter 474, Justice of the Peace Court), Code of Iowa, 1935, provides:

"The original, or a copy, of all written instruments upon which a cause of action or counterclaim is founded must be filed with the claim founded thereon, or a sufficient reason given for not doing so."

Section 10572, Code of Iowa, 1935, provides:

"A party obtaining a judgment in the justice's or mayor's court may cause a transcript thereof to be certified to the office of the clerk of the district court in the county."

Section 10574, Code of Iowa, 1935, provides as follows:

"The clerk shall file the transcript as soon as received, and enter a memorandum thereof and the time of filing in the judgment docket and lien index, and from such entry it shall be treated in all respects and in its enforcement as a judgment obtained in the district court. No execution shall issue from the justice's court after the filing of such transcript."

Section 11582-c1, Code of Iowa, 1935, provides:

"Unless otherwise ordered by the court or judge, the clerk of the district court shall not enter or spread upon the records of his office any judgment based upon any promissory note or notes or other written evidence of indebtedness, unless the note or notes or other written evidence of indebtedness are first delivered to the clerk."

It will be noted by perusal of Section 10574, above set out, that "the clerk *shall* file the transcript as soon as received and enter a memorandum thereof and the time of filing in the judgment docket and lien index * * *." This is a specific direction as to what the clerk must do when the transcript of a judgment is certified to his office. Has he any discretion as to whether or not such transcript should be filed and the memorandum thereof entered? We think not.

Chapter 474, relating to justice of the peace courts, makes no provision that the justice may not properly enter judgment without the filing of the note and we, therefore, incline to the view that such judgment is in all respects valid, notwithstanding the fact that the written evidence of indebtedness has not been surrendered to the justice. The only requirement in said chapter that the written instrument must be filed is the one relating to default judgments. See Section 10544. We think this is pertinent in determining the question now before us.

As to certified transcripts of judgments obtained in the justice courts, it is our view that the clerk has no judicial function; he is a ministerial officer and his only duty is to follow the mandates of the statutes, wherein his duties are pointed out.

Section 11582-c1, as we view it, has reference to notes sued upon in district court.

We reach the conclusion, therefore, that when a certified transcript of judgment is filed in the office of the clerk of the district court, he must file the same and enter a memorandum thereof to be made as required by Section 10574, notwithstanding the fact that the note or notes or other written indebtedness does not accompany such transcript.

TAX SALE CERTIFICATE: COUNTY AUDITOR: FEE OF ATTORNEY IN OBTAINING TAX DEED: Auditor may not legally tax as part of costs the fee paid to an attorney by certificate holder for assisting him in attempting to obtain tax deed.

July 17, 1939. *Mr. Melvin L. Baker, County Attorney, Humboldt, Iowa:* This is in answer to your letter of the 14th inst. asking our opinion as to the interpretation of Section 7283, Code of Iowa, 1935.

This section provides:

"The cost of serving the notice and affidavit of publication shall be added to the amount necessary to redeem. The fee for serving the notice shall be the same as for service of an original notice, including copy fee and mileage. The treasurer shall, upon the filing of proof of service and statement of costs, forthwith report the same in writing to the auditor, who shall enter it on the sale book against the proper tract of real estate. The holder of the certificate of sale or his agent may report in writing to the county auditor the amount of costs incurred in giving such notice, and the auditor shall enter the same in the sale book. No redemption shall be complete until such costs are paid."

There is no statute that provides that attorney fees, paid out by the holder of a tax sale certificate, are a part of the costs.

We reach the conclusion that the auditor may not legally tax as part of the costs the fee paid to an attorney by the certificate holder for assisting him in attempting to obtain a tax deed.

CIGARETTE LICENSES: SENATE FILE 141: SENATE FILE 128: It was the intention of the legislature that all permits should expire and a new one issued to each retailer, wholesaler, or distributor, expiration to be as of June 30, 1939.

July 17, 1939. *Mr. George B. Aden, County Attorney, Webster City, Iowa:* This is in answer to your letter of the 28th ult. wherein you ask our opinion as to the following legal questions:

"The question has arisen in our town with reference to the issuing of cigarette licenses under the new law as to when the old license now in existence expires. You will note that the new law under Senate File 128 as amended by House File 502, subsection 3 of Section 9, states that they shall expire on June 30th of each year. Two questions arise, namely:

"1. Will a license previously issued, and under the old law extending to June 30, 1940, be terminated and cancelled on June 30, 1939, even though the new act does not take effect until July 4, 1939, or in view of the wording of subsection 3 of Section 9, of S. F. 128, supra, 'All permits * * * shall expire June 30th of each year,' will the said present license retain effect until June 30, 1940?

"2. Will a license now in existence extend to its present expiration date or will this law apply, as for example, there are licenses that will not expire until 1941, under the old law?"

We are of the opinion that all permits expire as of June 30, 1939.

Subsection 1 of Section 9, Senate File 128, provides:

"Sec. 9. Distributor's, wholesaler's and retailer's permits.

"1. 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 retain cigarette permit as a distributor, wholesaler, or retailer, as the case may be, *and all permits authorizing the sale of cigarettes issued under the provisions of chapter seventy-eight (78), Code, 1935, shall terminate as of June 30th, 1939.*"

We reach the conclusion that the subsection just quoted is controlling and that it was the intention of the legislature that all permits should expire and a new one issued to each retailer, wholesaler, or distributor, as the case might be.

Section 1557, Code of Iowa, 1935 (being a section under Chapter 78), provides:

"No person shall sell cigarettes or cigarette papers without first having obtained a permit therefor * * *. Such permit may be granted by resolution of the council of any city or town * * *. Such permit shall remain in force and effect for two years following the July first after its issuance, unless sooner revoked."

It is our opinion that subsection 1 of Section 9, Senate File 128, refers to the section last above quoted from and is in effect a repeal of the last sentence thereof, which provides that permits shall remain in force for two years following the July first after their issuance.

Senate File 141, Acts of the 48th General Assembly, provides:

"All permits in force and effect on July 1, 1939, for the sale of cigarettes, as provided in Chapter 78, Code, 1935, are hereby extended to the 5th day of July, 1939."

We reach the conclusion, therefore, that all cigarette permits in this state expired as of June 30, 1939.

LEGAL SETTLEMENT: DICKINSON COUNTY: EMMET COUNTY: CLAUS JOHNSON FAMILY: This family has legal settlement in Emmet County; not necessary for Dickinson County to serve further notices until Johnson family filed affidavit with board of supervisors, which was not done.

July 18, 1939. *Mr. Harry E. Coffie, County Attorney, Estherville, Iowa:* This will acknowledge receipt of your letter of the 7th inst., wherein you ask the opinion of this department relative to the following legal question:

The Claus Johnson family were residents of Emmet County prior to March, 1931, and received relief intermittently while residents of Emmet County. They moved to Dickinson County in March, 1931, where they remained until March, 1938. They were served with non-resident notices by Dickinson County as follows: January 22, 1933; December 22, 1933; February 12, 1934; December 10, 1935; December 12, 1936 and December 5, 1937. The question is, does the lapse of one year, ten months, between February 12, 1934, and December 10, 1935, establish residence of this family in Dickinson County?

We are of the opinion that this family still has a legal settlement in Emmet County.

Subsection 1 of Section 1, Chapter 99, Acts of the 45th General Assembly, provides:

"1. Any person continuously residing in any one county of this state for a period of one year without being warned to depart as provided in this chapter acquires a settlement in that county, but if such person has been warned to depart as provided in this chapter, then such settlement can only be acquired after such person has resided in any one county without being warned to depart as provided in this chapter for a continuous period of one year from and after such time as such persons shall have filed with the board of supervisors of such county an affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county."

The subsection above quoted was enacted by the 45th General Assembly in lieu of Section 5311, Code of Iowa, 1931, and is now a part of the Code of 1935. The new law went into effect July 4, 1933, and, therefore, was the law when the notice referred to in your letter was served on February 12, 1934. It

therefore was not necessary for Dickinson County to serve any further notices until the Johnson family filed an affidavit with the board of supervisors, which was not done. Therefore, clearly, the Johnson family has a legal settlement in Emmet County. We see no escape from this conclusion, in view of Chapter 99, Laws of the 45th General Assembly.

FAIRS: AGRICULTURAL SOCIETY: COUNTY AID FOR FAIR SOCIETY: If Agricultural Society of county does not own buildings and improvements of at least $8,000.00 in value, it is not entitled to county aid. Section 2905, Code, 1935.

July 19, 1939. *Mr. Luther M. Carr, County Attorney, Newton, Iowa:* This is in answer to your letter of the 18th inst., wherein you ask the opinion of this department on the following legal question:

The Jasper County Agricultural Society owns no real estate. It has, however, leased 17 acres situated within the corporate limits of the City of Colfax for fair purposes. This ground is owned by a sale barn company which operates weekly farm sales in the buildings located thereon. The lease to the Society for fair purposes gives the Agricultural Society complete control over the land and buildings for the three days of the fair each year. The land and buildings together are not worth more than $25,000. The fee title to such land and buildings is in the farm sale company. The question now arises whether, under Section 2905, Code of Iowa, 1935, county aid may be given said Society.

Section 2905, Code of Iowa, 1935, reads as follows:

"The board of supervisors of the county in which any such society (referring to agricultural societies) is located may levy a tax * * * to be used for the purpose of fitting up or purchasing fair grounds for the society * * * provided such society shall be the owner in fee simple, or the lessee of at least ten acres of land for fair purposes, and *shall own buildings and improvements thereon of at least $8,000.00 in value.*" (Italics ours.)

We are of the opinion that the italicized portion of Section 2905 is controlling.

We, therefore, reach the conclusion that inasmuch as the Agricultural Society of your county does not own buildings and improvements of at least $8,000.00 in value, it is not entitled to county aid. This is our holding. We would reach a different result if the Agricultural Society leased property valued in excess of $50,000.00. See Section 2894, Code of Iowa, 1935.

LEGAL SETTLEMENT: HOSPITALIZATION BY COUNTY: "A" County is liable for hospitalization of children of person served with notice to depart by another county, even though "A" County directed return of the family to "A" County; said family remaining in county serving notice and receiving hospitalization in that county.

July 19, 1939. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* This is in answer to your letter of July 1, 1939, wherein you ask the opinion of this department on the following legal question:

"At the instance of Broadlawns Polk County Public Hospitals, I am requesting an opinion by your office on the following case concerning reimbursement of a county rendering medical aid and hospitalization by the county in which the recipients have legal settlement.

"In June, 1936, notice to depart was served on 'Y' by Polk County, at which time 'A' County was notified of said service. 'A' County then recognized legal settlement and directed the return of 'Y' to 'A' County, stating that it, 'A' County, would not be liable for aid given 'Y' in Polk County.

"A year later two children of 'Y,' who was still in Polk County, contracted

scarlet fever and were ordered by the Des Moines Health Commissioner to Broadlawns Contagious Hospital. 'A' County, after being duly billed for each case, paid one bill, then refused to pay the other. 'A' County's contention for avoiding liability is: Polk County's failure to return 'Y' and family, as directed by 'A' County in 1936, absolved 'A' County for expenses of care rendered in these contagious cases."

Section 2277, Code of Iowa, 1935, provides:

"If any person received services or supplies under this chapter (Chapter 108, Contagious and Infectious Diseases) who does not have a legal settlement in the county in which such bills were incurred and paid, the amount so paid shall be certified to the board of supervisors of the county in which said person claims settlement or owns property and the board of supervisors of such county shall reimburse the county from which such claim is certified, in the full amount originally paid by it."

Section 5313, Code of Iowa, 1935, provides as follows:

"1. Any person who is a county charge or likely to become such, coming from another state and not having acquired a settlement in any county of this state or any such person having acquired a settlement in any county of this state who removes to another county, may be removed from this state or from the county into which such person has moved, as the case may be, at the expense of the county wherein said person is found, upon the petition of said county to the district or superior court of that county. * * *

"3. If upon the hearing on said petition such person shall be ordered to remove from the state or county and fails to do so, he shall be deemed and declared in contempt of court and may be punished accordingly."

Section 5317, Code of Iowa, 1935, provides:

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

We are of the opinion that Section 2277, Code of Iowa, 1935, above quoted, is controlling and that, therefore, "A" County is liable to your county for the hospitalization of the two children of "Y."

TAXATION: DELINQUENT PERSONAL TAXES: INSTALLMENTS: RECEIPT: There is no prohibition in the statutes prohibiting the treasurer from accepting a partial payment of a delinquent personal property tax obligation. It is in the province of the treasurer, in the exercise of his sound discretion, to accept the partial payment. The treasurer's official tax receipt should be used, such as the miscellaneous receipt, and marked *"partial payment."*

July 19, 1939. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* Receipt is acknowledged of your letter of July 17th requesting an opinion on the following question:

"For one reason or another persons or firms in Polk County when served with a notice of delinquent personal tax make a request that they be permitted to pay said tax by installments. There are also many cases in which the board of supervisors accepts and approves a compromise of said personal taxes and in the terms of the compromise authorizes that it be paid in certain periodical installments.

"The question has now arisen as to whether or not a receipt should be issued to the taxpayer before the full amount has been paid and if a receipt is issued the type of receipt to be used."

The collection of the delinquent personal tax is made the duty of the county treasurer by Section 7184 of the 1935 Code, which provides as follows:

"* * * and he is also authorized and required to collect, as far as practicable, the taxes remaining unpaid on the tax books of previous years, his efforts to that end to include the sending by mail of a statement to each delinquent taxpayer not later than the first day of November of each year."

This office has previously held that the county should hold money due persons who owe delinquent personal tax, such as money due such persons by reason of witness fees, jury fees or the like and make application of such money upon the tax obligation owned by the person entitled to receive the money. Obviously, the amount of such a credit would in many instances be insufficient to pay the full amount of the tax obligation and so the effect of such a ruling has been that the taxpayer may make partial payment of the tax obligation.

We find no prohibition in the statutes prohibiting the treasurer from accepting a partial payment of a delinquent personal property tax obligation, and we are therefore of the opinion that it would be in the province of the treasurer, in the exercise of his own sound discretion, to accept the partial payment for application upon the delinquent personal property tax obligation.

With regard to the form of receipt that should be issued, we are of the opinion that the treasurer's official tax receipt, such as the miscellaneous receipt, should be used and if the partial payment is not enough to warrant a tax receipt for any year or half year but is merely a partial payment on the entire tax obligation, then it should be clearly marked *"partial payment."*

We do not feel that the provisions of Section 7188 of the 1935 Code prohibit the issuance of a receipt for partial payment. Said action undertakes to prescribe what the treasurer's official receipt shall contain, and insofar as it undertakes to state the amount for which the receipt shall be issued, such as the first half year, or second half year, or whole year's taxes, it has reference to current taxes rather than delinquent personal taxes.

MOTOR VEHICLE: INTERSTATE AND INTRASTATE COMMERCE: REGISTRATION: TRUCKERS: A truck carrying a load of freight from one point in the state to another point within the state by way of a foreign state, is engaged in intrastate commerce and is subject to the Iowa law accordingly.

July 19, 1939. *Department of Public Safety. Attention: C. A. Knee:* Your letter of July 18, 1939, inquiring our opinion on the following matter, is herewith acknowledged.

"A truck, which bears license plates of a state other than Iowa, goes to Anamosa, Iowa, takes on a full load of freight, then goes to Spencer, Iowa, via East Dubuque, Illinois. This truck makes a stop at its terminus in East Dubuque, but does not alter or change its load. Would this be considered an interstate or intrastate shipment?"

It may be assumed that the carriage of a full load of freight from one point in the state to another point within the state by way of a foreign state, is an attempt by the trucker to so engage in interstate commerce that he may by such act circumvent the Iowa statute obligating those engaged in intrastate traffic to register their motor vehicles in Iowa. If such a movement may be said to be intrastate commerce, then it follows that the trucker must register his motor vehicle in Iowa.

As bearing directly in point, we quote from the case of *Eichholz vs. Public Service Commission*, 83 L. Ed. Adv. Sheet 505 (Feb. 27, 1939), as follows:

"* * * the district court * * * found that the carriage of property from St. Louis, Missouri, to Kansas City (Kansas) and thence back into Kansas City, Missouri, for delivery, was not 'the normal, regular or usual route' for shipping merchandise between the two cities in Missouri; that the route used by appellant to his terminal at Kansas City, Kansas, was through Kansas City, Missouri, and that the same traffic-ways were used in making deliveries of merchandise after it had been hauled in the first instance to the terminal; that after reaching the terminal in Kansas City, Kansas, appellant in many instances did not unload the merchandise, that much of such shipments was in carload lots, and that the method employed was to haul the merchandise to his terminal in Kansas City, Kansas, 'where a new driver, either with the same tractor or trailer, or with another tractor and the same trailer, would return the merchandise to Kansas City, Missouri. That, in some instances, merchandise * * * was actually unloaded at the depot in Kansas City, Kansas, and then distributed to the consignees in Kansas City, Missouri,' but that this was 'a negligible percentage of the shipments between Missouri points'; and that the method of operation which appellant employed was designed to afford shippers the benefit of a lower rate and was not in good faith."

The court found, in part, as follows:

"Appellant insists that the hauling from St. Louis over the state line to Kansas City, Kansas, of merchandise consigned to persons in Kansas City, Missouri, and hauling it back again to its intended destination in Kansas City, Missouri, was actually interstate transportation. Hanley vs. Kansas City S. R. Co., 187 U. S. 617. * * * That fact, however, does not require the conclusion that the state's action for the protection of its intrastate commerce was invalid. * * * We may assume that Congress could regulate interstate transportation of the sort here in question, whatever the motive of those engaging in it. But in the absence of the exercise of federal authority, and in the light of local exigencies, the state is free to act in order to protect its legitimate interests even though interstate commerce is direcly affected. * * * If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the state's requirement as to intrastate commerce, there is no ground for saying that * * * the application of the Commission's rule * * * was an unwarrantable intrusion into the federal field or the subjection of interstate commerce to any unlawful restraint. And if the prohibition of such transactions was valid, the Commission was undoubtedly entitled to enforce it. * * *"

The situation as it arose in Missouri is exactly as the one here. The supreme court of the United States has said that where one by subterfuge of this nature, attempts to avoid the state laws in the absence of interstate regulation to the contrary, of which there is none, the state law will govern.

It is, therefore, our opinion that the truck in question, so far as the motor vehicle laws regulating intrastate commerce are concerned, was engaged in intrastate commerce and is subject to the Iowa laws accordingly.

COUNTY ATTORNEY: FEE FOR PROSECUTING ESCAPE CASES: PRISONERS: The county attorney of a county in which penitentiary is located is not entitled to fee for prosecuting escape cases in his county. No provision made for this by law.

July 19, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: L. I. Truax:* This is in answer to your letter of the 10th inst., wherein you ask the opinion of this department on the following question:

In Lee County is located the penitentiary. Occasionally prisoners escape therefrom. Under Section 13351, Code of Iowa, 1935, such escape is made a crime and punishable by imprisonment in said penitentiary for a term not

to exceed five years. The question is: Is the county attorney entitled to a fee of $25.00 for prosecuting escape cases in said county?

Section 13354, Code of Iowa, 1935, provides that the jurisdiction of an indictment for the crime of escape is in the county in which is located the penitentiary.

Section 13355, Code of Iowa, 1935, provides:

"All costs and fees hereafter incurred in prosecutions for violations of sections 13351 to 13354, inclusive, shall be paid out of the state treasury from the general fund, in any case where the prosecution fails, or where such fees and costs cannot be collected from the person liable to pay the same, the facts being certified to the clerk of the district court and verified by the county attorney of the county."

Section 13356, Code of Iowa, 1935, provides:

"The clerk of the district court, in which the case is prosecuted or tried, shall, under his seal of office, certify to the state comptroller a statement of the amount of fees or costs incurred in each case, and such statement shall be approved by the presiding judge in writing appended thereto or indorsed thereon. Should the cause be appealed to the supreme court, the costs there incurred shall be certified to the comptroller by the clerk of that court, but no fees, in such case, for the clerk of either the district or supreme court shall be included or paid from the state treasury."

Section 13357, Code of Iowa, 1935, provides that on such certificate being filed in the office of the state comptroller, the comptroller shall issue his warrant on the state treasurer for the amount thereof, payable to the clerk of the district court or supreme court, as the case may be, and the clerk shall pay the same to the persons entitled thereto.

These are the only statutes having any bearing on the question. You will note that therein no provision is made for the taxing of a fee in favor of the county attorney. We know of no statute that authorizes the taxation of such a fee.

We reach the conclusion, therefore, that the county attorney of Lee County is not entitled to such fees.

SHERIFF'S DUTIES: INCOMPATIBILITY IN OFFICE: A sheriff may not serve as a member of Soldier's Relief Commission and draw a per diem therefor, in addition to his regular salary as sheriff.

July 21, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: L. I. Truax, Supervisor County Audits:* We have your inquiry as to whether the sheriff of a county can legally serve as a member of the Soldier's Relief Commission of that county, and draw a per diem for his services as a member of the Commission in addition to his regular salary as sheriff.

While there is nothing in the statutes of the State of Iowa directly controlling upon this question, yet after a consideration of the principles involved, and the pronouncements of the courts on matters of this kind, we are constrained to answer your inquiry in the negative.

The case of *State of Iowa, ex rel, ves. Bobst*, 205 Iowa 608, discusses the legal principles involved. In that case the court quoted from the case of *State, ex. rel, vs. Anderson*, 155 Iowa 271, as follows:

"It is well-settled rule of common law that, if a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding * * *.' The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompati-

bility of offices; and the consensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each, having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time. * * * But that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other, 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' * * * A still further definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' "

The sheriff of a county is an elective official, and the nature of his office is such that he is, for all intents and purposes, required to be on duty at all times. In addition, he is paid a salary as a full-time officer, and is expected to devote his entire time to the duties of his office. It is our view that there is an incompatibility existing in the office of sheriff in thus requiring full time devotion to the duties of the office and at the same time functioning upon a board set up by the statutes of the State of Iowa which requires some part of his time, which contemplates that a sufficient amount of time shall be devoted to the work on the board by the members thereof as to warrant the payment of the compensation on a per diem basis.

BEER PERMITS: COUNTY FAIR ASSOCIATION: BOARD OF SUPERVISORS: No consideration should be given by the board of supervisors to an application for a beer permit made by the Davis County Fair Association for their fair grounds located outside of the city limits nor to an individual who holds a lease from the Fair Association and desires to sell beer on the fair grounds.

July 24, 1939. *Mr. D. W. Harris, County Attorney, Bloomfield, Iowa:* Receipt is acknowledged of your request for an opinion as to whether or not the board of supervisors of Davis County should grant the application for a beer permit made by the Davis County Fair Association for their fair grounds located outside the city limits of Bloomfield and not within the limits of any platted village and also whether or not they should grant the application of an individual who holds a lease from the fair association and desires to sell beer on the fair grounds.

Under Section 1921-f109 and 110 authority is granted to the board of supervisors to grant Class B beer permits to clubs located outside the city limits of cities and towns but the power is limited to grant such applications to "golf or country clubs." A fair association could not be construed to be included in the denition of a country club. This office has previously ruled that a gun club could be considered as a country club (see Opinions of the Attorney General, May 16, 1933, page 218). See also Opinions of the Attorney General, June 31, 1933, page 231.

In view of the limitations imposed by Section 1921-f110, we are of the opinion that no consideration should be given by the board of supervisors to either application for beer permit.

HIGHWAY COMMISSION: FARM-TO-MARKET: CONDEMNATION: Condemnation by Highway Commission of right-of-way for farm-to-market roads may only be made when requested by the county and in such cases purchase

or condemnation is for the use and benefit of the county and should in all cases be taken in the name of the county.

Ames, Iowa, July 24, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: Mr. C. Coykendall:* This will acknowledge receipt of your communication of July 18, 1939, in which you request our opinion on the following questions.

"In many of the counties, steps are now being taken to secure right-of-way required for farm-to-market projects under the provisions of Section 22 of House File No. 114, Acts of the 48th General Assembly.

"Sooner or later the question i s almost certain to be raised as to the Commission's authority to acquire right-of-way for such projects by condemnation. The section of the Act above referred to seems to imply that the Commission has authority to acquire right-of-way for such projects, and to pay for same out of the county's allotment of farm-to-market road funds.

"Does this infer that the Commission has authority to proceed under the statutes authorizing the condemnation of right-of-way for primary road construction, and to acquire such right-of-way as will be needed for these farm-to-market projects? Further, would title be taken in the name of the state or in the name of the county if such right-of-way was acquired by the Commission through condemnation proceedings?

"I think it would be well if we could be fully advised on the points herein raised in order that we will be in position to give county officials the correct information as to the procedure to be followed in acquiring right-of-way for these farm-to-market projects."

Sections 22 and 23 of Senate File 114, Acts of the 48th General Assembly, provide as follows:

"Sec. 22. Right-of-way for farm-to-market road projects under this act may be acquired by the county. However, the county board may request the state highway commission to acquire such right-of-way and in such event such right-of-way shall be paid for out of the county's allotment of the farm-to-market road fund.

"Sec. 23. In the maintenance, relocation, establishment or improvement of farm-to-market roads, including extension of secondary roads within cities and towns, the state highway commission shall have authority to purchase or to institute and maintain proceedings for the condemnation of the necessary right-of-way therefor and for the condemnation of land, including a sufficient roadway to such land by the most reasonable route for the purpose of obtaining gravel or other suitable material with which to improve such roads.

"All the provisions of the law relating to the condemnation of land for public state purposes, shall apply to the provisions hereof.

"The provisions of chapter two hundred thirty-seven (237), of the Code of 1935, shall not apply to the establishment, vacation, alteration or improvement of secondary roads under this section. * * *"

Answering your first question, it is clear that under the provisions of Section 22 the county may acquire right-of-way necessary for farm-to-market road projects, or may request the Highway Commission to acquire the same.

Construing the two sections together it seems equally clear that only when requested by the county may the Highway Commission purchase or condemn the necessary right-of-way for farm-to-market roads, and condemnation proceedings shall follow the provisions of Chapter 366 relating to the condemnation of land for state purposes. It is specifically prescribed by the third paragraph of Section 23, quoted, that Chapter 237 of the Code is inapplicable in so far as the provisions of this *section* are concerned.

We have, in a previous opinion to the Highway Commission, under date of May 3, 1939, construed the second and third paragraphs of Section 23 as limited to proceedings instituted by the Highway Commission rather than the

counties. The latter must continue to follow the procedure prescribed by Chapter 237 of the Code.

With respect to your second question, paragraph (b) of Section 1 of the act defines farm-to-market roads as a part of the secondary road system. Funds raised within the counties by taxation, or allocated to them from other sources are designed to be expended in their improvement.

Senate File 114, generally speaking, merely operates to hasten the improvement of the secondary road system; it requires the selection of a portion thereof, calls it the farm-to-market road system, and allocates additional funds to each county for its improvement to render available additional funds appropriated therefor by the Federal Government. Although the Highway Commission is given some additional supervisory authority in the improvement of farm-to-market roads we find no expression of intent by the legislature to treat them as separated from the secondary road system. Several provisions of the act, including Section 29 relating to maintenance, tend to confirm our opinion in this regard. This conclusion seems to us wholly inconsistent with the thought that the legislature intended that title to any part of the farm-to-market road system should be taken in the name of the state. Nowhere are the counties expressly deprived of jurisdiction, and find no provision of the act indicating that conveyances for right-of-way purposes on farm-to-market roads, in so far as the grantee is concerned, should be in any other authority than additional right-of-way acquired throughout the secondary road system.

The experience of the State Highway Commission together with the facilities it possesses for the acquisition of right-of-way for primary road purposes, may, in certain cases, enable it to acquire right-of-way for farm-to-market roads to greater advantage than that possessed by the counties following their procedure in Chapter 237; under extraordinary circumstances local conditions may render advisable the purchase of right-of-way by the Highway Commission rather than by local authorities; the counties are in a better position to determine the particular conditions or circumstances which would justify a request that the Highway Commission purchase such right-ofway. This in our opinion was the underlying purpose of the provisions of Sections 22 and 23 and we conclude that purchase or condemnation by the Highway Commission of right-of-way for farm-to-market roads may only be made when requested by the county; that in such cases purchase or condemnation is for the use and benefit of the county, and conveyance made pursuant thereto, should in all cases be taken in the name of the county.

JUDGE: ELECTION: EXPIRATION OF TERM: Judge appointed by governor to fill term of judge who resigned may serve only until next city election and that at such election a judge is elected to merely fill the unexpired term of the original incumbent.

July 26, 1939. *Mr. John F. Burrows, Deputy County Attorney, Keokuk, Iowa:* This will acknowledge receipt of your letter of July 20th, in which you ask our opinion on the following legal question.

A city election is held in the City of Keokuk every two years. A superior judge is elected at alternating city elections for a period of four years. At the election held in April, 1938, a superior judge was elected and qualified. Soon after assuming the duties of his office he became ill and resigned. In November, 1938, Governor N. G. Kraschel appointed a successor, pursuant to the provisions of Section 10702, Code of Iowa, 1935.

Question: Must a superior judge be elected in the spring of 1940 and if so does the person elected at said election serve until the expiration of the original term (i. e., the term of the judge who became ill and resigned) or is he elected for a period of four years, to wit, for the period from April, 1940, to April, 1944.

We are of the opinion that a judge of the superior court must be elected during the spring election of 1940 and that he holds office only until the spring of 1942; i. e., he completes the term of the original incumbent (the judge who resigned because of illness). We will hereinafter set out our reasons for so holding.

Chapter 476, Code of Iowa, 1935, deals with superior courts. Therein is set out the manner and method of establishing superior courts, the tenure of the judges thereof, jurisdiction of the court, etc.

Section 10702, Code of Iowa, 1935, provides:

"In case of vacancy in said office, the governor shall appoint a judge who shall hold office until the next city election, and in case of inability of any judge to act through sickness or any other cause, a judge shall be appointed by the governor to hold office during such inability."

It is clear that when the judge resigned because of illness, a vacancy was created.

Section 1146, Code of Iowa, 1935, provides:

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

"4. The resignation or death of the incumbent, or of the officer elect before qualifying."

A vacancy existing in said office, it was the duty of the governor to fill the same. Manifestly, he exercised this power under Section 10702 and therein it is explicitly provided that the judge appointed by the governor shall hold office until the next city election. Therefore, it is clear that a judge must be elected during the spring election of 1940. No cases, it seems, need be cited on this proposition.

The question then arises as to when the incumbency of the judge elected in the spring of 1940, ends. As hereinbefore indicated, we reach the conclusion that his incumbency ends in the spring of 1942, i. e., he is elected merely to finish the term of the original incumbent (referring now to the person who resigned because of illness).

In support of this contention, we feel it is necessary only to cite the case of Wilson vs. Shaw, 194 Iowa 28, and, in connection therewith, the constitutional provision, namely Article XI, Section 6, which provides:

"In all cases of elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the residue of the unexpired term; and all persons appointed to fill vacancies in office, shall hold until the next general election, and until their successors are elected and qualified."

And we here say, parenthetically, that it was held in *State vs. Lentz*, 50 Mont. 322, that the words "until the next general election" in a statute providing that an appointee to fill a vacancy hold until that time, meaning the next general election for the particular office involved. This, we believe, is a proper interpretation of the constitutional provision above quoted, insofar as the same relates to the office of superior judge, i. e., that the next general election means the next city election. But be that as it may, Section 10702,

Code of Iowa, 1935, specifically provides that an appointed superior judge shall hold office only until the next city election.

We now proceed to analyze the case of *Wilson vs. Shaw, supra.* The facts in that case were these. C. A. Dudley had been legally elected as judge of the 9th judicial district for the term of four years beginning January 1, 1915, and ending December 31, 1918. Judge Dudley died and on the 19th day of December, 1917, plaintiff, George A. Wilson, was duly appointed by the governor to fill the vacancy caused by the death of Judge Dudley. Following his appointment, plaintiff was duly elected at the November election, 1918, for the remainder of the unexpired term for which he was appointed. During the month of April, 1917, the 37th General Assembly increased the salary of district judges of this state from $3,500.00 to $4,000.00. This act was duly approved by the governor and became effective by constitutional provision July 4, 1917. Plaintiff sought the benefits of this enactment, claiming that he was entitled to a salary of $4,000.00 instead of $3,500.00.

This was an action in mandamus, attempting to compel Auditor of State Shaw to pay plaintiff on the basis of $4,000.00. The auditor contended that plaintiff was not entitled to the increase because of the constitutional provision forbidding the increase of the compensation of a judge "during the term for which he shall have been elected." Therefore, the question arose as to whether plaintiff Wilson was elected for a new term or was merely elected to finish the unexpired portion of the term for which Judge Dudley was elected. The court held the latter.

During the course of the opinion much is said which we think is decisive of the question before us. We quote:

"The Constitution of this state further provides that 'the term of office of each judge shall commence on the first day of January next after his election,' and that he shall hold it 'for the term of four years.' These are mandatory provisions and the Constitution fixed both the initial and the terminal points of the office so created. The office of district judge is a constitutional office. The legislature cannot change it, nor can a court by judicial interpretation give it a meaning other than prescribed by the fundamental law. There is but one term constitutional in character and that term is defined by the Constitution to be four years from a specified date. The Constitution intends and contemplates but *one term* regardless of the tenures of the various incumbents who might serve in the office during the prescribed term. A district judge has no successor within the term for which he is duly elected. His only successor within the constitutional meaning of the word *term* is the next incumbent chosen at the election by the people upon the termination of his constitutional term of four years for which he was elected. He may be his own successor.

"The state Constitution does provide for the temporary filling of a vacancy by appointment or by election, but this does not constitute or create a new term in a legal or constitutional sense. A person so appointed or elected is a mere holder of a tenure within the term. The constitutional provisions have no relation to the particular person or persons who may perform the functions of a district judge within the term defined and prescribed by the Constitution. This is evident from the language of the Constitution which provides in case of 'elections to fill vacancies in office occurring before the expiration of a full term, the person so elected shall hold for the *residue of the unexpired term:* * * *.'

"Therefore whoever is appointed or elected is appointed or elected for an unexpired portion of a prescribed term. The term prescribed is a unit of time. A new term is not created. The appointee simply steps into the shoes, so to speak, of him who was elected for the constitutional term of four years

and is entitled to perform the duties and receive the emoluments of the office until the end of that term or until a successor shall have been elected. The only *term* which is recognized by the Constitution is the term of four years. In popular language we speak of a 'long term' and a 'short term,' but these words are not found in the Constitution, and although perhaps happily chosen to convey an idea, they have no constitutional meaning or definition.

"The constitutional term of a district judge is a distinct thing or entity. An unexpired term can be predicated only on a pre-existent term of which it is a part. The *terms* lives on even though the *incumbent* resigns, is impeached or dies. Personality has nothing to do with the question, nor is a term within the meaning of the Constitution 'the period of a judge's service.' It is axiomatic that the whole is equal to the sum of its parts and that the part is never equal to or greater than the whole. * * *"

In view of the constitutional provision which we have quoted above, we see no reason why the reasoning and logic employed in the *Wilson case, supra,* should not control the case of superior judges.

We are abidingly convinced that under the provisions of the statute, the judge appointed by the governor may serve only until the next city election and that at such election a judge is elected to merely fill the unexpired term of the original incumbent.

ESTATE PROPERTY TAX: COUNTY TREASURER: HOUSE FILE 395: It is duty of treasurer to use reasonable diligence in ascertaining taxes on omitted property, which may include consulting records of estate in clerk's office and tax records in auditor's office.

July 27, 1939. *Mr. George R. Blake, Acting County Attorney, Shell Rock, Iowa:* This will acknowledge receipt of your letter of the 26th inst., wherein you ask the opinion of this department relative to the construction of H. F. 395, enacted by the last legislature.

The question is: Is the county treasurer required to search the records in the offices of county clerk and county auditor for omitted taxes before making a certificate that all personal taxes due, and to become due, have been fully paid and satisfied?

We are of the opinion that under said House File 395, it is the duty of the treasurer to use reasonable diligence in ascertaining taxes on omitted property, and that such reasonable diligence may include consulting the records of the estate in the clerk's office and the tax records in the auditor's office, insofar as they pertain to the estate of the decedent. We construe the words, "due, or to become due," to include taxes on omitted property.

COUNTY ATTORNEY: TOWNSHIP TRUSTEES: COUNSEL FOR TRUSTEES: In counties having population of more than 25,000 county attorney need not appear as counsel for township trustees in litigations. County attorney may be employed as trustees' attorney in his private capacity and tax may be levied to pay for his services.

July 31, 1939. *Mr. L. A. Winkel, County Attorney, Algona, Iowa:* This is in answer to your letter of the 27th inst., wherein you ask our opinion relative to the interpretation of Section 5544, Code of Iowa, 1935.

Kossuth County has a population in excess of 25,000. Appeal has been taken from the ruling of the township trustees, sitting as a board of review. The question is: Is the county attorney required to act as attorney for the trustees in defending the appeal and if the county attorney is not required to act as

such counsel, may the township trustees legally employ him at the expense of the township?

Section 5544, Code of Iowa, 1935, provides:

"In counties having a population of less than 25,000, where the trustees institute, or are made parties to, litigation in connection with the performance of their duties, as provided in this chapter, the county attorney, as a part of his official duties, shall appear in behalf of the township trustees, except in cases in which the interests of the county and those of the trustees are adverse."

Section 5545, Code of Iowa, 1935, provides:

"When litigation shall arise in any case not covered by section 5544, involving the right or duty of township trustees with reference to any matter within their jurisdiction, and the trustees become or are made parties to such litigation, they shall have authority to employ attorneys in behalf of said township, and to levy the necessary tax to pay for their services, and to defray the expenses of such litigation."

Inasmuch as your county has a population of more than 25,000, we are of the opinion that the county attorney need not appear as counsel for the trustees. This, we think, is the plain inference to be drawn from the phrase, "in counties having a population of less than 25,000, * * * the county attorney, as a part of his official duties, shall appear in behalf of the township trustees."

We also believe that this conclusion is supported by Section 5545, wherein it is said: When litigation shall arise in any case not covered by Section 5544 * * * they shall have authority to employ attorneys in behalf of said township * * *." We believe that this should be construed to mean that in counties having a population of less than 25,000, the county attorney is the legal adviser and attorney for the township trustees, but if the population is in excess of 25,000, other counsel may be employed. Of course, it follows that if it is not the duty of the county attorney to appear in behalf of the township trustees, he may be employed as their attorney in his private capacity and a tax may be levied to pay for his services.

We are of the opinion that House File 78, passed by the 40th General Assembly, has no effect on the question here involved.

We reach the conclusion, therefore, that in your county you are under no duty to appear for the township trustees and if they employ you as their counsel, you are entitled to reasonable compensation for the services performed.

COMMISSION ON FINES: SECTION 5228: COUNTY ATTORNEYS: COLLECTION OF FINES: In order to be entitled to a commission on fines provided for in Section 5228, the county attorney must either have physically appeared in the case or have had his appearance entered of record prior to time fine is paid.

August 1, 1939. *Honorable Chet B. Akers, Auditor of State. Attention: Mr. Truax:* We have your letter of July 31st requesting an opinion as to whether county attorneys in counties under 60,000 population are entitled to receive fees allowed to attorneys for suits on written instruments for fines collected where he has instructed the justice of the peace at the beginning of a period of time to enter his appearance in all criminal cases filed before the justice wherein the county attorney did not personally appear, and the justice, through oversight, failed to enter the county attorney's appearance for the state on the docket.

At the outset we call your attention to the fact that under date of February 6, 1939, this office rendered an opinion wherein it was held that the county attorney in office at the time the fine is actually paid in is entitled to the commission on the same, rather than the county attorney who is in office when the fine is imposed.

Also under date of May 5, 1939, this office rendered an opinion wherein it was held that it was not necessary for the county attorney to be physically present if he has in some manner entered his appearance in the action, and if he has done neither, then he would not be entitled to a commission on the fine collected.

The pertinent provision of Section 5228 is that in certain counties the county attorney shall "receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected where he appears for the state, but not otherwise, * * *"

It is our opinion that in order to be entitled to a commission on fines provided for in this section, that the county attorney must either have physically appeared in the case at some stage of the proceedings, either by way of prosecution of the case or by way of having actively participated in the collection of the fine, or have had his appearance entered of record prior to the time that the fine is actually paid.

We believe that it is contemplated by the wording of this statute that the county attorney must have made some contribution of effort in the case in order to be entitled to the commission on the fine. That if he physically appeared in the case, either before the fine was actually imposed, or after it was imposed but before it was collected, even though his appearance is not entered on the docket, that this physical appearance raises sufficient presumption of having contributed effort towards collection of the fine. On the other hand, assuming there has been no physical appearance, but there is a formal entry of appearance on the docket, made prior to the time the fine was collected, that this raises sufficient presumption of contribution of effort to entitle him to a commission on the fine.

We do not believe that a blanket direction to a justice of the peace for the entry of an appearance in all cases, which direction is not followed, either intentionally or through inadvertance, is sufficient in the absence of physical presence or actual entry of appearance before the collection of the fine to satisfy the requirements. It can well be presumed that if any contribution of effort was made in the case that that would be sufficient to call to the mind of the justice the fact that the county attorney had directed an appearance to be entered and that it would be entered.

SOCIAL WELFARE DEPARTMENT: OLD AGE ASSISTANCE: TAX COLLECTION: COUNTY TREASURERS: It is within discretion of board of supervisors as provided in Section 7225 to turn over collection of old age pension tax items to delinquent personal tax collector, compensation to come out of general fund of county (Section 7227). There is no provision in Code whereby fee for collection can be deducted from tax collected—merely additional burden on county treasurers.

August 1, 1939. *Mr. Francis Kuble, County Attorney, Des Moines, Iowa:* This is to acknowledge receipt of your letter of July 28th wherein you ask the following two questions:

1. Is the collection of delinquent old age pension tax items properly in the jurisdiction of the treasurer's office or in the delinquent personal tax collector?
2. "We specifically desire to know whether there is any provision in the Iowa Code whereby a fee for the collection of this tax could be deducted from the taxes collected?"

In answer to your first question, we are of the opinion that it is within the discretion of the board of supervisors as provided in Section 7225, 1935 Code of Iowa, to turn over the collection of these items to the delinquent personal tax collector. We are also of the opinion that if these items were turned over to said collector, that his compensation would have to come out of the general fund of the county as provided in Section 7227, 1935 Code of Iowa.

In answer to your second question, we are unable to find any provision in the Iowa Code whereby a fee for the collection of old age pension tax items can be deducted from the tax collected. It is our opinion that the legislature merely added an additional burden to the duties of the county treasurers and provided no fund for the expense of employing extra held in the county treasurer's office which might be needed for such collections.

BOARD OF EDUCATION: COAL BIDS: Senate File 157 is interpreted to mean that the purchasin board may exercise its discretion and if it decides that the benefits arising from the purchase of Iowa coal justifies so doing, Iowa coal may be purchased even though it is not found to be offered in the lowest bid.

August 1, 1939. *Iowa State Board of Education, Des Moines, Iowa:* We have your inquiry, as follows:

"Does Senate File 157 of the 48th General Assembly, and in particular the words 'unless the purchasing body shall determine that the general good of the State, including the best interests of the taxpayer and the employment of labor, the adaptability of the coal offered, or the efficiency and cost of operation of purchaser's plant makes it advisable to do otherwise, the contract shall be let to the lowest responsible bidder,' conflict with and hence render inoperative Section 1 of Chapter 93 of the laws of the 47th General Assembly, and in particular the words 'nor if the use of coal produced within the State of Iowa would materially lessen the efficiency or increase the cost of operating such purchaser's heating or power plants'?"

The courts have held repeatedly that "The law does not favor repeal by implication, and though two acts are seemingly repugnant, yet they should, if possible, receive such construction that the latter shall not repeal the former."

In reading this law, we arrive at the conclusion that the purchasing board, in accepting bids, shall take into consideration "the general good of the state, the best interests of the taxpayer and employment of labor, the adaptability of the coal offered, or the efficiency and cost of operation of purchaser's plant" and that this need not prevent the purchasing board from also taking into consideration the question of whether or not "the use of coal produced within the State of Iowa would materially lessen the efficiency or increase the cost of operating such purchaser's heating or power plants."

As we interpret Senate File 157, the purchasing board may exercise its discretion and if it decides that the benefits arising from the purchase of Iowa coal justifies so doing, Iowa oal may be purchased even though it is not found to be offered in the lowest bid.

SOCIAL WELFARE DEPARTMENT: COUNTY DIRECTOR: COUNTY BOARD OF SUPERVISORS: Compensation of all county employees subject to approval of State Board and county board of supervisors (Section 3661.014, 1939 Code). Failure of board of supervisors to approve compensation of local director who has been appointed by local board of social welfare —appointment valid—but he could not receive any compensation until approved by both.

August 1, 1939. *State BoBard of Social Welfare, Iowa Bldg., Des Moines, Iowa. Attention: H. C. Beard:* This is to acknowledge receipt of your lettery of July 31st, wherein you ask whether or not the failure of the board of supervisors to approve the compensation of a local director appointed by the local board of social welfare will deprive that county of a director who will act as executive officer of the local board of social welfare.

For the purposes of this opinion, we quote Section 3661.014 of the 1939 Code of Iowa:

"*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."

It will be noted that the compensation of all county employees shall be subject to (1) the approval of the State Board and (2) the approval of the county board of supervisors.

It is our opinon that the appointment of such a director would be valid, but that he could not receive any compensation until both the State Board of Social Welfare and the county board of supervisors approve his compensation.

SALARIES OF SECRETARY AND CLERK: BONUS BOARD: HOUSE FILE 200, SECTION 50: Salaries of secretary and clerk of bonus board limited by provisions of Section 50, House File 200 of the 48th General Assembly.

August 4, 1939. *Honorable C. Fred Porter, State Comptroller:* We have your letter of July 29th asking for an opinion as to the salary limits of the secretary of the Bonus Board and the clerk of the Bonus Board. This arises by reason of the fact that the biennial appropriation act adopted by the 48th General Assembly for the biennium of 1939 and 1941, in Section 50 thereof, provides that the salary of the secretary of the Iowa Bonus Board shall in no event exceed the sum of $2,400.00, and the salary of the clerk of the Iowa Bonus Board shall in no event exceed the sum of $1,200.00.

It appears to be the contention of the Bonus Board that Section 9 of Chapter 332, Acts of the 39th General Assembly, being a part of the Soldier's Bonus Act which provided for the soldiers' bonus, the issuance of bonds to provide for the payment of same, and the levying of a direct tax to retire the bonds, and which act was submitted to a vote of the people under the provisions of Section 5 of Article VII of the State Constitution, that subsequent legislatures cannot control or limit the acts of the Bonus Board, including the expenditures of money and the setting of salaries.

We find that under date of November 28, 1933, an opinion was rendered by the attorney general of the State of Iowa to the state comptroller, wherein it was held that said Section 9 which empowers the Bonus Board to employ and incur other expenses as may be necessary for the administration and car-

rying out of the act, was a part of the act submitted to a vote of the people and approved by the electorate, and being voted by the people the legislature cannot now change any provision of the act. We find it necessary to overrule the holding in that opinion.

Chapter 332 of the Acts of the 39th General Assembly, as suggested above, provides for and authorizes the issuance of $22,000,000 of bonds by the state, the proceeds to constitute a bonus fund to be distributed to the beneficiaries as defined in the act. The act then proceeds to set up the beneficiaries and the proceedings for qualifying; it creates a bonus board to administer the act and empowers the board to employ assistants and incur other expenses, and then provides for the levying of a direct tax for the retirement of the bonds, and for the submission of the law to a vote of the people. This requirement for submission of the law to a vote of the people is by reason of Section 5 of Article VII of the Constitution of the State of Iowa.

This constitutional requirement is that in case of the incurring of indebtedness in excess of $250,000 by the state the law incurring same shall impose and provide for the collection of a direct annual tax to pay the interest and the principal within twenty years and that such a law shall not take effect until at a general election it shall have been submitted to the people and have received a majority of all the votes cast for and against it at such election.

Section 6 of Article VII of the Constitution of Iowa provides:

"The legislature may, at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may, at any time, forbid the contracting of any further debt, or liability, under such law; *but the tax imposed by such law, in proportion to the debt or liability, which may have been contracted in pursuance thereof, shall remain in force and be irrepealable, and be annually collected, until the principal and interest are fully paid.*"

The fact that the law was submitted to a vote of the people and a majority voted in favor of the same, does not in and of itself, except for the constitutional provisions contained in Section 6 above quoted, clothe it with any higher degree of sanctity than an act which goes into effect by being passed by the legislature itself. It is only by reason of the provisions of Section 6 above quoted and italicized that a subsequent legislature is without power to repeal the tax levied thereunder until the obligation has been paid.

The reason for this is manifest. It is to guarantee and maintain unimpaired the obligation created by the issuance of bonds under the particular act.

It is the well settled general principle that a General Assembly cannot control the actions of future General Assemblies, and cannot render its enactment irrevocable and non-repealable by a future General Assembly. As stated in the case of *State of Iowa ex rel vs. Executive Council*, 207 Iowa 923, 931:

"No future General Assembly could repeal the levy of such tax while the debt remained. *But this is so because the Constitution makes it so.* 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."

A fair interpretation of the provisions of Section 6 of Article VII is that that section forbids the repeal of the tax imposed by such a law and the repeal

of any provision thereof which would affect the obligation created thereunder. We cannot bring ourselves to hold that an administrative board created for the purpose of administering such an act is beyond the control of any future General Assembly so long as such future General Assembly by its enactments and control of such administrative board does not impair the obligation created under the bonding act.

It is therefore our conclusion that the provisions of Section 50, House File 200, Acts of the 48th General Assembly, insofar as it limits the salaries of employees of the Iowa Bonus Board, is controlling rather than the discretion of the board itself in this respect, and that the maximum amounts provided in said Section 50 are the most that can be paid as salaries provided therein.

LEGAL SETTLEMENT: WIDOW'S PENSION: DIRECT RELIEF: STATE BOARD OF SOCIAL WELFARE: Since she chose Boone County as her legal settlement under subsection 4 of Section 5311, as a result, Boone County is responsible for direct relief given her. Since she applied for widow's pension from Story County before she removed therefrom and she had lived in Story County for more than a year and not served with notice to depart, she had legal residence in Story County and may receive widow's pension from Story County if the board of supervisors of that county in its discretion sees fit to allow it.

August 4, 1939. *Mr. Frank H. Lounsberry, County Attorney, Nevada, Iowa:* This is to acknowledge receipt of your letter of July 31st, wherein you ask our opinion on the following particular question:

"Bernadine Miller was born in Boone County on August 9, 1915. She was married to Erle Lawrence on December 6, 1932, at Blair, Nebraska, and resumed her home in Boone County until March, 1936, at which time she and her husband moved to Ames, Iowa, in this county where they took up their residence.

"On September 26, 1938, Erle Lawrence died at Ames in Story County, Iowa. The widow thereafter made an affidavit electing and claiming her legal settlement to be Boone County, Iowa, as provided in subsection 4 of Section 5311 of the 1935 Code of Iowa. About the same time, she also made application for a widow's allowance from Story County, Iowa, as she had one minor child at the time of her husband's death. She also made application for direct relief from Story County at said time. As you will note, she had lived in Story County from March, 1936, until November, 1938, at which time she returned to Boone County.

"There has been considerable controversy over which county is responsible for her support. We are wondering what your opinion is as to which county is responsible for a widow's pension to her. Is it your opinion that she gained a legal residence in Story County so as to be entitled to a widow's pension from Story County? No notice was ever served upon this family.

"We would also like your opinion on which county is responsible for direct relief to be furnished to her at this time."

The question as to which county is responsible for direct relief is relatively easy. Mrs. Lawrence has chosen Boone County as her legal settlement under subsection 4 of Section 5311 and as a result, Boone County is responsible for direct relief given her.

The question as to which county is responsible for widow's pension is a little more involved. In 1927, the case of *Adams County vs. Maxwell, Judge*, 202 Iowa 1327; 212 N. W. 152, the court, among other things, stated the following:

"The legislature has seen fit to make residence for one year on the part of the widow, and not legal settlement under the Pauper Acts, requisite to

an allowance of public aid in the support of her children, under Section3641."

(See also opinion of the attorney general addressed to John H. Mitchell, under date of November 29, 1938, pages 8 and 9.)

Under the facts of this case, Mrs. Lawrence evidently applied for widow's pension from Story County before she had removed therefrom and she had been living in Story County for more than a year with her husband and has not been served with notice to depart. It follows that she had a legal residence in Story County and because she had such legal residence, it is our opinion she may receive a widow's pension from Story County if the board of supervisors of that county, in its discretion, sees fit to allow it.

SENATE FILE 509: PERSONNEL OF MEMBERSHIP: RETRENCHMENT AND REFORM COMMITTEE: Senate File 509 of 48th General Assembly fails to change law with regard to creation of Retrenchment and Reform Committee; committee consists of chairman of Judiciary No. 1 in the Senate and chairman of Judiciary No. 1 in the House.

August 4, 1939. *Honorable C. Fred Porter, State Comptroller:* We have your letter of July 31st requesting an official opinion as to what constitutes membership of the committee on retrenchment and reform, with reference to the provisions of Senate File 509, Acts of the 48th General Assembly.

We believe that a proper understanding of the question here presented merits a review of the history of Senate File 509, Acts of the 48th General Assembly, as well as Chapter 218, Acts of the 39th General Assembly.

Omitting the formal parts of the bill, and that part contained in the publication clause, Senate File 509, as introduced in the Senate, provided as follows:

"Section 1. The chairman of each of the committees on ways and means, judiciary and appropriations, of the Senate and House respectively, and two members from the Senate, to be appointed by the president of the Senate, and two members of the House to be appointed by the speaker of the House, at each regular session of the legislature, shall constitute a standing committe on retrenchment and reform. Any vacancy occurring in the committee while the legislature is not in session shall be filled by the presiding officer of the House in the event the vacancy occurs in the membership of said committee from the House, and by the Lieutenant Governor in the event the vacancy occurs in the membership of said committee from the Senate."

On April 24, 1939 (Senate Journal 1409) an amendment was filed to strike out all of the bill after the enacting clause and insert in lieu thereof the following:

"Section 1. Section thirty-nine (39) of Chapter 2 of the code of Iowa 1935 is hereby amended by striking the word 'chairman' from line 1 and inserting in lieu thereof the words 'chairman of each'.

"Section 2. Section thirty-nine (39) of Chapter 2 of the code of Iowa 1935 is further amended by adding thereto the following: 'Any vacancy occurring on the committee while the legislature is not in session shall be filled by the presiding officer of the House in the event the vacancy occurs in the membership of said committee from the House, and by the Lieutenant Governor in the event the vacancy occurs in the membership of said committee from the Senate.'

"Section 3. (Publication clause.)

On April 25th (Senate Journal 1420) the above amendment was adopted and immediately upon its adoption the bill was read a third time and placed

on its passage, and on the question "Shall the bill pass?" there were 36 ayes, no nayes, and 14 absent or not voting. Immediately there was an amendment to the title adopted and the title, as amended, was agreed to.

On the same day (House Journal 1757) the bill, as thus passed by the Senate and which was in content exactly as the amendment which was adopted above, was referred to the sifting committee and on the same day placed upon the calendar. (House Journal 1798.)

On April 26th (House Journal 1809) Blue of Wright offered the following amendments (House Journal 1810):

"1. Amend section 1, line 4, by striking the words 'of each'.

"2. Amend section 2 by inserting after the colon in line 3 the following: 'In case there is more than one committee for judiciary, ways and means or appropriations, the Speaker of the House or the President of the Senate shall designate the members to sit on the committee on retrenchment and reform.'"

This amendment was adopted and thereupon the bill was read the third time in the House and placed on its passage and passed with 83 ayes, 2 nays, and 23 absent or not voting.

On April 26th (Senate Journal 1484) the Senate refused to concur in the House amendments and by unanimous consent Senate File 509 was messaged to the House immediately.

On the same day, April 26th (House Journal 1835), Fisbaugh moved that the House recede from its amendments to House File 509. The motion prevailed and the House receded from its amendments. Thereupon Blue moved that the bill be read the third time now and placed upon its passage, which motion prevailed, the bill was read the third time and on the question, "Shall the bill pass?" the ayes were 56, nays 30, and the bill having received the constitutional majority was declared to have passed the House. (House Journal 1836.)

On April 26th the bill was signed by the president of the Senate and by the speaker of the House and on May 3rd signed by the governor.

The bill, as enrolled and signed by the president of the Senate and speaker of the House, was as follows:

"Section 1. Section thirty-nine (39) of Chapter two (2) of the Code of Iowa of 1935 is hereby amended by striking the word 'chairmen' from line one (1) and inserting in lieu thereof the word 'chairman'.

"Section 2. Section thirty-nine (39) of Chapter two (2) of the Code of Iowa of 1935 is further amended by adding thereto the following: 'In case there is more than one committee for judiciary, ways and means, or appropriations, the speaker of the house or the president of the senate shall designate the member to sit on the committee on retrenchment and reform. Any vacancy occurring on the committee while the legislature is not in session shall be filled by the presiding officer of the house in the event the vacancy occurs in the membership of said committee from the house and by the lieutenant governor in the event the vacancy occurs in the membership of said committee from the senate.'"

It will be seen from the foregoing that the bill, as enrolled, never passed the Senate but is in the exact form as it first passed the House with the House amendments which the Senate refused to concur in, and which the House receded from.

Section 15 of Article 3 of the Constitution of Iowa provides as follows:

"*Bills.* Sec. 15. Bills may originate in either house, and may be amended, altered, or rejected by the other; and every bill having passed both houses, shall be signed by the speaker and president of their respective houses."

Section 17 of Article 3 provides as follows:

"No bill shall be passed unless by the assent of a majority of all the members elected to each branch of the General Assembly, and the question upon the final passage shall be taken immediately upon its last reading, and the yeas and nays entered on the journal."

In other words the constitutional requirement is that bills, to become effective, must be passed in identical form by both houses of the legislature, a majority of all the members elected to each branch voting for its passage.

While there has been some diversity of opinion in the courts as to the right to attack an enrolled bill on some constitutional ground which does not appear on the face of the bill, the most recent pronouncements in the Iowa Supreme Court are that our constitutional provisions with reference to the passage of a bill are mandatory and that they must apply to and govern the people as well as all government agencies, including the legislature.

In the case of *Smith vs. Thompson*, 219 Iowa 888, 907, the Iowa court said:

"We are of the opinion that the rule should be that an enrolled bill which bears the signature of the presiding officers of both houses and the governor, and filed in the office of the secretary of state, is the exclusive and conclusive proof and evidence of the text of the law as announced in such bill. And that such bill cannot be impeached except and unless it shows upon its face that it violates some constitutional provision, or that it be shown, by records which the constitution requires to be kept by the legislature, that some mandatory provision of the constitution has not been complied with in its passage by the legislature, or the signing by the officers whose signatures the constitution requires to be attached thereto.

"All prior decisions of this court touching the questions here determined are overruled so far as they may conflict with the holding herein announcer."

Section 9, Article III of the Constitution of Iowa provides:

"Each house shall sit upon its own adjournments, keep a journal of its proceedings, and publish the same; * * *."

It will be seen from an examination of the record of Senate File 509 of the 48th General Assembly, as disclosed by the Journals of the House and Senate which are required to be kept under the provisions of the constitutional provision hereinbefore quoted, that the constitutional provisions requiring a bill to pass both houses of the legislature in identical form, were not complied with. The rule, as laid down in the case of Smith vs. Thompson, supra, has been approved in the case of *Scott vs. Board of Assessment and Review*, 221 Iowa 1060, 1066, and *State vs. Woodbury County*, 222 Iowa 488, 490. It is also in accord with what the court said in *Conly vs. Dilley*, 153 Iowa 677, 693, wherein the court said:

"It may be that if the record affirmatively disclosed the adoption of an amendment which does not appear in the enrolled bill, or that such bill did not receive a constitutional majority of either house, or other vital defect of that nature, the court would not be bound to accept the enrollment and publication of an alleged statute as a finality."

In view of the foregoing record contained in the journals of the House and Senate and kept in accordance with the mandatory provisions of the constitution requiring same, which discloses unequivocally that the bill as enrolled, was as originally amended by the House, which amendments were not concurred in by the Senate and were receded from by the House, and that the same never passed the Senate, and the further consideration that in our opinion this falls squarely within the pronouncements of the court in Smith vs. Thompson, supra, we are constrained to hold that Senate File 509 is of no vitality

as a legislative enactment and is in fact no enactment of the legislature because the procedure it took in the legislature was not in accordance with the mandatory provisions of the Constitution and therefore does not affect the membership of the committee on retrenchment and reform.

Senate File 509 being no enacement of the legislature, we must then turn to Chapter 218, Acts of the 39th General Assembly, and from it determine who constitutes the committee on retrenchment and reform. Section 2 of Chapter 218, Acts of the 39th General Assembly, provides as follows:

"The chairman of the committee on ways and means, judiciary, and appropriations, of the senate and house, respectively, and two members from the senate, to be appointed by the president of the senate, and two members from the house, to be appointed by the speaker of the house, at each regular session, shall constitute a standing committee on retrenchment and reform."

From a reading of this section with Section 40 of the Code, we find that the chairman of the committee on ways and means, judiciary, and appropriations of the two houses, and two members of the minority party of the Senate appointed by the president of the Senate, and two members of the minority party of the House appointed by the speaker of the House, constitute the committee. However, in both the House and the Senate of the 48th General Assembly there are two committees on judiciary, and in each house for the purposes of designation they are known as committee on judiciary Number 1, and committee on judiciary Number 2, and the query is, do the chairmen of both judiciary committeees in each house serve on the committee on retrenchment and refarm, or only the chairman of one of the judiciary committies in each house, and if only one, which one?

In determining this question it should be borne in mind that none of the committees of either house of the legislature is provided for by statute (except the joint committee on retrenchment and reform).

The committees in each house are the creatures of that house, and authority for each house to create its own committees is found in Section 9 of Article III of the Constitution, which provides:

"Each house shall * * * determine its rules of proceedings * * *; and shall have all other powers necessary for a branch of the General Assembly of a free and independent state."

In other words, each house of each legislative assembly has the power and does provide for such committees as it deems necessary or proper, without any statutory provisions.

Thus it will be seen that at the time of the passage of Chapter 218 of the Acts of the 39th General Assembly in 1921, there was but one judiciary committee in the Senate and but one judiciary committee in the House. This 39th General Assembly must necessarily have considered but one judiciary committee chairman. The next legislature and every succeeding legislature thereafter down to and including the 48th General Assembly created the two judiciary committees in the Senate, and the 41st, 42nd and 45th (Extra) General Assemblies created two judiciary committees in the house. The records of the legislatures that have followed the 39th General Assembly disclose that at no time did the two chairmen of the judiciary committees serve on the retrenchment and reform committee.

The practice seems to have been that the chairman of judiciary No. 1 should always be a member of the retrenchment and reform committee unless for

some reason, he could not, or did not serve, and in one or two such instances the chairman of the judiciary No. 2 was designated by the president of the Senate to serve on the retrenchment and reform committee. There is not a single instance where the chairmen of the two committees served on the retrenchment and reform committee.

In construing this statute we think it only right to set forth this legislative history, and upon this showing it seems clear that the legislature's intention was to have the chairman of judiciary No. 1 the sole member of the retrenchment and reform committee, with the possible exception that where he did not or could not serve, the chairman of judiciary No. 2 would take his place. In no instance did they both serve as members of the retrenchment and reform committee. As was said in the case of *O'Conner vs Murtagh*, 281 N. W. 455, where the court had under consideration the legislature's intent with regard to continuing appropriation statutes and where the court delved into the legislative history of such appropriation statutes, the court said:

"This 69 or more years of legislative history is quite eloquent of the legislature's intent and practice. * * In construing statutes, and ascertaining the intent of the legislative branch of the government, the courts will take into consideration the settled practices of a legislative body. State vs. Clausen, 78 Wash. 103, 138 P. 653. And if there is one outstanding feature in the legislative history that has been outlined, it is the fact that every succeeding biennial legislature, without exception, has made specific appropriations for salaries of the attorneys general."

We feel in this case that it can be said that this legislative history shows a settled practice since the 39th General Assembly act of 18 years ago to place upon the retrenchment and reform committee the chairman of judiciary No. 1. There is some authority for the practice of placing on the judiciary committee at least in one instance the chairman of judiciary No. 2 when, for some reason the chairman of judiciary No. 1 did not serve. But this history shows conclusively that it has never been the practice to place both chairmen on the retrenchment and reform committee, although judiciaries No. 1 and No. 2 were created in the Senate in the 40th General Assembly and after the adoption of Chapter 218 of the 39th General Assembly.

As previously pointed out in the first part of this opinion, Senate File 509, Acts of the 48th General Assembly, fails to change the law with regard to the creation of the personnel of the retrenchment and reform committee, and we are therefore of the opinion that the law, as it stood prior to the 48th General Assembly, and based upon the legislative history, provided that the chairman of judiciary No. 1 be a member of the committee on retrenchment and reform. Consequently the chairman of judiciary No. 1 in the Senate and chairman of judiciary No. 1 in the House should be the only judiciary chairmen on the retrenchment and reform committee.

STATE FIRE MARSHAL: FIRE FIGHTING EQUIPMENT: CONTRACT FOR RENTAL: Legislature may give city authority to make a contract for an unlimited period. Municipal council may bind its successors in office. Election placing levy on township to support fire department is binding on new board of trustees and they must pay the town for services.

August 4, 1939. *Mr. Karl W. Fischer, Commissioner, Department of Public Safety. Attention: John W. Strohm, State Fire Marshal:* This will acknowledge

recepit of your letter of the 1st inst., wherein you ask the opinion of this department relative to the following:

"Will you kindly give us your written opinion on the following questions relative to the provisions of the new law authorizing the purchase of fire fighting equipment by townships, H. F. No. 71, 48th G. A.?

Paragraph 1, Section 1, H. F. No. 71, provides:

"'(1) The township trustees of any township may purchase, own, rent, or maintain fire apparatus or equipment and provide housing for same and furnish services in the extinguishing of fires in said township, independently or jointly with any adjoining township, likewise authorized as herein provided, or with any city or town."

"In the event that a city or town buys a fire truck and the township pays a certain amount of, say, $150.00 per year rent for the use of said fire truck when needed, then during the course of said rental period, an election is held and the members of the board of trustees are defeated, would that break the rental contract originally made by the outgoing members of the board?

"Also, if an election is held and a levy carried by the township to support the fire department and the new board of trustees refuses to pay the town for services, would the election be binding on the new board of trustees?"

It has been held that in the absence of any constitutional restrictions, the legislature may give to a city authority to make a contract for an unlimited period. *Belfast vs. Belfast Water Co.*, 115 Me. 234.

In the absence of limitation, either by charter or general statute, contracts have been sustained as valid when made for a reasonable term of years. *Hall vs. Cedar Rapids*, 115 Iowa 199.

Under the general rule a municipal council may bind its successors in office for a term of years where such contract is made in the exercise of its proprietary or business powers. *Red Oak First National Bank vs. Emmetsburg*, 157 Iowa 555.

We are, therefore, of the opinion that any contract permitted by law made by the incumbent board of township trustees is binding upon their successors. In other words, the contract made by the trustees is one between the township and the city. The fact that the trustees cease to hold the office does not have any effect whatsoever on the contract. The municipalities are the real parties to the contract. These are still in existence and the obligation, therefore, continues. The trustees in making the contract merely act as representatives of the municipalities in which they respectively hold office. This is a fundamental principle of law.

With reference to the question contained in the last paragraph of your letter, have to say that there can be no question but that the election is binding on the new board of trustees.

TAXATION: HOMESTEAD CREDIT: NON-RESIDENTS: No homestead credit should be allowed to any person who has not a legal domicile in this state regardless of whether or not the occupancy of the dwelling continues for more than six months.

August 7, 1939. *Hon. C. B. Akers, Auditor of State, State House, Des Moines, Iowa:* We are in receipt of your request for an opinion with regard to the right of granting homestead credit to persons who are citizens of other states but who reside in a dwelling house in this state more than six months of the year. The particular question has arisen by reason of the fact that certain persons who are really residents of Omaha and live in Omaha during the winter months

and have their voting residence in Omaha actually live in cottages around the shores of Lake Okoboji for more than six months of the year.

We are of the opinion that under the provisions of Chapter 195, Acts of the 47th G. A. homestead credit for such persons should be denied. The evident intent of the legislature as shown by the preamble to this act is that the homestead credit will encourage and foster home ownership and occupancy and the legislature felt that the creating of the benefits of homestead credit would arrive as the result of increasing that class of home owners and occupiers.

The homestead credit fund is made up of tax collected under our three-point tax system which includes income tax. These Omaha residents contribute nothing to income tax in Iowa and their contribution to sales tax is only the incidental contribution of all non-residents who sojourn in the state of Iowa for a portion of a year. The obvious intent of the legislature was to give the benefit to the owner of the dwelling who occupied the same "as a home." Such a person who occupies the dwelling house for a portion of the year is not occupying the dwelling house as a home when that person's domicile is in another state, where his real home is located and where he votes and pays taxes.

We are of the opinion that no homestead credit should be allowed to any person who has not a legal domicile in this state regardless of whether or not the occupancy of the dwelling continues for more than six months.

SALARIES: COUNTY AUDITOR: COUNTY TREASURER: DEPUTY SHERIFFS: KEOKUK—SPECIAL CHARTER CITY: LEE COUNTY: County auditor and county treasurer are entitled to additional salary not to exceed $300, to be fixed by board of supervisors of Lee County, provided special charter of Keokuk has not been abandoned. Salary of deputy sheriff at Keokuk not to exceed $1,500.00, as well as salary of deputy sheriff at Fort Madison, under Section 5227. No provision authorizing compensation for deputy sheriff for house rent.

August 9, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: Mr. L. I. Truax:* This is in answer to your letter of the 1st inst., wherein you ask our opinion as to the following matters:

"We are in receipt of the following letter from our examiner, Mr. McKay, regarding the salary of county officials in Lee County:

" '1. What should be the annual salary of the county auditor of Lee County? (Population, 41,268.)

" 'Code Section 5220-8 provides for an annual salary of $2,800.00. Code Section 5220-12 provides that he may receive an additional $300.00 if the county contains a "special charter city." Keokuk (population 15,106), was originally a special charter city, but sas been under the commission plan of government tor a number of years.

" '2. If the auditor is entitled to receive this additional $300.00, should not the same be authorized by the board of supervisors, as the Code uses the term "may receive"?

" '3. What should be the annual salary of the county treasurer?

" 'Code Section 5222-8 provides for $2,800.00. Code Section 5222-12 makes the same provision as is made for the county auditor for an additional $300.00.

" '4. The county sheriff received an annual salary of $2,200.00 (Code Section 5226-6) and lives in and maintains the county jail at Keokuk. His first deputy receives an annual salary of $1,430.00, or 65 per cent of $2,200.00 (Code Section 5227-3), and lives in and maintains the county jail at Fort Madison.

" 'His second deputy, Mr. E. F. Dunlavey, lives at Keokuk and recives annually $1,625.00, which is listed as "salary and house rent." Should Mr. Dunlavey's salary be set by the board of supervisors (Code Section 5227-1), or is he entitled to receive $1,430.00 under Code Section 5227-3?

"'5. Is Mr. Dunlavey entitled to receive additional compensation for house rent?

"'6. The third deputy sheriff lives at Fort Madison. Should he receive compensation under Code Section 5227-1, or Code Section 5227-3?'"

It is our opinion that the salary of the county auditor of Lee county is governed by Section 5220, Code of Iowa, 1935, subsections 8 and 12. Subsection 8 reads as follows:

"Each county auditor shall receive for his annual salary in counties having a population of: * * * 40,000 and less than 50,000, $2,800.00."

Subsection 12, provides:

"In counties over 50,000 population having two places at which the district court is held, $500.00 additional. In counties of over 25,000, having a special charter city, where the county auditor prepares and makes up the city tax books for such special charter city, he may receive not to exceed $300.00 additional compensation."

The base compensation, therefore, of the auditor in Lee county is $2,800.00 and he is entitled to an additional salary of $300.00 providing the county has within its borders a special charter city *"where the county auditor prepares and makes up the city tax books for each special charter city"* (italics ours).

There can be no question that the city of Keokuk in Lee county was at one time a charter city. It is equally true that at the present time it is operating under a commission form of government. (See 1937-38 Iowa Official Register, Page 367.) The troublesome question is as to whether the city of Keokuk is still a special charter city. In other words, does the fact that it has adopted a commission form of government have the effect of changing its status as a special charter city. This, as we view it, involves a fact question.

Section 6936, Code of Iowa, 1935, provides:

"Any city or town incorporated by special charter may abandon its charter and organize under the provisions of the general law, with the same territorial limits, by pursuing the course hereinafter prescribed."

Section 6937, Code of Iowa, 1935, provides:

"Upon a petition of legal voters, equaling ten per cent of the number voting at the last preceding municipal election of any such city or town, to the council, praying that the question of abandoning its charter be submitted to the legal voters, the council shall imediately direct a special election * * *."

Section 6938, Code of Iowa, 1935:

Section 6938, Code of Iowa, 1935, provides for notice. Section 6939 provides that at such election the proposition to be submitted shall be: "Shall the proposition to abandon the special charter of (naming the city or town) be adopted?" Section 6940 provides that "if a majority of the votes cast be in favor of the adoption of the proposition, the charter shall be abandoned * * *."

In our opinion, if the sections above set out have not been complied with in the city of Keokuk, it is still a charter city, for only by pursuing the statutory procedure above outlined can the character of the city government be changed. As we have above indicated, therefore, whether or not the city of Keokuk is still a charter city is a fact question to be determined by a perusal of the records in the office of the city clerk of said city. The fact that a commission form of government has been adopted in the city of Keokuk does not in itself destroy its charter. See *City of Keokuk vs. Kennedy*, 156 Iowa 680, wherein it was held: "Cities, including those organized by special charter, adopting the commission form of government, retain the powers previously exercised."

We are, therefore, of the opinion that the county auditor of Lee county is entitled to an additional salary of not to exceed $300.00, the amount thereof to be fixed by the board of supervisors. By this we mean that the board may allow him the full $300.00 or any fractional portion thereof in their discretion. As indicated, of course, this is on the condition only that the special charter of said city has not been abandoned by the statutory procedure hereinabove set out. Of course, we also call your attention to the fact that only "where the county auditor prepares and makes up the city tax books for such special charter city" is he entitled to the additional compensation. This is a fact question for your determination. The power of the board of supervisors to fix the extra compensation of the county auditor, under Section 5220, subsection 12, hereinabove quoted, is, we believe, governed by Section 5130, subsection 10, Code of Iowa, 1935, which reads:

"The board of supervisors at any regular meeting shall have power: 10. To fixe the compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of the same."

What we have herein said as to the auditor's salary applies in equal force to the salary of the treasurer, the provisions as to the salary of the latter officer being, in effect, indentical.

With reference to the salary of Mr. E. F. Dunlavey, second deputy sheriff, living at Keokuk, and where the sheriff lives in and maintains the county jail, we are of the opinion that his salary is governed by subsection 1, Section 5227, Code of Iowa, 1935, which reads:

"Each deputy sheriff shall receive as his annual salary in counties having a population of:

"1. Less than 50,000, and in any county where district court is held in but one place, not to exceed $1,500.00, fixed by the board of supervisors."

We do not believe that he is entitled to the salary provided in subsection 3 of Section 5227, which reads:

"3. In any county where district court is held in two places, for the chief deputy and for any deputy other than the chief deputy in charge of the office where such court is held outside the county seat, 65 per cent of the amount of the salary of the sheriff."

You will note that subsection 3 contains the following clause, "and for any deputy other than the chief deputy in charge of the office where such court is held outside the county seat." In other words, as we view it, the deputy to be entitled to 65 per cent of the amount of the salary of the salary must be in charge of the office. The sheriff lives in and maintains the jail at Keokuk, and we assume, therefore, that he is in charge of the office. In this connection we desire to say that whether Lee County is a place where district court is held in two places or has two county seats, is a question we need not at this time determine, in view of our interpretation of subsection 3 of Section 5227. If the county seat is at Fort Madison and Keokuk is merely a place where district court is held, then the deputy at Keokuk would receive 65 per cent of the amount of the salary of the sheriff were he in charge of the office but, as we above indicated, he is not in charge of the office, and, therefore, in no event could he receive 65 per cent of the amount of the salary of the sheriff.

We reach the conclusion, therefore, that the board of supervisors should fix the salary of Mr. Dunlavey at not to exceed $1,500.00, as provided by subsection 1, Section 5227.

With reference to payment of house rent to Mr. Dunlavey, deputy sheriff, have to say that we know of no provision authorizing payment of house rent to deputy sheriffs, under the circumstances outlined in your letter. It is, therefore, our opinion that he is not entitled to house rent.

As to the third deputy sheriff who lives at Fort Madison, we are of the opinion that his salary also is governed by subsection 1, Section 5227, Code of Iowa, 1935, for clearly Fort Madison is a county seat. Whether or not it is the only county seat, we need not, as we have heretofore indicated, at this time determine. His salary is clearly not governed by subsection 3 of Section 5227, for the reason that he is not "in charge of the office where such court is held outside the county seat."

APPROVAL OF EXAMINER'S ACCOUNT BY AUDITOR OF STATE: SENATE FILE 2: AUDITS BY EXAMINERS: Approval by governing body of political subdivision being examined is not a condition precedent to approval of examiner's account by auditor of state and comptroller.

August 10, 1939. *Mr. Chet B. Akers, Auditor of State:* We have your inquiry as to the proper application of the provisions of Senate File 2, Acts of the 48th General Assembly, insofar as this act provides for and affects the making of audits upon petition, and the payment of the examiners for making same.

Section 3 of this act re-enacts Section 124 of the Code and, as thus enacted, provides that any township or municipal corporation which is not required to have an annual audit may, on application to the auditor of state, secure an examination of its financial transactions and conditions of its funds, or that a like examination shall be had upon the application of 100 or more taxpayers, or if there are fewer than 500 taxpayers, then of 5 per cent thereof.

Section 5 of Senate File 2 repealed and enacted a substitute for Section 125 of the Code, which now reads as follows:

"125. Where the examination is made by the state auditor under the provisions of this chapter and this act, each examiner shall on the completion of any such examination file with the local governing body a detailed itemized and sworn voucher of his per diem and expense, which expense shall not exceed the sum of three dollars ($3) per day for the time such examiner is actually engaged in such examination, which statement or voucher shall be subject to approval by such governing body and when so approved shall be forwarded to the Auditor of State, and when approved by the Auditor of State and State Comptroller, shall be paid from any unappropriated fund in the State Treasury. Repayment to the State shall be made as provided by section one hundred twenty-six (126) of the Code."

Section 6 of Senate File 2 provides as follows:

"Upon payment by the state of the per diem and expenses aforesaid, the auditor of state shall at once file with the warrant-issuing officer of the county, school or city, whose offices were examined, a copy of the vouchers so paid by the state. Upon audit and approval by the board of supervisors, city, county, or school board, the said warrant-issuing officer shall draw his warrant for said amount on the general fund of the county, school, or city in favor of the auditor of state, which warrant shall be placed to the credit of the general fund of the state. In the event of the disapproval of any items of said vouchers by the county, school, or city authorities, written objections shall be filed with the auditor of state and said disapproved items of said vouchers shall not be paid to the auditor of state until changed and final approval is given.

"Whenever the county board of supervisors, the school board, or the council

shall file written objections with the auditor of state, he or his representative may hold a public hearing in the city where the examination was made, on the question of compensation and expenses, and shall give the complaining board notice of the time and place of hearing. After such hearing he shall have the power to reduce the compensation and expenses of the examiner and assistant examiner whose bills have been questioned. Any examiner or assistant examiner who shall be found guilty of padding his per diem or expense account shall be immediately discharged by the auditor of state and shall not be eligible for reemployment in either position. Such examiner or assistant examiner must thereupon reimburse the auditor of state for all such compensation and expenses so found to have been overpaid to him and in the event of his failure so to do, the auditor of state may collect the same amount from the examiner's bondsman by suit, if necessary."

Your problem arises by reason of the fact that an audit was made of a municipal corporation which is not required to have an annual audit, upon the petition of the requisite number of taxpayers, and after the audit was completed the city council refused to approve the statement or voucher of per diem and expenses of the examiners, which approval is provided for in Section 5 of Senate File 2 quoted above.

From a reading of Section 5 and Section 6 of Senate File 2 it would appear that the governing body of a county, school, or city has an opportunity to express its approval or disapproval of the cost of the examination both before and after the payment of the examiners by the auditor of state.

We do not believe that the legislature, by the enactment of Senate File 2, intended to enact legislation either inconsistent or unworkable. If the approval of the governing body of the political subdivision, provided for in Section 5 of the act, is to be construed as an absolute condition precedent to the approval of the examiner's statement by the auditor of state and the comptroller and the payment of same, then the provisions in Section 6 of the act for the filing of objections after payment, would appear to be so much surplusage. Under the provisions of Section 6 of the act, after payment of the the examiner's account has been made and same has been certified to the warrant-drawing officer of the political subdivision examined, the local political subdivision may express its disapproval of any items by filing written objection with the auditor, and thereupon a hearing on the objections takes place. It would appear from reading these two sections together that it was the intent of the legislature to provide for approval of the examiner's statement of per diem and expense in the first instance, and not as a condition precedent to the approval of the payment of same by the state, but as lodging in the auditor of state and comptroller a basis for the exercise of discretion in the event in their judgment a disapproval by the local governing body should be recognized before payment is made. But if in their discretion they should determine that the withholding of approval by the local governing body is not bona fide, but is arbitrary or capricious, then if in their judgment the statement of the examiner is proper, payment of same may be made, and the local governing body as to reimbursement by it to the state, is nevertheless protected by the provisions of Section 6 of the act.

A conclusion that approval by the local governing body, provided for in Section 5, is an absolute condition precedent to the forwarding of the statement of expense of the examiner to the auditor of state, to its approval of same by the auditor and comptroller, and to the payment of same, would most assuredly make unworkable in many instances the provisions that part of

Section 3 of the act which provides for an audit upon petition. When the petition audit is made, it is highly improbable that the governing body of the political subdivision being thus audited will be in sympathy with the making of the audit. It is not presuming too much to expect that in some, if not all, of such instances the governing body would refuse its approval of the examiner's statement of per diem and expense. If such a condition were permitted to exist it would be but a short time until it would be impossible to make any audits on petition because the approval of the local governing body would be withheld and then the examiners could not be paid, and of course there would be no way to put in operation the provisions of Section 6 of the act, they having to do with objections to reimbursement by the local body after the examiner has been paid. The provisions of Section 3 for petition audits would thus be entirely nullified. The courts will interpret statutes to give effect to all of their provisions, if possible.

The purpose of Sections 5 and 6 of this act is manifestly to protect the state and the particular subdivision being examined from the payment of excessive per diem and expense, and is not to be interpreted so as to permit the governing body of any political subdivision to arbitrarily or capriciously impede or prevent the making of examinations which the act specifically provides for.

To hold that the approval by the local governing body, provided for in Section 5 of the act, is an absolute condition precedent to payment would mean that all the provisions of the act could not be given effect.

It is therefore our conclusion and opinion that approval by the governing body of the political subdivision being examined which is provided for in Section 5 of Senate File 2, is not a condition precedent to approval of the examiner's account by the auditor of state and comptroller and payment of same, if in the judgment of these officers payment should be made without the approval of the local governing body.

JUDGMENT FOR COSTS: LIEN ON REAL ESTATE FOR COSTS JUDGMENT: The lien on real estate for costs judgment expires at the same time the judgment proper expires. Section 11602 and Section 11007-7.

August 12, 1939. *Mr. Maurice E. Rawlings, County Attorney, Sioux City, Iowa:* This will acknowledge receipt of your letter of the 9th inst., asking our opinion on the following legal question:

Does the statute of limitations relative to judgments operate as against the court costs which have accrued in any particular case?

You say:

"We realize that this inquiry probably presents two separate questions. In this respect, we have in mind Section 11602 which has to do with the matter of the lien of a judgment as against real estate and also Code Section 11007, subsection 7, which has to do with the complete 'expiration' of a judgment."

We are of the opinion that if the judgment is barred the costs are barred.

In the case of *State Insurance Co. vs. Griffin*, 84 Iowa 602, the court held:

"The costs cannot be tacked onto the judgment so as to suspend the operation of the statute of limitations; and Callender could not, by omitting to cause the fee-bill to be issued, prolong the statute of limitations, even if the remedy by motion were exclusive."

In 15 *Corpus Juris*, 107, paragraph 219, it was held:

"Inasmuch as costs are incident to a judgment, a discharge in bankruptcy discharges the costs * * *."

Citing *Clark vs. Rowling*, 3 N. Y. 216; *Graham vs. Benton*, 1 Wils. C. P. 41.

Section 11602, Code of Iowa, 1935, provides:

"Judgments in the supreme or district court of this state, or in the circuit or district court of the United States within the state, are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire, for the period of ten years from the date of the judgment."

Section 11007, subsection 7, provides that judgments of courts of record, whether of this or any other of the United States, or of the federal courts of the United States are barred after twenty years.

It will be observed that the courts have held that costs are an incident of the judgment proper. If the judgment is barred it would follow, therefore, so it seems to us, that the costs can not be collected.

The case of *Payette et al. vs. Marshall County*, 163 N. W. 592, sustains the conclusions herein reached. We quote from that case:

"Appellants further assert claim to a lien under the terms of Code, Section 2422, which provides that judgments for fines and costs for violating the liquor laws may be collected as a charge against the property, both personal and real, used or occupied, for such unlawful purpose, and that such charge shall be a lien on the property until paid. We shall not attempt to consider the extent or effect of the lien thus provided for by statute except to say that we think it ought not, and cannot, be construed to provide a perpetual lien on the property. There is nothing in the statute which excepts such a judgment from the general statute which limits the effective life of a judgment of a court of record to the period of 20 years, and, in our opinion, the lien mentioned must be held to expire with it. The issue joined as between defendants and appellee Hoes relates to a subsidiary matter which an affirmance upon the other issues renders of no importance at this time."

We reach the conclusion that the lien on real estate for the costs judgment expires under Section 11602, after ten years and that under Section 11007, subsection 7, the judgment for costs is barred at the same time as the judgment proper, to wit: After twenty years.

AUDUBON COUNTY: BOARD OF SUPERVISORS: BONDING COMPANY: COUNTY FUNDS: FUNDS: (Section 1176.) The conclusion, based on the contract itself, made and entered into with the bonding company, is that the contract was entered into as a means of evading the force of Section 1176, and the same would be illegal.

August 14, 1939. *Honorable Chet B. Akers, Auditor of State. Attention: Mr. Truax:* We are in receipt of your request for an opinion upon the following situation:

The board of supervisors of Audubon County entered into a contract with a bonding company providing for the payment of $675.00 by Audubon County to the said bonding company for services in connection with a bond issue of $72,000.00 by Audubon County. The written contract lists ten different items of services and supplies to be furnished by the said bonding company. These items consisted of securing certified statements of indebtedness and property valuation, analyzing the financial conditions of the county, selection of the most desirable methods for the proposed financing, working out a schedule of maturities within statutory limits, arranging and preparing and furnishing the necessary forms for all proceedings and instructions for an election, if an election is necessary, furnishing forms and instructions for notices required

by statute, furnishing lithographed printed bonds in denominations of $1,000.00, furnishing forms of proceedings and necessary certificates to be used in marketing the bonds, preparing transcript of proceedings for submission to Chapman & Cutler for examination and rendering any other service and furnishing additional forms incident to the performance of a complete bond service.

The question is whether or not such an expenditure of county funds is proper in view of Section 1176 of the 1935 Code of Iowa.

Section 1176 of the 1935 Code of Iowa provides as follows:

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

It is followed by Section 1177, which provides:

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

The two sections above were passed by the 40th General Assembly, being House File No. 576. There does not seem to be any decision of the supreme court of Iowa interpreting these sections, but Section 1176 seems to be clear and the intent of the legislature is forcibly expressed in Section 1177 placing a criminal liability upon the officer who violates Section 1176.

While there is nothing in the contract to the effect that the bonds are to be sold to the bonding company that signed the contract, still it does seem that this no doubt was the plain intent. The contract does not provide for a commission to be paid to the bonding company, but it does seem to fall within the prohibition of the second sentence of Section 1176 for the expenses to be paid contain items which could well be classed as "expenses * * * in connection with such sale."

We of course do not know all of the facts surrounding the transaction between the bonding company and the board of supervisors, but our conclusion, based on the contract itself made and entered into with the bonding company, would be that the contract was entered into as a means of evading the force of Section 1176, and the same would therefore be illegal.

FUNERAL CLAIM: OLD AGE ASSISTANCE: SOCIAL WELFARE: Sections 3828.021, 3828.022 and 3828.023, 1939 Code. Claim for funeral benefits is preferred claim and it has precedence over any claim for last illness for the reason that you may rely on the lien feature of the law rather than on the second class claim feature. Legislature intended to impress the lien upon the real estate of recipient during lifetime just the same as a mortgage.

August 15, 1939. *State Department of Social Welfare, Des Moines, Iowa. Attention: H. H. Bittinger:* We have your letter of August 14th, wherein you state the following hypothetical case and ask for our opinion on the following question:

"Assume that a recipient of old age assistance dies without a surviving spouse and leaves real estate and personal property. Petition of administration is filed at the proper time by the state as a creditor, and likewise a claim is filed against the estate for assistance payments made during the lifetime of the recipient; and in addition thereto, a claim is filed for funeral benefit paid by the state and which it holds as assignee from the undertaker who performed the services. Against this estate there are filed claims for last illness and claims for debt.

"Assume further that there are insufficient funds from the assets of the estate to pay the cost of administration, last illness, funeral, old age assist-

ance claim on file and claims filed for other debts due by the estate of the decedent.

"The question in respect to the above is as to whether or not the claim filed by the state for the funeral becomes a part of the lien against the real estate in the estate and as such takes preference against the proceeds from the sale of the real estate ahead of the claim for services performed during last illness.

"The further question involved in this hypothetical case is whether or not the lien of the state represented by a claim filed against the estate is of such a nature as in effect may preclude the real estate within the estate from being sold to pay any debts against the estate, including the costs of administration, except prior lien of record, unless authorized by the State Board of Social Welfare of Iowa."

For the purposes of this opinion, we quote in part from Section 3828.021, Funeral Expenses, as follows:

"Any funeral expenses thus paid by the division shall become a part of the claim for assistance paid the individual recipient of old age assistance and shall be collectible under the provisions of sections 3828.022 and 3828.023."

We also quote in part from Section 3828.022: *Deduction from estate:*

"On the death of a person receiving or who has received assistance under this chapter or of the survivor of a married couple, either or both of whom were so assisted, the total amount paid as assistance, shall be allowed as a lien against the real estate in the estate of the decedent and as a claim of the second class against the personal estate of such decedent, in the event the estate is admitted to probate. Neither the homestead nor the proceeds therefrom of such decedent or his survivor, shall be exempt from the payment of said lien or claim, any act or statute to the contrary nothwithstanding. The filing of its claim against the estate shall not constitute a waiver of the right of the state board, in behalf of the state, to maintain an action by equitable proceedings to foreclose upon its lien against a homestead left by deceased as well as any other real estate situated within the state of Iowa, and belonging to the estate of the deceased."

We also quote in part from Section 3828.023: *Transfer of property to the state:*

"In any event, the assistance furnished under this chapter shall be and constitute a lien on any real estate owned either by the husband or wife for assistance furnished to either of such persons. * * *

"Any action to enforce an old age assistance lien shall be by equitable proceedings."

In answer to your first question, we are of the opinion that it was the intent of the legislature to make any claim for funeral benefits a part of the lien which is against the real estate of the deceased recipient, and that said claim should be lumped together with any claim for old age assistance furnished during the lifetime of the recipient and should be collected as part of the lien against the real estate if the personal property is not sufficient to cover the payment of said claim. In other words, we are of the opinion that the claim for funeral benefits is a preferred claim and takes precedence over any claim for last illness for the reason that you may rely on the lien feature of the law rather than on the second class claim feature. We are of the opinion that the legislature intended to impress the lien upon the real estate of an old age recipient during his lifetime just the same as if that recipient had given a mortgage on said real estate, and as a result, the lien must be paid ahead of any other claims, preferred or not.

In answer to your second question, it is our opinion that that question should be answered in the same manner as your first question and that is, that unless the State Board of Social Welfare authorizes the taking out of

the proceeds of the sale of real estate belonging to the deceased old age recipient, the lien of the State Board of Social Welfare, for assistance granted, should be preferred as against all other debts or claims, preferred or classified, except those which constitute a prior lien of record.

TRANSCRIPT: INDUSTRIAL COMMISSIONER: The industrial commissioner is without authority to advance the expense of a transcript. The burden is upon the parties litigant to properly present their law suit in order that the commissioner may arrive at a just conclusion.

August 15, 1939. *Hon. John T. Clarkson, Industrial Commissioner:* You recently propounded the following for an opinion from this department, to wit:

"(1) Assuming that in a meritorious case, based upon the facts recited relating to financial condition of the employee, the industrial commissioner upon his own motion exercises the power conferred by Section 1443, then and in such case do the words 'shall be paid for by the party requesting it' apply and intended to apply to the industrial commissioner?

"(2) If yea, may the commissioner order the payment for the transcript to be made out of our appropriated departmental funds with the understanding that if thus drawn and expended, will be taxed as costs in the case and returned to the fund if and when collected?"

Section 1443 of the Code of Iowa, 1935, provides:

"1443. Transcript of evidence—compensation. The official shorthand reporter appointed for any hearing before the commissioner or a board of arbitration on written request by either party to the controversy, or by the commissioner, shall make a transcript of the evidence or so much thereof as shall be requested, to be paid for at the rate of not to exceed ten cents for each one hundred words. The transcript shall be paid for by the party requesting it, and if used as the record of the evidence on a review or appeal, the expense shall be taxed as part of the costs against the losing party, or apportioned as the case may be."

The expense of a transcript, as provided for in the foregoing, no matter who orders it, must be taxed as costs against the losing party, and while the law provides that a request may be made for the transcript by the commissioner, no provision is made for payment for same, except that the expense shall be taxed as costs.

Section 11622, Iowa Code, 1935, provides:

"11622. Recoverable by successful party. Costs shall be recovered by the successful against the losing party."

Section 11631, Iowa Code, 1935, provides:

"11631. Transcripts—retaxation. The fees of shorthand reporters for making transcripts of the notes in any case or any portion thereof, as directed by any party thereto, shall be taxed as costs, as shall also the fees of the clerk for making any transcripts of the record required on appeal, but such taxation may be revised by the supreme court on motion on the appeal, without any motion in the lower court for the retaxation of costs."

We are inclined to the view that "as directed by any party thereto" means one of the litigants.

In the case of *Democrat vs. Independent*, 161 Iowa 566, Justice Deemer made use of the following language:

"As costs were not taxable at common law, it is fundamental that they cannot now be taxed in the absence of a statute providing therefor, and as a rule, statutes granting the power are strictly construed, and implied authority to tax is not generally recognized."

It has been held by our courts that neither a court of law nor of equity

has inherent power to tax costs to the losing party in any action. Costs are allowed in the state in favor of the successful against the losing party by Section 11622, supra.

The taxing of costs seems to be based on the general principle that costs expended by the successful party, because of the acts of the losing party, should be repaid by said losing party.

Section 1442 of the 1935 Code of Iowa provides:

"1442. Appointment of reporter. If either, or both parties to any proceeding hereunder shall furnish compensation for a shorthand reporter in such reasonable amount as the commissioner shall fix, the commissioner shall appoint a reporter to report the proceedings of any hearing before the commissioner or a board of arbitration. The amount so paid shall be taxed as other costs. Any such reporter shall faithfully and accurately report any proceeding for which he or she shall be employed."

It will be observed that only if either, or both, parties shall furnish compensation, etc., shall the commissioner appoint a reporter to report proceedings, upon which the amount so paid shall be taxed as other costs.

Referring to the question of the commissioner advancing expense necessary to pay for transcript in case neither litigant is willing that the commissioner make the order for the transcript through his request, our attention is called to Section 22 of Chapter 1, Laws of the 48th General Assembly, as follows:

"Sec. 22. For the department of the industrial commission there is hereby appropriated for each year of the biennium beginning July 1, 1939, and ending June 30, 1941, the sum of thirty-eight thousand three hundred dollars ($38,300.00) or so much thereof as may be necessary, to be used in the following manner:

"For salary of the industrial commissioner.....$ 3,300.00

"For salaries, support, maintenance, compensation and miscellaneous purposes 35,000.00

"Grand total of all appropriations for all purposes for each year of the biennium for the department of the industrial commission.....$38,300.00"

and Sections 63 and 64, Chapter 1, Laws of the 48th General Assembly, as follows:

"Section 63. For the office of the industrial commissioner there is hereby set aside from the primary road fund the sum of twenty thousand dollars ($20,000.00) annually, for use in paying all claims of employees of the state highway commission who are injured or killed while on duty, as provided in chapter 70, of the Code of 1935.

"Sec. 64. For the office of the industrial commissioner there is hereby set aside from the liquor control act fund the sum of ten thousand dollars ($10,000) annually, or so much thereof as may be necessary, for use in paying all claims of employees for the liquor control commission who are injured or killed while on duty as provided for in section 1418, Code of 1935."

Neither of the last two above sections make a specific appropriation to the industrial commissioner for the purpose of paying for a transcript.

The use of appropriations is prescribed by Section 84-e29 of the 1935 Code, as follows:

"84-e29. Misuse of appropriations. Any board member, commissioner, director, manager, building committee, or other officer, or person connected with any institution, or other state department or establishment as herein defined, to which an appropriation is made, who shall expend any appropriation for any purpose other than that for which the money was appropriated, budgeted and allotted or who shall consent thereto, shall be liable to the state for such sum so spent, and the sum so spent, together with interest and costs, shall be recoverable in an action to be instituted by the attorney general for the use

of the state, which action shall be instituted in the district court of Polk county."

After a careful review of this question, we are of the opinion that the commissioner is without authority to advance the expense of a transcript.

The burden is upon the parties litigant to properly present their law suit in order that the industrial commissioner may arrive at a just conclusion.

SCHOOLS: TRANSPORTATION: NON-RESIDENT: If the board is fully reimbursed for the pro rata cost of transportation for non-resident students, it is proper and legal for it to furnish such transportation.

August 16, 1939. *Miss Jessie M. Parker, Superintendent of Public Instruction:* In reply to your letter of August 15th, in which you say:

"Taxpayers in a consolidated school district object to the board sending the district owned school busses outside the district to pick up non-resident students and transport them to and from the consolidated school. The board is fully reimbursed for the pro rata cost of transportation for such non-resident students."

we beg to call your attention to Section 4277 of the 1935 Code of Iowa, which reads in part as follows:

"4277. Tuition fees—payment. The school corporation in which such student resides shall pay from the general fund to the secretary of the corporation in which he shall be permitted to enter a tuition fee of not to exceed nine dollars per month during the time he so attends, not exceeding a total period of four school years.

"The tuition rate chargeable to the home district of such nonresident high school pupil shall not exceed the pro rata cost and shall be computed solely upon the basis of the average daily attendance of all resident and nonresident pupils enrolled in such high school, but it shall not include the cost of transportation to high school or any part thereof, unless the actual pro rata cost of such tuition is less than the maximum rate authorized by law, in which case the board of the district that is responsible for the payment of such tuition may, by resolution, authorize the payment of such portion of transportation costs as does not exceed the difference between the actual pro rata cost of high school tuition and the maximum rate authorized by law, provided the creditor district collects any balance of such transportation cost from the parents whose children are transported. Transportation costs shall, in all cases, be based upon the pro rata cost of all pupils transported to school in such district.

"It shall be unlawful for any school district maintaining a high school course of instruction to provide nonresident high school pupils with transportation to high school or normal college unless the district is fully reimbursed therefor, as provided in this section, or to rebate to such pupils or their parents, directly or indirectly, any portion of the high school tuition collected or to be collected from the home district of such pupils, or to authorize or permit such pupils to receive at the expense of the district, directly or indirectly, any special compensation, benefit, privilege, or other thing of value that is not and cannot legally be made available to all other pupils enrolled in such high school."

It is our opinion that if "the board is fully reimbursed for the pro rata cost of transportation for such nonresident students" it is proper and legal for it to furnish such transportation.

ITINERANT MERCHANT: ESTABLISHED PLACE OF BUSINESS: The home of a salesman where he maintains his stock and carries on his business permanently and in good faith is clearly an established place of business; a salesman transporting merchandise within 350-mile radius to a place of

business operated by him, is not an itinerant merchant for the reason that the transportation of the merchandise is incidental to his place of business.

August 16, 1939. *Mr. Geo. C. VanNostrand, County Attorney, Fairfield, Iowa:* Your letter of August 1, 1939, inquiring our opinion upon the following matter, is herewith acknowledged.

"1. Is the home of a salesman who keeps a full supply of products on hand for retailing an established place of business within Section 1, subsection (a) (5) of House File 155?

"2. Is such salesman purchasing products and general supplies direct from a factory, and from his supplies on hand retailing to places of business within 350 miles of his home an itinerant merchant?

"3. If your answer to the first question is 'no' and to the second question 'yes,' what physical requirements such as telephone, sign, office, and size of stock on hand would be required to establish a place of business?"

For the purpose of this opinion, we quote from Chapter 209, Acts of the 48th General Assembly, which is House File 155:

"Section 1. *Definition of the included class.*

"(a) When used in this act:

"(5) 'Established place of business' shall mean any permanent warehouse, building, or structure, at which a permanent business is carried on throughout the year or usual production or marketing season in good faith, and at which stocks of the property being transported are produced, stored, or kept in quantities reasonably adequate for, and usually carried for the requirements of such business, and which is recognized as a permanent place of business. It shall not mean tents, temporary stands or other temporary quarters.

"(b) The term 'itinerant merchant' shall not mean or include the following:

"(2) A person transporting property when such transportation is incident to a business conducted by him at an established place of business operated by him, either within or without this state, and when said property is being transported to or from said established place of business, and when the entire course of such transportation extends not more than three hundred and fifty miles from said established place of business; provided, however, that when the entire course of said transportation is for the purpose of delivery of said property subsequent to sale thereof said three hundred and fifty miles restriction shall not apply."

Answering question 1, it would appear that the home of a salesman where he maintains his stock and carries on his business permanently and in good faith is clearly an established place of business within the definition of the statute. The apparent purpose of the statute is to avoid an exemption to those who fraudulently set up a business front in order to escape the requirement of the act. There can be no doubt but what the salesman in question operates his business from his home in good faith and it is our opinion, therefore, that such a place of business is an established place of business within the meaning of the statute.

Answering question 2, the salesman in question is not an itinerant merchant within the meaning of the act for the reason that the transportation of his merchandise is incidental to a business operated by him and such merchandise is being transported either to or from his place of business, as the case may be, within a three hundred and fifty mile radius. The exception of the statute was evidently designed to exempt local merchants doing business from their own local established place of business within a three hundred and fifty mile radius from the requirement of the act. That the legislature intended that usual commerce such as the buying and selling of goods either at wholesale or retail in connection with such place of business should not

be restricted is indicated by the three hundred and fifty mile limitation, as it placed no mileage restriction upon the carriage of goods or merchandise for delivery only.

Because of our answer to questions 1 and 2, question 3 becomes moot.

MOTOR VEHICLE: LICENSE: NONRESIDENT: A nonresident operating a motor vehicle with a valid operator's license of his home state in his immediate possession, is exempt from the requirements of Section 205 by the specific exception of subsection 3 of Section 207.

August 16, 1939. *Mr. Archie R. Nelson, County Attorney, Cherokee, Iowa:* Your letter of July 29, 1939, inquiring our opinion on the following matter, is herewith acknowledged.

"An arrest was made by two patrolmen stationed here and an information filed charging an 18 year old boy with operating a motor vehicle without a valid operator's license. This boy who was living in Illinois had a valid Illinois driver's license in his possession. He was visiting his mother who was ill and was driving a car owned by a person who was riding with him. At a hearing yesterday I moved the court for a continuance pending an opinion by your office.

"The question, therefore, is: If a non-resident of this state, having in his immediate possession a valid operator's license issued to him in his home state, driving a motor vehicle in this state which motor vehicle is registered in this state, and driver as an operator only, is he guilty of a violation of Section 205 of the Iowa Motor Vehicle Law, or does he come within the exemption set forth in Section 207 of said law?"

For the purpose of this opinion, we quote from Chapter 134, Acts of the 47th General Assembly, as follows:

"Sec. 205. *Operators and chauffeurs licensed.* No person, except those hereinafter expressly exempted shall drive any motor vehicle upon a highway in this state unless such person has a valid license as an operator or chauffeur under the provisions of this chapter. No person shall operate a motor vehicle as a chauffeur unless he holds a valid chauffeur's license.

"Sec. 207. *Persons exempt.* The following persons are exempt from license hereunder:

"3. A nonresident who is at least sixteen years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country may operate a motor vehicle in this state only as an operator."

From an examination of the above statutes, it appears that Section 205 is the general requirement obligating all motor vehicle operators and chauffeurs to be licensed and that Section 207 qualifies Section 205 by providing the exemptions thereto. Section 207 provides in subsection 3 that a nonresident who is at least sixteen (16) years of age and who has in his immediate possession a valid operator's license issued to him in his home state or country may operate a motor vehicle in this state as an operator. This is a specific exemption which governs over the general statute.

The exemption is, therefore, controlling and inasmuch as the nonresident driver in question was operating the motor vehicle with a valid operator's license of his home state in his immediate possession, it is our opinion that he is exempt from the requirements of Section 205 by the specific exception of subsection 3 of Section 207. That the driver was operating a motor vehicle licensed in Iowa does not seem to us of importance.

INSTRUCTION PERMIT: MINORS: PERMIT: A minor between the ages of fourteen (14) and sixteen (16) years may be granted an instruction permit

provided the requirements of Section 214 of the Acts of the 47th General Assembly are met.

August 16, 1939. *Department of Public Safety. Attention: Karl W. Fischer:* Your letter of July 27, 1939, inquiring our opinion as to the following matter, is herewith acknowledged:

"Will you please furnish to this department an opinion as to whether an instructor's permit may be issued to a person over fourteen (14) and under (16) years of age.

"The question arises in passing upon an application by parent for instruction permit for a child, prior to making application for a school license permit."

For the purpose of this opinion, we quote the following sections of Chapter 134 of the Acts of the 47th General Assembly:

"Sec. 208. *Persons not to be licensed.* The department shall not issue any license hereunder:

"1. To any person, as an operator, who is under the age of sixteen years, except that the department may issue a restricted license as provided in Section two hundred twenty-five (225) to any person who is at least fourteen years of age.

"Sec. 210. *Instruction permits.* Any person who, except for his lack of instructions in operating a motor vehicle, would otherwise be qualified to obtain an operator's license under this chapter, may apply for a temporary instruction permit, and the department shall issue such permit, entitling the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the highways for a period of sixty days, but, except when operating a motorcycle, such person must be accompanied by a licensed operator or chauffeur who is actually occupying a seat beside the driver.

"Sec. 214. *Applications of minors.* The application of any person under the age of eighteen years for an instruction permit or operator's license shall be signed and verified before a person authorized to administer oaths by both the father and mother of the applicant, if both are living and have custody of him, or in the event neither parent is living then by the person or guardian having such custody or by an employer of such minor.

"Sec. 224. *Restricted licenses.* The department upon issuing an operator's or chauffeur's license shall have authority whenever good cause appears to impose restrictions suitable to the licensee's driving ability * * * including licenses issued under Section two hundred twenty-five (225) * * *.

"Sec. 225. Minors. Upon a written request of a parent or guardian, a restricted license may be issued to any person between the ages of fourteen and sixteen years, to be valid only in going to and from school."

Reviewing the sections above quoted, it appears that the legislature determined that no person under the age of sixteen (16) might be licensed as an operator of a motor vehicle with the one exception of school children between the ages of fourteen (14) and sixteen (16) years, who might be issued restricted licenses for the sole purpose of driving to and from school. The legislature recognized in addition, that before one otherwise eligible might acquire sufficient knowledge and ability to pass a driver's test, a certain training period would frequently be necessary and it, therefore, provided for instruction permits which entitle the applicant to operate a motor vehicle for sixty (60) days when accompanied by a licensed operator or chauffeur. Section 210 and Section 213 provide for instruction permits, the latter setting forth the requirements to be contained in the application of the instruction permit for minors.

There can be no question but what the restricted license provided for minors between the ages of fourteen (14) and sixteen (16) is an operator's license with certain restrictions attached and it is just as clear that the department

may, because of Sections 210 and 214 grant instruction permits to minors providing all the requirements of the application as set forth in Section 214 are met. One may not reasonably expect a minor of that age to have the knowledge and ability to pass a driver's test without instructions any more than one might expect an adult to have such knowledge and the legislature has in its wisdom provided for such contingency.

It is, therefore, our opinion that a minor between the ages of fourteen (14) and sixteen (16) years may be granted an instruction permit provided the requirements of Section 214 of the Acts of the 47th General Assembly are met.

BANG'S DISEASE: LEVY: It is mandatory upon the Board of Supervisors to make the levy provided in Section 21. The authority to determine the amount of the levy rests with the secretary of agriculture.

August 16, 1939. *Department of Agriculture. Attention: Mr. Thornburg:* Your letter of August 8, 1939, inquiring our opinion as to the following matter, is herewith acknowledged.

"Senate Fine No. 255, Acts of the 48th General Assembly, provided in part that each county in the state shall levy a tax sufficient to provide a fund to pay the indemnity and other expenses incurred in the eradication of Bang's disease at a levy not to exceed one-half mill in any year, the act further providing that such levy may be omitted should it appear to the secretary of agriculture that the balance in such fund is sufficient, with the county's allotment of state and federal funds, to carry on the work in such county for the ensuing year.

"The Board of Supervisors of Davis County have taken the position that the levy is discretionary with the county and need not be made should they determine that there will be no need for such a fund and if there is then such expense could be paid from the county general fund. We would, therefore, appreciate your opinion upon the following questions:

"1. Is the levy as provided by Senate File No. 255 mandatory?

"2. Does the authority to determine the amount of the levy to be made rest with the secretary of agriculture or with the county board of supervisors?"

For the purpose of this opinion, we quote from Chapter 87 of the Acts of the 48th General Assembly as follows:

"Sec. 2. *Rules and regulations.* The department may make rules and regulations respecting the official testing of cattle, the disposal by segregation and quarantine or slaughter of condemned livestock, the disinfection of the premises, the introduction into the herd of other cattle, the control and eradication of Bang's disease, the prevention of the spread thereof to the cattle of this state, and the proper enforcement of this act.

Sec. 21. *Eradication fund.* In each county in the state, the board of supervisors shall each year when it makes the levy for taxes, levy a tax sufficient to provide a fund to pay the indemnity and other expenses provided in this chapter, except as provided herein, but such levy shall not exceed one-half mill in any year upon the taxable value of all the property in the county.

"Sec. 22. *Collection.* Such levy shall be placed upon the tax list by the county auditor and collected by the county treasurer in the same manner and at the same time as other taxes of the county. The money derived from such levy shall be placed in a fund to be known as the "County Bang's Disease Eradication Fund," and the same shall only be used for the payment of claims as provided in this chapter.

"Sec. 23. *Report by auditor.* The county auditor of each county shall, not later than July 15 of each year, certify to the secretary of agriculture a report showing the amount in the Bang's Disease Eradication Fund on July 1 of each year.

"Sec. 24. *Levy omitted.* Should it appear to the secretary of agriculture that the balance in such fund is sufficient, with the county's allotment of state and

federal funds available, to carry on the work in such county for the ensuing year, he shall so certify to the county auditor, and, when such certification has been made, the board shall make no levy for such Bang's Disease Eradication Fund for such year."

From a review of Chapter 87 and particularly of Sections 21-24 of that chapter, it appears that the legislature determined that each county should raise a fund to be known as the Bang's Disease Eradication Fund, this fund to be joined with federal and state aid in the eradication of Bang's disease from that county and thus from the state. The specific duty of making rules and regulations, as well as doing all other things necessary to enforce the act was placed with the Department of Agriculture.

In answer to question 1, it is our opinion that it is mandatory upon the board of supervisors to make the levy provided in Section 21. The statute specifically provides that the "board of supervisors *shall* * * * levy a tax." The word "shall" is controlling, and reading this section with Section 24, it appears that only the secretary of agriculture may authorize the omission of this levy. The board of supervisors, therefore, has no discretion but must make the levy in accordance with the direction of the statute.

In answer to question 2, the authority to determine the amount of the levy rests with the secretary of agriculture. It is his duty and responsibility to enforce the act and only he may authorize an omission of the tax. It is from his knowledge and information that the work of eradication is carried on and only his department has such a comprehensive acquaintance with the disease throughout the state that a coordinated effort may be made at the proper times and places as the disease may require in order to cause its eradication. Inasmuch as the department alone has the responsibility of eradicating Bang's disease, then, therefore, only the department would necessarily have the proper knowledge to determine what part of a levy not to exceed one-half mill should be made by the county. The secretary of agriculture may, if he determines it wise, authorize an omission of the levy, but until he does the board of supervisors must make the levy and in accordance with his direction. To determine otherwise would serve to defeat the purpose of the act and would seriously hinder, if not completely prevent the work of the Agriculture Department in the eradication of the disease.

TAXATION: SALES TAX: GREENHOUSE: FUEL: Fuel not used to create heat used in processing is not exempt from the retail sales tax.

August 16, 1939. *Iowa State Horticultural Society. Attention: Mr. R. S. Herrick:* Your letter of July 18, 1939, inquiring our opinion as to the following matter, is herewith acknowledged.

"* * * the use of fuel in creating heat in the greenhouse is part of the processing in the growing of plants and flowers, bringing them to a stage of development where they can be sold * * *.

"We would deem it a favor if you would please give us a ruling as to whether or not our Iowa greenhouse operators should continue to pay the retail sales tax on fuel used for greenhouse purposes, where the flowers are sold at retail and the retail sales tax is collected on such sales."

For the purpose of this opinion, we quote in part from Chapter 196, Acts of the 47th General Assembly as amended by Senate File No. 113, Acts of the 48th General Assembly:

" 'Retail sale' or 'sale at retail' means the sale to a consumer or to any person

for any purpose other than for processing * * * Tangible personal property is sold for processing within the meaning of this subsection only when it is intended that such property * * * shall be consumed as fuel in creating heat, power or steam for processing or for generating electric current."

The quoted subsection provides that certain tangible personal property used for processing shall be exempt from the retail sales tax and among such exceptions is tangible personal property sold for processing to be consumed as fuel in creating heat. The evident purpose of the legislature in excepting tangible personal properties used in processing was to avoid a tax both upon such property and upon the finished product.

There can be no question but that the use of heat is essential to the proper growth of plant life in a greenhouse and because of such necessity the heat derived from the fuel used becomes an essential to the proper development and growth of the plant life. May it, therefore, be said that the fuel is consumed in creating heat for the processing of the product to the stage where it may be sold at retail?

The supreme court of Iowa has recently defined processing in connection with the growth of plants or vegetation in the case of *Kennedy vs. State Board of Assessment and Review*, (1937) 276 NW 205, from which we quote:

"It appears to the court that the production of crops by means of fertilization and cultivation is a growing of the crops rather than a processing of crops. Processing as I understand the term is a change in the form of the article itself by artificial or natural means. *If a processor is one who is in the business of converting agricultural commodities into marketable form, then the grower is not a processor.* (Italics ours.) Technically speaking any change, chemical or otherwise, is a process, but I do not believe the legislature intended so strained a construction as to call the developing of crops by means of fertilizer a processing * * * As the court understands the matter, processing is some change made in the natural product as the curing of meats, canning of vegetables and it has been held that the glazing of an eggshell to better preserve the egg is a processing. The growing of the article is not in the common use of the term a processing, but some change in the article after it is grown by means of special treatment is a processing."

It would, therefore, appear from the definition of the court that the fuel here used in the creation of heat was not used in the processing of the plant life in the greenhouse. The heat is without question for the growth of such plant life and not for some particular change in the article after it is grown.

It is, therefore, our opinion that the fuel in question is not used to create heat used in processing and is, therefore, not exempt from the retail sales tax.

TAXATION: NOTICE: INHERITANCE TAX: (Sec. 7332) Notice to be given under Section 7332 is to be given by the inheritance tax appraisers and it is not the duty of the county attorney to prepare these notices or to take care of the serving of same.

August 17, 1939. *Mr. Clinton H. Turner, County Attorney, Clarinda, Iowa:* We have received your request for an opinion with regard to Section 7332 of the 1935 Code of Iowa. You inquire whether, under the above section, the county attorney should prepare the notice and take care of the serving of the same.

We are of the opinion that the notice to be given under Section 7332 is to be given by the inheritance tax appraisers and it is not the duty of the county attorney to prepare these notices or to take care of the serving of same.

BEER LICENSE: HOTELS: FEE FOR BEER LICENSE IN HOTELS: The permit fee for a Class "B" beer permit in a hotel of less than 100 rooms would be $100.00 (Section 1921-f117).

August 19, 1939. *Mr. L. H. Pine, City Solicitor, Atlantic, Iowa:* We have been prevailed upon to answer the request for an opinion contained in your letter of June 27th with regard to the license fee that a Class "B" licensee should pay to sell beer in a hotel with less than 100 rooms.

Under the provisions of Section 1921-f117, subsection 'c', specific provision is made that the permit fee for such a hotel Class "B" permit would be $100.00, and we are of the opinion that this is controlling.

The fact that the hotel in question has a street entrance to the room in which the beer is sold would be immaterial.

WPA LABOR: QUARRYING: AGRICULTURE LIME: LIME: The board of supervisors has full authority to use WPA labor in quarrying agriculture lime under Chapter 150 of the Acts of the 47th General Assembly.

August 22, 1939. *Hon. Fred Cromwell, State Senator, Burlington, Iowa:* Your letter of August 19, 1939, inquiring our opinion upon the following matter, is herewith acknowledged.

"We have a rather pertinent matter up before the board of supervisors and farm bureau, concerning the use of WPA labor in the quarrying of lime stone and lime dust for agricultural purposes.

"As some of the history concerning the matter, in the 47th General Assembly, the Legislature passed House File 147, or appearing in the session laws, Chapter 150, provided in brief, that the board of supervisors may acquire lime stone quarries and provide the labor for the same, and sell the lime stone to farmers. Under the provisions of this act, the cost of lime stone may be passed off by special assessments on the land where the lime stone is finally spread. The cost has been prohibitive for the average farmer, and it is taken advantage of only by the higher grade farmers who have the necessary funds to repair their soils.

"As a gesture in this direction, the U. S. congress in its past session just completed, passed Public Resolution No. 24 which is now a law. At the top of Page 2, provides as follows—'The production of lime and marl for fertilizing soil for distribution to farmers under such conditions as may be determined by the sponsors of such projects under the provisions of state law; enabling the WPA to cooperate with states in furnishing labor in lime stone quarries.' This particular amendment broadened the original terminology of the resolution so that it is applicable to all states, whereas in the original terminology it was applicable to the state of Wisconsin only.

"The question arising, is whether the WPA can under Chapter 150, provide labor in county quarries for the production of lime stone to be spread on agricultural lands."

For the purpose of this opinion, we quote from Public Resolution No. 24, Acts of the 76th Congress, as follows:

"Section 1. (a) In Order to continue to provide work for needy persons on useful public projects in the United States and its territories and possessions, there is hereby appropriated to the Works Projects Administration, out of any money in the treasury not otherwise appropriated, for the fiscal year ending June 30, 1940, $1,477,000,000 * * *.

"(b) The funds provided in this section shall be available for (3) * * * the production of lime and marl for fertilizing soil for distribution to farmers under such conditions as may be determined by the sponsors of such projects under the provisions of state law; * * *.

"Sec. 16. (a) In employing or retaining in employment on Work Projects Administration work projects, preference shall be determined, as far as practicable, on the basis of relative needs and shall, where the relative needs are

found to be the same, be given in the following order: (1) Veterans of the World War and the Spanish-American War and veterans of any campaign or expedition in which the United States has been engaged (as determined on the basis of the laws administered by the veterans' administration) who are in need and are American citizens; and (2) other American citizens, Indians and other persons owing allegiance to the United States who are in need."

And from Chapter 150 of the Acts of the 47th General Assembly, as follows:

"Sec. 1. The board of supervisors of any county where there is no privately owned quarry, or where a privately owned quarry in unable to supply limestone in the same amount and at the same price and terms, shall have the jurisdiction, power and authority, at any regular, special or adjourned session to establish, locate, acquire by purchase, condemnation or lease for the county use, any limestone quarry not at that time being operated by private individuals, corporations or associations, suitable for agricultural purposes * * *.

"Sec. 2. The board of supervisors shall have the authority and power to acquire such equipment as it shall deem necessary for the operation of any limestone quarry acquired for the production of agricultural lime.

"Sec. 4. The board shall have full power and authority to quarry, pulverize and sell or to purchase and resell to said farm owners in their respective counties, limestone for their use on their farms * * *.

Sec. 11. The board is specifically authorized to use relief labor in the production of agricultural lime as provided for in this act, but shall pay the prevailing labor scale for that type of work, customary in that vicinity."

Reviewing Chapter 150 and particularly the quoted sections, it is clear that the legislature determined that it was desirable that agricultural lime should be made available to the farm owners at the lowest possible cost and for that reason broad authority was vested in the board of supervisors of each county to provide from limestone quarries within the county, suitable agricultural lime for the use of the farmers. Public policy dictates that in an agricultural state all proper means shauld be used to preserve the land. Nevertheless, the actual operation as contemplated was found to be so costly that many prospective purchasers could not afford to buy or use the finished product.

Public Resolution No. 24 as passed by the 76th Congress provides that WPA labor may be used on projects of this nature under the provisions of state law. It will readily be seen that the cost of the agricultural lime to the farmer would be materially reduced if the labor used was without cost to the county. In addition, the intended purpose of the law would be more properly fulfilled by the agricultural lime being made available for the land of all farm owners at a price they could more nearly afford to pay. The use of WPA labor on such a project would also serve to relieve the county of a part of its relief load and at the same time would assist materially those requiring relief.

Chapter 150 provides no means by which the board of supervisors may select the labor for these projects. This is left entirely to their discretion. Section 11 provides specifically that relief labor may be used.

Because it enables the fulfillment of the intention of the legislature in allowing the farmer to fertilize his land, because of the many benefits accruing to the county and because it is entirely within the discretion of the board of supervisors as to what labor may be used considering at the same time their authority to hire relief labor, it is our opinion that the board of supervisors has full authority to use WPA labor in quarrying agricultural lime under Chapter 150 of the Acts of the 47th General Assembly.

EMERGENCY RELIEF: OLD AGE ASSISTANCE: MEDICAL CARE—1ST AND 2ND CALL: Sec. 3828.032: Administration of all relief in counties receiving state funds is in county board of social welfare. Medical care and payment of medical bills for relief clients are up to the discretion of the local board of social welfare rather than to the discretion of the county board of supervisors, as has always been the rule under Section 5329, 1935 Code.

August 23, 1939. *Mr. Pearl W. McMurry, County Attorney, Corydon, Iowa:* We are in receipt of your letter of August 19th, wherein you state the following facts and ask our opinion on same:

"The board of social welfare of Wayne county, Iowa, has passed a resolution to the effect that Wayne county will not be responsible under the emergency relief law which provides for emergency medical care for recipients of old age assistance for the first two calls.

"I have been asked by a local doctor as to the validity of this resolution and whether or not his bill for a first or second call can be collected from the emergency relief.

"I would very much appreciate an opinion from your office in answer to this question."

For the purposes of this opinion, we quote from Section 3828.032, 1939 Code of Iowa:

"No person receiving assistance under this chapter shall at the same time receive any other assistance from the state, or from any political subdivision thereof, except for fuel, dental, nursing, osteopathic, chiropractic, medical and surgical assistance and hospitalization * * *."

It will be noted that this provision is in the negative and implies that extra assistance, such as enumerated, will be supplied by a political subdivision of a state, presumably the county.

Senate File 476, 48th General Assembly, provided for the administration of emergency relief funds and it is silent as to the payment of any medical expense.

We are informed that Wayne County is one which receives the state emergency funds and as we have previously held, the administration of all forms of relief in counties receiving state funds is in the county board of social welfare. This leads us to the conclusion that medical care and payment of medical bills for relief clients are up to the discretion of the local board of social welfare rather than up to the discretion of the county board of supervisors as has always been the rule under Section 5329, 1935 Code.

We are, therefore, of the opinion that the resolution passed by the board of social welfare of Wayne County, as stated in your letter, is purely a matter within the discretion of the said county board.

TAXATION: LIEN ON STOCK OF GOODS: LANDLORD'S LIEN: CHATTEL MORTGAGE LIEN: (Section 7205): The lien created by Section 7205 has application to all stocks of merchandise, and is paramount and superior to all other liens even though the other liens are created prior to the creation of the tax lien.

August 23, 1939. *Mr. J. F. Wilson, County Attorney, Sac City, Iowa:* We are in receipt of your request for an opinion upon the following question:

"The question that has arisen in our minds is the meaning of said Code Section 7205. When it refers to taxes on stocks of goods and merchandise does this mean only the stocks of goods and merchandise found in hotels, restaurants, rooming houses, billiard halls, moving picture shows, etc., or does it mean stocks of goods and merchandise in any place of business?"

You also ask as to the priority of the lien created by Code Section 7205 over a chattel mortgage lien or lien created by a conditional sales contract or other lien created by law.

Section 7205 of the 1935 Code of Iowa provides as follows:

"*Lien follows certain personal property.* Taxes upon stocks of goods or merchandise, fixtures and furniture in hotels, restaurants, rooming houses, billiard halls, moving picture shows and theaters, shall be a lien thereon and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser, or vendee, and such owner, purchaser, or vendee of any such goods, merchandise, furniture, or fixtures shall be personally liable for all taxes thereon."

In looking at the history of this section of the law, we find that in Code Supplement of 1913 this was Section 1400 and at that time it read:

"* * * taxes upon stocks of goods or merchandise shall be a lien thereon and shall continue a lien thereon when sold in bulk any may be collected from the owner, purchaser, or vendee."

It will be noted that the amendment enlarged the scope of the lien to include "fixtures and furniture in hotels, restaurants, etc." In other words, the lien at first included all stocks of goods and merchandise, and the later amendment enlarged the lien to include fixtures and furniture in hotels, restaurants, etc.

In view of the above, we would be of the opinion that in answer to your first question the lien created by Section 7205 of the 1935 Code does have application to all stocks of merchandise.

With respect to your second question as to the priority of the lien created by Section 7205 we feel that the answer to this question involves an analysis of recent supreme court decisions.

In the case of *Linn County vs. Steele*, 223 Iowa 864, 273 N. W. 920, the lien under consideration was a conditional sales contract. In this case, Edith Steele owned a certain building used as a restaurant and the fixtures contained in said building. She sold the building and the fixtures upon a conditional sales contract reserving the right to possess until the full purchase price was paid. Four years later she repossessed the property but in the meantime taxes had been levied against the building which was located on leased ground and against the fixtures in the restaurant. She contended that since her lien under her contract was prior in point of time to the tax liens that she took said property free from the liens and she was successful in her contention in the lower court. The supreme court reversed the lower court and in an opinion written by Justice Hamilton, wherein Chief Justice Richards dissented, the court held the tax lien was a prior and paramount lien over the lien created by her contract. The case contained a good discussion of Section 7205 and Section 7206 and expressly overruled *In re Assignment of Cutler and Horgan*, 213 Iowa 983, 234 N. W. 238.

The court in this opinion recognizes the well established principle of law to the effect that whether this statutory lien is paramount to other liens upon the property depends upon whether the legislature intended it to be such, and this intent must be ascertained from the express language of the statute or by necessary implication, and then goes on to discuss a number of authorities and the language of the statutes involved. With regard to Section 7206, the statute that provides for the tax lien on property located on leased premises, the court held that the words "shall be and remain a lien * * *

until paid," showed the legislative intent to make the lien paramount and superior to all other liens.

With regard to Section 7205, the statute here under discussion, the court held that the words contained in said statute, "shall be a lien thereon and shall continue a lien thereon," indicated a legislative intent to make this lien paramount and superior to all other liens.

In view of the holding in the Linn County case, we are of the opinion that in so far as taxes upon stocks of goods, merchandise, fixtures, and furniture in hotels, restaurants, rooming houses, billiard halls, moving picture houses, and theaters, are concerned, the lien created by Section 7205 is paramount and superior to all other liens even though the other liens are created prior to the creation of the tax lien. We also refer you to a similar holding rendered by the attorney general's office under date of January 25, 1932.

Nothing in this opinion shall be construed as deciding any question of priority involving personal property tax lien arising under any statute other than Section 7205 of the 1935 Code of Iowa.

Amended opinion as to question 2 of opinion rendered to Mr. Pritchard on April 19, 1939.

August 24, 1939. *Mr. Elbert M. Prichard, County Attorney, Onawa, Iowa:* Under date of April 19, 1939, this office rendered an opinion to you wherein in answer to question No. 2 this department held in effect that the lien created by statute in favor of the landlord was senior to the lien provided in Section 7205 against a stock of goods or merchandise.

We now wish to withdraw that part of the opinion wherein the above was the holding and substitute in lieu thereof the holding in the opinion rendered under date of August 23, 1939, to Mr. J. F. Wilson, county attorney, Sac City, Iowa, a copy of which opinion we herewith enclose.

TUCK LAW: SECTION 5259: SOLDIERS' RELIEF FUND: Soldiers' Relief Fund is exempted from the operation of the Tuck law for the reason that subsection 4 of Section 5259 of the 1935 Code specifically provides that it shall not apply to expenditures for the benefit of any person entitled to receive help from public funds.

August 25, 1939. *Mr. George F. Mikesh, County Attorney, Cresco, Iowa:* We have your request for an opinion on the following:

"Under Section 5259 of the 1935 Code of Iowa, subsection 4 states as follows: Expenditures for the benefit of any person entitled to receive help from public funds. Does that exception apply and include soldiers' relief funds? It applies to poor funds but the question is whether or not it would apply to soldiers' relief funds."

It is the opinion of this office that the Soldier's Relief Fund is exempted from the operation of the Tuck Law, for the reason that subsection 4 of Section 5259 of the 1935 Code of Iowa specifically provides that it shall not apply to expenditures for the benefit of any person entitled to receive help from public funds.

Chapter 273 of the 1935 Code of Iowa provides for a tax for the relief of certain persons, the manner of disbursement, etc., so there can be no doubt that they are "persons entitled to receive help from public funds."

CHATTEL MORTGAGE: MARGINAL RELEASES: COUNTY RECORDER: FEE: Recorder had no right to charge fee of 25 cents for marginal release of chattel mortgages, which are only filed and not recorded. However, could charge for filing of release contained in separate instrument.

August 25, 1939. *Mr. Charles I. Joy, County Attorney, Perry, Iowa:* This will acknowledge receipt of your letter of the 23rd day of May, 1939, wherein you ask our opinion relative to the following question:

"Should the recorder charge a fee of 25 cents for a marginal release of a chattel mortgage?"

We are of the opinion that the county recorder has no right to make such a charge. Section 5177 of the Code of 1931, prior to the 43rd General Assembly, did not contain any provision for a fee on marginal assignments or releases. The bill by which that section of the Code was amended by the 43rd General Assembly, being H. F. 186, is as follows:

"An act amending Sections 5177 and 10115 of the Code, 1927, relating to marginal assignments or releases of mortgages, contracts or other instruments constituting encumbrances on real estate.

"Be it Enacted by the General Assembly of the State of Iowa:

"Sec. 1. That Section 5177 of the Code, 1927, be amended by adding thereto the following: '3. For every marginal assignment or release (except those made by the clerk of the district court) twenty-five (25) cents.'

"Sec. 2. That Section 10115 of the Code, 1927, be amended by adding thereto the following: 'As soon as a marginal assignment or release has been witnessed by the county recorder, the county recorder shall forthwith index the same just as though such assignment or release had been by separate written instrument.' "

You will note that H. F. 186, an act of the 43rd General Assembly, provides in the title that it amends Code Section 5177 and 10115 relating to Marginal Assignments or *Releases of Mortgages, Contracts or other instruments constituting encumbrances on real estate.* This act does not pretend to amend any part of Chapter 437 of the Code of 1927.

We wish to call your attention to Section 10031 of the Code of 1935, which fixes the fees to be collected by the county recorder under Chapter 437. This section reads as follows:

"The fees to be collected by the county recorder under this chapter shall be as follows:

"1. For filing any instrument affecting the title to or incumbrance of personal property, twenty-five cents each.

"2. For recording or making certified copies of such instruments, fifty cents for the first 400 words and ten cents for each 100 additional words or fraction thereof."

It will also be noted that in H. F. 186, the Acts of the 43rd General Assembly, no reference is made to Chapter 437 of the Code of 1927. The title expresses the purposes of the act, that is, that it is an amendment to certain Code sections relating to *marginal assignments* or releases of certain instruments constituting encumbrances on real estate.

This office is, therefore, of the opinion that the county recorder is not permitted to make any charge for a marginal release of a chattel mortgage which was only filed and not recorded. She would, however, be entitled to charge for the filing of a release contained in a separate instrument.

COUNTY AUDITOR: CLAIMS ALLOWED—GROUPED: BOARD OF SUPERVISORS: Auditor must show the name of each individual to whom county

warrant is delivered; the "bunching of claims" is illegal and contrary to statute.

August 25, 1939. *Mr. George H. Struble, County Attorney, Toledo, Iowa:* This is in answer to your letter of the 7th inst. wherein you ask our opinion relative to whether or not it is proper for the auditor's office to group claims when publishing the proceedings of the board of supervisors. For example:

Lake Quarry Payroll	$ 23.80
County Payroll	129.20
Dobson Quarry Payroll	220.10

Section 5412-a1, Code of Iowa, 1935, provides:

"All proceedings of each regular, adjourned or special meeting of boards of supervisors, including the schedule of bills allowed, shall be published immediately after the adjournment of such meeting of said boards, and the publication of the schedule of the bills allowed shall show the name of each individual to whom the allowance is made and for what such bill is filed and the amount allowed thereon. The county auditor shall furnish a copy of such proceedings to be published, within one week following the adjournment of the board."

It is our opinion that in order to comply with this statute the auditor must show the name of each individual to whom a county warrant is delivered. The above statute provides: "All proceedings * * * including the schedule of bills allowed, shall be published * * * and the publication of the schedule of bills allowed shall show the name of each individual to whom the allowance is made and for what such bill is filed and the amount allowed thereon."

These provisions, it seems to us, clearly make the "bunching of claims" illegal and contrary to the clear mandate of the statute.

We reach the conclusion, therefore, that the practice of your auditor, as set out in your letter, is not in compliance with this statute.

REA: BORROW DIRT PIT: TRANSMISSION LINES: Where transmission lines are placed on private land, the county would be liable for expense incident to resetting poles because of borrow dirt pit, but where poles are placed within the highway no such liability would exist against the county.

August 29, 1939. *Mr. Hubert H. Schultz, County Attorney, Primghar, Iowa:* This is in answer to your letter of the 3rd inst., wherein you ask our opinion relative to the following legal question:

"The Rural Electrification Association of O'Brien County, after obtaining a franchise from the state, has erected its electric transmission poles on the thirty-two foot line. O'Brien county, through the board of supervisors, has purchased a borrow dirt pit from the land owners of land adjoining these transmission poles. When the county takes this dirt the transmission poles of the REA will be left high or else their support will be taken away. In either case it will be necessary to reset these transmission poles. The question is: Is the county responsible and liable to the REA for the expense of resetting these poles? In the event that the poles were set on the thirty-four line, the REA having obtained an easement from the land owner to set the poles one foot from the fence line, would the county in this event be liable for the expense of resetting said poles?"

In answer to a letter of ours of the 16th inst. you furnished us with the following additional information:

"For your information, I am enclosing a sample contract similar to the ones that are being signed from time to time by land owners and the board of supervisors of this county in regard to borrow dirt pits. None of these contracts are recorded.

"The purpose in my writing to you originally was not to determine a spefific right in regard to a specific borrow dirt pit; rather, I was writing to determine a future policy. In giving your opinion you can assume that all the borrow dirt contracts are signed after the franchise of the REA to erect transmission poles along the highways of this county. Also, you may assume that all easements given by land owners to the REA to erect transmission poles upon the land were given and recorded prior to the signing of the contract between land owners and O'Brien county in regard to borrow dirt."

It is our opinion the county would be liable for the removal of the support for the REA poles in case number one, i. e., where the poles are erected on private property and where the easemnt to the REA is of record prior to the contract between the owner of the land on which the borrow pit is located and the county. In that case, so it seems to us, the REA would have a prior right and the owner of the land on which the poles are located, or about to be located, can only convey for borrow pit purposes subject to franchise of the REA. We might also add that if the poles are actually erected the county would have notice, irrespective of the recording of the easement, as it is a fundamental rule of law that actual possession of real estate places the grantee thereof on notice.

On your question number two, i. e., where the REA poles are placed inside the highway, we arrive at a different conclusion. These poles, as we know, are placed pursuant to terms of a franchise granted under Section 8309, Code of Iowa, 1935, by either the railroad commission or the board of supervisors. The county engineer locates the line under Section 4838, Code of Iowa, 1935.

It is our opinion that the granting of this franchise for the location of the line does not cast any restriction whatsoever on the use of the land of the adjoining owner. We believe that our view is supported by reason and logic as we do not feel that the railroad commission or the board of supervisors can grant to electric transmission companies a right that will in any way interfere with the full enjoyment of adjoining property owners' land.

Summing up our conclusions, we hold:

1. That where the transmission lines are placed pursuant to an easement on private land and the county either has constructive or actual notice of such easement, the county would be liable for the expense incident to resetting the poles.

2. Where, however, the poles are placed within the highway, no such liability would exist against the county.

TAXATION: PRIVATE CEMETERIES: CEMETERIES: It is within the discretion of the township trustees whether a private cemetery shall receive tax money levied and collected for its benefit.

September 1, 1939. *Mr. Melvin L. Baker, County Attorney, Humboldt, Iowa:* Receipt is acknowledged of your request for an opinion upon the following matter:

"Pursuant to Code Section 5562 Delana township and the town of Bode in Humboldt county have levied a tax for the maintenance of a cemetery in the town of Bode which is owned and operated by the Lutheran church of that town. At the time the town and the township began to levy this tax a couple of years ago it was understood that the cemetery was devoted to general public use. However, the church recently refused to sell a lot to a widow who intended to bury her husband on said lot if she expected to have a masonic ceremony at

the grave. She was advised that if it was intended that such a ceremony be had, that the sale of the lot could not be made to her.

"My question in regard to the situation and relative to which the town and township officers wish an opinion is as to whether or not they should continue to make a tax levy under the above section if any restrictions are to be placed upon the sale of lots. There has also come up the matter of turning over to the cemetery or the church tax moneys which have been levied and collected and now in the hands of the town clerk and township trustees. These funds represent taxes collected this year. It is my opinion that in view of the fact that the taxes have been levied and collected that they should be turned over in spite of the fact that it now appears that the cemetery is not open to general public use.

"With relation to the taxes to be levied this year the county auditor wishes an opinion as to whether or not the cemetery tax which has now been certified to the auditor but which has not been levied by the board of supervisors can be stricken from the proposed budget, providing, of course, such a request is made by the town and township."

Section 5562 is found in a group of statutes outlining the duties of township trustees with regard to cemeteries and this section provides as follows:

"5562. *Tax for nonowned cemetery.* They may levy a tax not to exceed one-fourth mill to improve and maintain any cemetery not owned by the township, provided the same is devoted to general public use."

The answer to your question must necessarily turn on the interpretation of the words in the statute: "Provided the same is devoted to general public use."

We will assume the bar of the Masonic rites at the grave is contained in some by-law or regulation of the private cemetery. This statute contemplates tax help for a private cemetery so the existence of by-laws or regulations governing the use of all private cemeteries was no doubt within the contemplation of the legislature. The use of the cemetery could still be a public use if any member of the community could be buried therein in conformity with reasonable rules and regulations previously adopted by the private cemetery.

We are of the opinion that this group of statutes place a good deal of discretion in the township trustees and such trustees know, or should have known, of the by-laws or rules or regulations governing the use of the private cemetery at the time they voted the tax levy.

We are not prepared to hold that any rule or regulation which was in force at the time the township trustees voted the tax aid disqualifies the private cemetery from receiving tax money levied and collected for its benefit. As we have stated, the matter lies largely within the discretion of the township trustees and we would therefore be of the opinion that the money already collected upon the levy should be turned over to the private cemetery and the question of whether or not a future levy should be voted for this cemetery would lie within the discretion of the township trustees.

Unquestionably, the trustees could rescind their action wherein such a levy was voted for this year, and in that event the board of supervisors could strike it out of the proposed budget.

TAXATION: INTEREST ON UNPAID TAXES: PENALTY ON UNPAID TAXES: DELINQUENT ROAD POLL TAXES: The penalty provided in Section 6233 does not render Sections 7214 and 7215 inapplicable, and the penalties provided in these later sections will apply as the penalty in Section 6233 only applies in event of an action by the municipal corporation. The

action contemplated in Section 6237 is the action by the city or town authorized in Section 6233.

September 1, 1939. *Mr. Clarence A. Kading, County Attorney, Knoxville, Iowa:* We are in receipt of your letter of August 18th requesting an opinion upon the following matter:

"Section 7214 and Section 7215 of the 1935 Code of Iowa provide for interest and penalty on unpaid taxes. Section 6233 provides for an action to recover delinquent road poll tax by a municipal corporation, which action may include a penalty of not more than $2.00. In view of the penalty clause in Section 6233, would Sections 7214 and 7215 apply in the case of delinquent road poll tax"

You also inquire as to whether the action for the recovery of delinquent road poll tax authorized in Section 6237 of the 1935 Code refers back to the action of the municipal corporation in Section 6233 providing for such an action by the municipal corporation, or wherether this action refers to the general action by the county treasurer to collect delinquent personal tax authorized in Chapter 346 of the Code.

In answer to your first inquiry, we find that Section 6233 is in Chapter 318 which authorizes the road poll tax and the manner of the collection of the same. Section 6233 provides as follows:

"6233. *Action to recover.* In case of failure to pay said sum of money as provided in Section 6231 said corporation may recover same, and penalty of not more than two dollars, by action brought in the name of such city or town in any court having jurisdiction over the subject matter of the action."

It will be noted that the above section authorizes the city or town to add to the delinquent tax a penalty of $2.00 when bringing action for the recovery of the same. Other sections in this chapter provide for the certification of this unpaid tax to the county auditor by the first day of December and that he shall then enter it upon the tax list and that it shall be "collected as ordinary county taxes."

We are of the opinion that the penalty provided in Section 6233 does not render Sections 7214 and 7215 inapplicable, but that the penalties provided in these later sections will apply as the penalty in Section 6233 only applies in the event of the action by the municipal corporation.

In answer to your second inquiry with regard to Section 6237 which provides, in substance, that the entry of the tax on the tax list shall not prevent the bringing of an action therefor has reference to the action authorized in Section 6233 and that even after the tax has been certified to the county auditor, the city or town may still bring the action authorized in Section 6233 if brought within one year from the first day of October following the giving of the notice by the city or town for the payment of said tax.

We quote below Section 6237:

"6237. *Action.* Then entry of such tax and penalty upon the tax list shall prevent the bringing of an action therefor as authorized by law. Such action must be commenced within one year from the first day of October following the giving of notice for the payment of said tax. When judgment has been rendered therefor and paid in whole or in part after the same has been certified to the county auditor, the court receiving such payment shall execute duplicate receipts, exclusive of costs, if so requested, and upon filing such receipt or duplicate with the county auditor he shall make the proper entries on the tax lists, showing the full payment of such tax and penalty, or part thereof as the case may be."

It will be noted in the above that all of the machinery is provided for the showing of the payment of the tax in the event the judgment in the action is paid.

We also call attention to the antecedent statute in the Code of 1897 where Section 892 first provided for this action, and is the antecedent statute for Section 6233 in the present Code, and the following section, Section 893, states in part as follows:

"* * * but the entry of such tax and penalty upon the tax list shall not prevent an action being brought therefor *as hereinbefore authorized.*" (Italics ours.)

In view of the above, it is our opinion that the action contemplated in Section 6237 is the action by the city or town authorized in Section 6233 of the 1935 Code.

TAX LISTS: PUBLICATION IN OFFICIAL NEWSPAPERS: Upon proper publication of tax lists, tax titles will be determined, and the county treasurer should obey the intent of the Legislature and publish the tax list in one newspaper only.

September 1, 1939. *Honorable Chet B. Akers, Auditor of State. Attention: Mr. L. I. Truax:* You have requested an opinion upon the following matter:

"We are in receipt of the following request from the county treasurer of Wapello county:

"Under Section 7246 would it be legal and proper to advertise the tax list in one paper on first publication and then change to some other or others for the second, or can I divide it on each publication between our five official papers?"

In view of the fact that Section 7246 of the 1935 Code provides for publication once each week for two weeks, we are a little at a loss to understand how any county treasurer could divide such a publication among five official papers. In view of our answer to this question, the suggestion of a division of publication between five papers will, however, be immaterial.

Section 7246 of the Code of 1935 provides for the publication:

"In some newspaper in the county once each week for two consecutive weeks."

It will be noted that this is singular. In Section 7249 the form of the certificate of publication is set forth, and this too, in form at least, denotes the legislative intent that the publication was to be in one newspaper.

We might also state that it is the duty of the county treasurer to secure this publication at the lowest possible price. It is well known that all newspaper rates are much higher for a single publication and the rates decrease for successive publications of the same material.

In view of the fact that upon proper publication, tax titles will be determined, we are of the opinion that the county treasurer should obey the manifest intent of the legislature and publish the tax list in one newspaper.

INFAMOUS CRIME: RESTORATION TO CITIZENSHIP: ELECTOR: Any person, charged with and convicted of crime where punishment may be imprisonment in penitentiary, is "convicted of infamous crime," and it is immaterial whether the court imposes penitentiary sentence or not, so long as he *may* do so.

September 1, 1939. *The Honorable Geo. A. Wilson, Governor of Iowa:* This will acknowledge receipt of your letter of the 31st ult., wherein you ask the opinion of this department relative to the interpretation of Article II, Section 5, Constitution of the State of Iowa, which reads:

"No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector."

You say in your letter:

"This information is needed in connection with certain applications for final discharge or restoration to citizenship, in some of which it appears that the applicant was not deprived of his privilege as an elector, by the conviction."

The answer to your question, of course, involves the interpretation of the phrase, "convicted of any infamous crime." In connection therewith, these questions present themselves: 1. Does conviction of a crime, the punishment for which may be imprisonment in the penitentiary or confinement in the county jail or the payment of a fine, deprive the person so convicted of the privilege of an elector? 2. In the event the court, exercising his proper discretion under the statute involved, imposes a jail sentence or a fine, is the person convicted subjected to the disabilities provided by the above quoted section of our statute?

We are of the opinion that any person charged with and convicted of the commission of a crime where the punishment may be imprisonment in a penitentiary or men's reformatory, is a "person convicted of any infamous crime," as provided in said Section 5, and we hold that it is immaterial, when a person is so convicted, whether the court imposes the penitentiary sentence or the jail sentence or fine provided for in the statute. It is also our opinion that even in the event the court suspends the sentence during the good behavior of the defendant, he is, nevertheless, deprived of the privileges of an elector. In other words, the true test to determine whether or not a person has been convicted of an infamous crime is whether the court *may* sentence him to the penitentiary or reformatory.

The following cases, as we view it, sustain our conclusion:

State vs. Clark, 56 Pac. 767, 60 Kan. 450;
Ex parte Wilson, 5 Sup. Ct. 935, 114 U. S. 417;
In re Mills, 10 Sup. Ct. 762, 135 U. S. 263;
United States vs. Johannesen (U. S.) 35 Fed. 411;;
Mackin vs. United States, 117 U. S. 348;
Ex parte McClusky (U.S.) 40 Fed. 71;
In re Claasen, 11 Sup. Ct. 735; 140 U. S. 200;
Stokes vs. United States, 60 Fed. 597;
United States vs. Maxwell, 26 Fed. Cas. 1221;
The Paquette Habana, 20 Sup. Ct. 290, 171 U. S. 677;
United States vs. J. Lindsay Wells Co., 186 Fed. 248;
Stevens vs. Wilber, 300 Pac. 329, 136 Ore. 599;
Parkinson vs. United States, 121 U. S. 281;
Blodgett vs. Clarke, 177 Iowa 575;
Flannagan vs. Jepson, 177 Iowa 393.

In the *Habana* case, above cited, the court said:

"Third. 'In cases of conviction of a capital or otherwise infamous crime.' This clause looks to the nature of the crime, and not to the extent of the punishment actually imposed. A crime which might have been punished by imprisonment in the penitentiary is an infamous crime, even if the sentence actually pronounced is of a small fine only."

In *ex parte Wilson, supra*, the defendant was confined in the house of correction at Detroit, in the State of Michigan, under a sentence to be imprisoned there for 15 years at hard labor, upon an information filed by the district attorney, charging the defendant with the crime of having published with the intent to sell an obligation engraved and printed as the similitude of securities issued under authority of the United States, to wit: An interest

bearing coupon bond. The case came upon a writ of habeas corpus. For the proper decision of the case, it was necessary to decide what constituted an infamous crime. The court said:

"But, for the reasons above stated, having regard to the object and the terms of the first provision of the fifth amendment, as well as to the history of its proposal and adoption, and to the early understanding and practice under it, this court is of opinion that the competency of the defendant, if convicted, to be a witness in another case is not the true test; and that no person can be held to answer, without presentment or indictment by a grand jury, for any crime *for which an infamous punishment may be imposed by the court.*" (Italics ours.)

"The question is whether the crime is one for which the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. When the accused is in danger of being subjected to an infamous punishment if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury.

In Words and Phrases, Volume 4, page 3574, first series, the following appears:

"But the supreme court of the United States settled that the test to be applied in determining whether an offense is an infamous crime is the character of the punishment which *may* (italics ours) be inflicted. It is, however, held that the real criterion to be applied in such cases is whether the crime is one for which the statute authorizes the court to award an infamous punishment and not whether the punishment ultimately awarded is an infamous one. If the accused is in danger of being subject to an infamous punishment, the crime is deemed to be infamous, although infamous punishment may not actually be inflicted. (Citing the greater number of the cases above cited by us.)"

In the same volume of Words and Phrases, page 3575, we read:

"The words 'infamous crime' have a fixed and settled meaning. In a legal sense they are descriptive of an offense which subjects a person to infamous punishment or prevents his being a citizen."

And the following:

"The character of an offense, whether infamous or not, is to be determined by the punishment, and at common law the deprivation of civil and political privileges was considered as an infamous punishment. It is said in Cooley Const. Law, Page 29, that the punishment of the penitentiary must always be deemed infamous, and so must any punishment that involves the loss of civil or political privileges. *Baum vs. State*, 157 Ind. 282."

In the case of *Stevens vs. Wilber*, *supra*, the court said:

"Infamous is defined as shameful or disgraceful. Punishment for violating liquor laws by confinement in penitentiary or imprisonment in county jail is infamous and words imputing charge so punishable are actionable per se."

In the case of *United States vs. J. Lindsay Wells Co.*, *supra*, the court said:

"As I understand the authorities, they hold in any offense, the punishment for which may be imprisonment in the penitentiary with or without hard labor, is an infamous crime' (citing cases). On an examination of the act under which this suit is instituted, I find that the punishment therefor is a fine not exceeding $200 for the first offense, and, upon conviction for each subsequent offense, not exceeding $300, or by imprisonment not exceeding one year, or both, in the discretion of the court.

"Under the authorities above cited, it is held that a defendant cannot be imprisoned in the penitentiary, unless the time for which he is sentenced shall be more than one year. Under the act of June 30, 1906, the imprisonment cannot exceed one year. Therefore, the court has no power to sentence the defndant to imprisonment in the penitentiary, because that would be in excess of the maximum time which the court is authorized to imprison a party for such offense. As I understand the authorities, they hold in substance that, where the court may imprison the accused for more than one year, the confinement

must be in the penitentiary, and that fact, with or without labor, makes the offense for the commission of which the accused is imprisoned an infamous crime. Upon the other hand, where the period of imprisonment is for one year or less, the court must imprison in a county jail, and in such case the crime is not infamous. If the court may imprison for more than one year, the crime is infamous. If for a year or less, it is not infamous."

In the *Blodgett case, supra,* the court said:

"To be eligible to an elective office created by the Constitution, a person must be a qualified elector. *State vs. Van Beek,* 87 Iowa 569. Section 5 of Article 2 of the Constitution of Iowa declares: 'No * * * person convicted of any infamous crime shall be entitled to the privilege of an elector.'

"Any crime punishable by imprisonment in the penitentiary is an 'infamous crime.' *Flannagan vs. Jepson,* 177 Iowa 393. As the punishment prescribed by statute for forgery is confinement in the penitentiary not more than 10 years, the offense is infamous."

We here pause to call to your attention that the punishment for forgery is as follows, Section 13139, Code of Iowa, 1935:

"* * * he shall be imprisoned in the penitentiary not more than ten years or imprisoned in the county jail not exceeding one year, or fined not exceeding one thousand dollars."

Thus it would appear that the Iowa court also has, inferentially at least, held that if the person is subject to be imprisoned in the penitentiary it is immaterial whether such imprisonment is in fact imposed. The court, in its discretion, may impose a fine only but the person convicted would, nevertheless, be "punishable" by imprisonment in a penitentiary.

In the *McClusky case, supra,* the court held:

"It is not necessary to make a punishment infamous, that the law should require that the party should in terms be sentenced to hard labor. If, under the law, he may be sentenced to a state prison or penitentiary, either with or without hard labor, his punishment is infamous." See also 31 Corpus Juris, 977.

In the case of *State vs. Clark, supra,* the court said:

"In some of the earlier decisions there was a tendency on the part of the courts to hold that the question of infamy was to be determined by the nature of the crime and not at all by the character of the punishment, but the supreme court of the United States settled that the test to be applied in determining whether an offense is an infamous crime is the character of the punishment which may be inflicted (citing cases). In *Ex parte Wilson,* supra, however, it was held that the real criterion to be applied in such cases is whether the crime is one for which the statute authorizes the court to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one. If the accused be in danger of being subjected to an infamous punishment the crime is deemed to be infamous, although infamous punishment may not be actually inflicted. If this rule be applied to the case under consideration, it results in the conclusion that Postlewaite was infamous and incompetent to testify. Grand larceny, being a felony, is ordinarily punishable by confinement and hard labor in the penitentiary. All agree that punishment of this character renders the convict infamous and disqualifies him as a witness. The punishment in the present case was, as we have seen, confinement in the industrial reformatory, and the character of the punishment and discipline there is reformatory rather than ignominious or infamous; however, the convict was subject to the infliction of the severer punishment. The statute under which he was sent to the reformatory does not arbitrarily fix the punishment; and whether he was sent to the penitentiary or to the reformatory was left to the discretion of the trial judge * * *.

"Since it is left to the discretion of the trial judge, and the accused is in danger of being subjected to an infamous punishment, it falls within the rule announced by the federal authorities. As the statutes authorize the court to award an infamous punishment, the convict is deemed to be infamous, although

the punishment actually administered be not infamous. In *People vs. Park*, 41 N. Y. 21, it was held that a person under sixteen years of age who was convicted of burglary in the third degree was incompetent to testify as a witness, although he was sentenced to the house of refuge established for the reformation of juvenile delinquents."

These cases, as we view it, amply support the conclusion herein reached.

HIGHWAY COMMISSION: WEEDS: It is the duty of the Highway Commission to destroy all noxious weeds on the rights-of-way of the primary road system outside cities and towns and to cut all weeds, noxious or otherwise, which is reasonably necessary in the proper maintenance of the highway.

September 5, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: W. H. Root:* This will acknowledge receipt of your communication of August 17, 1939, in which you request an opinion on the following question:

"What I would like to know is, whose duty is it to cut secondary noxious and ordinary weeds on the primary road rights-of-way?

"It has been the commission's policy for a good many years to keep these weeds out, but this year in some counties we have been a little slow in getting them out, and while we are not looking for an alibi, we wonder if the adjacent property owner has been relieved of his responsibility with reference to the cutting of such weeds."

Sections 4826, 4827 and 4829-a5, Acts of the 47th General Assembly, with which we are primarily concerned, are quoted as follows:

"4826. Each owner and each person in the possession or control of any lands shall cut, burn or otherwise destroy, in whatever manner may be prescribed by the board of supervisors, all noxious weeds thereon as defined in this chapter at such times in each year and in such manner as shall prevent said weeds from blooming or coming to maturity, and shall keep said lands free from such growth of any other weeds, as shall render the streets or highways adjoining said land unsafe for public.

"4827. The board of supervisors shall destroy primary noxious weeds growing in county, trunk and local county roads, and the highway commission shall destroy primary noxious weeds growing on primary roads. Nothing herein shall prevent the landowner from harvesting, in proper season, the grass grown on the road along his land.

"4829-a5. The board of supervisors shall order all weeds other than primary noxious weeds, on all county trunk and local county roads and between the fence lines thereof to be mowed to prevent seed production thereof, either upon its own motion or upon receipt of written notice requesting such action from any residents of the township in which such roads are located, or any person regularly using said roads. Said order shall define the roads along which said weeds are required to be cut and shall require said weeds to be cut within thirty days after the publication of said order in the official newspapers of said county. If the adjoining owner fails to cut said weeds as required in said order the county or township commissioner shall have same cut and the cost thereof shall be paid from the general county fund, and recovered later by an assessment against the adjoining property owners as provided in Section four thousand eight hundred twenty-nine-a six (4829-a6) hereof."

Section 4826 prescribes the general duty on the part of "each owner and each person in the possession or control of any lands" to cut, burn, or otherwise destroy noxious weeds. An opinion of a former attorney general, under date of July 16, 1938, interprets the word "person" to include cities and towns, and for the same reason we conclude that the Highway Commission is included within the scope of the phrase last above quoted.

Section 4827 specifically prescribes the duty of the Highway Commission to destroy primary noxious weeds growing on primary roads.

Section 4829-a5 makes no reference to any duty or obligation on the part of the adjoining owner to cut or destroy weeds on primary roads, nor do we find elsewhere in the act any specific provision prescribing such duty. A reasonable construction to be placed on this section seems to relieve the adjoining land owner from any duty to destroy weeds on primary roads. This construction is further supported by the fact that the legislature undoubtedly recognized the general obligation of the Highway Commission to maintain the primary roads outside of cities and towns—and under certain conditions inside the same—which necessarily includes the cutting of all weeds in the proper maintenance of the highway.

We conclude, therefore, that it is the duty of the Highway Commission to destroy all noxious weeds on the rights-of-way of the primary road system outside cities and towns by reason of the general duty improsed by Section 4826 and the specific provisions of Section 4827; and under its general obligations to maintain it is the further duty of the Highway Commission to cut all weeds, noxious or otherwise, which is reasonably necessary in the proper maintenance of the highway.

PERSONAL TAXES: COUNTY TREASURER: OLD AGE PENSION LAW—$2.00: Chapter 243, 48th G. A. relates to all personal taxes, including old age pension tax (now repealed) which are "personal taxes due and to become due the county."

September 7, 1939. *Mr. Frank Drake, County Attorney, Muscatine, Iowa:* This is in answer to your letter of the 6th inst., wherein you ask the opinion of this department relative to an interpretation of Chapter 243, Laws of the 48th General Assembly. You say:

"Will you pleased advice whether Chapter 243 covers such matters as the personal tax of $2.00 per year under the Old Age Pension law which every person had to pay until the law was repealed."

Section 1 of Chapter 243, Acts of the 48th General Assembly, reads as follows:

"No final report of the fiduciary shall be approved by any court unless there is attached thereto and made a part thereof, the certificate of the county treasurer of a county in which the estate is held by the fiduciary that all personal taxes due and to become due the county in such estate matter have been fully paid and satisfied."

It is our opinion that this chapter relates to all personal taxes. You will note that Section 1 of the act provides "that all personal taxes due and to become due * * * have been fully paid and satisfied." The employment by the legislature of these plain and unambiguous words, we think, should be construed to mean that the law making body intended that all personal taxes be included. Itis our opinion that an old age pension tax is "personal taxes due and to become due the county."

We reach the conclusion, therefore, that if the old age pension tax is unpaid, this would inhibit the treasurer from giving the certificate referred to.

SECTION 60, CHAPTER 1, Acts of the 48th G. A.: SECTION 1225-d1: Section 5, CHAPTER 131, Acts of the 48th G. A. Section 5, Chapter 131, Acts of the 48th G. A. applies to state officers and employees whom are being paid out of state appropriations and is not intended to repeal Section 1225-d1.

September 7, 1939. *Mr. Harold L. Martin, County Attorney, Hamburg, Iowa:*

Replying to your letter of September 5th, relative to Section 60, Chapter 1, Acts of the 48th General Assembly, and its effect on Section 1225-d1 of the 1935 Code of Iowa, I beg to advise you that the 1939 Code of Iowa will contain Section 1225-d1 as it now appears in the 1935 Code. Section 60, Chapter 1, being in the Appropriation Bill, will not be carried as a permanent law.

Section 5 of Chapter 131, Acts of the 48th General Assembly, will appear in the 1939 Code and reads as follows:

"No state officer or employee shall use any state owned car for his own personal private use, nor shall he be compensated for driving his own motor vehicle except if such is done on state business and in such case he shall not receive more than four cents per mile."

The last above citation applies strictly to state officers and employees who are being paid out of state appropriations and is not intended to repeal Section 1225-d1, which applies to public officers not paid out of monies appropriated by the General Assembly.

COUNTY ENGINEER: TRANSMISSION LINES: BOARD OF SUPERVISORS: County engineer can not under Section 4838 1935 Code, be required to make a survey to locate corner stones. Only duty of engineer or board is to locate new transmission or other lines with reference to highway lines already determined.

September 8, 1939. *Mr. Glenn L. Eichhorn, County Attorney, Montezuma, Iowa:* This is in answer to your letter of the 8th ult., wherein you ask the opinion of this department relative to the following legal question. You say:

"As I understand it, the REA people, at least in our county, are contending that this opinion, (Attorney General's opinion to Donald P. Chehock, dated May 17, 1939) makes it obligatory on the part of the county engineer to locate transmission lines, when the proper application has been made. It is my opinion that Section 4836 of the Code makes it mandatory on the county engineer to perform such services; however, here is a difficulty we are experiencing in this county.

"There are a number of miles of road where the REA people desire lines to be located, where there is no record of any corner stones, whereby the boundary lines of the highway may be located. Therefore, to locate the transmission line would involve quite an expenditure of time and money with a crew of surveyors, to make surveys in order that section stones might be properly located.

"Will you kindly clear this point as to whether it is the duty of the county engineer in such cases to locate lines by surveys which require the location of lost corners; or whether locating these lines has reference only to their relative position in respect to the highway in general."

It is our opinion that the county engineer can not, in discharging his duty under Section 4838, Code of Iowa, 1935, be required to make a survey to locate corner stones.

Section 4838, Code of Iowa, 1935, provides:

"New lines, or parts of lines hereafter constructed shall, in case of secondary roads, be located by the county engineer upon written application filed with the county auditor, and in case of primary roads, by the state highway engineer upon written application filed with the state highway commission, and shall thereafter be removable according to the provisions of this chapter. *If there be no county engineer, the board of supervisors, in case of secondary roads, shall designate said location.* (Italics ours.)

You will note that the above quoted statute provides that "new lines * * * shall * * * be located by the county engineer," and said section further provides, "if there be no county engineer the board of supervisors, in case of

secondary roads, shall designate said location." It will be seen that an answer to your question involves the interpretation of the phrase, "located by the county engineer," and also the phrase, "designate said location."

We are inclined to the view that it was the intent of the legislature, in enacting this statute, to merely place upon the county engineer, or upon the board of supervisors, as the case may be, the duty of determining where the transmission line was to be located with reference to highway lines already determined. We feel that the legislature did not intend to burden the county with the expense of making extensive surveys. You will note that if there be no county engineer, the board of supervisors shall designate said location. Manifestly, the board of supervisors would not be qualified to make surveys, so it is very clear that all that is required of the supervisors is that they advise the owners of the concern about to erect transmission lines where to place the poles with reference to an already determined line. If this is so where there is no county engineer, manifestly it would be illogical to say that the duty of the engineer was greater than that of the board of supervisors.

We reach the conclusion, therefore, that the only duty devolving on the county engineer or the board of supervisors, as the case may be, under Section 4838, is to merely locate the new transmission or other lines with reference to highway lines already determined.

SCHOOL: PROVISIONAL CERTIFICATE: COUNTY SUPERINTENDENT: Party cannot teach without a certificate and be paid out of the public school fund. The county superintendent has no power to issue a provisional certificate as that power is vested in the board of examiners.

September 9, 1939. *Mr. George B. Aden, County Attorney, Webster City, Iowa:* We have your letter of September 4th, in which you say:

"I have been requested for an official opinion relative to the authorization of permitting a music teacher to teach in public schools who does not hold a regular certificate.

"The teacher has taught music privately and in public schools for fourteen years in the state of Iowa, and prior to that in the state of Indiana. He has had collegiate work but does not hold any degree. He has made arrangements to teach in a rural independent grade and high schools outside of the county. His usual method of teaching is to teach the scholars individually and also in a group in an orchestra or band. This is done under the supervision of another teacher in the schools or the grade school teacher, and the school boards, because they cannot afford to hire full time music teachers, have employed this party on a part-time basis. The scholars are privileged to get off during study periods to take their lessons and it is not a compulsory course in these schools.

"The teacher does not give any grades or approve of any credits for the music. If they are given, this is done by the certified teacher under whose supervision he works. This has been his usual method of teaching in the schools during the past years. Some question has been raised by the school boards as to their authority to hire him and to pay for his services out of the regular school funds. The school boards would like to employ him if they can under these arrangements.

"It is entirely a part-time employment and no regular certified teacher can be obtained for this work, for the reason that the school board cannot afford to hire a full time music teacher and because a part-time music teacher, holding a certificate, is not available.

"Two problems are presented:

"1. Can this party teach without a certificate and be paid out of the public school fund?

"2. Would the county superintendent act within his scope of authority to issue a proviso certificate as provided under Section 3890?"

The answer to your first question is found in Section 4336 of the 1935 Code of Iowa, as follows:

"No person shall be employed as a teacher in a common school which is to receive its distributive share of the school fund without having a certificate of qualification given by the county superintendent of the county in which the school is situated, or a certificate or diploma issued by some other officer duly authorized by law.

"No compensation shall be recovered by a teacher for services rendered while without such certificate or diploma."

and in the case of *Clay vs. Independent School District*, 187 Iowa 89.

As to your second question, we find that the county superintendent has no power to issue a provisional certificate as that power is vested in the Board of Examiners. The office of the State Superintendent of Public Instruction advises us that the Board of Examiners have discontinued t' issuance of provisional certificates.

In brief, your two questions must be answered in the negative.

CAR DISPATCHER: HOUSE FILE 327: BOARD OF EDUCATION: House File 327, as passed by the 48th General Assembly, does not apply to the insttutions under the Board of Education.

September 11, 1939. *Mr. George W. Hesalroad, State Car Dispatcher:* In your letter of September 8th, you ask for an opinion on the following:

"In carrying out the provisions of House File 327 as passed by the 48th General Assembly and titled State Car Dispatcher, I would like an opinion from your office as to whether this would apply to the institutions under the Board of Education in the buying of cars and keeping their cost records."

To get a proper perspective, we must examine the law as it has existed for many years.

Section 3919 of the 1935 Code of Iowa provides:

"3919. Institutions governed. The state board of education shall govern the following institutions:

"1. The State University of Iowa.

"2. The college of agriculture and mechanic arts, including the agricultural experiment station.

"3. The Iowa State Teachers College.

"4. The State School for the Blind.

"5. The State School for the Deaf."

Section 3921 provides:

"3921. Powers and duties. The board shall:

* * *

"4. Manage and control the property, both real and personal, belonging to said institutions.

* * *

"7. Direct the expenditure of all appropriations made in said institutions, and of any other monies belonging thereto, but in no event shall the perpetual funds of the state college of agriculture and mechanic arts, nor the permanent funds of the university derived under acts of Congress be diminished.

* * *

"11. Perform all other acts necessary and proper for the execution of the powers and duties conferred by law upon it and the finance committee."

Section 3935 of the Code provides:

"3935. Duties of treasurer. The treasurer of each of said institutions shall:

"1. Receive all appropriations made by the general assembly for said institution, and all other funds from all other sources, belonging to said institution.

"2 Pay out said funds only on order of the board of education, or of the finance committee, on bills duly audited in accordance with the rules prescribed by said board.

"3. Retain all bills, so paid by him, with receipts for their payment as his vouchers.

"4. Keep an accurate account of all revenue and expenditures of said institution, so that the receipts and disbursements of each of its several departments shall be apparent at all times.

5". Annually, and at such other times as the board may require, report to it said receipts and disbursements in detail."

When the psychopathic hospital was established, it was integrated with the college of medicine and hospital of the State University of Iowa and by Section 3957 placed under the management and control of the Board of Education.

"4026. Record and report of expenses. The superintendent of said hospital shall keep a correct account of all medicine, care, and maintenance furnished to said patients, and shall make and file with the state comptroller an itemized, sworn statement of all expenses thereof incurred in said hospital. But he shall render separate bills showing the actual cost of all appliances, instruments, X-ray and other special services used in connection with such treatment, committments, and transportation to and from the said university hospital, including the expenses of attendants and escorts.

"All purchases of materials, appliances, instruments and supplies by said university hospital, in cases where more than one hundred dollars is to be expended, and where the price of the commodity or commodities to be purchased are subject to competition, shall be upon open competitive quotations, and all contracts therefor shall be subject to the provisions of Chapter 62."

Section 3, subsection (d), Chapter 131, Acts of the 48th General Assembly, provides:

"The state car dispatcher shall purchase all new motor vehicles for all branches of the state government, and the cost of the same shall be paid out of the budgets of the department, bureau, commission, or state office to which they may be assigned. Before purchasing any motor vehicle he shall make requests for public bids by advertisement and he shall purchase the vehicles from the lowest responsible bidder for the type and make of car designated. No passenger motor vehicle except ambulances, buses or trucks shall be purchased for an amount in excess of the sum of one thousand dollars ($1000.00) retail delivered price."

This section was not meant to and does not apply to the motor vehicles of institutions under the Board of Education, as Section 3921 gives the power to said board to manage and control the property, both real and personal, belonging to said institutions and that law never has been specifically repealed.

Chapter 131, Acts of the 48th General Assembly, has a provision that "all acts and parts of acts in conflict herewith are hereby repealed." However, it is a well established rule of statutory construction that repeals by implication are not favored and will not be allowed if it is possible in any way to construe statutes as compatible. The Iowa Supreme Court has gone far in applying this rule in the following cases:

Diver vs. Savings Bank, 126 Iowa 691;
Lambe vs. McCormick, 116 Iowa 169;
Schoenwetter vs. Oxley, 213 Iowa 528.

The cases cited above, and many others, hold that a subsequent statute will not be given the effect of repealing an existing statute unless the latter act is so clearly and unmisakably a substitute for the former or is so inconsistent

therewith that both cannot possibly be given effect. Wherever there is any possibility or reconciling the two, they will be held consistent and an interpretation given which will allow both to stand.

In view of the above law and authorities cited, it is our opinion that House File 327, as passed by the 48th General Assembly, does not apply to the institutions under the Board of Education.

MINOR: PARTITION PROCEEDINGS: DISTRIBUTION OF MINOR'S SHARE UNDER $200.00: Referee in partition proceedings to be considered "Trustee" under Chapter 244, 48th G. A. and can turn over to parents or guardian of minor, his share when less than $200, if so ordered by court.

September 12, 1939, *Mr. Weston E. Jones, County Attorney, Charles City, Iowa:* This is in answer to your letter of the 30th ult., wherein you ask the opinion of this department on the following question:

"A partition suit was instituted in Floyd county and the property involved was sold and the proceeds of the said sale were turned over to and now remain in the hands of the clerk of the district court. One of the parties in interest is a minor whose share in the proceedings is in a sum less than $200.00.

"The minor does not have a legal guardian appointed. Can the clerk of the court under and by virtue of the provisions in Chapter 244 Acts of the 48th G. A. turn over the minor's share to the parents of the minor?"

Chapter 244, Acts of the 48th General Assembly, provides as follows:

"Whenever a minor shall become entitled under the terms of a will to a bequest or legacy, or to a distributive share of the estate of an intestate, or to a beneficial interest in a trust fund upon the distribution thereof, and the value of such bequest, legacy, distributive share or interest shall not exceed the sum of $200.00, and no legal guardian of the person or property of such minor has been heretofore appointed, the district court having jurisdiction of the distribution of such funds may in its discretion, upon the application of the executor, administrator or trustee, as the case may be, enter an order authorizing such executor, administrator or trustee to pay such bequest, legacy, shart or interest to the parents or natural guardian of such minor, or to the person with whom such minor resides, for the use of such minor, and the receipt of such person or persons therefor, when presented to the court or filed with the report of distribution of any such executor, administrator or trustee, shall have the same force and effect as though such payment had been made to a duly appointed and qualified legal guardian of the person or property of such minor."

The question is as to whether or not, under the provisions of the above statute, funds derived from the sale of real estate under partition proceedings may be paid to such "parents or natural guardian of such minor, or to the person with whom such minor resides."

It is our opinion that such payment may be legally made under the above quoted chapter. You will note that said statute provides, "or to a beneficial interest in a trust fund upon the distribution thereof." This phrase we construe to include all moneys to which the minor becomes entitled because of any and all court proceedings. While a referee, appointed in partition proceedings, is not strictly a trustee as that term is generally understood, we feel that it was the legislative intent to enact this statute to dispense with the necessity of guardianship proceedings where the amount involved was less than $200.00 and, therefore, the statute should be given a broad and liberal interpretation in order that its beneficent purposes may be accomplished.

We reach the conclusion, therefore, that the referee is to be considered, under

this statute, as a "trustee," and that such referee is empowered under the provisions of this chapter to pay over any sum less than $200.00, if so ordered by the court, to the "parents or natural guardian of such minor, or to the person with whom such minor resides" and to take their receipt therefor, and that thereupon he is discharged from liability to the same extent as if such payment had been made to the legal guardian of such minor.

OLD AGE ASSISTANCE: SUBPOENAS: COUNTY BOARD OF SUPERVISORS: It was the intention of the Legislature to let the expense for such subpoenas issued by the county board fall upon the county and not upon the individual members of the county board. Said expense should be approved by the county board of supervisors and payment made out of county funds.

September 12, 1939. *State Board of Social Welfare, Iowa Building, Des Moines, Iowa. Attention: H. C. Beard:* We are in receipt of your letter of September 12th, asking for our interpretation of Section 3828.015, 1939 Code of Iowa, in regard to payment of costs made necessary by the issuance of subpoenas. That section reads as follows:

"*Witnesses.* For the purpose of any such investigation, the state board and the county board shall have the power to compel, by subpoena, the attendance and testimony of witnesses and the production of books and papers. All witnesses shall be examined on oath, and any member of the state board or of the county board may administer said oath.

"The costs incurred in connection with any such hearing or examination shall be paid by the state board or county board, whichever issues the subpoenas; and the witnesses shall be entitled to claim a two-dollar fee and mileage expense at a rate of five cents per mile, except that responsible relatives as defined in Sections 5298, 5301 and 10501-b6, Code 1935, shall not be entitled to claim witness fees and mileage expense."

You will note that any costs incurred under subpoenas issued by the State Board will be borne by the State Board presumably out of appropriated funds for the use of the State Board. The question then arises as to whether or not the county board members are individually liable for the expense incurred by the issuance of subpoenas by the said county board.

It is our opinion that it was the intention of the legislature to let the expense for such subpoenas issued by the county board fall upon the county and not upon the individual members of the county board. It is our further opinion that said expense should be approved by the county board of supervisors and payment made out of county funds.

OLD AGE ASSISTANCE: GUARDIANSHIP PROCEEDINGS: STATE BOARD OF SOCIAL WELFARE: Clerk of the court should file the petition for guardianship, the court order, and the letters of guardianship without charge if the court, in its discretion, determine by order entered of record that the aged person is unable to assume said expense.

September 12, 1939. *Mr. Roy W. Smith, County Attorney, Council Bluffs, Iowa:* We are in receipt of your letter of September 11th, wherein you ask the following question:

"The point in question relates to whether the above sections referred to, could be interpreted to mean the filing of the petition for guardianship, the court order and the issuance of the letters of guardianship should be issued by the clerk of the court without charge. We would greatly appreciate your opinion on this matter."

The section you have in mind will apear in the 1939 Code of Iowa as Section 3828.035. The first two paragraphs of said section provide for the application and appointment of a guardian for incompetent aged persons who wish to receive old age assistance. The last paragraphs in said section reads as follows:

"All guardianship proceedings in the case of an applicant or recipient shall be carried out *without fee or other expense* when, in the opinion of the court, the aged person is unable to assume said expense. At the discretion of the court, such a guardian may serve without bond."

It is our opinion that it was the intention of the legislature to provide for the guardianship of incompetent aged persons without any cost whatsoever. It is our further opinion that the words "without fee or other expense" should be interpreted to include the words "court costs."

It is, therefore, our opinion that the clerk of the court should file the petition for guardianship, the court order, and the letters of guardianship, without charge if the court in its discretion determines by order entered of record that the aged person is unable to assume said expense.

COUNTY RECORDER: COUNTY AUDITOR: FEE FOR FILING PUBLIC DOCUMENTS: OLD AGE ASSISTANCE LIENS: County recorder and county auditor must in all cases except as to old age assistance liens, charge and collect fees from governmental agencies for public documents, such as tax deeds taken by county, etc.

September 12, 1939. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* This is in answer to your letter of the 26th ult., wherein you ask the opinion of this department relative to the following question:

"The particular question which this office desires your opinion on is whether or not the county recorder and the county auditor can charge a fee to either the state or county for filing of any public documents, such as old age assistance liens, tax deeds taken by the county by virtue of the Scavenger Tax Law, etc."

Section 5177, Code of Iowa, 1935, provides:

"The recorder shall charge and collect the following fees:

"1. For recording each instrument containing 400 words or less, fifty cents.

"2. For every additional hundred words or fraction thereof, ten cents.

3. For every marginal assignment or release (except those made by the clerk of the district court) twenty-five cents."

Section 5155, Code of Iowa, 1935, provides:

"The county auditor shall be entitled to charge and receive the following fees:

"1. For transfers made in the transfer books, for each deed, or transfer of title certified by clerks of district courts, twenty-five cents.

"2. For issuing certificate of redemption of land sold for taxes, twenty-five cents.

"3. For each certificate issued by the treasurer for lands sold for nonpayment of taxes, fifteen cents."

We call your attention to Section 5296-f16, Code of Iowa, 1935 (Old Age Assistance chapter), which provides:

"* * * Whenever an order is made for such assistance to any person in whom or in whose spouse the title to any real estate is vested, a copy of such order shall be indexed and recorded in the manner provided for the indexing of real estate mortgages in the office of the county recorder of the county in which the real estate is situated, and such recording and indexing shall constitute notice of such lien. *The county recorder shall not charge a fee for such recording and indexing.* (Italics ours.)

We are of the opinion that except as to Old Age Assistance liens these officers must charge and collect the fees required by the statutes above set out.

COUNTY ATTORNEY: TELEPHONE EXPENSE: COUNTY: Telephone calls made necessary by the fact that county attorney does not live in county seat may be legally charged to the county.

September 12, 1939. *Mr. Clark E. Lovrien, County Attorney, Britt, Iowa:* This is in answer to your letter of the 23rd ult., asking the opinion of this department on the following question:

"Garner is the county seat of Hancock county, but I reside in Britt, ten miles away. Your opinion of April 14 is quite clear that I am not entitled to mileage from Britt to the county seat under any circumstances. How about telephone calls on county business to the other county officers at the county seat? Is it legal for the board to reimburse me for these?"

It is our opinion that telephone calls made necessary by the fact that you do not live in the county seat may be legally charged to the county. This, as we view it, is a part of your office expense.

CLERK DISTRICT COURT: REFEREE'S FEES: "OFFICIAL SERVICE": Clerk in office of clerk of district court, appointed by court to act as referee performs "official service" and may not retain referee's fees.

September 13, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: L. I. Truax:* I have your letter of the 8th inst., wherein you request the opinion of this department as to whether or not a clerk in the office of the clerk of the district court, appointed by the court, may retain the referee's fees taxed as part of the costs in administration of estates.

We can see no escape from Section 5245, Code of Iowa, 1935, which reads:

"Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, *and their respective deputies or clerks*, shall belong to the county."

We therefore reach the conclusion that the clerk in question, when acting as referee, performs an "official service," as provided in said statute and may not retain the referee's fees.

BOARD OF SUPERVISORS: COUNTY OFFICES: Board of supervisors has no authority to direct the other county officers to keep their offices open on Saturday afternoon.

September 13, 1939. *Mr. J. Paul Naughton, County Attorney, Marengo, Iowa:* This is in answer to your letter of the 2nd inst., wherein you ask the opinion of this department on the following question:

"Does the county board of supervisors have legal authority to require the various county offices to remain open on Saturday afternoons throughout the year?"

It is our opinion that the board of supervisors has no authority to direct the other county officers to keep their offices open on Saturday afternoon.

It is presumed that all county officers will perform the duties enjoined upon them by law.

JUSTICE OF PEACE: MISDEMEANOR: BAIL: Whether the misdemeanor is indictable or nonindictable, the arresting officer must give the defendant opportunity to give bail if the arrest is made in county other than the one in which the warrant was issued, irrespective of type of misdemeanor with which defendant is charged.

September 13, 1939. *Mr. E. B. Shaw, County Attorney, Oelwein, Iowa:* This is in answer to your letter of the 9th inst., wherein you ask the opinion of this department on the following legal question:

"It seems that one of your justices issued a warrant against a certain defendant for reckless driving in your county. The defendant is a resident of an adjoining county. When arrested the defendant demanded to be taken before a justice of the peace in the county of his residence."

Section 13482, Code of Iowa, 1935, provides:

"If the offense stated in the warrant be a misdemeanor, and the defendant be arrested in another county, the officer must, upon being required by the defendant, take him before a magistrate or the clerk of the district court of the same county in which he was arrested, for the purpose of giving bail, and the magistrate or clerk before whom he is taken in such county must take bail from him, in the sum indorsed upon the warrant, for his appearance at the district court of the county in which the warrant was issued, on the first day of the following term."

Question: Does Section 13482 include nonindictable misdemeanors?

You will note that the above section provides: "If the offense stated in the warrant be a misdemeanor." Inasmuch as the above section contains no exceptions, we incline to the view that whether the misdemeanor is indictable or nonindictable, the arresting officer must give the defendant opportunity to give bail if the arrest is made in a county other than the one in which the warrant was issued, irrespective of the type of misdemeanor with which said defendant is charged.

POOR RELIEF: BOARD OF SUPERVISORS: Amount of relief furnished for labor performed should not exceed $2.00 per week for each person for whom relief is thus furnished, exclusive of medical attendance. Sec. 5322, 1935 Code.

September 13, 1939. *Mr. Reid L. Hunt, County Attorney, Tipton, Iowa:* This will acknowledge receipt of your letter of the 3rd ult., wherein you ask the opinion of this department on the following subject:

"To meet the requirements of the WPA on a stone crushing project or a rock quarrying project in this county the county invested considerable money in equipment and the board of supervisors and our engineer are both anxious to continue the operation of this quarry using the labor that has heretofore and to some extent is still being furnished by the WPA.

"It is the plan of the board of supervisors, providing it is legal and will meet with your approval, to continue to use upon this rock quarrying project those persons who have been employed there by the WPA. The board proposes to pay these persons regular wages, allowing them to earn up to $30.00 per month. Since all of these persons now employed, and which the board proposes to employ, would be relief clients were they not now on the WPA rolls, it is proposed to pay the $30.00 per month in the following manner: $25.00 per month out of the poor funds and $5.00 per month out of the maintenance funds, or to pay all foremen out of maintenance funds and pay all common labor out of relief funds. In asking for your opinion or approval of this plan, I do so for the reason that if this plan is approved the board will have to budget these two funds, namely, highway maintenance and the poor funds accordingly."

Section 5322, Code of Iowa, 1935, provides:

"The relief may be either in the form of food, rent or clothing, fuel and lights, medical attendance, or in money, and shall not exceed two dollars per week for each person for whom relief is thus furnished, exclusive of medical attendance. They may require any able-bodied person to labor faithfully on the streets or highways at the prevailing local rate per hour in payment for

and as a condition of granting relief; said labor shall be performed under the direction of the officers having charge of working streets and highways."

We are of the opinion that if the amount of relief furnished for labor performed in the stone quarry does not exceed $2.00 per week for each person for whom relief is thus furnished, exclusive of medical attendance, the payments of such relief from the poor fund would be legal.

You will note that the above quoted section provides: "and shall not exceed two dollars per week for each person for whom relief is thus furnished, exclusive of medical attendance." This section also provides: "They may require any able-bodied person to labor faithfully on the streets or highways at the prevailing local rate perhour in payment for and as a condition of granting relief * * *." In light of our opinion, of course, neither of the plans submitted can be approved.

MOTOR VEHICLE: TRACTORS, TRAILERS AND TRUCKS: REGISTRATION: LICENSING: A tractor licensed in Nebraska, towing a trailer licensed in Minnesota and Missouri is not a combination duly registered and both vehicles should be required to be registered under the laws of Iowa. A nonresident trucker operating a ten-ton truck in Iowa with five-ton registration plates is not duly registered in the place of residence of the owner and must be required to be registered under the laws of Iowa.

September 13, 1939. *Department of Public Safety. Attention: Mr. Karl W. Fischer:* Your letter of August 19, 1939, inquiring our opinion as to the following matters, is herewith acknowledged.

"1. The Iowa Highway Safety Patrol has caused the arrest of a trucker who was operating a tractor licensed in Nebraska towing a trailer licensed in Minnesota and Missouri. There seems to be no question but what such combination is improperly registered under the laws of either three states.

"2. The Iowa Highway Safety Patrol has caused the arrest of a non-resident trucker operating a ten-ton truck in Iowa with five-ton registration plates, of a foreign state, but which at the time of the arrest was carrying a load of ten tons.

"Will you, therefore, kindly advise if such vehicles should be required to be registered under the laws of the state of Iowa by purchase of Iowa license plates."

For the purpose of this opinion, we quote from Chapter 134, Acts of the 47th General Assembly, as follows:

"Sec. 84. *Nonresident owners exempt.* A non-resident owner, except as otherwise provided in Sections eighty-five (85) and eighty-six (86), owning any foreign vehicle of a type otherwise subject to registration may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration card and registration plate or plates issued for such vehicle in the place of residence of such owner."

It is to be observed that one of the criteria of the privilege of exemption for nonresident owners is that the motor vehicle of the nonresident must be duly registered in the place of residence of the owner.

Analyzing both problems, it appears that it must first be determined as to when a motor vehicle may be said to be "duly registered." A motor vehicle might be registered but it might not at the same time be lawfully or properly registered. As in question 1, assuming the owner had his residence in Nebraska, the tractor is registered but not the trailer, or in question 2

a truck registered with five-ton plates is carrying a load of ten tons. May these vehicles be said to be "duly registered" so as to avoid registration in Iowa?

The word "duly" has been passed on many times:

"The word 'duly' means 'according to law,' that is, according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity of procedure. Reynolds vs. Harlem Const. Co., 128 N. Y. Supp. 642, 643, 71 Misc. Rep. 446.

"The word 'duly,' in a record stating that the accused was duly arraigned in open court, means according to law. Clements vs. State, 40 South. 432, 436, 51 Fla. 6 (citing 3 words and phrases, p. 2259).

" 'Duly' means in a due, fit, or becoming manner; properly or regularly; in due time or proper manner; in accordance with what is right, required, or suitable; fittingly, becomingly, regularly. Rogers vs. Trumble, 125 N. W. 600, 602, 86 Neb. 316 (quoting 3 Words and Phrases, p. 2259).

"The word 'duly' has acquired a fixed legal meaning, and when used before any word implying action it means that the act was done properly, regularly, and according to law * * * O'Donnell vs. People, 79 N. E. 639, 640, 224 Ill. 218, 8 Ann. Cas. 123.

" 'Duly,' in legal parlance, means according to law. It does not relate to form merely, but includes both form and substance. Levy vs. Cohen, 92 N. Y. Supp. 1074-1076, 103 App. Div. 195 (Citing Brownell vs. Town of Greenwich, 22 N. E. 24, 114 N. Y. 527, 4 L.R.A. 685), Sherman vs. Ecker, 110 N. Y. Supp. 265, 59 Misc. Rep. 219 * * *." 2 *Words and Phrases*, p. 183.

It therefore appears that the word "duly" means properly and according to law. Are the vehicles in question, then, registered properly and according to law?

As to question 1, there is no doubt but that either the tractor or the trailer is not properly licensed in the place of residence of the owner. If the owner had his residence in Nebraska, then the trailer remains unlicensed there and if the residence is in Minnesota or in Missouri, then the tractor is unlicensed in such state. It consequently appears that at least one of the vehicles in question is not registered in the place of residence of the owner. Nevertheless it appears in addition, that in the states in question tractors and trailers are licensed in combinations as a unit and not as single vehicles and such licensed combinations are required to operate together. This being true, then the combination is not duly registered in the place of residence of the owner. Inasmuch as it appears that the combination is not duly registered under the laws of the state of the owner's residence then both such vehicles must be required to be registered under the laws of the State of Iowa.

Answering question 2, if the truck in question is licensed for five tons but is a ten-ton truck carrying a load of ten tons, it is apparent that the truck is not duly registered in the place of residence of the owner for the reason that it does not carry ten-ton plates. The legislature must have intended that foreign vehicles operating in Iowa to avoid registration here must be licensed in the foreign state as the law requires there, and the operation of the foreign vehicle in Iowa must be in accordance with that registration as the legislature certainly intended that no liberties should be extended for the operation of foreign motor vehicles other than the privileges granted by due registration in their own state.

The truck in question, therefore, not being duly registered in the place of residence of the owner, must be required to be registered under the laws of Iowa.

FUR DEALERS: LICENSE: CERTIFICATE: AGENTS: REPRESENTATIVES: Section 84, Chapter 99, Acts of the 47th General Assembly is still in full force and effect except as to the payment of the required fee and the Iowa State Conservation Commission must issue certificates to agents or representatives of fur dealers.

September 13, 1939. *Iowa State Conservation Commission, Tenth and Mulberry Streets, Des Moines, Iowa. Attention: Mr. M. L. Hutton:* Your letter of September 7, 1939, inquiring our opinion as to the following matter, is herewith acknowledged.

"Under the provisions of Section 84, Chapter 99, Laws of the 47th General Assembly, the State Conservation Commission is directed to issue certificates to agents or representatives of licensed fur dealers who buy or sell furs or hides for such licensed dealers. The schedule of license fees provided a fee of $1.00 for such crtificates, but the schedule of fees was amended by the 48th General Assembly (Section 1, Chapter 76, Laws of the 48th General Assembly), the $1.00 fee being stricken from the schedule and a $50.00 fee for non-resident fur dealers license substituted in its place. Obviously it was the intent of the Legislature to discontinue the $1.00 certificates, but the Legislature neglected to repeal Section 84, Chapter 99, Laws of the 47th General Assembly, which provides for the issuance of certificates.

"* * * if the section must be held in full force and effect, we would be required to issue approximately 500 of the certificates each year and would receive no fee whatsoever for them."

For the purpose of this opinion, we quote from the 1935 Code of Iowa, as follows:

"1794-e1. *Licenses.* Except as otherwise provided in this chapter, no person shall fish, trap, hunt, pursue, catch, kill or take in any manner, or use or have possession of, or sell or transport all or any portion of any wild animal, bird, game or fish, the protection and regulation of which is desirable for the conservation of the resources of the state, without first procuring a license or certificate so to do and the payment of a fee as follows:
"Agents or representatives of fur-dealers' certificate.....$1.00"

From Chapter 99, Acts of the 47th General Assembly:

"Sec. 84. The commission shall, upon application and the payment of the required fee, issue a certificate to each person who, as an agent or representative of a licensed fur dealer, buys or sells fur or hides for such dealer. The dealer to whose agent or representative such a certificate is issued shall be responsible for all his acts as such representative or agent. No fur dealer shall be entitled to operate under such agent's certificate."

And from Chapter 76, Acts of the 48th General Assembly:

"Sec. 1. Section seventeen hundred ninety-four-e one (1794-e1), Chapter eighty-six-E one (86-E1), Code of 1935, is amended * * * by striking the words in lines thirty-four (34) and thirty-five (35), and the figure '1.00,' and inserting in lieu thereof the words and figure, 'Non-resident fur dealer's license, 50.00; * * *.'"

From an examination of the statutes as amended, it clearly appears that the legislature sought to end the licensing of agents or representatives of fur dealers. This is indicated by the repeal of the license fee requirement of Section 1794-e1 for that particular group. Nevertheless the general rule is that statutes will seldom be repealed by implication and that if the statute in question may be reconciled with that which may have a contrary effect, then both statutes may be said to be in effect. That is the situation that exists in regard to Section 84 of Chapter 99, Acts of the 47th General Assembly, and the repeal of that part of Section 1794-e1 of the 1935 Code of Iowa by Section 1 of Chapter 76, Acts of the 48th General Assembly, in reference to

agents or representatives of fur dealers. It appears that although the license fee for agents or representatives of fur dealers is repealed, that the Commission may still provide and issue certificates to such persons even though there may be no payment of a required fee. Statutory interpretation requires this construction, and it is our opinion that Section 84 of Chapter 99 of the Acts of the 47th General Assembly is still in full force and effect except as to the payment of the required fee and that the Iowa State Conservation Commission must issue certificates to agents or representatives of fur dealers.

TAXATION: SCAVENGER TAX SALES: Chapter 211 provides for the exclusion of all interest and penalties on the delinquent taxes for which the property was sold and also on such subsequent delinquent taxes as the county treasurer has shown paid and carried against such tax sale certificate.

September 13, 1939. *Mr. Weston E. Jones, CountyAttorney, Charles City, Iowa:* This office is in receipt of your request for an opinion which we will state as follows:

"Does the exclusion of penalties and interest provided in Chapter 211 Acts of the 48th General Assembly include penalty and interest that accrued prior to the sale of the property for taxes?"

Chapter 211, Acts of the 48th General Assembly, provides in substance that the owner of real estate, which has been sold for taxes and bid in by the county, can redeem upon a ten-year partial payment plan if the county is still the holder of the tax certificate. In the event the owner avails himself of the provisions of this chapter, he shall sign an agreement and insofar as the exclusion of penalties is concerned, the chapter provides that the tax "may be composed into one item or amount for the entire amount of all such taxes and costs excluding penalties and interest as hereinbefore provided." And further the offer to pay must be an "offer to pay the current taxes, subsequently maturing installments of special assessments, if any, each year before they become delinquent, and to pay the amount of all such delinquent general taxes and costs included in said sale, including all subsequent taxes added affecting the particular property sold appearing on the tax sale record in the office of the county auditor, but excluding penalties and interest, as certified by the county auditor, * * *."

Section 2of the act provides:

"Upon the filing of said agreement, all the accrued penalties and interest on the taxes embraced within said agreement shall be waived and further proceedings shall be suspended as long as no default exists * * *."

There is also included in Section 1 of the act a form of agreement which is to be signed by the owner. It will be noted in this agreement that certain directions are given for the insertion of figures in the blank lines in the form and the direction contained in lines 39 and 40 is:

"(Here insert year or years of delinquency and the total amount of delinquent taxes and costs exclusive of penalties and interest.)"

We are of the opinion that the above are material portions of the statute pertinent to this discussion and these portions of the statute indicate an intention to exclude all penalties and interest and the exclusion, in our opinion, embraces all penalty and interest including the penalty and interest that accrued prior to the sale.

Somewhat to the same effect is the opinion by N. S. Genung written to the

county attorney at Onawa under date of July 31, 1937, and contained in the 1938 Attorney General's Report at page 417.

BEER PERMIT: BOARD OF SUPERVISORS: The board of supervisors has complete authority to refuse to issue any beer permit even though the applicant desires such a permit for a duly platted village.

September 14, 1939. *Mr. Harold M. Vestermark, County Attorney, Iowa City, Iowa:* You have submitted to the attorney general's office certain results of certain written reports with regard to holders of Class "B" beer licenses in Johnson County issued by the board of supervisors for places outside of Iowa City.

In going over the statutes with regard to the issuance of such beer permits, we find first, in Section 1921-f99, the board of supervisors is granted certain discretion with regard to the issuance of such licenses. Part of that statute provides as follows:

"Power is hereby granted to boards of supervisors to issue, at their discretion, Class 'B' and 'C' permits in their respective counties in villages platted prior to January 1, 1934 and to clubs, as defined in Section 1921-f110 * * *."

A village is defined by Section 5623, subsection 4, to be:

"Town sites platted and unincorporated shall be known as villages."

Chapter 321 of the Code contains a number of sections defining plats.

The question to determine in each case is first, whether or not the location of the permittee is that of a platted village, as shown by the records in the auditor's office, and second, whether or not the village was platted prior to January 1, 1934. These are questions of fact and even though it is a platted village, the question of the granting or the refusal to grant a beer permit is up to the board of supervisors, as they have complete discretion in the matter of issuing these permits.

We would have to examine the original records before we could pass upon the question of whether or not the locations described by you are in platted villages. As we have stated, this question would be one of fact upon which we do not like to render an opinion. It is sufficient to say that unless the record discloses the location to be in a duly platted village which was filed before January 1, 1934, the permit should be immediately revoked as having been issued without authority by the board of supervisors.

In any event, the board of supervisors has complete authority to refuse to issue any beer permit even though the applicant desires such a permit for a duly platted village.

BEER LICENSES: FEES: FEDERAL LIQUOR STAMPS: An ordinance fixing the fee for a Class "B" beer license at a higher rate where the holder of the Class "B" license has a federal liquor stamp would be invalid. The holder of a license who has a federal liquor stamp and the holder of a license who has no federal liquor stamp are in exactly the same position insofar as the right to dispense malt beverages is concerned and the fee for the beer permit should be the same to both.

September 20, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: Mr. LeHart:* Receipt is acknowledged of your letter requesting an opinion upon a proposed city ordinance of the city of Muscatine, Iowa. We understand the

ordinance proposes to fix the fee for a Class "B" beer license at a higher amount where the party holds a federal liquor stamp.

We are of the opinion that such an ordinance would be invalid in that there is not contained therein a uniform standard of fees to be charged to permittees. The fact that a permittee holds a federal liquor stamp would not be a legal basis for a higher charge for a beer permit for such a federal liquor stamp gives the holder thereof no rights to sell intoxicating liquors in this state. The beer license permittee who holds such a federal stamp and the beer license permittee who holds no such federal stamp are both in exactly the same situation insofar as the right to dispense malt beverages are concerned and the fee for the permit should be the same to both.

In passing, we might state that they are also in the same situation insofar as the right to sell intoxicating liquor is concerned, which means that neither have such a right and both could be prosecuted under the same Iowa law if they make such sales.

BEER LICENSES: TRANSFER OF: The granting of a Class "B" beer permit is personal and such a permit is not transferable. The administrator of an estate of a deceased permittee would have no right to carry on the business of dispensing beer under the permit issued to the deceased, but would have to secure a new permit in order to carry on the business.

September 20, 1939. *Mr. Lester L. Orsborn, County Attorney, Red Oak, Iowa:* Receipt is acknowledged of your request for an opinion upon the following question:

"A man who operates a beer parlor dies. An administrator is duly appointed by the court. It is necessary for the administrator to make a new application for a Class 'B' license or may the administrator simply give an additional bond and continue on without an additional beer license?"

This office has heretofore held that the granting of a Class "B" beer permit is purely personal and that such a permit is not transferable. There is no provision in the statutes for the transfer of such a permit, and in our opinion the death of the permittee extinguishes all rights thereunder.

We would be of the opinion that an administrator or executor of the estate of such deceased permittee would have no right to carry on the business of dispensing beer under the permit issued to the deceased, but would have to secure a new permit in order to carry on such a business.

SCHOOLS: ERECTING TWO GRADE SCHOOLS: If electors have given consent to building two new grade schools, one school cannot be started and the other delayed unless another election is called.

September 21, 1939. *Mr. Edward J. Grier, County Attorney, Ottumwa, Iowa:* In your recent communication you advise us that a proposition has been voted on and carried, authorizing the erection of two new grade schools at a cost of not to exceed $240,000; that at the time of the election a great deal of publicity was given of the assurance the board had of getting a Federal grant to assist in the building of these two buildings, and further that up to date no grant has been made.

With this in mind, you ask, "Could one of the schools be started and the other delayed?"

Without being authorized by the electors, the board could not proceed with this building program and having received authority from the electors to proceed to build two grade schools, we are of the opinion that the board is bound by the edict of the electors to build two grade schools or call another election.

REFUND OF WARRANTS: CIGARETTE LAW: TRANSFER OF ADMINISTRATION: CHAPTER 72 ACTS OF THE 48TH GENERAL ASSEMBLY: All proceeds from the administration of Section 31 of Chapter 72, Acts of the 48th General Assembly, are to be credited to the general fund, and all warrants for refund shall be drawn on that fund by the comptroller.

September 21, 1939. *Hon. C. Fred Porter, State Comptroller:* We have your letter of September 14th inquiring as to what fund warrant is to be drawn on in making refund under paragraph 3 of Section 4, Chapter 72, Acts of the 48th General Assembly.

This act, Chapter 72, Acts of the 48th General Assembly, is the new cigarette law. Chapter 73, Acts of the 48th General Assembly, amended Chapter 72 by changing the words "State Treasurer" and "Treasurer of State" to read "State Tax Commission" and "Commission" wherever the words "State Treasurer" and "Treasurer of State" and "Treasurer" appear in Chapter 72. The obvious purpose of this was to carry out the transfer of the administration of the cigarette law from the treasurer of state to the State Tax Commission.

Paragraph 3 of Section 4 of Chapter 72 provides for refunds on unused stamps to persons who purchased said stamps, and in Section 3 it is provided, "In making such refund the Treasurer shall prepare a voucher showing the amount of refund due and to whom payable, and the Comptroller shall then issue a warrant upon the Treasurer for same." In accordance with the provisions of Chapter 73 as above indicated, the words "Commission" must be substituted for the word "Treasurer" in the above quotation.

Chapter 72, Acts of the 48th General Assembly, by Section 36 thereof, repealed all but certain designated sections of Chapter 78 of the Code of 1935. Section 1575-a1 of the Code of 1935 is not one of the sections excepted from the repeal by Section 36 of Chapter 72, Acts of the 48th General Assembly. This Section 1575-a1 appropriated out of any unappropriated sums a sum sufficient to carry out the provisions for refund in the law as it existed prior to the enactment of Chapter 72, Acts of the 48th General Assembly.

Nowhere in Chapter 72, Acts of the 48th General Assembly, is there any provision the equivalent of Section 1575-a1 of the Code of 1935.

Section 31, Chapter 72, Acts of the 48th General Assembly, provides that the proceeds of all sales of stamps and the payment of taxes, fees and penalties provided for under the act shall be credited to the general fund of the State of Iowa.

While there is no specific provision in Chapter 72, Acts of the 48th General Assembly, specifically appropriating any funds with which to pay the refunds provided for in paragraph 3 of Section 4, yet it was clearly the intention of the legislature that these refunds should be paid, and in view of the fact, under the provisions of Section 31 of the act, that all proceeds from the administration of the act are to be credited to the general fund of the State of Iowa. It is our opinion that in order to carry out the provisions for refund

of warrants drawn by the comptroller therefore shall be drawn on the general fund.

STATE APPEAL BOARD: SECTION 6261: CHAPTER 165 OF THE 48TH GENERAL ASSEMBLY: SECTION 6125: It is the appeal board, rather than the state comptroller who acts under the provisions of Chapter 24. Chapter 165 prohibits issuance of certificates or bonds for improvements referred to, unless 15 days' notice of hearing be given to taxpayers, and providing for appeal.

September 21, 1939. *Hon. C. Fred Porter, State Comptroller:* We have your letter of September 16th asking for an interpretation of Chapter 165, Acts of the 48th General Assembly.

Your inquiries are, (1) as to the authority vested in the State Board of Appeal under the provisions of Chapter 165 of the 48th General Assembly, (2) as to whether this Chapter 165, 48th General Assembly, affects bonds issued under Section 6261, as well as those issued under Section 6125, and (3) whether there is any conflict of jurisdiction between the Board of Appeal and the comptroller.

Addressing ourselves to the first inquiry: Chapter 165, Acts of the 48th General Assembly, amends Section 6261 of the Code by adding to that section, and as thus amended it prohibits the issuance of certificates or bonds for the improvements thereinbefore referred to unless the city or town has given fifteen days' notice by publication of a fixed time for the hearing upon such proposed issuing of bonds or certificates, at which hearing taxpayers of the city or town, and other interested persons for or against the proposal, may be given an opportunity to be heard. It further provides that within fifteen days after the decision of the city or town council, if such decision is in favor of the issuance of such bonds or certificates, a certain number of persons in such municipality may appeal by filing their appeal with the clerk of the city, town or municipal government proposing to authorize the issuance of the bonds or certificates, on the written protest setting forth the objections to the issuance of the bonds or certificates and the grounds for said objections. The clerk of the municipality then is required to prepare a true and complete copy of the written protest, together with a statement describing the proposed improvement and the bonds proposed to be issued and to which objections are made, and to transmit the same to the State Board of Appeal. It then goes on to provide that all the provisions applicable thereto, as contained in Chapter 91, Acts of the 47th General Assembly, shall thereafter govern the proceedings with reference to the appeal.

Chapter 91, Acts of the 47th General Assembly, provided for the State Appeal Board, composed of the comptroller, auditor of state, and treasurer of state. The act also provides the procedure in the event of an appeal to the Appeal Board which includes the holding of hearings and the manner thereof, and the determination of the appeal. That part of Section 3 of Chapter 91, Acts of the 47th General Assembly, which is to appear as Section 390-h1 of the Code, reads: "After a hearing upon such appeal, the State Board shall certify its decision with respect thereto to the County Auditor, and such decision shall be final * * *."

The latter part of Section 1, Chapter 165, Acts of the 48th General Assembly, so far as this question is concerned, provides as follows: "Such appeal shall

be heard and determined within twenty days of the receipt by the State Appeal Board of such protest, and at least three of the number of persons signing such protest and the proper officers of the municipality shall be given five days' notice of the time and place set for the hearing on said appeal; that the State Appeal Board is and shall be required to render its decision upon such protest within ten days after such hearing is held."

It would appear from the above provisions of Chapter 91, Acts of the 47th General Assembly, and Chapter 165, Acts of the 48th General Assembly, that it is contemplated that the appeal provided for in the last mentioned act shall be determined by a decision of the State Board of Appeal, and that the determination of the appeal must be on the basis of the issue made by the protest or objections filed by the objectors. If the objections are to the bond issue without qualications, then it would seem that the issue would be whether the bonds should or should not be issued, and the decision of the Appeal Board would be to either sustain the municipality in its action, or to completely overrule it. On the other hand, if the objections were to the extent of the bond issue, then the issue would be not as to whether the bonds should or should not be issued in any amount, but as to whether they should be issued in the amount provided for by the action of the municipality, or in a lesser amount as indicated by the objections.

We next turn to your second question, as to whether Chapter 165, Acts of the 48th General Assembly, affects bonds issued under Section 6125 of the Code. It is our opinion that this must be answered in the negative. Chapter 165 of the 48th General Assembly by its title is an act to amend Section 6261 of the Code, and by its contents amends only Section 6261 of the Code, and Section 6125 of the Code is nowhere mentioned in the act. It is true that the bonds authorized to be issued under Section 6125 are for the same purpose as some of the bonds authorized to be issued under Section 6261 of the Code, but they are not the same type of bonds. The bonds authorized to be issued under Section 6261 of the Code are in anticipation of the collection of taxes to be levied. The indebtedness incurred by the issuance of bonds under Section 6125 is, by the very terms of the section, not to be considered an indebtedness incurred for ordinary purposes. If the legislature had intended that Chapter 165 should affect Section 6125 of the Code, it would have so provided.

As to your third inquiry, we do not seem to find any conflict by reason of the provisions of Chapter 165, Acts of the 48th General Assembly, and Chapter 24 of the Code, as it now stands, in so far as the comptroller or the State Board of Appeals are concerned. We call attention to the fact that under the provisions of Section 2 of Chapter 91, Acts of the 47th General Assembly, Chapter 24 of the Code was amended by substituting the words "State Board" whenever and wherever the word "Comptroller" appears anywhere in the provisions of said Chapter 24, and it would appear therefore that it is the Appeal Board, rather than the comptroller, who acts under the provisions of said Chapter 24.

CHAPTER 98, ACTS OF THE 48TH GENERAL ASSEMBLY: INSANE: MAINTENANCE: Chapter 98, Acts of the 48th General Assembly creates a lien against real estate of person committed to institution or spouse of same for maintenance. Lien was not created until law went into effect, and it is

effective as to amounts accumulating on patients already in institutions as well as those admitted after law went into effect.

September 23, 1939. *Mr. William M. Spencer, County Attorney, Oskaloosa, Iowa:* Replying to your request of August 28, 1939, in which you say:

"Our county auditor would like your opinion concerning the interpretation of Section 4 of Chapter 98 of the Laws of the 48th General Assembly of the State of Iowa.

"Section 4 of said Chapter 98, Laws of the 48th General Assembly provides that any assistance furnished under this chapter for the care and maintenance of an insane person at an institution shall constitute a lien against any real estate owned either by the person committed to such institution or by the spouse of such person. In the same section the auditor of each county is directed to keep an accurate account of the cost of the maintenance of any patient and also keep an index of the names of persons committee from such county. This same paragraph of said Section 4 provides that the indexing and the record of the account of such patient in the office of the county auditor shall constitute notice of the lien in favor of the county for such maintenance.

"Said Chapter 98 of the Laws of the 48th General Assembly became effective upon publication which was made on June 1, 1939. Our auditor wants to know whether the index which he is now required to keep shall carry only the names of persons committed to an institution after June 1, 1939, or whether he is required to include in the index the names of all persons who have been committed from this county prior to the effective date of the act who are still receiving maintenance in an institution for the insane. If the names of persons committed before the effective date of the act are to be included, should he include therein the expense for the care of such patients from the time of their commitment to the institution or only the expense of the maintenance of such persons from the effective date of this act."

We beg to advise you it is the opinion of this department that this law must apply to the future and not the past.

In the case of *Foster & Sons vs. Bellows*, 204 Iowa, at page 1054, the court made use of the following language:

"Established principles of construction compel us to say that acts of the law-making body, unless otherwise plainly expressed, are aimed for the government of the future, rather than the past."

In the case of *In Re Estate of Aaron Culbertson*, 204 Iowa 473, the court held:

"Statutes should be construed as having a prospective, and not a retrospective, effect, unless a contrary legislative intent appears."

Chapter 98, Laws of the 48th General Assembly, creates a lien against real estate of the person committed to an institution or the spouse of same for maintenance. While the obligation already existed, the lien was not created until the law went into effect.

Unless we attribute retrospective force to the law, the lien attaches only after the law became effective and it then is effective as to amounts accumulating on patients already in institutions as well as those admitted after the law went into effect.

LOCAL BUDGET LAW: STATE BOARD OF APPEAL: SECTION 4644-c17: ROAD FUNDS: Board of supervisors may authorize the transfer of funds from secondary road construction fund to secondary road maintenance fund, or vice versa.

September 25, 1939. *Hon. C. Fred Porter, State Comptroller:* We have your letter of September 19th, requesting our opinion on the following questions:

"1. Can the board of supervisors authorize the transfer of road funds which will result in spending more money in either the maintenance fund or con-

struction fund than was fixed in the budget published and adopted in August or are they only required to keep within the total of both funds as shown in the budget? If it is not legal for the board to transfer as noted above, would a transfer approved by the state comptroller under Section 388 of the code tend to legalize the transfer and expenditure?

"2. Thirty-five per cent of the construction fund is pledged to local county roads (Sec. 4644-c9) and Section 4644-c34 states how it is to be expended. Is this money subject to transfer by the board of supervisors under Section 4644-c17 for (1) general maintenance purposes or, (2) for the maintenance of strictly local county roads? Is it subject to transfer at all after the board of approval has decided upon its program?

"3. In the budget estimate enclosed the gasoline tax receipts were estimated at $36,000.00 but may amount to $53,000.00. It also develops that there was a balance in the construction fund January 1 of $22,484.00 not taken into consideration when the budget was made up. This increases the 1939 receipts to $149,000.00 which were originally estimated at $110,000.00 Can the board legally spend the additional receipts? If not, would it be possible for the state comptroller to approve the transfer of unappropriated road funds to construction or maintenance, as the case may be?"

Answering your first question, it is our opinion that the board of supervisors can authorize the transfer of funds from the secondary road construction fund to the secondary road maintenance fund, or vice versa, under the provisions of Section 4644-c17, Code 1935, which reads as follows:

"The board may make a permanent or temporary transfer of funds from the secondary road construction fund to the secondary road maintenance fund, or from the latter fund to the former fund. (C24, No. 4801; C27, 4635-b1, 4801; C31, No. 4644-e17; 45 GA, ch. 72, No. 1.)"

and that this can be done without the approval of the State Board of Appeal which acts in lieu of the comptroller under Chapter 24 of the Code of 1935, by reason of Chapter 91, Acts of the 47th General Assembly. The word "board," as it appears in Section 4644-c17, refers to the board of supervisors. This section, together with the other sections as they appear in Chapter 240 of the Code of 1935, were enacted as a part of the secondary road law, which was Chapter 20, Acts of the 43rd General Assembly, and, as originally enacted, this section required the approval of the state budget director in order for the board to make such a transfer. However, the requirement of the approval of the state budget director was eliminated by Section 1, Chapter 72, Acts of the 45th General Assembly, which indicated clearly that the board could thus act without the approval of any of the other officers or board. Section 388 of the Code of 1935 provides for transfers of money from one fund of the municipality to another fund thereof on the approval of the State Appeal Board, and there is this provision in the section:

"But in no event shall there be transferred for any purpose any of the funds collected and received for the construction and maintenance of secondary roads."

This Section 388 is in the chapter with reference to the local budget law. The administration of secondary roads is placed in the board of supervisors. It is our studied opinion that the last of above quoted provisions of Section 388 was not placed therein for the purpose of qualifying Section 4644-c17, but was placed there for the purpose of safeguarding road funds from use for other purposes. Your first question also implies inquiries as to whether such transfers would permit the spending of more money from either the maintenance fund or construction fund than fixed by the budget for each, as published. It is our opinion that this is permissible so long as the sum

total of the budget for maintenance and construction is not exceeded.

Section 380 of the Code, which has to do with the local budget law, provides, inter alia:

"Thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in Sections 373, 381 and Paragraph 4 of Section 5259."

This provision was a part of the statutory law of the state for a considerable time prior to the time Section 4644-c17 was enacted, which was in 1929, as a part of Chapter 20, Acts of the 43rd General Assembly. The legislature evidently had a purpose in enacting Section 4644-c17, and it would appear that any other interpretation would make this section meaningless. It was evidently the intention of the legislature, so far as the above quoted provision of Section 380 is concerned, and the secondary road construction fund, and the secondary road maintenance fund, that it only controls the sum total of the two funds, and not the total of each.

This right to transfer under Section 4644-c17 is, however, subject to the qualification that such transfers cannot impair the 35 per cent of the construction fund pledged to the local county roads under Section 4644-c9, which involves the second question propounded by you.

Answering your second question, it is our opinion that the 35 per cent of the construction fund pledged to local county roads under Section 4644-c9 cannot be impaired by any transfer by the board of supervisors under the provisions of Section 4644-c17. Section 4464-c9 specifically pledges 35 per cent of the secondary road fund for the improvement and expenditure on local county roads, and Section 4644-c39 provides for the manner of adoption of the progress for the improvement of these local county roads. This approval is made by what is known as the "board of approval" consisting of the board of supervisors and a representative from each township in the county.

Section 4644-c34 provides for the adoption of the program for the improvement of the "local county roads to be paid for from the 35 per cent of the secondary road construction fund which is dedicated to local county roads," and further provides that "the action of this board shall be final except as it applies to the sixty-five per cent of the secondary road construction fund to be expended under the direction of the board of supervisors."

In view of these very clear provisions of the law no transfers under Section 4644-c17 can be made which will impair this pledged fund.

While in your third question two queries are presented, yet they are in fact one. The unappropriated road funds referred therein would include additional receipts, that is, receipts over and above what was estimated in the budget, and if the comptroller could approve a "transfer of unappropriated road funds," it would be approving not the transfer of funds, but the use of additional receipts going into the fund. There is no provision in Chapter 24 of the Code, the local budget law, permitting the use of receipts additional to those estimated as contained in the final budget as approved, and if this were permitted it would undoubtedly fly in the face of the local budget law, and particularly the provisions of Section 380 of the Code, which provides inter alia,

"* * * and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated

therefor, except as provided in Sections 373, 381, and Paragraph 4 of Section 5259."

The use of additional receipts does not come within any of the exceptions made in the above quoted section. Such use would undoubtedly result in an increase in the total expenditure of the county over and above the total provided for in the finally approved budget, and at least in this respect would be contrary to the finding of the Iowa court in *Clark vs. City of Des Moines*, 22 Iowa 317, 267 N. W. 97.

It is, therefore, our conclusion that your third question is to be answered entirely in the negative.

FEES: CORPORATION PROPERTY INCREASE: SECTION 8423: SECTION 8424: The payment of $25.00 minimum fee, would permit corporation to hold property in the state of Iowa to the value of $10,000, and if the original investment was less than $10,000 and should increase to $10,000 no additional fee should be charged until such time as their investment exceeded the minimum of $10,000.

September 28, 1939. *Hon. Earl G. Miller, Secretary of State. Attention: Rollo H. Bergeson:* We have your letter of September 27th requesting our opinion as to the application of Sections 8423 and 8424 of the Code as to the amount of the fee a corporation should be required to pay upon increase in value of its property in the State of Iowa.

Your problem is illustrated by the following: A corporation shows an investment in Iowa in the amount of $5,000.00, and pays the minimum fee of $25.00, uniform for all corporations showing property in the state of the value of $10,000 or less. Later additional statements filed show their investment has increased to $10,000.00. Should the corporation be charged an additional fee for this increase which is still within the minimum?

An examination of Sections 8423 and 8424 which provide for the amount of fees to be paid by corporations, and for the payment of additional fees upon increase in the value of property of the corporation in the state, it would appear that it was the intent of the legislature that the payment of the $25.00 fee should permit it to hold property in the state of Iowa to the value of $10,000.00, and that if their original investment was less than $10,000.00, and later it was increased to $10,000.00, that no additional fee would be required until such time as their investment exceeded the minimum of $10,000.00. It is further our opinion that on investments in the state in excess of the minimum of $10,000.00, additional fees should be required on the basis of $1.00 per each $1,000.00 or fraction thereof, of increase, on each increase over its last quoted valuation, and that the statute does not contemplate that upon increases from time to time each increase shall be figured from the minimum fees of $10,000.00 valuation.

SMALL LOANS: COUPON BOOKS: SECTION 419-f1: In view of the fact that the administration of this act devolves upon the banking department, it is to be enforced by the banking department.

September 28, 1939. *Hon. D. W. Bates, Superintendent Banking Department. Attention: R. L. Bunce:* We have your inquiry as to the following situation:

"A mercantile establishment within the state, selling $10.00 coupon books on a time payment plan, each book containing coupons of various denomina-

tions, aggregating $10.00 that may be used at any time for the purchase of merchandise, the same as cash. No reduction of price is contemplated in the plan.

"A $10.00 book is sold on the following basis: $3.00 cash payment at the time of purchase and $2.50 per month thereafter until $11.00 has been paid in full. That is, a $1.00 charge for the extension of credit. Your computation of this charge on an interest basis amounts to 8.16 per cent per month, or approximately 100 per cent per annum."

We have examined this particularly in the light of the provisions of Section 419-f1 of the Code, which is the chapter providing for the making of small loans under $300.00 by licensees for that purpose, as provided for in the chapter, Section 9438-f18, provides as follows:

"Interest limited—Violation—Effect. No person, except as authorized by this chapter, shall directly or indirectly charge, contract for, or receive any interest or consideration greater than the lender would be permitted by law to charge if he were not a licensee hereunder, upon the loan, use, or forbearance of money, goods, or things in action, or upon the loan, use, or *sale of credit* of the amount or value of three hundred dollars or less.

"The foregoing prohibition shall apply to any person who, *by any device, subterfuge, or pretense whatsoever*, shall charge, contract for, or receive greater interest, consideration, or charges than authorized by this chapter for any such loan, use or forbearance of money, goods, or things in action or for any such loan, use, or *sale of credit.*"

The statements of facts as given in your letter and as set out above would seem to indicate without question that the transaction inquired about is a "sale of credit." It will also be noted that the statute is very broad in its scope, and specifically provides that it shall apply to any person who, *by any device, subterfuge, or pretense whatsoever, shall charge, contract for, or receive greater interest.* It would follow that the transaction described above is in violation of the provisions of Section 9438-f18 of the Code, and would be subject to the penalties provided for in Section 9438-f19.

As to whether there is any duty or responsibility in connection with violations of the chapter devolving upon the banking department, it is our opinion that in view of the fact that this chapter, by its terms throughout, is to be administered by the banking department, that the primary duty and responsibility for initiating enforcement of its provisions would devolve upon that department.

ELECTION EXPENSES: TOWNSHIP: FIRE APPARATUS ELECTION: No provision made in statute for payment of costs incident to election in township for purchase or maintenance of fire apparatus or equipment, and therefore general election laws govern, upon proper bills being filed therefor.

September 29, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: Mr. Truax:* This will acknowledge receipt of your letter of the 20th inst., wherein you ask the opinion of this department relative to the following question:

"You say, insubstance, that Section 5570-c3 Code of Iowa, 1935, provides for the holding of elections for the purpose of submitting to the voters of a township the question of whether or not the township trustees are authorized to levy a tax for the purchase or maintaining fire apparatus or equipment.

"Your spefific question is: How may the expense of this election be paid?"

First we desire to call to your attention that Section 5570-c3, Code of Iowa, 1935, has been repealed, together with Sections 5570-c1 and 5570-c2, and a substitute therefor enacted by the 48th General Assembly, same being Chapter 149.

In the new act, as in the old, the proposal to levy the tax provided for may be submitted by the township trustees at any regular election held in the township or at a special election called for the purpose, and provision is made in said statute that the trustees "shall submit the proposition when petitioned therefor by 25 per cent of the qualified electors of said township." The new law makes no provision for the payment of the expenses incident to the holding of such election.

We are of the opinion that inasmuch as no provision has been made in the statute for the payment of the costs incident to the holding of this election, the general election laws govern and that, therefore, such expenses must be paid by the county, upon proper bills being filed therefor.

BOARD OF SUPERVISORS: CITY ASSESSOR: EXPENSES: It is within the sound discretion of the county board of supervisors and city council to authorize the city assessor to attend a national conference of assessors, and it is legal disbursement of county to pay one-half of his expenses.

September 29, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: L. I. Truax:* This will acknowledge receipt of your letter of July 10th, wherein you ask our opinion on the following question:

"We are in receipt of the following communication from our examiner in Woodbury county:

" 'Warrant No. 6415 was issued to P. C. Cockerill, assessor for the city of Sioux City, in payment of:

" 'Notation on claim—One-half of expenses of trip to National Conference, N. Y., and return, called by governor of Iowa (remaining half to be borne by city of Sioux City), entire expenses of this trip were $143.25 and were incurred between dates of October 17 and 24 inclusive and are classified as follows:

" 'Railroad and Pullman fares, taxi, etc.	$ 99.85
" 'Hotel bills and meals	38.40
" 'Conference registration fee	5.00
" 'Grand total	$143.25

" "One-half $71.62."

You ask our opinion as to whether or not payment of the $71.62, as shown above, is a legal disbursement by the county.

In your communication of the 26th inst., you advise us as follows:

"We have been advised that there was an agreement between the city and the county as to the payment of the bill, prior to the trip made by the assessor."

We are of the opinion that it is within the sound discretion of the county board of supervisors and the city council to authorize the city assessor to attend a national conference of assessors.

Section 5260, Code of Iowa, 1935, provides:

"No claim shall be allowed or warrant issued or paid for the expenses incurred by any county officer in attending any convention of county officers."

This statute, of course, has no application to a city official.

We reach the conclusion, therefore, that it is within the sound discretion of Woodbury County to pay the expenses in question.

STATE BOARD OF SOCIAL WELFARE: OLD AGE ASSISTANCE: LEGAL SETTLEMENT: (Subsection 3, Section 5311, 1935 Code): A person who receives old age assistance is one who is supported by public funds and thus cannot acquire a legal settlement for the purpose of relief in any county other than the county in which he lived at the time he started receiving old

age assistance. It is not necessary to serve a non-residence notice on any recipient to keep him from acquiring legal settlement.

October 2, 1939. *Mr. Lester L. Osborn, County Attorney, Red Oak, Iowa:* We have your letter of September 28th, wherein you ask the following questions:

"Please advise if a person who is receiving old age pension moves from one county to another in the state of Iowa, whether or not said pensioner can gain a residence in the county to which he or she has moved.

"Also, if a person receiving an old age pension moves into your county, whether or not it is necessary to serve on them a non-resident notice in order to keep them from gaining a residence in your county."

For the purposes of this opinion, we quote in part Section 5311:

"*Settlement—how acquired.* A legal settlement in this state may be acquired as follows:

* * *

"3. Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any institution supported by charitable or public funds in any county in this state or any person who is being supported by public funds shall not acquire a settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county."

* * *

We assume that where you use the word "residence" in your question, that you mean "legal settlement" for the purposes of relief.

It is our opinion that subsection 3 of Section 5311 of the 1935 Code is controlling. A person who receives old age assistance is one who is supported by public funds and thus cannot acquire a legal settlement for the purposes of relief in any county other than that county in which he lived at the time he started receiving old age assistance.

In answer to your second question, it is our opinion that it follows that it is not necessary to serve a nonresidence notice on any recipient of old age assistance to keep him from acquiring a legal settlement.

MARGINAL RELEASE OF CHATTEL MORTGAGE: FEE-REFUND: Fees collected under authority of A.G.O. of May 24, 1939 should be refunded.

October 2, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: L. I. Truax:* This is in answer to your letter of the 19th ult., wherein you say:

"Your opinion on the following matter is requested. Should a refund of fees be made in cases where a county recorder has made a charge of twenty-five cents for the marginal release of chattel mortgage under the attorney general's opinion of May 24, 1939, in which it was held that such a charge should be made. Under the opinion of recent date the former opinion holding that this charge should be made was withdrawn. During the interim the county recorders have followed the opinion of May 24 and collected the twenty-five cent fee."

It is our opinion that the fees collected under the authority of our opinion of May 24, 1939, should be refunded.

GOVERNMENTAL FUNCTION: WEED COMMISSIONER: BOARD OF SUPERVISORS: County is not liable to either tenant or landlord for loss to tenant of cattle occasioned by syraying of weeds by county weed commissioner, as commissioner was in exercise of a governmental function.

October 2, 1939. *Mr. Earl H. Fisher, County Attorney, Rock Rapids, Iowa:*

This is in answer to your letter of the 29th ult., wherein you ask the opinion of this department relative to the following question:

"The facts are these: The weed commissioner of one of your townships, with the consent of the title holder, entered upon the land of said title holder for the purpose of destroying certain weeds by the application of sodium chloride. It appears that the tenant's cattle ate the weeds sprayed with this solution and as a result thereof, sickened and died.

"The question is: Is the county liable for the damages to either the tenant or the owner of the farm?

We are of the opinion that there is no liability on the part of the county to either the landlord or the tenant. We hereinafter give you our reasons for so holding.

Authorities:

Larson vs. Independent School Dist. 272 NW 632, 223 Iowa 691;
Kincaid vs. Hardin County, 33 Iowa 430;
Miller Grocery Co. vs. City of Des Moines, 195 Iowa 1310;
Smith vs. Iowa City, 213 Iowa 391, 239 NW 29;
Wilson vs. Wapello County, 129 NW 77;
Snethen vs. Harrison County, 172 Iowa 81;
Post vs. Davis county, 196 Iowa 183;
Lane vs. District Township of Woodbury, 58 Iowa 462;
Montanick vs. McMillin, 280 NW 608 (Iowa);
Packard vs. Voltz, 94 Iowa 277.

In the Larson case, supra, the court said:

"So, we think, from the decision of the courts of Iowa, that there is a line of distinction between incorporated cities and towns and such corporations as counties and school districts, the latter being what are known as quasi corporations, and only for governmental purposes. *A school district is an organization simply for the purpose of carrying on the schools, for that and for nothing else.* It is only a quasi organization * * * it would be very disregardful of the law for the court to hold * * * that the school district is liable."

In the Lane case, supra, it was said:

"A school corporation, or quasi corporation, is created by statute for the purpose of executing the general laws and policy of the state, which require the education of all its youth. It is a branch of the state government, an instrument for the administration of laws and so far as the people are concerned, an involuntary organization."

In *Smith vs. Iowa City, supra*, the court held that:

"* * * a city in exercising its governmental power through a park board to acquire and maintain public parks is not liable for damages consequent on the negligent failure to keep the instrumentalities in said parks in repair; *nor are the members of the park board individually liable for such nonfeasance on their part.*"

These cases, as you will note, lay down the rule that the county is not liable for damages resulting from the exercise of a governmental function.

It is our opinion that the county, acting through its weed commissioner, was in the exercise of a governmental function at the time the weeds in question were sprayed.

Chapter 131, Laws of the 47th General Assembly, provide for the appointment of "either a county weed commissioner or one township weed commissioner for each township." This weed commissioner has the authority under said chapter to enter upon lands for the purpose of destroying weeds growing thereon. The duty of destroying these weeds is placed upon the board of supervisors by the provisions of said chapter.

We reach the conclusion, therefore, that the county is not liable to either

the tenant or the landlord for the loss to the tenant occasioned by the spraying of the weeds in question.

STATE BOARD OF SOCIAL WELFARE: OLD AGE ASSISTANCE: MEDICAL AID: COUNTY: (Sections 3828.009 and 3828.032, 1939 Code): Legislature provided not to exceed $5.00 for medical attention when it is needed continuously by recipient. Legislature also intended that the county could furnish medical and surgical assistance but payment of such claims for medical assistance are purely within the discretion of board of supervisors as provided in Section 5329.

October 2, 1939. *Mr. C. Morse Hoorneman, County Attorney, Le Mars, Iowa:* We are in receipt of your letter of September 27th wherein you ask the following question:

"The Plymouth county welfare director has asked me to get an opinion from you on the question of whether or not the county poor fund or the county authorities were responsible for the payment of necessary medical care to be extended to old age pension recipients."

For the purposes of this opinion, we quote from Section 5296-f10, 1935 Code, and as amended by Chapter 137, Section 7, 47th General Assembly, and House File 628, Section 1, of the 48th General Assembly, which will appear in the 1939 Code as Section 3828.009:

"*Amount of assistance.* The amount of assistance shall be fixed with due regard to the condition of the individual, household situation and community in each instance, subject to the rules, regulations and standards adopted by the state board, but in no instance shall it be an amount which, when added to the income of the applicant from all other sources, exclusive of the exemptions hereinafter provided, shall exceed a total of twenty-five dollars a month. However, a further allowance not to exceed five dollars per month may be allowed, when essential, to meet additional expenses due to the individual's mental and/or physical condition."

We also quote from Section 5296-f27, 1935 Code, as amended by Chapter 137, Section 23, 47th General Assembly, and House File 628, Section 4, 48th General Assembly, which will appear in the 1939 Code as Section 3828.032:

"*Recipient not to receive other assistance.* No person receiving assistance under this chapter shall at the same time receive any other assistance from the state,or from any political subdivision thereof, except for fuel, dental, nursing, osteopathic, chiropractic, medical and surgical assistance and hospitalization. * * *."

You will note that in the first quoted section, the legislature has provided that an allowance not to exceed $5.00 may be given a recipient of old age assistance for medical attention, but it is our opinion that this is only to provide funds for such medical attention when it is needed continuously by such recipient. You will also note that in the last quoted section, the legislature has by inference stated that any person receiving old age assistance may receive additional assistance in the form of medical and surgical assistance and hospitalization.

It is our opinion that the legislature intended that the county, a political subdivision of the state, could furnish medical and surgical assistance. You should bear in mind that the payment of all such claims for medical assistance are purely within the discretion of the board of supervisors as provided in Section 5329, 1935 Code of Iowa.

HIGHWAY PATROL: NUMBER OF MEMBERS: MEMBERSHIP: PATROL: In addition to a chief and two assistant chiefs, the highway safety patrol is entitled to a personnel of one hundred twenty-five men.

October 6, 1939. *Department of Public Safety. Attention: Karl W. Fischer:* Your letter of October 2, 1939, inquiring our opinion on the following matter is herewith acknowledged.

"Under Senate File 379 as passed by the 48th General Assembly, Section 4 of the above act provides: 'The commissioner shall succeed in the administration and control of the Iowa Highway Safety Patrol established under Chapter 134, Acts of the 47th General Assembly. The commissioner is authorized to employ the members of said patrol; however, not to exceed one hundred twenty-five men.'

"In view of the above there is some question in our minds as to whether we are entitled to one hundred twenty-five patrolmen plus one chief and two assistanct chiefs or whether the one hundred twenty-five includes a chief and two assistant chiefs."

For the purpose of this opinion, we quote from Chapter 67.1 of the 1939 Code of Iowa, as follows:

"1225.09. *Highway patrol.* The commissioner shall succeed in the administration and control of the Iowa Highway Safety Patrol established under Chapter 134, Acts of the 47th General Assembly. The commissioner is authorized to employ the members of said patrol; however, not to exceed one hundred twenty-five men, and not more than sixty per cent of said patrol shall at any time be members of the same political party. Provided, however, the present personnel of the highway patrol in good standing are exempted from the provisions of this section..

1225.10. *Officers of patrol.* The commissioner is authorized to appoint a chief, a first and second assistant and all other supervisory officers of said patrol. All appointments and promotions shall be made on the basis of seniority and merit examination. There shall not be more than twenty supervisory officers in the said patrol unless the membership thereof is increased to such a number as to require the appointment of additional supervisory officers.

1225.12. *Patrolmen and employees—Salaries.* The commissioner, with the approval of the governor, shall appoint such deputies, inspectors, officers, clerical workers and other employees as may be required to properly discharge the duties of this department, provided, however, that all members in good standing of what was heretofore known as the Iowa Highway Safety Patrol, shall upon the enactment of this chapter, immediately become members of this department without appointment and the rank and salary of all members of the Iowa Highway Safety Patrol shall remain the same as heretofore fixed by statute, or as may be provided for in this chapter."

The history of the highway patrol indicates that the 46th General Assembly provided for a patrol of not to exceed 53 members and the subsequent 47th General Assembly increased this number by an additional 75 men. The patrol consequently, at the present time, is composed of 125 men and three officers, to wit, a chief and two assistant chiefs.

Were it to be assumed that the legislature intended to include the officers of the patrol in the 125 members referred to in Section 1225.09, then the 125 patrolmen now in existence must necessarily be reduced to 122 in number. However, from a reading of the entire chapter, it seems to be the clear intention of the legislature that the patrol should not be reduced but should retain its composition of the 125 men and three officers. Section 1225.12 provides "that all members in good standing of what was heretofore known

as the Iowa highway safety patrol shall, upon the enactment of this chapter, immediately become members of this department * * *." This would indicate that the legislature had no thought of reducing the membership of the force. On the other hand, if a reduction was the intention of this body, then the provision that the members in good standing should carry over would become inoperative. The provision amounts substantially to a re-enactment of the previous provision allowing a patrol membership of 125 men and three officers. With this in mind, it may reasonably be said that the phrase of Section 1225.09, "not to exceed one hundred twenty-five men," refers to the patrolmen only and not to the officers, that is to say the chief and the two assistant chiefs. The following Section 1225.10 refers to the officers and their appointment as distinguished from the men of the patrol.

In addition, the general rule of statutory construction requires that statutes must be reconciled if possible and the only way that Sections 1225.09 and 1225.12 may be so construed is to hold as the legislature evidently intended that the entire patrol consisting of 125 men and three officers be carried forward in that particular status and the provision of Section 1225.09 providing that the commissioner may employ the members of said patrol not to exceed 125 men was intended solely to apply to the personnel of the patrolmen themselves or the 125 men now in existence by virtue of the Acts of the 46th and 47th General Assemblies.

It is, therefore, our opinion that in addition to a chief and two assistant chiefs, the highway safety patrol is entitled to a personnel of 125 men.

PODIATRY SCHOOLS: ENTRANCE REQUIREMENT: MATRICULANTS: EXAMINATIONS: Not until January 1, 1940, may matriculants be obliged to have a year of college as an entrance requirement and those entering podiatry school prior to that time in the usual and ordinary manner may proceed to the conclusion of their course and may thereafter be eligible to take the Iowa Podiatry Board examinations in 1942.

October 6, 1939. *Board of Podiatry Examiners. Attention: Dr. Stewart E. Reed:* Your letter of September 25, 1939, inquiring our opinion as to the following matter, is herewith acknowledged.

"From your interpretation of the Podiatry law, is it necessary that matriculants into Chiropody colleges this year have one year of college education as a pre-requisite requirement to attend these Chiropody colleges as so prescribed in our law? Matriculants of this year (this term) will automatically be graduated in the spring of 1942. Would they be eligible to take the Iowa Board of Podiatry examinations in 1942 if they had not had one year of college education?"

We quote from Chapter 104, Acts of the 47th General Assembly, as follows:

"Sec. 5. No school of podiatry shall be approved by the board of podiatry examiners as a school of recognized standing unless said school:

"(a) Requires for graduation or the receipt of any podiatric degree the completion of a course of study covering a period of at least eight months in each of three (3) calendar years.

"(b) After January 1, 1940, no school of podiatry and/or chiropody shall be approved by the board of podiatry examiners which does not have an additional entrance requirement of one (1) year's study in a recognized college, junior college, university or academy."

Reviewing the statute, it appears that the Board of Podiatry Examiners may not approve a school of podiatry as a school of recognized standing unless it

meets certain requirements. The 47th General Assembly provided that in addition to previous requirements, such schools to be approved must have an entrance requirement of one (1) year's study in a recognized college, junior college, university or academy, and that this requirement shall be in effect after January 1, 1940.

It is apparent that the legislature intended that not until January 1, 1940, would those matriculating in a podiatry school be required to have the one (1) year's college training. This being true, then the entrants in the fall of 1939 and graduating in 1942 may not be obliged to have the additional year for the reason that the criterion is one of admission and not one of graduation and does not attach to matriculants until January 1, 1940. It is, in addition, unreasonable to suppose that the legislature could have intended that a student partially through podiatry school could be required to have a year of college when the law was not in effect at the time of his entrance.

It is, therefore, our opinion that not until January 1, 1940, may matriculants be obliged to have a year of college as an entrance requirement and those entering podiatry school prior to that time in the usual and ordinary manner may proceed to the conclusion of their course and may thereafter be eligible to take the Iowa Podiatry Board examinations in 1942.

FARM TO MARKET PROJECTS: SECONDARY ROAD FUND: Resolution of the board by which it proposes to pay excess cost of its farm to market projects from the secondary road construction fund is not legal. Section 20 of Farm to Market Act contains provision on how to proceed.

October 6, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: C. Coykendall:* This will acknowledge receipt of your inquiry of September 28, 1939, in which you set forth the following facts:

"The Winneshiek county board of supervisors has recommended to the state highway commission two Farm to Market Road Projects, the cost of which exceeds the amount that can be allocated to Winneshiek county from the Farm to Market Road Fund during the years 1939 and 1940, by approximately $18,000.00.

"Before the contracts were awarded, the board of supervisors' attention was called to the fact that the work would cost substantially in excess of the amount of farm to market funds available and the board was advised that before the commission could award and release said contracts it would be necessary that the board file with us a resolution agreeing to pay any such excess cost beyond the amount available in the farm to market road fund from the secondary road construction fund of Winneshiek county.

"Such a resolution was duly signed by the board and filed with the commission and on the strength of this resolution, we have awarded the contracts and the same have been released to the contractors.

"We would appreciate your advice as to the legal and practical way to accomplish this end sought by the Winneshiek county board. Section 20 of the Farm to Market Road Law provides that any board of supervisors may make available for improvement or construction of farm to market roads within the county, an amount not to exceed twenty-five per cent of the allotment of motor fuel license fees. This section further directs that upon certification of such a resolution the state treasurer shall place in the county's allotment of farm to market road funds the amount authorized by such resolution.

"I do not believe that Winneshiek county had in mind following this particular section of the Farm to Market Road Law. It is my information that Winneshiek county has on hand some $30,000 or $35,000 of unobligated Secondary Road Construction Funds and expects to use whatever part of this amount will be necessary to make final payment on these projects.

"Under these conditions we would appreciate your advice as to whether it would be legal for us to proceed in the following manner:

"1. We advance all construction costs from the Farm to Market Road Funds on the above mentioned projects and make payment direct to the contractor for work performed under these contracts.

"2. As soon as the entire cost of the project has been determined we submit a claim to the Winneshiek county board of supervisors for whatever amount is necessary to make final payment on these contracts after all funds available during 1939 and 1940 from the Farm to Market Road Fund credited to the account of Winneshiek county has been expended.

"If such procedure cannot be followed and it is necessary, in order to accomplish what the Winneshiek county board desires, for the board to proceed under the provisions of the above mentioned Section 20. In that event, we would also appreciate your recommendations to the form of resolution which the board of supervisors should adopt, authorizing the transfer of motor fuel license fees to the Farm to Market Road Fund."

Your first question relative to the legality of the resolution of the board by which it proposes to pay the excess cost of its farm to market projects from the secondary road construction fund must be answered in the negative.

It is a familiar rule of law that the proceeds of taxation pledged and allocated to a specific purpose may not be diverted except by express statutory authority. The purposes to which secondary road funds are to be expended are set forth in Chapter 240 of the Code and allied provisions. The Farm to Market Road Act, while it embraces roads in the secondary road system, nevertheless contemplates the adoption of a separate program for the construction and improvement of which additional funds are provided than those pledged and allocated to the secondary road construction program. One exception is made in the provisions of Section 20 of the Farm to Market Road Act whereby the board is enabled to divert 25 per cent of its allotment of motor fuel license fees to the construction and improvement of farm to market roads. Nowhere in the act is provision made for a further diversion of secondary road construction funds to the cost of construction of farm to market roads, and a resolution seeking to accomplish a further diversion would be invalid.

Answering your second question, the act specifically provides for the claims which shall be paid from the farm to market road fund, and the manner and method of payment thereof. Section 28 provides for advancement from the primary road fund of engineering, inspection and administration expense only, but no provision is made for construction costs, or for billing the county's secondary road construction fund for advancements so made.

The solution to your difficulty lies in the provisions of Section 20 of the act heretofore referred to, and a general form of resolution to accomplish the purposes set forth is enclosed herewith.

OSTEOPATHS: HEMORRHOIDS: INTERSTITIAL INFILTRATION: The treatment of hemorrhoids by the interstitial infiltration method, using a solution of 95 per cent wesson oil and five per cent phenol is not major operative surgery, nor is it the use of internal curative medicine as defined by statute, and such practice is, therefore, not prohibited to the osteopath by law.

October 7, 1939. *Board of Osteopathic Examiners. Attention: D. E. Hannan, D. O.:* We acknowledge herewith your request for our opinion as to whether the treatment of hemorrhoids by the interstitial infiltration method, using a

solution of 95 per cent wesson oil and 5 per cent phenol amounts to prescribing or giving internal curative medicine, and if it further amounts to major surgery so as to be prohibited to practitioners of osteopathy by law.

For the purpose of this opinion, we quote the following sections of Chapter 118 of the 1935 Code of Iowa:

"2554-g7. *Scope of practice.* One licensed as an osteopathic physician may practice osteopathy as defined in Section 2554-g1 including obstetrics and minor surgery. One specially licensed as an osteopathic physician and surgeon under section 2554-g5 may also practice major surgery. Neither osteopathic physicians nor osteopathic physicians and surgeons licensed under this chapter shall be subject to the provisions of Chapter 116.

2554-g8. *Internal curative medicines—Surgery.* A license to practice osteopathy or osteopathy and surgery shall not authorize the licensee to prescribe or give internal curative medicines and a license to practice osteopathy shall not authorize the licensee to engage in major operative surgery. The words 'internal curative medicine,' as used herein, shall be so construed as not to include antidotes, biologics, drugs necessary to the practice of minor surgery and obstetrics, or to the simpler remedies commonly given for temporary relief."

For a proper understanding of the problems presented, it is necessary that a hemorrhoid be defined and the interstitial infiltration method of treatment be properly understood.

"A hemorrhoid, although not strictly speaking a tumor, is a more or less pedicled swelling, either internal or external, which is covered with mucous membrane or skin, and in the center of which are one or more dilated veins * * *.

"A great variety of operations have been employed for the cure of a patient with chronic hemorrhoids. They are all based on the assumption that surplus tissue exists, and that it should be removed. They may be divided into three groups, according to the method by which the excess of tissue is to be removed; namely, the injection of chemicals to shrink the excess tissue; * * *."

—*Principles and Practice of Minor Surgery*, by Foote and Livingston.

"Ten to twenty minims of the phenol solution are injected directly into the middle of a selected hemorrhoidal mass."

—*Minor Surgery*, by Christopher.

In the interstitial infiltration method, it will, therefore, be observed that the practitioner injects the solution by hypodermic syringe into the center of the hemorrhoidal mass, the solution producing an irritation which causes a shrinkage and collapse of the hemorrhoid.

With this in mind, two questions arise: (1) Is the use of the syringe in injecting the phenol solution the practice of minor surgery so as to be permitted to the osteopath, and (2) is the injection of the phenol solution such a use of an antidote, biologic or drug necessary to the practice of minor surgery so as to be permitted to the osteopath.

A review of the statutes indicates that an oseopath may not "prescribe or give internal curative medicine" but the statute continues, "the words 'internal curative medicine', as used herein, shall be so construed as not to include antidotes, biologics, drugs necessary to the practice of minor surgery * * *." If, therefore, the interstitial infiltration method of treating hemorrhoids is minor surgery and the use of the solution in question is an antidote, biologic or drug necessary to the practice of this minor surgery, then it is lawful for the osteopath to engage in this practice.

Authorities have sought to define the limits within which major and minor surgery may be said to operate, with minor surgery frequently being desig-

nated as that field of surgical practice which by elimination does not invade the scope of major surgery.

"Evidently viewing the matter from the standpoint of a hospital superintendent and considering the length of time the operating room will be in use and the quantity of material that will be consumed, a major operation has been defined as one covering a considerable period of time or requiring a considerable amount of surgical supplies. Another definition of somewhat the same type describes a major operation as one requiring general anesthesia, one or more scrubbed nurse assistants, and a fully set-up operation room. A minor operation is, on the contrary, defined as one that can be done in a patient's home, a physician's office, or an out-patient department, leaving the patient able to walk immediately after the operation or within a short time; or as an operation requiring little or no assistance and brief anesthesia, general or local. From a surgical standpoint a major operation has been defined as one requiring special training or skill; an operation in which incisions are made through tissues below the subcutaneous and submucous layers; an operation requiring a general anesthetic, or requiring the use of morphin or scopolamin, together or alone, or the use of more than a minimum of novocain or cocain; or an operation requiring general anesthesia for more than fifteen minutes.

"Operations that have been classed as major operations are as follows: Opening the cranial, thoracic, peritoneal, or pelvic cavities; operations on the spine, the joints, and the nervous system; large orthopedic procedures; extensive amputations and operations for injuries; therapeutic spinal punctures and cistern punctures; blood transfusions; any operation carrying a notable risk to life, say a 2 per cent mortality; any operation that entails, of necessity, a variable period of total disability, the average of which exceeds two weeks; any operation that requires a patient to remain in bed for more than twenty-four hours afterwards. The following have been named as minor operations: Incisions of abscesses; excisions of lippmas and similar benign, superficial tumor masses; amputation of digits; simple circumcision of an infant; removal of cataracts; removal of tonsils, submucous resections; suturing of small wounds; treatment of small, limited, superficial lacerations, superficial abscesses and boils. Operations for inguinal hernia, cystoscopy, and catheterization of the ureters, it has been said, should not usually be regarded as major operations."—*Surgery*, by Nelson.

"Minor surgery is the surgery which has a low mortality; which requires but few assistants; which generally is done in the hospital out-patient department or in the office. It includes the large majority of surgical cases; the every day surgical conditions * * *.

"Pennoyer believes that varicose veins of the lower extremity can be permanently obliterated by the injection method, and that the method is safer and easier than the surgical excision * * *.

"The smaller thrombosed hemorhoids will very frequently yield to rest and hot or cold fomentations. The larger ones will require minor surgical treatment."

—*Minor Surgery*, by Christopher.

"The advantage of the method (interstitial infiltration), in suitable cases, are the ease of its performance, the fact that no anesthetic, or at most a local one is necessary, and the possibility that the patient in many cases can be treated in the office and need not go to bed."

—*Principles and Practice of Minor Surgery*, by Foote and Livingston.

From a review of the above definitions, there can be no doubt that the use of a syringe in injecting a solution into a tumorous mass is one of the most minor of surgical practices. The authorities have specifically listed this practice as that of minor surgery. We consequently arrive at the conclusion that the treatment of hemorrhoids by the interstitial infiltration method is a practice of minor surgery.

It now remains to be determined as to whether the injection of the phenol solution is a use of an antidote, biologic or drug necessary to the practice of minor surgery. That phenol is a drug, there can be no doubt. An exam-

ination of standard medical and therapeutic works reveals that phenol (carbolic acid) is a drug. It is a constituent of coal tar obtained by fractional distillation and subsequently purified. See Materia Medica and Therapeutics, Sixth Edition, by John V. Shoemaker. Since we have determined that the treatment in question is minor surgery, is the use of such phenol necessary to this practice?

"From the many chemicals which have been used for injections (in the interstitial infiltration method), it is sufficient to mention three. Carbolic acid, from 5 to 15 per cent in oil or glycerin; 95 per cent alcohol; and an 8 per cent solution of quinine and urea hydrochlorid."

—*Principles and Practice of Minor Surgery*, by Foote and Livingston.

"Although the injection treatment of hemorrhoids has been in use for over fifty years, of recent years it has received renewed attention * * *.

"Various solutions are employed. The five per cent siolution of quinine and urea hydrochloride of Terrell is used by Buie of the Mayo Clinic; five to ten per cent phenol in glycerin, olive oil, cottonseed oil (Goldbacher), Wesson oil or almond oil."

—*Minor Surgery*, by Christopher.

"In hemorrhoids, carbolic acid, either pure or diluted with oil, has been employed with satisfactory results."—*Materia Medica and Therapeutics*, by Shoemaker.

The authorities thus examined indicate without question that the solution used is proper and suitable for the treatment in question and that phenol is one of the drugs approved and necessary to the practice of the interstitial infiltration method.

It is, therefore, our opinion that the treatment of hemorrhoids by the interstitial infiltration method, using a solution of 95 per cent Wesson oil and 5 per cent phenol is not major operative surgery, nor is it the use of internal curative medicine as defined by statute, and such practice is, therefore, not prohibited to the osteopath by law.

BOARD OF SUPERVISORS: GOVERNMENTAL FUNCTION: LIABILITY OF COUNTY: No liability exists against the county for injury sustained by person in collision with gravel truck operated for county, as county was engaged in governmental function and it was duty of board of supervisors to interpose a proper defense to claim.

October 9, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: L. I. Truax:* This is in answer to your letter of the 14th ult., wherein you request the opinion of this department on the following matter:

"* * * payment of $175.00 was ordered by the board in supervisors in full settlement of all claims for damages which were sustained by one George Preston of Creston, Union county, in a collision with a gravel truck operated for Union county. This payment was based upon the provisions of a release signed by George C. Preston, a copy of which is herewith attached.

"Please advise us if the payment of this claim is a proper expenditure of county funds. An early reply will be appreciated."

We are of the opinion that there is no liability on the part of the county. We hereinafter give you our reasons for so holding.

Authorities:

Larson vs. Independent School Dist., 272 NW 632, 223 Iowa 691;
Kincaid vs. Hardin County, 33 Iowa 430;
Miller Grocery Co. vs. City of Des Moines, 195 Iowa 1310;
Smith vs. Iowa City, 213 Iowa 391, 239 NW 29;
Wilson vs. Wapello County, 129 NW 77;
Shethen vs. Harrison County, 172 Iowa 81;

Post vs. Davis County, 196 Iowa 183;
Lane vs. District Township of Woodbury, 58 Iowa 462;
Montanick vs. McMillin, 280 NW 608 (Iowa).
Packard vs. Voltz, 94 Iowa 277.

In the *Snethen case, supra*, the court said:

"Counties, unlike cities and incorporated towns are not, as a rule, held liable for torts committed by them, so long as they are acting within the scope of their governmental powers. They are quasi-municipal corporations engaged in the performance of governmental functions, and are not responsible for the neglect of duties enjoined upon them, in the absence of statute giving a right of action."

Also in the above case the court quoted with approval from *Soper vs Henry County*, 26 Iowa 264, as follows:

"Counties are involuntary political or civil divisions of the state, created by general statutes, to aid in the administration of government. * * * The opinion of the court is that the court below rightly held that the county was not liable to the plaintiff in respect to the injury for which his action was brought. *If the county ought to be held liable in such a case, the remedy must be sought from the legislature.*"

Inasmuch as there is no liability on the part of the county, we are of the opinion that the payment of $175.00 under the circumstances outlined in your letter was improper.

Section 5230, subsection 6, Code of Iowa, 1935, provides:

"The board of supervisors at any regular meeting shall have power:
* * *

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

Whereas, it appears from the statement of facts contained in your letter that at the time of the injury the county was engaged in a governmental function and hence no liability existed against the county, as revealed by the authorities cited, we are of the opinion that it was the duty of the board of supervisors to interpose a proper defense to the claim in question.

STATE BOARD OF SOCIAL WELFARE: RELIEF: LEGAL SETTLEMENT: As to whether a particular applicant for relief established legal settlement outside of Polk county and whether the fact that Jasper county accepted applicant as Jasper county charge by furnishing relief constituted legal settlement in Jasper county. Not having lived continuously in any one county for a year except Polk county, his legal settlement must be Polk county—also the fact that Jasper county gave relief to this applicant for a period of several years is not binding on Jasper county.

October 9, 1939. *Mr. Luther M. Carr, County Attorney, Newton, Iowa.* This is to acknowledge receipt of your letter under date of October 3rd, in which you ask our opinion as to the legal settlement of an applicant for relief. The facts, as we understand them, are these:

The applicant for relief lived in Polk County continuously until 1923. At that time, he moved to Jasper County and before he had lived there one year, he was served with notice to depart. He then lived in various places, including Chicago, Des Moines and Knoxville, and states that he never lived in any one place continuously for one year. In 1934, he returned to Polk County and at that time, was served with a non-residence notice by Polk County and Jasper County was so notified. In addition, the relief director of Jasper County accepted this applicant as a Jasper County charge and since that time, Jasper

County has been furnishing this applicant relief even though the applicant has been living in Polk County.

There seem to be two questions involved—one, did the applicant ever establish a legal settlement outside of Polk County, and second, would the fact that Jasper County accepted the applicant as a Jasper County charge by furnishing relief to him constitute a legal settlement in Jasper County for the purpose of relief.

In answer to the first question, it is our opinion that Section 5312, 1935 Code of Iowa, governs. That section is as follows:

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

If there is no proof to the contrary that the applicant's statement of fact is correct, that is to say, that he has not lived in any one place continuously for a year, other than Polk County, then his legal settlement must necessarily still be in Polk County. However, there seems to be the second question which must also be considered.

It is our opinion that your former relief director who accepted the applicant as a Jasper County charge was acting outside the scope of his authority and contrary to law. Jasper County had no legal responsibility to furnish relief to this applicant until he had acquired a legal settleement in Jasper County by living there for one year without being served with notice to depart. The unauthorized act of this former relief director could not bind Jasper County. See *Seddon vs. State*, 100 Iowa 378, in which it was held that the unauthorized statement of the sheriff could not bind the State of Iowa because it was outside the scope of his authority. See also *Frise vs. Porch*, 49 Iowa 351. See also *State vs. Haskell*, 20 Iowa 276, wherein it was held that the unauthorized representations of an agent, especially a public agent whose duties are expressly defined by a public statute touching facts peculiarly within his own knowledge but regularly open to both parties and readily susceptible of ascertainment, are not binding upon his principal or the public.

It is our further opinion that the fact that Jasper County has continued to give relief to this applicant for a period of several years is not binding on Jasper County. In other words, Jasper County could not ratify the unauthorized acts of its former relief director. See *Doon Twp. vs. Cummins*, 142 Iowa 366 at 376, in which case the court in an action for the payment of bonds issued above the statutory limit and in violation of the state constitution, could not be maintained, stated:

"It is hardly necessary to add that the payment of some installments of interest cannot have the effect of ratifying bonds issued beyond the constitutional limit; for a ratification can have no greater effect than a previous authority; and debts which neither the district nor its officers had any power to authorize or create cannot be ratified or validated by either of them, by the payment of interest or otherwise."

See also L. R. A. 1915-A, at page 1025.

By reason of the foregoing authorities cited, it is our opinion that under the facts as stated, the legal settlement of the applicant is in Polk County and not in Jasper County.

EVENING SCHOOLS: PUBLIC FORUMS: USE OF SCHOOL FUNDS TO FINANCE: SECTION 4288: A board may establish evening schools and provide for them in their budget.

October 9, 1939. *Hon. C. Fred Porter, State Comptroller:* We have your request for an opinion as to the legality of the use of public school funds to finance the so-called public forums in independent school districts of Des Moines, the question arising on appeal of certain taxpayers to the proposed budget of said district. It appears that this is set up in the proposed budget as a part of the evening school and adult educational program.

Section 4268 of the Code of 1935 provides:

"Persons between five and twenty-one years of age shall be of school age. A board may establish and maintain evening schools for all residents of the corporation regardless of age and for which no tuition need be charged. Nonresident children and those sojourning temporarily in any school corporation may attend school therein upon such terms as the board may determine."

In addition to this section we also have Sections 4288 to 4290 inclusive, which constitute Chapter 217, "Evening Schools." These three sections of the code have been in existence in substantially the form in which they now appear since their enactment by the 37th General Assembly in 1917. Section 4288 provides as follows:

"Evening Schools Authorized. The board of any school corporation may establish and maintain public evening schools as a branch of the public schools when deemed advisable for the public convenience and welfare."

It would appear from the provisions of this section that the establishment of schools by the board thereunder is within their discretion.

Section 4289 provides when the establishment of evening schools is mandatory on the school corporation, but there is nothing to indicate that the authority of the board in establishing the evening school under Section 4288 is in any way limited or qualified by reason of any of the provisions of Section 4289. It is evident that the legislature intended that the field of public education should be broadened in its scope and its application by the enactment of these provisions. This legislative intent is further evidenced by the fact that the following provision in Section 4268 of the code was not placed in the code until 1927 by the 42nd General Assembly: "A board may establish and maintain evening schools for all residents of the corporation regardless of age and for which no tuition need be charged."

If the legislature did not intend to broaden the scope of public education, and particularly as same was applicable to adults and evening schools, most certainly the provisions of Section 4288 to 4290 inclusive, would have been considered sufficient.

Section 4250 of the Code provides that the board of education shall prescribe courses of study for the schools of the corporation, and following this section, and in the same chapter there are various provisions with reference to certain subjects which are required to be taught in all schools, and providing for certain minimum instruction on American citizenship, the Constitution of the United Stats and the state of Iowa, American history, civics, physiology and hygiene, and the effects of narcotics and stimulants. However, we do not feel that the provisions of the chapter covering courses of study wherein certain subjects are required to be taught necessarily circumscribes the board of education in determining what other courses shall be taught in the schools.

A board being empowered under the provisions of the law heretofore set out, to provide for evening schools and for adult education, it follows that if the so-called public forums are a part of the adult education and evening school

program, and if these forums reasonably tend to fulfill the purpose and object of this program, then it is within the power of the board to provide for them in their budget.

We are not unmindful of the provisions of Sections 3888 and 4336 of the code, which provide for registration of teachers' certificates, and prohibiting any person from being employed as a teacher without having a certificate of qualification, as provided by law. However, we do not deem that these sections in any way affect lecturers or speakers who may be compensated in connection with their appearance at the public forums. In our opinion they are in no way employed as teachers, and it was not the intent of the legislature that no person could be compensated for appearing at a school assembly or other school function and delivering a lecture which would be of educational value, without holding a teacher's certificate. If this were true, it would be impossible to compensate speakers who are brought in to deliver commencement addresses, or to appear at school assemblies, who are compensated.

TAXATION: DELINQUENT SPECIAL ASSESSMENTS: NOTICE: TAX SALE: In the event of a tax sale for delinquent special taxes where the general taxes have been suspended, the tax sale notice should include the general taxes with a notation that the same have been suspended so that the purchaser at a tax sale will receive notice that if he purchases the property for the delinquent special taxes, his certificate will be subject to the lien of the suspended general taxes.

October 10, 1939. *Mr. Donald P. Chehock, County Attorney, Osage, Iowa:* We are in receipt of your request for an opinion upon the following situation:

"The owner of a house and lot here in Osage procured an old age pension in the year 1933 and the general taxes were automatically suspended. There were special assessments also against this property because of pavement and said real estate was put up for sale for the special assessments for three successive years and this last December was sold at scavenger sale, the said special assessments totaling approximately $104.00 and the purchaser buying the tax certificate for $5.00. The suspended general taxes without computing penalty and interest at that time totaled roughly $129.00. As you know the law does not permit either a county or city to bid in on special assessments. The question now arises how the county or city is going to protect itself as against the purchaser procuring the tax certificates by sale of the property for these special assessments, in view of the fact that a tax deed will wipe out the suspended general taxes."

We have given the above question careful consideration and we feel that the rule which has been adopted in several counties should be followed. In the event of a tax sale for delinquent special taxes where the general taxes have been suspended, the tax sale notice should include the general taxes with a notation that the same have been suspended so that the purchaser at a tax sale will receive notice that if he purchases the property for the delinquent special taxes, his certificate will be subject to the lien of the suspended general taxes. If this is done, then the tax deed, which might later issue upon the tax certificate, will not wipe out the suspended general taxes. The situation is somewhat analagous to the case of a tax sale for personal taxes where the property is subject to a prior mortgage and where the tax sale is always subject to the lien of this prior mortgage.

The attorney general's opinion appearing in the 1934 Report of the Attorney General's office at Page 398 is not quite applicable in that there the suspension

was a voluntary suspension by the board of supervisors. The present statutes making such suspension compulsory when the owner is the recipient of old age assistance must not be interpreted to work an extinguishment of suspended taxes.

We feel that with such notice the purchaser at the tax sale for the delinquent special assessments will know that he is only receiving the certificate subject to the lien of the suspended general taxes.

We wish it understood that we pass no opinion upon the question of whether or not a tax deed issued upon the sale for delinquent special assessments would or would not cut off the lien of suspended taxes even if the notice herein suggested were not given. We have suggested the above as a rule to be followed but the question of the loss of the lien for suspended taxes in the event the rule is not followed is not before us.

TAXATION: COMPROMISE OF INHERITANCE TAX: No compromise can be made of inheritance tax claims except under Section 7394 of the 1935 Code, as amended by Chapter 214, Acts of the 48th General Assembly. Section 288 of the 1935 Code has no application to tax claims.

October 11, 1939. *State Tax Commission, Des Moines, Iowa. Attention: C. R. Selland, Inheritance Tax Division:* You have requested an opinion from this office upon the following situation:

"Under an opinion of the attorney general's office dated February 16, 1928, compromises of inheritance taxes were authorized, in situations whilch could not properly be brought within the scope of Section 7394 of the Code of Iowa, by application to the Executive Council under Section 288 of the Code. We now wish an opinion from your office as to this right to compromise inheritance taxes under Section 288 of the Code of Iowa."

The general statute with regard to the compromise of inheritance tax claims is found in Section 7394 of the 1935 Code of Iowa as follows (Amended by Chapter 214 Acts of the 48th General Assembly):

"*Compromise settlement.* Whenever an estate charged or sought to be charged with the inheritance tax is of such a nature, or is so disposed, that the liability of the estate is doubtful, or the value thereof cannot with reasonable certainty be ascertained under the provisions of law, the State Tax Commission may, with the written approval of the attorney general, which approval shall set forth the reasons therefor, compromise with the beneficiaries or representatives of such estates, and compound the tax thereon; but said settlement must be approved by the district court or judge of the proper court, and after such approval the payment of the amount of the taxes so agreed upon shall discharge the lien against the property of the estate."

It will be noted that the foregoing section provides that the inheritance tax may be compromised in only two situations, first, when the liability of an estate is doubtful and second, when the value thereof cannot be determined with reasonable certainty. Section 288 of the 1935 Code of Iowa provides as follows:

"*Compromise of claims.* The executive council, on a written report to it by the attorney general together with his opinion as to the legal effect of the facts, may determine by resolution to be duly entered in its official records, the terms on which claims of doubtful equity or collectibility, and in favor of the state, may be compromised and settled with all or any of the parties thereto. Such terms may be withdrawn prior to acceptance, or in case the debtor fails to comply therewith within a reasonable time. The attorney general shall have full authority to execute all papers necessary to effect any such settlement."

It will be noted that the above section authorizes the compromise of claims "of doubtful equity or collectibility." Under the opinion of the attorney general's office rendered to Honorable R. E. Johnson, treasurer of state, under date of February 16, 1928, it was held that where equities existed in favor of the taxpayer, compromises of inheritance tax could be obtained under Section 288 even though compromises could not be obtained under Section 7394. It will be noted that Section 288 does not by express language include the compromise of a tax claim. Quite obviously the statute was intended as authority for the executive council to make compromises of claims due the state by reason of some special contract or other liability growing out of the general business of the state. To say that this statute would be authority for a compromise of inheritance tax would, we feel, be extending the scope of this statute far beyond the legislative intention. The liability for tax is different than the liability to pay an ordinary claim and it is significant that wherever the legislature has granted power to compromise a tax claim, spefific provision has always been made therefor in some statute. If Section 288 is to be construed as authority for the executive council to compromise inheritance tax claims, then there is no limit to its power to compromise all tax claims. Such a construction, if carried to its logical conclusion, would mean that the collection of taxes due the state might be subject to the right of the council to determine the equities surrounding the collection from some certain taxpayer and the decision of the council would determine whether or not the taxing statute should be strictly enforced against certain persons subject to the tax. Such a construction would, we feel, lead to discrimination and confusion in the collection of the taxes and exceed the legislative intent.

In view of the above, we are of the opinion that Section 288 would have no application to inheritance tax claims and no compromise can be made of inheritance tax claims except those made within the provisions of Section 7394 and the opinion of the attorney general's office dated February 16, 1928 rendered to R. E. Johnson, treasurer of the state of Iowa, is hereby expressly overruled.

PUBLICATION: CHARGE: ORDINANCE: NEWSPAPER: The fee for publishing an ordinance may not exceed one dollar ($1.00) for one insertion and fifty cents (50c) for each subsequent insertion for each ten (10) lines of brevier type.

October 11, 1939. *State Department of Health. Attention: Dr. Walter L. Bierring:* Under date of January 26, 1939, this office rendered an opinion at your request to the effect that the cost of publishing an ordinance should be fifty cents (50c) for each ten (10) lines of brevier type and twenty-five cents (25c) for each ten (10) lines of brevier type for subsequent insertions.

We have had occasion to review and to study the matter further, and it is now our conclusion that the publication fee may not exceed one dollar ($1.00) for one insertion and fifty cents (50c) for each subsequent insertion for each ten (10) lines of brevier type.

The opinion of January 26, 1939, was based on Sections 5722 and 5723 of Chapter 290 of the 1935 Code of Iowa, which sections are as follows:

"5722. *Proceedings published or posted.* Immediately following a regular or special meeting of the city or town council, the clerk shall prepare a condensed statement of the proceedings of said council, including the list of

claims allowed and from what funds appropriated, and cause the same to be published in one or more newspapers of general circulation, published in said city or town; provided, however, that in cities and towns in which no newspaper is published, such statement and list of claims shall be posted in at least three public places on the business streets of said city or town.

"5723. *Cost of publishing.* The compensation allowed each newspaper for such publication shall not exceed one-half of the legal fee provided by statute for the publication of legal notices."

However, Chapter 290 also contains Section 5720 which provides:

"5720. *Publication.* All ordinances of a general or permanent nature, and those imposing any fine, penalty, or forfeiture, shall be published in some newspaper published and of general circulation in the city or town; but if there be no such newspaper, such ordinances may be published in a newspaper designated by the council and having a general circulation in such city or town, or by posting copies thereof in three public p'aces therein, one of which shall be at the mayor's office. When the ordinance is published in a newspaper it shall take effect from and after its publication; when published by posting, it shall take effect ten days thereafter. It shall be a sufficient defense to any suit or prosecution for such fine, penalty, or forfeiture, to show that no such publication was made."

Section 11106 as amended, provides that the fees which form the basis of charge as required in either case, is as follows:

"11106. *Fees for publication.* The compensation, when not otherwise fixed, for the publication in a newspaper of any notice, order, citation, or other publication required or allowed by law, shall not exceed one dollar for one insertion, and fifty cents for each subsequent insertion, for each ten lines of brevier type. In case of controversy or doubt regarding measurements, said controversy shall be referred to the state printing board and its decision shall be final."

From an examination of the history of these statutes, it appears that Section 5720 first appeared in the revision of 1860 and in order to make the fees uniform for such publication, Section 11106 appeared in the Code of 1873 by Act of the 14th General Assembly. Section 11106 thereupon fixed the price for the publication of ordinances.

Thereafter, in 1909 the 33rd General Assembly passed House File 379 which became Chapter 42, Acts of the 33rd General Assembly, and which provides:

"*Publication of proceedings of city and town councils.* H. F. 379.

"*An act* providing for the publication of the proceedings of city and town councils. (Additional to chapter three (3) of title five (V) of the code, relating to ordinances, courts and fines.)

"*Be it enacted by the General Assembly of the State of Iowa:*

"Section 1. *Proceedings published or posted.* Immediately following a regular or special meeting of the city or town council, the clerk shall, when so ordered by said council, prepare a condensed statement of the proceedings of said council, including the list of claims allowed, and from what funds appropriated and cause the same to be published in one or more newspapers of general circulation, published in said city or town, or by posting in one or more public places, as directed by said council.

"Sec. 2. *Cost of publishing.* That the compensation allowed each newspaper for such publication shall not exceed one-third of the legal fee provided by statute for the publication of legal notices.

"Approved April 12, A. D. 1909."

These sections, with a slight amendment, now appear in Sections 5722 and 5723 respectively of the 1935 Code of Iowa.

It appears consequently, that Section 5723, which was Section 2 of Chapter 42 of the Acts of the 33rd General Assembly, refers only to the publication cost of Section 5722 and in no way refers to or affects Section 5720. This being

true, then the fee for publishing ordinances as required by Section 5720 is not modified by Section 5723 and the fee for such publication may not exceed one dollar ($1.00) for one insertion and fifty cents (50c) for each subsequent insertion for each ten (10) lines of brevier type.

The opinion of January 26, 1939, is, therefore, withdrawn.

BAILIFF OF MUNICIPAL COURT: TRAVELING EXPENSE: EXPENSES: Bailiffs of municipal courts entitled to five cents per mile for the use of their own automobile while traveling on official business.

October 12, 1939. *Mr. M. E. Rawlings, County Attorney, Sioux City, Iowa:* This will acknowledge receipt of your letter of recent date, wherein you ask the opinion of this department on the following question:

Is the bailiff of the municipal court in and for the city of Sioux City, Iowa, entitled to five cents per mile when traveling on official business within the county, or is he entitled to seven cents per mile, the amount allowed to sheriffs?

It is our opinion that the bailiffs of municipal courts are entitled to five cents per mile, i. e., they are entitled to the mileage allowed to constables, We hereinafter give our reasons for so holding.

Section 10671, Code of Iowa, provides:

"If no provision is made in the laws applicable to the district court for fees, costs, and expenses, they shall be the same as in justice of the peace courts. The bailiff may retain the amounts allowed to him by law for mileage and necessary actual expenses in addition to his salary. All other fees, fines, forfeitures, costs, and expenses shall be turned over to the city treasurer by the officer collecting the same on or before the tenth day of each succeeding month, and the city treasurer shall forthwith pay to the county treasurer, for the benefit of the school fund, the portion of the fines and forfeitures collected for the violation of state laws."

Section 10637, Code of Iowa, 1935, provides:

"Constables shall be entitled to charge and receive the following fees: * * *
"4. For traveling fees, going and returning by the nearest traveled route, per mile, five cents."

In the case of *Brookins vs. Polk County*, 213 NW 258 (Iowa) the supreme court had occasion to construe the various statutes relating to the fees of the bailiff of the municipal court. While this case is not decisive of the question, we feel that what is therein said sustains the conclusion we have herein reached.

In the *Brookins case* an action was commenced against Polk county for expenses and mileage incurred by plaintiff Brookins, as bailiff of the municipal court of Des Moines, in the service of warrants and subpoenas in state cases having venue in said municipal court. Defendant demurred to the petition and the same was overruled. Upon an election to stand thereon being entered, defendant prosecuted his appeal to the supreme court. The court held that the demurrer was properly overruled.

In this case the court employed the following pertinent language which, we believe, indicates what the holding of the supreme court would be were the question involved in your request squarely presented to it. The court said:

"We now turn to the statutes in an attempt to find the answer to the question presented, since there is no common-law liability on the part of the county for costs. 15 C. J. 324. *The municipal court of Des Moines is a city court.* (Italics ours.) * * * The plaintiff, as bailiff of the municipal court of Des Moines, is an elective officer of said city. * * * His duties are the

same, as far as applicable, as those of constable and sheriff, respectively." Citing Section 10648.

Section 10648, Code of Iowa, 1935, reads in part as follows:

"The duties of the clerk and the bailiff shall be the same, so far as applicable, as those of the clerk of the district court, and of constables and sheriffs, respectively. * * *"

The court further said, in the *Brookins case:*

"The fees of the justice court are defined and prescribed by sections 10636 and 10637."

Here we pause to note that Section 10637 is the section that schedules the fees that may be charged by the constable for his services.

On Page 259, the court goes on to say:

"The salary of a municipal court bailiff is fixed by law, and is paid monthly, alternately, by the city and by the court. Section 10688. The fees, costs, and expenses in municipal court cases, if no provision is made in the laws applicable to the district court therefor, shall be the same as in justice of the peace court, and the bailiff may retain the amounts allowed to him by law for mileage and necessary actual expenses, * * *"

We find, therefore, that in the *Brookins case* the court commented on Section 10671, which in part reads:

"The fees, costs and expenses in municipal court cases, if no provision is made in the laws applicable to the district court therefor, shall be the same as in justice of the peace court * * *."

The pertinent inquiry then, so it seems to us, is whether provision is made in the laws applicable to the district court for the mileage that may be charged by the bailiff. We have examined these laws and we come to the conclusion that there is no provision made for the bailiff's mileage and that, therefore, in order to determine the same, resort must be had to the law pertaining to justice of the peace courts, and when we do that we find that the mileage for the constable, who is the officer of the justice of the peace court, is five cents.

In the *Brookins case* the court said: "The fees of the district court are fixed by Section 10837," and when we read this section we find no provision therein for the mileage of either the sheriff or the bailiff. The conclusion, it seems to us, is inescapable that Section 10671 is applicable and that we must resort to Section 10637 in order to determine the fees to be paid the municipal court bailiff.

We reach the conclusion, therefore, that the bailiff is entitled to five cents per mile for the use of his automobile while traveling on official business.

BOARD OF SUPERVISORS: BOARD OF CONTROL: MEDICAL TREATMENT OF PATIENTS CONFINED IN COUNTY HOME: COUNTY HOMES: Board of supervisors have no legal right to prevent paupers confined in county home or relatives of insane persons confined therein from calling any physician they may choose, providing the employment of such physician be without expense to county. Board of Control had right to make such a rule.

October 12, 1939. *Mr. E. B. Shaw, County Attorney, Oelwein, Iowa:* This is in answer to your letter of the 28th ult., wherein you ask our opinion relative to the following question. You say:

"Our board of supervisors is somewhat disposed to question the rights of doctors other than the physician employed by the county, to treat insane patients and other persons confined in the county home, to render services and to be admitted to the county home for the purpose of treating patients

confined there, whether called at the request of the patient, or at the request of interested friends or relatives. The doctor who has been denied admission to the county home for the purpose of treating patients, has obtained from the State Board of Control a copy of the "Rules and Regulations Governing County Homes and Private Institutions in which Insane Persons Are Kept."

"Rule 13 provides that a physician shall be employed for the insane inmates of each county and private institution in which such persons are kept at public expense. The last sentence of Rule 13 reads as follows: 'Nothing herein contained shall be construed to prevent the employment of competent physicians for the treatment of private or other patients without cost to the institution, providing that such treatment shall not in any respect interfere with the rules, management and operation of the institution.'

"Will you please advise whether this ruling is valid and legal and whether it is the law that paupers confined in the county home are also entitled to call private physicians to treat them *without cost to the institution or court?*"

We are of the opinion that Rule 13 is in all respects legal and valid. There can be no question, we think, but that the board of control of state institutions has the right to promulgate such a rule. It is based upon a sound public policy and in accord with wholesome human attitudes.

We reach the conclusion, therefore, that the board of supervisors have not the legal right to prevent paupers confined in the county home or the relatives of insane persons confined therein from calling any physician they may choose, providing that the employment of such physician be without expense to the county.

COUNTY RECORDER: ACKNOWLEDGMENT: ASSIGNMENT CLAUSE: The recorder has no right to refuse to record the assignment in a conditional sale contract because of absence of acknowledgment insofar as the assignment clause is concerned. Recorder should index the assignment upon request and the payment of fee fixed by law.

October 18, 1939. *Mr. Grant L. Hayes, County Attorney, Mount Ayr, Iowa:* This will acknowledge receipt of your letter of recent date, wherein you ask our opinion relative to the following legal question:

It appears that a conditional sale contract, copy of which you have submitted to us, contains the following assignment clause: "9. The Purchaser acknowledges receipt from the Dealer of a true and complete copy of this contract, and takes notice that the Dealer for value received hereby sells and transfers this contract and said note and all the right, title and interest of the Dealer in and to said property to Federal Motor Finance, of Des Moines, Iowa."

The purchaser signing the contract is Barker and Cross, a partnership. The instrument was executed by and on behalf of said partnership by Ames Cross, partner. The dealer is Means Nash Sales Co., a partnership. This contract was signed for the said dealer by D. H. Kubeman, and acknowledgment on the back of this conditional sale contract is apparently in due form. It appears to have been executed by Ames Cross, a member of the partnership of Barker and Cross, before Asa W. Huggins, clerk of district court, whose seal is impressed thereon. The instrument is designated as "Conditional Sale Contract and Assignment." The county recorder of your county has accepted for record the conditional sale contract, but has refused to index the assignment. It appears that the fee for indexing the said assignment has been tendered to the county recorder.

The question is: Has the recorder a right to refuse to record the assignment because of the absence of acknowledgment insofar as the assignment clause of this instrument is concerned?

We are of the opinion that the county recorder is not vested with the right to refuse to index the assignment in question.

In the case of *Weyrauch vs. Johnson*, 201 Iowa 1197, the supreme court had occasion to pass on a somewhat analogous question. In that case Edward Weyrauch executed to appellee, Hulda Weyrauch, an instrument denominated "Chattel Mortgage." The instrument describes certain animals and other personal property. And also contained the following clause: "This mortgage shall also cover any and all crops * * * sown, planted raised * * * during the years 1924 and 1925 upon the said real property hereinbefore described." The instrument was duly filed for record with the county recorder as a chattel mortgage. Demand was made upon the county recorder to index said instrument in the real estate mortgage index of said county, the fee therefor being tendered. This the county recorder refused to do. Mandamus action was brought to compel appellant county recorder to so record said written instrument.

The supreme court sustained the writ of mandamus and, in the final paragraph of its opinion, said:

"We may observe that the county recorder is largely a ministerial officer. It is a matter of common knowledge that many instruments that are technically defective are recorded, and the record of such instruments may be insufficient to impart constructive notice. * * * He cannot arbitrarily refuse to record instruments which are in proper form and eligible to record, under our recording acts, where a reasonable request for recording is made and the fee is duly tendered."

In this case the recorder acknowledges that the conditional sale contract itself is entitled to record but makes the claim that, inasmuch as the assignment clause is not acknowledged, such assignment is ineligible for index.

Section 10024, Code of Iowa, 1935, reads:

"Assignments—how made. A chattel mortgage filed or recorded may be assigned of record by the mortgagee or the record holder thereof, by the execution of an appropriate written instrument, duly acknowledged, and filed in the same office where the mortgage is filed or recorded. If the mortgage is recorded, an assignment thereof may be made by the mortgagee or the record holder of the mortgage executing an assignment on the margin of the record of such mortgage, or, if the mortgage be filed but not recorded, such assignment may be indorsed upon the instrument, the assignor shall be identified and his signature to such assignment witnessed and attested by the recorder or his deputy."

We call to your attention that frequently real estate mortgages contain chattel mortgage clauses and it has been the common practice in this state for years to record such an instrument as a real estate mortgage and also index the same as a chattel mortgage. It is a matter of common knowledge that these instruments have but one acknowledgment. We think that there can be no question that in such a case the recorder would be under a duty to record the instrument both as a real estate and chattel mortgage. In the *Johnson Case, supra*, the instrument seemed to be primarily a chattel mortgage but contained a real estate mortgage clause and it was held, as we have indicated, that the recorder could not arbitrarily refuse to record such instrument as a real estate mortgage.

The instrument submitted by you is acknowledged only by the purchaser but, as we see it, he is a party not only to the conditional sale contract, but also to the assignment. The clause which we have quoted recites that he takes notice that the contract has been assigned to the finance company and inferentially agrees to make payments to said company.

It is our holding that this instrument, having been acknowledged, is entitled

to record. On the question of whether or not this assignment, when so indexed, imparts constructive notice, we express no opinion. In matters of this kind, the recorder's duties are purely ministerial and he may not judicially determine, under the facts set out in your letter, that such assignment is not entitled to record.

We reach the conclusion, therefore, that the county recorder of your county should index the assignment upon request and the payment of the fee fixed by law.

TAXATION: RURAL ELECTRIFICATION PROJECTS: USE TAX: The Executive Council has no duty with regard to an application from the State Tax Commission that requests authority for permission to grant refunds of taxes already collected, nor does it have jurisdiction to grant refunds and cancel the assessments.

October 19, 1939. *Mr. Berry F. Halden, Secretary, Executive Council:* You have requested an opinion from this office upon a certain application from the state tax commission to the executive council for permission to refund certain use taxes collected from contractors who constructed portions of rural electrification projects. Attached to the request for an opinion is the application of the state tax commission listing the projects and the contractors to whom it is suggested the refunds be made and also listing the projects and the contractors against whom a tax has been assessed but not paid, and the request is made that in these latter cases the assessments be cancelled. The reasons for the suggested refunds and cancellations are set forth in the application, but for the purposes of this opinion they are immaterial for we understand the question, or rather the questions, upon which we are here called upon to render an opinion are:

1. Has the Executive Council authority to grant permission to the State Tax Commission to make a refund of use tax already collected?
2. Has the Executive Council authority to grant permission to the State Tax Commission to cancel an unpaid use tax assessment?

The only power lodged in the executive council which would be even urged as authority here is found in Section 288 of the 1935 Code of Iowa which is as follows:

"Compromise of claims. The executive council, on a written report to it by the attorney general together with his opinion as to the legal effect of the facts, may determine by resolution to be duly entered in its official records, the terms on which claims of doubtful equity or collectibility, and in favor of the state, may be compromised and settled with all or any of the parties thereto. Such terms may be withdrawn prior to acceptance, or in case the debtor fails to comply therewith within a reasonable time. The attorney general shall have full authority to execute all papers necessary to effect any such settlement."

Some authority is also found in an opinion of the attorney general's office rendered under the last administration and appearing in the 1938 Attorney General's Report at Page 558. In that opinion the writer held that the state board of assessment and review, now the state tax commission, had no authority to compromise a tax, after a distress warrant had been placed in the hands of the sheriff, by accepting a portion of the amount due in full settlement of the tax claimed and then the statement is made that Section 288 above provides the machinery for such a compromise.

We have no trouble in answering the first question. Section 288 clearly cannot be construed as a refund authorization statute. Moreover, the use tax law provides for the machinery for refunds. Chapter 198 of the Acts of the 47th General Assembly, which is the use tax law, provides in Section 22 that Sections 6943-f54 to Section 6943-f62 inclusive shall be included in the use tax law insofar as they grant powers and authority to the board. In these included sections we find Section 6943-f60 and Section 6943-f61 outlining the board's duties with regard to the correction of errors and the certification of refunds.

In view of the above, we are therefore of the opinion that the executive council has no duty at all with regard to this application insofar as the application requests authority for permission to grant refunds of taxes already collected.

With regard to the second question as to the right of the council to authorize the State Tax Commission to cancel an assessment of use tax, we call attention first to the provisions of Section 288 which provides for the authority of the executive council to compromise "claims." In an opinion rendered to the State Tax Commission under date of October 11, 1939 we interpreted the above section of the statute as follows:

"Quite obviously the statute was intended as authority for the Executive Council to make compromises of claims due the state by reason of some special contract or other liability growing out of the general business of the state."

In this opinion we held that this statute would not be authority for the executive council to grant permission to the State Tax Commission to compromise inheritance taxes.

What we there said in holding that this Section 288 was not authority for the executive council to compromise inheritance tax, we feel is now applicable upon the question of whether this statute is authority for the executive council to grant permission for the cancellation of the use tax. We do not feel that taxes are claims within the legislative intent as expressed in Section 288. These taxes are liens against real and personal property. A reading of the provisions of Title XVI of the code dealing with taxation and more particularly Chapter 329-C2 to Chapter 329-G1, inclusive, dealing with the powers and duties of the State Tax Commission with regard to the collection of taxes under the Iowa three point tax law, shows that it was the intent of the legislaure to turn over to the State Tax Commission all of the powers and duties with regard to the collection of the taxes therein provided for. We find in Section 6943-c24 the tax commission has "power to establish all needful rules not inconsistent with law for the orderly and methodical performance of its duties. And again in Section 6943-c27 provision is made that the tax commission shall have and assume powers and duties over the administration of the assessment and tax laws of the state. We have already seen in the prior paragraphs of this opinion that the commission has power to correct errors and order refunds.

With these broad powers turned over to the tax commission, we do not feel that the executive council should sit as a court of review and pass upon the tax commission's actions with respect to the cancellation of erroneous use tax assessments. We do not feel that such a tax assessment is a claim within the purview of Section 288, and for these reasons we are of the opinion that the

executive council has no duty at all with regard to claims for use tax assessment cancellations.

We do not in this opinion pass upon the question of whether or not the refunds should be granted or the tax assessments cancelled, nor de we pass upon the question of the right of the State Tax Commission to make the refunds or cancel the assessments in the instances outlined in the request. We merely hold that the executive council has no power or duty in the premises, and the request for authorization to grant the refunds and cancel the assessments should be returned to the State Tax Commission with the statement that the executive council has no jurisdiction in the matter.

SOLDIERS' RELIEF FUND: WIDOWS' PENSION: STATE BOARD SOCIAL WELFARE: (Section 380—Section 5259, paragraph 4.) Soldiers' relief fund and widows' pension fund are public funds as per paragraps 4, Section 5259, and exempted from provisions of Section 380 and expenditures may be made in excess of published estimates if need arises. If sufficient money available to meet additional obligations it may be used.

October 25, 1939. *Mr. King R. Palmer, Chairman, State Board of Social Welfare, Des Moines, Iowa:* This is to acknowledge receipt of your letter of October 23 in which you ask our opinion on the following:

"The opinion of your department issued on September 25, 1939, to Hon. C. Fred Porter, state comptroller, has been brought to our attention. We note this opinion is confined largely to a question of whether or not road funds can be expended during a given year for an amount greater than that shown in their published estimate. Although this opinion does not definitely mention other funds, it is being construed as to prohibit expenditures above the published estimate in certain other funds under the control of the counties.

"You quote from Section 380 of the Code:

" 'and thereafter no greater expenditure of public money shall be made for any specific purpose than the amount estimated and appropriated therefor, except as provided in sections 373, 381 and paragraph 4 of section 5259.'

"The above exception includes paragraph 4 of Section 5259, which is:

" 'Expenditures for the benefit of any person entitled to receive help from public funds.'

"It appears to be generally understood that this paragraph exempts the poor fund from the provisions of your opinion. In other words, poor fund expenditures during a given year may, if necessary, exceed the published estimate. However, there appears to be a difference in opinion in connection with other funds used for 'benefit of any person entitled to receive help from public funds.'

"Because of these differences we wish to ask whether or not other funds used for public assistance, the soldiers' relief fund and the widows' pension fund are limited to the published estimates or may such estimates be exceeded if the need arises for additional expenditures from these funds? Would the fact that sufficient money is available to meet additional necessary obligations affect the legality of such additional expenditures?

"Your early opinion on these questions will be greatly appreciated as soldiers' relief expenditures in at least one of the counties is being delayed until receipt of this opinion."

It is our opinion that Paragraph 4 of Section 5259, 1935 Code, as quoted in your letter, is controlling and that soldiers' relief funds and the widows' pension fund are public funds as contemplated by the legislature in Paragraph 4 of Section 5259, and are thus exempted from the provisions of Section 380, 1935 Code of Iowa.

It is our further opinion that under this exception to the general law, expen-

ditures may be made from either of the above mentioned funds in excess of the published estimates, if need arises therefor.

It is our opinion that if there is sufficient money available to meet additional necessary obligations, it may be used for said expenditures.

TAXATION: RAILROAD COMPANIES: SALES TAX: USE TAX: TANGIBLE PERSONAL PROPERTY: Purchases made by railroads or other transportation companies within the State of Iowa are subject to the sales tax and the fact that the tangible personal property purchased is for use in connection with interstate commerce or interstate transportation is immaterial. Purchases of supplies by railroad companies for immediate or ultimate installation in their interstate railroad facilities from out-of-state sellers and delivered in Iowa are subject to the use tax of 2 per cent.

October 30, 1939. *Iowa State Tax Commission, Des Moines, Iowa:* We have received a request from you for an opinion upon the following matters:

"Certain purchases of tangible personal property are made by railroad companies engaged in interstate commerce, exclusive of rolling stock, for supplies, improvements, replacements and extensions. Some of these purchases are made from Iowa sellers and some from out-of-state sellers. These companies have contended that such purchases are not subject to the Iowa sales tax nor the Iowa use tax by reason of the fact that they are for use in connection with interstate transportation or interstate commerce.

"We desire a ruling from your department as to whether or not:

"1. Such purchases which are made and delivered from Iowa sellers within the state are subject to the sales tax.

"2. Such purchases made from out-of-state sellers and delivered in Iowa are subject to the use tax, and especially in view of the provisions of Section 3, paragraph 2 of the Personal Property Use Tax Act of 1937."

In order to answer the first question we must first examine the Iowa Sales Tax law which is Chapter 196, Acts of the 47th General Assembly. We do not find railroad companies listed in the exemption section, which is Section 3 of the act. The only exemption on the tax which is at all applicable is subsection "a" of Section 3 which exempts from the provisions of the act

"a. The gross receipts from sales of tangible personal property which this state is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of this State."

Our inquiry, therefore, must be as to whether or not such purchases of tangible personal property are exempt from the provisions of the act by reason of the fact that they are purchased for and used in interstate transportation and interstate commerce. The opposing argument would be that if such purchases are taxed, then that constitutes a direct burden on interstate commerce and would therefore be unconstitutional under the commerce clause of the Constitution of the United States.

The complete answer to this argument is found in the case of *Eastern Air Transport, Inc. vs. South Carolina Tax Commission, et al.*, 285 U. S. 147, 76 L. Ed. 673. In this case the supreme court of the United States held that a state tax on the sale of gasoline for use by air transport lines in conducting interstate transportation across the state is not invalid, as the mere purchase of supplies for conducting an interstate business is not so identified with such business as to make the sale immune from a non-discriminating state tax. The court pointed out that if this tax were, in effect, a tax upon the goods, its validity could not be questioned and cited many authorities for the right of

the state to tax property that might actually be used in interstate commerce and then stated:

"Treating the tax as an excise tax upon the sales does not change the result in the instant case, as the sales are still purely intrastate transactions. Superior Oil Co. vs. Mississippi, 280 U. S. 390, 395, 74 L. Ed. 504, 507, 50 S. Ct. 169. Undoubtedly, purchases of goods within a state may form part of transactions in the interstate commerce and hence be entitled to enjoy a corresponding immunity. But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the state upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the state may be subjected."

In view of the fact that there is no specific exemption in the sales tax act applicable to railroads or other transportation companies and no prohibition in the Constitution of the United States or the state of Iowa, we are of the opinion, in answer to your first question, that purchases made by such companies within the state of Iowa are subject to the sales tax and the fact that the tangible personal property purchased is for use in connection with interstate commerce or interstate transportation is immaterial.

The second question presents the more difficult problem. Here too, we have some recent pronouncements of the supreme court of the United States which we feel are applicable. The use tax law has been attacked several times on the ground that it is in violation of the commerce clause of the United States Constitution, Article I, Section 8. The supreme court of the United States has always upheld the tax as constitutional and Justice Cardozo in the case of Henneford vs. Silas Mason Company, 300 U. S. 577, 81 L. ed 814 stated:

"A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

The history of use tax legislation in the states which have such a tax shows that all of these states first passed a sales tax. With this tax the local retail dealers were placed at a disadvantage in that buyers were tempted to place their orders in other states in an effort to escape the payment of the tax on local sales. The use tax placing a tax on the use of tangible personal property, but exempting that property on which a sales tax was paid, brought into operation a system whereby local retailers were helped to compete upon terms of equality with retail dealers in other states. It prevented a drain upon the revenues of the state, as buyers were no longer tempted to place their orders in other states.

In interpreting the use tax law, we feel the sales tax law must be taken into consideration as the two laws present a system of taxation. A reading of the Henneford case, cited above, shows that the court did take into consideration the Washington sales tax law in determining the constitutionality of the Washington use tax law. We quote as follows from this case:

"Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or

sales tax has been paid for the same thing. This is true where the offsetting tax becomes payable to Washington by reason of purchase or use within the state. It is true in exactly the same measure where the offsetting tax has been paid to another state by reason of use or purchase there. No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere. Every one who has paid a use or sales tax anywhere, or, more accurately, in any state, is to that extent to be exempt from the payment of another tax in Washington. When the amount is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed. Equality exists when the chattel subjected to the use tax is bought in another state and then carried into Washington. It exists when the imported chattel is shipped from the state of origin and an order received directly from the state of destination. In each situation the burden borne by the owner is balanced by an equal burden where the sale is strictly local. 'There is no demand in * * * (the) Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power.' Gregg Dyeing Co. vs. Query, 286 U. S. 472, 480, 76 L. Ed. 1232, 1238, 52 S. Ct. 631, 84 A. L. R. 831. If the sales tax were abolished, the buyer in Washington would pay at once upon the use. He would have no longer an offsetting credit. While the sales tax is in force, he pays upon the sale, and pays at the same rate. For the owner who uses after buying from afar the effect is all one whether his competitor is taxable under one title or another. This common sense conclusion has ample precedent behind it."

The case which is most closely in point is the recent case of Southern Pacific Co. vs. Gallagher, decided by the supreme court of the United States January 30, 1939 and appearing in 83 L. ed. Adv. Opinions, 352. In this case the California act provided for a tax on the use or storage of tangible personal property within the state and purchased from a retailer on which no state sales tax had been paid. The Southern Pacific company, an interstate railroad, purchased property in other states consisting of repair equipment or property for construction or reconstruction of various portions of its railroad system. It was argued that this Califrnia tax could not apply to these articles as such a tax would be an unconstitutional burden upon the facilities of commerce of which the articles purchased were a part. The California use tax law defined use as "the exercise of a right of ownership" and defines storage as "any keeping or retention." Some of the articles purchased were installed immediately upon arrival in California. Other articles were stored for a time, but the storage was merely incidental to protection and use. The court held:

"We think there was a taxable moment when the former had reached the end of their interstate transportation and had not begun to be consumed in interstate operation. At that moment the tax on storage and use—retention and exercise of a right of ownership respectively—was effective. The interstate movement was complete. The interstate consumption had not begun."

And again the court stated:

"This conclusion does not give preponderance to the language of the state act over its effect on commerce. State taxes upon national commerce or its incidents do not depend for their validity upon a choice of words but upon the choice of the thing taxed. It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation. This is not significant. The prohibited burden upon commerce between the states is created by state interference with that commerce, a matter distinct from the expense of doing business. A discrimination against it, or a tax on its operations as such, is an interference. A tax on property

or upon a taxable event in the state, apart from operation, does not interfere. This is a practical adjustment of the right of the state to revenue from the instrumentalities of commerce and the obligation of the state to leave the regulation of interstate and foreign commerce to the Congress."

In this case, also, the court in the preliminary discussion pointed out that this use tax law in California is complemental to the California retail sales tax act and cited the case of *Henneford vs. Silas Mason Company.*

Thus we see that the purchases of property outside of a state for immediate or subsequent installation in an interstate railway facility can be subjected to a use tax on the theory that there is a taxable moment when the use, which is defined as right of ownership, is an intrastate event and this event takes place before the beginning of the consumption or use in interstate operation.

Let us now look at the Iowa Use Tax act which is Chapter 198, Acts of the 47th General Assembly. Here, "use" is defined to mean and include "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property * * *."

We also find that under Section 3 certain exemptions are enumerated. The exemption which is pertinent to the discussion herein is as follows:

"Section 3. The use in this State of the following tangible personal property is hereby specifically excluded from the tax imposed by this Act: * * *

"2. Tangible personal property used (a) In interstate transportation or interstate commerce, * * *."

This brings us to the real point of difficulty in this question. Certainly, without Paragraph 2, above, our right to tax would be governed entirely by the Southern Pacific company case and there would be no question but that the use tax would apply upon the purchases made by the railway company of property for installation in the interstate railway facility.

The question now turns upon an interpretation of Paragraph 2 of Section 3 above. If that paragraph is interpreted to read:

"tangible personal property *to be* used in interstate transportation or interstate commerce,"

then clearly the use tax cannot apply. If it is interpreted to read:

"tangible personal property actually used in interstate commerce or interstate transportation prior to its entry into this state."

then the tax would apply. It will be noted in the Southern Pacific case, the court there indicates that California could not tax the actual use in interstate commerce. It was the use prior to the consumption in interstate operation that was held taxable. And this was under a definition similar to the Iowa definition that use was an exercise of ownership, and the court reasoned that there was a taxable moment or an exercise of ownership prior to the consumption in interstate operation. So, too, under this Iowa exemption a strict construction merely defines a certain use which cannot be the subject of the use tax, but as stated in the Southern Pacific case, we are not attempting to tax this use. It is the use prior to the interstate operation. It is the exercise of the ownership that existed for a moment or, as the court states, for that taxable moment prior to the beginning of the consumption in the interstate operation.

In the California Use Tax Act there is a prohibition similar to the prohibition in our Sales Tax Act prohibiting the use or other consumption which the state would be prohibited from taxing under the Constitution or laws of the United States of America, or under the Constitution of the State of California. The regulations of the California Tax Commission state:

"The tax does not apply to the use or storage of property purchased for use in interstate or foreign commerce and actually placed in use in interstate or foreign commerce prior to its entry into this State." C. C. H., Cal. 2, 64-211, page 6143.

We feel the exemption contained in paragraph 2 of Section 3 of the Use Tax Act is merely expressive of the constitutional prohibition against the direct tax upon use in interstate operation. It is similar to the prohibition contained in our Sales Tax Act and the California Use Tax Act prohibiting the taxation of sales or use which this state would be prohibited from taxing under the Constitution of the United States or the Constitution of the state enacting the law. We feel paragraph 2 of Section 3 should be given a strict interpretation. Strictly construed this prohibits the tax upon use in interstate transportation or interstate commerce. We do not believe it can be given the interpretation "to be used" or "for use." This is a tax exemption statute and should be strictly construed against the exemption.

Some authority for our position is found in that line of cases construing tax exemption statutes granting exemptions to property used for charitable purposes. In this line of cases the mere prospective use of the property for religious or charitable purposes does not exempt the property from taxation under statutes granting the exemption upon property used for charitable or religious purposes. In 2 A. L. R. 545 there is a note and a good collection of cases supporting the rule as announced by the note writer as follows:

"Exemption from taxation is the exception to the rule that all property is liable to contribute to the common burden, and is not favored in law. It can be allowed only when granted in clear and unmistakable terms, and can never be presumed. Consequently the rule generally obtains that a mere prospective use of property for religious or charitable purposes does not exempt it from taxation."

We are further influenced in our interpretation of paragraph 2, Section 3, by our decision with regard to the sales tax law. Quite clearly the sales tax law would place upon the local retailers the burden of collecting a sales tax upon all purchases made of such property for use or installation in the railway facility. To hold that the use tax act would not apply, would mean that these railroad companies would refrain from buying from local retailers and thereby avoid any tax. We feel the use tax act was complemental to the sales tax act and the legislative intent was to provide a system whereby all purchases by consumers would be subjected once to the 2 per cent tax, whether purchased in or out of Iowa, except of course, in certain enumerated exceptions applicable to both acts.

We believe this interpretation carries out the intent of the legislature, and we are, therefore, of the opinion that purchases of supplies by railroad companies for immediate or ultimate installation in their interstate railroad facilities from out-of-state sellers and delivered in Iowa are subject to the use tax of 2 per cent.

TAXATION: LEVY: BILL: PAYMENT: LITIGATION: A levy cannot be made for the payment of a bill incurred in connection with litigation.

November 1, 1939. *Mr. Robert N. Johnson, Jr., County Attorney, Fort Madison, Iowa:* You have requested an opinion from this office upon the following situation:

In the year 1938 the trustees of Van Buren Township of Lee County, Iowa, prepared printed petitions that were circulated amongst the voters of Van Buren Township petitioning the board of supervisors of Lee County, Iowa, for a reduction in the tax valuations on real estate in that township. The petitions were signed and presented to the board of supervisors, but in view of the fact that real estate assessments had been made the preceding year, the petitions were ignored. The board of trustees of the same township have requested the auditor to fix a tax upon the residents of Van Buren Township to pay for the expenses of these proceedings under Section 5545 of the 1935 Code. The expenses consist of an item of $25.00 for attorney fees and an item of $1.25 for the printing of the petition, making a total of $26.25 and the board of trustees asked to raise the sum of $50.00 by taxation in order to meet the expenditure out of the general fund."

You ask whether a levy can be made for the purpose of paying the above bill of $26.25.

Section 5545 of the 1935 Code provides as follows:

.."5545. *Employment of counsel.* When litigation shall arise in any case not covered by section 5544, involving the right or duty of township trustees with reference to any matter within their jurisdiction, and the trustees become or are made parties to such litigation, they shall have authority to employ attorneys in behalf of said township, and to levy the necessary tax to pay for their services, and to defray the expenses of such litigation."

It will be noted that the foregoing section only provides for the levy of such a tax "when litigation shall arise." Black's Law Dictionary defines "litigation" as:

"A judicial controversy; a contest in a court of justice for the purpose of enforcing a right."

Clearly, the services performed and the expenses incurred were not in connection with litigation within the provisions of Section 5545. There was no action pending in any court wherein the township was a party or in which the township had any interest.

We do not believe the bill was incurred in connection with litigation, and consequently we are of the opinion that the levy cannot be made.

TAXATION: MERCHANDISE STOCK: STOCK: UTILITY COMPANIES: ASSESSMENT: Under the provisions of Section 6981 only the personal property used by the utility company in the conduct of its utility business should be assessed by the state tax commission and the merchandise stock of acessories and gas or electrical equipment should be assessed by the local assessors in the same manner that other assessments are made of merchandise stocks owned by other retail merchants.

November 1, 1939. *State Tax Commission, Des Moines, Iowa:* You have requested an opinion from this department with regard to the following question:

"Are merchandise stocks such as stoves, refrigerators, water heaters, radios, etc., carried as merchandise stock by utility companies assessable by the tax commission, or should they be assessed by local assessors?"

We have read the opinion of the attorney general's office dated April 19, 1933, wherein it was held that under the provisions of Section 6979 and Section 6981 of the 1931 Code of Iowa such merchandise stocks were assessable by the then State Board of Assessment and Review. There has been no change in these sections pertinent to the discussion of this question. We quote below the applicable parts of these two sections, as amended now that the name of the State Board of Assessment and Review has been changed to the State Tax Commission:

"6979. *Public utility plants.* The lands, buildings, machinery, and mains belonging to individuals or corporations operating waterworks or gasworks or pine lines; the lands, buildings, machinery, tracks, poles and wires belonging to individuals or corporations furnishing electric light or power; the lands, buildings, machinery, poles, wires, overhead construction, tracks, cables, conduits, and fixtures belonging to individuals or corporations operating railways by cable or electricity, or operating elevated street railways; and the lands, buildings, tracks, and fixtures of street railways operated by animal power, shall be listed and assessed by the state tax commission * * *.

6981. *Personal property.* All the personal property of such individuals and corporations used or purchased by them for the purposes of such gas or water works, electric light plants, electric or cable railways, elevated street railways or street railways operated by animal power, including the rolling stock of such railways and street railways, and the animals belonging to such street railways operated by animal power, shall be listed and assessed by the state tax commission * * *."

Thus we find that in Section 6979 the specific list of the property that is to be assessed by the State Tax Commission does not contain any item which could include the merchandise sold by the utility companies. The writer of the former opinion based his conclusion on the provisions of Section 6981 and the clause "all the personal property." As we read Section 6981, we note it provides for the assessment by the State Tax Commission of "all the personal property * * * used or purchased * * * for the purposes of such gas, water works, electric light plants, etc."

The stocks of radios, refrigerators, stoves, water heaters and the like cannot be classed as being used or purchased for the purposes of the utility business. The carrying on of an individual electric applicance business is in no sense necessary to the utility branch of the business.

In conducting the electric appliance business the utility company is in competition with local merchants carrying similar stocks of goods. Whereas local assessors might not be qualified to make valuations and render assessments upon property used in connection with the utility business, still it would seem they would be more qualified than the State Tax Commission to make valuations and render assessments upon stocks of merchandise. Wherever utility companies have been allowed to engage in the accessory or electric appliance business, they have been compelled to keep this business entirely separate from the utility branch of the business. The profit or loss in that branch of the business which has to do with the retail sales of electric accessories and appliances can never be considered for the purpose of making rates for the utility service.

We are of the opinion therefore, that under the provisions of Section 6981 only the personal property used by the utility company in the conduct of its utility business should be assessed by the State Tax Commission and the merchandise stock of accessories and gas or electrical equipment should be assessed by the local assessors in the same manner that other assessments are made of merchandise stocks owned by other retail merchants.

SHERIFF: BOARD OF SUPERVISORS: Sheriff is vested with power to obligate county for supplies and equipment reasonably necessary to discharge his duties under Section 5501, also electricity to heat water for prisoners. Sheriff has no authority to employ clerk to assist renewal of operator's licenses under provisions of motor vehicle law.

November 1, 1939. *Mr. Archie R. Nelson, County Attorney, Cherokee, Iowa:*

This will acknowledge receipt of your letter of the 19th ult., in which you ask the opinion of this department relative to the following legal questions:

"It appears that in 1938 the sheriff of your county asked the board of supervisors to install a hot water heater to heat water which was used in the sheriff's residence and in the jail, it being the contention of the sheriff that it was necessary that hot water be provided for bathing purposes for the prisoners and to keep the jail in a sanitary condition. The board of supervisors refused to make such purchase and thereupon the sheriff, at his own expense, purchased a heater and caused it to be installed at his own cost. For sometime after that the bill for the electric current was paid by the board, but in the spring of 1939 a change was made and a separate meter was installed on the heater. The board then announced that they would no longer pay for the current used through that particular meter. The sheriff also refused to pay and the charge made by the Iowa Public Service company from May 20, 1939 to October 5, 1939, totalled $30.32. This amount remained unpaid and service was terminated by the company. The question is: Whether or not the county is liable for the payment of this electric bill, or is it a personal liability of the sheriff?

"You also inquire as to whether or not the sheriff has authority to purchase bedding and supplies for the jail, it appearing that the purchase price thereof was reasonable and that said bedding and supplies were necessary for the comfort of the prisoners.

"The question is: May the sheriff pay for these items and compel the board to reimburse him or, in the event he makes the purchase and charges same to the county can the vendor compel the county to pay?

"During the period of time prior to July 15, when applications were made for the renewal of operator's licenses under the provisions of the motor vehicle law, the sheriff employed a secretary to assist in office work and paid her at the rate of $2.50 per day for four days and now seeks reimbursement from the county. The board of supervisors had refused payment thereof.

"The question is: Can the sheriff compel payment of such charge?"

Section 5130, Code of Iowa, 1935, provides:

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

* * *

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

Section 5501, Code of Iowa, 1935, provides:

"The keeper of each jail shall:

"1. See that the jail is kept in a clean and healthful condition.

"2. Furnish each prisoner with necessary bedding, clothing, towels, fuel, and medical aid.

"3. Serve each prisoner three times each day with an ample quantity of wholesome food.

"4. Furnish each prisoner sufficient clean, fresh water for drinking purposes and for personal use.

"5. Keep an accurate account of the items furnished each prisoner."

While it is true that under Section 5130 the board has power "to represent its county and have the care and management of the property and business thereof," we are of the opinion that under Section 5501 the sheriff is vested with power to obligate the county for supplies and equipment reasonably necessary to discharge his duties under said section. You will note that under subsection 1 it is the sheriff's duty to "see that the jail is kept in a clean and healthful condition." Manifestly, this can not be done without hot water and we do not believe, in this modern age, that it was the intention of the legislature that the sheriff should not be provided with reasonably modern equipment for producing such hot water.

In line with what we have said, it is therefore the duty of the county to

allow a reasonable bill for heating hot water. I desire here, however, to call your attention to our opinion of February 9, 1939, wherein we hold that it was not the board's duty to furnish supplies, etc., for the sheriff's residence. Therefore, if the bill in question was incurred in part for heating water for the use of the sheriff or his family and in part for the prisoners, the county would be under no obligation to pay that portion of the bill which rightfully was for the sheriff's private convenience and comfort.

As to your second question, we are of the opinion that inasmuch as Section 5501 places upon the sheriff the duty of furnishing each prisoner with necessary bedding, clothing, towels, fuel and medical aid that this official has full authority to purchase in reasonable quantities and at reasonable prices the bedding and supplies referred to in said question. We hold that such authority is granted by said statute. This was the holding in *Miller vs. Dickinson County*, 68 Iowa 102, and in *Feldenheimer vs. County of Woodbury*, 56 Iowa 379.

As to your third question, have to say that the sheriff had no authority to employ the clerk in question. Such clerks, under the new motor vehicle law, are employed by the commissioner of public safety and their compensation paid for out of the funds belonging to that department. It follows, therefore, that the sheriff cannot compel payment of the bill in question.

BOARD OF SUPERVISORS: CALL FOR JUDICIAL CONVENTION: JUDICIAL CONVENTION: Claims for printing the call for judicial convention may not be legally paid by the county. Members of party central committee issue call, and since they are not officers of the county the claim for such printing may not be allowed by board of supervisors.

November 1, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: L. I. Truax:* This is in answer to your letter of the 24th ult., wherein you ask the opinion of this department on the following question:

"We have had inquiry from one of our examiners regarding the right of county boards of supervisors to allow claims for printing 'call for judicial conventions' as provided for in Section 664 of the 1939 Code."

It is our opinion that claims for printing the call for judicial convention may not be legally paid by the county. You will note that this section places the duty of issuing the call upon the party central committee for the judicial district. The members of this committee are not officers of the county and we, therefore, are of the opinion that the claim for printing such calls may not be legally allowed by the board of supervisors.

MOTOR VEHICLE RELATIONS: RECIPROCITY AGREEMENTS: FOREIGN STATES: The commissioner of public safety may enter into reciprocal agreements with officials of the foreign states in regard to motor vehicle relations with such foreign states, with the qualification that the commerce commission has the privilege of entering into reciprocal agreements with the officials of other states to the extent of obtaining for the carriers of Iowa as many privileges and exemptions in the foreign state as the waiver of the fee may allow.

November 6, 1939. *Department of Public Safety. Attention: Karl W. Fischer:* Your inquiry in regard to the following matter, is herewith acknowledged:

"Will you please give me your opinion on the question of whether I, as commissioner of public safety of the state of Iowa, have authority to enter into any reciprocity agreement with officials of foreign states in regard to motor vehicle relations with such foreign states?"

For the purpose of this opinion, we quote from the 1939 Code of Iowa, as follows:

"5003.01. *Nonresident owners exempt.* A nonresident owner, except as otherwise provided in Sections 5003.02 and 5003.03, owning any foreign vehicle of a type otherwise subject to registration may operate or permit the operation of such vehicle within this state without registering such vehicle in, or paying any fees to, this state subject to the condition that such vehicle at all times when operated in this state is duly registered in, and displays upon it a valid registration card and registration plate or plates issued for such vehicle in the place of residence of such owner.

"5003.04. *Scope of exemption.* The provisions of Section 5003.01 shall be operative as to a motor vehicle owned by a nonresident of this state to the extent that under the laws of the foreign country, state, territory, or federal district of his residence like exemptions and privileges are granted to motor vehicles duly registered under the laws, and owned by the residents of this state.

"Nonresident cars shall be listed within ten days after entering the state, with the county treasurer or department who will issue a permit for the period of exemption."

And from Chapter 252-c1 of the 1935 Code of Iowa, as amended, the following:

"5105.09 *Fee.* No permit shall be issued nor continued in force until the holder thereof shall have paid to the commission for the administration of this chapter an annual permit fee for each motor truck operated thereunder in the amount of five dollars. The Iowa State Commerce commission shall be empowered to waive the fee provided for in this section, provided said motor truck is owned by a nonresident of this state and is operated upon the highways thereof only in the conduct of business in interstate commerce and provided further that the owner of said motor truck has complied with the registration requirements of the state of his or its residence, and said commission shall do all things necessary or required to negotiate and perfect reciprocal agreements between the various states and the state of Iowa, waiving the fee provided for in this section for the purpose of securing exemptions and privileges for citizens of this state operating motor vehicles in other states."

Sections 5003.01 and 5003.04 are the statutes of Chapter 251.1 entitled "Motor Vehicles and Laws of the Road," providing for and determining under what conditions reciprocity may be allowed to foreign motor vehicles. These sections first appear in the Supplement of 1913 and were continued without change to the Acts of the 47th General Assembly at which time the legislature amended the statutes as they are found in Chapter 134 of their Acts and as they are now in the Acts of the 48th General Assembly as quoted above. Prior to the enactment of Chapter 251.1 by the 48th General Assembly, however, the secretary of state was charged with the duty of administering the motor vehicle law, excepting those special duties in regard to common carriers which the legislature vested in what is now designated as the Iowa State Commerce Commission. The amendment to Section 5105-09 granting to the Commerce Commission certain powers to enter into reciprocal agreements is new with the 48th General Assembly and is first found in Chapter 136 of the Acts of that body.

Because of the necessity of definite understandings and agreements between the states whose residents operate their vehicles upon the highways of the State of Iowa and the converse, the secretary of state has, from time to time and for a period extending back to 1913, entered into agreements by virtue of which there were definite understandings whereby and under what circumstances citizens of those states and of this might operate their vehicles reciprocally without the possibility of penalty and with the same privileges and exemptions as the citizens of such states. It has been found, as a matter

of practice, entirely impractical to allow to residents of other states like exemptions and privileges that such state may allow to the citizens of Iowa, without written understandings in regard to those matters for the reason that no privileges or exemptions will be allowed by other states without a definite agreement in writing and without which the residents of Iowa would be subjected to penalties from which the legislature sought to obtain protection for them as well as privileges and exemptions. Following the procedure and custom of his predecessors, the secretary of state, prior to the present incumbent, entered into agreements of this nature with several states. These agreements are about to expire and, therefore, the question as above quoted has arisen.

As above noted, reciprocal agreements relative to motor vehicles have been made on behalf of the State of Iowa by the secretary of state since 1913 in his capacity as administrator of the motor vehicle law. The 48th General Assembly, however, removed the direction of this department from under his jurisdiction and joined it as a division of the Department of Public Safety, the commissioner of public safety assuming the duties heretofore exercised in regard to motor vehicles by the secretary of state.

The statutes by virtue of which the secretary of state made such agreements were carried forward by the 48th General Assembly without change into the motor vehicle law to be administered by the commissioner of public safety and it may, therefore, be said that such commissioner succeeds to the duty and privileges of entering into reciprocal agreements with the officials of other states and for the purpose of providing privileges and exemptions to the citizens of the State of Iowa who operate their motor vehicles within such foreign state with the exception of one qualification. This qualification is found as Section 5105.09 as amended in the 1935 Code of Iowa and is quoted above. Certain taxes and fees for the proper compensation for use of the Iowa highways by common carriers have been prescribed by the legislature and recognizing that advantageous agreements might be provided for regular carriers by the Commerce Commission by a waiver to the carriers of foreign states of certain of these fees by the Commission, the amendment to this statute was initially included in the Acts of the 48th General Assembly as paragraph 1 of Chapter 136. The evident purpose of this amendment is to grant to the Commerce Commission the privilege of entering into reciprocal agreements with the officials of other states to the extent of obtaining for the carriers of Iowa as many privileges and exemptions in the foreign state as the waiver of the fee may allow. To this extent, therefore, the privilege of entering into reciprocal agreements with the officials of other states has been delegated to the Commerce Commission.

It is, therefore, our opinion with the qualification above noted, that the commissioner of public safety may enter into reciprocal agreements with officials of foreign states in regard to motor vehicle relations with such foreign states.

TAXATION: LOCAL BOARD OF REVIEW: EQUALIZATION: The difference between the tax actually paid and the tax that should have been paid upon the raised valuation should be carried forward by the treasurer as an unpaid tax against the said property and the auditor has the right to correct this assessment on his books so as to show the higher valuation. (See opinion for further questions and rulings.)

November 6, 1939. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* This office is in receipt of your request for an opinion upon the situation which has developed due to the fact that the supreme court of Iowa in the case of *State ex rel vs. Local Board of Review*, 283 N. W. 87, held that the State Board of Assessment and Review order purporting to equalize valuations in the city of Des Moines in connection with the 1937 assessment was binding upon the local board of review of the city of Des Moines. It appears that the State Board of Assessment and Review order was ignored by the local board of review, and the lower court held that the local board of review was not bound to follow this order, but the supreme court of Iowa reversed the lower court. The decision was not rendered until 1939 although it related back to the 1937 assessment.

Your request for an opinion consists of eleven questions. We have reworded question 1 to include the addition made in your subsequent letter containing question 11 and for convenience, we are listing each question separately and following the question with our discussion and answer. Our opinion follows:

"1. The taxes upon the property in question have been paid for the years 1937 and 1938 and a receipt in full has been issued to the taxpayer. Enforcement of the state board order results in a raising of the valuation over and above that upon which the 1937 and 1938 tax was levied. Does the auditor have the right to correct the assessment on his books so as to show the higher valuation and should the difference between the tax actually paid and the tax that should have been paid upon the raised valuation be carried forward by the treasurer as an unpaid tax against the said property?"

We feel the difference between the tax actually paid and the tax that should have been paid upon the raised valuation should be carried forward by the treasurer as an unpaid tax against the said property and the auditor has the right to correct this assessment on his books so as to show the higher valuation. Payments made by the taxpayers of the amounts shown on the county treasurer's books in the instances referred to in question did not discharge the entire tax. The county officials are required now to show on their books the entire tax and of course the additional amounts which will be presently entered have not been paid so that they should be carried forward. We assume the changes in such cases as are mentioned in the question may be treated as corrections in the assessment or tax list under the provisions of Section 7149 of the 1935 Code of Iowa. We think it is a fair construction of the decision of the supreme court that the assessment process in the city of Des Moines was not complete until the order of the State Board of Assessment and Review was complied with.

"2. Assuming the fact situation in question 1, from what date should interest and penalty on the excess be figured?"

Under Section 7210 of 1935 Code it is the duty of every taxpayer to attend at the office of the treasurer and pay his taxes. The hypothetical taxpayer referred to in the question undoubtedly did this. Until the additional taxes are extended and shown on the records, no taxpayer could know the amount of his additional taxes. This happened without any fault of the taxpayer and it would seem, therefore, that interest should not be computed from a date earlier than the time the taxes are extended upon the public record.

"3. Assuming the fact situation in question 1, should the property in question be advertised for taxes in this year's sale?"

Once the taxes are shown upon the records it would seem that Section 7244

of the 1935 Code would apply. Literally, the taxes which will be so shown are taxes "for the preceding year or years" and we feel they are delinquent. We might suggest that in view of the short time which must elapse between the extension of the taxes on the tax books in the treasurer's office and the publication of the notice of sale that the county treasurer could not be blamed for merely carrying the 1937-38 taxes forward as delinquent taxes and not include them in the next tax sale, especially in view of the fact indicated in later questions in your letter that certification will not be complete in time to publish the notice for the regular December sale.

"4. Assuming the facts as in question 1, with the exception that the result of the state board order is to decrease rather than to increase the valuation, is the taxpayer entitled to a refund?"

It is our opinion that such a taxpayer would be entitled to a refund under Section 7235 of the 1935 Code, as it would seem such a tax was "erroneously or illegally exacted." See, also, the case of *C. Hewitt & Sons vs. Keller*, 223 Iowa 1372, and cases therein cited.

"5. If the answer to question 4 is in the affirmative, is it material whether the taxes were originally paid under protest or not?"

It is our opinion under the facts which concern the Des Moines assessment that it would be immaterial whether the taxes were originally paid under protest or not. See, *Hewitt & Sons vs. Keller*, 223 Iowa 1372.

"6. The 1937 and 1938 taxes on a piece of property in question have not been paid and the same has been sold at tax sale, but deed has not been issued. The result of the state board order is to increase the valuation, shall the county auditor add the increased amount of tax to the tax sale or should it simply be carried forward as a delinquent tax to be picked up by the certificate holder on the payment of subsequent taxes?"

It is our opinion that the increased amount of the tax in the above situation should simply be carried forward as a delinquent tax and that this tax would be paid by the certificate holder in the same manner as the payment of subsequent taxes by such certificate holder.

"7. Assuming that a property was assessed in 1937 for three thousand dollars, by action of the local board of review the assessment was reduced to eighteen hundred, the effect of the order of the state board of review is to affect a reduction to only twenty-five hundred upon which valuation should the taxes be collected?"

In answering the foregoing question, we first assume that the action of the local board of review was, in the year 1937, on complaint of a taxpayer and before the State Board order. We understand there was no action by the local board of review with regard to individual assessments after the State Board order was entered. The board merely ordered a uniform mode of valuation for assessments and stated a percentage of increase and reduction in the various subdistricts. This percentage would be computed on the basis of the assessment previously made and if an individual assessment had become the subject of an appeal and changed according to the board order, then the computation would be on the basis of the assessment as ultimately determined by the local board of review before the entry of the State Board order. It is a little bit difficult to answer this question in the way it is phrased, but applying the above rule to the fact situation, we would state that the valuation upon which the taxes should be collected would be that valuation found by the local board of review as changed by order subsequently entered.

"8. Assume that a piece of property was assessed in 1937 for three thousand dollars and the valuation was reduced by court decree to eighteen hundred dollars, the state board order affects a reduction to only twenty-five hundred dollars, should the tax be figured on the state board order or the court decree?"

Since the State Board order to the local board of review recognized pending appeals and made specific reference to the fact that the order was not to affect such pending appeals, we are of the opinion that the decree subsequently entered upon such a pending appeal would be the controlling assessment.

"9. Because of the fact that the records of the local board of review will not be certified until November 22, which is too late to make publication for a tax sale on the first Monday of December, our county treasurer plans holding the tax sale in January in accordance with the provisions of Section 7262. The first Monday in January, however, is a holiday, being January 1. May the treasurer hold this sale on Tuesday, January 2?"

There is no statute holding that the county treasurer cannot act officially on a legal holiday. Unless the statute forbids action, then legal action can be taken on the first day of January if the treasurer elects to do so. Of course the treasurer could solve any doubts he has in the matter by fixing the sale for the first Monday in February. While January 1st is referred to as an official holiday, it takes express enactment to make official action invalid on a legal holiday. A litigant cannot be required to appear on a legal holiday, but one cannot assume that courts and officials cannot legally act on that day. See Michel vs. Creamery Co., 128 Iowa 706, 708.

We have given the questions stated in your letter careful consideration and we hope that our answers will be of assisance to you in advising your county officials on the problems that are bound to arise in connection with the Des Moines tax situation.

AREA OF HOMESTEAD: HOMESTEAD TAX EXEMPTION ACT: AGRICULTURAL LAND CREDIT FUND: CHAPTER 109: Chapter 109, Acts of the 48th General Assembly, applies only to independent school districts and defines the extent of a "homestead." Chapter 195, Acts of the 47th General Assembly, provides that if within a city or town plat, it must not exceed one-half acre in extent, but if assessed valuation is less than $2500 the land area may be enlarged.

November 6, 1939. *Hon. C. Fred Porter, State Comptroller:* We have your inquiry with reference to the agricultural land credit fund as provided for by Chapter 109, Acts of the 48th General Assembly, presenting two inquiries.

Your first proposition has to do with the area of a homestead insofar as Section 9 of Chapter 109, Acts of the 48th General Assembly is concerned. You suggest the following situation:

"Take for instance this case: A man has 120 acres of land that is in an independent school district within the limits of a city or town. Under the homestead credit fund as provided by Chapter 195 of the 47th General Assembly, he has claimed 40 acres upon which his residence and other farm buildings are located as homestead and received homestead credit. Under the agricultural land credit, it speaks frequently of real estate over 10 acres. Now, this land owner proposes to change the limit of his homestead from 40 acres to 10 acres upon which his residence and farm buildings are situated. This 10 acres has a taxable value in excess of $2,500 upon which he will receive a credit of $62.50 from the homestead credit fund. On the other 30 acres of the original homestead forty, he proposes to seek an agricultural land credit in excess of the 15 mill school tax."

The resultant inquiry is as to what is the extent of the homestead on which the agricultural land credit is not allowed under Section 9 of the act.

Section 9 of Chapter 109, Acts of the 48th General Assembly, provides as follows:

"The agricultural land credit as provided in this act shall not be made to any taxpayer on any portion of his property upon which a homestead credit as provided by chapter one hundred ninety-five (195), Acts of the 47th General Assembly, has been allowed for the year in which the agricultural credit is claimed."

We next turn to the Homestead Tax Exemption Act which is found in Chapter 195, Acts of the 47th General Assembly, and particularly to Section 19, wherein "homestead" is defined in the following language:

"The word 'homestead,' shall have the following meaning:

"a. The homestead must embrace the dwelling house in which the owner claiming a millage credit or refund under this act actually lives six (6) months or more in the year except that in the first year of ownership it shall be sufficient if the owner is living in the dwelling house at the time the claim for homestead credit is made, and makes an affidavit of his intention to occupy said dwelling house, in good faith, as a home.

"b. It may contain one or more contiguous lots or tracts of land with the buildings or other appurtenances thereon habitually, and in good faith, used as a part of the homestead.

"c. If within a city or town plat, it must not exceed one-half (½) acre in extent; if, however, its assessed valuation is less than twenty-five hundred dollars ($2500.)), the land area may be enlarged until its assessed valuation reaches that amount.

"d. If outside of a city or town, it must not contain more than forty (40) acres.

"e. It must not embrace more than one dwelling house, but where a homestead outside of a city or town has more than one dwelling house situated thereon, the millage credit provided for in this act, shall apply to forty (40) acres, the home and buildings used by the owner, but shall not apply to any other dwelling house and buildings appurtenant thereto situated upon said forty (40) acres."

It will be seen that the provisions with reference to the extent of the homestead under subdivisions *c.* and *d.* quoted above are that if within a city or town plat it must not exceed one-half acre in extent, but if this assessed valuation is less than $2,500.00 the land area may be enlarged until this assessed valuation reaches that amount, and if outside a city or town it must not contain more than forty acres.

The implication here is that forty acres is the maximum where it is without a city or town *plat*, and it is our opinion that if it is within the limits of a city or town, but is not in a platted portion thereof, that the maximum would still be forty acres. However, the forty acres is merely the maximum, and the homestead may cover less than forty acres, just as the one-half acre maximum in the city or town plat is the maximum, and the homestead may cover less than the one-half acre.

The purpose of Section 9 of Chapter 109, Acts of the 48th General Assembly, is to prohibit an agricultural land credit under that act on property upon which there is a homestead tax credit. The language of Section 9 is that the agricultural land credit shall not be made to any taxpayer on any *portion* of his property upon which a homestead credit has been allowed. It follows that the law does not prescribe the particular size of the property on which the homestead credit may be obtained and that therefore the size of the plot

or portion of the property on which the agricultural land credit may not be obtained under Section 9 depends entirely upon the size of the property on which they had been allowed a homestead exemption.

In your illustration it would follow that the owner could take his homestead exemption on ten acres which had a taxable value in excess of $2,500.00, and on the other thirty within the original homestead forty, seek an agricultural land credit.

Your second question is as to whether agricultural land credit applies to rural independent school districts, and to rural independent school townships. This question must be answered in the negative.

Our school laws recognize four forms of school districts or corporations: (1) Independent school districts; (2) Consolidated school districts; (3) Rural independent school townships subdivided into subdistricts, and (4) Rural independent school districts.

Rural independent school districts result when a subdistrict under an independent school township, by proper proceedings, removes itself from the school township and becomes independent.

It is our studied opinion that Chapter 109, Acts of the 48th General Assembly, applies only to the first of the above districts, to wit, independent school districts. An examination of the preamble of the act wherein it is said, among other things, "whereas the school tax levied upon agricultural land lying in *independent school districts is greatly in excess and is disproportionate to the schools tax upon similar lands outside of the independent school districts,*" confirms this.

TAX SALE: NOTICE: RIGHT OF REDEMPTION: Chapter 212 of the Acts of the 48th General Assembly amends Sections 7279 and 7280 of the 1935 Code and provides for service of notice of expiration of right of redemption from tax sale upon mortgagees, assignees and division of old age assistance. The act became a law on July 4, 1939 and is not retroactive, but applies to notices given after the effective date of the act.

November 7, 1939. *Mr. John L. Duffy, County Attorney, Dubuque, Iowa:* We have your letter of request for an opinion with regard to whether or not Senate File 133, Acts of the 48th General Assembly, which is Chapter 212 of the published acts, is retroactive.

This act amends Sections 7279 and 7280 of the Code of 1935 and provides for service of notice of expiration of right of redemption from tax sale upon mortgagees, assignees and the Division of Old Age Assistance. There was no publication clause on this act and it therefore became a law on July 4, 1939.

We are of the opinion that this law is not retroactive, but applies to notices given after the effective date of the act.

TAXATION: INHERITANCE TAX: STOCKS AND BONDS OF A NONRESIDENT HELD IN TRUST OR IN SAFETY DEPOSIT BOX: The present inheritance tax law does not impose an inheritance tax in the case of stocks, bonds, or other intangible personal property held in Iowa in a trust created by a person who, at the time of his death is a nonresident of this state.

November 7, 1939. *State Tax Commission, Des Moines Building, Des Moines, Iowa:* You have requested an opinion from this office upon the following situation:

"Does the state of Iowa impose an inheritance tax in the case of stocks, bonds, or other intangible personal property held in Iowa in a trust created by a person who, at the time of his death, is a nonresident of this state, or in the case of such property of nonresidents in safety deposit boxes or in safekeeping or agency accounts in this state when the state of residence has a reciprocal statute similar to our Section 7393-c1 of the 1935 Code?"

Section 7393-c1 of the 1935 Code of Iowa provides as follows:

"*Foreign estates—Reciprocity—Personal property.* The tax imposed by this chapter in respect to personal property of nonresidents (other than tangible personal property having an actual situs in the state) shall not be payable (1) if the decedent at the time of his death was a resident of a state or territory of the United States which at the time of his death did not impose a transfer tax or death tax of any character in respect to personal property of residents of this state (other than tangible personal property having an actual situs in such state or territory), or (2) if the laws of the state or territory of residence of the decedent at the time of his death contained a reciprocal provision under which nonresidents were exempted from transfer taxes or death taxes of every character in respect of personal property (other than tangible personal property having an actual situs therein) provided the state or territory of residence of such nonresidents allowed a similar exemption to residents of the state or territory of residence of such decedent. (3) In no case shall the provisions of this section apply to the intangible personal property of nonresident decedents unless such intangible personal property shall have been subjected to a tax or submitted for purposes of taxation in the state of the decedent's residence. (4) This section shall apply only to estates of decedents dying subsequent to the effective date of this section. For the purpose of this section the District of Columbia and possessions of the United States shall be considered territories of the United States."

In view of the statutory provisions above, the present inheritance tax law of Iowa does not impose an inheritance tax in the case of stocks, bonds, or other intangible personal property held in Iowa in a trust created by a person who, at the time of his death, is a nonresident of this state, or in the case of such property of nonresidents in safety deposit boxes or in safekeeping or agency accounts in this state, even though the intangible personal property has a taxable situs in Iowa, where

(1) Such intangible personal property shall have been subjected to a tax or submitted for purposes of taxation in the state of decedent's residence; and

(2) The state of decedent's residence at the time of his death does not impose a transfer tax or death tax of any character in respect of personal property of residents of this state (other than tangible personal property having an actual situs therein) either because of a specific or a reciprocal provision to that effect in the statute of said state.

COUNTY: LIFE ESTATE: OLD AGE ASSISTANCE: (Sections 10260-e1 and 10260-g1, 1935 Code): County cannot deed life estate to old age recipient in property which it obtained under tax deed.

November 8, 1939. *Mr. Pearl W. McMurry, County Attorney, Corydon, Iowa:* This will acknowledge receipt of your letter of October 23, 1939, wherein you ask our opinion on the following question:

"A number of recipients of old age assistance are living in properties which the county has taken title to by tax deeds. The auditor has been asked to collect rent from these recipients or, if they do not pay rent, a certain amount will be deducted from their grant of assistance. The auditor wants to know if it would be legally advisable to deed these properties to them, the recipients, giving them a life estate in the property for one dollar and other valuable consideration.

This suggestion is made with the thought in mind that it will be impossible to collect rent from some of these recipients and a reduction in the grant will work a material hardship on the recipient. Is there any reason why the county should not deed life estates in these properties to these recipients and would it affect their grants?"

For the purposes of this opinion, we quote from Section 10260-e1, 1935 Code of Iowa:

"*Management.* When the title to real estate becomes vested in the state, or in a county or municipality under this chapter, or by convenience under the statutes relating to taxation, the executive council, board of supervisors or other governing body, as the case may be, shall manage, control, protect by insurance, lease or sell said real estate on such terms, conditions or security as said governing body may deem best."

We also quote from Section 10260-g1, 1935 Code of Iowa:

"*Title under tax deed—Sale—Apportionment of proceeds.* When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed and sold by the board of supervisors as provided in this chapter, except that any sale thereof shall be for cash and for a sum not less than the total amount stated in the tax sale certificate including all endorsements of subsequent general taxes, interests and costs, without the written approval of a majority of all the tax levying and tax certifying bodies having any interest in said general taxes. All money received from said real estate, either as rent or as proceeds from the sale thereof shall, aftr payment of any general taxes which have accrued against said real estate since said tax sale and after payment of insurance premiums on any buildings located on said real estate and after expenditures made for the actual and necessary repairs and upkeep of said real estate, be apportioned to the tax levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold."

Section 10260-g1 was passed by the 46th General Assembly and is subsequent in time to the enactment of Section 10260-a1. Section 10260-g1 therefore limits the scope and operation of Section 10260-e1. *Owens vs. Smith*, 200 Iowa 261, *Waugh vs. Shirer*, 216 Iowa 468.

It is also noted that under Section 10260-g1, the county must sell property held by it under tax deed, for cash. It is our opinion that the legislature intended that the county should sell such property in its entirety. It is our further opinion that the legislature did not intend the county to sell any severable part of such property, such as a life estate.

It is, therefore, our opinion that the answer to your question should be in the negative and that the county could not legally deed to anyone any life estate in property held by the county under a tax deed.

MANICURING: COSMETOLOGY: LICENSE: In order to practice manicuring upon women or children, one must first secure a license to practice cosmetology.

November 8, 1939. *Department of Public Health. Attention: Dr. Bierring, Commissioner:* Your inquiry in regard to the following matter is herewith acknowledged:

"It would be appreciated if your department would render an opinion as to whether or not in view of the existing law, in order to practice manicuring one must first secure a license to practice cosmetology."

For the purpose of this opinion, we quote from Chapter 124-b1 of the 1935 Code of Iowa, as follows:

"2585-b1. *Definitions.* For the purpose of this chapter the following classes of persons shall be deemed to be engaged in the practice of cosmetology:

"2. Persons who, with hands or mechanical or electrical apparatus or appliances, or by the use of cosmetic preparations, antiseptics, tonics, lotions, or creams, engage for compensation in any one or any combination of the following practices: Massaging, cleansing, stimulating, manipulating, exercising, manicuring, beautifying, or similar work, the scalp, face, neck, hands arms, bust or upper part of the body or the removing of superfluous hair by the use of electricity or otherwise, on or about the body of any woman or child."

Legislative history indicates that the 45th General Assembly at its Extraordinary Session passed House File 178 relating to cosmetology and which became a part of the Acts of the 45th General Assembly passed at such session as Chapter 30. Among other provisions enacted, this chapter provided in paragraph 2 of Section 1, that the word "manicuring" should be inserted following the word "exercising" in line 7 of subsection 2 of Section 2585-b1. In preparing the 1935 Code, the Code editor made such insertion.

It clearly appears that it was the intention of the legislature that all manicurists who serve women or children in the capacity of a manicurist must be registered cosmetologists as they are by this section defined as being engaged in the practice of cosmetology. Because the legislature has so defined a manicurist as one so engaged, it follows that such manicurist is subject to all of the laws affecting the practitioner of cosmetology and must, consequently, obtain a cosmetology license before he or she may engage in such practice.

It is, therefore, our opinion that in order to practice manicuring upon women or children, one must first secure a license to practice cosmetology.

FEE: CENSUS RECORDS: FAMILY RECORDS: RECORDS: A fee of twenty-five cents should be charged a private party for both a certified and an uncertified copy of a family record from the census record. A fee for copy of records that originate in the department of history and archives shall be charged in accordance with the fee provided for such copy, and if none is specified, then in accordance with Section 1220. There is no provision by virtue of which photostatic copies may be provided, but transcripts may be prepared and charged in accordance with Paragraph 3 of Section 1220.

November 13, 1939. *State Department of History and Archives:* Your letter of November 7, 1939, inquiring our opinion on the following matter, is herewith acknowledged.

"Our most frequent requests (for records) come from private individuals for a copy of their family record in the state census. They desire this in order to establish the age of some member of the family, usually for insurance, pension, or retirement purposes.

"We are hereby asking for an official ruling from your department on the following questions:

"1. What fee shall the department of history and archives charge a private party for a *certified* copy of a family record from the census record?

"2. What fee, if any, shall be charged for an *uncertified* copy of such record?

"3. What fee shall be charged for a copy of a record that originated in the department of history and archives?

"4. What fee shall be charged for a photostatic copy of any of the above-mentioned records?"

For the purpose of this opinion, we quote from Chapter 113, Acts of the 47th General Assembly, as follows:

"Sec. 12. *Certified copies—Fees.* Upon request of any person, the curator shall make a certified copy of any document contained in said archives, and when such copy is properly authenticated by him it shall have the same legal effect

as though certified by the officer from whose office it was obtained or by the secretary of state. Said curator shall charge and collect from such copies the fees allowed by law to the official in whose office the document originates for such certified copies, and all such fees shall be turned into the state treasury."

And from the 1935 Code of Iowa, as follows:

"425. *Federal census.* The secretary of state shall, whenever a general census is taken by the federal government, procure from the supervisor of such census, or other proper federal official, a copy of such part of said census as gives the population of the state of Iowa by counties, by cities, and by towns, and file the same in his office and attach thereto, dated and signed by him, a certificate that the same is the census report furnished to him by said federal official.

"426. *Publication.* He shall at once cause such census report and certificate to be published once in each of two daily newspapers of the state and of general circulation, and from and after the date of such publication said census shall be in full force and effect throughout the state. On payment of a fee of two dollars he shall furnish a certified copy of the whole or any part of such census report.

"1220. *General fees.* Any officer legally called on to perform any of the following services, in cases where no fees have been fixed therefor, shall be entitled to receive:

"1. For drawing and certifying an affidavit, or giving a certificate not attached to any other writing, twenty-five cents.

"2. For affixing his official seal to any paper, whether the certificate be under seal or not, thirty-five cents.

"3. For making out a transcript of any public papers or records under his control for the use of a private person or corporation, or recording articles of incorporation, for every one hundred words, ten cents."

The record in question seems to be one that has its inception with the Department of History and Archives. The only other official or department where such record could have had its origin would be the secretary of state in his previous position as custodian of the Federal census, but the history of these documents indicates that they have never been supplied by the secretary of state. The $2.00 fee for which he was to supply a certified copy of the whole or any part of the census would seem to apply to that part of the Federal census which would supply to applicants the censuse of the state or of counties, cities or towns.

The documents which you have been supplying are in the nature of a family record, the information regarding which is supplied from the census. It is conceivable that the legislature would provide a fee of $2.00 for the supplying to applicants of certified copies of the census or its parts such as counties, cities and towns, for the reason that copy of such records may be lengthy and complicated, whereas the information supplied in the family records consists of three or four statements at the most. In addition, it would not seem that the providing of a family record would be in the sense of supplying a part of the census even though part of the information contained in the record might have been supplied from the census.

Inasmuch, therefore, as the record originates with the Department of History and Archives and there is no designated fee for it, then such fee shall be in accordance with Section 1220 of the 1935 Code of Iowa. In answer to question 1, a fee of twenty-five cents (25c) should be charged and a like fee in answer to question 2, for the reason that such a record without certification is not within the contemplation of this section.

In answer to question 3, it appears that fee for copy of records that originate in the Department of History and Archives shall be charged in accordance

with the fee provided for such copy and if none is specified, then in accordance with Section 1220. In answer to question 4, there is no provision by virtue of which photostatic copies may be provided, but transcripts may be prepared and charged for in accordance with paragraph 3 of Section 1220.

CCC CAMP ENROLLEE: LEGAL SETTLEMENT: RESIDENCE: CCC enrollee does not gain legal settlement in county where camp is located even though there a year without notice to depart. Should he marry, his wife takes the settlement of the husband, not vice versa.

November 15, 1939. *Mr. Ralph H. Goeldner, County Attorney, Sigourney, Iowa:* This will acknowledge receipt of your letter of the 1st inst., wherein you ask the opinion of this department relative to the following legal question:

"Can an enrollee in a CCC camp gain a settlement in a county where the camp is located? Would his marriage to a local girl change the situation either before or immediately after?

Section 5311, Code of Iowa, 1935, provides:

"A legal settlement in this state may be acquired as follows:

"1. Any person continuously residing in any one county of this state for a period of one year without being warned to depart as provided in this chapter acquires a settlement in that county, but if such person has been warned to depart as provided in this chapter, then such settlement can only be acquired after such person has resided in any one county without being warned to depart as provided in this chapter for a continuous period of one year from and after such time as such persons shall have filed with the board of supervisors of such county an affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county."

The correct answer to your inquiry, as we view it, is dependent upon whether or not mere physical presence in the county continuously for one year without notice to depart is sufficient for the acquisition of a legal settlement therein, or must there be coupled with such physical presence an intention to make such county a permanent abode.

We are of the opinion that mere physical presence is not sufficient but that the person claiming legal settlement must establish that his removal to the county was with the intention of remaining there an indefinite period of time.

This is, as we view it, the effect of the holding in *County of Cerro Gordo vs. County of Wright*, 50 Iowa 439. In this case the question involved the liability of Wright County to Cerro Gordo County for relief furnished by the latter county to one Hattie Bennett. She came from Illinois to Wright County in December, 1874, and remained there until March, 1876, when she went to Cerro Gordo County. Shortly afterwards she was taken sick and the support for which the action was brought was furnished during the summer of 1876. Wright County claimed that she had not a legal settlement there for the reason that she was a mere sojourner and intended to return to Illinois. There was evidence, however, that Hattie Bennett went to school in Wright County and worked out as a servant girl and she remained there for 15 months and went to Cerro Gordo County only because she had an opportunity to obtain work there. The court said:

"Under these circumstances it was highly proper that the court should have defined the character of inhabitancy which constitutes residence. It is true the code (Section 1352) provides that persons residing in the state one year, without being married, gain a settlement in the county of their residence; but what constitutes residence is not defined by statute. It should have been defined to the jury as 'personal presence in a fixed and permanent abode' * * *."

In the case of *In Re Estate of Rowe*, 179 Iowa 541, the court had occasion to consider the matter of what constitutes "residence." On page 544 the court said:

"It will be noted that the statute does not define what constitutes residence such as confers exclusive jurisdiction upon the district court of the county. In attempting to define the term 'residence' or 'resident,' courts have encountered much difficulty, and we may say, from an examination of the authorities, that there is not any definition that applies to the facts of every case, but it seems to run through the authorities that the place where a man resides with his family is at least presumptively his place of residence. In some cases, it is suggested that a man's residence is a matter to be determined by his own intention; but it clearly appears that when one has a fixed residence at a particular place, a residence where he abides with his family, a home, an abiding place, with no present intention to leave it for another place, that is his residence for the time being, * * *. Where one takes up his abode at a particular place, removes his family there, procures a dwelling house, installs his family in it, and surrounds himself by his property, that becomes his residence for the time, even though, perchance, he may have in mind an idea or purpose not to remain there permanently. Citing County of Cerro Gordo vs. County of Wright, 50 Iowa 439."

In 48 *Corpus Juris* 469, it is said:

"Physical presence in a town or poor district, while generally necessary to initiate a residence, is not alone sufficient, but to gain a residence it is necessary that the person should take up his habitation in the place with the intention of remaining, or at least without any present intention of removing. But a person who moves into a town or district with the intention of making it his fixed residence, for an indefinite time, and without any certain purpose of returning to his former place of abode, and resides there for the statutory period, gains a legal settlement * * * The animus mandendi is the controlling element in determining whether a residence has been acquired, and the existence of such intention is a question of fact."

See *Monroe County vs. Jackson County*, 72 Wis. 449, 40 N. W. 224; *Palmer vs. Hampden*, 182 Mass. 511, 65 N. W. 817.

See also *Cass County vs. Audubon County*, 221 Iowa 1037. In this case the court said:

"Under the fact situation in this case, two things would concur in the acquiring of a settlement in a given county by the poor person: First, personal presence in a fixed and permanent abode, or permanency of occupation as distinct from lodging, boarding, or temporary occupation; and, second, an intention to remain there, without any present intention of removing therefrom. Cerro Gordo County vs. Wright, 50 Iowa 349; Hinds vs. Hinds, 1 Iowa 36."

With the pronouncements in these cases in mind, let us proceed to apply them to the facts in your case, It is a matter of common knowledge that an enrollee in a CCC camp "enlists" for a definite period of time. At the conclusion of this period he is free to return home. The camp is under the supervision of the United States Government. However, the Civilian Conservation Corps is not a part of the United States Army. It is also a matter of common knowledge that the enrollee has no voice in the selection of the camp in which he is to serve. He may be transferred at the will of the government authorities. He may be sent to another camp within the state or to camps situated in other states. It is clear, therefore, that he exercises no volition in the selection of the county in which he is to be situated. Residence embodies the idea of freedom of choice. This the CCC enrollee does not have and furthermore it is clear that his intention is not to remain in that county for any indefinite period of time. This, as we have pointed out, depends upon the will of his superior officer.

For the reasons hereinabove pointed out, we have reached the conclusion that a CCC enrollee does not gain a legal settlement in the county where the camp is located, even though he is physically present in said county for one year without notice to depart.

At the time of the decisions in *Cerro Gordo vs. Wright, supra,* and *Cass County vs. Audubon County, supra,* the statute as to settlement read, in substance, "Any adult person residing in this state one year without being warned to depart, as provided in this chapter, acquires a settlement in the county of his residence." Now the statute reads, "A legal settlement in this state may be acquired as follows: Any person continuously residing in any one county of this state for a period of one year without being warned to depart * * *." We do not believe that the change in the statute renders the above cases inapplicable. We are of the opinion that insofar as these cases define "residence," they may be used with equal effectiveness in determining what is meant by the term "residing" in the third line of the present Section 5311.

Included in your question is the proposition of whether or not his marriage to a local girl would change the situation, assuming such marriage took place either during or immediately after his enrollment. We think not. The girl, upon being married, acquires the settlement of her husband. The husband does not acquire the settlement of his wife.

SCHOOL DISTRICTS: BOUNDARIES: School district may change boundaries by giving land to an adjoining district, even though it is across a township or county line.

November 17, 1939. *Mr. John E. Miller, County Attorney, Albia, Iowa:* We have your favor of November 4th in which you ask the following question:

"A question has arisen in our county under the provisions of Chapter 208 of the Code of Iowa, 1935. One of our school districts, which borders on Wapello county, desires to change the boundaries of their district by giving certain land to an adjoining district in Wapello county. The Wapello county school board is willing to accept land, but the question has arisen as to whether or not it can be done."

We beg to say that after reading the case of *Thomasson vs. Warren Grove Independent School District,* 206 Iowa 1183, and considering the repeal afterward of Section 4135 of the 1931 Code of Iowa, it seems to us that the General Assembly sought to overcome the effect of the holding in the supreme court in the Thomasson case.

Section 4131 of the 1935 Code of Iowa provides:

"4131. Attaching territory to adjoining corporation. In any case where, by reason of natural obstacles, any portion of the inhabitants of any school corporation in the opinion of the county superintendent cannot with reasonable facility attend school in their own corporation, he shall, by a written order, in duplicate, attach the part thus affected to an adjoining school corporation, the board of the same consenting thereto, one copy of which order shall be at once transmitted to the secretary of each corporation affected thereby, who shall record the same and make the proper designation on the plat of the corporation. Township or county lines shall not be a bar to the operation of this section."

Section 4132 provides:

"4132. Restoration. When the natural obstacles by reason of which territory has been set off by the county superintendent from one school district and attached to another in the same or an adjoining county, as provided in Section 4131, have been removed, such territory may, upon the concurrence of the

respective boards, be restored to the school district from which set off and shall be so restored by said boards upon the written application of two-thirds of the electors residing upon the territory so set off together with the concurrence of the county superintendent and the board of the school district from which such territory was originally set off by the county superintendent."

And Section 4133 provides:

"4133. Boundary lines changed—Consolidation. The boundary lines of contiguous school corporations may be changed by the concurrent action of the respective boards of directors at their regular meetings in July, or at special meetings thereafter, called for that purpose. The corporation from which territoy is detached shall, after the change, contain not less that four government sections of land, and its boundary lines must conform to the lines of congressional divisions of land. In the same manner, the boundary lines of contiguous school corporations may be so changed that one corporation shall be included in and consolidated with the other as a single corporation."

Since Section 4135 was repealed, there seems to be no prohibition against the attaching of territory to adjoining corporation, even though it is across a township or county line.

It is the opinion of this department that your question must be answered in the affirmative.

COUNTY RECORDER: CHARGE FOR RECORDING: ASSIGNMENTS: FEE: An assignment which describes several conditional sales contracts is only one instrument and the fee to be charged for recording assignment must be governed by Sections 10031 and 5177.

November 20, 1939. *Mr. James P. Irish, Assistant County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter of recent date wherein you request the opinion of this department on the following proposition:

"A is the owner of several conditional sales contracts, which contracts are recorded both in Polk county, and in an adjoining county. A, by the same written instrument, assigns all of these conditional sales contracts to B in a single instrument which instrument, however, individually describes each of the conditional sales contracts covered. B presents the assignment to the county recorder of Polk county, Iowa, for recording and is charged a fee based on a charge of fifty cents for each conditional sales contract covered in the assignment. B then presents the instrument for recording to the recorder of the adjoining county and is charged a fee on the basis of fifty cents for the first four hundred words and ten cents for each additional one hundred words or a fraction thereof, as provided in Section 10031. The county recorder of Polk county, Iowa, takes the position that the recording and indexing of this instrument requires her to make a separate entry of a release for each of said conditional sales contracts covered and, therefore, the recorder is entitled to the fee on the basis of the number of contracts actually covered by the assignment."

Section 10031, Code of Iowa, 1935, provides:

"The fees to be collected by the county recorder under this chapter shall be as follows:

"1. For filing any instrument affecting the title to or incumbrance of personal property, twenty-five cents each.

"2. For recording or making certified copies of such instruments, fifty cents for the first 400 words and ten cents for each one hundred additional words or fraction thereof."

Section 5177, Code of Iowa, 1935, provides:

"The recorder shall charge and collect the following fees:

"1. For recording each instrument containing four hundred words or less, fifty cents.

"2. For every additional hundred words or fraction thereof, ten cents.
"3. For every marginal assignment or release (except those made by the clerk of the district court) twenty-five cents."

We are of the opinion that the two sections above quoted are controlling and that, therefore, the recorder may not charge in excess of fifty cents for the first four hundred words and ten cents for each additional one hundred words or fraction thereof.

The assignment in question, it is true, assigns several conditional sales contracts, but we incline to the view that the assignment is still one instrument and that no statutory authority exists justifying the charge of fifty cents for each conditional sales contract described in the assignment.

It will be noted that Section 10031 provides:

"1. For filing *any instrument* * * *.
"2. For recording or making certified copies of such instruments, fifty cents for the first four hundred words and ten cents for each one hundred additional words or fraction thereof."

We reach the conclusion, therefore, that the assignment in question, although describing several conditional sales contracts, is one instrument and that the fee to be charged for recording same is governed by Section 10031 and the general statute, Section 5177.

NOTICE TO DEPART: LEGAL SETTLEMENT: BOARD OF SUPERVISORS: TOWNSHIP TRUSTEES: Board of supervisors or township trustees must order service of notice to depart, according to statute, otherwise service is no good.

November 20, 1939. *Mr. William J. Kennedy, New Hampton, Iowa:* We are in receipt of your letter of the 17th inst. wherein you ask the opinion of this department relative to the following legal question. You say:

"The Jones family moved to Nashua in Chickasaw County on September 1, 1938. Prior to that date the family had lived in Clear Lake, Cerro Gordo County, Iowa, steadily for three years. On February 6, 1939, by personal service on the head of the family a notice to depart was served on the family by Addison Lee, the overseer of the poor for Chickasaw County, Iowa. On October 1, 1939, the family left Nashua and moved to Charles City in Floyd County where they now live."

It is conceded that neither the township trustees nor the board of supervisors ordered the service of such notice.

The question is whether or not the Jones family has been legally warned to depart by your county so that the settlement still continues in Cerro Gordo County.

We are of the opinion that this case is ruled by *Emmet County vs. Dalley*, 216 Iowa 166. There the notice to depart was ordered served by the board but no resolution was passed. It was merely discussed by the members of the board while in session and after such discussion the chairman was orally ordered to sign and serve the notice. The court held:

"A board must act as a unit, and in the manner prescribed. The determination of the members individually is not the determination of the board."

Section 5316, Code of Iowa, 1935, provides:

"Such warning shall be in writing, and may be served upon the order of the trustees of the township or of the board of supervisors, by any person; * * *"

The court said in the Emmet County case:

"* * * and it is because of this unusual power that the courts universally have held that the power, in order to be effective, must be exercised strictly

according to the statute. The language of this statute is clear. The notice is to be served 'upon the order of the trustees of the township, or of the board of supervisors.' There is no showing in this record of strict compliance with the statutory requirements."

We are, therefore, of the opinion that inasmuch as the statute specifically directs that the notice to depart shall be served upon order of the township trustees or of the board of supervisors that such notice is ineffective unless served pursuant to such order. In your case there was no such order. Therefore, we reach the conclusion that the Jones family has a legal settlement in your county.

STATE BOARD OF SOCIAL WELFARE: OLD AGE ASSISTANCE: TAXES, SUSPENSION COUNTY AUDITOR: (Section 6950-g1, 1935 Code.) County auditor should not suspend taxes if property is listed in recipient's wife's name. If recipient and deceased wife left no issue, auditor should suspend taxes. If they left issue, husband would get one-third and auditor should not suspend the one-third and collect the two-thirds, auditor should suspend taxes on property in which old age recipient has life estate.

November 23, 1939. *Mr. Donald P. Chehock, County Attorney, Osage, Iowa:* This will acknowledge receipt of your letter of November 10th wherein you ask our opinion on the following propositions:

"The county auditor has requested that I write you in regard to the suspension of taxes for old age recipients when the record title of the real estate is in the name of the spouse of the recipient rather than the recipient himself. The three particular cases that he had in mind are as follows:

"1. The husband receives an old age pension; the property is in the name of the wife; both are living. Does the auditor have the right to suspend the taxes in the wife's name?

"2. Facts are the same as in the first case except the wife dies with the property in her name and her husband who is the old age recipient is still living. The estate of the deceased wife has not been probated. Should the taxes on the real estate be suspended in this instance?

"3. The old age recipient has a life estate in the real estate. Does the auditor have a right to suspend taxes on this property?"

For the purposes of this opinion, we quote from 6950-g1, 1935 Code, as amended by Chapter 186, Section 1, 47th General Assembly, and Senate File 475, Section 10, 48th General Assembly:

"*Suspension of taxes.* 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 the 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 6950, Code, 1935, 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 answer to your first question, it is our opinion that the auditor should not suspend the taxes if the property is listed in the wife's name, the reason being that the property is not owned by the old age recipient.

In answer to your second question, if the old age recipient and his deceased

wife left no issue, then the property would descent directly to the husband, if the property was valued at less than $7,500.00. In this situation, it is our opinion that the auditor should suspend the taxes. However, if the old age recipient and his wife left issue, the husband, of course, would only get one-third of the property upon his wife's death. It is our opinion that in this situation, the auditor should not suspend the taxes as it would hardly be practicable to suspend one-third of the taxes and collect the other two-thirds.

In answer to your third question, it is our opinion that the county auditor should suspend the taxes on property in which the old age recipient has a life estate. A life tenant is responsible for the payment of taxes and it is our opinion that he is possessed of such an interest in real estate that the taxes should be suspended under the provisions of the above quoted section.

CHILD WELFARE: ADOPTION: NAME: (Section 10501-b5.) The home which is a licensed child-placing agency should be required to include the true name of the child to be adopted in its petition for adoption and the true name of the child adopted should be included in decree of adoption.

November 23, 1939. *State Board of Social Welfare, Des Moines, Iowa. Attention: Laura L. Taft, Director, Division of Child Welfare:* This will acknowledge receipt of your letter of November 9th, wherein you ask the following question:

"In 1938, we obtained an opinion through the legal counsel for this department, Mr. A. C. Campbell, on the legality of fraudulent names appearing in adoption decrees. We would like very much to have, at this time, an opinion from the attorney general which will stand in the file for future reference and use.

"A home, which is a licensed child placing agency under the supervision of the State Department of Social Welfare, has been making frequent use of the names "John Doe" and "Mary Doe" as the true names of the children who are being adopted. These names appear in the adoption decrees. We all know because of their frequency that the true names of the children are not being written into the decree, and we are now wanting to know our position in a matter of this kind so that we can take it up with some authority with the agencies who are giving children in adoption."

For the purposes of this opinion, we quote from Section 10501-b5, 1935 Code of Iowa:

"*Decree—change of name.* If upon the hearing the court shall be satisfied as to the identity and relationship of the persons concerned, and that the petitioners are able to properly rear and educate the child, and that the petition should be granted, a decree shall be entered in the office of the clerk setting forth the facts including as far as known the name of the child, of its parents and of the persons adopting it, and the name under which the child is thereafter to be known, and ordering that from the date thereof, the child shall be the child of the petitioners. The clerk shall deliver to the foster parents a certified copy of the decree. If desired, the court, in and by said decree, may change the name of the child."

Before there can be a legal adoption, there must be a petition on file in court pursuant to Section 10501-b1. The language of the above quoted section is mandatory upon the court to enter a decree which sets out the true name of the child, if it be known.

It is, therefore, our opinion that the home to which you refer in your letter, should be required to include the true name of the child to be adopted in its petition for adoption, and it is our further opinion that the court should in-

clude the true name of the child to be adopted, if it be known, in its decree of adoption.

TOWNSHIP OFFICERS: APPRAISEMENT OF LANDS: Township officers are abolished when border lines of township coincide with that of city. Duty of trustees to appraise land acquired by state in foreclosure of school fund mortgage is in that case performed by city council.

November 29, 1939. *Mr. Harold W. Vestermark, County Attorney, Iowa City, Iowa:* This is in answer to your letter of the 14th inst., wherein you request the opinion of this department relative to the procedure to be followed in selling lands acquired by the state in the foreclosure of school fund mortgages. It appears that the property in question is a lot located within Iowa City.

Section 4472, Code of Iowa, 1935, provides that before the sale of lands acquired by foreclosure of school fund mortgages the same must be appraised by the trustees of the township where the land is located. The township in which Iowa City is located has no township trustees and the question, therefore, arises as to by whom the appraisement is to be made.

Section 5553, Code of Iowa, 1935, provides:

"Where a town or city * * * constitutes one or more civil townships the border lines of which coincide throughout with the boundary lines of the town or city, the offices of township clerk and trustee are abolished."

Section 5554, Code of Iowa, 1935, provides:

"The duties required by law of the township clerk in such cities shall be performed by the city clerk and those required of the board of trustees shall be performed by the city council."

In view of the statutes above quoted, we reach the conclusion that the lot in question should be appraised by the city council of the city of Iowa City.

NATIONAL GUARD: AIR UNIT: ARMORY BOARD: GUARD: The Armory Board may, with the approval of the governor, enter into a fifteen (15) year lease with private parties for the rental of an air unit armory consisting of the necessary facilities for housing and training such a unit.

November 29, 1939. *Hon. Charles H. Grahl, The Adjutant General of Iowa:* Your letter of November 27, 1939, inquiring our opinion on the following matter, is herewith acknowledged.

"This department desires to make application to the National Guard Bureau for the allocation to the State of Iowa, of a National Guard air unit consisting of an observation squadron * * *

"In order to obtain favorable consideration from the National Guard Bureau for the allocation of an air unit to the National Guard of the State of Iowa, the state must agree to furnish adequate housing facilities in the way of hangar, machine shops, class rooms, office space for administration facilities, adequate air-field facilities,etc.

"In view of the fact that the Des Moines airport is the only airport in the State of Iowa that meets the requirements of the War Department for an air unit, it would be necessary to have this proposed air squadron located in Des Moines and the facilities constructed on the Des Moines airport. The city of Des Moines is agreeable to this proposal.

"It is contemplated that the city of Des Moines or a group of private individuals will finance the construction of the hangar and other necessary facilities at the Des Moines airport, if and when an air unit of the National Guard is allocated to the State of Iowa and authorized for organization.

"The question arises as to whether or not the Armory Board of the State

of Iowa is authorized to enter into a fifteen-year lease with either the city of Des Moines or any corporation or group of individuals for the rental of an air unit armory consisting of the necessary facilities for housing such a unit. Such lease to be approved by the Executive Council and the Interim Committee of the legislature, providing of course the Interim Committee and the legislature make adequate appropriation for the rental involved.

"Your opinion is respectfully requested as to whether Section 467-f47, Code of Iowa, 1935, gives the Armory Board authority to enter into such a lease with the approval of the State Executive Council and the Interim Committee of the legislature."

For the purpose of this opinion, we quote from the 1935 Code of Iowa, as follows:

"467-f47. *Armory board.* The governor shall appoint an armory board which shall consist of the adjutant general, and four other officers from the active, inactive, or retired commissioned personnel of the national guard. The board shall meet at such times and places as are ordered by the governor. The four officers so appointed shall serve at the pleasure of the governor. The board shall, for each unit of the national guard, fix the rent allowance to be paid by the state for other than state-owned armories, and shall acquire, contract, erect, purchase, sell, maintain, repair and alter state-owned armories subject to the laws made and provided therefor. Said board may lease property to be used for armory purposes, said lease to extend for any period but not to exceed fifteen years.

The board shall fix the amount to be paid to commanding officers of each division, brigade, regiment, batallion, company or other unit of the national guard for headquarters expense and shall provide by regulation how the same shall be disbursed by such commanding officers. The actions of the armory board shall be subject to the approval of the governor.

"The allowances made by the armory board shall, when approved by the governor, be paid from the funds appropriated for the support and maintenance of the national guard."

Reviewing the above section, it appears that the legislature, recognizing the need of providing training and housing facilities for the Iowa National Guard, vested in the Armory Board the authority to provide both state owned and privately owned armories, with the approval of the governor, for the use of the Guard. This authority includes the leasing of such privately owned facilities, but limits such lease to a period of fifteen (15) years.

It appears that private interests propose the providing of a hangar, together with the other necessary requirements suitable for the proper housing, training and instruction of an air unit. This unit will be a component part of the Iowa National Guard and there can be no doubt that the facilities suggested may be construed to be an armory within the contemplation of the statute. Surely there can be no other reasonable construction placed upon the facilities described as there is no means of training, or housing the materials necessary, for an air unit except as provided by a hangar and adequate housing pertinent thereto, at an airport.

It is, therefore, our opinion that the Armory Board may, with the approval of the governor, enter into a fifteen (15) year lease with private parties for the rental of an air unit armory consisting of the necessary facilities for housing and training such a unit.

WIDOW OF A VETERAN: PENSION FOR WIDOW: SOLDIER'S EXEMPTION: Widow of Spanish War veteran is not entitled to soldier's exemption when she subsequently marries and thereafter again becomes a widow, as she is not a "widow remaining unmarried of a deceased soldier."

December 5, 1939. *Mr. Chet B. Akers, Auditor of State. Attention: L. I. Truax:* This is in answer to your letter of the 29th ult. wherein you request the opinion of this department on the following legal question:

"The widow of a Spanish War veteran was drawing a pension and was entitled to a soldier's exemption. She remarried and after her second husband died, she again claims a soldier's exemption on property which she acquired from her second husband. Her second husband was not a soldier.

"The question is: Is she entitled to now again claim rights to a soldier's exemption by virtue of being a widow of the first husband?"

Section 6946, Code of Iowa, 1935, provides the following exemptions from taxation shall be allowed:

"1. * * *

"2. The property, not to exceed eighteen hundred dollars in actual value, and poll tax of any honorably discharged soldier, sailor, marine or nurse of the war with Spain, * * *

"3. * * *

"4. * * *

"5. The property, to the same extent, of the widow remaining unmarried and of the minor child or children of any such deceased soldier, sailor, or marine."

You will note that the above subsection 5 provides that the exemption is "to the same extent, of the widow *remaining unmarried.*" As we construe this statute the widow referred to in your letter did not remain unmarried and, therefore, is not entitled to the exemption. We incline to this construction of the statute partly in view of the universal holdings of the courts that taxation is the rule, exemption is the exception. The courts have also uniformly held that exemption laws must be strictly construed.

In the case of *Shaw vs. Shaw,* 115 Iowa 193, it was held that a devise of property to testator's wife to have and to hold so long as she remained his widow, vested in her a conditional estate subject to her subsequent marriage. In other words, in that case it was held that when the testator's wife remarried she ceased to be his widow. A long line of other Iowa cases support this view. We believe these cases to be analogous to the one referred to in your letter.

It is our conclusion, therefore, that while the woman mentioned in your communication is a widow, she is not a "widow remaining unmarried of a deceased soldier."

DETENTION HOMES: CHILD WELFARE: POOR FUND: COUNTY: Sections 3653-3654, 1935 Code.) Expenditures for detention homes as authorized by Section 3653 are not legal charges against the poor fund. If a tax as contemplated by Section 3654 is not levied, such expenditures must necessarily be charged to general fund of the county.

December 6, 1939. *Mr. King R. Palmer, Chairman, State Board of Social Welfare, Iowa Building, Des Moines, Iowa:* This will acknowledge receipt of your letter of December 5th wherein you ask for our opinion on the following proposition:

"Section 3653 of the 1935 Code of Iowa, as amended by Chapter 101, Acts of the 48th General Assembly, provides that the board of supervisors in counties having a population of more than forty thousand shall, and in counties of over thirty thousand may, provide and maintain detention homes for dependent, neglected and delinquent children. Section 3654 provides that the board of supervisors may annually levy a tax not to exceed one-fourth mill

for the purpose of maintaining such homes and paying the salaries and expenses of all appointees authorized by this chapter.

"We wish to know whether or not expenditures for detention homes as authorized by Section 3653 are legal charges against the poor fund of the county."

For the purposes of this opinion we quote from Section 3653, 1935 Code, as amended by Chapter 101 of the Acts of the 48th General Assembly:

"3653. *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 enclosure of any jail or police station, a suitable detention home and school for dependent, neglected and delinquent children."

We also quote Section 3654, 1935 Code:

"3654. *Tax.* The board of supervisors may annually levy a tax of not to exceed one-fourth mill for the purpose of maintaining such home and paying the salaries and expenses of all appointees authorized by this chapter."

It will be noted that in counties having a population of more than forty thousand, that the legislature has seen fit to use mandatory language to require such counties to provide juvenile homes and, at the same time, the legislature has used permissive language in providing for the upkeep and maintenance of such homes. It has long been the practice, and it is our opinion that the poor fund of a county can be used only for the relief of poor persons. It does not follow that every child who is committed to a home as contemplated in Section 3653 is a "poor person" as defined by Chapter 267 of the 1935 Code.

It is, therefore, our opinion that expenditures for detention homes as authorized by Section 3653 are not legal charges against the poor fund. It is our further opinion that if a tax as contemplated by Section 3654 is not levied, such expenditures must necessarily be charged to the general fund of the county.

SCHOOLS: INSURANCE: MUTUAL INSURANCE: A school district may buy wind and fire insurance from a mutual insurance company and Section 8907 does not discriminate between assessable and non-assessable mutuals and consequently the district may purchase either, if it is provided for by the Budget Law.

December 6, 1939. *Mr. E. F. Kennedy, County Attorney, Sibley, Iowa:* We have your request for an opinion on the following:

"1. May a board of directors of a school district buy wind and fire insurance from a mutual insurance company?

"2. Would it make any difference whether or not it would be non-assessable?"

The answer to your first question is found in Section 8907 of the 1935 Code of Iowa, which reads as follows:

"8907. Membership in mutuals. Any public or private corporation, board, or association in this state, or elsewhere, may make applications, enter into agreements for and hold policies in any such mutual insurance company. Any officer, stockholder, trustee, or local representative of any such corporation, board, association, or estate may be recognized as acting for, or on its behalf for the purpose of such membership, but shall not be personally liable upon such contract of insurance by reason of acting in such representative capacity. The right of any corporation organized under the laws of this state to participate as a member of any such mutual insurance company is hereby declared to be incidental to the purpose for which such corporation is organized and as much granted as the rights and powers expressly conferred."

A school district is a public corporation and may act as outlined in the above quoted section.

As to question Number 2, Section 8907 does not discriminate between assessable and non-assessable mutuals and consequently the boards of directors may purchase either, if it is provided for by the Budget Law, as outlined in Section 370 of the 1935 Code of Iowa.

TAXES: SUSPENSION OF: OLD AGE ASSISTANCE: (Section 6950-g1, 1935 Code.) Property sold for taxes after those taxes have been suspended, said tax sale is illegal and tax sale certificate should be cancelled and money paid should be refunded to purchaser by board of supervisors. Special assessments are not taxes, therefore should not be suspended. Sale of delinquent general taxes in effect pays those taxes and if suspension goes into effect subsequent to that time, there is nothing to suspend.

December 11, 1939. *Mr. Raymond H. Wright, County Attorney, Burlington, Iowa:* This will acknowledge receipt of your letter of November 28, wherein you ask our opinion on the following questions:

"1. If a taxpayer's taxes are suspended because he is receiving old age assistance and after the suspension his property is sold for taxes which became delinquent before the suspension, should this tax sale certificate be cancelled and if so, how should the money paid in be refunded to the purchaser?

"2. Does the suspension of taxes under Section 6950-g1 of the Code include special assessment?

"3. If property is sold for general taxes and subsequent to the sale, the collection of taxes is suspended under 6950-g1, should the county treasurer cancel the certificate which had been issued by virtue of the sale?

"4. If the answer to question No. 3 is in the affirmative, is the answer changed if the sale is to the public bidder for general taxes, and the tax sale certificate is subsequently assigned to a holder of a special assessment certificate on the property in question?

"5. If the answer to No. 3 is in the affirmative, would it make any difference if the sale were for a delinquent special assessment as well as delinquent general taxes?"

For the purposes of this opinion, we quote from Section 6950-g1, 1935 Code of Iowa:

"*Suspension of taxes.* 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 the 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 6950, Code, 1935, 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 answer to your first question, it appears that if property is sold for taxes after those taxes have been suspended, the tax sale is an illegal one and it is our opinion that that tax sale certificate should be cancelled and the money paid by the certificate purchaser should be refunded to said purchaser by the board of supervisors. Said refund will necessarily have to come out of the general county fund.

In answer to your second question, it is our opinion that special assessments are not taxes as contemplated by Section 6950-g1, and therefore, said special assessments should not be suspended.

In answer to your third question, it is our opinion that a sale for delinquent general taxes in effect pays those taxes and therefore, if a suspension goes into effect subsequent to that time, there is nothing to suspend. It is, therefore, our opinion that in such case, the county treasurer should not cancel the certificate of sale which has been issued.

Since the answer to your third question is in the negative, we need not answer your fourth and fifth questions.

PROCESS AGENT: APPLICATION OF FOREIGN CORPORATION: SECRETARY OF STATE: Secretary of state could refuse to issue permit to foreign corporation in event application did not show certified copy of resolution designating some individual other than secretary of state as process agent.

December 14, 1939. *Hon. Earl G. Miller, Secretary of State. Attention: Mr. Bergeson:* We have your inquiry of December 7 as to whether the secretary of state may refuse to be named as resident process agent by a foreign corporation seeking a permit to do business in Iowa.

Section 8421 provides that the application for permit to do business shall set forth a certified copy of the resolution of the board of directors of the corporation giving the name and address in Iowa of a resident agent on whom service of process may be made, and that in the event the corporation fails to do this, or in the event the agent named cannot be found, that service may be made through the secretary of state.

This Section 8421 provides what shall be set out in the application, and the provision for service on the secretary of state is only in the event that there is not a designation, or the agent designated is not to be found.

In view of this we are of the opinion that the secretary of state could refuse to issue a permit in the event the application did not show a certified copy of the resolution designating some individual other than the secretary of state as process agent. We believe the provision for the secretary of state acting as process agent does not require him to function as such except when the designated agent cannot be found.

SECONDARY ROAD CONSTRUCTION PROGRAM: ROAD CONSTRUCTION: Outlining method of adopting program of secondary road construction.

December 14, 1939. *Mr. Donald P. Chehock, County Attorney, Osage, Iowa:* This will acknowledge receipt of your inquiry of November 21, 1939, relative to the action taken by a board of approval convened on November 15, 1939, to adopt your secondary road construction program for 1940.

Sec. 4644-c33 provides that the representatives of the several townships on the board of approval shall be named by the township trustees at their January meeting. Construing this section with Sections 4644-c24 and 4644-c25, it is obvious that the meeting referred to at which the selection shall be made, must be in January of the year of adoption of the program.

There could have been no compliance with the section first above referred to, to enable the board to adopt its 1940 program in November of the year preceding, and we are of the opinion that the proceedings had at that time are

void. Although a January meeting is not specifically provided for under Section 5543, a special meeting must be called for the purpose of making the selection in conformity with the statutory provision.

Your letter further sets forth in substance the proceedings of the board wherein, after the motion was adopted designating the surfacing to be done under the program for all sixteen townships, the program as finally adopted redistributed among the other fourteen townships the five miles originally contemplated for Rock and Newburg townships. This appears to have been done following disclosure that nine miles of Farm to Market roads were being improved in these two townships.

Although what we have heretofore said operates to void the entire proceedings of the board under date of November 15, 1939, for your information in contemplation of further proceedings after the first of the year for the formation and adoption of your program, we direct your attention to Sections 4644-c24 to 4644-c34, inclusive, of Chapter 240 of the Code.

Without setting forth these sections in detail in this opinion you will note that Section 4644-c24 provides for the adoption of a comprehensive program of secondary road construction as a condition precedent to proceeding with "any construction work."

You will note also that although the succeeding section provides for the selection by each township of the roads which should first be improved, this selection is only tentative to be used as a guide in the designation of the roads to be incorporated in the final program to be submitted to the Highway Commission for its approval.

Although it is contemplated by Section 4644-c34 that each township shall receive an equitable distribution of the mileage to be improved without discrimination against "those townships which have heretofore improved their township roads," there is no provision which compels an exactly equal distribution between all townships of the secondary road mileage to be improved, or of the funds to be expended thereon, in any one program.

Each program should embody a "general, uniform, and unified plan" giving 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, * * *." Construing the provisions of Section 4644-c26, above quoted, together with the other provisions of the chapter relating to secondary road construction, it seems clear the legislature intended that ultimately a composite of the several programs by which the entire system is improved will afford the highest possible systematic, intra-county and inter-county connections of all roads of the county.

Obviously this cannot be accomplished in any single program, and it follows that in the final analysis all townships will, and should, receive an equitable distribution of improved secondary road mileage.

As bearing somewhat on this question your attention is directed to O. A. G. 1936, Page 519, O. A. G. 1938, Page 86 and O. A. G. 1938, Page 600.

We trust this sufficiently answers your inquiry.

HIGHWAY COMMISSION: SPLIT-AXLE: TRAILER: Section 483, Chapter 134, Acts of the 47th General Assembly contemplated each axle as extending entirely across a vehicle of normal width regardless of the number of parts into which it may be divided; that maximum wheel load at either

extremity is four tons, and 40-inch measurement is intended to apply only to a tandem axle construction.

December 15, 1939. *Iowa State Highway Commission, Ames, Iowa. Attention: W. O. Price:* This will acknowledge receipt of your communication of November 25, 1939, requesting the opinion of this department relative to an interpretation of Section 483 of Chapter 134, Acts of the 47th General Assembly (Section 5035.08, Code of 1939).

Your letter is quoted in part as follows:

"Recently there has come into general use for heavy hauling, a type of trailer having what is known as 'split axles.' In some cases these are mounted in tandem so that one is ahead of the other a distance of forty inches or more similar to the picture shown on the attached manufacturer's circular describing the Fruehauf Carry-All. Other concerns manufacture and distribute trailers with similar construction. These have been used in this vicinity for the past three or four years but may have been used earlier in other parts of the country. We have made inquiry from various manufacturers and others in an endeavor to learn the date of their first use, but have not yet had time for replies.

"We have recognized that the split type of axle spreads the load to some extent and we have allowed a maximum load of twelve tons on one of these axles in our permit regulations, provided the nearest axle to that one is at least fourteen feet away. In the case of tandem split axles such as the illustration, we have considered each of them as one axle which would allow a total of sixteen tons on the assembly.

"The contention has recently been made by a general hauling contractor that a 'split axle' is in reality two axles, each of which is entitled to four tons per wheel or a total of thirty-two tons for an assembly of tandem split axles such as is illustrated. This is obviously more than our pavement or bridges can stand with safety to the structure and we believe more than was intended when the statute was enacted. * * *

"In the contractor's contention that a 'split axle' should be considered as two axles, he mentions that the centers of bearing between the two parts of the 'split axle' are more than forty inches apart and are, therefore, within the scope of Section 5035.08. This brings up the point as to what is meant by 'center to center' and we believe that this should be interpreted. We believe it was the intention of the legislature to consider this distance as being measured along the highway.

"I am requesting an opinion or an interpretation of this statute and especially as to whether an axle of the 'split type' as described above should be considered as one or two axles within the meaning of these sections."

Sections 475, 483 and 487, provide as follows:

"Sec. 475. Scope and Effect. It is a misdemeanor, punishable as provided in section five hundred (500), for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this chapter, and the maximum size and weight of vehicles herein specified shall be lawful throughout this state, and local authorities shall have no power or authority to alter said limitations except as express authority may be granted in this chapter.

"Sec. 483. Dual Axle Requirement. No motor vehicle, trailer, or semitrailer having axles less than forty inches apart center to center, shall be operated on the highways of this state.

"Sec. 487. Maximum Load. The total maximum load on any one wheel of any vehicle, including the weight of the vehicle and the load it carries, shall be four tons for vehicles equipped with pneumatic tires or three and one-half tons for vehicles equipped with solid rubber tires, provided the total maximum weight of any vehicle or combination of vehicles and load shall not in any event exceed twelve tons plus four hundred fifty pounds for each foot, or fraction thereof, of distance between the front and rear axles of the

vehicle or first and last axles of a combination of vehicles. Two or more wheels on the same end of a given axle shall be considered as one wheel."

The provisions of Section 483, aforesaid, are a re-enactment of the same provisions as contained in Section 5067-d3 of the 1931 and 1935 Codes.

In addition to the facts set forth in your communication information from the Design Department of the Highway Commission discloses that at the time of enactment of the various provisions limiting size, weight and load the legislature was furnished with all data relative to the maximum wheel load given areas of the surface of the pavement and bridge floor were designed to support.

This data contemplated an axle extending approximately the full width of a vehicle with single or double wheels a normal distance apart at each extremity of the axle. It further contemplated a distribution of eight tons of weight of vehicle and load distributed over such entire width, or a maximum wheel load of four tons.

In the event of tandem axles it was wisely provided that they should be spaced not less than forty inches apart to accomplish a further distribution over the bearing surface of the highway of this additional wheel load. As a further precaution for the protection of the state's investment in its highways already constructed Section 487 of the act limits the weight of vehicle and load in any event to twelve tons plus four hundred fifty pounds per foot of distance between front and rear axles. Clearly this provision contemplates a maximum weight of considerably less than twelve tons concentrated over the rear assembly with the remaining maximum permissive weight of four hundred fifty pounds per lineal foot evenly distributed over the entire distance between front or first and rear axles.

The provisions of Section 491 to Section 494, inclusive, of the act, make possible the movement over the highways of vehicles and loads exceeding the statutory limitations heretofore referred to, but only under special permit under conditions of operation prescribed by the commission.

Clearly in the enactment of these statutes the legislature had uppermost in its mind the safety of its highways; any interpretation placed upon these statutory provisions which would permit the operation of a vehicle and load of a weight in excess of that for which our highways are designed to stand would be unreasonable and contrary to any intent which we may attribute to the legislature.

We conclude therefore, that the enactment of Section 483 contemplated each axle as extending entirely across a vehicle of normal width regardless of the number of parts into which it may be divided; that the maximum wheel load permissible at either extremity thereof is four tons, and that the forty inch measurement was and is intended to apply only to a tandem axle construction.

This view we believe is in conformity with the rule of interpretation of statutes announced in *State vs. City of Des Moines*, 221 Ia. 642, 266 NW 41, at Page 43, wherein the court states:

"In seeking to find the intent of the legislature common sense and reason should prompt us to look for the object and purpose which the legislature had in mind and not to depend on dogmatic terms of expression. Indeed, the legislature itself has provided by statute, Chapter 4, Section 63, Code, under rules of construction that '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,' thus emphasizing the fact that the intent of the General Assembly is to override, if necessary, even the terms therein defined which are to govern ordinarily in the construction of statutes.' "

CONTINUATION CERTIFICATS: SECTION 1905-c13: ACCOUNTANTS' BOND: RENEWAL CERTIFICATE: Provisions of statute can be satisfied only upon execution of the bond when the certificate to practice is first granted, and the execution of a new bond every year thereafter.

December 16, 1939. *Hon. Chet B. Akers, Auditor of State:* We have your request for an opinion as to whether or not a renewal certificate issued by a surety company on the bond of an accountant at the time his certificate to practice is renewed satisfies the requirements of the bond provided for in Section 1905-c13 of the Code.

Your inquiry indicates that it has been the practice of the corporate sureties on the bonds of some of the certified public accountants registered to practice under the act, to execute a continuation certificate as to the original bond made for the practitioner whenever his certificate is renewed. These continuation certificates frequently contain provisions limiting the liability of the surety to the face amount of the bond from the date of the issuance of the bond to the date of the expiration of the continuation certificate, or future continuation certificates, or providing that liability under the bond and continuations thereof shall not be cumulative in amount.

The governing provisions of Section 1905-c13 of the Code wherein a bond is required, is in the following language:

"Every person having been granted a certificate to practice accountancy under the provisions of this chapter, or any renewal thereof, shall give a bond in the sum of five thousand dollars to the auditor of state before entering upon the discharge of his duties for the faithful performance of the same."

Section 1905-c15 provides as follows:

"Registrations and certificates to practice shall be subject to renewal in December, of each year upon payment of the fees provided by this chapter."

The above quoted provisions of Section 1905-c13 with reference to the giving of a bond are mandatory, and a careful reading of the same indicates that it was the intention of the legislature in enacting this provision that a bond in the amount of $5,000 should be given upon the granting of a certificate, and that the bond of $5,000 should be given upon the renewal of the certificate, and it is our conclusion that this is not true when a renewal certificate is to be issued by the surety company executing a continuation certificate to the bond originally given, but that the provisions of the statute can be satisfied only upon the execution of the bond when the certificate to practice is first granted, and the execution of a new bond every year thereafter. This would seem to be the plain intent of the statute.

LEASE: GOVERNMENTAL AGENCY: CONTRACTS LIMITED TO TERM OF OFFICE: No general rule could be laid down whereby the questions of authority of agencies of the State of Iowa to execute a lease for a period extending beyond their term of office, could be answered unequivocally as applicable to any and all contracts.

December 18, 1939. *Hon. C. Fred Porter, State Comptroller:* We have your letter advising that the Retrenchment and Reform Committee at their meeting on November 17th requested an opinion on the following question:

"Have any agencies of the State of Iowa the authority to execute a lease for a period extending beyond the end of the biennium ending June 30, 1941?"

The general rule as laid down by the courts with reference to the proposition of law here involved is that a governmental agency or body may execute a binding contract covering a reasonable period of time. This period of time is not necessarily limited to the time covered by their term of office, or any other fixed period. The reasonableness of this, of course, depends upon all the surrounding circumstances. It follows that no general rule could be laid down whereby the foregoing question could be answered unequivocally as applicable to any and all contracts.

BEER PERMITS: CITY CLUBS: (Section 1921-f110.) Subsections b, c, d, e and f of Section 1921-f110 are limitations on the board of supervisors' right to issue Class "B" beer permits to golf and country clubs and in no way restrict the right of the city council to issue Class "B" beer permits to city clubs.

December 20, 1939. *Mr. F. H. Lounsberry, County Attorney, Nevada, Iowa:* You have requested an opinion from this office in regard to the following question:

Has the city council of the town of Ames, Iowa the right to issue a beer permit to the Ames Elk Lodge which has recently been organized and has not been in continuous operation as a club for more than a few months?

We understand the sole question is as to whether or not such a permit could be issued because of the fact that the club was not in continuous operation as a club for at least two years prior to the date of its application and we are assuming that all of the other provisions of Section 1921-f110 have been complied with. Section 1921-f109 grants to the cities and towns the right to issue Class "B" beer permits to clubs upon proper application.

Section 1921-f110 states the conditions under which such permits shall be granted. A reading of this latter section shows that the conditions are really stated in the negative in that the statute provides that no club shall be granted a Class "B" permit if and unless certain conditions are present or requirements are not complied with. This section is rather long and we do not quote it in this opinion, but taking up the subsequent paragraphs in order we find that in subsection "a" no permit shall be granted to a club if the building occupied by such club is not wholly within the territorial limits of the city or town and subsection "b" provides that no permit shall be issued if the club is a proprietary club, or operated for pecuniary profit. Then follow subsections "c," "d," "e," and "f" providing that the permit shall not issue unless certain conditions are present.

It is noted, however, that in the last few lines of subsection "a" provision is made that the golf and country clubs shall comply with the restrictions contained in the succeeding paragraphs of the section. There is no statement in subsection "a" that the city clubs shall comply with all of the restrictions of the subsections after section "a." The succeeding restrictions in c, d, e and f would therefore clearly be applicable to golf and country clubs but not applicable to applicants by city clubs. This seems to be the legislative intent for clearly there is no reason for placing such restrictions on city clubs. Such Class "B" beer permits are issued to other Class "B" applicants in the city without such restrictions as outlined in subsections c, d, e and f, and

there would seem to be no reason for placing such restrictions on a city club application. We do find, however, on examining other statutes, that where the board of supervisors issue permits, similar restrictions are placed on such issuance. Thus we find the board of supervisors is authorized to issue permits in villages platted prior to January 1, 1934. This is somewhat similar to subsection f where the right to grant the permit to a club is based on the club having been in operation since the first day of January, A. D., 1934.

It is our conclusion, therefore, that subsections b, c, d, e and f in Section 1921-f110 are limitations on the board of supervisors' right to issue Class "B" beer permits to golf and country clubs and in no way restrict the right of the city council to issue Class "B" beer permits to city clubs. We therefore hold that the city council of Ames could, in this instance, issue a Class "B" beer permit to the Elks Club at Ames.

We are not unmindful of the fact that this overrules the opinion of July, 1937, to Mr. M. C. Williams, county attorney of Boone, Iowa.

SHERIFF: CONSTABLE: DISTRESS WARRANTS: TAXATION: There is no authority for the sheriff in executing a distress warrant issued by the Tax Commission for tax collectible by that body to collect anything more than the exact amount of the tax, penalty and costs, and that Section 7224 has no application when the sheriff is executing such a distress warrant.

December 20, 1939. *State Tax Commission, Des Moines, Iowa. Attention: Mr. D. L. Murrow:* You have requested an opinion from this office upon the following question:

Is a sheriff or constable, when executing a distress warrant for taxes collectible by the State Tax Commission, entitled to collect the additional compensation provided for in Section 7224 of the 1935 Code?

Section 7224 provides as follows:

"*Sheriff or constable as collector.* In the discharge of his duties as collector, should it become necessary to make the delinquent taxes by distress and sale, or should no collector be appointed, or should the collector fail to institute proceedings to collect said delinquent taxes, the treasurer shall place the same in the hands of the sheriff or constable, who shall proceed to collect the same, and either shall be entitled to receive the same compensation, in addition to the five per cent, as constables are entitled to receive for the sale of property on execution."

It will be noted that this section is found in that chapter of the Code outlining the local county treasurer's duty in the matter of the collection of taxes and the taxes which are the subject of the provisions of the chapter are real estate taxes and personal property taxes. There is no provision in the Sales Tax Act, Use Tax Act, or Income Tax Act making Section 7224 applicable by any direct reference.

The only statute which provides for the collection procedure on distress warrants is Section 6943-f22 which states:

"The board shall, substantially as provided in Sections 7189 and 7189-d1, proceed to collect all taxes and/or penalties as soon as practicable, etc."

The above section is found in the income tax statute, but by reference it is made a part of the sales taxe and use tax statutes. But it will be noted that the statute does not make all of the statutes with regard to distress warrants applicable, but specifically provides the procedure shall be as outlined in Sections 7189 and 7189-d1. These sections merely provide for the

distress and sale and for the form of the distress warrant. There is no provision in the income tax law, sales tax law, or use tax law providing for the hiring of a delinquent collector who can collect not only the tax and penalty but also a fee for his services from the delinquent taxpayer. There is such a provision in the personal property tax collection law and Section 7224 merely places the sheriff or constable in the position of a delinquent tax collector in that when collecting personal property taxes by distress warrant, he will be given this right that any delinquent personal property tax collector has, to charge for his services and collect such service charge from the delinquent taxpayer.

There are penalty statutes for all of the tax collected by the State Tax Commission and to give Section 7224 application with regard to such tax would be to increase the penalty, which cannot be done without specific reference in the taxing statutes.

In view of the above, we are of the opinion that there would be no authority for the sheriff in executing a distress warrant issued by the Tax Commission for tax collectible by that body to collect anything more than the exact amount of the tax, penalty and costs, and that Section 7224 has no application when the sheriff is executing a distress warrant issued by the Tax Commission.

This opinion overrules a portion of the opinion of April 9, 1937, rendered to Mr. J. R. Ewing, sheriff at Creston, Iowa.

TAXATION: MONEY AND CREDIT TAX: ESTATE: TRUST: The assets of a trust consisting of intangible personal property in the hands of a trustee in a foreign state is only subject to taxation at the place where the trustee lives and keeps the assets.

December 21, 1939. *Mr. Weston E. Jones, County Attorney, Charles City, Iowa:* We are in receipt of your request for an opinion upon the following situation:

An estate which is being probated in Floyd County involves a testamentary trust where the trustee is a Minneapolis bank. The question is whether or not the assets consisting of intangible personal property in the hands of the trustee are subject to a money and credit tax in Floyd County.

We will first review the applicable statutes. We find under Section 6956 of the 1935 Code that every *inhabitant* of this state shall list all property of which he is the owner or has the control or management. Under Section 6957 provision is made that a person required to list property belonging to another shall list it in the same county in which he would be required to list it if it were his own.

Again in Section 6963 provision is made that moneys and credits shall be listed where the owner lives and in Section 6964 the word "owner" is defined to include all persons (with nonapplicable exceptions) having in their possession property belonging to another, etc.

We now quote from your brief which accompanied your request:

"Our supreme court, following the general rule, has held that real and personal property held under a testamentary or other trust, is taxable to the trustee and not the beneficiary. *Elsworth College vs. Emmet County,* 156 Iowa 52 at 58. This, of course, is the general rule accepted by the great weight of authority.

"Where the trustee is a non-resident, this rule immediately raises the

question of the taxable situs of the trust estate. We have not been able to find a recent Iowa case passing directly upon this question. The first Iowa case on the subject, however, held that the personal property left by the decedent should be taxed in the county where the decedent died rather than in the county where the executor resided. *McGregor vs. Vonpel*, 24 Iowa 456.

"The second case on this subject, criticized the opinion in the first case and intimated that it should be overruled. The court in this second case held that the personal property of the estate, in the actual possession of the administrator, was taxable in the township where the decedent lived at the time of his death. *Cameron vs. Burlington*, 56 Iowa 320.

"In *Burns vs. McNalley*, 90 Iowa 432, the court held that intangible personal property of an estate was taxable in the township where the co-executor who had possession of the property lived. In *Hinkhouse vs. Wilton*, 94 Iowa 254, the Iowa court held that moneys and credits in possession of a guardian were taxable where the guardian lived and not where the ward lived. In view of the distinction in legal theory between the location of title in guardianships and trusts, this case is strong authority for the rule that moneys and credits are taxable to the trustee at the place of the trustee's residence. In legal theory, the guardian only holds custory of the property, the ward, legal title. Whereas the trustee and executor or administrator hold legal title.

"If moneys and credits are therefore to be taxed to the guardian where the guardian lives, rather than to the ward where the ward lives, it certainly would follow that moneys and credits would be taxable where the trustee lived, rather than to the beneficiary where the beneficiary lived and if the trustee was a non-resident, no Iowa moneys and credits tax could be levied.

"The rule outside of Iowa is almost universal. It holds personal property in the hands of a trustee, executor or administrator in his official capacity, is assessable and taxable to him at the place of his domicile notwithstanding the fact that the beneficiaries may reside elsewhere. 67 A. L. R. 393 at 394. Generally speaking it seems that the residence of a fiduciary controls the taxable situs of moneys and credits.

"Iowa subscribes to the rule that property within this state in the hands of an ancillary administrator is subject to taxation in Iowa, especially if taxes have not been paid upon it at the place of principal administration. *Dorris vs. Miller*, 105 Iowa 564.

"There are many cases, such as *Tofel vs. Lewis*, 75 Ohio State 182, holding that an executor having a legal title to property is taxable therefor at his domicile although the decedent and the beneficiaries under the will are non-resident."

You have given us the benefit of your brief and your conclusion that such intangible personal property is only subject to taxation at the place where the trustee lives and keeps the assets. We agree with that conclusion.

ASSESSOR: BOARD OF SUPERVISORS: Board of supervisors have neither authority nor would they be required to furnish city assessors with supplies and an office in cities of first class with population less than 60,000.

December 27, 1939. *Mr. E. A. Fordyce, Assistant County Attorney, Cedar Rapids, Iowa:* We have your letter of the 20th inst. wherein you ask an opinion of this department on the following question:

"By Section 5656, counties are directed to furnish an office and supplies to city assessors of cities having a population of 60,000 or more. By Section 429 of the Code when population is mentioned in any statute, it is to be ascertained by the last official state or national census. Would the county be authorized or required to pay the office rent and furnish office supplies to the assessor of a city where the last national or state census showed the population to be less than 60,000?"

It is our opinion that in counties where the last national or state census shows the population to be less than 60,000 the payment of office rent and

the furnishing of office supplies to the assessor of such county would be illegal.

Section 5656, Code of Iowa, 1935, provides:

"All assessors elected by cities and towns shall perform the same duties as township assessors. They may appoint such number of deputies as the council shall authorize. In cities of the first class having a population of 60,000 or over the board of supervisors of the county shall furnish the assessor with supplies and an office; and said assessor shall appoint such number of deputies as the board of supervisors may authorize, such appointments to be approved by said board. If any city or town is situated in two or more counties, the assessor shall make returns of the assessment to the proper county."

In view of the above statute, we reach the conclusion that the board of supervisors would be neither required nor authorized to furnish the city assessor with supplies and an office in cities of the first class having a population of less than 60,000.

COUNTY ATTORNEY: EXPENSES: MILEAGE: When county attorney travels upon official business from either county seat or his home (when home is in other town in county) to some other place within or without the county, he is entitled to actual mileage.

December 27, 1939. *Mr. Charles I. Joy, County Attorney, Perry, Iowa:* This will acknowledge receipt of your letter of the 18th inst., wherein you ask the opinion of this department in reference to the following legal question:

"A question has been raised by one of the state checkers as to my allowance for mileage. The county seat of Dallas County is in Adel and I reside in Perry, a distance of about twenty miles from the county seat. In making my bills for mileage I include no trips from Perry to Adel, but when I make a trip to another town or one outside the county, I bill the county from Perry to the town in question. The checker has stated that I am entitled to mileage from the county seat to any point to which I travel and that I am not entitled to mileage from Perry to any point to which I travel other than the county seat."

It is our opinion that you are entitled to mileage for any trips made outside of your residence or county seat upon official business.

Section 5228, Code of Iowa, 1935, provides:

"The county attorney shall receive his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat."

It is clear that when you travel upon official business from either Perry or Adel to some other place within or without the county, you are entitled to actual mileage.

ASSESSOR: TOWNSHIP TRUSTEE: VACANCY IN OFFICE: Offices of assessor and township trustee become vacant when those officers move from the township. Almost without exception a person must be a resident of the political subdivision in which he is an officer.

December 27, 1939. *Mr. H. K. Roggensack, County Attorney, Elkader, Iowa:* This will acknowledge receipt of your letter of the 19th inst., wherein you ask the opinion of this department on the following legal questions:

1. Does the office of assessor become vacant when the assessor takes up a residence outside of the township?
2. Does the office of township trustee become vacant when the trustee moves outside of the township?

It is our opinion that in both of the above cited cases the office becomes vacant. Almost without exception a person must be a resident of the political subdivision in which he is an officer.

COMPENSATION FOR ATTORNEY: ATTORNEY APPOINTED BY THE COURT: Court has right to appoint attorney to represent any person whether charged with commission of indictable misdemeanor or felony and a fee of $10.00 for each case would not be unreasonable.

December 28, 1939. *Mr. D. W. Dickinson, County Attorney, Eldora, Iowa:* This is in answer to your letter of the 20th inst., wherein you ask the opinion of this department relative to the right of the board of supervisors to allow a claim for compensation to an attorney appointed by the court to defend persons indicted for misdemeanors. You call our attention to Section 13774 and suggest that only when the crime charged is a felony is the attorney appointed entitled to compensation.

We are of the opinion that the court has a right to appoint an attorney to represent any person charged with the commission of an indictable misdemeanor. We cannot agree with you that only when the crime charged is a felony is defending counsel entitled to compensation. Section 10, Article 1 of the Constitution of the State of Iowa provides:

"In all criminal prosecutions, and in cases involving the life or liberty of an individual the acused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him, to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and, *to have the assistance of counsel.*" (Italics ours.)

Section 13773 provides:

"If the defendant appears for arraignment without counsel, he must, before proceeding therewith, be informed by the court of his right thereto, and be asked if he desires counsel; and if he does, and is unable to employ any, the court must allow him to select or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours."

It is apparent from a reading of the constitutional provisions above quoted, and the statute set out above, that any person against whom an indictment is returned, or a true information filed must, if he so requests, have counsel assigned to represent him. Must this attorney serve without pay when the crime charged is less than a felony? We think not. We are of the opinion that in such cases the attorney assigned to represent the accused is entitled to reasonable compensation not exceeding, of course, ten dollars.

Section 13774 provides: "* * * If the prosecution be for any other felony, he shall receive the sum of ten dollars in full for services. * * *"

It is a matter of common knowledge, of course, that it requires as much of the attorney's time to represent an accused where he is charged with an indictable misdemeanor as when he is informed against for the commission of a felony.

Sustaining our view see *Ferguson vs. Pottawattamie County*, 278 N. W. 223, and cases therein cited.

Therefore, we believe that the appointed attorney is entitled to a fee whether his client is charged with a felony or an indictable misdemeanor. We are inclined to the view that in the misdemeanor cases a fee of ten dollars would not be unreasonable.

BOARD OF SUPERVISORS: BIDDING ON ROAD CONSTRUCTION: CONTRACTS: FINANCIAL STATEMENT: Financial statement not required for bid on material only, but board may require such statement. Also it would be within the sound discretion of board to require bidder to file financial statement certified to by C. P. A.

December 28, 1939. *Mr. James P. Irish, Assistant County Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 16th inst., wherein you ask our opinion on the following legal questions:

1. Is it mandatory that the board of supervisors require a financial statement from the bidder on material only?
2. If you hold that a financial statement is not mandatory does the board have a right on letting for material only to require a financial statement of the bidder?
3. In event the filing of a financial statement is not mandatory do the board of supervisors have authority to require a financial statement to be filed by the bidder certified to by a C. P. A.?

Section 4644-c41, Code of Iowa, 1935, provides:

"The various contracts for carrying out of said construction program or project in the most effecient, practicable and economical manner shall, as far as possible, be accompanied by standard specifications, and no traveled roadway shall be less than twenty-two feet from shoulder to shoulder.

"Each bidder on secondary road construction work shall file with the board, statements showing his financial standing, his equipment and his experience in the execution of construction work. Said statements shall be on standard forms prepared by the state highway commission.

"In the award of contracts, due consideration shall be given not only to the prices bid, but also to the financial standing of the contractor, his equipment, and his experience in the performance of like or similar contracts as shown by such statements."

Answering your first inquiry, we are of the opinion that where the bid is on material only a financial statement is not required, under the above quoted section.

Answering your second inquiry, we are of the opinion that it is within the sound discretion of the board of supervisors to require a financial statement of the bidder, even though the bidding involves only materials. We base our opinion on the broad powers given the board of supervisors under and by virtue of Section 5130, Code of Iowa, 1935. We call your particular attention to subsection 6 thereof, which reads as follows:

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

Should the board of supervisors deem it for the best interests of the county to require a financial statement from bidders where the contract to be made is for the furnishing of materials only, we feel that that body has the right, under Section 5130 above quoted, to require such financial statement.

As to your third inquiry, our opinion is that requiring a bidder to file a financial statement, certified to by a certified public accountant, would be within the sound discretion of the board.

TAXATION: OMISSION FROM ASSESSMENT: APPORTIONMENT: All interest and penalty on delinquent taxes should be apportioned to the general fund, and this would be true even though the taxes were collected in any action by the treasurer, or person assisting the treasurer, such as a tax ferret, in the matter of the collection of taxes on property omitted from assessment.

December 28, 1939. *Mr. Hubert H. Schultz, County Attorney, Primghar, Iowa:* We are in receipt of your request for an opinion upon the following question:

Should the interest and penalty collected upon taxes upon omitted moneys and credits be apportioned to the general fund, or apportioned in the same manner that the tax is apportioned?

Section 7232 of the 1935 Code of Iowa provides as follows:

"*Monthly apportionment.* On or before the tenth day of each month, the treasurer shall apportion all taxes collected during the preceding month among the several funds to which they belong according to the number of mills levied for each fund, and the interest and penalties thereon to the general fund, and shall enter the same upon his cash account, and report the amount of each tax and the interest and penalties collected on the same to the county auditor, who shall charge him in each fund with the same."

It would seem from the above section that the treasurer is given specific direction to apportion the interest and penalty to the general fund. The legislative direction to apportion the interest and penalty to the general fund is made more positive by Section 7233, where provision is made that in the event the treasurer does not apportion "any interest or penalty on delinquent taxes" to the general fund, then the amount so misapplied may be recovered from the treasurer or his bondsmen in a civil action.

Under date of September 17, 1928, the then attorney general ruled in an opinion to the county attorney at Sioux City, Iowa, that interest and penalty collected under the provisions of Sections 7155 and 7156 should be apportioned along with the tax collected to the various funds for which the taxes were levied. We do not agree with the reasoning of that opinion. Although Section 7156 does provide that the amount collected "shall be by the treasurer apportioned ratably as the taxes would have been if they had been paid according to law," still if the taxes had been collected according to law, the interest and penalty would have been apportioned to the general fund.

In view of the very positive direction to the treasurer under the provisions of Sections 7232 and 7233, we are of the opinion that all interest and penalty on delinquent taxes should be apportioned to the general fund, and this would be true even though the taxes were collected in any action by the treasurer, or person assisting the treasurer, such as a tax ferret, in the matter of the collection of taxes on property omitted from assessment.

COMPENSATION TAX: RECIPROCITY AGREEMENT: The compensation tax as required by Division II of Chapter 135 of the Acts of the 48th General Assembly must be collected by the Commerce Commission and may not be waived by virtue of the reciprocity statutes or otherwise.

January 11, 1940. *Hon. George A. Wilson, Governor of Iowa:* In compliance with your oral request for an opinion concerning the right, duty or obligation of the commissioner of public safety and the Commerce Commission to extend, approve, grant, authorize or enter into reciprocity agreements with other states with reference to registration fees and the compensation tax as provided in Chapter 135 of the Acts of the 48th General Assembly of Iowa, and after an open hearing before the staff of this office, together with the commerce counsel, and after a full consideration of the matter, we beg leave to submit the following opinion:

We are of the opinion that the law of this state makes mandatory upon the Commerce Commission the collection of the compensation tax as provided in

Division II of Chapter 135 of the Acts of the 48th General Assembly, and further that said compensation tax is expressly provided as a tax for the use of the highways to carry on business and for the repair and maintenance of the highways.

Section 18 of said chapter and division provides travel orders may be obtained by nonresident owners and resident owners of motor vehicles registered outside of this state for motor vehicles operated within this state only occasionally or on specified trips into or across the state for interstate transportation of persons or property for compensation, which motor vehicle shall then be exempt from the annual compensation tax imposed by this division upon obtaining from the Commission such travel order for each such trip any such vehicle is operated into or across the State of Iowa.

Section 18 clearly reflects the intent of the legislature to require the payment of the compensation tax as provided in Chapter 135 of the Acts of the 48th General Assembly from nonresident owners and resident owners of motor vehicles registered outside of this state, except for the travel order provision.

It is further our opinion that Section 5003.01 and Section 5003.04 of Chapter 251.1 of the 1939 Code of Iowa applies to motor vehicles and laws of the road only, and that, therefore, said sections are not applicable nor do they apply in any regard to Division II of Chapter 135 of the Acts of the 48th General Assembly, and only apply to registration fees of nonresident owners or resident owners of motor vehicle equipment registered outside of the state.

DRAINAGE DISTRICT: BOARD OF SUPERVISORS: JOINT MEETING OF BOARDS OF SUPERVIVSORS: It is not necessary for boards to meet jointly for purpose of allowing claims filed for the repair of drain, after such drainage district has been established.

January 17, 1940. *Mr. Melvin L. Baker, County Attorney, Humboldt, Iowa:* This is in answer to your letter of recent date, wherein you ask the opinion of this department on the following legal question:

Joint drainage districts have been established in your county. From time to time it becomes necessary to repair the drain. The question is: Must the board of supervisors of the two or more counties in which the joint drainage district is located meet to allow claims for such repair or is it proper for the board of each county to allow their respective portion of such repair expense?

We are of the opinion that, while Section 7610 provides for the joint meeting of boards of supervisors to consider petitions for the establishment of drainage districts, after such district has been established and the drain constructed it is not then necessary for the boards to meet jointly merely for the purpose of allowing claims filed for the repair of the drain.

We think that in the event such repair is made, it is proper for each county to allow such portion of the expense of repairing the drain as the same bears to the area of the district located in the county, i. e., assuming that 40 per cent of a certain drainage district is located within Humboldt County and 60 per cent in an adjoining county, and the cost of repair was, let us say, $1,000.00. Humboldt County should bear 40 per cent of such expense and the adjoining county should bear 60 per cent. We know of no reason why it should be necessary for the boards to meet jointly for the purpose of allowing claims filed for the repair of the drain. We assume, of course, that the respective boards are in agreement as to the allowance of the bills.

LICENSE: TOWNSHIP TRUSTEES: CITY COUNCIL: Eating establishment and place where patrons dance, which is situated in township, even though attached to filling station which is within city limits, may not be operated without first obtaining a license from the township trustees of said township.

January 17, 1940. *Mr. O. E. Anderson, County Attorney, Creston, Iowa:* This is in answer to your letter of the 4th inst. wherein you ask the opinion of this department relative to the following legal question:

"There is a certain service station with a dine and dance hall in connection therewith located in such a position in this county that the service station part of the building is within the city limits of Creston and the eating establishment and the place where the patrons dance is located in Douglas Township outside the corporate limits of the city of Creston. The service station and the eating establishment are all in one building and the question now arises as to whether the city of Creston or the township trustees of Douglas Township, Union County, should license the eating establishment."

Section 5582, Code of Iowa, 1935, provides:

"No person shall, for himself or for any other person, firm, or corporation, keep or operate for hire or for profit any theater, moving picture show, pool or billiard room or table, dance hall, skating rink, club house, roadhouse, amusement park, or bowling alley, outside the limits of cities and towns without first procuring a license therefor from the township trustees.

"This section shall not apply to baseball games or county fairs."

Section 5582-c1, Code of Iowa, 1935, provides:

"A roadhouse, for the purposes of section 5582, shall be construed to mean any building or establishment open to the public and located on or accessible to a road or public highway outside the limits of an incorporated town or city where entertainment, prepared food or drink is furnished to the public generally for hire, sale or profit."

We are of the opinion that, under Section 5582, inasmuch as the eating establishment and the place where the patrons dance is located in Douglas Township, the township trustees have jurisdiction. Therefore, as we view it, the said establishment located in Douglas Township may not be operated without first obtaining a license from the township trustees of said township.

Section 5582 provides that "no person shall * * * keep or operate any * * * dance hall * * * roadhouse * * * outside the limits of cities and towns without first procuring a license therefor from the township trustees." We believe that the person in question is operating a dance hall and roadhouse outside the limits of a city and, therefore, must procure a license from the township trustees.

We do not think it is material that the dance hall and eating place is attached to a building situated within the city. We have been unable to find any authorities holding that when a building is situated partly within and partly without a city, the city has jurisdiction over all of said building and the business conducted therein.

RECEIVERS: CONSERVATORS: FORECLOSURE: Chapter 243, Acts of the 48th General Assembly, does not apply to receivers or conservators in foreclosure actions.

January 24, 1940. *Mr. Thomas E. Perry, County Attorney, Columbus Junction, Iowa:* You have requested an opinion from this office upon the following situation:

"Chapter 243, Acts of the 48th General Assembly, states that all fiduciaries

must file a certificate of the county treasurer that all personal taxes are paid before final discharge. The question comes up as to whether or not receivers or conservators in foreclosure are intended to be included in the law. A receiver might well collect sums of money that would be accounted for and not be subject to the tax, yet the county treasurer could, under the law, demand tax on the whole amount collected."

Chapter 243, Acts of the 48th General Assembly, is as follows:

"Section 1. No final report of a fiduciary shall be approved by any court unless there is attached thereto and made a part thereof, the certificate of the county treasurer of a county in which the estate is held by the fiduciary that all personal taxes due and to become due the county in such estate matter have been fully paid and satisfied.

"Sec. 2. For the purpose of facilitating the speedy settlement and distributon of estates, the county treasurer of such county, by and with the consent of the board of supervisors may compromise and agree upon the amount of personal taxes at any time due or to become due the county from such estate and payment in accordance with such compromise or agreement shall be for the satisfaction of all taxes in such estate matter, and no compensation shall be allowed any person because of such compromise or agreement. Provided, however, where an estate is insolvent the board of supervisors may by proper order certified to the court cancel all unpaid personal property taxes."

We are of the opinion that Chapter 243 has application only to the final reports of fiduciaries of an estate. It will be noted that in the first paragraph that the certificate required is the one to be issued by the treasurer of a county "in which the *estate* is held." Also the reference is to the "taxes due and to become due the county in such estate matter."

In the second paragraph there are provisions made for compromise and here there are several references to "such estates." Clearly, the legislature did not intend the statute to extend to all fiduciary relationships. This relationship can arise by simple contract or by the position one person occupies toward another such as a corporation director who holds a position of peculiar confidence toward the corporation. It can of course arise by operation of law such as guardians, administrators, or executors, and where the report of such fiduciary is subject to the approval of the court, the act serves to withhold such approval until the personal taxes "due in such estate matter" have been paid.

The receiver in a mortgage foreclosure action arises by reason of the receivership clause in the mortgage and under Section 12383.2 of the 1939 Code of Iowa provision is made that funds be applied on taxes. The obligation to pay taxes is not a general obligation of the receiver as he is a receiver in an action in rem and the obligation to pay the tax is only the obligation to apply the funds in his hands in payment of all taxes that are liens against the property which is the subject of the action. He is not a fiduciary holding an "estate" within the meaning of the act and it is our opinion that Chapter 243, Acts of the 48th General Assembly, would not apply to such receivers or conservators in foreclosure actions.

CONSERVATION COMMISSION: CORALVILLE DAM: FEDERAL PROJECT: GOVERNOR: AUTHORITY: The governor of Iowa and the Executive Council are without authority to either accept or reject a proposed Federal project by virtue of which a dam would be constructed through or across waters over which the State of Iowa has sole jurisdiction. However, Section 4, Chapter 1 of the Code of Iowa, 1939, apparently authorizes the

government of the United States without the consent of any Iowa authority, to acquire by condemnation or otherwise, lands for a Federal project.

January 26, 1940. *Hon. George A. Wilson, Governor of Iowa:* Your oral request for an opinion upon the following matter, is herewith acknowledged.

Does the governor of Iowa or the Executive Council have the authority to accept or reject a proposed Federal project by virtue of which a dam would be constructed through or across waters over which the State of Iowa has sole jurisdiction?

For your convenience, we quote from the 1939 Code of Iowa, as follows:

"1812. *Jurisdiction.* Jurisdiction over all meandered streams and lakes of this state and of state lands bordering thereon, not now used by some other state body for state purposes, is conferred upon the commission. The commission, with the approval of the executive council, may establish parts of such property into state parks, and when so established all of the provisions of this chapter relative to public parks shall apply thereto."

And as bearing directly upon the authority of the Iowa Conservation Commission, the following:

"1703.59 *General powers.* The commission shall have full power and authority to sell, exchange or lease lands under its jurisdiction when in its judgment it is advantageous to the state to do so, provided said sale, lease or exchange shall not be contrary to the terms of any contract which it has entered into.

"1799.1 *Construction permit—regulations.* No person, association or corporation shall build or erect any pier, wharf, sluice, piling, wall, fence, obstruction, building or erection of any kind upon or over any state-owned land or water under the jurisdiction of the commission, without first obtaining from such commission a written permit. The commission shall charge a fee of not less than ten dollars nor more than twenty-five dollars per year in the discretion of the commission for each such permit issued for any pier, wharf, sluice, piling, wall, fence, obstruction, building or erection of any kind, used for commercial purposes.

"It shall be the duty of the commission to adopt and enforce rules and regulations governing and regulating the building or erection of any such pier, wharf, sluice, piling, wall, fence, obstruction, building or erection of any kind, and said commission may prohibit, restrict or order the removal thereof, when in the judgment of said commission it will be for the best interest of the public.

"Any person, firm, association, or corporation violating any of the provisions of this section or any rule or regulation adopted by the commission under the authority of this section shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not to exceed one hundred dollars or by imprisonment in the county jail not to exceed thirty days.

"1799.2 *Obstruction removed.* The commission shall have full power and authority to order the removal of any pier, wharf, sluice, piling, wall, fence, obstruction, erection or building of any kind upon or over any state-owned lands or waters under their supervision and direction, when in their judgment it would be for the best interests of the public, the same to be removed within thirty days after written notice thereof by the commission. Should any person, firm, association or corporation fail to comply with said order of the commission within the time provided, the commission shall then have full power and authority to remove the same."

The question propounded arises because of the proposed construction of a Federal flood control dam across the Iowa River above Coralville, Iowa. It was determined very early by the Iowa supreme court that the beds of the navigable streams, together with their waters, lying within the boundaries of the State of Iowa, belong to the public, and therefore jurisdiction over the waters of the river in question at the point where the proposed dam is

contemplated is clearly that of the State of Iowa, the Iowa River having been meandered by original government survey through the entirety of Johnson County. *McManus vs. Carmichael*, 3 Iowa 1. No proceedings have been initiated by the Federal Government under the statutes of Iowa providing for the construction of dams.

It is elementary that jurisdiction of state owned lands and waters lies in the first instance with the legislature and that such jurisdiction may be properly conferred should this body deem it advisable. From a review of the quoted statutes, it appears that the legislature, believing it to be proper and suitable because of conservation purposes and otherwise, sought to confer on the Iowa Conservation Commission full and sole authority over all meandered streams and lakes of this state. Certain exceptions are provided by statute whereby the acts of the Commission must be governed by the the consent and approvel of the Executive Council, but it will be recognized that the matter in question, not having been properly initiated as required by statute, is not now for the consideration of that body. With this in mind and in the light of the clear provision of the statute, it cannot be said that either the governor or Executive Council of the state may determine whether or not a dam, obstruction or other erection may be placed across a stream which is unquestionably under the jurisdiction of the Iowa Conservation Commission but which has not come within the purview of the Executive Council. The Iowa Conservation Commission is a creature of the legislature and in its members is vested the authority to determine in their best judgment, all matters affecting the streams and lakes of the state. The legislature has vested this body with full and sole authority to act, and with it lies the sole authority to determine the advisability of matters of this nature. It may, therefore, be said that when the Iowa Conservation Commission speaks on matters over which it has such jurisdiction, it speaks for the State of Iowa.

It may be suggested that the authority of the Conservation Commission extends only so far as the interests of the State of Iowa are concerned and may in no way be construed to affect the proprietary rights of private individuals or interests.

It should further be said that this opinion is not intended to restrict the statutory rights of cities and other proper authority to proceed under proper statute to seek the privilege of building dams across the streams of Iowa. The sole authority of the Conservation Commission herein declared extends only until such time as the proposed project itself is brought within the consideration of the Executive Council by virtue of proper proceedings initiated in accordance with the statutes of the State of Iowa.

It is, therefore, our opinion that the governor of Iowa and the Executive Council are without authority to either accept or reject a proposed Federal project by virtue of which a dam would be constructed through or across waters over which the State of Iowa has sole jurisdiction. However, we call your attention to the following provisions of the Iowa law, to wit: Section 4, Chapter 1, of the Code of Iowa, 1939, which reads as follows:

"*Acquisition of lands by United States.* The United States of America may acquire by condemnation or otherwise for any of its uses or purposes any real estate in this state, and may exercise exclusive jurisdiction over its holding.

"This state reserves, when not in conflict with the constitution of the United States or any law enacted in pursuance thereof, the right of service on real

estate held by the United States of any notice or process authorized by its laws; and reserves jurisdiction, except when used for naval or military purposes, over all offenses committed thereon against its laws and regulations and ordinances adopted in pursuance thereof.

"Such real estate shall be exempt from all taxation, including special assessments, while held by the United States."

This section of the Iowa law apparently would authorize the government of the United States without the consent of any Iowa authority to acquire by condemnation or otherwise, land for a Federal project of the character here proposed.

OLD AGE ASSISTANCE: STATE BOARD SOCIAL WELFARE: TAX SALE OF RECIPIENT'S PROPERTY: SUSPENSION OF TAXES: It is with sound discretion of board of supervisors as to whether tax sale of real estate belonging to old age recipient could be cancelled and property placed on suspended list.

January 29, 1940. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa. Attention: E. A. Fordyce:* This will acknowledge receipt of your letter of January 18th relative to the following question:

"Section 6950-g1 of the 1935 Code provides that when a certificate of old age assistance has been issued to a person and he is receiving such assistance, the old age assistance commission(or board of social security) shall notify the board of supervisors of the county giving a statement of the property, real or personal, owned by such person and 'it shall then be the duty of the board of supervisors so notified to order the county treasurer to suspend the collection of the taxes assessed against such person' for such time as he is receiving such assistance.

"Under this section would it be the duty of the board to suspend taxes which had become payable and delinquent in the years preceding the granting of the old age assistance to the owner that remain unpaid at the time such assistance was granted?

"Also, if the old age assistance commission or board of social security failed to notify the county auditor and the real estate of the person receiving old age assistance was sold at tax sale and bid in by the county, could this sale be set aside under the provisions of Section 7294 of the 1935 Code, or other sections, and the taxes then suspended?"

Your first question has been answered in a previous opinion by this office and we are enclosing a copy of same.

In answer to your second question, it is our opinion that it is within the sound discretion of the board of supervisors as to whether or not such a tax sale could be cancelled and the property placed on the suspended list.

INSURANCE, LIFE, ASSIGNMENT OF: OLD AGE ASSISTANCE: STATE BOARD OF SOCIAL WELFARE: If old age recipient has more than $300, if unmarried, or more than $450, if married, he is ineligible for assistance. Cash value of life insurance policy is the same as cash in hands of insured. It is within sound discretion of State Department to require either assignment of such policy or cancellation of recipient from old age assistance rolls.

January 29, 1940. *Mr. Ralph C. Jones, County Attorney, Bedford, Iowa:* This will acknowledge receipt of your letter of January 26th, wherein you ask our opinion on the following set of facts:

"An old age pension recipient now living in Bedford, Iowa, had a life insurance policy taken out on her life in the year 1917 by her son-in-law. At the time the son-in-law took out the life insurance, being in a fraternal beneficiary association, for the sole purpose of paying funeral expenses and

debts incident to the last sickness. The policy is for $1,000. The son-in-law paid $8 per quarter or $32 a year for this $1,000 life insurance with the Standard Life Association of Lawrence, Kansas, being a fraterial beneficiary society.

"The Division of Public Assistance has notified the welfare investigator for Taylor County, Iowa, that the recipient of the old age pension must assign any right or equity that she may have in said policy to the state and that the son-in-law must assign any right or equity in the policy to the state before they will reinstate the old age recipient, so she may receive the old age pension. She had prior to this letter been receiving an old age pension but it has been stopped for the reason as I explained above. * * *

"In this case it would seem to me as the son-in-law is now living in and has been living in Denver, Colorado, for a considerable period of time and he has paid the premiums for 23 years and the Division of Public Assistance under the insurance consultant states they will reimburse the son-in-law for all premiums paid in the past and all future premiums. The insurance policy at the present writing has a cash value of $462.33, and a paid-up value of $675.89 and has been paid up to this time amounting to $736 in premiums. * * *

"I would appreciate receiving an opinion on this matter at an early date."

For the purposes of this opinion, we quote in part first from Section 3828.026, 1939 Code of Iowa:

"3828.026 *Assignment of insurance.* Any person, who has been granted a certificate of old age assistance and is receiving payments of assistance from the old age assistance fund, may petition the state board to accept an assignment of any assignable death benefits, loan value, or cash surrended value, of any life insurance policy, death or funeral benefit of any association, society or organization, requiring further payment of premiums or assessments which such person believes he is unable to pay. The state board may accept such assignment if it deems such action advisable and in the best interests of such person and the state. Upon payment of such death benefit, the division shall first deduct the amount of funeral expenses, incurred under the provisions of section 3828.021 of this chapter, the amount of the premiums or assessments paid by the division to keep the insurance or benefit in force, and the amount of assistance paid to such person, all of which shall accrue to the old age assistance revolving fund, and pay the balance received, if any, to such person as was the beneficiary last specified upon the policy. * * *"

We also quote in part from Section 3828.012:

"3828.012 *Property exclusions.* * * *

"No person shall receive old age assisance if he has more than three hundred dollars, or if married and not separated from the spouse, if he and his spouse have more than four hundred fifty dollars in cash, on deposit in a bank, in postal savings, or if the immediate cash value, as determined by the board and subject to review by the division, of his holdings of bonds, stocks, mortgages, other securities or investments, except real estate, exceeds three hundred dollars, or if married and not separated from the spouse if he and his spouse have more than four hundred fifty dollars. At the discretion of the division, however, where such immediate sale, for cash, of such securities or investments necessitates an undue financial sacrifice, the applicant, when in immediate need of assistance, shall assign such securities and investments to the state to be held in trust by the state board to reimburse the old age assistance revolving fund for the amount paid from the old age assistance fund and the old age assistance revolving fund in assistance or other benefits in behalf of said applicant. * * *"

It is our opinion that Section 3828.012 as above quoted is the controlling statute in that if the old age recipient has more than $300.00, if unmarried, or more than $450.00 if married, then he is ineligible for old age assistance. As stated in your letter, the cash value of the insurance policy in question is $462.33 and it follows that it makes no difference whether this applicant is

single or married as he still has insurance, the cash value of which is greater than the limit allowed by law. There is nothing to prevent the recipient from withdrawing this cash value of the insurance policy without the consent of anybody who has paid the premiums on the insurance. In other words, the cash value of the policy is just the same as cash in the hands of the insured.

It is our further opinion that it is within the sound discretion of the State Board of Social Welfare to determine that the cashing in of such policy would be an undue sacrifice. It is our further opinion that in such case, it is within the sound discretion of the State Department to require either an assignment of such policy or the cancellation of such recipient from the old age assistance rolls.

HIGHWAY COMMISSION: REAL ESTATE: TAXES: If possession is acquired prior to December 31, 1938, no lien accrues on land acquired by state and tax should be cancelled. If only portion of tract is taken for right-of-way, only remedy is application to board of supervisors for apportionment prior to payment of tax.

February 1, 1940. *Mrs. Virginia Bedell, County Attorney, Spirit Lake, Iowa:* This will acknowledge receipt of your request for the opinion of this department on the following question:

"During the year 1938, the State Highway Commission purchased parcels of real estate for highway purposes. The contracts for the purchases were made during the spring and summer of 1938 and provided for closing during that year. Several of these contracts were not closed until the spring of 1939, due to delay on the part of the Highway Commission in not having their remittances ready and their deeds prepared, and, in no way, was the seller responsible for the delay. Should these taxes be paid by the Highway Commission, by the seller, or cancelled by the board of supervisors? All of the sellers object to paying the 1938 taxes on these parcels of real estate, claiming they had not taken into consideration the amount of said taxes at the time they entered into the contract, expecting the contract to be closed before said taxes became a lien."

Your attention is called to the opinion of a previous attorney general to the auditor of state, rendered April 6, 1938, and reported in O. A. G. 1938, at page 692. This opinion presents a review of authorities which we believe partially answers your questions.

We note, however, that although contracts were executed in which no provision was made for payment of taxes for the year 1938, conveyances were not executed until the following year. Possession, however, was given prior to December 31, 1938, on which the 1938 taxes become a lien. The courts have nevertheless held that possession is the test of ownership.

See:
Miller vs. Cory, 15 Ia. 166;
Sackett vs. Osborn, 26 Ia. 146;
Nungesser vs. Hart, 122 Ia. 647; 98 N. W. 505;
Mohr vs. Joslin, 162 Ia. 34, 142 N. W. 981;
Mitchell vs. Mutch, 189 Ia. 1150, 179 N. W. 440 at p. 441.

Therefore, if possession is acquired prior to December 31, 1938, no lien accrues on the land acquired by the state and the tax should be cancelled, as stated in the attorney general's opinion heretofore referred to.

A different situation exists however where only a portion of the tract is taken for right-of-way purposes, leaving in many cases a part thereof assessed

in the name of the vendor to which the lien for the entire amount of tax attaches on December 31st, following the levy. Under such circumstances, there being no duty to apportion on the initiative of the taxing authorities, in our opinion the only remedy in such case is by way of application to the board of supervisors for an apportionment before payment of the tax as provided by Chapter 350 of the Code.

DEPUTY COUNTY OFFICERS: COUNTY OFFICER: BOARD OF SUPERVISORS: Board of supervisors has authority to either increase or decrease the salaries of deputy officers and clerks for the second year of a two-year term, even though such salaries were fixed by the board for the period of time of their appointment.

February 2, 1940. *Mr. Arthur F. Janssen, County Attorney, Maquoketa, Iowa:* This will acknowledge receipt of your letter of the 4th ult., wherein you ask the opinion of this department relative to the following legal question:

On January 6, 1939, the board of supervisors of Jackson County passed a resolution fixing the salaries of several deputy county officers and clerks for the years 1939 and 1940. The various deputies and clerks furnished bonds for the period of their appointment. It appears that a majority of the present board desires to reduce the salaries of the various deputy county officers and clerks for the year 1940.

Question: Can the board of supervisors lower the salaries of such deputy county officers and clerks for the year 1940, bearing in mind that such salaries had been previously fixed by the board of supervisors for the period of time of their appointment, which includes the year 1940?

Section 5130, Code of Iowa, 1939, provides:

"The board of supervisors at any regular meeting shall hove power: * * *

"10. To fix the compensation for all services of county and township officers not otherwise provided by law, and to provide for the payment of the same."

Section 5221, Code of Iowa, 1939, provides:

"Each deputy auditor shall receive as his annual salary in counties having a population of:

"1. Less than 50,000, one-half the amount of the salary of the auditor, but if that amount is less than $1,500.00, the board of supervisors may allow an additional amount to make an aggregate not to exceed said sum."

Subsections 2 and 3 of this section make provision for salaries to deputies in counties over 50,000. Inasmuch as your county is less than 50,000, we do not set these out. This is also true as to the deputy officers hereinafter named.

Section 5223, Code of Iowa, 1939, provides:

"Each deputy treasurer shall receive as his annual salary in counties having a population of:

"1. Less than 50,000, one-half the amount of the salary of the treasurer, but if that amount is less than fifteen hundred dollars, the board of supervisors may allow an additional amount to make an aggregate not to exceed said sum."

Section 5225, Code of Iowa, 1939, provides:

"Each deputy recorder shall receive as his annual salary in counties having a population of:

"1. (same provision as for auditor and treasurer)."

Section 5227, Code of Iowa, 1939, provides:

"Each deputy sheriff shall receive as his annual salary in counties having a population of:

"1. Less than 50,000, and in any county where district court is held in but one place, not to exceed $1,500.00, fixed by the board of supervisors."

Section 5231, Code of Iowa, 1939, provides:

"Each deputy clerk shall receive as his annual salary in counties having a population of:

"1. (same provision as for other county officers)."

Section 5238, Code of Iowa, 1939, provides:

"Each county auditor, treasurer, recorder, sheriff, county attorney, clerk of the district court, coroner, and county superintendent of schools, may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

Section 5239, Code of Iowa, 1939, provides:

"When any such appointment has been approved by the board of supervisors, the officer making such appointment shall issue in writing a certificate of such appointment, and file the same in the office of the auditor where it shall be kept."

Section 5240, Code of Iowa, 1939, provides:

"Any certificate of appointment may be revoked in writing at any time by the officer making the appointment, which revocation shall be filed and kept in the office of the auditor."

We are of the opinion that the board of supervisors has the authority to lower the salaries of the deputy officers and clerks referred to, and we will hereinafter give our reasons for so holding.

As we have quoted above, Section 5130 provides that the board of supervisors at any regular meeting shall have power to fix the compensation for all services of county officers not otherwise provided by law, and to provide for payment of the same.

We call also to your attention that under the facts above quoted, a maximum and minimum salary is provided for all deputy county officers, except deputy sheriff and deputy county superintendent. These statutes provide that such salaries between the minimum and maximum are to be fixed by the board of supervisors. The minimum, as will be noted, is one-half of the amount of the salary of the elected officer; the maximum is $1,500.00 (except deputy sheriff and deputy county superintendent).

The salary of the deputy sheriff shall be not to exceed $1,500.00. There is no minimum. The salary of the deputy county superintendent is fixed by the county board of education. We call your attention also to Section 5240, above quoted, which provides that the appointment of deputy officers may be revoked in writing at any time by the officer making the appointment. Therefore, no deputy, assistant or clerk is appointed for any definite period of time.

It is the general rule that where the power to fix the compensation of a public officer has been delegated to a county board, in the absence of any constitutional or statutory provision, the compensation of such officers may be changed during the term of office.

Iowa City vs. Foster, 10 Iowa 189;
State vs. Hill, 32 Minn. 275; 20 N. W. 196;
Yuma County vs. Sturges, 15 Ariz. 538; 140 P. 504;
46 C. J. 1020;
22 R. C. L. 553.

In *Iowa City vs. Foster, supra*, the court said:

"* * * public officers * * * are governed by considerations relating to

the common good, *and that there is nothing of the nature of contract pertaining to them,* * * *. The compensation to which Foster was entitled, therefore, was subject to the action of the local legislature or council of the city."

In *Butler vs. Pennsylvania*, 10 How. 402, the court said:

"These services * * * rendered by public officers, *do not in this particular partake of the nature of contracts, nor have they the remotest affinity thereto.*"

In the case of *Kollock vs. Dodge, et al.*, 105 Wis. 187, 80 N. W. 608, the court said:

"It is well settled that, in absence of any prohibition or restriction, the term of office and the compensation of the officer may be changed by the proper authority, and such change will apply to those thereafter selected."

There is no statute in this state which expressly prohibits reducing or increasing the compensation of deputy county officers or clerks and, inasmuch as the courts have held that the relationship between the public corporation which they serve is not contractual, we see no reason why the board of supervisors of your county would not have the authority to reduce the salaries for the year 1940.

We do not pass upon the question as to whether or not the board might, at any regular meeting, reduce or increase the salaries of such deputies and clerks for the reason that this question is not included in your request. As we understand it, the sole and only question is as to whether the board may meet and reduce the salaries of the deputy county officers and clerks for the year 1940.

We have given consideration to *Kellogg vs. Story County*, 257 NW 399, 219 Iowa 399, but do not think the same is decisive of the question. Thase case involved the question of whether or not the salary of a county superintendent, when once fixed, could be reduced. The court there held that such salary could not be reduced during the three-year term. However, in this case we are confronted with an entirely different factual situation and are called upon to interpret other statutes than those involved in the Story County case. Among these is Section 5240 which specifically provides that any deputy county officer's appointment may be revoked at any time. We are of the opinion that if the appointment may be revoked the salary may be reduced. This, we feel, is one of the most cogent reasons for reaching the conclusion herein announced. The other reasons, with citation of authorities set out herein, are, as we see it, equally persuasive.

We reach the conclusion, therefore, that your board has the authority to either increase or decrease the salaries of deputy county officers and clerks for the year 1940.

DEPUTY CLERK: MINOR: CLERK OF DISTRICT COURT: A minor is ineligible for appointment as deputy clerk of district court.

February 6, 1940. *Mr. Waldo E. Don Carlos, County Attorney, Greenfield, Iowa:* This is in answer to your letter of the 5th inst., wherein you ask the opinion of this department on the following questions:

May a minor be appointed deputy clerk of the district court?

If a minor is appointed deputy clerk of the district court, would his official acts, in the absence of the clerk, be just as legal and valid as though performed by the clerk himself?

We are of the opinion that a minor is ineligible for appointment as deputy clerk of the district court.

It is the general rule that unless otherwise specifically provided, none but qualified electors can hold elective offices. *Barr vs. Cardell*, 173 Iowa 18; 155 N. W. 312.

In the Michigan case of *Attorney General vs. Abbott*, 80 N. W. 372, it was held that where the law is silent respecting qualifications for office, electors, and no others, are eligible.

In the case of *Blodgett vs. Clarke*, 177 Iowa 575, it was held to be eligible to an elective office created by the Constitution, a person must be a qualified elector.

Section 5238, Code of Iowa, 1939, provides:

"Each county auditor, treasurer, recorder, sheriff, county attorney, superintendent of schools, may, with the approval of the board of supervisors, appoint one or more deputies * * *"

Section 5241, Code of Iowa, 1939, provides:

"Each deputy shall be required to give a bond in an amount to be fixed by the officer having the approval of the bond of his principal, with sureties to be approved by such officer. * * *"

Section 5242, Code of Iowa, 1939, provides:

"Each deputy, assistant, and clerk shall perform such duties as may be assigned to him or her by the officer making the appointment, and during the absence or disability of his principal, the deputy or deputies shall perform the duties of such principal. * * *"

It is clear under the above decisions that a minor would be ineligible to hold the office of clerk of the district court and we are of the opinion that, inasmuch as under Section 5242, the deputy, in the absence of his principal, performs all the duties of such principal, the qualifications of the deputy must be the same as the clerk.

We suggest also another reason why the deputy clerk may not be a minor. Section 5241 provides that each deputy shall give a bond in an amount to be fixed by the officer having the approval of the bond of his principal. A minor could not generally enter into a valid contract for this bond. He could repudiate the same at any time during his minority or within a reasonable time after becoming of age.

We reach the conclusion, therefore, that a minor is disqualified for appointment as deputy clerk of the district court.

BOARD OF CONTROL: CAPITAL EXPENDITURES: SUPPORT AND MAINTENANCE: Funds transferred from Support and Maintenance to Miscellaneous Capital Expenditures must be accounted for in the same manner as if they had been included in the original appropriation.

February 14, 1940. *Mr. D. R. McCreery, Chairman, Board of Control:* We have your favor of February 10th, reading in part as follows:

"As provided by law, this Board on July 13, 1939, did, with the approvel of the comptroller and the governor, transfer from certain support funds in Eldora Training School for Boys to Miscellaneous Capital Expenditures of same institution, the sum of $4,421.08.

"This Board also on same date did transfer from support funds of the Anamosa Men's Reformatory to Eldora Training School for Boys Miscellaneous Capital Expenditures, the sum of $15,000.00. Of this total amount, there was expended for the rebuilding and improvements of the boiler house at Eldora

Training School for Boys, prior to December 31, 1939, the sum of $878.74, and there remained in this fund the sum of $18,542.34.

"The work on this boiler house was planned to be done principally by institutional labor with the employment of some additional professional labor and no contract was made. However, the work was only well started on December 31, 1939, and the brick walls of one addition to the building are only partially completed.

"The question now arises, does this balance of these funds revert to the general treasury?"

We must call your attention to Sections 55 and 56 of Chapter 1, Acts of the 47th General Assembly, which read as follows:

"Sec. 55. No obligation of any kind, whatsoever, shall be incurred or created subsequent to June 30, 1939, against any appropriation made by this act, unless otherwise specifically provided by law, and, on June 30, 1939, it shall be the duty of the head of each department, board or commission, receiving appropriations under the provisions of this act, to file with the state comptroller a list of all expenditures for which warrants have not been drawn.

"Sec. 56. All appropriations made by this act, remaining unexpended or unobligated, at the close of business on December 31, 1939, shall revert to and become a part of the general fund in the state treasury."

This is the chapter creating the appropriations covering the period of 1937 to 1939 and Section 55 is designed to keep the comptroller advised as to the condition of the finances of the state and aid in the determining of the tax levy for the future.

By referring to Section 290 of the 1939 Code of Iowa, we find that:

"Report of unexpended balances. All commissions, boards, officers or persons placed in charge, by statute, of special work for which a specific appropriation of state funds has been made, shall, biennially, report to the executive council the progress of such special work, the balance on hand in such fund, a list of all unpaid bills, and the amount of each, then outstanding, with such other information as the council shall from time to time require."

The above quoted provision governs specific appropriations for special work and it is our interpretation of Section 294 that the exception therein applies to specific appropriations as outlined in Sections 290 to 293 of the Code.

Your question, as to funds which have been transferred from Support and Maintenance to Miscellaneous Capital Expenditures losing their identity, must be answered in this way: These funds must be accounted for in the same manner as they would have to be if they had been included in the original appropriation.

LEGAL SETTLEMENT: WIDOW'S PENSION: NOTICE TO DEPART: Widow ineligible to receive aid where she had not a legal settlement. However, widow supported by public funds of county of former residence need not be served notice to depart.

February 15, 1940. *Mr. Robert S. Bruner, County Attorney, Carroll, Iowa:* This is in answer to your letter of January 28, 1940, wherein you ask the opinion of this department relative to the following legal question. You say:

"X, a widow, is receiving widow's aid from A county. X moves to B county where she is immediately served with a non-residence notice. However, she lives in B county two years thereafter, without receiving further non-residence notice. My questions are these:

"1. May A county discontinue widow's aid to X under the provisions of Section 3641 of the 1935 Code of Iowa, which reads: 'No payments shall be made after * * * she (the mother) has acquired a legal residence in another county * * *'?

"2. May X obtain widow's aid from B county under Section 3641 after having been a resident of B county for one year preceding the filing of the application, or is X prevented from so doing under the provisions of subsection 3, Section 5311 of the 1935 Code of Iowa?"

In order to answer your question it will be necessary, as we see it, to construe two statutes, which we hereinafter set out.

Section 3641, Code of Iowa, 1935, provides:

"Aid to widow in care of child. If the juvenile court finds of record that the mother of a neglected child is and has been a resident of the county for one year preceding the filing of the application, and is a widow and a proper guardian, but, by reason of indigency, is unable to properly care for such child, and that the welfare of said child will be promoted by remaining in its own home, it may, on ten days' written notice to the chairman of the board of supervisors, of said application, by proper order determine the amount of money, not exceeding two dollars and fifty cents per week, necessary to enable said mother to properly care for said child. The board of supervisors shall cause said amount to be paid from the county treasury as provided in said order. Such order may, at any time, be modified or vacated by the court. No payment shall be made after said child reaches the age of sixteen years, or after the mother has remarried, or after she has acquired a legal residence in another county, or after she has become a nonresident of the state.

"No person on whom the notice to depart provided for in chapter 267 shall have been served within one year prior to the time of making the application, shall be considered a resident so as to be allowed the aid provided for in this section."

Section 5311, Code of Iowa, 1935, insofar as pertinent to this question, provides as follows:

"Settlement—how acquired. A legal settlement in this state may be acquired as follows:

"1. Any person continuously residing in any one county of this state for a period of one year without being warned to depart as provided in this chapter acquires a settlement in that county, but if such person has been warned to depart as provided in this chapter, then such settlement can only be acquired after such person has resided in any one county without being warned to depart as provided in this chapter for a continuous period of one year from and after such time as such persons shall have filed with the board of supervisors of such county an affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county.

"2. Any person having acquired a settlement in any county of this state shall not acquire a settlement in any other county until such person shall have continuously resided in said county for a period of one year without being warned to depart as provided in this chapter.

"3. Any such person who is an inmate of or is supported by any institution whether organized for pecuniary profit or not or any institution supported by charitable or public funds in any county in this state or any person who is being supported by public funds shall not acquire a settlement in said county unless such person before becoming an inmate thereof or being supported thereby has a settlement in said county.

"4. * * *

"5. * * *

"6. * * *"

It is now and has been the holding of this department that notice under Section 5311, subsection 1, does not make a widow ineligible to apply for and receive a widow's pension in the county of her actual residence. Notice must be served each year. If she continues to live in said county for more than one year after the service of notice to depart she becomes eligible to apply for and to receive such pension, unless she has, during the time of her residence in said county, been supported by public funds of the county of her

former residence, in which event it is our holding that the notice to depart is unnecessary.

While it is true that Section 3641 provides as follows:

"If the juvenile court finds of record that the mother of a neglected or dependent child is and has been a resident of the county *for one year* (italics ours) preceding the filing of the application, * * * it (the court) may determine the amount of money * * * necessary to enable said mother to properly care for said child. * * *"

we must not lose sight of the last paragraph of said section, which provides:

"No person on whom the notice to depart provided for in chapter 267 shall have been served within one year prior to the time of making the application, *shall be considered a resident* so as to be allowed the aid provided for in this section." (Italics ours.)

Under the provisions of this paragraph, it is very clear that a widow is ineeligible to receive a widow's pension if a notice to depart is served upon her each year. It is also equally true, as we see it, that if she is being supported by public funds of the county of her former residence, notice to depart becomes unnecessary. Such support from public funds has, in our opinion, the same effect, so far as acquisition of legal residence, as used in this section, is concerned, as if notice to depart had been served upon her each year.

Sections 3641 and 5311 must, as we view it, be considered and construed together and when this is done, we feel that the construction which we have herein placed upon these two sections is inescapable. The last paragraph of Section 3641 specifically provides that the widow shall not be considered a resident so as to be allowed the aid provided for if she has been served with a notice to depart provided for in Chapter 267. This, of course, refers to the notice referred to in Section 5315 of said Chapter 267, and has as its purpose that of preventing legal settlement. What the legislature, in the last paragraph of Section 3641, virtually said was this: If the widow is prevented by the service of requisite notice from acquiring a legal settlement in the county of her then residence, she is not entitled to a widow's pension in said county, for she is then not to be considered a resident thereof. Clearly, if the service of a notice to depart once each year will prevent the widow from acquiring residence for purposes of receiving a widow's pension, in the county where she lives, then the support from public funds by the county of her former residence, and which we have learned dispenses with the service of notice, will have the same effect as if the notice was actually served each year. This conclusion, we think, is inescapable.

Section 3641 also provides:

"No payment shall be made after said child reaches the age of sixteen years, or after the mother has remarried, or after she has acquired a legal residence in another county, or after she has become a non-resident of the state."

Now, inasmuch as the last paragraph of Section 3641 provides that a widow shall not be considered a resident of the county to which she has removed if a notice to depart has been served upon her within one year prior to the making of the application, it follows, we think, that she has not lost her residence for the purpose of widow's pension in the county from which she removed, which in your case is A county.

We reach the conclusion, therefore, that X may not legally receive a widow's pension from B county but is not disqualified from receiving such aid from A county for the reason that in line with the reasoning employed in this

opinion, she did not acquire a residence in B county, as that term is used in Section 3641, and for the reason she received aid from A county, thus dispensing with the necessity of serving notice to depart.

In order that our interpretation of the sections referred to may be more readily understood, we say that the last paragraph of Section 3641 should be construed as if the same read, "no person shall receive a widow's pension who has not a legal settlement in the county." What other meaning could the following phrase have, "no person on whom the notice to depart provided for in chapter 267 shall have been served within one year * * * shall be considered a resident so as to be allowed the aid provided for in this section"? What is the purpose of the service of such notice? Preventing the acquisition of legal settlement, of course.

In arriving at this conclusion we have not overlooked the case of *Adams County vs. Maxwell*, 202 Iowa 1327. Therein is contained certain language that it may be argued is in conflict with this opinion. We must, however, bear in mind that the above cited case was decided prior to the amendment to Section 3641, the amendment being the last paragraph of said section.

This amendment was made by the 42nd General Assembly (1927). Had this amendment been in existence at the time of the decision in the Adams County case we are of the opinion that a different result would have been reached. In any event, the Adams County case did not pass on the question here presented.

We must also bear in mind that subsection 1of Section 5311 was not a part of said statute until 1933 (45th General Assembly). Prior thereto notice to depart each year was necessary for the purpose of preventing the acquisition of legal settlement in all cases.

As we have observed, the amendment to Section 3641 in 1927, which has been referred to herein as the last paragraph of said section, provides that if the widow has been served with notice to depart provided for in Chapter 267 within one year prior to the time of making the application, she shall not be considered a resident so as to be allowed aid (widow's pension).

When we consider Chapter 267, we find that the notice to depart referred to is provided for by Section 5315. This reads as follows:

"Persons coming into the state, or going from one county to another, who are county charges or are likely to become such, may be prevented from acquiring a settlement by the authorities of the county, township, or city in which such persons are found warning them to depart therefrom. After such warning, such persons cannot acquire a settlement except by the requisite residence of one year without further warning."

This is the notice referred to in the last paragraph of Section 3641.

Can it be said, with logic, that the legislature, in the amendment referred to, did not say in effect: "If the widow is prevented by the service of a notice upon her from acquiring a legal settlement in the county in which she then lives, she shall be ineligible to receive widow's pension?" We think this conclusion is inescapable for the reason that they referred to a notice that has, as we view it, only one purpose and that is to prevent the acquisition of legal settlement. May it logically be said that this notice has one effect under Chapter 180 and another under Chapter 267? We think not. There can be no question but that if the notice is served upon the widow once each year in the county to which she has removed, it has the effect of preventing her

from acquiring a legal settlement therein. Manifestly, when the legislature referred, in Section 3641, to Chapter 267, it was the intention that the notice should have the effect that Section 5315 gave it. Consequently, we believe that if the widow is supported by public funds of the county of her former residence, it has the effect of dispensing with the service of such notice, for in that event subsection 3 of Section 5311 becomes applicable.

We also wish to call your attention to the following clause from Section 3641:

"No payment shall be made after said child reaches the age of sixteen years, or after the mother has remarried, or after she has acquired a legal residence in another county, or after she has become a nonresident of the state."

It is clear, under the provisions just quoted, we believe, that a widow would be entitled to receive a widow's pension from the county from which she removed, if a notice was served on her each year by the county to which she moved, for, in that event, under the last paragraph of Section 3641, she would not, for the purpose of widow's pension, be a resident of the latter county. Her residence in said county would not be a "legal residence," as used in the above quoted portion from Section 3641.

Insofar as this opinion conflicts with the opinions of former attorneys general, the same are hereby overruled.

OLD AGE ASSISTANCE: TAX: COLLECTION CHARGE: In view of the mandatory provisions of Section 3828.039, it is our opinion that any tax ferret employed by the county cannot legally charge a commission for collection of old age assistance taxes or penalties arising thereform.

February 17, 1940. *Mr. Luther M. Carr, County Attorney, Newton, Iowa:* This will acknowledge receipt of your letter of February 6, in which you ask our opinion on the following situation:

"A question has arisen with reference to the right of the tax ferret to charge a commission for the collection of delinquent old age pension taxes.

"I am unable to find any statute that covers this and there is nothing specifically said about the matter in the contract between the ferret and the board.

"A penalty is collected with the delinquent tax which far exceeds the commission but since the money goes to the state fund, the board has questioned the legality of a commission or fee."

Section 3828.039, 1939 Code, provides the manner in which old age assistance tax and penalty shall be collected and reads in part as follows:

"The penalties accruing under the provisions of this section shall accompany the tax and be credited to the old age assistance fund."

The compensation of the tax ferret employed by the county is apportioned out of the funds benefited by his activity as provided under Section 7161, 1939 Code. The code is silent as to any compensation for a tax ferret for old age assistance taxes and penalties which might be collected.

In view of the mandatory provisions of the above quoted part of Section 3828.039, it is our opinion that any tax ferret employed by the county cannot legally charge a commission for the collection of old age assistance taxes or penalties arising therefrom.

FEES: INSANE COMMISSION: GRAND JURY: EXPENSE OF GRAND JURY: Expert witness before county insanity commission can receive only ordinary statutory compensation. Court has no power to authorize the fur-

nishing of meals to grand jurors at the expense of county during grand jury sessions.

February 27, 1940. *Mr. C. Morse Hoorneman, County Attorney, Le Mars, Iowa:* This is in answer to your letter of the 17th inst., wherein you ask the opinion of this department relative to the two following legal questions:

1. The county has been paying witness fees for expert testimony before the county insane commission. Should such fees be allowed?
2. May the court authorize the grand jury to take their meals at the expense of the county during sessions of the grand jury?

Answering your first question, we set out Section 11329, Code of Iowa, 1939, which reads as follows:

"Witnesses called to testify only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations and state the result thereof, shall receive additional compensation, *to be fixed by the court*, with reference to the value of the time employed and the degree of learning or skill required; but such additional compensation shall not exceed four dollars per day while so employed." (Italics ours.)

You will note that the additional compensation is "to be fixed by the court."

We are of the opinion that it may not be said that the insanity commission is a "court" which may allow additional compensation. We reach the conclusion, therefore, that when an expert testifies before the insanity commission he can receive only the ordinary statutory compensation.

As to the second inquiry, we are of the opinion that the court has no power to authorize the furnishing of meals to grand jurors at the expense of the county during the time such grand jury is in session. We call your attention to Section 5143, Code of Iowa, 1939, which reads in part as follows:

"The county auditor is hereby authorized to issue warrants as follows before bills for same have been passed upon by the board of supervisors:

"1. * * *
"2. * * *
"3. * * *
"4. * * *
"5. For expense of the grand jury upon order of the judge of the district court."

We are of the opinion that the meals referred to are not an "expense of the grand jury." The compensation allowed the grand jury is fixed by Section 10846. This section reads as follows:

"Jurors shall receive the following fees:
"1. For each day's service or attendance in courts of record, including jurors summoned on special venire, three dollars, and for each mile traveled from his residence to the place of trial, ten cents."

It is clear that were the judge to allow the expense of meals for grand jurors it would be in the nature of compensation additional to that provided by statute. This, of course, is not authorized.

PUBLIC FUNDS: WPA: RELIEF: Persons employed on WPA projects are not "being supported by public funds." These employees perform labor for which they are paid in same manner as other persons employed by county, state, or government.

February 27, 1940. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa. Attention: James P. Irish:* This is in answer to your letter of the 20th inst., asking the opinion of this department on the following legal question. You say:

"Section 3828.088 of the Code of 1939 determines the way in which a settlement may be acquired under the poor laws. Subdivision 3 of that section provides in part as follows:

"'* * * any person who is being supported by public funds shall not acquire a settlement in said county * * *.'"

"Are WPA funds public funds within the meaning of this section?"

We are of the opinion that a person employed on a WPA project is not "being supported by public funds" as that phrase is used in Section 3828.088. WPA employees perform labor for which they are paid in cash in the same manner as other persons employed by the county, state, or government. For every dollar they receive they are presumed to have performed labor commensurate with the compensation paid. Therefore, we are of the opinion that such persons are not "being supported by public funds." We do not believe that it may be said that a person is being supported by public funds when he labors for that which he receives and when such labor is performed as the result of selection by a superior authority, as is the case on WPA projects.

We make this last statement in view of Section 3828.099, which provides that persons receiving relief may be required to labor on the streets or highways at the prevailing local rate per hour in payment for and as a condition for granting relief. Under this statute a person, notwithstanding that he is required to perform labor for any relief furnished him, is still supported by public funds, in our opinion. Such a case, however, is, as we have pointed out, readily distinguishable from those who labor on WPA projects for, as has been said, whether or not they may receive WPA benefits is dependent upon selection by governmental representatives.

HOSPITAL—ISOLATION: BOARD OF SUPERVISORS: County can recover cost of keep of patient in isolation hospital from financially responsible patient, but the county in which the infected person has a legal settlement pays the bill when and if the patient is unable to pay the same. These patients were removed to isolation hospital in city of Mason City.

February 27, 1940. *Mr. Chas. W. Barlow, County Attorney, Mason City, Iowa:* This is in answer to your letter of the 26th inst., asking the opinion of this department with reference to the interpretation of Section 2271, 1939 Code. You say:

"The city of Mason City owns the isolation hospital which is within the limits of Mason City. The board of supervisors of Cerro Gordo County had been paying the bills of people who have been removed to the isolation hospital. The question presented is: Can the county of Cerro Gordo recover the cost of the keep of a patient in the isolation hospital from the patient? We assume, of course, that the patient is financially responsible."

Section 2271 reads as follows:

"The local board shall provide the proper care, provisions and medical attendance for every person removed and isolated in a separate house or hospital for detention and treatment, and the same shall be paid for by the county in which the infected person has a legal settlement *if patient or legal guardian is unable to pay same.*" (Italics ours.)

It is our opinion that the italicized portion of the statute answers the question. In other words, as we interprete this statute the county in which the infected person has a legal settlement pays the bill only when and if the patient is unable to pay same, and if payment has been made by the county the same may be recovered from any financially responsible patient.

FEES AS SECRETARY OF DRAINAGE DISTRICT PAID TO COUNTY AUDITOR: CHAPTER 358: COUNTY AUDITOR: Compensation paid to county auditor in amounts $5 per month as secretary of board of trustees of drainage district, is not received by him in his official capacity and he is not required to account to the county for same.

February 28, 1940. *Hon. Chet B. Akers, Auditor of State. Attention: L. I. Truax, Supervisor of County Audits:* We have your letter of February 26 inquiring as to whether or not a county auditor would be entitled to receive compensation of five dollars per month for services as secretary for the board of trustees of a drainage district managed as provided for in the provisions of Chapter 358 of the Code of Iowa, 1939.

Section 7699 of the Code authorizes the trustee of such district to select some other taxpayer of the district as clerk of the board who shall serve during the pleasure of the board of trustees. We believe this situation is governed by the holding of this office in an opinion rendered under date of January 24, 1939, to Hon. Hubert E. Schultz, county attorney of O'Brien county, wherein it was held that the clerk of the district court could act as receiver and retain fees allowed the receiver in real estate foreclosure actions. In that opinion reference is made to the case of Burlingame vs. Hardin County, 164 NW 115, wherein the court stated as follows:

"The right of the county to demand and recover money received by the clerk depends solely upon the question whether such money has been received by him in his official capacity. A county official does not contract to give all his time to the public service in any such sense that all the money he may earn or receive from any and every source during his term of office must be accounted for to the county."

The compensation paid to the county auditor in the amount of five dollars per month for services as secretary of the board of trustees, is not received by him in his official capacity. Furthermore, the position of secretary or clerk to the board of trustees is not incompatible with the position of county auditor, which distinguishes the situation from that of a sheriff serving on the Soldiers' Relief Commission, opinion on which we rendered your office under date of July 21, 1939. Same, for another reason, is distinguishable from the situation of a county attorney acting as a member of the insanity commission, which we held was improper in an opinion rendered your office under date of May 24, 1939.

It is our conclusion that the county auditor is entitled to receive this compensation, and is not required to account for the same to the county.

CODE: COST OF PRINTING AND BINDING: PRINTING BOARD: The cost of printing and binding the Code may be paid out of appropriation contained in Section 35 of Chapter 1, Acts of 48th General Assembly.

February 28, 1940. *Hon. C. Fred Porter, State Comptroller:* We have your letter of February 27 with reference to payment of printing, binding and paper stock for the 1939 code.

Chapter 13 of the 1935 Code relates to the reporter of the supreme court and the code editor, and Section 170 thereunder provides for the preparation and printing of the code after the final adjournment of each even numbered regular session of the general assembly. This section provides that the code editor shall prepare copy for the code, and that the printing board shall cause the code to be printed and bound.

Section 177 of the 1935 Code was a general provision appropriating out of any money in the treasury not otherwise appropriated, an amount sufficient to defray all expenses incurred in the carrying out of the provisions of the act. Chapter 183 of the Acts of the 48th General Assembly repealed Section 177. However, the 48th General Assembly, in enacting Chapter 3 of the acts thereof, provided in Section 7a of said chapter an appropriation to the reporter of the supreme court and code editor the sum of $75,000,00, or so much thereof as may be necessary to be used for salaries, support, maintenance and miscellaneous purposes in editing the code, annotations, advance sheets, skeleton digest, and parallel tables of corresponding sections.

By this it was undoubtedly their purpose to supplant the general provisions of Section 177 of the Code repealed by the same general assembly, insofar as financing the editorial work is concerned, which under the provisions of Section 170 of the Code is placed on the code editor.

Inasmuch as this same section places the duty of printing and binding the code on the printing board, it follows that the appropriation in Section 7a of Chapter 3, Acts of the 48th General Assembly, to the reporter of the supreme court and code editor, would not cover printing and binding which is done by the printing board.

Section 177 of the code ceased to exist on July 4, 1939, and it necessarily follows that no payment under the authority of that section can now be made.

In the general appropriation bill, known as Chapter 1, Acts of the 48th General Assembly, and in Section 35 thereof, appropriation is made to the state printing board in the amount of $150,000. This section limits the demands of the various departments to various amounts, and further provides that in case of emergency, the executive council may authorize increased amounts where necessary, these, of course, within the limits of the appropriation. The appropriation made is in the following language:

"For the necessary printing and binding authorized by law for the general assembly and for all state departments that have not been provided for in departmental appropriations, * * * $150,000.00."

This amount is for each year of the biennium, and aggregates $300,000. The limitations on the various departments for printing, as provided for in this section, aggregate $160,285.00, and the limitation is imposed in the following language:

"The following departments are hereby limited to their demands for printing during the biennial period, commencing July 1, 1939, and ending June 30, 1941, to an amount not to exceed the following."

Out of the aggregate appropriation of $300,000 for the biennium, there is approximately $140,000 available over and above the amounts specified by way of limitation to the various departments, and this amount is available for printing in those departments which do not have any limitation imposed upon them by the appropriation act, and further for increased amounts to be authorized by the executive council, as provided for therein.

The printing board is one of the departments of the state government, and under the provisions of Section 170 of the Code, it has the duty of providing for the printing and binding of the code. This mandatory duty bearing upon the work of printing and binding the code within the qualifications of the appropriation bill is "necessary printing and binding authorized by law."

It follows that the cost of printing and binding the code may ,therefore, be

paid out of the appropriation contained in Section 35 of Chapter 1 of the Acts of the 48th General Assembly.

TAXATION: REA: ASSESSMENT: The REA assessment should be made on the basis of the member's share or interest as a member of the cooperative in all of the tangible property of the cooperative without regard to indebtedness or other liens that might exist against the property of the cooperative. The member's interest can be ascertained by dividing the total value of all property of the cooperative by the number of members in the cooperative.

March 7, 1940. *Mr. Hubert H. Schultz, County Attorney, Primghar, Iowa:* You have requested an opinion from this department upon the following situation:

The REA in your county has assets of approximately $270.000.00 with about 556 members. The property is assessable under the provisions of Section 7102 of the 1939 Code and the question has arisen as to the manner in which this assessment should be made.

We note that it is your opinion that in arriving at the value of the interest of each member it would merely be necessary to divide the $270,000.00 by 556. Certain attorneys for these co-operatives assert that the value of the member's interest in the co-operative cannot exceed his membership fee as that is the most he could ever get out of the lines as the lines are mortgaged for as much or more than they are worth. You state that you would like an opinion as to the proper interpretation of Section 7102 of the 1939 Code as to the correct method to be followed in the making of this assessment. Section 7102 provides as follows:

"7102. *Interest of cooperative members.* The value of the interests of members in such cooperative corporations or associations which are not organized or operated for profit shall, for the purpose of taxation, be deemed real estate, and be assessed as part of the real estate served by such transmission line or lines."

It will be noted that the above section provides that for the purpose of taxation the value of the interests of members shall "be deemed real estate." Surely here it is meant that it is the member's interest in the tangible property of the co-operative that is to be assessed. The word "value" is sometimes given the meaning of amount or quantity. See Webster's Dictionary. And the word "interest" as used in this section can well be said to be the equivalent of share. Quite obviously it was the intent of the legislature to set up a plan for the assessment of a co-operative transmission line that differed from the plan of the assessment of a transmission line company organized for profit. The fundamental idea of a co-operative is perhaps best expressed by an example of five or six farmers organizing such an association to thereby secure needful service in the performance of their individual agricultural business. If it is a manufacturing plan for the purpose of manufacturing fertilizer, or a petroleum marketing station for the purpose of handling petroleum products, or any other legitimate co-operative activity, the property would be assessable against the association owning the property. It will be noted, however, that the co-operative operation of a transmission line presents a little different proposition. Here the property is strung across a large area and located in many taxing districts. Clearly, by the above section it was the intent of the legislature to tax the property of this co-operative operating a transmission line the same as it taxed the property of other co-operative activities, but here the manner of the assessment, because of the difference in the nature of the property was

also to be different. In all co-operative associations the property owned by the co-operative is actually owned by the members in their proportionate shares. The legislature, by Section 7102, merely went behind the corporation or association entity and for the purpose of assessment for taxation placed the burden on the members in proportion to the ownership of the member in all co-operative property. It was the extent of the individual member's share in the co-operative owned property that was to "be deemed real estate." When deemed real estate it received the general levy when the assessment was made of the real estate served by the transmission line.

In this situation clearly the mortgage indebtedness would not be a proper deduction. We are dealing here merely with the assessment of the member's share in the co-operative property. The debts owed by the co-operative might be deductible items if we were considering a money and credit tax, but here we are considering property taxes, the subject of the general levy and not to money and credit levies. If the mortgage indebtedness was to be considered as a deductible item, then we can conceive of a situation when it would be an advantage for a co-operative to never pay a mortgage indebtedness. If the mortgage indebtedness was equal to the assessed valuation of the property and the interest rate on the mortgage was lower than the general levy, it would be to the advantage of the co-operative to continue the mortgage lien and thereby escape taxation.

In view of the foregoing, we are of the opinion that the method of assessment outlined by you is correct and that the assessment should be made on the basis of the member's share or interest as a member of the co-operative in all of the tangible property of the co-operative without regard to indebtedness or other liens that might exist against the property of the co-operative. The member's interest can be ascertained by dividing the total value of all the property of the co-operative by the number of members in the co-operative.

FUNDING AND REFUNDING BONDS: LEVYING LIMITATION BONDS, FUNDING AND REFUNDING: SECTION 5284: CHAPTER 266: Section 5284, Code 1939, does not limit the amount of the levy that may be made for funding and refunding bonds provided in Section 5275.

March 8, 1940. *Mr. Robert Knudson, County Attorney, Fort Dodge, Iowa:* We have your request for an opinion as to whether or not Section 5284 of the Code is a limitation on the amount that the board of supervisors may levy by way of a tax for payment of bonds issued under the provisions of Chapter 266 of the Code, wherein this section appears, and particularly by reason of Section 5275 of the Code, which provides for funding and refunding bonds.

The history of these statutes discloses that in the 1897 code, what is now Section 5284 appeared as Section 1384 (Code 1897) under the chapter relating to assessment of taxes, except that the millage limitation, as it appeared in the Code of 1897, was three mills, whereas it is now three-fourths of a mill, and the exception at the end of the section read: "Except as provided in Chapter 1 of Title IV of the Code." Reference to Chapter 1 of Title IV of the Code disclosed that this chapter contained the provisions of the statute with reference to county bonds, which now appear, with some modifications, in Chapter 266 of the 1939 Code, and particularly Section 5275. In other words under the Code of 1897 there could be no question that the funding and refunding bonds issued

by counties were not subject to the tax limitation contained in Section 1384 of the Code of 1897.

In connection with the making of the code revision, which resulted in the Code of 1924, under proper legal authority the compiled code of 1919 was prepared. The code commissioners evidently determined that what is now Section 5284 more properly belonged in the chapter having to do with county bonds, than in the chapter having to do with the assessment of taxes, and an examination of the compiled Code of 1919 discloses that they placed what is now Section 5284 of the 1939 Code (Code 1897, Section 1384) into the compiled code under the chapter having to do with county bonds, the same chapter heading in which it now appears, and in doing so, under authority permitted the code commissioners, they deleted the words "except as provided in Chapter 1 of Title IV of the Code," and substituted the words "except as provided in this chapter." he reason for this is obvious, because in the Code of 1897 the exception quoted above excepted from the operation of that section the county bonds "provided in Chapter 1 of Title IV."

In the code revision session, the 40th Extra General Assembly, Senate File 139 was enacted, which was an act to amend, revise and codify what was contained in Chapter 11 of Title XII (county bonds) of the compiled code, and this enacted what is now Chapter 266 of the 1939 Code, wherein the sections in question now appear and in the language in which they now appear.

This legislative history indicates conclusively that it was never intended that the levying limitation found in Section 5284 of the 1939 Code applied to funding and refunding bonds, as are provided for in Section 5275, nor even the language of the section itself leads to this conclusion; the section contains the words "except as provided for in this chapter," and the only bonds provided for in the chapter are funding and refunding bonds.

It is, therefore, our considered conclusion that Section 5284, Code 1939, does not limit the amount of the levy that may be made for funding and refunding bonds provided in Section 5275.

BUILDING AND LOAN: ASSESSMENT: TAXATION: In assessing the shares of building and loan associations, the assessment should be determined by deducting the indebtedness of the borrowing shareholders from the total value of all shares. (Chapter 334, 1939 Code of Iowa.)

March 11, 1940. *Mr. Maurice Rawlings, County Attorney, Sioux City, Iowa. Attention: Mr. Ralph G. Prichard:* Receipt is acknowledged of your request for an opinion on the following situation:

"In assessing the share of building and loan associations, under the provisions of Chapter 334 of the 1939 Code, the assessors have, since the enactment of these statutes, determined the value of such shares by deducting the indebtedness of the borrowing shareholders from the total value of all shares.

"Some question has arisen as to whether or not the deduction provided for in Section 7017.04 should be made from the share credits, of the borrowing shareholders only, instead of from the share credits of all shareholders.

"We would appreciate receiving an attorney general's opinion as to the correct method of assessing building and loan associations."

Section 7017.04 of the 1939 Code provides as follows:

"7017.04 *Determination of value.* In arriving at the value of the shares of each mutual building and loan or savings and loan association the assessor shall allow as a deduction the total amount of indebtedness of all borrowing

members to the association and shall fix and determine the value of the shares based upon the information contained in the statement provided for in section 7017.02, and upon such other information as he may secure."

It will be noted that the foregoing section provides for the method to be used in arriving at the value of the shares of such mutual building and loan association. The statute does not state that this method shall be followed in arriving at the value of the shares of the borrowing members only, but rather the method to be followed in arriving at the value of all of the shares, and the method described in the statute is to allow as a deduction the total amount of the indebtedness of all the borrowing members and the result will fix and determine the value of the shares. Here again, the statute dos not say that this will fix the valuation of the shares of the borrowing members, but it is the value of all of the shares which is to be arrived at by the method of deducting the indebtedness of the borrowing shareholders from the total value of all shares.

You state in your letter that some question has arisen as to whether or not the deduction provided for in this statute should be made from the share credits of the borrowing holders only. Some authority for such an interpretation is indicated in some of the succeeding sections where the association is directed to apportion against the owners of the stock their share of the tax, but the most that can be said is that the statute is somewhat ambiguous and in this situation we must look to the departmental construction by those officers and departments of government whose duty it has been to carry out the provisions of these statutes.

In examining the record we find that shortly after the passage of the act the State Tax Commission, acting under its general authority to provide forms for use by assessors, issued a form upon which the return required by this chapter should be filed by the building and loan associations. This form provided for the deduction of the share credits from the value of all of the shares. Because of the ambiguity of the statute some question was raised as to whether this was the proper method, and an attorney general's opinion was sought, and under date of October 8, 1931, the attorney general's office rendered an opinion to the effect that the proper method for arriving at the valuation should be the deduction of the share credits from the value of all of the shares. Thereafter, on February 15, 1935, a bill to amend this section was introduced in the 46th General Assembly by Representative Elliott of Des Moines, which bill, if passed, would have amended this section to provide for the method of arriving at the valuation by deducting the share credits from the shares of borrowing members only. This bill failed of passage. It therefore appears that only the one method of arriving at the valuation has been followed, and this method has been sanctioned by an attorney general's ruling, and the legislature, with knowledge of the method of administration of this act, has rejected an attempt to provide for any other method of assessment. In the face of this record, we are of the opinion that the method which has been followed by the officers charged with the duty of carrying out the provisions of this act since the act became a law should be considered the proper method of assessment until the legislature sees fit to change the method by appropriate amendment. As authority for our position, we cite the recent case of *State ex rel Pew, Commissioner of Insurance, vs. Independent Order of Foresters*, decided by the

supreme court June 20, 1939, and appearing in 286 N. W. 425. In that case the construction of the statutes, upon which the state relied as imposing a gross premium tax, was not free from doubt. The court stated in the opinion that the intention of the legislature was not clearly expressed, but its acquiescence in the departmental construction would be considered evidence of the legislature's intent. The court held:

"The legislature is presumed to know the construction of its statutes by the executive departments. If it was dissatisfied with such construction, it could very easily remedy the situation. The only conclusion we can reach is that it must have been satisfied with such construction."

In view of the record in this case where the departmental construction is so clearly evidenced, it can well be held to be the intention of the legislature that the departmental construction was the legislative intent, and the attempted amendment, which was rejected by the legislature, furnishes additional authority for our view that the present plan of assessment of the shares of stock of building and loan associations is the only plan provided for under a proper construction of the act within the intent of the legislature.

EGG DEALER LICENSE: ESTABLISHMENT: TRUCK: The activity of a nonresident in purchasing eggs from farmers by driving a truck from farm to farm is clearly that of dealing in and buying eggs, and the only establishment which he could be said to have in the State of Iowa is the truck from which he operates, and he must, therefore, obtain a license from the Department of Agriculture for the truck by virtue of which he operates his business. The farmers selling eggs to such operators are not so engaged in the business of buying, selling or dealing in eggs as to be obliged to obtain a license before such sales can be made.

March 12, 1940. *Hon. Mark G. Thornburg, Secretary of Agriculture:* Your letter of March 1, 1940, inquiring our opinion upon the following matters, is herewith acknowledged.

"We would appreciate your opinion on the following questions:

"1. An egg dealer from outside the state with no 'establishment' in the state comes into Iowa with his truck and buys eggs at the farm from the producer and from licensed dealers. Not having any established place of business in the state, would his truck become the 'establishment' at which his business is conducted?

"2. If this truck is the 'establishment,' can he be required to comply with Sections 3101 to 3112, 1939 Code? If so, would it be necessary to require the dealer to maintain on his truck an adequate place for properly candling and handling eggs as set out in Section 3106?

"3. If the truck in this case does not become the 'establishment' where his business is conducted, could we require a license from him for each and every farm where he buys eggs, as set out in the enclosed correspondence from Wescott and Wenks?"

For the purpose of this opinion, we quote the following sections of the 1939 Code of Iowa:

"3101. *License.* Every person engaged in the business of buying, selling, or dealing in eggs shall obtain a license from the department for each establishment at which said business is conducted.

"3103. Fee. The license fee shall be one dollar per annum and each license shall expire on March 1 after the date of issue."

From a review of these sections, it would appear that the legislature had in mind the licensing of every person conducting a business by virtue of which he buys, sells or deals in eggs. Nevertheless, it is not reasonable to

suppose that the legislature intended to require a license of every farmer who incidentally sold eggs in the operation of his general agricultural activity.

The activity of the nonresident in purchasing eggs from farmers by driving a truck from farm to farm is clearly that of dealing in and buying eggs, and the only establishment which he could be said to have in the State of Iowa is the truck from which he operates. It may be that such operator retails his eggs to Iowa establishments as well as to those within his own state. Inasmuch, however, as his automobile or truck is the place of business from which he operates, it is our opinion that the operator must obtain a license from the Department of Agriculture for the truck by virtue of which he operates his egg buying business, and it is further our opinion that the farmers selling eggs to such operators are not so engaged in the business of buying, selling or dealing in eggs as to be obliged to obtain a license before such sales can be made.

The operators of the trucks in question must, in addition, comply with all of the sections of Chapter 151 of the 1939 Code of Iowa, entitled "Production and Sale of Eggs," so far as the chapter may reasonably be applied to them.

TAXATION: POLK COUNTY TAX SITUATION: PENALTY: No penalty should be imposed upon Polk county taxpayers until after the expiration of 91 days after the tax books have been received by the county treasurer.

March 13, 1940. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa. Attention: Mr. James P. Irish:* You have requested an opinion from this office upon the following situation:

"Because of the peculiar situation arising in Polk county due to the order of the State Board of Assessment and Review regarding the 1937 assessment, and because of the changes in the auditor's books which were thereby made necessary, the tax books for this county have not yet been certified from the auditor to the treasurer. The probabilities are that this certification cannot be completed until April 1, 1940.

"The statutes of the state of Iowa are, of course, specific to the effect that penalties shall accrue on the first half of one's taxes if the same are not paid by April 1 of the year in which they are due. The treasurer will not be able to accept tax money until after April 1, and it would therefore seem unfair to assess a penalty as of that date. In the ordinary course of procedure the taxpayer may make payment of his taxes immediately after the first of the year and, therefore, has a ninety-day period before he is in default. Is it permissible for the county treasurer to make some extension of time on these penalties?"

Section 7210 of the 1939 Code of Iowa provides as follows:

"7210. *Payment—Installments.* No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the treasurer, at some time between the first Monday in January and the first day of March following, and pay his taxes in full, or one-half thereof before the first day of March succeeding the levy, and the remaining half before the first day of September following."

Section 7211 provides that "in all cases where the first half of the taxes is not paid before the first day of April succeeding the levy, the amount thereof shall become delinquent from the first day of April after due."

Section 7214 provides that if the first installment is not paid by April 1st the same "shall become due and draw interest, as a penalty, of three-fourths of one per cent a month until paid, from the first day of April following the levy."

Surely the statute that fixes April 1st as a delinquent date presupposes

compliance with previous statutes relative to the certification of the tax list to the treasurer by the first Monday in January. "Delinquent," as here used, means some failure of duty. No taxpayer can be held delinquent in the fact situation outlined in your question. No penalty can be imposed until that failure of duty exists. As to the period of time, after the books have been certified to the treasurer, that the treasurer can accept tax payments without penalty, we are in doubt. The statutes, which were drawn for orderly payment between specific dates, give us but little aid in your situation. Section 7210 and succeeding statutes indicate that the taxpayer is to have from the first Monday in January to March 31st to pay without penalty. We feel you should resolve all doubts in favor of the taxpayers. The first Monday in January to March 31st is a period of 91 days. If you grant to the taxpayers a similar period of time after the books are received by the treasurer within which to pay without penalty, then one paying after that date with penalty cannot be heard to complain. The county could not well complain of the failure to collect penalty by the treasurer at an earlier date for the fact remains the treasurer who is the tax collector is merely giving the taxpayers the same period of time to pay without penalty that the statutes, by reference to specific dates, provide.

It is our opinion therefore that no penalty should be imposed upon real or personal tax collections as outlined in your question until after the expiration of 91 days after the tax books have been received by the treasurer.

TAXATION: USE TAX: Trucks purchased by a motor freight line for use in interstate transportation are exempt from the payment of use tax under the provisions of Section 3, Paragraph 2, Chapter 198, Acts of the 47th General Assembly.

March 13, 1940. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa:* You have requested an opinion from this office upon the following facts:

"A motor freight line, doing a general trucking business, engaged in interstate commerce, contends that as long as they are engaged in interstate commerce, and I believe are licensed by the interstate commerce commission, that they have the right to buy a truck, either in Iowa or in some other state, and if the truck is to be used in interstate commerce under their license that they do not have to pay, upon the registration of this truck, the use tax, or sales tax in connection with the purchase."

Under the provisions of Section 3, Chapter 198, Acts of the 47th General Assembly, commonly known as the Use Tax Act, the use of certain property is exempt from the provisions of the act. We quote the applicable portion of the section, as follows:

"Sec. 3. The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

* * *

"2. Tangible personal property used (a) in interstate transportation or interstate commerce * * *."

Under the statement of facts in your question, the truck is to be used in interstate commerce and as a part of the interstate commerce facilities of the Motor Freight Line.

We believe the foregoing provision under Section 3, paragraph 2 of the act would extend an exemption to such property purchased and that no use tax should be collected upon the registration of the motor vehicle.

NOTARIAL EXPENSE ON BOND AND GOVERNOR'S FEE IN SHERIFF'S OFFICE: It is within power of board of supervisors to authorize payment of items which are reasonably necessary for proper conduct of the office.

March 21, 1940. *Hon. Chet B. Akers, Auditor of State. Attention: Mr. L. I. Truax:* We have your inquiry for an opinion on the question as to the propriety of the board of supervisors of a certain county approving payments for notarial expense on bond and governor's fee in sheriff's office, county health unit and relief office.

While there is no specific statutory provision authorizing the board of supervisors to incur these items of expense, yet it is our opinion that by reason of the general statutory provisions authorizing the board of supervisors to conduct the business of the county, that it is within their power to authorize the payment of items from any office, which are reasonably necessary for the proper and efficient conduct of the office.

Nowhere in the statutes can one find authorization for the expenditures for particular individual items, yet it is generally conceded that county officers are within their authority in making expenditures reasonably necessary for the conduct of an office.

SHERIFF: FEES: JUSTICE COURT: When the sheriff serves process issued by the justice court he is entitled to his regular fees, per Section 5191.

March 22, 1940. *Mr. John E. Miller, County Attorney, Albia, Iowa:* This will acknowledge receipt of your letter of the 16th inst., wherein you ask the opinion of this department on the following legal question:

"The question has arisen in our county as to what fees the sheriff is entitled to when acting as constable under the provisions of Section 10630 of the Code of Iowa, 1939. In other words, should there be charged as part of the costs in the action, fees as provided in Section 5191, or the fees as provided in Section 10637?"

We are of the opinion that the sheriff, when serving process issued by the justice court, is entitled to the fees provided by Section 5191, Code of Iowa, 1939.

Section 10629, Code of Iowa, 1939, provides:

"Constables are ministerial officers of justices of the peace, and shall serve all warrants, notices, or other process directed to them by and from any lawful authority, and perform all other duties now or hereafter required of them by law."

Section 10630, Code of Iowa, 1939, provides:

"The constable is the proper executive officer in a justice's court, but the sheriff may perform any of the duties required of him. The powers and duties of the sheriff in relation to the business of the district court, so far as the same are applicable and not modified by statute, devolve upon the constable in relation to the justice's court."

Section 5191, Code of Iowa, 1939, provides:

"The sheriff shall charge and be entitled to collect the following fees:

"1. For serving a notice and making return thereof, for the first person served, fifty cents, and each additional person, twenty-five cents.

* * *

"3. For serving and returning a subpoena, for each person served, twenty-five cents * * *.

* * *

"6. For serving an execution, attachment, or order for the delivery of personal property * * * two dollars.

* * *

"10. Mileage in all cases required by law, going and returning, seven and one-half cents per mile * * *."

It will be noted that no distinction is made in the statute as to whether the notice, warrant or other process is issued by the justice or district court. We believe it was the intention of the legislature to allow the sheriff certain fees, irrespective of whether the process originated in the justice or district court.

POLITICAL PARTY: FARMER-LABOR PARTY: Farmer-Labor Party not entitled to place on ballot in any county in this state, as it is immaterial that in a particular county at least two per cent of the total vote was cast for the Farmer-Labor's candidate for governer the last preceding general election. As the Farmer-Labor candidate for governor did not receive two per cent of the vote in 1938 that party ceases to be a "political party."

March 25, 1940. *Mr. J. Paul Naughton, County Attorney, Marengo, Iowa:* This is in answer to your letter of the 19th inst., wherein you ask the opinion of this department relative to the following question. You say:

"The county auditor of Iowa county has requested me to write your office on the question of whether the Farmer-Labor party is entitled to a place on the ballot in this county. The Farmer-Labor party cast approximately three per cent of the total vote cast for governor in the last general election."

We are of the opinion that the Farmer-Labor Party is not entitled to a place on the ballot in any county in this state and we hereinafter give our reasons for so holding.

Section 528, Code of Iowa, 1939, provides:

"The term 'political party' shall mean a party which, at the last preceding general election, cast for its candidate for governor at least two per cent of the total vote cast at said election."

We are of the opinion that this section has reference to the total vote cast in the state and that it is immaterial that in a paricular county at least two per cent of the total vote was cast for the Farmer-Labor's candidate for governor at the last preceding general election. There were three candidates for governor, i. e., Wilson, Kraschel and Short, the last named being the candidate on the Farmer-Labor ticket. Wilson received 446,959 votes; Kraschel received 387,783 votes; Short received 10,214 votes. A total of 844,956 votes were cast for governor. Two per cent of this number is 16,899. Therefore, Mr. Short, as the Farmer-Labor candidate for governor, not having received two per cent of the vote, that party ceases to be a "political party," as defined in Section 528, as we view it.

COUNTY AUDITOR: OATHS: ABSENT VOTING: The county auditor is not authorized to leave his office for the purpose of administering oaths on absent voters ballots, as this is not a matter pertaining to the business of his office.

March 25, 1940. *Mr. E. M. Prichard, County Attorney, Onawa, Iowa:* This is in answer to your letter of the 13th inst., wherein you ask the opinion of this department relative to the following legal question:

"Can the county auditor, who is not a notary public, administer the oath called for by the absent voter's law outside his office?"

We are of the opinion that the county auditor is not authorized to administer oaths in connection with voting by absent voter's ballot.

Section 1216, Code of Iowa, 1939, reads as follows:

"The following officers and persons are empowered to administer oaths and take affirmations in any matter pertaining to the business of their respective office, position, or appointment:

"1. * * *

"2. * * *

"3. All county officers other than those named in Section 1215."

It is our opinion that the county auditor may administer oaths and take affirmations in any matter pertaining to the business of his office, but that leaving his office for the purpose of administering oaths on absent voters' ballots is not a matter pertaining to the business of his office.

We call your attention to an opinion by the attorney general to the secretary of state, dated May 12, 1934, which clearly indicates that the auditor has no duty in reference to delivering ballots to absent voters and that, therefore, he clearly would have no authority to leave his office for the purpose of administering oaths on absent voters' ballots.

BOARD OF SUPERVISORS: MINISTERS' SERVICES: BURIAL OF RELIEF CLIENT: County funds may not be spent for services and mileage of ministers, where they officiate at the burial of persons who have been receiving relief from the county.

March 25, 1940. *Mr. E. M. Prichard, County Attorney, Onawa, Iowa:* This is in answer to your letter of the 13th inst., wherein you ask the opinion of this department relative to the following legal question:

"Can the board of supervisors make any allowance to ministers for their services, or their mileage, where they render services at the burial of persons who have been receiving relief from the county?"

We are of the opinion that county funds may not be spent for any religious or sectarian purpose. We, therefore, hold that the board of supervisors is without authority to make any allowance to ministers for their services or their mileage, where they officiate at the burial of persons who have been receiving relief from the county.

We must bear in mind that it is fundamental in this country that church and state are absolutely divorced. The courts have many times held that public monies may not be used for denominational or religious purposes.

VETERAN: EXEMPTIONS: Estate of Civil War veteran may not claim exemption which was not claimed during his lifetime. Under Section 6946 exemption enures only to the benefit of the veteran and certain others. It may not be claimed by veteran's estate.

March 25, 1940. *Mr. E. M. Prichard, County Attorney, Onawa, Iowa:* This is in answer to your letter of the 13th inst., wherein you ask the opinion of this department relative to the following legal question:

"A Civil War veteran has recently died and his administrator has listed certain moneys and credits which were never listed by the veteran during his lifetime and upon which he paid no tax. The record is not clear whether the veteran claimed his exemption or not, but he did receive credit for it upon his homestead. The administrator is now claiming credit for the balance of the exemption to be applied on the moneys and credits. No statement was filed with the board within the time fixed by Section 6949. Can the estate of this veteran now be given credit for the balance of his exemptions upon moneys and credits that were never listed by him with the assessor?"

We are of the opinion that the exemption given by law may not be allowed to the estate of the veteran, no claim for such exemption having been made during the veteran's lifetime.

The recent case of *Emma L. Lewis vs. Roy Vanier and G. C. Greenwalt, Treasurer of Polk County, Iowa*, we think is controlling. The substance of the holding in the *Lewis* case is to the effect that an exemption may be allowed only when and if the application for such exemption was filed each year. This case was decided March 12 ,1940, and is as yet not in the Northwestern Advance Sheet.

We also call to your attention Section 6946, Code of Iowa,, 1939, which clearly provides that the exemption inures only to the benefit of the veteran, his widowed mother, his widow, or his minor children. Therefore it appears that it is the spirit of the law to allow the exemption to the veteran and the others named in the statute as a personal right. It may not be claimed by the veteran's estate. This would be wholly out of harmony with the spirit and purpose of this statute.

TAXATION: PERSONAL PROPERTY: FARM BUREAU ASSOCIATIONS: The personal property, such as office equipment, typewriters, of County Farm Bureaus is not subject to taxation. Section 6944 of the Code.

March 27, 1940. *Mr. J. F. Wilson, County Attorney, Sac City, Iowa:* We are in receipt of your request for an opinion upon the following question:

"Is the property of the Sac County Farm Bureau office, such as office equipment, typewriters, etc., taxable?"

We have examined the exemption statutes contained in Chapter 330 of the Code and we find in paragraph 9 of Section 6944 an exemption that extends to the grounds and buildings used by "* * * Agricultural Institutions and Societies." In paragraph 10 of the same section provision is made for the exemption of "the books, papers, * * * apparatus and other personal property belonging to such institutions." In this latter section specific reference is made to the institutions described in paragraph 9 of Section 6944.

We understand that the Farm Bureau is organized under the provisions of Chapter 138 authorizing the organization of such farm aid associations. The statutes provide that such corporations cannot declare dividends and that in order to receive county aid they must be organized to cooperate with the United States Department of Agriculture, the State Department of Agriculture, and the Iowa State College of Agriculture and Mechanic Arts.

The purposes of such associations are for the improvement and advancement of agriculture, domestic science, animal husbandry and horticulture.

There is no doubt but that such an association is an agricultural institution within the meaning of paragraph 9 of the exemption statute and as such its personal property would be exempt from taxation under the provisions of paragraph 10 of the same section.

CHILD WELFARE: BENEDICT HOME: CUSTODY OF CHILD: Benedict Home responsible for care of child as if guardian of same. Until there is order of court to contrary, Benedict Home is liable for care of child.

March 27, 1940. *Mr. King R. Palmer, Chairman, State Board of Social Welfare, Iowa Bldg., Des Moines, Iowa:* This will acknowledge receipt of your letter of March 22nd, wherein you ask our opinion on the following question:

"'A,' an unmarried mother, transferred the custody of her child by a signed and notarized relinquishment to the Benedict Home for the purpose of adoptive placement. The infant was placed, for the probation period required by law, in a foster home. Within a month, the baby developed spasms which were diagnosed by physicians at the University Hospital as, 'spasms following a birth injury.' The infant was then physically transferred to the County Relief Agency of Mahaska County which placed it in a local hospital. The Benedict Home has repudiated at this point its legal responsibility for the child by refusing to make other plans for it or to pay for its care.

"The director of relief of Mahaska County wishes to know what his responsibility is in this case. He acknowledges Mahaska County to be the legal residence of the mother of the child. Other than this fact, the county has had no part in placement plans for the child.

"Is there a law relieving a child placing agency of its legal responsibilities in a case of this sort? What are the implications of responsibility involved when an agency accepts the legal custody of a child?"

You also state in your letter that the superintendent for the Benedict Home has based her action under Section 10501.7, 1939 Code of Iowa.

For the purposes of this opinion, we quote from Sections 3661.097 and 3661.099, 1939 Code of Iowa, as follows:

"3661.097. *Relinquishment of rights and duties.* No person may assign, relinquish, or otherwise transfer to another his rights, or duties with respect to the permanent care or custody of a child under fourteen years of age unless specifically authorized or required so to do by an order or decree of court, or unless the parent or parents sign a written release attested by two witnesses, of the permanent care and custody of the child to an agency licensed by the state board of social welfare.

"3661.099. *Relinquishment, parents not married.* If the parents are not married to each other, the parent having the care and providing for the wants of the child may sign the release."

We also quote in part from Section 3661.103:

"3661.103. *Authority to agencies.* Any institution incorporated under the laws of this state or maintained for the purpose of caring for, placing out for adoption, or otherwise improving the condition of unfortunate children may, under the conditions specified in this chapter and when licensed in accordance with the provisions of this chapter:

* * *

"3. Receive, control, and dispose of all minor children voluntarily surrendered to such institutions."

It will be noted from the above quoted sections that the legal custody of the child has been given to the Benedict Home and that the Benedict Home stands in the same position as though it were guardian of said child.

It is our opinion that the Benedict Home in the above stated case is still legally responsible for the care and custody of the child. It is our further opinion that until there is an order of court to the contrary, that the Benedict Home is liable for the expense of caring for the child. It is our further opinion that Section 10501.7 has no application to the stated case for the reason that there has been no adoption as contemplated by said section.

TAXATION: DELINQUENT TAX COLLECTOR: PENALTY: The amount of penalty collected by the delinquent tax collector appointed under either section is the five per cent provided for in Section 7215 plus the additional five per cent provided for under Section 7223, or a total of ten per cent.

March 27, 1940. *Honorable C. B. Akers, Auditor of State. Attention: Mr. L. I. Truax:* We are in receipt of your request for an opinion as to the

amount of penalty that should be collected by a delinquent tax collector appointed under the provisions of Section 7225 of the 1939 Code.

There is no question but that the 5 per cent penalty added by virtue of Section 7215 of the Code is to be collected by such tax collector, but the real question is whether or not the additional 5 per cent penalty provided for under the provisions of Section 7224 should also be collected by such a collector appointed under the provisions of Section 7225.

In examining the legislative history of these sections, we find that Section 7224 was originally 1407 in the Code of 1897 and thereafter the 33rd General Assembly passed Chapter 89, Section 1, which was an amendment to Section 1407 in the Code of 1897. This amendment in the 33rd General Assembly amended Section 1407 by adding thereto the very section which is now Section 7225 of the Code. The division of these sections has been made by the code editor, for in the 1913 Supplement the two sections are contained in the same section, or Section 1407 of that Supplement.

In examining the two methods outlined in the Code for the appointment of tax collectors, we find that the collector appointed under the provisions of Section 7222 is appointed by the treasurer without the approval of the board of supervisors to collect the delinquent taxes immediately after they become delinquent. The statute provides in Section 7222, as follows:

"7222. *Collectors—Appointment.* Immediately after the taxes become delinquent, each county treasurer shall proceed to collect the same by distress and sale of the personal property of the delinquent taxpayers, and for this purpose he may appoint one or more collectors to assist him in collecting the same."

It will be noted that under the above there is some indication that the collector so appointed is for the purpose of aiding the treasurer in his distress and sale proceedings, but in any event, such a collector is only appointed for the purpose of aiding the treasurer in the collection of the taxes which have just become delinquent. It is not contemplated that a tax collector could be appointed under this provision for the collection of taxes for prior years. It is these collectors who receive 5 per cent and who collect this 5 per cent from the taxpayer.

The collectors appointed under the provisions of Section 7225 are appointed by the treasurer with the authorization of the board of supervisors to assist in the collection of delinquent personal taxes for certain designated years. These are the collectors who can collect for prior years and here the collector is given not more than 10 per cent of the amount collected as his fee, but there is no provision here that this amount shall be collected from the taxpayer.

We are of the opinion therefore that in any event the collectors must always collect the additional 5 per cent provided for in Section 7215 on taxes delinquent on the first Monday in December, and thereafter the collector appointed under the provisions of Section 7222 would collect an additional 5 per cent from the delinquent taxpayer which he would be entitled to retain, but that collectors appointed under the provisions of Section 7225 receive not more than 10 per cent of the amount collected, but such collectors so appointed under the provisions of Section 7225 do not collect the 10 per cent that they receive, or any portion thereof, from the delinquent taxpayer.

HIGHWAY COMMISSION: EMPLOYEES: Section 5021.01 does not apply to

a road worker or maintenance employee when he is actually engaged in work upon the surface of the highway.

Ames, Iowa, March 28, 1940. *Iowa State Highway Commission, Ames, Iowa. Attention: L. L. Clement:* This will acknowledge receipt of your request for an opinion on the following question:

"Occasionally an accident occurs between motor vehicles one of which is operated by a maintenance employee actually engaged in work upon the surface of the highway. These men receive wages insufficient to enable them to employ counsel to defend an action brought against them; they cannot afford to carry public liability insurance and there is no authority under which we can carry it for them.

"We would like to have your opinion as to whether or not, in the event judgment is entered against such employee, and unpaid, the provisions of Section 5021.01 are applicable in view of Section 5017.06 to the effect that "the provisions of this chapter shall not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway * * *."

Sections 5017.06 and 5021.01 of the Code of 1939, provide as follows:

"5017.06. Road workers exempted. The provisions of this chapter shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work.

"5021.01. Suspension of licenses. Whenever a final judgment is recovered in any court of record of this state in an action for damages for injury to or death of a person or for injury to property caused by the operation or ownership of any motor vehicle on the highways of this state, and such judgment shall remain unsatisfied and unstayed for a period of sixty days after the entry thereof, a transcript of such judgment duly authenticated may be filed with the commissioner and thereupon the commissioner shall forthwith suspend the license, if any, of the judgment debtor or debtors, as the case may be, to operate a motor vehicle on the highways of the state and shall forthwith suspend the registration of any and every motor vehicle registered in the name of any such judgment debtor or debtors, and the commissioner shall forthwith notify such owner or owners by registered mail of such cancellation and the owner or owners so notified shall immediately upon receipt of such notice surrender to the county treasurer all registration plates so suspended, and such suspension shall not be removed nor such registration plates returned by the county treasurr nor shall a license to operate a motor vehicle thereafter be issued to such judgment debtor or debtors, nor shall a motor vehicle be registered in the name of such judgment debtor or debtors until proof that such judgment has been stayed, satisfied or otherwise discharged of record shall be filed with the county treasurer."

It is obvious that if the provisions of Chapter 251.1 were applicable to maintenance vehicles and operators thereof while actually engaged in work on the surface of the highway, the maintenance thereof would be seriously obstructed. The necessity for such work under all conditions, character of vehicles and equipment used, and the manner in which the work must be accomplished requires the presence on the highways of equipment under conditions which may at times be hazardous to the traveling public.

This condition would seem to have been anticipated by the legislature in its enactment of Section 5017.06; this section is directed at the entire chapter, 251.1, and is unambiguous. Section 5021.01, above quoted, is one of the "provisions of this chapter," and clearly comes within the purview of Section 5017.06.

In view of the decision in *Montanek vs. McMillan*, 280 N. W. 612, 617; 225 Ia. 442, by which agents and employees of the state are liable in a tort action,

notwithstanding they were at the time engaged in some governmental function, it is conceivable that judgment might be obtained against them. In such event, it is our opinion that the provisions of Section 5021.01 are not applicable if the injury or damage referred to results in an unpaid judgment against a road worker or maintenance employee at a time when he is actually engaged in work upon the surface of the highway.

STATE BOARD SOCIAL WELFARE: OLD AGE ASSISTANCE: SPECIAL ASSESSMENTS: LIENS: If property has been deeded to state, there can be no special assessment levied against it for installation of sanitary toilets. If property merely impressed with lien in favor of state and title remains in old age recipient, then special assessments may be levied against property.

April 2, 1940. *Dr. Walter L. Bierring, Commissioner, Department of Health, Des Moines, Iowa. Attention: A. H. Wieters:* This will acknowledge receipt of your letter of March 23, wherein you ask our opinion on the following question:

"The city of Storm Lake, Iowa, is conducting a campaign for the elimination of insanitary privies in the city where sewers are available, and in accordance with Sections 5784 and 5785, Code of Iowa, 1939, are requiring connection to sanitary sewers.

"In many instances they are proceeding by special assessment, as provided for in Section 5786, Code of Iowa 1939.

"They have a considerable number of instances where the properties in question are occupied by old age recipients and in some cases, the old age recipient has deeded the property to the state. In other cases, the property merely has a lien on it by reason of old age assistance being granted.

"The question arises in such instances, "Can a city levy such special assessments for the installation of sanitary toilets in the homes?

"Your opinion as to the power of a municipality in cases such as this will be very greatly appreciated."

It is our opinion that if the property in question has been deeded to the state, that there can be no special assessments levied against such property. On the other hand, if the property is merely impressed with the lien in favor of the state and title remains in the old age recipient, then it is our opinion that a special assessment may be levied against said property.

STATE BOARD SOCIAL WELFARE: OLD AGE ASSISTANCE: LIENS: TAXES: SPECIAL ASSESSMENT: Sec. 3828.023—Sec. 6950.1. The lien upon the property of an old age recipient is in the nature of a mortgage and as such, is inferior to any lien on property by reason of general taxes or special assessments. Special assessments are not taxes so as to fall within provisions of Sec. 6950.1. Property can be sold to pay for any special assessment.

April 4, 1940. *Mr. Charles I. Joy, County Attorney, Perry, Iowa:* This will acknowledge receipt of your letter of April 1st, wherein you ask our opinion on the following questions:

"When a special assessment is levied upon town property belonging to an old age assistance recipient, is the lien for old age assistance already received by this recipient a prior lien to the lien created by the special assessment?

"Is the special assessment ahead of subsequent payments to the old age assistance recipient?

"Can the property be sold to pay for this special assessment?

"Is the special assessment lien ahead of or on a parity with the regular taxes?"

For the purposes of this opinion, we quote Section 3828.023, 1939 Code, which reads in part as follows:

"3828.023. *Transfer of property to the state.*
* * *

"The sale for any general or special taxes of any property, against which a lien has been filed under the provisions of this and the preceding section, shall not affect said lien or its enforcement; and the state board and division shall be entitled to an assignment of the certificate of tax sale of said property upon tender to the holder or to the county auditor of the amount to which the holder of the tax sale certificate would be entitled in case of redemption.
* * *."

Section 6950.1, 1939 Code of Iowa, reads as follows:

6950.1. *Suspension of taxes.* 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 the 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 constract. 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 6950, 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 answer to your first two questions, it is our opinion that the lien upon the property of an old age assistance recipient is in the nature of a mortgage and that as such, it is inferior to any lien placed upon the property by reason of general taxes or special assessments.

It is our opinion that the point of time when general taxes or special assessments are placed upon the property is immaterial and that both are superior to any old age assistance lien which may be filed.

In answer to your third question, this office has already given an opinion under date of December 11, 1939, that special assessments are not taxes so as to fall within the provisions of the above quoted Section 6950.1. It follows that it is our opinion that the property can be sold to pay for any special assessments.

We believe that the foregoing answers your fourth question.

TAXATION: TOWNSHIP TRUSTEES: CEMETERY MAINTENANCE: AUTHORITY: (Sections 5560 and 5562, 1939 Code): The trustees in levying a tax for maintenance purposes under Section 5560 are not limited to the one-fourth mill limitation found in Section 5562; this limitation applies only where the tax is for maintenance or improvement of a cemetery that the township does not own.

April 10, 1940. *Honorable C. B. Akers, Auditor of State. Attention: Mr. L. I. Truax:* Receipt is acknowledged of your letter of March 21st requesting an opinion as follows:

"We would like your interpretation of Sections 5560 and 5562 of the 1939 Code as to what authority the township trustees have for levying tax for cemetery maintenance purposes. It is our observation that for the most part the one-fourth mill provided in Section 5562 is all that the township trustees are levying for maintenance purposes. However, in some instances this is not sufficient to provide funds for maintenance purposes.

"We would like your opinion as to what authority the trustees have in levying a tax for maintenance purposes under Section 5560 of the 1939 Code."

Section 5560 of the 1939 Code provides as follows:

"5560. *Cemetery and park tax.* They shall, at the regular meeting in April, levy a tax sufficient to pay for any lands so condemned or purchased, or for the necessary improvement and maintenance of cemeteries thus established, and for the necessary improvement and maintenance of public parks acquired by gift, devise, or bequest under Section 5559, or for the maintenance and improvement of cemeteries so established in adjoining townships, in case they deem such action advisable."

It will be noted that the above section provides that the township trustees at the April meeting may levy a tax sufficient to pay for the maintenance of cemeteries established in accordance with the previous sections. The previous sections are Sections 5558 and 5559. Under Section 5558 township trustees are empowered to condemn or purchase and pay for lands within the territorial limits of the township for use as cemeteries, and Section 5559 gives the trustees power by proper resolution to accept and receive gifts of money or property for the purpose of establishing cemeteries.

An examination of all of these statutes indicates that it was the legislative intent to give the trustees power to levy a sufficient tax for maintenance purposes for cemeteries acquired by purchase, condemnation or gift.

Passing now to Section 5562, we find the provision that the township trustees may levy a tax "not to exceed one-fourth mill to improve and maintain any cemetery not owned by the township, provided the same is devoted to general public use." The limitation in Section 5562 to one-fourth mill is for a tax for maintenance or improvement of a cemetery that the township does not own. There does not seem to be this limitation in Section 5560 where the authorization is to levy a tax "sufficient" to pay for maintenance.

In view of the above, it is our opinion that the trustees in levying a tax for maintenance purposes under Section 5560 are not limited to the one-fourth mill limitation found in Section 5562, and that this limitation only applies where the tax is for maintenance or improvement of a cemetery that the township does not own.

TAXATION: MONEYS AND CREDIT: TRUST: Where the property is actually located in one county and the trustee lives in another, the moneys and credit tax should be collected in the county where the property is actually located.

April 11, 1940. *Mr. Henry J. TePaske, County Attorney, Orange City, Iowa:* We are in receipt of your request for an opinion upon the following question:

"The will of a decedent, who died in this county and whose estate was probated here, created a trust by which the trustees should collect the rent and income from real estate for the benefit of the surviving spouse during her lifetime, the trustees to pay the taxes and upkeep out of the rent and the balance to go to the spouse. The widow did not draw all of the income as she had a right to do, but permitted some of it to accumulate in the hands of the trustees. The widow lived in this county and the trust assets were kept in a deposit box in this county. The trustee lives in an adjoining county. The accumulations arose out of the convenience of the parties and not because of any provisions of the will; the widow was entitled to all of them. The widow has now died and her estate, or the trust, desires to pay up the taxes due on these moneys and credits. Is this county or the adjoining county entitled to these moneys and credits taxes?"

The applicable sections of the Code are Sections 6956 and 6957 of the 1939 Code providing in effect that trust property must be listed by the trustee in

the county in which he would be required to list it if it were his own, and Section 6963 providing that moneys and credits shall be listed and assessed where the owner lives, and Section 6985 specifically providing that such property shall be assessed and the tax collected where the owner resides. The foregoing statutes have been reviewed by the Iowa supreme court in several cases.

In the case of *McGregor's Executors vs. Vanpel*, 24 Iowa 436, it was held that where the executor resided in a county other than that in which the decedent died and in which administration was granted that personal property of the decedent should, as a rule, be assessed in the county in which the decedent died a resident.

After the McGregor decision the court again passed upon a similar question in the case of *Cameron vs. The City of Burlington*, 56 Iowa 322. In this case the decedent died a resident of the city of Burlington, but the administrator was a resident of another township in the same county. The court construed these same statutes and while not expressly overruling the McGregor case, it refused to apply the rule therein laid down and held that the property of the estate in the form of notes and held by the executor in the township where he resided should be assessed in that township rather than in Burlington.

The next case decided by the supreme court was the case of *Burns, Executor, vs. McNally*, 90 Iowa 432, where there were joint executors each having part of the estate property in his immediate possession and each residing in different townships. Here the court laid down the rule as follows:

"We think, however, that the true rule in a case like that at bar, where there are two executors, both having actual possession of personal property of the decedent, and both residing in the same county, but in different taxing districts, is that each should return to the assessor of his township for taxation such personal property of the decedent as may be in his immediate possession in his township."

Throughout this case the court seems to recognize the fact that the circumstances surrounding the situation, location and use of the property should all be taken into consideration and the court stated it was impossible to lay down an inflexible rule applicable to all cases. The court cited with approval the statement made in the Cameron case that the important consideration is not so much the comparative rights of the different taxing bodies of the state, but the certainty that all property shall be taxed once and only once.

The court examined these statutes in the case of *Hinkhouse vs. Wilton*, 94 Iowa 254, but merely held in a short opinion that the personal property of a ward is assessable where the guardian lives, but it appeared that the guardian had the personal property in his possession in the couty of his residence, and it extended the rule in *Burns vs. McNally* where personal property was owned by executors in two different townships to the situation where they are residents of two counties.

Analyzing all of these decisions, we believe the true rule to be that the property held by a trustee is assessable in the county of his residence in those cases where the trust property is actually in his possession in the county of his residence. There does not seem to be any Iowa decision directly holding that a different rule would apply when the situs of the property of the trust is actually in a county other than the county of his residence.

Some indication is given in the case of *Burns vs. McNally* by way of a hypothetical case and a dictum statement that where the property is actually located in a county other than the residence of the fiduciary, it may under some circumstances be taxable in that county where the property is actually located.

Under the facts outlined in your question, where the property is actually located in a deposit box in Sioux County, we feel the assessment should be in Sioux County. The added reason that this property represents accumulation of property in the corpus of the trust, which is left in trust more for convenience than because of any provision of the will, lends additional support to our conclusion. The argument also could be made that the business which was left to the trustees to carry on was the business of renting real estate in Sioux County, and the personal property of the trust located in that county where that business is carried on would be the proper situs for taxation.

We do not have a copy of the trust instrument, but you state that the trustee's duty was to collect the rent and income from the real estate and pay it over to the spouse. We are inclined to agree with your conclusion that the widow was probably more than the mere beneficial owner of these accumulated rentals, and under all of the facts it would seem to us that the proper place to tax the property in question would be Sioux County.

TAXATION: COMPROMISE: The following opinion modifies opinion to Executive Council under date of October 19,1939. The council would have the right to compromise taxes already paid under provisions of Section 288 upon proper report and opinion of the attorney general's office. (Sec. 288.)

April 23, 1940. *Mr. Berry F. Halden, Secretary, Executive Council:* Under dates of October 11, 1939, and October 19, 1939, this office rendered opinions relative to your right to compromise or cancel tax claims due the State of Iowa.

In those opinions it was held, first, that inheritance tax claims could not be compromised under Section 288 of the 1935 Code for there is a specific compromise statute for inheritance tax. (See attorney general's opinion of October 11, 1939.)

We also held that Section 288 did not give to the Executive Council the right to order refunds of taxes already paid. (See attorney general's opinion of October 19, 1939.)

In this last opinion we also ruled that Section 288 did not give to the Executive Council the right to cancel an unpaid use tax assessment, and it is this ruling that we now wish to modify, at least to the extent of holding that the Executive Council would have the right to compromise and settle such a tax claim under the provisions of Section 288, above, upon proper report and opinion of the attorney general's office.

TAXATION: EXEMPTION: GOVERNMENT LANDS: Government land purchased from the state in 1938 would be exempt from taxation in the year 1938. Such property cannot be assessed for taxation until 1939 for the taxes that will be payable in 1940.

April 23, 1940. *Mr. Weston E. Jones, County Attorney, Charles City, Iowa:* Receipt is acknowledged of your request for an opinion upon the following situation:

"Certain land owned by the state of Iowa was purchased by 'E' on January 3, 1938 and the deed recorded in the office of the county recorder of Floyd county on January 28, 1938. The assessor assessed this land on April 1, 1938 against 'E' and levy was made on this assessment in September of 1938. The question is whether, under the provisions of Section 6944 Paragraph 18 of the 1939 Code, such land was assessable for taxation during the year 1938."

Paragraph 18 of Section 6944 provides as follows:

"6944. *Exemptions.* The following classes of property shall not be taxed:
* * *

18. *Government Lands.* Government lands entered and located, or lands purchased from this state, for the year in which entry, location, or purchase is made."

It will be noted from the above that the exemption from taxation extends to "government lands * * * purchased from this State * * * for the year in which * * * purchase is made." If the exemption extends to the property for the year in which the purchase is made, and under the facts stated in your question that purchase was made in the year 1938, then the land is exempt from taxation for the year 1938. It is true that the assessor in making the assessment before April 1st is assessing for taxes that will not be paid until 1939, but, nevertheless, it is the 1938 tax assessment that he is making. As we read this exemption statute, it is an exemption from taxes for a certain year, namely, the year of purchase. This means that the property is exempt from taxes for the year 1938, which taxes would be payable in 1939, and this property cannot be assessed for taxation until 1939 for the taxes that will be payable in 1940.

REGISTRATION: ELECTIONS: VOTING: Primary election not special election under Section 691, and registration not required, in cities under 125,000 or in cities where permanent registration has not been adopted. But in cities over 125,000 registration is required to vote at primary election whether city or state-wide. In primary election, person not previously registered in precinct may vote there if that is his residence. Voter must be resident of county for 60 days and state six months or he is disqualified from voting at all.

April 23, 1940. *Mr. Charles L. Johnston, County Attorney, Centerville, Iowa:* This is in answer to your letter of the 20th inst. wherein you ask the opinion of this office relative to the following legal questions:

"1. Is a primary election a special election within the meaning of section 691 of the 1939 Code, and, if so, is it mandatory that the registers meet at the times required by said Section 691?

"2. In the event that the primary election is held not to be a special election within the meaning of Section 691, and therefore the registers not being required to meet prior to said election, then and in that event, is a resident of a certain precinct entitled to vote at the primary election if he is not registered in that precinct? In other words, would John Doe be entitled to vote in Precinct A if he were a legal resident of that precinct, but had never registered therein?

"3. Where a voter is duly registered under the provisions of Chapter 39 of the 1939 Code in Precinct A, and five days prior to a general election moves to Precinct B, in which precinct is he entitled to vote?

"4. Last year, at several voting precincts in this county, we had considerable difficulty as to the matter of challenged votes and what should be done with the ballots when a voter was challenged. Section 798 provides the oath that shall be administered to the voter where he is challenged. Section 799 provides that the judges shall endorse his initials on said ballot, but does not state what disposition shall be made of the voter who has been challenged and who has taken the oath and voted other than depositing the ballot in the ballot box. The question then arises, in the event of a contest, and if it were necessary to

show that Voter A was not entitled to vote, and if the same should be shown, how would it be determined which of the ballots in the ballot box was that of Voter A?"

Answering your first question, we are of the opinion that a primary election is not a special election within the meaning of Section 691 of the 1939 Code and that, therefore, registration is not required as a condition precedent to the right to vote at said election. We call your attention to the following secions whitch we deem o be pertinent:

"566. *Voter confined to party ticket.* The elector shall be allowed to vote for candidates for nomination on the ballot of the party with which he is registered as affiliated, and shall receive no other ballot. The voter shall return the ballot, folded, to one of the judges who shall deposit it in the ballot box.

"568. *Records of party affiliation.* Prior to all primary elections, the county auditor shall, for each precinct, prepare two alphabetically arranged lists of all voters, with their party affiliation, as shown by the poll books of the last preceding primary election, and deliver the same to the judges at least one day prior to each primary election. All such lists shall, with the poll books, be returned by the judges to the auditor.

"570. *New voters.* Any elector whose party affiliation has not, for any reason, been registered, or any elector who has changed his residence to another precinct, or a first voter or citizen of this state casting his first vote in this state, shall be entitled to vote at any primary election by declaring his party affiliation at the time of voting.

"677. *Registers.* The city council shall, for each precinct in the city and on or before the sixth Monday preceding each general election, appoint one suitable person from each of the two political parties which cast the greatest number of votes at the last general election, from three names presented by each chairman of the city central political committee of such parties, to be registers of voters.

"691. *Time of meeting of registers.* Registers shall meet:

"1. On the second Thursday prior to any general, city, or special election.

"2. On the last Saturday before any such election.

"3. On the day of such election."

A reading of these statutes, we believe, makes it quite clear that in cities where permanent registration is not required by law, that is, in towns under 125,000, or in such cities where such registration has not been adopted as by law required, registration is not required as a condition precedent to voting in primary elections. In Chapter 39.1, which deals with permanent registration, elections is defined as follows:

"For the purpose of this chapter, the word 'elections' shall be held to mean general, municipal, special, school, or primary elections, and shall include state, county, and municipal elections."

Thus it is clear that in cities over 125,000 registration is required as a condition precedent to voting at a primary election whether that be the city, primary of the state-wide primary. Under Chapter 39, which contains the general provisions with reference to registration of voters, an election is not thus defined and nothing contained therein, so it seems to us, in any manner indicates that the legislature intended that elections for which registration is required included the primary. We reach the conclusion, therefore, as to your question No. 1, that if, in your county, there is no city having permanent registration, a person may lawfully and legally vote in the primary election without registering.

Your question No. 2 is answered, we believe, by Section 570 which we have set out above. We hold that A, although not previously registered in the precinct, may vote therein, providing that he is otherwise qualified, that is,

he must have been a resident of the state six (6) months and of the county sixty (60) days as provided by the Constitution. See Constitution of the State of Iowa, Article II, Section 1. We believe that the provision with reference to the ten (10) day residence in the precinct applies only to city elections. See Sections 5628, Code of Iowa, 1939.

With reference to question No. 3, have to say that so far as the primary election is concerned, it is our opinion that if the person desiring to vote in the primary has been a resident of the state six (6) months and of the county sixty (60) days, he is qualified to vote. Manifestly, if he has not been a resident of the county for sixty (60) days he could not vote in the county of his residence nor in the county from whence he moved, although assuming he has been a resident of the state six (6) months. It is fundamental that a person has the right to vote only in the county of his residence and if the removal into the county has occurred within sixty (60) days next preceding the primary, then he is disqualified from voting at all. This often occurs. Section 1, Article II of the Constitution of the State of Iowa which we have above referred to, specifically provides that residence is essential to the exercise of the privilege of voting and as has been seen this residence must be for the requisite period, namely, residence in the state for six (6) months and in the county of his residence sixty (60) days. It is clear that he could not return to his former place of residence because therein he would be disqualified because of lack of residence.

BEER LICENSE AND PERMIT: CITIES AND TOWNS: ORDINANCES: The number of Class "B" Beer Permits issued by cities and towns may be limited by ordinance.

April 24, 1940. *Mr. Carroll Johnson, County Attorney, Clinton, Iowa:* This office is in receipt of your request for an opinion upon the following subject:

"May a city council adopt a valid ordinance that would limit the number of Class "B" beer permits to the number as provided by Section 1921.129, but further providing that the limitation shall not apply to present license holders nor to the purchasers of the businesses of present license holders?"

Section 1921.129 of the 1939 Code provides as follows:

"1921.129 *Power of municipalities* * * * Cities and towns * * * are * * * empowered to adopt ordinances providing for the limitation of Class 'B' permits as follows:

"Allowing only one Class 'B' permit to be issued * * * for each five hundred population, or fractional part thereof, up to twenty-five hundred, and allowing only one additional permit for each seven hundred fifty population, or fractional part thereof, over and above twenty-five hundred * * *."

It would appear from the above and the other statutes giving to cities and towns the power to issue permits that the legislature intended that the number of permits to be issued in any one town or city could be limited by ordinance with, however, a minimum restriction on this power to limit. In other words, the legislature sought to prevent local option by compelling the city or town to issue a certain minimum number of permits upon proper application therefor, but beyond that minimum the number to be issued could be the subject of a local ordinance.

No person has any vested right to engage or carry on the business of selling beer. The power to limit the number of permits in the field beyond the minimum, as outlined in the above statute, has been delegated to the cities

and towns. The proposed ordinance would, we feel, be a lawful exercise of the police power of the state which has been delegated by the legislature to the cities and towns and such an ordinance as proposed would be valid and legal.

As authority for our position we cite 11 *American Jurisprudence* 1050; *Columbus City vs. Cutcomb*, 61 Iowa 672; *Babbitt vs. Alger, et al.*, 160 Iowa 361; and 16 *Corpus Juris Secundum* 648.

TAXATION: PERSONAL PROPERTY: A purchaser of personal property has no personal liability for the tax assessed against the property transferred to him by the owner on January 1.

April 26, 1940. *Mr. Clarence A. Kading, County Attorney, Knoxville, Iowa:* Receipt is acknowledged of your request for an opinion upon the following question:

"During the summer and fall of 1939 'A' accumulated a car load of steers which he placed in a feed lot on his farm and prepared for market. During the early morning of January 1, 1940, these steers were driven into town, loaded and consigned to the National Livestock Commission Company, Chicago, Illinois. The train left for Chicago during the forenoon of January 1, and the cattle were accompanied by the owner. The train crossed into Illinois sometime during the late afternoon of January 1 and arrived in Chicago around midnight. The cattle were unloaded at the stock yard sometime after midnight and were sold by the commission men on the following day, which was January 2.

"Should these steers be assessed to 'A' as personal property under that part of Section 6959 which is 'property shall be taxed each year, and personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January?' "

We have been unable to find any direct authority bearing upon the question involved. Section 6959 of the 1939 Code provides that personal property shall be listed and assessed in the name of the owner thereof on the first day of January. Section 6956 provides that the owner of property subject to taxation must list the same with the assessor, and the assessment roll form that follows Section 7115 has thereon the date of January 1st.

Under the statement of facts here, "A" was the owner of the cattle on January 1st. These cattle were subject to taxation. As such an owner, "A" would be compelled to list them for the assessment of the tax. In the statement of your question you do not specifically state that "A" parted with the title to the cattle at any time during the day, but you state they were sold by the commission man on January 2nd. However, in the further discussion of your problem you discuss the question as if there were a change of ownership during the day of January 1st, so we will assume that there was a change of ownership when the cattle were loaded and consigned to the National Livestock Commission Company during the forenoon of January 1, 1940.

In any event, "A" was the owner of the cattle for the first period of time that elapsed after December 31, 1939, and as we have pointed out above, it was his duty as the owner on January 1st to list this property for assessment. It is our opinion that this ownership after December 31, 1939, fixes his liability for the personal property tax. We confess that this is largely a rule of reason as we are not able to find specific authority for our position. Some authority is contained in the real estate statutes which specifically provide that as between vendor and purchaser, such liens shall attach to real estate

"on and after the thirty-first day of December in each year." See Section 7204 of the 1939 Code. Some further authority for our position is contained in the case of *Larson vs. Hamilton County*, 123 Iowa 485. In that case a stock of goods was sold after it had been assessed but before the taxes were levied, and the court there said:

"The theory of the statute seems to be that such property is so far permanent in character that, in the matter of taxation, it may be treated like real estate."

The court also in that case pointed out the statute with regard to the lien of real estate taxes attaching after the 31st day of December in each year.

Furher discussing the statutes the court held that the stock of goods and merchandise could be subjected to the tax in the hands of the purchaser, but that this purchaser was not personally liable for the tax, and the purchaser's land could not be subjected to the payment of this tax. The court stated:

"The taxes, however, are those of the owner of the stock January 1 previous, and it is his duty to pay them. Section 1404, Code. They never become the taxes of the purchaser. He merely acquires the property subject to the lien and the right of the treasurer to enforce collection against it. He is under no obligation to pay the vendor's taxes, save for the purpose of discharging the lien. The legislature could not have contemplated the collecting of another's taxes from him save by the specific enforcement of such lien against the property."

Of course the above case can be distinguished on the facts in that there the transfer took place long after January 1st, but the court does draw an analogy from the real estate statutes providing for the attachment of the lien after December 31st and the court does hold that the purchaser has no personal liability for the tax assessed against the property transferred to him by the owner on January 1st.

We believe that a reasonable application of the statutes rendering the January 1st owner liable for the tax would subject "A," the first owner on January 1st, personally liable for the personal tax on the property.

NOMINATION: COUNTY SUPERVISORS: CANDIDATE: A candidate for county supervisor need not receive 35 per cent in order to be nominated in a county divided into supervisor districts. Section 581, Code, 1939 governs.

May 2, 1940. *Mr. George H. Struble, County Attorney, Toledo, Iowa:* This is in answer to your letter of the 29th ult., wherein you ask the opinion of this department on the following legal question:

"Must a candidate for county supervisor receive 35 per cent in order to be nominated in a county divided into supervisor districts, as by law provided?"

Our answer to this is in the negative. We think that Section 581, Code of Iowa, 1939, governs. This section reads as follows:

"The candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as the candidate or candidates of his party for such office, except that no candidate whose name is not printed on the official primary ballot, who receives less than five per cent of the votes cast in such subdivision for governor on the party ticket with which he affiliates, at the last general election, nor less that five votes, shall be declared to have been nominated to any such office."

STATE BOARD OF SOCIAL WELFARE: EMERGENCY RELIEF: LEGAL SETTLEMENT: Notice to depart served on family by Webster county before they had lived there one year, therefore legal settlement not Webster county.

Inasmuch as Webster county officials acted without authority in sending family to Wisconsin, family should be returned to Webster county and then ordered removed to original residence in Rice county, Minnesota.

May 3, 1940. *Mr. King R. Palmer, Chairman, State Board of Social Welfare, Des Moines, Iowa:* This will acknowledge receipt of your letter of May 2nd, wherein you ask our opinion on the following question concerning legal settlement:

"A question has arisen regarding the legal settlement of a mother and six children.

"The family was on relief in Rice county, Minnesota from June, 1934 until March, 1936. They then moved to Webster county, Iowa, and a notice to depart was served by Webster county on September 3, 1936. Rice county, Minnesota was contacted by letter and telegram, but Rice county refused to accept the family or authorize their return because they had 'lost their legal residence by virtue of the fact they had been gone over a year and their intent when leaving was to establish residence in another state.' Temporary aid was given the family by Webster county. The mother requested that she be allowed to make Shell Lake, Wisconsin her home and she was therefore sent to Shell Lake, Wisconsin, by Webster county, Webster county giving sixty dollars per month (ten dollars per month for each child) in the absence of any other plan for aid for dependent children. This amount of sixty dollars per month was continued by Webster county for one year, at which time payments were stopped. At no time was any Wisconsin official contacted. After payments were stopped by Webster county, the family applied for relief in Wisconsin and it was refused and Wisconsin officials immediately started court action to have the family returned to Iowa. The court did so order the family returned. At the present time, the family is in Wisconsin and we would like to have your opinion as to the legal settlement of said family and if the legal settlement is not in Webster county, Iowa, what, if anything, should be done by Webster county?"

From the facts as stated in your letter, it is apparent that a notice to depart was served by Webster County upon the family before the family had lived in Webster County one year. It is, therefore, our opinion that the legal settlement of said family is not in Webster County.

However, it is also apparent from the facts that the Webster County officials acted without any authority in sending the family to Wisconsin. It is, therefore, our further opinion that the family should be returned to Webster County and then an action should be brought in Webster County ordering the removal of the family back to its original residence in Rice County, Minnesota.

FARM SECURITY ADMINISTRATION: PUBLIC FUNDS: LEGAL SETTLEMENT: Section 3828.088, subsection 3, 1939 Code: If Farm Security Administration funds are given to a farmer and mortgage taken to secure repayment, then those funds are not public funds. If funds granted outright to farmer with no provision for repayment, then those funds are public funds. It is necessary to determine whether farm contracts to repay or it is an outright grant before possible to determine legal settlement.

May 3, 1940. *Mr. King R. Palmer, Chairman, State Board of Social Welfare, Des Moines, Iowa.* This will acknowledge receipt of your letter of May 1st, regarding the following legal question:

"A question has arisen whether or not the funds available to farmers from the Farm Security Administration are public funds within the meaning of Section 3828.088, subsection 3, 1939 Code of Iowa.

"May we please have your opinion as to whether or not these funds are public funds so as to prevent the acquisition of legal settlement of a farmer who has received such funds."

The Farm Security Administration funds are funds loaned to farmers to buy live stock and machinery and in some instances, farms. The mortgage is taken by the Farm Security Administration to cover all loans made. In addition, there are some instances in which outright grants are made to farmers to cover such contingencies as emergency operations, etc. In such cases, there is no provision in the law for repayment of these outright grants.

It is our opinion that if Farm Security Administration funds are given to a farmer and a mortgage taken to secure repayment, then those funds are not public funds within the meaning of Section 3828.088, subsection 3, 1939 Code of Iowa.

If, on the other hand, Farm Security Administration funds are granted outright to a farmer, with no provision made for repayment of same, then those funds are public funds within the meaning of the above named section of the Iowa Code. It follows that it is necessary in all cases to determine whether a farmer is receiving funds which he contracts to repay or funds which are an outright grant before it is possible to determine whether or not a legal settlement can be acquired.

COUNTY RECORDER: FEE FOR INDEXING AND RELEASING: Recorder is without authority to charge 25 cents for indexing and releasing each of the leases incorporated in a single instrument. The recorder may charge per Subsections 1 and 2 of Section 5177, Code, 1939.

May 3, 1940. *The Honorable Chet B. Akers, Auditor of State. Attention: L. I. Truax:* This will acknowledge receipt of your letter of the 22nd ult., wherein you request the opinion of this department relative to the following question:

"The question on which we are not clear is whether in addition to the statutory fee allowed the county recorder as provided for in Section 5177 of the 1939 Code, an additional fee of 25 cents may be charged by the recorder for the indexing and the releasing of each lease which is incorporated in the instruments. (Instruments referred to are release of oil and gas leases, incorporating the description of 83 leases.)

"It is our observation that the recording fee to be allowed the recorder under Section 5177 would be $4.10. If the recorder is entitled to an additional 25 cent fee for each lease, he would be entitled to 25 cents for 83 leases, or $20.75 in addition to the $4.10 for filing and recording the enclosed instruments."

It is our opinion that the recorder is without authority to charge and receive 25 cents for indexing and releasing each of the leases described in the instruments submitted with your letter. One of these provided "That G. W. Woodward does hereby release, remise and relinquish unto the respective lessor named therein (whether one or more), his or their successors and assigns, all his rights, title and interest in and to the following oil and gas leases covering lands located in Adams County, Iowa, to wit: * * *." Then follows the descriptions of 83 different oil and gas leases. This release is properly signed and acknowledged.

We are of the opinion that the recorder is not entitled to charge 25 cents for indexing and releasing each lease.

Section 5177, Code of Iowa, 1939, provides:

"The recorder shall charge and collect the following fees:

"1. For recording each instrument containing 400 words or less, 50 cents.

"2. For every additional hundred words or fraction thereof, ten cents.

"3. For every marginal assignment or release (except those made by the clerk of the district court) 25 cents."

Subsection 3 of the above section is the only statute we can find that authorizes the charge of 25 cents for assignments or releases. This subsection, of course, has no application to the facts in this case, for the reason that the release is not marginal. The release is effected by the filing of an instrument for which the recorder may, under subsection 1 of the above section, charge 50 cents and under subsection 2 may charge 10 cents for each additional 100 words. This, as you have indicated, would entitle the recorder to collect $4.10. In our opinion this is the only fee she may legally collect.

It is fundamental, of course, that only such fees as are expressly authorized may be charged by any public officer. We find no statute authorizing the charge of 25 cents for indexing and releasing each individual release described in a general release instrument.

SHERIFF: FEES: TAXES—COLLECTION OF: Section 7224 has no application to collection of income, corporation and sales tax, but deals only with collection of ordinary taxes. Therefore sheriff has no authority to retain fees for services rendered in connection with income, corporation and sales tax.

May 3, 1940. *The Honorable Chet B. Akers, Auditor of State. Attention: L. I. Truax:* This is in answer to your letter of the 22nd ult., wherein you ask the opinion of this department relative to the following question:

"Our examiner, who is making an audit and examination of the Polk county officers' accounts, has advised us that the sheriff of Polk county has collected and retained approximately $240.00 under Section 7224 of the 1939 Code, which is in addition to the five per cent provided for in said section. These fees were collected on cases instituted by the State Tax Commission for the collection of income tax under Section 6943.058 of the 1939 Code.

"The question upon which we desire your answer is whether or not the sheriff should account for these fees and pay them over to the county treasurer as he does other office fees, or if he is entitled to retain these fees as his personal property."

Section 6943.058, Code of Iowa, 1939, deals with the lien of income, corporation, and sales tax, makes provision for the collection thereof and authorizes certain actions to be brought for the purpose of effecting collection. Among others the following provision is contained in said section:

"The commission shall, substantially as provided in Sections 7189 and 7189.1, proceed to collect all taxes and/or penalties as soon as practicable after the same become delinquent, except that no property of the taxpayer shall be exempt from the payment of said tax."

Section 7189, Code of Iowa, 1939, provides:

"The treasurer shall collect all delinquent taxes by distress or sale of any personal property belonging to the person to whom said taxes are assessed, and not exempt from taxation, or any real or personal property upon which they are a lien, but he shall continue to receive the same until collected, and any owner or claimant of any real estate advertised for sale may pay to the county treasurer, at any time before the sale thereof, the taxes due thereon, with accrued penalties, interest, and costs to the time of payment."

Section 7189.1, Code of Iowa, 1939, provides:

"Distress warrants issued by the county treasurer for the collection of delinquent personal taxes shall be substantially in the following form:

"State of Iowa,)
ss.
".....County)

"To the sheriff or any constable or tax collector of————————County, Iowa."

Then follows the remainder of the form of distress warrant.

Section 7224, Code of Iowa, 1939, provides:

"In the discharge of his duties as collector, should it become necessary to make the delinquent taxes by distress and sale, or should no collector be appointed, or should the collector fail to institute proceedings to collect said delinquent taxes, the treasurer shall place the same in the hands of the sheriff, or a constable, who shall proceed to collect the same, and either shall be entitled to receive the same compensation, in addition to the five per cent, as constables are entitled to receive for the sale of property on execution."

It is our opinion that Section 6943.058, in referring to Sections 7189 and 7189.1, simply provides the procedure by which delinquent income, corporation and sales tax may be collected. Instead of setting out specifically the means and method whereby such collection is to be effected, reference is made to Section 7189, which deals with distress and sale in order to effect collection of ordinary taxes, and Section 7189.1, which sets out the form of the distress warrant to be used to enforce collection.

It is clear, so it seems to us, that the county treasurer has no duty whatsoever in reference to the collection of income, corporation and sales tax. This duty devolves upon the tax commission. Note the following language in Section 6943.058: "The commission shall, substantially as provided in sections 7189 and 7189.1, proceed to collect all taxes * * *." As we construe this section, instead of the distress warrant being issued by the county treasurer the same is to be issued by the tax commission. As we have said, Sections 7189 and 7189.1 are referred to merely for convenience and should not be construed as placing any duty upon the county treasurer in reference to the collection of income, corporation and sales tax.

With what we have said as a premise, we now come to the consideration of Section 7224. As to whether or not under this section the sheriff would be entitled to retain fees for the collection of ordinary taxes, we deem it unnecessary to decide. It is clear, however, that this section furnishes no authority for retaining fees received for the collection of income, sales or corporation taxes. Nowhere in Chapter 329.3, which is the chapter which deals with income, corporation and sales tax, is there any provision authorizing the payment to the sheriff of fees for effecting collection of such taxes.

Section 7224 deals with the collection of ordinary taxes and has no application, whatsoever, as we view it, to the chapter dealing with income, corporation, and sales tax. This section, therefore, we believe, furnishes no authority for the retention of fees for services rendered in the collection of income, corporation, and sales tax.

It is fundamental that officers may retain only such fees as are expressly authorized. All other fees must be paid to the county treasurer.

Section 5192, Code of Iowa, 1939, provides:

"The amounts allowed by law for mileage and for actual, necessary expenses paid by him, and for board, washing, and care of prisoners, may be retained by him in addition to his salary."

It is clear that under this section the sheriff is not entitled to receive any of the fees enumerated in Section 5191. We have called your attention to these two sections to indicate that as a general rule the sheriff retains only such fees as he is expressly authorized to retain by statute.

We find no authority for either collecting or retaining any fees collected for effecting collection of income, sales and corporation tax.

We reach the conclusion, therefore, that the sheriff of Polk county, Iowa, may not lawfully retain the $240.00 referred to in your letter. It is our express holding that Section 7224 has no application whatsoever to the collection of income sales and corporation taxes.

COUNTY ATTORNEY: SCHOOL BOARD: LEGAL SERVICES: The county attorney is under obligation to give advice or opinion in writing to school boards, but under no legal duty to defend the school corporation in a suit. County attorney may charge for legal services rendered when hired by school board to defend it.

May 4, 1940. *Mr. C. Morse Hoorneman, County Attorney, Le Mars, Iowa:* This is in answer to your letter of the 19th ult., asking our opinion on the following legal question:

"The facts are briefly these, as we understand them: You acted as attorney for the Hinton School Board, defending that board in an action that was brought by an applicant for a job as bus driver. This individual brought a mandamas action to force the school board to hire him, said action being based on the soldiers preference law. This resulted in a dismissal of the mandamus action.

"The question now is as to whether the Hinton School Board may legally pay you for your services."

It is our opinion that it is not your duty to defend an action brought against any school corporation.

Section 5180, Code of Iowa, 1939, provides:

"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.*

"7. Give advice or his opinion in writing, without compensation, to the board of supervisors and other county officers and to school and township officers, when requested so to do by such board or officer, upon all matters in which the state, county school, or township is interested, or relating to the duty of the board or officer in which the state, county, school, or township may have an interest; * * *."

It will thus be noted that with reference to school officers the only duty of the county attorney is to give advice or his opinion in writing. Under Subsection 6 it appears that only when the county or some county officer is a party must the county attorney "commence, prosecute, and defend all actions and proceedings."

We are, therefore, of the opinion that you were under no legal duty to defend the school corporation. If they saw fit to hire you they have a legal right to pay you for your services.

BOARD OF SUPERVISORS: FEDERAL OFFICES: FARM CREDIT ETC. OFFICES: Board of supervisors has no authority to expend county funds for clerical help performed by persons not employed by the county or provide free office space for Farm Credit and Security offices.

May 4, 1940. *Honorable Chet B. Akers, Auditor of State. Attention: L. I. Truax:* Received your letter of the 18th ult., requesting the opinion of this department relative to the following legal question:

"Crawford county furnishes office space in the court house for the Farm Credit and Farm Security offices, and in addition thereto, during the year 1939, there was expended $1,055.00 of county funds for clerical help in these offices.

"The federal budget for expense of these offices are fixed and limited, and

it is for this reason and in order to get the maximum amount of relief for Crawford county, through these offices, that the board of supervisors have authorized the expenditure from county funds as above stated.

"By this set up the relief load of Crawford county no doubt has been reduced a considerable amount by grants and loans made to residents of this county.

"Under these circumstances may the board of supervisors legally expend county funds for clerical help in the Farm Credit and Farm Security offices and provide free office space for these offices?"

Clearly the board of supervisors has no authority to expend county funds for the purpose indicated in your letter, notwithstanding the fact that it may actually be a saving to the taxpayers of Crawford County.

It is fundamental that municipal corporations have only such powers as are expressly given them and such others as may be reasonably implied from the express grant. There is no statute authorizing county funds for clerical help performed by persons who are not employees of the county, except where such expenditure has been expressly authorized. No statute has been passed authorizing the expenditure for the employees referred to in your letter.

TAXATION: REAL ESTATE: ASSESSMENT: Real estate shall, in real estate assessing years, be assessed as of its value on the first day of January.

May 8, 1940. *Mr. Clarence A. Kading, County Attorney, Knoxville, Iowa:* We are in receipt of your letter of April 18 enclosing an opinion which you have prepared for the county auditor of your county upon the following question:

"Should an assessor in a real estate assessment year assess real estate as of its value on the first day of January, or as of the day on which the assessment is actually taken and placed on the roll?"

We are of the opinion that the various sections of the statutes relating to this subject must be construed in their relationship to each other. You rightly conclude that personal property shall be assessed as of January 1. Section 6959 of the 1939 Code provides for the listing of property both personal and real estate. Said section provides that personal property shall be listed and assessed each year in the name of the owner thereof on the first day of January. This section of the statute does not expressly state that real estate is to be listed and assessed on the first day of January in the years in which real estate is assessed, which the law provides shall be in the year 1933 and every four years thereafter, but other statutes indicate that it was the intention to value real estate as of January 1.

For instance, we find that real estate belonging to public utilities which is assessed by the State Tax Commission shall be assessed by that commission upon a statement filed by the utility showing in detail the number of miles of railway owned, operated and leased within and without the State of Iowa, together with other detailed information regarding property and real estate holdings as of the close of the year ending December 31. See Section 7046 Code of 1939.

The same is true with regard to pipe line companies, for you will note in Section 7103.13 provision is there made for a detailed statement of the company for the year ending December 31, and it is this statement that becomes the basis for the assessment.

Section 7120 of the 1939 Code provides that the county auditor shall furnish each assessor a plat book in which shall be shown all of the lands and lots in

his assessment district, together with the number of acres and the amount to be deducted for railroad right-of-way and for roads and other purposes and with the name of the owner. As the assessor enters upon his duties immediately after the second Monday of January of each year, then clearly this plat or assessor's book must be prepared by the county auditor prior to the beginning of the assessor's work.

Section 7115 of the 1939 Code prescribes the form of the assessor's roll which is to be used in listing property. It appears to be significant that the roll is devised for the listing of both personal property and real estate on the same page. Assessor's Roll Form No. 2 which is also prescribed in said section of the statute provides that the listing of moneys and credits shall be shown as of January 1. It would thus seem that the intention of the legislature was that all property should be assessed as of the same date as the same is listed, to wit, January 1.

We do not feel that it was ever the intent of the legislature that the value of the property for tax assessment purposes should depend upon the date when the assessor sees fit to view the property for assessment purpose. We think the rule of the January 1 assessment valuation has been universally followed in the State of Iowa. No hardship would result from this rule, for the person who has improved his property after January 1 has presumably been subjected to the money and credit tax on the money he had on hand to pay for the improvement on January 1. To hold otherwise might well subject both the money for the improvement and the improvement itself to tax for the same year.

We do not believe *Sully vs. Poorbaugh*, 45 Iowa 453 is authority against our position here, and we are therefore of the opinion that real estate shall, in real estate assessing years, be assessed as of its value on the first day of January.

OVERSEER OF THE POOR: LEGAL SETTLEMENT: NOTICE TO DEPART: The overseer of the poor has power to order notices to depart to be served upon such persons as he shall determine have not a legal settlement in said county, and it is sufficient if he merely signs the notice and files such notice with return of service thereon.

May 13, 1940. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa. Attention: Mr. Irish:* This is in answer to your letter on the 8th inst. wherein you ask the opinion of this office relative to the following legal question. The facts are these:

"In your county an overseer of the poor for the entire county has been appointed by your board of supervisors, subject to the provisions of Section 3828.098, Code of Iowa, 1939. The overseer of the poor has served notices to depart required by Section 3828.092 without any resolution having been passed either by said overseer of the poor, the board of supervisors or the township trustees of the various townships comprising your county. The overseer of the poor when he discovers that a certain family residing within the county has not a legal settlement therein, signs the customary notice to depart and causes the same to be served. The person serving the notice endorses thereon what is commonly denominated as the "return of service" which shows upon whom the notice has been served and also the time and place of service as required by law. This notice when thus endorsed, is duly filed either in the office of the overseer of the poor or the county auditor. The question is whether a notice served under the facts and circumstances outlined above is effectual in preventing legal settlement from being obtained by the persons upon whom served."

We are of the opinion that the above notice is valid and that service thereof

under the circumstances outlined above has the effect of preventing legal settlement from being acquired by the persons upon whom the same is served. Section 3828.092 provides:

"*Notice to depart.* Persons coming into the state, or going from one county to another, who are county charges or are likely to become such, may be prevented from acquiring a settlement by the authorities of the county, township, or city in which such persons are found warning them to depart therefrom. After such warning, such persons cannot acquire a settlement except by the requisite residence of one year without further warning."

Section 3828.093 provides:

"*Service of notice.* Such warning shall be in writing, and may be served upon the order of the trustees of the township, or of the board of supervisors, by any person; and such person shall make a return of his doings thereon to the board of supervisors, which, if not made by a sworn officer, must be verified by affidavit.

"In the event such person cannot be found within the county, any person attempting to make such service shall file with the board of supervisors an affidavit that diligent search has been made and that such persons cannot be found within the county and the same shall constitute sufficient service of warning as provided herein."

Section 3828.097 provides:

"*Relief by trustees.* The township trustees of each township, subject to general rules that may be adopted by the board of supervisors, shall provide for the relief of such poor persons in their respective townships as should not, in their judgment, be sent to the county home."

Section 3828.098 provides:

"*Overseer of poor.* The board of supervisors in any county in the state may appoint an overseer of the poor for any part, or all of the county, who shall have within said county, or any part thereof, all the powers and duties conferred by this chapter on the township trustees * * *."

It will be observed that Section 3828.098 specifically provides that the board of supervisors may appoint an overseer of the poor who shall have within said county or any part thereof, all the powers and duties conferred on the township trustees. It is clear, therefore, that the overseer of the poor is invested with the power to order notices to depart to be served upon such persons as he shall determine have not a legal settlement in said county. Section 3828.093 provides:

"Such warning * * * may be served upon the order of the trustees of the township, or of the board of supervisors, by any person; * * *."

The specific question is, of course, as to whether or not the overseer of the poor must cause a formal record of his order to be made or is it sufficient if he merely signed the notice and filed such notice with the return of service thereon. We think that this is a sufficient compliance with the statute. As supporting our view, see *Bremer County vs. Buchanan County*, 61 Iowa 624. In that case, after a full discussion of the law relating to the service of notices to depart, the court finally said in the last paragraph of the opinion:

"By Section 1356 of the Code the warning to depart is required to be in writing, and may be served upon the order of the trustees of the township or of the board of supervisors. In this case, the trustees themselves signed the warning and it seems to us this is a sufficient order."

We reach the conclusion, therefore, that notice to depart in the posited case having been signed by the overseer of the poor, caused to be served and such notice with the return of service filed as required by law, that this is a substantial and sufficient compliance with the statute and that such notice is valid

and effectual in preventing the acquisition of legal settlement by the persons upon whom served.

Insofar as any previous opinion rendered by this department may be in conflict herewith, the same is withdrawn.

COUNTY AUDITOR: WARRANTS: There is no statute authorizing the issuance by county auditor of one warrant to cover a number of small ones held by the bank at five per cent interest, as it would be in the nature of the refunding of outstanding indebtedness.

May 14, 1940. *Mr. Donald P. Chehock, County Attorney, Osage, Iowa:* This is in answer to your letter of the 10th inst., wherein you ask the opinion of this department on the following question. You say:

"The maintenance and construction road funds are quite often short and for that reason when warrants of various denominations, and many of them of small amounts, are issued, the payees of the warrants take them to the banks and the banks cash them and then after accumulating a number of them, the banks take them to the county treasurer, who dates and signs them and marks them "not paid for want of funds," after which they draw a five per cent interest.

"If the amount that the banks have accumulated was in the form of one warrant rather than a lot of small ones, the banks would be willing to carry them at a much lower rate of interest, or at around one percent rather than five per cent. For that reason the county auditor was wondering as to whether or not he would have a legal right to have the banks bring the warrants of various denominations to him and that he then reissue a warrant for the total amount of all the warrants brought to him and the county treasurer then would mark this large warrant "not paid for want of funds" and thereafter it would draw one per cent interest. The county auditor would then note in his register, opposite the small warrants that he would then have in his possession, the fact that the other large warrant had been re-issued in place of the small warrants; and, opposite the large warrant a notice would be made that it was issued in lieu of the small warrants.

"This procedure would save the county considerable money, although it would, of course, mean more bookkeeping on the part of the county auditor. If this procedure is permissible, the county auditor would prefer to do it, since the savings to the county would be considerable."

There is no statute authorizing the proposed plan and we are, therefore, of the opinion that the issuance of the larger warrant as proposed would be illegal. It would be in the nature of the refunding of outstanding indebtedness. There is no authority for such procedure. It would be desirable if it could be done but we believe the answer is that until the legislature has passed a statute authorizing the same, the auditor would have no authority to issue the proposed warrant.

STATE BOARD SOCIAL WELFARE: EMERGENCY RELIEF: FUNDS: BOARD OF SUPERVISORS: WPA: County funds may be used only for labor under Sec. 3828.071, or direct relief under Chapter 189.4 WPA project on which board of supervisors could require labor under Sec. 3828.071 are those of community-wide or county-wide nature. Administration authority cannot be delegated to city council by board of supervisors. WPA projects come within meaning of Subsection 2, Section 3828.68. State board may cooperate with WPA in continuation of WPA projects, including right and power of state board to furnish the material where emergency exists. Polk County is in need of state funds pursuant to Sec. 3828.068. Such funds could be for purchase of material used on WPA projects and Polk County could issue bonds to take care of direct relief.

May 15, 1940. *Mr. Francis J. Kuble, County Attorney, Des Moines Iowa:* This

will acknowledge receipt of your letter of May 3, relative to the following legal question. We quote in part from your letter:

"The recent case of Brunk vs. City of Des Moines held that the City of Des Moines had exceeded its five per cent constitutional limitation for the issuance of city bonds. This case arose from a contemplated issuance of a number of bonds to provide material involved in WPA work. It now becomes the duty of the county to carry on either by direct relief which is somewhat more expensive, or under the provisions of Chapter 189.3, 1939 Code, and more particularly, Section 3828.071. We would like to have your opinion as to whether or not the county, through the board of supervisors, could designate the city council of the City of Des Moines, such authority as it deems advisable for administration expediency.

"Des Moines, as you know, comprises two civil townships. We first want to know if the city council could be designated as they supersede the township trustees.

"Some of the projects that have heretofore been carried on by the city could be construed as community wide, for example, the Des Moines Municipal airport development. Others are within the city, but are strictly beneficial to only certain communities within the city.

"We also desire your opinion relative to the right we would have to obtain any aid from the State Department of Social Welfare that is contemplated in Chapter 189.3. As we construe Section 3828.071 and also Section 3828.099, the county can only provide money for the payment of labor and cannot provide the material with the WPA providing the labor. May we have your opinion as to whether or not the county may provide material? The county has yet approximately $3,000,000 under its five per cent constitutional limitation of indebtedness, but there is a contemplated issue of $550,000 in bonds for a public hospital."

For the purpose of this opinion, we quote Section 3828.071, 1939 Code of Iowa:

"3828.071. County supervisors to determine relief and work projects. The local county board of supervisors shall ascertain all necessary details concerning those seeking relief, shall determine the minimum amount of relief required for each such person or family, and shall ascertain which of such persons are employable.

"The board of supervisors may require that all employables contribute as many hours of his or her labor as that employable's requirements, as estimated by the board, will buy at the prevailing rate of compensation for that class of labor in that community.

"The board of supervisors may determine on what projects of county-wide or community-wide nature such relief labor may be used. It may, however, delegate to its political subdivisions such authority as it deems advisable for administrative expediency.

"To the board of supervisors is reserved all authority not expressly otherwise set out previously."

It will be noted from the above quoted section that the board of supervisors may require that all employables seeking relief must contribute labor at the prevailing wage scale for any relief advanced. However, the above quoted section provides in Paragraph 3 that the board of supervisors may determine on what projects of *county-wide* or *community-wide* nature *such* relief labor may be used. It thus appears that if the board of supervisors in its discretion required that labor be performed, that said labor can only be required on projects of community-wide or county-wide nature.

From your letter, it is also noted that many of the projects now in operation are not community-wide or county-wide. It is our opinion that the only projects upon which the board of supervisors could require labor under Section 3828.071 are those of a community-wide or county-wide nature.

You ask further if the board of supervisors could designate the administra-

tion authority to the city council of the City of Des Moines. The City of Des Moines is a municipal corporation within the territorial limits of Polk County. It is a separate and distinct corporation and it is our opinion that the administration of which you speak could not be delegated to the city council by the board of supervisors.

In answer to your question as to whether or not the county can provide materials for a continuation of WPA projects, we find no provision in the code which permits the county to expend any funds for such purpose. On the contrary, it is our opinion that county funds may be used only for labor under Section 3828.071, or direct relief as contemplated by Chapter 189.4, 1939 Code of Iowa.

We wish to call your attention to Section 3828.067, 1939 Code of Iowa, and Section 3828.068, 1939 Code of Iowa, which read as follows:

"3828.067. *Administration of emergency relief.* The state department of social welfare, in addition to all other powers and duties given it by law, shall be charged with the supervision and administration of all funds coming into the hands of the state now or hereafter provided for emergency relief.

"3828.068. *Powers and duties.* The state board shall have power to:

"1. Appoint such personnel as may be necessary for the efficient discharge of the duties imposed upon it in the administration of emergency relief, and to make such rules and regulations as it deems necessary or advisable covering its activities and those of the county boards.

"2. Join and co-operate with the government of the United States, or any of its appropriate agencies or instrumentalities, in any proper relief activity.

"3. Make such reports of budget estimates to the governor and to the general assembly as are required by law, or are necessary and proper to obtain appropriations of funds necessary for relief purposes and for all the purposes of this chapter.

"4. Determine the need for funds in the various counties of the state basing such determination upon the amount of money needed in the various counties to provide adequate relief, and upon the counties' financial inability to provide such relief from county funds. The state board may administer said funds belonging to the state within the various counties of the state to supplement local funds as needed.

"5. Make such reports, obtain and furnish such information from time to time as may be required by the governor, by the general assembly, or by any other proper office or agency, state or federal, and make an annual report of its activities."

It will be noted from Subsection 2 of Section 3828.068 above quoted, that the State Board of Social Welfare may join and co-operate with the government of the United States or any of its appropriate agencies or instrumentalities in any proper relief activities. It is our opinion that WPA projects are within the meaning of the above quoted subsection, and further, that the State Board of Social Welfare may join and co-operate with WPA officials in the continuation of WPA projects where the emergency exists. It is our further opinion that such joining and co-operation include the right and the power of the state board to furnish materials for WPA projects where the emergency exists. It is clear that an emergency exists in Polk County. The State Board of Social Welfare has already determined that Polk County is in need of state funds pursuant to Subsection 4 of the above quoted Section 3828.068. It is our opinion that such state funds which have been allocated to Polk County could be used by Polk County for the purchase of materials to be used in WPA projects and that Polk County could issue bonds to take care of its direct relief needs.

LEGAL SETTLEMENT: RESIDENCE: PRISONER: LEO MIKESH: Mikesh moved from Hardin to Black Hawk County and before living in Black Hawk one year he is removed to the penitentiary. Involuntary removal of Mikesh to the penitentiary would not have the effect of interrupting his residence in Black Hawk County. When the year expired without notice to depart, Mikesh and his family acquired a legal settlement in Black Hawk County.

May 22, 1940. *Mr. D. W. Dickinson, County Attorney, Eldora, Iowa:* This is in answer to your letter of the 13th inst., wherein you ask our opinion on the following legal question:

"Leo Mikesh was a resident and had a legal settlement in Hardin County. He had been such resident there for some eight years. He moved with his family to Waterloo, Black Hawk County, Iowa, on or about the 26th day of March, 1939. No notice to depart was served upon him or any member of his family. While living in Hardin County, Mikesh was convicted of bank robbery and was sentenced as by law provided. It was while the appeal from this conviction was pending that he moved from Hardin to Black Hawk County. The conviction having been affirmed and petition for rehearing having been denied, a procedendo as by law provided was issued and thereupon Mikesh was taken into custody and forthwith transferred to the penitentiary at Fort Madison. This occurred two weeks prior to the expiration of the requisite one year's residence in Black Hawk County.'

"The question is: Does Mikesh have a legal settlement in Black Hawk County or Hardin County?"

We are of the opinion that the legal settlement of Mikesh is clearly in Black Hawk County.

See *Washington County vs. Mahaska County*, 47 Iowa 57; *Fayette County vs. Bremer County*, 56 Iowa 516.

In the Mahaska County case the court, in substance held:

"A person choosing a residence while sane, and removing there, acquires a settlement as provided in this section, although he becomes insane and is removed to the hospital before the expiration of the year. Such removal to the hospital is not an interruption of his residence."

The holding of the Bremer County case is, in substance as follows:

"A person who is insane and helpless and does not voluntarily change his place of residence, but is a simple, passive subject without exercise of volition, does not acquire a settlement upon being removed from one county to another at the expense of the former."

It is our opinion that the involuntary removal of Mikesh to the penitentiary would not have the effect of interrupting his residence in Black Hawk County. Therefore, when a year expired without notice to depart, Mikesh and his family acquired a legal settlement in the last mentioned county. The principle of law announced in the two above cited cases, we believe, applies to the posited case. Certainly Mikesh, during the first two weeks of his incarceration in the penitentiary would not cease to be a resident of Black Hawk County, as that term is used in the statutes relating to the poor.

COUNTY AUDITOR: ELECTION CONTEST: CITY OFFICER: Even though election contest involves a city officer the auditor is, nevertheless, the clerk of the contest board.

May 23, 1940. *Mr. George H. Struble, County Attorney, Toledo, Iowa:* This is in answer to your letter of the 9th inst., wherein you ask the opinion of this department relative to the following legal question. You say:

"There is a city election contest in Gladbrook, Iowa. The county auditor here does not take my word for it that he shall be the clerk, consequently he has

asked me to have you send me an opinion on the matter. Will you kindly advise whether or not the county auditor shall or shall not be the clerk of the election contest in the city election contest?"

Section 5629, Code of Iowa, 1939, provides:

"A tie vote for any city or town office shall be determined as provided in the title on elections. The election of any person to a city or town office may be contested on the same grounds and in the same manner provided for contesting elections to county offices, so far as applicable. The mayor shall be the presiding officer of the court, but if his election is contested, the council shall select one of its members to act in his place."

Section 1022, Code of Iowa, 1939, provides:

"The county auditor shall be clerk of this court, and keep all papers, and record the proceedings in the election book, in manner similar to the record of the proceedings of the district court, but when the county auditor is a party, the court shall appoint a suitable person as clerk, whose appointment shall be recorded."

It is our opinion that even though the election contest involves a city officer the auditor is, nevertheless, the clerk of the contest board. We believe that *Jenkins vs. Furgeson*, 212 Iowa 640; 233 NW 741, supports the conclusion herein reached.

TAXATION: PERSONAL PROPERTY TAX: MOTOR VEHICLES: Registration under the provisions of Section 88 to 96, Chapter 134 of the Acts of the 47th General Assembly would be sufficient to render the private passenger automobiles exempt from personal property taxation.

May 23, 1940. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa. Attention: Mr. Jas. P. Irish:* Under date of January 17 we issued an opinion to your office holding in effect that stocks of private passenger motor vehicles which are registered under the provisions of Sections 88 to 96 of Chapter 134 Acts of the 47th General Assembly, but not otherwise registered, would not be exempt from personal property taxation under the provisions of Section 160 Chapter 134, Acts of the 47th General Assembly, as amended by Chapter 124 of the Acts of the 48th General Assembly.

Since that opinion was written, we have given further consideration to our holding, with special reference to the amendment of the said Section 160, Acts of the 48th General Assembly.

As the statute stood before the amendment of the 48th General Assembly the registration fees that were to be "in lieu of all taxes" did not include the registration fees of manufacturers and dealers but this was because of the specific prohibition in the statute, for the statute then stated that the registration fees "other than those of manufacturers and dealers" would be the registration fees intended.

The act of the 48th General Assembly in striking from Section 160 "other than those of manufacturers and dealers" signified an intention that the registration fees would now include those of manufacturers and dealers. To hold otherwise would be giving no effect to the act of the legislature in striking the above words out of the new statute.

Clearly, the words "other than those of manufacturers and dealers" were placed in the original Section 160 for the purpose of creating an exception to the general exemption contained therein and the act of the legislature in striking those words from the new statute in the Acts of the 48th General Assembly must indicate an intention to withdraw the exception from the

exemption, which in effect, extends the exemption to all "registration fees" provided in Chapter 134 of the Acts of the 47th General Assembly.

Because we feel that we did not give sufficient consideration to the amendment, and because of the reasoning herein, we now wish to reverse our opinion to you of January 17, 1940 and hold that such a registration under the provisions of Sections 88 to 96, Chapter 134 of the Acts of the 47th General Assembly would be sufficient to render the private passenger automobile exempt from personal property taxation.

LEGAL SETTLEMENT: MINOR: Minor who has acquired the status of an emancipated child, may acquire legal settlement in county after living there over one year without notice to depart.

May 28, 1940. *Mr. Carl V. Burbridge, County Attorney, Logan, Iowa:* This is in answer to your letter of the 14th inst., wherein you ask the opinion of this department relative to the following legal question. The pertinent facts are as follows:

"A couple separated, and subsequently a divorce was granted to the wife in Shelby County, where both had legal settlement. By the provisions of the decree the mother was granted the absolute care, custody and control of a minor son. The mother later remarried and moved with her second husband and her minor son to B county. The first husband continued to maintain his legal settlement in Shelby County. The mother, child and second husband obtained a settlement in B county. While the mother, child and second husband were living in B county, the mother died. The minor child then moved to Harrison County, working for his board in the city of Missouri Valley. He has lived in Harrison County for over a year without notice to depart being served upon him. While thus living and working in Harrison County the said minor became a public charge and the question is:

"1. Is the county in which the minor's father has a settlement liable for his support?

"2. Is the county in which the mother died (B county) and in which she, her second husband and the said minor child had a legal settlement liable for his support?

"3. Is Harrison County liable for the support of said minor?"

When his mother died, we are of the opinion that the minor acquired the status of an emancipated child and that, being of the age where he could support himself as evidenced by the fact that he worked in your county without public support for over a year, he was then free to acquire a legal settlement.

The courts have held that an emancipated child may acquire a settlement in his own right. *Canton vs. Simsbury*, 54 Conn. 86; 6 Atl. 183. *New Hampshire County Poor Directors vs. Stroudsbury Poor Dist.*, 9 Pa. Dist. 614; 23 Pa. Cop. 488.

There is also a doctrine known as constructive emancipation which may be effected by implication of law, as distinguished from voluntary act of the parent, by the attainment of majority by the child, by conduct of the parent inconsistent with the performance of his parental obligations, or by the assumption by the infant of a status inconsistent with subjection to the control and care of the parent. *Tunbridge vs. Eden*, 39 Vt. 17.

We reach the conclusion, therefore, that inasmuch as this minor has for over a year lived in your county without notice to depart, during which time he was not subject to the custody or control of his parents or either of them, that he acquired a legal settlement in your county and that your county is

liable for his support. We do not believe that under the set of facts outlined in your letter Section 3828.088, Code of Iowa, 1939, applies. This section, as we view it, has no application to a case where the father has lost the right to the care, custody and control by judicial determination.

MINORS: CLERK: GUARDIAN: Court has no authority to order payment of funds in the hands of the clerk belonging to minors, except under the provisions of Section 2057 and Section 12077.1, Code, 1939.

June 5, 1940. *Mr. E. A. Fordyce, Assistant County Attorney, Cedar Rapids, Iowa:* Received your letter of the 24th ult., requesting our opinion on the following legal question:

"In some actions brought in our district court here in automobile damage cases brought by minors through their next friend, the plaintiff's attorney has procured orders from the court that the judgment be paid to the parents of the minor. Our clerk has some fear that this order affords him no protection in making such payment, especially in view of the provisions of Section 2057 and 12077.1 and the lack of such provisions in other cases. He asks us to obtain your opinion as to whether the court has jurisdiction to order payment to the parents of a minor in automobile damage cases without the appointment of a guardian for such minor."

It is our opinion that the court would have no authority to order payment of funds in the hands of the clerk belonging to minors, except under the provision of Section 2057 and Section 12077.1, Code of Iowa, 1939.

The two above referred to sections have no application to the facts set out in your letter, in our opinion. For a discussion of an analogous case to the one set out in your communication see Irwin vs. Keokuk Sgs. Bank, 218 Iowa 477.

TAXATION: MONEYS AND CREDITS: If a decedent dies intestate, or if his estate is willed directly to the beneficiary without reservations or limitations, the statute gives to the beneficiary of such an income the right to make deductions of indebtedness the same as though the estate were in his possession and under his direct control. (Sec. 6993, 1939 Code.)

June 5, 1940. *Mr. Earl H. Fisher, County Attorney, Rock Rapids, Iowa:* We are in receipt of your request for an opinion to assist you in the interpretation of Section 6993 of the 1939 Code of Iowa. You state your question to be as follows:

"If a decedent dies intestate, or if his estate is willed directly to the beneficiaries without reservations or limitations, can the fiduciary set off the obligations of all of the heirs against the money and credits belonging to said estate for the purpose of moneys and credits taxation?"

Section 6993 of the 1939 Code of Iowa provides as follows:

"6993. *Deductions to fiduciary.* In listing moneys and credits as provided in this chapter, any administrator, executor, trustee or agent shall be entitled to deductions, as prescribed in Sections 6988 to 6992, inclusive, of debts owing by the legatee, devisee, beneficiary or principal to the same extent as such fund might be reduced if it were held by such legatee, devisee, beneficiary or principal who may be entitled to the income on such trust or fiduciary fund."

We are of the opinion that the above statute only applies to estates where the legatee, devisee or beneficiary is entitled to income on a trust or fiduciary fund. The statute merely gives to the beneficiary of such an income the right to make deductions of indebtedness the same as though the estate were in his possession and under his direct control.

TAXATION: CREDIT UNIONS: SHARE CREDITS: The share credit item in arriving at the moneys and credits owed by a credit union is a deductible item and the shares in credit unions are exempt from taxation in the hands of individual members. (Code Section 9305.22, 1939 Code.)

June 5, 1940. *State Tax Commission, Des Moines Building, Des Moines, Iowa. Attention: Mr. Ben H. Hall, Director Property Tax Division:* Receipt is acknowledged of your letter of May 25th in which you request an opinion upon the following questions:

"1. In the assessment of the credit union is the item classed as share credits assessable to the union?

"2. If the share credits are not assessable to the union, then would the individual shareholders be liable for assessment on the value of the shares held by them?

"3. If the individual shareholders are liable for the assessment, would the particular union be required to furnish the assessor with a list of the shareholders?"

Section 9305.22 of the 1939 Code of Iowa provides as follows:

"9305. *Taxation.* A credit union shall be deemed an institution for savings and shall be subject to taxation only as to its real estate, moneys and credits. The shares shall not be taxed."

We understand the item described as "share credits" means the amount of money paid into the corporation by the members for which shares have been issued. It will be noted that the statute states that a credit union shall be deemed "an institution for savings." Other sections in this chapter indicate that the credit union plan involves little more than a savings plan similar to a savings bank and the shareholders resemble depositors in a savings bank. The taxing act took cognizance of this fact and, in effect, states that for the purpose of taxation, the credit union shall be deemed an institution for savings. We construe this to mean that the shareholder will be a depositor. A savings bank does not pay a money and credit tax on the amount of deposits, and this item of share credits is similar to the deposit account of a savings bank. For this reason we feel that the credit union should not pay a tax upon the share credit account.

The next question presented of course is whether the individual shareholder should pay a money and credit tax on the value of his share which represents the amount he deposited with the credit union. Here we are faced with the language in the statute, to wit: "The shares shall not be taxed." It might be argued that the legislature in this statute was only dealing with the taxes to be paid by the credit union and this last sentence of the statute merely meant that the shares should not be taxed to the credit union, and that the credit union should pay no tax by virtue of these shares, but the language is general and purports to exempt the shares in credit unions from taxation.

We feel in view of this unequivocal exemption contained in the statute that the exemption from taxation of the shares of the credit unions should extend to the individual owner of the share.

We realize that this no doubt leaves but little property for taxation, and it may be that that was the legislative intent and thereby aid the organization of such credit unions. Insofar as moneys and credits are concerned, it leaves for taxation the money in excess of the share credit account and it also leaves for taxation the real estate owned by the credit union.

It is our opinion therefore that the share credit item is a deductible item

in arriving at the moneys and credits owned by a credit union and that these shares in credit unions are exempt from taxation in the hands of individual members.

HOMESTEAD: ESTATES: LIEN: STATE BOARD SOCIAL WELFARE: OLD AGE ASSISTANCE: If a homestead of a deceased old age recipient is sold by an administrator to satisfy old age assistance lien upon said homestead, such sale passes good title.

June 6, 1940. *Mr. Lester L. Orsborn, County Attorney, Red Oak, Iowa:* This will acknowledge receipt of your letter of May 16 wherein you ask our opinion on the following question:

"The Division of Old Age Assistance is having administrators appointed of estates wherein they have a lien, and the majority of the estates consist only of a homestead. They are then requesting that the administrator sell the homestead to pay the money which they have advanced the pensioner. Will you please give me an opinion as to whether or not the sale by the administrator passes good title."

For the purposes of this opinion, we quote Section 3828.022, 1939 Code:

Deduction from estate. On the death of a person receiving or who has received assistance under this chapter or of the survivor of a married couple, either or both of whom were so assisted, the total amount paid as assistance, shall be allowed as a lien against the real estate in the estate of the decedent and as a claim of the second class against the personal estate of such decedent, in the event the estate is admitted to probate. *Neither the homestead nor the proceeds therefrom of such decedent or his survivor, shall be exempt from the payment of said lien or claim, any act or statute to the contrary notwithstanding.* The filing of its claim against the estate shall not constitute a waiver of the right of the state board, in behalf of the state, to maintain an action by equitable proceedings to forclose upon its lien against a homestead left by the deceased as well as any other real estate situated within the State of Iowa, and belonging to the estate of the deceased. The proceeds of such claims shall be paid into the old age assistance revolving fund. In case of the death of either husband or wife, either or both of whom have been receiving or have received assistance under this chapter, the estate of deceased shall not be settled or the homestead sold until the surviving spouse shall die or cease to occupy the homestead as such. Furthermore, no such claim shall be enforced against any real estate of the recipient or the real estate of a person who has been a recipient, while it is occupied by the recipient's surviving spouse, if the latter, at the time of marriage to the recipient, was not more than fifteen years younger than the recipient, and does not marry again."

We also quote Section 10155, 1939 Code:

"*Debts for which homestead liable.* The homestead may be sold to satisfy debts of each of the following classes:

"1. Those contracted prior to its acquisition, but then only to satisfy a deficiency remaining after exhausting the other property of the debtor, liable to execution.

"2. Those created by written contract by persons having the power to convey, expressly stipulating that it shall be liable, but then only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt.

"3. Those incurred for work done or material furnished exclusively for the improvement of the homestead.

"4. If there is no survivor or issue, for the payment of any debts to which it might at that time be subjected if it had never been held as a homestead."

It will be noted from the first quoted section that there is no homestead exemption in a case where old age assistance has been granted or paid. It is also noted that in the first quoted section, there is this provision: "In case of

death of either husband or wife * * *, the estate of deceased shall not be settled *or the homestead sold* * * *." It is our opinion that the legislature intended that the homestead of a deceased old age recipient should be sold, if necessary to pay the old age assistance lien. From Section 10155 above quoted, it is clear that a homestead is liable for certain enumerated debts. If a debt were contracted prior to the acquisition of a homestead, it is our opinion that an administrator could sell such a homestead for the payment of that debt and that if he did sell such a homestead, that good title would pass. It is our opinion that Section 3828.022 above quoted merely added another classification to the four enumerated classes under Section 10155.

It, therefore, follows that it is our opinion that if the homestead of a deceased old age recipient is sold by an administrator to satisfy the old age assistance lien upon said homestead, that such sale passes good title.

COUNTY: CONSERVATION COMMISSION: PAYMENT OF MATERIALS FROM DES MOINES RIVER: MATERIALS: If a county desires to use materials from the Des Moines River it may proceed only by virtue of an agreement with the Iowa State Conservation Commission, which agreement may specify the terms and consideration under which such removal may be permitted.

June 6, 1940. *Newton W. Roberts, County Attorney, Ottumwa, Iowa:* Your letter of June 3, 1940, making inquiry as to the following matters, is herewith acknowledged.

"The board of supervisors of Wapello County, Iowa, has asked me to procure from you an opinion as to whether or not Wapello County will be compelled to pay the Iowa State Conservation Commission for materials removed from the Des Moines River.

"The State Conservation Commission has heretofore been exacting of this county, payment for sand and materials taken out of the river, and the board of supervisors feel that inasmuch as it is for county purposes that it should not be compelled to pay for this material, and that the provisions of Section 1828.18 of the Code of Iowa, 1939, does not apply to the county."

As bearing directly upon this proposition, we quote the following sections of the 1939 Code of Iowa:

"1828.18. *Agreement with commission.* No person shall remove any ice, sand, gravel, stone, wood or other natural material from any lands or waters under the jurisdiction of the commission without first entering into an agreement with the commission.

1828.19. *Permits.* The commission may enter into agreements for the removal of ice, sand, gravel, stone, wood, or other natural material from lands or waters under the jurisdiction of the commission if, after investigation, it is determined that such removal will not be detrimental to the state's interest. The commission may specify the terms and consideration under which such removal is permitted and issue written permits for such removal."

From a review of the quoted sections, you will observe that the legislature has vested in the Iowa State Conservation Commission the authority to enter into agreements granting to individuals the privilege of removing ice, sand, gravel, stone, wood or other natural materials from lands or water under the jurisdiction of the commission and that the commission may specify the terms and consideration under which such removal is permitted and may, in addition, issue written permits for such removal. We know of no exception whereby a county may be granted a privilege unless specifically provided by the statute or one which may be necessarily implied. There is no authority by virtue of

which the conservation commission may enter into agreements for the removal of materials from state owned lands and waters except as provided in the quoted statutes, and there is no exception provided in favor of a county and none can reasonably be implied from the statute. The county would, therefore, stand in exactly the same position as any person or individual who seeks to remove and use materials from state owned lands and waters.

With this in mind, it is our opinion that if Wapello County desires to use materials from the Des Moines river, that it may proceed only by virtue of an agreement with the Iowa State Conservation Commission, which agreement may specify the terms and consideration under which such removal may be permitted.

BROADLAWNS GENERAL HOSPITAL: LIABILITY INSURANCE: There would be no basis for the hospital to carry liability insurance covering the county or the hospital for negligence of any of its employees.

June 17, 1940. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa. Attention: Mr. James P. Irish:* We have your letter of June 14 asking for an opinion of this office as to whether the Board of Trustees of the Broadlawns Polk County Public Hospital has authority to procure and pay for professional liability insurance on full time resident physicians employed by the Board of Trustees.

Under the provisions of Section 5359 of the Code the Board of Trustees is required to employ a superintendent, matron, and necessary assistants and employees, and have control and supervision over the physicians in the hospital.

Section 5362 of the Code provides that residents of a county are entitled to the benefits of the hospital, but that every person, except such as may be found to be indigent and entitled to free care, shall pay a reasonable compensation therefor.

Section 5363 provides for the collection of accounts, and all legal services for such performance shall be performed by the county attorney without additional compensation.

It is evident from the provisions of law providing for the erection of a county public hospital and the maintenance of the same, and the particular sections above referred to, that the county public hospital is a public institution operated by the county as a municipal corporation.

The next question is as to whether or not there would be any liability on the county as a municipal corporation for injuries to patients or others through the negligence of its employees.

In 43 *Corpus Juris*, Page 971, Section 1749, it is stated:

"The performance of duties that relate to the preservation of the public health and the care of the sick is of concern to the public as a whole; in executing this function the municipality and the officers through whom its acts perform governmental or public functions, and such officers are not agents of the municipality, but public officers, for whose wrongful acts or omissions the municipality is not responsible in the absence of a statute imposing liability, even though they are appointed by the municipal authorities. Upon the same principal a municipality is not ordinarily liable for injuries resulting from defects in, or the negligent management of, hospitals, pesthouses, and other like institutions for the care of the sick."

In 43 *Corpus Juris*, 1169, Section 1934, it is stated:

"A municipal corporation which maintains a hospital, either for a charitable purpose, or in the exercise of its police power to provide for the general health and to prevent the spread of disease, is performing a governmental function, and is not liable for injuries to patients, or other rightfully on the premises, through the negligence of its nurses, physicians, or other employees, even though some of the patients are pay patients."

It would appear from the foregoing that the operation of a public hospital by a municipal corporation is a governmental function, as distinguished from a proprietary function, and it would follow that there would be no liability on the county for any negligent act of a physician employed by the Board of Trustees of the hospital in the operation of the hospital.

It would, therefore, follow that there would be no basis for the hospital to carry liability insurance covering the county or the hospital for negligent acts of any of its employees.

PRIMARY ROAD FUND: UNEXPENDED BALANCES: FIRST FISCAL YEAR: STATE TREASURER: Unexpended balances in the Primary Road maintenance, and engineering, inspection and administration funds from the first fiscal year shall revert to the Primary Road Fund and may be carried over and used during the second fiscal year of the biennium instead of reverting to the general fund in the state treasury.

Ames, Iowa. June 20, 1940. *Iowa State Highway Commission, Ames, Iowa. Attention: F. R. White, Chief Engineer:* This will acknowledge receipt of your request for the opinion of this department relative to disposition to be made of unexpended balances in the Primary Road maintenance, and engineering, inspection and administration funds at the close of the fiscal year ending June 30, 1940.

Section 59 of Chapter 1, Acts of the 48th General Assembly, provides as follows:

"Section 50. Except where otherwise specifically provided by law, all appropriations made by this act, remaining unexpended or unobligated at the close of business on December 31, 1941, shall revert to and become a part of the general fund in the state treasury."

This provision has previously been construed to permit unexpended balances from the first year of the biennium to be carried over into the second year; this is the logical conclusion arrived at from the fact that the provision contemplates no reversion shall take place until December 31 following the end of the second year of the biennium, and conforms to the practice heretofore followed by other state departments, including those for which, like the Highway Commission, appropriations are made from specific funds rather than the general fund of the state.

The question then arises as to whether or not the provision of Section 1 of Chapter 118, Acts of the 48th General Assembly excepts the Highway Commission from the practice followed by other state departments as above referred to.

We do not believe this was the intent of the legislature. The section provides in part as follows:

"Section 1. * * *

"Any unexpended balance at the end of any year in the amount so authorized for said year shall revert to the Primary Road Fund * * *."

The sentence quoted relates back to the phrase "except where otherwise specifically provided by law" in Section 59 of the Appropriation Act heretofore quoted. In the absence of the provision quoted from Section 1 of Chapter 118, it might well be contended that unexpended and unobligated balances from funds authorized to be expended by the Highway Commission would revert to the general fund of the state. In view of the purposes to which expenditures from the Primary Road fund are pledged and devoted, it is only reasonable to believe that the legislature intended that no such diversion should take place, and the quoted provision of Section 1 of Chapter 118 was inserted for the sole purpose of restoring such unexpended balance to the fund from which the same was appropriated. To give this section any broader interpretation would bring it into direct conflict with the scope of the provisions of Section 59 above. Such conflict is disposed of by the provisions of Section 66 of the Appropriation Act—the enactment of which was subsequent to Chapter 118 referred to—which provides, "Where any provisions of the laws of this state are in conflict with this act the provisions of this act shall govern for the biennium."

We conclude therefore, that unexpended balances from the first fiscal year may be carried over and used during the second fiscal year of the biennium.

The opinion of a previous attorney general, appearing in O.A.G. 1938, under date of March 26, 1937, lends support to this view.

BOARD OF SUPERVISORS: ATTORNEY: COMPENSATION: PRISONER: Board authorized to allow only twenty dollars per day for services rendered in defending the prisoner and twenty dollars may not be paid to each of the counsel appointed.

June 20, 1940. *Mr. D. W. Dickinson, County Attorney, Eldora, Iowa:* Received your letter of the 5th inst., wherein you request the opinion of this department relative to the proper interpretation of Section 13774, Code of Iowa, 1939.

We can see no escape from the plain provision of Section 13774, which reads: "Only one attorney in any one case shall receive such compensation."

It is our conclusion that the board would be authorized to allow only twenty dollars per day for services rendered in defending the prisoner. Twenty dollars may not be paid to each of the counsel appointed in this case.

BOARD OF CONTROL: SENTENCE: Judge in pronouncing sentence may have sentence run concurrently with prior sentence from another district. Prisoner compelled to serve remainder of first sentence after termination of second sentence in order to finish out term under first sentence.

June 25, 1940. *Mr. D. R. McCreery, Chairman Board of Control of State Institutions, Des Moines, Iowa:* I am in receipt of yours of the 22nd, making inquiry as to the sentence of Joseph Hanig, No. 16174, inmate of Anamosa Reformatory, wherein you ask an opinion on the question as to whether or not a judge in one judicial district may, in pronouncing a sentence, have the sentence run concurrently with a prior sentence from another judicial district. In connection therewith we beg to advise:

The pertinent section of the statute is as follows:

"13959. *Cumulative sentences.* If the defendant is convicted of two or more offenses, the punishment of each of which is or may be imprisonment, the

judgment may be so rendered that the imprisonment upon any one shall commence at the expiration of the imprisonment upon any other of the offenses."

This statute has been construed by the Iowa supreme court in the case of Dickerson vs. Perkins, 182 Ia. 871. In that case the court holds that the sentences will run concurrently unless the later sentence expressly provides that it shall be cumulative. The court also holds that the fact that the sentences are rendered by different courts is immaterial, saying, at Page 874:

"Except for such possibility of the concurrence of terms of imprisonment under two or more convictions, there would have been no occasion for the statute, either in its original mandatory form or in its later discretionary form, unless, as therein stated, the clear implication of the statute is that such terms may run concurrently, unless the court enter judgment otherwise."

The cases Fisher vs. Hollowell, 199 Ia. 335 and State of Iowa vs. Van Klaveren, 208 Ia. 867, also have some bearing upon this subject. Accordingly, the fact that the commitment is from different courts or different districts is immaterial. Under the law the sentences will run concurrently unless the judge specifically provides in the sentence that they shall be cumulative.

In the situation presented to us by your correspondence the further question arises to the the effect of the prisoner being on parole at the time he received the second sentence. The facts reveal that the prisoner was on parole at the time he received the second sentence and that he had commenced serving time under the second sentence some little time before his parole was revoked under the first sentence, the delay in the revocation of the parole creating a result such that he would serve longer under the first sentence than the second one, and the question arising whether the prisoner should be confined after the termination of the second sentence in order to finish out his term under the first sentence. Bearing upon this subject, Section 3792 of the Code of Iowa is pertinent. That section reads as follows:

"*Parole time not counted.* The time when a prisoner is on parole or absent from the institution shall not be held to apply upon the sentence against the parolee if the parole be violated."

Our supreme court, in the case of Kirkpatrick vs. Hollowell, 197 Ia. 927, considered this subject, and there specifically held that the acceptance by a convict of a parole automatically stops the running of his sentence, and that accordingly if he be convicted and imprisoned when he is on parole, his suspended sentence may not be said to run concurrently with the second sentence until the parole be revoked; saying,

"The prisoner was 'upon parole' under his first sentence during the time he was serving the second sentence, within the purview of this statute. His parole had not been revoked. He was not serving any imprisonment under his first sentence at the time he was being imprisoned under the second. The terms of imprisonment did not and could not run concurrently, because there was then no imprisonment under the first sentence. It was suspended and, in a sense, in abeyance, while the second sentence was being served. The appellant was not entitled to be discharged from imprisonment under the sentence in Wapello County because of service of the term of imprisonment under the sentence in Linn County, under these conditions. There was no concurrent imprisonment."

This rule is also followed by the United States Supreme Court as is shown in the case of Zerbst vs. Kidwell, 82 L. ed. (Adv. 918), 58 S. Ct. 872. Bearing upon the same subject is an extensive note in 116 A.L.R.

Three former opinions bearing, to some extent, upon this subject, have been rendered the board of control, being so dated December 6, 1934, pertaining to

Byron Green, No. 15157; May 27, 1936, pertaining to Ray Curling, No. 15673; opinion dated June 4, 1937 (prisoner's name not given). Accordingly, it is our opinion that the computation made by Mr. Davis, the warden at Anamosa, as suggested by him in his letter to you under date of June 7, 1940, is correct, and Joseph Hanig, No. 16174, will be compelled to serve the remainder of his sentence under the first judgment after he has fully served the judgment and sentence under which he was committed the second time.

TAXATION: SPECIAL ASSESSMENTS: Special assessments are merely debts and are not due the government or any branch thereof, and it would appear that since the debt is not in writing or signed by the persons to be bound thereby, it would be a debt as contemplated in the Statute of Limitations, and the same would outlaw in five years the same as any other ordinary indebtedness.

June 25, 1940. *Mr. John E. Miller, County Attorney, Albia, Iowa:* Sometime ago you submitted a request for an opinion from this office and we held up your request for the time being to see if there would be any change in the opinion in the case of *Bennett vs. Greenwalt*, 286 NW 722. We now understand no petition for rehearing was filed in that case and we are giving your request for an opinion consideration. With your request you presented a brief of the law and your conclusions, and since your brief states the questions upon which you desired the opinion of this office, and since we concur in your conclusions and reasoning as set forth in your brief, we are merely adopting your opinion as the opinion of this office and we set forth below your opinion to Mr. Peterson, your county treasurer, which now becomes the opinion of this office upon the questions asked.

"William Peterson
"County Treasurer
"Monroe County, Iowa
"Dear Sir:

"You have requested an opinion dealing with special assessments, in particular the following three questions:

"1. What is the effect of a sale for ordinary taxes on the lien of special assessments?

"2. Does it make any difference whether the sale for ordinary taxes is made to the county under the public bidders law, or to other parties?

"3. Do special assessments ever outlaw?"

This brief deals solely with the duration of the lien of special assessments, and for the purposes hereof, I assume that the lien has at one time been a valid lien upon real estate. In particular, this brief deals with the question of whether or not the lien of special assessments may be lost, canceled or satisfied without payment thereof.

It is the general rule in Iowa that where additional liens exist against property sold for general (ordinary) taxes are not of equal priority with the lien of general taxes, a tax sale for the delinquent general taxes will extinguish all rights of such other liens, and creates a new and independent title in the purchaser.

Fergason vs. Aitken, 220 Iowa 1154 (Special assessments for drainage districts);
Lucas vs. Purdey, 142 Iowa 359 (Costs of sewer);
Fitzgerald vs. Sioux City, 125 Iowa 397 (Street improvements).

In several cases it has been held that the sale alone satisfies, as in payment

of all prior taxes, and that said sale relieves the owner from liability for all prior taxes then due and not included therein, and this is true even though the owner makes redemption.

In re Estate of Harger, 212 Iowa 851 (Personal taxes);
Hough vs. Easley, 47 Iowa 330 (Other ordinary taxes);
Phillips vs. Wilmarsh, 98 Iowa 32.

There are also a number of Iowa cases which hold that a tax lien for general, or ordinary, taxes and a tax deed issued thereon displaces unmatured special assessments liens which attached prior to the deed of sale.

Iowa Securities Company vs. Barrett, 210 Iowa 53 (Road improvements);
Western Securities Company vs. Blackhawk National Bank, 211 Iowa 1304 (Road improvements);
Fergason vs. Aitken, Supra;
Fitzgerald vs. Sioux City, Supra.

Our court has further held that a tax deed issued on a sale for ordinary or regular taxes nullifies the lien of all special assessments levied on the land by a city after the sale and before the execution of the deed.

Means vs. City of Boone, 214 Iowa 948 (Road improvement);
Montgomery vs. City of Des Moines, 190 Iowa 705 (Street improvement);
Harrington vs. Valley Savings Bank, 119 Iowa 312 (Street improvement).

The above rules are quite definitely settled in the Iowa law. However, on June 20, 1939, the Iowa Supreme Court, in the case of *Bennett vs. Greenwalt*, appearing in 286 NW, on Page 722, refused to enjoin the county treasurer of Polk County, Iowa, from offering property for sale on delinquent special assessments, although prior to that time the county had secured deed to the property in some instances and held tax sale certificates in others. This sale has caused a lot of confusion among the attorneys of the state, for the reason that a casual reading thereof indicates that it reverses all other rules which heretofore have been considered rules of property in Iowa. This case holds that the treasurer shall sell property upon which there are special assessments due and delinquent, even though the county is the holder of a tax sales certificate upon said premises, and expressly advises that Section 7244 of the Code which provides for a tax sale and also provides that no property against which the county holds a tax sales certificate shall be offered or sold, does not apply to special assessments and draws a distinction between the terms "taxes" and "special assessments," and advises that "special assessments" are not technically taxes.

It is a little difficult for us to understand this holding, in view of the fact that in Paragraph III of this opinion the court states that it is fully agreed that a tax deed, when valid and effective, displaces and extinguishes the lien of all special assessments against the property conveyed, existing at the time of the general tax sale, and without regard as to which said assessments were then due or were to become due.

It would appear that the treasurer would be compelled to offer the property for sale for the special assessment, but that the purchaser, when paying his money, would be in a position where, if the holder of the tax sale certificate, whether it be the county or some other person, would secure a tax deed. The holder of the certificate of sale for special assessment would be cut off and would have invested his money and received nothing but a right to redeem from the other tax sale before deed was issued, which right the holder of the special assessment would have prior to any tax sale.

The Bennett case does not discuss the propositions or the rules at law set out in the Harger case, supra, Hough vs. Easley, supra, or Phillips vs. Wilmarsh, supra, but when it draws the distinction between special assessments and taxes, it could perhaps be distinguished from the above three cases, for the reason that these cases deal with personal taxes and other ordinary real estate taxes, and not with special assessments.

With reference to the Statute of Limitations running against special assessments, the Bennett case would lend support to the theory that they would outlaw, although that proposition is not discussed in any manner whatsoever in the opinion. But in the Bennett case, and on Page 732, the court states:

"Generally speaking, special assessments are generally imposed by an exercise of the taxing power, yet a clear distinction is everywhere recognized between a 'tax,' in the proper sense of the word, and a 'special assessment.' Taxes may be said to be a contribution or levy imposed upon property for general public benefits, without regard to the question of public benefits conferred. While special assessments are imposed only as a payment for special benefits conferred upon the property charged by an improvement, the expense of which is thereof to be met."

It therefore appears that the court in this case recognizes that special assessments are merely debts and are not due the government or any branch thereof, and following this reasoning and theory, it would appear that since the debt is not in writing or signed by the persons to be bound thereby, that it would be a debt as contemplated in the Statute of Limitations, and that the same would outlaw in five years the same as any other ordinary indebtedness.

Pursuant to the statements made at the outset, you are now advised that the opinion of the attorney general's office in answer to the interrogatories is in complete accord with the foregoing quoted opinion of your office to Mr. Peterson.

SHERIFF: REWARD: BOARD OF SUPERVISORS: Sheriff has no authority to offer reward for information leading to the capture of a person charged with a criminal act. Board of supervisors may not allow such a claim.

June 26, 1940. *The Honorable Chet B. Akers, Auditor of State. Attention: L. I. Truax:* This is in answer to your letter of the 18th inst., wherein you ask the opinion of this department relative to the following legal question:

"It appears that a reward of $25.00 was offered by the sheriff of Chickasaw County, Iowa, for information leading to the capture of a person charged with a certain criminal act. Pursuant to such offer, information was received. The person in question was convicted and duly sent to the state penitentiary for life.

"The question now has arisen as to whether or not the board of supervisors has authority to allow and pay a claim for said reward."

We are of the opinion that the sheriff had no authority to offer the reward in question, Therefore, the board of supervisors is without authority to allow and order payment of said claim.

NOMINATION: JUSTICE OF PEACE: RESIDENT: Justice of the Peace must be a resident of the township in order to qualify for office therein.

June 26, 1940. *Mr. Dudley Weible, County Attorney, Forest City, Iowa:* This is in answer to your letter of the 20th inst., wherein you ask the opinion of this department on the following legal question:

"Can a person who is a non-resident of a township but a resident of the county in which the township is located be nominated and elected to the office of justice of the peace in the township of which he is a non-resident?"

We are of the opinion that a justice of the peace must be a resident of the township in order to qualify for office therein.

We think the following is authority for our position:

Section 1146, Code of Iowa, 1939, provides:

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

"1, * * *

"2. * * *

"3. 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 exercised. (Italics supplied.)

* * *."

Independent School District of Manning vs. Miller, 189 Iowa 123, 178 NW 323.

INCOMPATIBLE OFFICES: CITY COUNCIL: BOARD OF TRUSTEES: When member of city council accepts office of trustee of a municipally owned light plant, it *ipso facto* causes a vacancy in his office as councilman, as these two offices are incompatible.

June 26, 1940. *The Honorable Chet B. Akers, Auditor of State. Attention: T. E. DeHart:* This will acknowledge receipt of your letter of the 24th inst., wherein you request the opinion of this department on the following legal question. You say:

"Can a man who is a member of a city or town council be appointed by this council as a trustee of a municipally-owned light plant and hold both offices simultaneously?

"If such an appointment as mentioned above was made, would not such an appointment be illegal and would it not be necessary for the present council to make a new appointment to the position of trustee?"

It is our opinion that these offices are incompatible. Therefore, when a member of the city council accepts the office of trustee of a municipally owned light plant, it *ipso facto* causes a vacancy in his office as councilman.

In the case of *State of Iowa, ex rel vs. Bobst*, 205 Iowa 608, the legal principle involved in your question is discussed. In this case the court quoted from State ex rel vs. Anderson, 155 Iowa 271, as follows:

"It is a well-settled rule of common law that, if a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office, 'and his title thereto is thereby terminated without any other act or proceeding.' * * * The principal difficulty that has confronted the courts in cases of this kind has been to determine what constitutes incompatibility of offices; and that the concensus of judicial opinion seems to be that the question must be determined largely from a consideration of the duties of each ,having, in so doing, a due regard for the public interest. It is generally said that incompatibility does not depend upon the incidents of the office, as upon physical inability to be engaged in the duties of both at the same time, * * * but that the test of incompatibility is whether there is an inconsistency in the functions of the two, as where one is subordinate to the other, 'and subject in some degree to its revisory power,' or where the duties of the two offices 'are inherently inconsistent and repugnant.' * * * A still further definition has been adopted by several courts. It is held that incompatibility in office exists 'where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both.' "

We think it is clear that under the principles laid down in the Bobst and Anderson cases, the office of councilman and trustee of the municipally owned light plant are incompatible.

In considering whether there is such incompatibility as will prevent the same person from occupying the two offices in question, consideration should be given to Section 6147, Code of Iowa, 1939. This section provides:

"If a majority of the votes cast at such election are in favor of placing the management and control of any or all of the said utilities in the hands of trustees, the mayor shall, within ten days after such election, appoint a board of three trustees, *which appointment shall be approved and confirmed by the council.* * * * The compensation of each trustee shall be not more than one-hundred dollars per year, and each trustee shall execute and furnish to the city an official bond in the sum of twenty-five hundred dollars to be approved by the mayor and filed with the city clerk."

Section 6149, Code of Iowa, 1939, provides:

"The board of trustees shall have all the power and authority in the management and control of the utilities mentioned in the question submitted to the voters at such election as provided in chapter 313."

In consulting Chapter 313 we find that waterworks trustees have certain powers and duties. It is not necessary to set out all of these for the purpose of this opinion. We call your attention, however, to Section 6159 which provides, among other things, that:

"The board (trustees) shall make quarterly statements giving full and complete reports of the receipts and disbursements of the board. Said reports shall be filed in the office of the city clerk * * *. *The reports shall be audited by the city council.*"

It is very clear that a member of the city council can not be permitted, as a member of the board of trustees, to prepare and file a report showing receipts and disbursements of the light plant and then subsequently sit as a member of the city council and participate in the approval of his own report. This clearly renders the two offices incompatible, in addition to other reasons that may be urged.

It is, therefore, our conclusion that a member of the city council may not at the same time hold the office of trustee of the municipally owned light plant.

We now come to your other question, i. e. is the appointment illegal and must the council proceed to appoint another trustee?

We think not. He has a right, as a member of the city council to accept the appointment as a trustee of the municipally owned light plant but the two offices being incompatible, it has the effect of *ipso facto* vacating his office as councilman. Therefore, the councilmen should forthwith proceed to fill such vacancy on the council.

We believe this conclusion is inescapable under the opinions in the Bobst and Anderson cases above cited.

BOARD OF SUPERVISORS: PURCHASE OF BUILDING: CONTRACT: There is no authority authorizing the board of supervisors to enter into an installment contract for the purchase of a building to house various county departments.

June 26, 1940. *Mr. Harold W. Vestermark, County Attorney, Iowa City, Iowa:* This is in answer to your letter of the 14th inst., asking our opinion relative to the following legal question:

"The county owns a piece of ground. It is proposed to construct a building upon this land for the purpose of housing various county departments, as follows:

"1. Statistical Department.

"2. Old Age Assistance Department.

"3. Surplus Commodities Department.
"4. Child Welfare and County Nurse.
"It is proposed to erect the building under the following plan: Construct a building which will cost approximately twelve thousand dollars. The board has proposed to let this contract to some competent contractor or builder. It is then proposed to purchase the building from the contractor or builder and pay the cost of construction on an installment payment plan of approximately two hundred dollars per month.
"It is proposed further to construct the building in such a manner that if it become necessary to vacate the same it can be used for other than county purposes without any material changes. It is understood that, inasmuch as the building will cost in excess of five thousand dollars, the proposition will first have to be approved by the voters.
"The question is: May the board of supervisors lawfully enter into the proposed contract, assuming that the proposition is approved by the voters?"

We are of the opinion that the proposed plan of financing the building in question is illegal. No authority for the proposed action exists, in our opinion.

We hereinafter quote the statutes which we think govern. Section 352, Code of Iowa, 1939, provides:

"Before any municipality shall enter into any contract for any public improvement to cost five thousand dollars or more, the governing body proposing to make such contract shall adopt proposed plans and specifications and proposed form of contract therefor, fix a time and place for hearing thereon at such municipality affected thereby or other nearby convenient place, and give notice thereof by publication in at least one newspaper of general circulation in such municipality at least ten days before said hearing."

Section 353, Code of Iowa, 1939, provides that objections may be filed by any interested person. Section 354, Code of Iowa, 1939, provides for an appeal in case objections are overruled.

Section 363, Code of Iowa, 1939, provides:

"Before any municipality shall institute proceedings for the issuance of any bonds or other evidence of indebtedness, excepting such bonds or other evidence of indebtedness as have been authorized by a vote of the people of such municipality, and except such bonds or obligations as it may be by law compelled to issue, a notice of such action, including a statement of the amount and purpose of said bonds or other evidence of indebtedness shall be published at least once in a newspaper of general circulation * * *."

Section 364, Code of Iowa, 1939, provides that objections may be filed in the office of the clerk or secretary of the municipality at any time before the date fixed for the issuance of such bonds or other evidence of indebtedness. Section 365 provides for notice of hearing upon said objections before the comptroller. Section 367 provides that any bonds or other evidence of indebtedness issued contrary to the provisions of this chapter and any tax levied or attempted to be levied for the payment of any such bonds or interest thereon shall be null and void.

Section 1171.18, Code of Iowa, 1939, provides:

"When a proposition to authorize the issuance of bonds by a county * * * is submitted to the electors, such proposition shall not be deemed carried or adopted, * * * unless the vote in favor of such authorization is equal to at least sixty per cent of the total vote cast * * *."

Section 1172, Code of Iowa, 1939, provides:

"When public bonds are offered for sale, the official or officials in charge of such bond issue shall, by advertisement published for two or more successive weeks in at least one official newspaper of the county, give notice of the time and place of sale * * *."

Section 1173, Code of Iowa, 1939, provides:

"Sealed bids may be received at any time prior to the calling for open bids * * *."

Section 1174, Code of Iowa, 1939, provides that any bids may be rejected.

Section 1179.1, Code of Iowa, 1939, provides:

"Hereafter issues of bonds of every kind and character by counties, * * * shall be consecutively numbered. The annual levy shall be sufficient to pay the interest and approximately such portion of the principal of the bonds as will retire them in a period not exceeding twenty years from date of issue * * *."

It is our opinion that there is no authority authorizing the board of supervisors to enter into an installment contract for the purchase of a building under the plan outlined in your letter.

It is clear that the statutes above quoted contemplate that the county may not become indebted in the form proposed. As a general rule the only evidence of indebtedness that a county has the right to issue is bonds. To this there are some exceptions which it will not be necessary to note. However, it is clear that no authority exists for the erection or purchase of a building under the installment contract proposed by the board of supervisors of your county.

We must bear in mind that municipal corporations have only such powers as are expressly granted or such as may be implied from the express grant. No express or implied authority exists for the construction or purchase of a building under the terms of an installment contract.

We reach the conclusion, therefore, that the board of supervisors of your county has no authority to enter into a contract for the construction and purchase of a building for the county under the plan outlined in your letter.

TAXATION: BOARD OF REVIEW: ASSESSMENT: No revaluation or reassessment can be made by the local Board of Review under the provisions of Section 7129.1 of the Code in a year other than the regular assessment year without that board first finding a change in value. We do not believe this board can be used to correct an erroneous assessment in such a year.

June 26, 1940. *Mr. John E. Miller, County Attorney, Albia, Iowa:* You have written to me with regard to an opinion as to the right of the local board of review to reduce an assessment under the provisions of Section 7129.1 of the 1939 Code of Iowa in a year that is not a regular assessing year, and I have phrased your question from the correspondence as follows:

"Does the local Board of Review have the power to change an assessment and revalue and reassess property in a year other than a regular assessment year without finding that the property has changed in value since the regular assessment?"

This question has been answered by the district court of Webster County, Iowa in the opinion in the case of *Webster Realty Co. vs. The Board of Review*, rendered by Judge O. S. Thomas of Rock Rapids, Iowa. In that case the plaintiff claimed the right to have its property revalued in the year 1938. The plaintiff did not claim a change of value, but asserted that there had been no material change in the market value of the property since its assessment in 1937. Plaintiff there claimed that the right to reassess existed even though there was no change in value since the assessing year.

We quote below certain portions of Judge Thomas' opinion, but we are sending to you a copy of the complete opinion. After a preliminary discussion of the history of this statute, Section 7129, Judge Thomas stated:

"The legislature certainly intended to decrease the frequency of valuing real estate, placing on the local board the duty of revaluing and reassessing, after assessment years, when it finds the value of real estate has changed. When making this change in the law and continuing an established legislative policy, the legislature surely cannot be considered to have intended to give taxpayers the right to ask each year for a revaluation of property regardless of changes of value. To give such new right, contrary to the very object sought in the act which is so amended, clear and unmistakable language should have been used.

* * *

"The duty and power of the board under 7129-E1 is definitely fixed and is based solely on a finding of change of value. If an aggrieved taxpayer petitions for a revaluation, no additional power is thereby conferred on the board. Its power is still fixed by express words of the statute and if it acts on a taxpayer's petition it must revalue and reassess 'where it finds the same has changed in value.' If this is a correct construction of the powers of the board under this section, it is inconsistent with a right of having the property revalued, regardless of claimed changes in value."

In view of the reasoning as set forth in Judge Thomas' opinion, we come to the conclusion that no revaluation or reassessment can be made by the local board of review under the provisions of Section 7129.1 of the Code in a year other than the regular assessment year without that board first finding a change in value. We do not believe this board can be used to correct an erroneous assessment in such a year.

BOARD OF SUPERVISORS: COMPENSATION: SOCIAL WELFARE—COUNTY BOARD OF: If board of social welfare meets during evening of day on which board of supervisors meets, the members of such board of social welfare who are members of board of supervisors may not receive compensation for their services as members of the board of social welfare.

June 27, 1940. *The Honorable Chet B. Akers, Auditor of State. Attention: L. I. Truax:* This is in answer to your letter of the 25th inst., wherein you ask the opinion of this department relative to the following legal question:

"In Wayne County two members of the board of supervisors are also members of the county board of social welfare. These two members serve on the board of supervisors during the day and during the evening of the same day they sit as members of the board of social welfare.

"The question is: Are they entitled to a per diem for both sessions?"

Section 3661.011, Code of Iowa, 1939, provides:

"All members of the county board (of social welfare) shall be reimbursed for the actual and necessary expenses incurred by them in the discharge of their duties. They shall also receive compensation for services at the rate of three dollars per diem, but such compensation shall not exceed a total of ninety dollars in any one year in counties of less than 33,000 population. * * * Provided, however, that members of the board of supervisors serving on said county board of social welfare shall not be paid compensation as members of said board of social welfare for any day on which they are paid for their official work as members of the board of supervisors."

It is our opinion that, if the board of social welfare meets during the evening of the day on which the board of supervisors meets, the members of such board of social welfare who are members of the board of supervisors may not legally receive compensation for their services as members of the board of social welfare.

This is our interpretation of the provisions of Section 3661.011, above quoted. The wording of the statute is clear and unambiguous. It recites: * * *

members of the board of supervisors serving on said county board of social welfare shall not be paid compensation as members of said board of social welfare for any day on which they are paid for their official work as members of the board of supervisors."

When payment is made to the members of the board of social welfare for services rendered during the evening of the day on which the board of supervisors meets, are they not paid compensation as members of said county board of social welfare for a day on which they are paid for their official work as members of the board of supervisors? We think so. The claims would bear the same date and the warrants would bear the same date. This would make them illegal under any interpretation of the statute. Certainly, so it seems to us, it was not the intention of the legislature that an independent investigation would have to be made to determine whether these members of the board of supervisors sat as members of the board of supervisors in the forenoon and as members of the board of social welfare in the afternoon.

Clearly under that set of facts, compensation could not be legally paid to these members for services on both boards during the usual business hours. Does the fact that they meet in the evening alter the situation? We think not.

We hold that the statute is clear and unambiguous and is, therefore, under well-known rules, not subject to construction. The legislature had a right to include in the statute the provision in question in reference to compensation and has, as we view it, done so in plaid words. The intention of the legislature is set out in clear and unequivocal language and under such circumstances the mandate of the statute must be followed.

POLL BOOKS: AUDITOR: ELECTION: JUDGES OF ELECTION: Sections 573 and 574 apply to primary elections; Sections 856 and 857 apply to general elections. After primary election judges of election should return all books and papers to your auditor.

July 1, 1940. *Mr. J. Berkley Wilson, County Attorney, Indianola, Iowa:* This is in answer to your letter of the 10th inst. wherein you ask the opinion of this department relative to the construction of Sections 856, 858, 573, Subsection 6 and 574, Code of Iowa, 1939. We quote from your letter:

"Request has been made to me through the township trustees in this county relative to their alleged contention that the sections relating to return of poll books are ambiguous. Sections 856 to 858, inclusive, provide that one book shall be returned to the auditor's office and the other retained by the township clerk. Section 573, Subsection 6 and 574, provides that all the poll books, etc., shall be delivered to the auditor's office. The latter section in Chapter 36 is under the head of "nomination" being primary election but while Chapter 41 refers both to primary and general election and the former sections above quoted do not state whether they apply to general, primary or both. One or two have refused to turn their books in and to save any embarrassment we would like to have a ruling on it."

Section 573, Subsection 6, Code of Iowa, 1939, provides:

"Upon the closing of the polls the judges and clerks shall immediately:
* * *

"6. Seal the poll books, containing the tally sheets and certificates of the election judges, in an envelope, on the outside of which are written or printed in perpendicular columns the names of the several political parties with the names of the candidates for the different offices under their party name, and

opposite each candidate's name enter the number of votes cast for such candidate in said precinct."

* * *

Section 574, Code of Iowa, 1939, provides:

"Said judges and clerks shall deliver said poll books, tally sheets, certificates, envelopes containing ballots, and all unused supplies to the county auditor within twenty-four hours after the close of the polls. Said auditor shall carefully preserve said returns and envelopes in the condition in which received and deliver them to the county board of canvassers."

Section 855, Code of Iowa, 1939, provides:

"A return shall be made in each poll book, giving, in words written at length, the whole number of ballots cast for each officer, except those rejected, the name of each person voted for, and the number of votes given to each person for each different office; which return shall be signed by the judges, and be substantially as follows:

"At an election at.....in.....township, or in..... precinct of.....township, in.....County, State of Iowa, on the .....day of.....A. D....., there were.....ballots cast for the office of.....of which:

"A.....B.....had.....votes.

"C.....D.....had.....votes.

"(and in the same manner for any other officer)

"A true return: L.....M.....) Judges
N.....O.....) of
P.....Q.....) Election

"Attest: R.....S.....) Clerks of
T.....R.....) Election"

Section 856, Code of Iowa, 1939, provides:

"In each precinct, one of the poll books containing the aforesaid signed and attested return, and one of the registration books, if any, shall be delivered by one of the judges within two days to the county auditor."

Section 857, Code of Iowa, 1939, provides:

"The other of said poll books and the other registration book, if any, shall be forthwith delivered by one of the judges to the township, city, or town clerk, depending on whether the precinct is a township, city or town precinct."

It is our opinion that Sections 573 and 574 apply to primary elections and that Sections 856 and 857 apply to general elections. This is the only interpretation that will permit giving effect to both sections, as we view it. Section 573 is clear and unambiguous and it seems that under that section it is the duty of the judges of election to return all books and papers to your auditor.

BANKING SUPERINTENDENT: LIQUIDATION OF BANKS: ASSETS: RIGHT TO SELL: Superintendent of Banking has the right to sell and distribute all assets, securities or otherwise, of insolvent banks which he has taken over.

July 3, 1940. *Mr. D. W. Bates, Superintendent of Banking:* We have your request for an opinion as to your authority as superintendent of banking, under the laws of Iowa, to proceed with the liquidation of an insolvent bank without being appointed receiver or asking aid or intervention of the courts.

The statutes of this state pertaining to the liquidation of insolvent banks is found in Chapter 415, Title XXI, of the Code of Iowa, 1939. Section 9235 provides:

"Illegal practices—insolvency. When it shall appear to the Superintendent of

Banking that any savings or state bank has refused to pay its deposits in accordance with the terms on which such deposits were received, or has become insolvent, or that its capital has become impaired, or it has violated the law, or is conducting its business in an unsafe manner, he shall, by an order addressed to such bank, direct a discontinuance of such illegal or unsafe practice, and require conformity with the law."

Section 9238 provides:

"Liquidation—right of levy suspended. If any such bank shall fail or refuse to comply with the demands made by the said superintendent, or if the said superintendent shall become satisfied that any such bank is in an insolvent or unsafe condition, or that the interests of creditors require the closing of any such bank, he may appoint an additional bank examiner to assist him in the duty of liquidation and distribution, whereupon the right of levy, or execution, or attachment against said bank or its assets shall be suspended."

Webster's Dictionary defines the word "liquidate" as follows:

"To settled the accounts and distribute the assets of a corporation or estate in bringing it to an end. To liquidate ones debts or accounts. Further defines "liquidator" to be one who liquidates. The person appointed to conduct the winding up of a company."

Section 9242 provides:

"The superintendent of banking henceforth shall be the sole and only receiver of liquidating officer for state incorporated banks and trust companies * * *."

The supreme court of Iowa in the case of *Leach vs. Exchange State Bank*, 200 Iowa 185, stated, beginning at Page 193, in speaking of the last two above quoted sections, as follows:

"The act in question gives to the superintendent of banking, independently of the appointment of a receiver, the power to liquidate an insolvent bank and distribute its assets. After providing that he may, in a proper case, take possession of a bank, it gives him authority to appoint an additional bank examiner to assist him in the duty of liquidation and distribution. It is then further provided that he may apply to the court for the appointment of himself as receiver for the bank, and that its affairs shall thereafter be under the direction of the court. The change here is significant. Whereas formerly it was only upon the appointment of a receiver that the bank's affairs were to be wound up, and then under the direction of the court, under the instant statute the superintendent is first authorized to appoint an additional bank examiner to assist him in the duty of liquidation and distribution, and then given permission to apply for a receiver; and thereafter the bank's affairs shall be under the direction of the court. * * * Furthermore, the present statute expressly provides that the superintendent of banking shall be the 'sole and only receiver of liquidating officer.' If it was not the legislative purpose to give to the superintendent of banking, as such, and without its being appointed receiver, power to liquidate an insolvent bank—if a receiver was still to be the only liquidating officer—why was it thought necessary to provide, and in the alternative, not only that the superintendent should be the only receiver, but that he should be the only liquidating officer? It is the superintendent of banking, and not the receiver, who is made the only liquidating officer."

This case is followed in the case of *Harris Estate vs. West Grove Savings Bank*, 207 Iowa 41, at Page 45.

The above quoted statutes vest in the superintendent of banking, power and authority to liquidate the assets of a closed bank which he finds to be insolvent, and to distribute the assets thereof, and the supreme court of Iowa in the cases above cited so construe the provisions of that statute. The real question is: Does the superintendent of banking, as such liquidator, have the power and authority to sell such assets and collect the proceeds, including the sale of any securities, stocks, bonds and other securities that may be owned and held

by the bank and that were taken over by the superintendent of banking as liquidator thereof? It would seem clear on the above statutes and the construction placed thereon by the supreme court that the superintendent of banking has the power and authority to convert all the assets into cash, including bonds and securities and distribute the proceeds thereof to the creditors of the insolvent bank, according to their respective established interests.

It is therefore the opinion of this department that the superintendent has the right and authority to sell and distribute all assets, securities or otherwise, in insolvent banks which he has taken over and is liquidating under the provisions of Section 9238 of the Code of Iowa, 1939.

IOWA STATE HIGHWAY COMMISSION: MISSOURI HIGHWAY AUTHORITIES: INTERSTATE CONNECTION: SHARE OF COST: EXCESS COST: Iowa State Highway Commission has authority to enter into agreement with Missouri Highway authorities to pay its share of cost of interstate connection; such agreement may provide for payment by State of Iowa of sum in excess of improvement within Iowa.

July 5, 1940. *Iowa State Highway Commission, Ames, Iowa. Attention: F. R. White, Chief Engineer:* This will acknowledge receipt of your request for opinion on the following questions restated for purpose of brevity.

At the Iowa-Missouri state line south of Centerville, Iowa, Primary Road No. 60 connects with Missouri State Route No. 5. From preliminary examinations which have been made it appears that the highway could be straightened in such manner as would secure a shorter, more direct and better line between Cincinnati, Iowa, and Unionville, Missouri.

It is disclosed that such change would substantially shorten the distance and reduce expense of further construction and maintenance of Route No. 60 in Iowa, but the expense of construction of that portion of the route within the State of Missouri would be greater than the cost of improvement of the present route of No. 5 in that state.

The Missouri State Highway Commission seems agreeable to such relocation providing the State of Iowa will share in payment of the excess cost of the improvement in Missouri.

Your question is whether or not the Iowa State Highway Commission has authority to enter into an agreement with the Missouri highway authorities to pay its share of the cost of this interstate connection, and whether or not such agreement may provide for the payment by the State of Iowa of a sum in excess of the improvement within Iowa. This excess is estimated at about $35,000.00.

You call attention to Sections 4663 and 4755-33, Code of 1939. Section 4663 is quoted as follows:

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

By a provision similar to Section 4663, enacted (36 G. A., Chapter 339, Section 4) in 1915, the State Highway Commission was given exclusive power to confer with authorities of bordering states and to agree upon proper connec-

tions, plans and the apportionment of cost of highway improvements upon or across state lines.

Section 28 of Chapter 25, enacted by the 40th Ex. G. A., amended, revised and codified Chapters 5 and 18 of Title 11 of the Compiled Code and Supplement thereto at which time (1924) the section referred to was changed to read as it appears in the quotation above. The effect of this change was to provide that the local board of supervisors and the Highway Commission should act jointly in these matters involving interstate agreements. This was reasonable, for at that time the county boards of supervisors still had jurisdiction over improvement of primary roads subject only to supervisory powers by the Highway Commission.

Thereafter the 42nd General Assembly, Chapter 101, Section 8, enacted what now appears as Section 4755-33 of the 1939 Code, transferring the powers and duties of boards of supervisors to the Highway Commission with respect to primary road improvement.

It is clear that by this section all powers and duties of the local boards were transferred to the Highway Commission so far as the improvement of the primary road system is concerned, and it is only reasonable to conclude that such transfer was inclusive of the authority which was theretofore possessed by the local board to act jointly with the Highway Commission with respect to agreements with border states affecting primary road connections.

Relative to the second part of your question, the authority conferred by Section 4662 to "agree with highway authorities of such border state on * * * * apportionment of work and *cost* of roads, bridges and culverts on or across the state line," contemplates that a fair apportionment of the expense should be borne by the state of Iowa, which may be more or less than the actual cost of improvement of the portion within this state; in this respect the statute is clear and unambiguous; authority is given to "confer and agree" on "apportionment" of "cost" in the interest of better interstate connections contemplated by the act. It might readily be said that any intention to the contrary would render the provision for apportionment of cost wholly unnecessary. Certainly had the legislature intended otherwise such intention could have been easily expressed.

In our opinion, therefore, the answer to both of your questions is in the affirmative.

GOVERNOR: DISCHARGE: PAROLE: MISDEMEANOR: FELONY: Discharge from governor is necessary releasing man from parole for misdemeanor just as it is necessary to release a man from parole for a felony.

July 11, 1940. *Hon. George A. Wilson, Governor of Iowa:* We are in receipts of yours of the 9th, wherein you ask an opinion on the following question:

"Is a final discharge from the governor required to release a man from parole, where the conviction was for a misdemeanor?"

opinion being asked in connection with the case of Keith Lister.

Relying thereto, it is our opinion that a discharge from the governor is necessary releasing a man from parole for a misdemeanor just as it is necessary to release a man from parole for a felony. We base this conclusion upon the following:

Section 3800 of the Code provides for parole by the trial court for all convictions except certain crimes, none of the exceptions being misdemeanors.

Section 3805 of the Code provides that a suspension of a sentence by the court may be revoked at any time without notice by the court or judge.

Our supreme court has repeatedly held that the effect of Section 3805 is that one who receives a suspended sentence may be forced to serve the sentence or the portion remaining unserved at any time in the future.

In the case of Bennett vs. C. C. Bradley, Judge, 216 Ia. 1267, this question was raised in a case where the petitioner had been convicted of driving a motor vehicle while intoxicated and sentenced to a year in the penitentiary, whose sentence had been suspended during good behavior, the court therein saying:

"The original sentence, including the order of suspension thereof, was regular and legal in every way, and the court had the right to revoke the suspension and parole at any time thereafter, and the court did not lose this right even after the original sentence had expired."

The rule is thus stated in Corpus Juris:

"While a defendant sentenced to a term of years is entitled to immediate incarceration, yet if he does not object to the suspension of execution by the court, the judgment during such suspension remains unexecuted and can be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or some legal authority. 16 C. J. 1336."

While the statute in force provided for a penitentiary sentence for driving while intoxicated at the time of the hearing of the Bennett case, the court did not place any stress upon the question of whether or not the crime committed was a felony or misdemeanor.

In the case of Pagano vs. Bechly, 211 Ia. 1294, which case is cited with approval in the Bennett case, the defendant was convicted of violation of the liquor laws, and was sentenced to pay a fine of $300.00 and to imprisonment in the county jail for one year, the jail sentence being suspended during good behavior. The supreme court opinion does not indicate whether or not this conviction was for a felony or a misdemeanor, but an examination of the abstract on file in the clerk's office indicates that the conviction was for a misdemeanor. The court gives full effect to Section 3805 of the Code, and the clear effect of the decision is that it applies to misdemeanors equally with felonies. As a matter of fact, the above cited statutes make no distinction between felonies and misdemeanors, and the supreme court in cases which have been repeatedly before it, wherein these statutes are involved, has on no occasion seen fit to differentiate between felonies and misdemeanors, uniformly holding that unless a sentence is actually served power is inherent in the court to revoke the suspension of a sentence and parole at any time thereafter; that is,

"A suspension * * * can be satisfied only by the actual suffering of the imprisonment imposed unless remitted by death or some legal authority."

We reach the conclusion, therefore, as above stated, that thereis no distinction in law between felonies and misdemeanors, and a suspended sentence continues to have legal vitality unless remitted by death or by your own acts in discharging the same.

STATE BOARD SOCIAL WELFARE: CHILD WELFARE: FOSTER HOME: TUITION; RESIDENCE: Sections 3661.057, 4283.01, 4268 and 4275: It is

within sound discretion of superintendent of public instruction to determine time or times that census of foster home should be taken. Child over age of 14 and under 21, living in licensed boarding home counted as one of the "three or more children" resident in such boarding home. Foster child should take school residence of foster family.

July 12, 1940. *Mr. King R. Palmer, Chairman, State Board of Social Welfare:* This will acknowledge receipt of your letter of recent date wherein you ask our opinion concerning some problems which are being raised with reference to school tuition. We are taking the liberty of quoting in part from your correspondence:

"First, the question has come up repeatedly whether three or more children must actually be present each month in a licensed foster home in order to bring those children under the state provisions for payment of school tuition for foster children. These are children placed by the Child Welfare workers, not private children's agencies. * * * The question is, therefore, whether a home licensed to receive three or more children comes within the tuition provisions, or do those provisions apply only to a home licensed for three or more children which actually had resident in it that many children at all times. If the latter is true, must the population remain constant? If not constant, what day of the month or period shall be used as the standard for determining the average population?

"Second, in a number of our counties the problem has come up of paying high school tuition for children in boarding homes. If a child is under fourteen years of age and lives in a licensed foster home, can high school tuition be collected from the state just the same as grade school tuition? Some school boards have refused to pay tuition for children attending high school in other districts when the school board has a high school of its own. They maintain that the children must go to the school in the district in which they are legally resident, or finance their own education. This is particularly important for Johnson County and the Iowa City School District where children attend the University Speech Clinic for a year at a time and attend the Iowa City Schools. The question has also been raised as to what is the home district of a foster child. If the child is in the legal custody of the court and is placed in a foster home under the supervision of a child welfare worker, does that child's residence remain where his parents lived at the time of the court decree, or does the child have the residence of the school district in which the court is located?"

In answer to your first question, we first quote from Section 3661.057, 1939 Code:

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

We also quote Section 4283.01:

"*Tuition when in boarding home.* When any child of school age has become a public charge and is being cared for in a children's boarding home licensed by the state, and the domicile of such child at the time it became a public charge was in another school district than the one wherein such boarding home is located, then, such child shall be entitled to attend public school in the school district in which such boarding home is located, or if such district does not maintain a school offering instruction in the grade in which such child is properly classified, then such child may attend upon such instruction in any approved public school in the state that will receive it. The tuition of such a child, at the rates established by law, shall be paid by the treasurer of state from any funds in the state treasury not otherwise appropriated, and upon warrants drawn by the state comptroller upon the requisition of the superin-

tendent of public instruction. If such child was in the district at the time the regular biennial school census was taken, the semiannual apportionments shall be deducted from the tuition due the district under the provisions of this section. The superintendent of public instruction is hereby empowered to require such reports as are necessary properly to carry out the provisions of this section."

We wish to call to your attention an opinion which was given by this office on July 26, 1939, and addressed to Miss Jessie M. Parker, superintendent of public instruction, which held that in order to qualify as a children's boarding home under Section 3661.057 above quoted, there must be at least three children in such home. You ask whether the population of the home should remain constant, or in the alternative, what date of the year or month should be used to determine whether or not three or more children actually reside in the boarding home. From the last sentence of the above quoted Section 4283.01, it appears that the superintendent of public instruction may require such reports as are necessary to make the statute workable. It is our opinion that it is within the sound discretion of the superintendent of public instruction to determine the time or times that a census of the foster homes should be taken.

In answer to your second question, we first quote from Section 4268, 1939 Code:

"*School age—nonresidents.* Persons between five and twenty-one years of age shall be of school age. A board may establish and maintain evening schools for all residents of the corporation regardless of age and for which no tuition need be charged. Nonresident children and those sojourning temporarily in any school corporation may attend school therein upon such terms as the board may determine."

It will be noted from the above quoted section that any child between the ages of five and twenty-one is of school age. Also, it is noted from Section 4283.01, above quoted, that tuition may be paid by the state for any child of "school age." The section further states that if a child of school age is being cared for in a children's boarding home, his tuition must be paid by the state. It follows that it is our opinion that a child over the age of fourteen and under the age of twenty-one, living in a licensed children's boarding home, should be counted as one of the "three or more" children resident in such boarding home.

You state that you have been having some difficulty with children attending high school in districts other than their own. Section 4275 of the 1935 Code provides as follows:

"*High school outside home district.* Any person of school age who is a resident of a school corporation which does not offer a four-year high school course, and who has completed the course as approved by the department of public instruction for such corporation, shall be permitted to attend any public high school in the state approved in like manner that will receive him * * *."

It is noted that this section applies only to children of high school age who live in the district which does not have a high school. It is our opinion that the only manner in which this problem can be solved is by following the terms of Section 4274, 1939 Code, which reads as follows:

"*Attending in another corporation—payment.* A child residing in one corporation may attend school in another in the same or adjoining county if the two boards so agree. In case no such agreement is made, the county superintendent of the county in which the child resides and the board of such ad-

joining corporation may consent to such attendance, if the child resides nearer a schoolhouse in the adjoining corporation or nearer to a regularly established transportation route to a consolidated school and two miles or more from any public school in the corporation of his residence. Before granting such consent the county superintendent shall give notice to the board where the child resides and hear objections, if any. In case such consent is given, the board of the district of the child's residence shall be notified thereof in writing, and shall pay to the other district the average tuition per week for the school or room thereof in which such child attends. If payment is refused or neglected, the board of the creditor corporation shall file an account thereof certified by its president with the auditor of the county of the child's residence, who shall transmit to the county treasurer an order directing him to transfer the amount of such account from the funds of the debtor corporation to the creditor corporation, who shall pay the same accordingly."

Your final question concerns the home districts of the foster child. It is our opinion that school districts in which the child is placed, should govern and that he should take the school residence of his foster family.

JUSTICE OF PEACE: GRAND JURY: FEES: Justice is entitled to $1.00 where he conducts preliminary hearing to final conclusion. Should defendant, before conclusion of hearing, waive further examination of witnesses and consent to entry holding him to grand jury, justice is also entitled to $1.00 trial fee.

July 16, 1940. *The Honorable Chet B. Akers, Auditor of State. Attention: L. I. Truax:* This is in answer to your letter of the 15th inst., wherein you ask the opinion of this office upon the following legal questions:

1. If a preliminary hearing is conducted by a justice of the peace and witnesses are called and examined, with the result that the defendant is held to the grand jury, is the justice entitled to the $1.00 fee provided in Section 10636, subsection 21, Code of Iowa, 1939, or is such trial fee earned by the justice only when the case is a non-indictable misdemeanor?
2. In the event that a preliminary hearing is held in justice court and after one or more witnesses have been examined the defendant waives further hearing and consents that an entry be made holding him to the grand jury, has the justice earned the $1.00 fee provided in Section 10636, subsection 21?
3. In the event that preliminary hearing is had and goes on to final determination with the result that the defendant is bound over to the grand jury or discharged for lack of evidence, as the case may be, is the justice entitled to $1.00 fee for conducting said trial?

Section 10636, Code of Iowa, 1939, provides:

"Justices of the peace shall be entitled to charge and receive the following fees: * * *

"21. For trial of all actions, civil or criminal, for each six hours or fraction thereof, one dollar. * * *."

It will be immediately seen that the pertinent inquiry is as to what is meant by the two first words of subsection 21, viz., "for trial."

Answering your first question, we are of the opinion that the justice of the peace is entitled to one dollar where he conducts a preliminary hearing to its final conclusion. It is our view that the phrase, "for trial," does not apply only to cases which may be tried and finally determined in justice court, i.e., non-indictable misdemeanors. It is a matter of common knowledge that preliminary hearings frequently consume more time than do non-indictable misdemeanor trials and we, therefore, see no reason or justice for an interpretation that would deprive the justice of this fee.

We hold, therefore, that a preliminary hearing is a "trial," and one dollar should be taxed as part of the costs and paid to the justice as by law provided.

Answering your second question, it is our opinion that where a preliminary hearing is held before the justice of the peace and witnesses are examined but the defendant, before the conclusion of the hearing, waives further examination of witnesses and consents that an order may be made holding him to the grand jury, that the justice is nevertheless entitled to the trial fee of one dollar.

It is our opinion that this factual inquiry, though not completed, constitutes a "trial," as used in subsection 21, above quote. "Trial" has been variously defined. We set out a few.

In *Hunter vs. District Court of Polk County*, 126 Iowa 356, "trial" was said to mean an investigation into the facts according to forms of law. In *Finn vs. Spagnoli*, 67 Cal. 330, it was said that the "trial" is the examination before a competent tribunal according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such an issue.

We hold that in the posited case there was a "trial." It was not completed, but it was nevertheless a "trial" as that term is used in the above quoted subsection. The judicial determination of the facts in issue had begun and it was only because the defendant waived further examination that the hearing was not concluded. This, as we view it, would constitute no reason for holding that there was not a "trial." It should be understood, however, that our interpretation of the word "trial," is confined to the construction of that word as the same is used in the above subsection. We have no doubt that a situation might arise where the construction which we have placed on the word "trial," insofar as it relates to justice fees, might not apply in the interpretation of other statutes. We simply hold that where witnesses are examined before a justice of the peace at a preliminary hearing and the examination is not completed because of waiver of the defendant, that a sufficient "trial" has been had to entitle the justice to the one dollar trial fee.

What we have herein above said answers your question number three.

BOARD OF CONTROL: COUNTY: UNIVERSITY HOSPITAL AT IOWA CITY: PAROLEE: TRAVEL EXPENSE: Parolee of penal institution receiving medical attention at University Hospital at Iowa City shall be charged against quota of county of residence, and Board of Control not required to pay traveling expense to and from hospital.

July 17, 1940. *Board of Control. Attention: Warren L. Huebner, Secretary:* We have your letter of the 16th wherein you ask our opinion and advice upon the following question:

"Upon whom devolves the expense, medical and transportation, for treatment of parolees from our penal institutions at the University Hospital at Iowa City?"

the foregoing being asked in connection with treatment accorded Glenn Hudson, of Elkader, Clayton County, Iowa, while residing in that county and on parole from the state penitentiary at Fort Madison.

The correct answer to the foregoing question is by no means free from doubt. An examination of our reports definitely establishes that neither this subject nor one parallel to it has ever been discussed by the supreme court. The respective statutes involved do not provide us with a clear answer to the ques-

tion. However, after having examined Chapter 188, particularly Sections 3790, 3796 and 3797, and Chapter 189.7, particularly Sections 3828.132, 3828.147 and 3828.159 thereof, which read as follows:

"Chapter 188. Sec. 3790. *Legal custody of paroled prisoners.* All paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent and under the control of said board, and shall be subject, at any time, to be taken into custody and returned to the institution from which they were paroled.

"Sec. 3796. *Clothing, transportation, and money.* When a prisoner is paroled, he shall be furnished, by the warden, with such clothing, transportation, and money as is provided for prisoners when discharged at the termination of their sentence, but no further allowance shall be made if final discharge is granted while on parole.

"Sec. 3797. *Parole relief fund.* There is hereby established, from any unappropriated funds in the state treasury, a fund of twelve hundred fifty dollars which shall be known as the parole relief fund. The treasurer of state shall continue to maintain said fund in said amount.

"Chapter 189.7. Sec. 3828.132. *Complaint.* Any adult resident of the state may file a complaint in the office of the clerk of any juvenile court, charging that any legal resident of Iowa residing in the county where the complaint is filed is pregnant or is suffering from some malady or deformity that can probably be improved or cured or advantageously treated by medical or surgical treatment or hospital care, and that neither such person nor persons legally charageable with his support are able to pay therefor.

"Sec. 3828.147. *County quotas.* Subject to subsequent qualifications in this section, there shall be treated at the university hospital during each fiscal year a number of committed indigent patients from each county which shall bear the same relation to the total number of committed indigent patients admitted during the year as the population of such county shall bear to the total population of the state according to the last preceding official census. This standard shall apply to indigent patients, the expenses of whose commitment, transportation, care and treatment shall be borne by appropriated funds and shall not govern the admission of either obstetrical or orthopedic patients. If the number of patients admitted from any county shall exceed by more than ten percent the county quota as fixed and ascertained under the first sentence of this section, the charges and expenses of the care and treatment of such patients in excess of ten percent of the quota shall be paid from the funds of such county at actual cost; but if the number of excess patients from any county shall not exceed ten percent, all costs, expenses, and charges incurred in their behalf shall be paid from the appropriation for the support of the hospital.

"Sec. 3828.159. *Transfer of patients from state institutions.* The board of control of state institutions, and the board in control of the school for the blind, the school for the deaf, the soldiers' orphans home, and the juvenile home, may, respectively, send any inmate of any of said institutions, or any person committed or applying for admission thereto, to the hospital of the medical college of the state university for treatment and care as provided in this chapter, without securing the order of court required in other cases. Said boards shall respectively pay the traveling expenses of any patient thus committed, and when necessary the traveling expenses of an attendant for such patient, out of funds appropriated for the use of the institution from which he is sent."

We are of the opinion that since this parolee was a resident of Clayton County at the time he was admitted to the University Hospital that he should be charged against the quota of that county, even though a parolee from the State Penitentiary at Fort Madison, since Section 3828.147 does not except such persons, and further that since he was not sent to the University Hospital by the Board of Control the board is not required to pay the traveling expenses to and from the hospital.

GASOLINE TAX: SECTION 5093.29: TAX REFUND ON GASOLINE STATIONARY ENGINES: There could be no basis for a tax refund to a city or other municipal corporation purchasing gasoline for use in stationary engines operated by the city in construction work.

July 18, 1940. *Hon. W. G. C. Bagley, Treasurer of State. Attention: Mr. Freese:* I have before me letter directed to you on the question as to whether or not a city purchasing gasoline which is used in a stationary engine to operate machinery in the construction of sewers by the city is subject to motor vehicle fuel refund, the work being done by the city itself, and of course paid for from public funds.

Some reference is made to a former opinion by the attorney general's office rendered in August, 1938.

The subject of refunds in the motor vehicle fuel tax law is contained in section 5093.29. The pertinent provision therein is the next to the last paragraph of that section which provides:

"No tax refund shall be paid to any person, firm or corporation on any motor vehicle fuel used in any construction or maintenance work which is paid from public funds, but this provision shall not be construed as requiring payment of the tax herein imposed with respect to the sale or use of fuel oil so used unless the same is used as a fuel to propel motor vehicles operated upon the public highways for the purposes of transportation."

Prior to the enactment of Chapter 133, Acts of the 48th General Assembly, and section 4 thereof, the above quoted provision ended with the words "from public funds." Section 4 of Chapter 133, Acts of the 48th General Assembly added the balance of the quoted provision.

Two things are referred to in the above quoted provision of section 5093.29; one is "motor vehicle fuel" and the other is "fuel oil." The prohibition of tax refund to any person, firm or corporation is as to "motor vehicle fuel" used in construction and maintenance work paid from public funds. The exemption from payment of the tax is with reference to "fuel oil." The motor vehicle fuel tax law recognizes a difference between these two fuels, as is indicated by the provisions of section 5093.02, wherein various terms are defined.

Prevention of evasion of the tax provided for by the law is one of the purposes of the law. Considering the provisions above quoted in connection with the entire act, it is evident that the legislature had the matter of evasions in mind in connection with the enactment of the provision prohibiting refunds on motor vehicle fuel used in construction or maintenance work paid from public funds, and it likewise recognized that while the use of motor vehicle fuel on the highways was the rule, rather than the execption, that the use of fuel oil on the highways was the exception, rather than the rule, and that the legislature therefore determined that no refund should be given to any person, firm or corporation on motor vehicle fuel used in construction and maintenance work paid from public funds, and that the latter part of the above quoted provision was enacted that there might be no question that fuel oil which was used for propelling vehicles on the highways only in execptional cases, should not pay the tax in the first instance, unless it was used to propel motor vehicles on the highways, but that motor vehicle fuel should pay the tax in the first instance.

A further question that might arise is as to whether or not the prohibition as to refunds applies to municipal or public corporations as well as to private corporations. We can find no sound reason for making any distinction as to

the nature of the corporation. The ordinary use of motor vehicle fuel by a municipal corporation for the purpose of propelling vehicles so far as the tax is concerned, is treated the same as a vehicle used by a person, firm or private corporation. A municipal corporation pays the tax on the gasoline used in its motor vehicles, the same as anyone else, and there is nothing appearing in the law which would permit any such differentiation between the private and municipal corporations, so far as the provision of the above quoted section is concerned.

It is, therefore, our conclusion that there could be no basis for a tax refund to a city or other municipal corporation purchasing any gasoline for use in a stationery engine operated by the city in construction work.

TAXATION: DOG LICENSE: PENALTY: No penalty should be eliminated after July 1 just because the owner of a dog comes in and voluntarily declares the dogs and states that the assessor did not list his dog. In case the owner acquires the dog after April 1, or in case the dog becomes three months of age after July 1, it would seem that the penalty should not attach.

July 18, 1940. *Mr. Frank H. Lounsberry, County Attorney, Nevada, Iowa:* We are in receipt of your request for an opinion upon the following question:

"There has been a question raised in regard to the fee to charge on dog licenses when the owner has not been assessed and voluntarily declares the dog after penalty date of April 1. This also applies to the owner who wants a license tag on a dog that has passed the three months of age period after the first of April.

"We will appreciate your opinion as to whether such license should be issued without charging penalty or whether penalty should be charged as in the case of an assessed dog on which the license was not paid until after penalty date."

With regard to the first part of your question, it would seem that no penalty should be eliminated after April 1 just because the owner of a dog comes in and voluntarily declares the dog and states that the assessor did not list his dog. Section 5422 of the Code of Iowa provides that it is the duty of the owner of a dog for which a license is required to make application on or before the first day of January to the county auditor for a license. This puts the burden on the owner of the dog to make the application whether or not it is listed by the assessor. The fact that the owner comes in and reports his dog which has been missed by the assessor would not in any way excuse him from paying the penalty if he did not make the application until after April 1.

In case the owner of a dog acquires the dog after April 1, or in case the dog becomes three months of age after April 1, it would seem that the penalty in those cases should not attach. The owner would have the same duty to make application for license, but since this is not specifically covered by statute and since penalty is always a charge for delinquency, we do not believe it was the intent of the legislature that penalty be charged where it cannot be said that the owner of the dog was in any manner delinquent on April 1.

It is therefore our opinion that in these cases no penalty should attach.

CLERK OF DISTRICT COURT: ESTATE: TRUSTEESHIP: FEES: The clerk shall charge and collect fees for services performed in estate of any decedent, minor, insane person, or other person laboring under any legal disability, and this includes estates administered by a trustee.

July 25, 1940. *Mr. E. A. Fordyce, Assistant County Attorney, Cedar Rapids,*

Iowa: This is in answer to your letter of May 17, 1940, wherein you ask the opinion of this department relative to the following legal question.

Subsection 29 of Section 10837, Code of Iowa, 1939, provides:

"The clerk of the district court shall charge and collect the following fees, all of which shall be paid into the county treasury:

"29. For all services performed in the settlement of the estate of any decedent, minor, insane person, *or other persons laboring under any legal disability*, except where actions are brought by the administrator, guardian, trustee, or person acting in a representative capacity or against him, or as may be otherwise provided herein, where the value of the property of the estate does not exceed $3,000.00, $3.00; where such value is between $3,000.00 and $5,000.00, $5.00 * * * (the fees increasing in proportion to the amount of the estate)."

You inquire as to whether this subsection applies to an estate administered by a trustee appointed by will. You say:

"There are numerous cases in which, after the estate is settled, money, or a large portion of it, is turned over to the trustee provided for in the will. The question has arisen whether the clerk is entitled to receive the compensation provided in subsection 29 in the trusteeship as well as in the estate."

We are of the opinion that the clerk is entitled to receive the fees in both matters.

You will note that the subsection in question reads: "For all services performed in the settlement of the estate of any decedent, minor, insane person, or other persons laboring under any legal disability." A reading of this excerpt reveals that the word "estate," as used in said excerpt, is not confined to the estate of decedents, for it goes on to provide that it applies to the estates of minors and insane persons, and then finally it is provided, "all other persons laboring under any legal disability."

We reach the conclusion, therefore, that the clerk is entitled to receive the fee in the trustee matter as well as in the estate itself.

SECTION 6310: POLICEMEN AND FIREMEN PENSION FUND: LIMITATION OF LEVY: Section 6310 of the Code removes the limitation on millage levy provided for in section in those cities in which a police and/or fire retirement system shall be established, and the only limitation is in an amount sufficient to meet necessary obligations and expenditures.

July 25, 1940. *Hon. Chet B. Akers, Auditor of State. Attention: Mr. T. E. DeHart:* Under date of August 18, 1939, we rendered an opinion to your department interpretive of section 6310 of the Code as to the limitation of levy for policemens' and firemens' pension funds. Upon further consideration of this matter we have come to the conclusion that the result reached in that opinion was not the proper result, and accordingly that opinion is hereby withdrawn.

The question involved and for determination is as to the effect of the following provision now contained in section 6310 of the Code of 1939:

"Provided, further, that cities, in which a police and/or fire retirement system based upon actuarial tables shall be established by law, shall levy for the police and/or fire pension funds, a tax sufficient in amount to meet all necessary obligations and expenditures; and said obligations and expenditures shall be direct liabilities of said cities."

Section 6310, as it appeared in the 1931 Code and prior to the 45th Extra General Assembly, was in the language it now appears except that the above quoted provision was not contained therein. The effect of this was to limit the amount that cities of more than 17,000 population could annually levy not

to exceed one-half mill for each such department for such purpose. The above quoted provision came into the section by reason of the enactment of what appears as Chapter 75 Acts of the 45th Extra General Assembly. This Chapter 75 Acts of the 45th Extra General Assembly was in two divisions. Division 1 provided for the creation of retirement systems for policemen and firemen, appointed *after* the date the act took effect and to be set up on an actuarial basis. Division 2of the Chapter 75 Acts of the 45th Extra General Assembly directly amended certain sections of the Code appearing under Chapter 322. This Chapter 322 had been in existence for some time prior to the 45th Extra Session, and was the only provision for firemens' and policemens' pensions in existence at that time.

The new retirement system which appears in the 1939 Code as Chapter 322.1, provides in considerable detail for the system thereby provided for, including the method of financing. The method of financing appears to be set up on an actuarial basis and contemplates, insofar as the pension accumulation fund is concerned, contributions not only from both the individual members of the departments, but also on the part of the city. The pertinent part, so far as contributions by the city are concerned, appears as Section 9, Chapter 75 Acts of the 45th Extra General Assembly. This required the boards of trustees to certify to the Superintendent of Public Safety the amounts due and payable during the next year to the pension accumulation fund, and the expense fund, and required the Superintendent of Public Safety to include these amounts in his annual budget estimate, and required these amounts to be appropriated and transferred to the retirement system for the ensuing year. This clearly contemplated that there should be included in the annual budget of the city the amount required for the city's share of these funds, and being included in the budget, levy therefor would have to be made. However, in order to clarify this, the 47th General Assembly in Chapter 179, added the following sentence:

"Said cities shall annually levy a tax sufficient in amount to cover such appropriation."

It is thus seen that in Division 1of Chapter 75 Acts of the 45th Extra General Assembly, as amended, complete provision was made for the cities to levy any tax necessary for the new system therein provided for, that is, the retirement system for policemen and firemen appointed after the effective date of the act. This retirement system was entirely separate and distinct from the then existent pension fund systems in various cities and towns. Division 2 of Chapter 75, Acts of the 45th Extra General Assembly, was devoted entirely to amendments to the law pertaining to the then existent pension fund system, and Section 13, which is the first section under said Division 2, amended Section 6310 of the Code by providing that cities in which a police or fire retirement system based upon actuarial tables established by law *shall* levy for the police and/or fire pension fund a tax sufficient to meet all necessary obligations and expenditures and made those obligations and expenditures direct liabilities of the cities. The law which this section amended had nothing whatever to do with the new retirement system provided for in Division 1 of the Act, and it is quite evident that what the legislature intended to do was to enlarge the limitation of one-half mill for the old pension fund systems and make the obligations and expenditures involved in those funds direct liabilities of the cities in all cities where the new system was established.

The fact that the amendment to Section 6310 made in Division 2 of Chapter 75 Acts of the 45th Extra General Assembly, was not intended to have anything to do with the new system, but only with the old, is further strengthened by an examination of the title of said Chapter 75. We will not attempt to set out the title in full because of its length. The greater part of the title has to do with the new retirement or pension system newly provided for in the act, and after setting out the various matters involved in the first division of the act, the title states:

"All relating to retirement systems applicable only to civil service members of police and/or fire departments who shall be appointed to such forces after the date this act takes effect.

The title then continues in the following language:

"* * * to amend sections six thousand three hundred ten (6310), as amended by the 45th General Assembly, six thousand three hundred eleven (6311) * * * all relating to pensions for disabled and retired firemen and policement and civil service members of police and/or fire departments appointed prior to the date this act takes effect."

In other words, the title is indicative that in amending Section 6310 it had no relation to the new system created in Chapter 75, but only to the pension systems for which provision of law was in effect at and prior to the passage of said Chapter 75.

It is therefore our opinion that Section 6310 of the Code, by reason of the provision therein first quoted in this opinion and which was enacted by said Chapter 75, Acts of the 45th Extra General Assembly, removes the limitation on millage levy provided for in said section in those cities in which a police and/or fire retirement system based upon actuarial tables shall be established by law, and that the only limitation in those cities in levying for the old firemens' and policemens' pension funds is in an amount sufficient to meet the necessary obligations and expenditures thereof.

FEES: MAYOR: COUNTY TREASURY: STATE CASES: When mayor acts as ex officio justice of peace and, because of city ordinance, is not entitled to personally receive fees assessed, the fees collected in state cases would be paid into the county treasury.

July 26, 1940. *Mr. Ralph H. Goeldner, County Attorney, Sigourney, Iowa:* This is in answer to your letter of the 14th ultimo wherein you ask the opinion of this department on the following question. We quote from your letter:

"Ordinance No. 8, Section 2, of the Ordinances of Sigourney, Iowa, reads as follows: 'The mayor shall receive as full compensation for all his services as mayor the sum of two hundred dollars ($200.00) per year, and all fees collected or received by him shall be turned into the city treasury.'

"In the cases where the mayor acts as a mayor's court over matters relative to city ordinances, there is no question but what the fees are turned over to the city treasury. The question that arises is:

"2. If he is not entitled to personally receive the fees assessed when he acts as an ex officio justice of peace, would the county be required to pay said fees to the city to be turned into the city treasury."

We are of the opinion that under the provisions of Section 5670, Code of Iowa, 1939, the mayor must pay fees collected while acting as ex officio justice of peace to the county treasury. Section 5670 provides:

"*Salaries in lieu of fees.* It may be provided by ordinance that any city or town officer elected or appointed shall receive a salary in lieu of all other compensation; and in such case such officer shall not receive for his own use any

fees or other compensation for his services as such officer, but shall collect the fees authorized by law or ordinance, and pay the same as collected, or as prescribed by ordinance, into the city or county treasury, as the case may be."

The phrase, "but shall collect the fees authorized by law or ordinance, and pay the same as collected, or as prescribed by ordinance, into the city or county treasury, as the case may be," requires fees collected in state cases to be paid into the county treasury.

TAXATION: BEER LICENSES: CITY ORDINANCE (Clinton): Cities and town councils have express authority to pass ordinances regulating opening and closing of places where beer is sold.

July 30, 1940. *Mr. Carroll F. Johnson, County Attorney, Clinton, Iowa:* We are in receipt of your request for an opinion upon the following state of facts:

"The city council of Clinton has passed an ordinance providing that Class 'B' beer licensees shall not sell beer between the hours of one o'clock A. M., and six o'clock A. M., on week days, or twelve o'clock midnight on Saturday until seven o'clock A. M., Monday morning.

"The question is whether or not the municipal ordinance is in conflict with the state statute in that violations of the ordinance are punishable by a maximum $100 fine while violations of the provisions of the chapter regulating beer and malt liquors are made indictable misdemeanors."

In Section 1921.129 of the 1939 Code of Iowa we find express authority for cities and town councils to pass ordinances regulating opening and closing of places where beer is sold. That statute states in part as follows:

"* * * and said city and town councils are further empowered to adopt ordinances subject to the express provisions of Section 1921.115 for the fixing of the hours during which beer may be sold and consumed in the places of business of Class 'B' permittees, and further providing that subject to the express provisions of said section 1921.115 no sale or consumption of beer shall be allowed on the premises of a Class 'B' permittee, as above provided, between the hours of one a. m. and six a. m.; * * *."

It will be seen from the foregoing that not only are the cities empowered to adopt ordinances not in conflict with the provisions of the chapter, but the cities are expressly empowered to adopt ordinances regulating the opening and closing of such businesses. The Clinton ordinance does not violate the statute, but on the contrary, it would seem that such an ordinance would carry out the legislative intent. It must be said that the ordinance is within the powers conferred upon the city or town and the fact that the state statutes have legislated upon the same subject would not render the ordinance invalid. We do not feel that the facts here bring the case within the line of authorities holding ordinances invalid where they are in violation of regulations contained in state statutes. In such instances the cases usually turn upon the question of whether or not the power to adopt the ordinance can be fairly held within the statute conferring such power upon the municipal government. In other words, there might be some question here if the only power to adopt ordinances conferred upon the municipal government were the power contained in the first part of Section 1921.129 where the municipal government is granted power to adopt ordinances not in conflict with the act. We find, however, in the quoted portion of the foregoing section the specific power to adopt such ordinances regulating the opening and closing of such places of business and with this specific power granted to the city no conflict arises.

We feel this case lies within the authority of the case of *Town of Neola vs.*

Reichert, 131 Iowa 492. The following quotation from that case sufficiently states the Iowa doctrine with regard to such ordinances:

"May a city or incorporated town declare acts offenses against the municipalities, and prescribe punishments therefor, when the same acts are denounced as misdemeanors by the statutes of the state and punished accordingly? If such power is specifically conferred, the authorities agree that it may be excised. The conflict arises in determining whether such authority is to be implied from statutes conferring general powers upon municipalities to enact such ordinances. This court is committed to the doctrine that if the subject of the ordinance is fairly within those powers conferred upon the town or city, the mere fact that the matter has been covered by statute will not invalidate the ordinance."

In view of the above, we are of the opinion that the Clinton ordinance is valid.

DELINQUENT TAXES: TAXES: REDEMPTION: Where title to land has been taken by county under public bidder law and sold, interest and penalties should be credited to general fund as in ordinary cases. Only the tax itself is to be apportioned to taxing districts. Where real estate is sold for less than general tax plus penalties, etc., costs should be first deducted and put in general fund; then tax should be apportioned to various taxing districts, balance, if any, to be applied on penalty and interest and paid into general fund.

July 30, 1940. *Mr. John L. Duffy, County Attorney, Dubuque, Iowa:* This is in answer to your letter of the 13th inst. wherein you request the opinion of this department relative to the following legal question. We quote from your letter:

"When redemptions are made on real estate bought in by the county under scavenger sale, the costs, penalties, and interest are put in the County General Fund and the balance of the tax apportioned to the various taxing districts.

"The county has now taken title to several pieces of property and sold for the amount of general tax or more plus penalties, interest and cost.

"The question now arises should the amount of penalties, interest and cost be put in the general county fund and the balance apportioned in the same way as though it were redeemed.

"How should this apportionment be made where the real estate is sold for less than the general tax plus penalties, interest and costs?"

The answer to these questions, we believe, are found in the following statutes. Section 7227, Code of Iowa, 1939, provides:

"*Interest and penalties—apportionment—compensation of collectors.* The interest and penalty on delinquent taxes collected shall be apportioned to and become a part of the general fund of the county, and the amount allowed as compensation to delinquent tax collectors shall be paid from said fund."

Section 10260.4, Code of Iowa, 1939, provides:

"*Title under tax deed—sale—apportionment of proceeds.* When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed and sold by the board of supervisors as provided in this chapter, except that any sale thereof shall be for cash and for a sum not less than the total amount stated in the tax sale certificate including all indorsements of subsequent general taxes, interests and costs, without the written approval of a majority of all the tax levying and tax certifying bodies having any interest in said general taxes. All money received from said real estate either as rent or as proceeds from the sale thereof shall, after payment of any general taxes which have accrued against said real estate since said tax sale and after payment of insurance premiums on any buildings located on said real estate and after expenditures made for the actual and necessary repairs and upkeep of said real estate, be apportioned to the tax levying and certifying

bodies in proportion to their interests in the taxes for which said real estate was sold."

It will be noticed that Section 7227 provides that the interest and penalty on delinquent taxes collected shall be apportioned to and become a part of the general fund of the county. It is our opinion that where title to land has been taken by the county under the Public Bidder Law and thereafter sold as provided by said law, the interest and penalty collected should be credited to the general fund. We hold that when such a sale takes place, the amount realized exclusive of the interest and penalty is "delinquent taxes" and that Section 7227 above quoted governs insofar as it concerns interest and penalty. It follows, therefore, that such interest and penalty should be credited to the general fund in such case to the same extent as such interest and penalty is credited to said fund in the ordinary case. When such real estate is sold, the tax is "collected" as that term is used inSection 7227. There is no other statute that governs the disposition of interest and penalty except Section 7227.

The following from Section 10260.4 above quoted, we believe also substantiates our contention. We quote:

"When the county acquires title to real estate by virtue of a tax deed such real estate shall be controlled, managed and sold by the board of supervisors as provided in this chapter, except that any sale thereof shall be for cash and for a sum not less than the total amount stated in the tax sale certificate including all indorsements of subsequent general taxes, interests and costs, without the written approval of a majority of all the tax levying and tax certifying bodies. * * * All money received * * * after payment of any general taxes * * * and after expenditures made for the actual and necessary repairs and upkeep of said real estate, *be apportioned to the tax levyiny and certifying bodies in proportion to their interests in the taxes for which said real estate was sold* (italics supplied)."

The italicized portion of the above statute ,we think, makes it clear that only the tax itself is to be apportioned to the tax levying and tax certifying bodies. The inference is clear, in our opinion, that the interests, penalties and costs are to be retained by the county, for it is specifically stated that the apportionment operates on the taxes only.

Answering the following question:

"How should this apportionment be made where the real estate is sold for less than the general tax plus penalties, interest and costs?"

we are of the opinion that the following procedure should be employed: The costs should first be deducted and put into the general fund; then the tax should be apportioned to the various taxing districts in proportion to their interest in said tax. The balance, if any, should be applied on penalty and interest and paid into the general fund as by statute provided.

TAXATION: BEER PERMITS: ADVERTISING: A Class "B" beer permit holder who gives beer to those presenting coupons given away by the brewers violates the provisions of Section 1921.107 of the 1939 Code of Iowa.

August 12, 1940. *State Tax Commission, Des Moines, Iowa. Attention: M. W. Dailey, Superintendent Beer and Cigarette Revenue Department:* You have requested an opinion upon the following situation:

"On or about August 2, the Mankato Brewing Company of Mankato, Minnesota advertised in the Fort Dodge newspaper that on Saturday at 12 o'clock, noon, an airplane would fly over the city of Fort Dodge and release balloons on which would be printed a coupon and that if the finder of the balloon would

deliver same to any Class 'B' distributor in Fort Dodge handling Mankato beer, that the Class 'B' distributor would furnish, free-of-charge, one pint bottle of Mankato Brew to the holder of the coupon.

"In talking with the representatives of the Mankato Brewing Company, I was informed that the Mankato Brewing Company of Mankato, Minnesota paid for the advertising in connection with the above, and that the beer would be replaced to the Class 'B' retail dealers by the Mankato Brewing Company.

"The sheriff, county attorney, and several beer distributors have questioned the legality of this procedure. Will you please furnish the State Tax Commission, Beer Revenue Department with rulings as to the legality of this matter?"

Section 1921.107 of the 1939 Code of Iowa, in outlining the authority of the holders of Class B beer permits, provides in the last sentence as follows:

"It shall be unlawful for any licensee hereunder to give away beer, or to promote the sale of beer by the gift of any lunch, meal, or articles of food except pretzels, cheese or crackers."

There is no question but that the plan outlined in your question is a plain violation of the above provision of the laws of Iowa. Clearly the Class B dealers are giving away beer when they give a bottle of beer to a person who presents the company's coupon.

Other sections of the chapter relating to beer indicate a legislative intent not to permit excessive advertising or brewers to directly or indirectly supply or furnish fixtures and equipment where beer is dispensed. It was the evident intent of the legislature to regulate the manufacture and sale of beer to the end that beer shall be available for purchase by the public at duly licensed establishments, but that sales promotion be discouraged.

We are of the opinion that the Class B dealer who gives beer to those who present coupons as outlined in your question, violates the provisions of Section 1921.107 of the 1939 Code of Iowa.

TAXATION: MONEYS AND CREDITS: ANNUITY POLICY: An annuity policy which is a gift to a dependent mother from a daughter responsible by statute for her support, is subject to moneys and credits tax. Proceeds received by a beneficiary under an insurance policy shall also be subject to the moneys and credits tax.

August 12, 1940. *State Tax Commission, Des Moines, Iowa. Attention: Ben H. Hall:* You have submitted two questions to us presented to you by the city assessor of Des Moines, for official opinions. The questions are as follows:

"1. Is an annuity policy, the gift to a dependent mother from a daughter responsible by statute for the mother's support, exempt from the provisions of the Moneys and Credits Tax T. XVI, Chapter 332, Section 6984, Code of 1939?"

"2. Assuming the assessor has before him for assessment the proceeds of a life insurance policy payable as a death claim where the terms of the policy provide that the principal sum be held in trust by the insurance company and paid to the designated beneficiary in designated equal monthly payments for twenty years certain and for as long thereafter as the beneficiary shall survive, would he make the assessment under the provisions of the Moneys and Credits Tax T XVI, Chapter 332, Section 6984, Code of 1939, or would he be required to declare the proceeds of this life insurance policy exempt from taxation?"

There can be no question but that under the provisions of Section 6985 annuities are taxable as credits. In fact the statute specifically lists annuities as one of the forms of moneys and credits taxable, so the only question involved in the first question must be whether an annuity policy which is given for the support of a person the donor might be legally obligated to support, is taxable in the hands of the owner. The moneys and credits tax is a property tax and

the question of the use to which the property is to be put or consideration for the transfer or circumstances that have motivated the gift are all immaterial. The specific provision of the statute taxing annuities renders the annuity in the situation described in the first question taxable.

In the second question, the beneficiary is clearly the holder of an annuity and it would be taxable the same as any other annuity as a moneys and credits. Section 8776 providing for exemption for the proceeds of life insurance policies merely provides for the exemption from debts of the beneficiary in certain instances. There is no statute specifically providing that proceeds received by a beneficiary under an insurance policy shall be exempt from the moneys and credits tax. We hold, therefore, that such annuity would be taxable.

In your communication you ask other questions with regard to the method of making assessment under the American Experience Table with interest at four per cent or interest at six per cent. We do not feel that we should lay down any rule that would govern the assessment value of such annuities. We believe that it is definitely within the province of the State Tax Commission to give to the assessors proper instructions which will enable them to assess the present value of such annuities and until such time as the instructions or regulations of the Tax Commission are called in question we do not care to express any opinion as to the proper method of making such assessments.

VOTING MACHINE: ABSENT VOTER'S BALLOT: SAMPLE BALLOT: Sample ballot may be printed in the same form as the absent voter's ballot; that is, by retaining the square above the name, and without substituting a facsimile of the pointers which appear on the voting machine.

August 13, 1940. *Mr. Newton W. Roberts, County Attorney, Ottumwa, Iowa. Attention: John D. Moon, Assistant County Attorney:* We have your letter of August 10, requesting an opinion of this office in connection with the form of "sample ballot," where voting machines are used.

As stated in your inquiry, the situation is as follows:

Where voting machines are used, the sample ballot has been printed so that a facsimile of the pointers which appear on the voting machine are printed on the sample ballot over each candidate's name. The form of these sample ballots has been identical with the absent voters' ballots, except that in the absent voters' ballots, instead of a facsimile of the pointer being printed above each candidate's name, a small square appears above each candidate's name; this in order that the voter in voting the absent voters ballot, may express his vote by marking a cross above the name of the candidate for whom he wishes to vote. Your inquiry is directed as to whether or not the form of the absent voter's ballot, that is, with the square above each name instead of the facsimile of the pointer, could be legally used as a sample ballot, with, of course, the words "sample ballot" stamped or printed thereon. You intimate that if this can be done, there can be a saving in both time and expense.

Section 915 of the Code of Iowa 1935, provides that each voting place shall be provided with two sample ballots "which shall be arranged in the form of a diagram showing the entire front of the voting machine as it will appear after the official ballots are arranged for voting on election day."

This is the only provision of the statute which we find which can possibly govern in determining the question submitted, and the pertinent part of the

provision is that which directs that the sample ballot shall be arranged in the "form of a diagram showing the entire front of the voting machine as it will appear after the official ballots are arranged for voting." It will be noted that the essential part directs that it shall be a diagram, not a facsimile. A facsimile, it might well be contended, would require that the sample ballot be an exact picture of the front of the machine. However, in using the word "diagram" it is evident that it was not intended that the sample ballot should be an exact copy or picture of the machine, but rather that it should show precisely the location on the machine of the party tickets, the candidates' names, and the offices to be voted for. When the sample ballot meets these requirements, it has fulfilled the requirement of the statute, and the purposes of the statute, to-wit: To inform the voters before they vote as to the location on the voting machine of the various parties, the offices to be voted for, and the candidates for those offices. No additional purpose is served by having printed upon the sample ballot facsimilies of the pointers which appear upon the mechanical part of the machine, and which are pulled down by the voter in the process of designating his choice. Every purpose of the statute is served and every requirement met for a sample ballot which is in the same form as the ballot used for the absent voters which has the square above the name, rather than a facsimile of the pointer.

It is therefore our conclusion that the sample ballot may be printed in the same form as the absent voter's ballot, that is, by retaining the square above the name, and without substituting a facsimile of the pointers which appear on the voting machine.

HOSPITALS: PATIENT: LIABILITY: It is duty of county hospital authorities to advise patient risk he may take in leaving hospital before released by physician. After this, patient has right to leave hospital should he so elect, but there is no liability against the hospital or the physician should patient suffer adverse effect.

August 14, 1940. *Mr. Francis J. Kuble, County Attorney, Des Moines, Iowa. Attention: James P. Irish:* This is in answer to your letter of the 18th ult., wherein you request the opinion of this department relative to the following question. You say:

"Our county hospital has presented to this office a legal question which we believe is of sufficient importance to county hospitals throughout the state as to warrant our requesting you for an opinion.

"On many occasions the physicians in attendance and the hospital staff are of the opinion that it is highly dangerous to the life and health of the patient to leave the hospital, and the question arises as to whether or not there is any liability on the part of the hospital, or its physicians, if the patient is permitted to leave contrary to medical advice. In other words, how far can, or should, the hospital go in restraining a patient from leaving against the doctor's orders?"

You say further:

"Of course, the above question does not contemplate a case where the patient is mentally incompetent to determine his own best interests."

It is our opinion that it is the duty of the hospital authorities and the attending physician to advise the patient of any risk that he or she may take in leaving the hospital before released by the physician. However, after the patient has been so advised he certainly has the right to elect to leave the hospital when-

ever he may so desire. It is very clear that neither the hospital authorities nor the attending physician has any right to restrain a person from leaving the institution, assuming, of course, that such person is rational and in full control of his mental faculties. If the patient suffers adverse effects because of having left the hospital contrary to doctor's orders, we feel certain there would be no liability as against the hospital or against the physician.

Sustaining our view is *In re Carlson*, 130 Fed. 379, where it was said:

"* * * if this seaman desired to leave the hospital he had the right to do so, no matter how imprudent was the step, and regardless of how his health might be affected thereby * * *."

See also *Cook vs. Highland Hospital*, LRA 1915D 611.

We, of course, can not too strongly urge that where the patients referred to in your letter desire to leave the hospital before released by the attending physician, a written release of liability, properly witnessed, should be obtained.

JUSTICE OF PEACE: MARRIAGES: JURISDICTION: Justice of peace has right to perform marriage ceremonies in any part of his county other than his township.

August 14, 1940. *Mr. Carroll Johnson, County Attorney, Clinton, Iowa:* This is in answer to your letter of the 17th ult. wherein you ask the opinion of this department relative to the following legal question:

"Does the justice of the peace have the right to perform marriage ceremonies in other parts of the county other than the township in which he serves?"

It is our opinion that this question should be answered in the affirmative. The following sections, we think, are pertinent.

Section 10502, Code of Iowa, 1939, provides:

"The jurisdiction of justices of the peace, when not specially restricted, is coextensive with their respective counties; * * *."

Section 10436, Code of Iowa, 1939, provides:

"Marriages must be solemnized by:

"1. A justice of the peace, or the mayor of the city or town wherein the marriage takes place."

Inasmuch as the first quoted section provides that the jurisdiction of justices of the peace is coextensive with their respective counties, we are of the opinion that such officer may legally perform a marriage ceremony in any part of his county.

SPECIAL OFFICERS: DEPUTIES: FAIR POLICE: SHERIFF—LIABILITY OF: Sheriff is responsible for acts of his deputies; appointments should be approved by board of supervisors and bond or liability policy furnished by deputies. However, fair board officers may appoint own special police and thus relieve any liability on part of sheriff.

August 14, 1940. *Mr. George F. Mikesh, County Attorney, Cresco, Iowa:* This is in answer to your letter of August 3, asking the opinion of this department on the following legal question:

"When the Howard County Fair starts, the sheriff is called on to deputize approximately thirty men as special officers to do police work such as guarding fences, quell disturbances, act as night watchmen, etc.

"In previous years the practice has been for the sheriff to appoint these deputies, administer to them an oath, but to require no bond. Such appointments are not approved by the board of supervisors. The sheriff has become

concerned as to whether, in the event such officers act illegally in making arrests, etc., he would be liable for damages."

It is our opinion that the sheriff is responsible and would be liable for any illegal or unlawful act of said special deputy sheriffs.

Section 5238, Code of Iowa, 1939, provides:

"Each county auditor, treasurer, recorder, sheriff, * * * may, with the approval of the board of supervisors, appoint one or more deputies or assistants, respectively, not holding a county office, for whose acts he shall be responsible. The number of deputies, assistants, and clerks for each office shall be determined by the board of supervisors, and such number together with the approval of each appointment shall be by resolution made of record in the proceedings of such board."

Section 5241, Code of Iowa, 1939, provides:

"Each deputy shall be required to give a bond in an amount to be fixed by the officer having the approval of the bond of his principal, with sureties to be approved by such officer * * *."

Section 5241.1 Code of Iowa, 1939, further provides:

"The bond of sheriffs' deputies shall be either a bond or liability policy as may be required by the sheriff with the approval of the board of supervisors."

In view of the above statutes, we are of the opinion that the appointment of temporary deputies by the sheriff must be approved by the board of supervisors and a bond or liability policy approved by the board of supervisors must be furnished by such deputies. In view of Section 5238, above quoted, it seems clear that the sheriff is absolutely responsible for any illegal act performed by such deputies and we are, therefore, of the opinion that the appointments should be approved by the board and bond or liability policy furnished by these deputies as required by the sections above quoted.

We also want to make it clear that it is our opinion that the sheriff's liability for the acts of these special officers continues, notwithstanding the approval of the appointments by the board and the giving of requisite bond, but to the extent that the bond or liability policy furnished is adequate, the sheriff would be protected.

As to the liability of the sheriff for the acts of his deputies, see:

Thompson Bros. vs. Phillips, 198 Iowa 1064;

Brayton vs. Town, 12 Iowa 346;

Headington vs. Langland, 65 Iowa 276;

Rehmel vs. Board of Supervisors, 172 Iowa 455.

For your information we also call to your attention Section 2895, Code of Iowa, 1939, which reads:

"During the time a fair is being held, no ordinance or resolution of any city or town shall in any way impair the authority of the society, but it shall have sole and exclusive control over and management of such fair."

And Section 2898, Code of Iowa, 1939, which provides:

"The president of any society may appoint such number of special police as he may deem necessary. Such officers are hereby vested with the powers and charged with the duties of peace officers."

We have set out the above two sections so that you may call these to the attention of the fair board, if you have not already done so. When the fair board officers become conversant with these statutes, it is probable that the fair association may elect to appoint its own special police. In that event the sheriff will be relieved of the responsibility.

STATE BOARD OF SOCIAL WELFARE: OLD AGE ASSISTANCE: HEAD TAX: LIEN ON REAL ESTATE: It is impossible for county treasurer to carry such tax forward as a delinquent tax because he would have no valid tax list (county auditor failed in many instances to make certification required in Sec. 5296-f35). If county auditor did not certify those lists of persons subject to tax for years 1935-36, there is no lien created against property of such persons by reason of their failure to pay said tax.

August 14, 1940. *Mr. Francis J. Kuble, County, Attorney, Des Moines, Iowa:* This will acknowledge receipt of your letter of August 1st, in which you ask our opinion on the following question:

"Under the provisions of the law relating to Old Age Assistance Tax, which now appears in Section 3828.039 of the Code, there is a provision whereby the head tax of two dollars, levied for the years 1935 and 1936, shall be certified to the county treasurer for collection. It now appears that in this county at least a great portion of these separate items have not been so certified. Our question is, if the tax has not been certified to the county treasurer, is it a lien upon the real estate of the person subject to the tax?"

For the purpose of this opinion, we first quote in part from Section 3828.039:

"*Assistance fund created.* There is hereby created a fund to be known as the old age assistance fund to be administered by the state board and division, the proceeds of which shall be used to pay the expenditures incurred under this chapter. To provide money for said fund, there is hereby levied on all persons residing in this state and who are citizens of the United States and of twenty-one years of age and upwards, except inmates of state and county institutions, an annual tax of two dollars, to and including December 31, 1936. From the list certified to the county treasurer under the provisions of section 5296-f35 (Code, 1935), it shall be the duty of such county treasurer to place the names of all persons subject to said tax on a tax list as specified by the auditor of state * * * In any subsequent year to that in which any tax is due and payable, the county treasurer shall charge any unpaid tax and/or penalty against the property owned by the person by whom said tax is payable * * *."

We also quote Section 5296-f35, 1935 Code of Iowa, which is not carried in the 1939 Code:

"*Census of taxpayers.* Each assessor shall at the time of listing property for assessment list and return to the county auditor on or before June 1, 1936, and each year thereafter, the names and post-office addresses of all persons subject to the tax provided for in this chapter; and the county auditor shall certify said list to the county treasurer on or before June 30, 1936, and each year thereafter."

You state in your letter that the county auditor failed in many instances to make the certification required in Section 5296-f35 above quoted. We fail to see how the county treasurer could compile a tax list without knowing what names to place upon said list. The tax in question is a personal tax and all personal taxes, if unpaid, must be carried forward by the county treasurer as delinquent taxes in order to constitute a lien on real estate under the provisions of Section 7203, 1939 Code.

It is our opinion that from the facts as stated in your letter, it would be impossible for the county treasurer to carry such tax forward as a delinquent tax because he would have no valid tax list.

It follows that it is our opinion that if the county auditor did not certify a list of those persons subject to old age tax for the years 1935 and 1936, there is no lien created against the property of such persons by reason of their failure to pay said tax.

BOARD OF SUPERVISORS: ROAD ASSESSMENT DISTRICT: TENANTS IN COMMON TO BE CONSIDERED UNIT: Tenants in common are to be considered as one when signing petition to establish road assessment district, in determining whether or not the petition has been signed by 35 per cent of the owners of the lands within proposed district.

August 27, 1940. *Mr. Alden D. Avery, County Attorney, Spencer, Iowa:* This will acknowledge your letter of the 21st inst. wherein you ask the opinion of this department relative to the following legal question. Your letter follows:

"I would appreciate your opinion of the interpretation of that portion of the first paragraph of Sec. 4746 of the 1939 Code of Iowa, which reads as follows: "Said petitions shall be signed by 35 per cent of the owners of the land within the proposed district * * *."

"The local board of supervisors has before it a petition to establish a road assessment district. This particular district has an unusual situation in that one farm is in the name of a man and his wife as tenants in common and another farm was recently inherited by five heirs of the former owner and is now owned by the five as tenants in common. In arriving at the 35 per cent of the owners of the lands would the five tenants in common be considered as one or would they be considered as five owners? To make myself more clear, assuming that there were four separate farms in the proposed district, three of which were each owned by one separate owner and one of which was owned by six tenants in common, could the six tenants in common block said establishment by refusing to sign a petition to establish a road assessment district?

"The above situation is confronting the Clay County board of supervisors on a petition that has just been filed. I would appreciate your opinion in regard to this."

It is the opinion of this department that in determining whether or not the petition has been signed by 35 per cent of the owners of the lands within the proposed district, that the tenants in common are to be considered as one. In the hypothetical case set out in your letter, it is our opinion that when the three persons who owned their farms separately signed the petition, such petition was signed by 75 per cent of the owners. We make this statement in order that our opinion may be more readily understood.

TAXATION: HOMESTEAD CREDIT: TUITION: Where taxpayer's children attend school in a district in which he does not reside but owns property in said district, full amount of school tax should be deducted from tuition charged by said school district for attendance of his children therein because the full amount of the general taxes is paid by taxpayer even though part of the payment is in the form of a credit given to the taxpayer as a homestead credit.

August 27, 1940. *Mr. Clark O. Filseth, County Attorney, Davenport, Iowa:* We have your request for an opinion with regard to the interpretation of Section 4269 of the 1939 Code of Iowa and its application to a homestead credit situation. The specific question you ask is as follows:

"A now resides outside the City of Davenport and owns property in the City of Davenport on which she resided until November, 1939. She has a boy attending high school in Davenport, for which she is assessed tuition of a certain stated amount. She will this year pay general county taxes of $97.22 for the year 1939, on which she will receive a homestead exemption in the sum of $62.50. This leaves a balance of $34.72 which she will actually pay the county treasurer as general taxes. Of this amount the school district will receive about 50 per cent for school tax or $17.36. The school board feels that the amount of $17.36 is the amount that should be deducted from the tuition charge they make under the above quoted section.

"A contends that she is entitled to deduct 50 per cent of the $97.22 from the

tuition she will pay the Davenport school district and it is my opinion that the school district should allow her an offset of 50 per cent of the general tax assessed $(97.22) because the facts reveal that they receive their proportionate share of the homestead exemption and furthermore, that the homestead exemption being the result of a replacement tax which she actually pays that she comes within the meaning of Section 4269 and should be allowed the offset contemplated therein."

Section 4269 of the 1939 Code of Iowa provides as follows:

"4269 *Offsetting tax.* The parent or guardian whose child or ward attends school in any independent district of which he is not a resident shall be allowed to deduct the amount of school tax paid by him in said district from the amount of the tuition required to be paid."

Under the homestead credit law the amount of the credit, or $62.50, that Scott County receives from the State of Iowa will be apportioned out to the taxing districts, and the school district will receive its proportionate share. The homestead exemption credit is the result of a property replacement tax. It is paid from the fund collected by our three-point tax system of income, corporation and sales tax. In Section 6943.034 the purpose of our three-point tax is stated as follows:

"6943.034. *Purpose or object.* This chapter shall be known as the 'Property Relief Act,' and shall have for its purpose the direct replacement of taxes already levied or to be levied on property to the extent of the net revenue obtained from the taxes imposed herein, which shall be apportioned back to the credit of individual taxpayers on the basis of the assessed valuation of taxable property as provided in division VI of this chapter."

Under the facts stated, the county actually receives the full amount of the taxes, or $97.22, and the payment is by the taxpayer, even though part of the payment is in the form of a credit given to the taxpayer by reason of occupancy as a dwelling house. The taxpayer actually pays the full amount of the general county taxes and the full amount of the school tax should be allowed as an offset upon the tuition. In the case you state, this is approximately 50 per cent of the general tax. This is the amount that should be deducted from the tuition under the provisions of Section 4269 of the 1939 Code of Iowa.

TAXATION: TUITION: OFF-SET: We know of no other off-set for tuition allowable under the statutes except that in Section 4269 of the 1939 Code. This off-set is for the benefit of the taxpayer, and it is our opinion that the rural district is liable for the tuition of the children attending high school.

September 4, 1940. *Mr. Earl H. Fisher, County Attorney, Rock Rapids, Iowa:* You have requested an opinion from this office on the following situation:

"A resident and taxpayer of the Independent School District of Rock Rapids has three children attending school, two of them in high school and one of them in grade school. By or before the beginning of the coming school year, the aforementioned resident and his family are moving to a farm which he owns just outside the Rock Rapids Independent School District. The three children will continue attending school in Rock Rapids and, of course, in the rural district to which they are moving, there is no high school.

"Under section 4269 there would no doubt be an off-set allowable to the said taxpayer for the taxes which he pays in the City of Rock Rapids for the tuition of the children attending grade school. The question put by the rural district board is whether or not they are entitled to an off-set for the taxes paid by the parent of the said children in the Independent School District of Rock Rapids in excess of the off-set for the tuition of the child in grade school."

We know of no other off-set allowable under the statutes except that in

Section 4269 of the 1939 Code. This off-set is for the benefit of the taxpayer, and it is our opinion that the rural district is liable for the tuition of the children attending high school.

CITY COUNCIL: MINORS: BEER: ORDINANCE: City council may enact an ordinance prohibiting minors from entering a place of business where beer is sold, whether or not accompanied by parents or guardian, except where business of selling beer constitutes less than 50 per cent of the gross business.

September 4, 1940. *Mr. John E. Miller, County Attorney, Albia, Iowa:* This will acknowledge receipt of your letter of the 29th ult., asking the opinion of this department on the following two legal questions:

"1. May a city council legally pass an ordinance prohibiting minors from entering a place of business holding a Class B beer license, whether or not such minors are accompanied by their parents or guardian?

"2. If the city council may not legally pass an ordinance prohibiting minors from entering the place of business of a Class B permittee when accompanied by their parents or guardian, may such ordinance prohibiting minors from entering such place of business be legally enacted if such minors are not accompanied by their parents or guardian?"

We are of the opinion that a city or town council may legally and constitutionally enact an ordinance prohibiting minors from entering a place where beer is sold, whether or not accompanied by parents or guardian, except in the place of business of a permit holder in which the business of selling beer constitutes less than fifty per cent of the gross business transacted therein.

We call your attention to Section 1921.116, Code of Iowa, 1939, which provides:

"Minors are prohibited from serving beer in the place of business of any permit holder in which the business of selling beer constitutes more than fifty per cent of the gross business transacted therein."

Under this statute it is clear that the city would have no authority to pass an ordinance prohibiting minors from entering a place of business where the statute says they may lawfully work. This, we think, is the only restriction on the city's power.

We call also to your attention Section 5714, Code of Iowa, 1939, which provides, so far as is material to the question here under discussion:

"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, * * *."

You will notice that municipal corporations have power to enact ordinances not inconsistent with the laws of the state.

We hold that there are no provisions in the beer law that would have the effect of making ordinances, prohibiting minors from entering a place where beer is sold, in conflict with the provisions of the beer statute. It is true that Section 1921.115, Code of Iowa, 1939, provides:

"* * * No person except parent or guardian, shall furnish to any minor under twenty-one years of age, by gift, sale or otherwise, any beer * * *."

This is a general prohibition and does not imply that the city may not keep minors out of places where beer is sold.

We reach the conclusion, therefore, that a city or town, in the exercise of its police power, may legally enact an ordinance prohibiting minors from entering places where the business of selling beer constitutes more than fifty per cent of the gross business transacted therein.

TAXATION: ASSESSMENT: SHARES OF STOCK: Shares of stock in Iowa corporations are not taxable in the hands of the shareholders for it is presumed the tax on these shares was paid at source.

September 4, 1940. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa. Attention: Mr. E. A. Fordyce, Assistant County Attorney:* We are in receipt of your request for an opinion upon the following situation:

"A corporation incorporated under the laws of Iowa and subject to assessment as provided by Chapter 334 of the 1939 Code of Iowa has most of its assets invested in the shares of stock in other Iowa corporations. The officers of the corporation take the position that in arriving at the value of the shares of their corporation the assessor should deduct the value of shares of other corporations on the ground that they are represented by shares of Iowa corporations and are exempt, under the provisions of the 1939 Code of Iowa. The argument of the directors is that under the rule laid down in Morrill vs. Bentley, 150 Iowa 677 shares of stock are not credits within the meaning of the use of that term in Section 7008 and therefore constitute deductible items when the capital stock of a corporation is invested in shares of another corporation."

Section 7008 of the 1939 Code of Iowa provides that the shares of stock in any corporation organized under the laws of Iowa shall be assessed as moneys and credits and then further provides a rule to be followed in arriving at the assessable value of a share of stock. This rule is as follows:

"* * * In arriving at the assessable value of the shares of stock of such corporations, the amount of their capital actually invested in property other than moneys and credits shall be deducted from the actual value of such shares. Such property other than moneys and credits shall be assessed as other like property."

From the foregoing it will be seen that the assessor in arriving at the value to be placed upon a share of stock must first deduct all the property other than moneys and credits. The case of *Morrill vs. Bentley*, 150 Iowa 677, squarely holds that shares of stock do not constitute credits within the meaning of the money and credit statute. Such shares are taxed at the same rate, but the shares are not money and the shares are not credits so that in following the rule announced in the statute the assessor when deducting all that is not money or a credit must deduct shares of stock in other corporations.

We pass now to a consideration of the last sentence of Section 7008. Here the statute says.

"Such property other than moneys and credits must be assessed as other like property."

Now to follow this rule the assessor must assess to the corporation its realty, its personalty, and in fact all other property that is not money and not a credit. When the assessor finds other shares of stock he must assess them to the corporation just the same as he would if they were owned by an individual. If an individual owns shares in an Iowa corporation, the individual pays no tax thereon for that tax has been collected at source. Thus if a corporation owns shares in another Iowa corporation, the assessor does not assess these shares against the corporation.

In answer to your question, it is our conclusion, not that the other shares in Iowa corporations are deductible as credits, but that they are not credits within the meaning of the statute, but nevertheless they are not taxable under the last sentence of the statutory rule because other like property, namely, shares in Iowa corporations are not taxable in the hands of the shareholder for it is presumed the tax on these shares was paid at source.

SHERIFF: FEES: COLLECTION DELINQUENT TAXES: Sheriff is not entitled to retain fees received in collection of delinquent taxes by distress and sale. These fees should be accounted for to the county as other fees received by virtue of his office.

September 4, 1940. *Mr. O. E. Anderson, County Attorney, Creston, Iowa:* This is in answer to your letter of the 24th ult., wherein you ask the opinion of this department upon the following legal question. We quote from your letter:

"Our sheriff has collected delinquent taxes by distress and sale and has collected compensation as provided under Section 7224, Code of Iowa, 1939. The question which we desire an answer is whether or not the sheriff should account for these fees and pay them to the county treasurer as he does other office fees or is he entitled to retain said fees as his personal property?"

We are of the opinion that the sheriff is not entitled to these fees and that he must account for same to the county as he does other fees received by virtue of his office.

The following statutes, we believe, are controlling.

Section 5191, Code of Iowa, 1939, provides:

"The sheriff shall charge and be entitled to collect the following fees:

"1. For serving a notice and making return thereof, for the first person served, fifty cents, and each additional person, twenty-five cents.

"2. For each warrant served, two dollars, and the repayment of necessary expenses incurred, in executing such warrant, as sworn to by the sheriff; * * *.

"3. For serving * * * a subpoena, * * * twenty cents.

"4. For summoning a grand * * * jury, * * * actual and necessary expenses * * *.

"5. For summoning a jury to assess damages to the towners of land * * * five dollars per day, and necessary expenses incurred.

"6. For serving an execution, attachment * * * (etc.) two dollars.

"7. For * * * executing a certificate or deed * * * one dollar.

* * *

"11. For boarding a prisoner, a compensation of twenty cents for each meal, and not to exceed three meals in twenty-four consecutive hours; and fifteen cents for each night's lodging * * *.

"12. For waiting on and washing for prisoners, the sum of five cents per prisoner per day.

* * *."

We have set out a sufficient part of the above section, we believe, to show the general nature thereof.

Section 5192, Code of Iowa, 1939, provides:

"The amounts allowed by law for mileage and for actual, necessary expenses paid by him, and for board, washing, and care of prisoners, may be retained by him in addition to his salary."

Section 5245, Code of Iowa, 1939, provides:

"Except as otherwise provided, all fees and charges of whatever kind collected for official service by any county auditor, treasurer, recorder, sheriff, clerk of the district court, and their respective deputies or clerks, shall belong to the county."

Section 7224, Code of Iowa, 1939, provides:

"In the discharge of his duties as collector, should it become necessary to make the delinquent taxes by distress and sale, or should no collector be appointed, or should the collector fail to institute proceedings to collect said delinquent taxes, the treasurer shall place the same in the hands of the sheriff, or a constable, who shall proceed to collect the same, and either shall be entitled to receive the same compensation, in addition to the five per cent, as constables are entitled to receive for the sale of property on execution."

Section 5192, Code of Iowa, 1939, sets out the fees which may be retained by the sheriff. It provides that "the amounts allowed by law for mileage and for actual, necessary expenses paid by him, and for board, washing, and care of prisoners, may be retained by him in addition to his salary." In accordance with the familiar rule of statutory construction—expressio unius est exclusio alterus—the mention of one thing implies the exclusion of another thing, it is apparent that the fee thus received by the sheriff under Section 7224, above set out, belongs to the county and not to the sheriff.

We reach the conclusion, therefore, that the sheriff may not legally retain the fees provided for in Section 7224, Code of Iowa, 1939, and that these should be accounted for to the county as are other fees collected by the sheriff.

STATE PERMIT BOARD: BEER PERMIT: REVOCATION: State permit board has no authority to review action of city and town councils or boards of supervisors in revoking beer permit. The permit board has jurisdiction to review the action of lower bodies only when they fail to revoke these permits.

September 5, 1940. *The Honorable Earl G. Miller, Secretary of State:* This is in answer to your letter of the 3rd inst., wherein you ask the opinion of this department relative to the interpretation of Section 1921.089. The specific question is as to whether or not the state permit board may review the action of the board of supervisors in revoking a beer permit and if the evidence justified it, reinstate said permit.

We are of the opinion that the state permit board has no authority to review the action of city and town councils or boards of supervisors when beer permits have been revoked by these bodies.

The state permit board has jurisdiction to review the action of these lower bodies only when they fail to revoke these permits. We hereinafter set out our reasons for so holding.

Section 1921.098, Code of Iowa, 1939, provides:

"The state permit board may review the action of any city or town council, including special charter cities, and boards of supervisors, in any case where a hearing has been had relative to the cancellation or revocation of a permit and it appears from the records of the hearing held by said city or town council or board of supervisors, that the *permit has not been revoked or cancelled*, and it appears from an investigation made by the state permit board that there is reasonable ground to believe that such permit holder has been guilty of violation of the provisions of this chapter, and upon such hearing the permit board shall make a finding, after hearing the facts with reference to the grounds for the revocation of such permit, and *by a majority vote shall determine whether or not such permit shall be revoked and make an order accordingly, and said finding shall be final.*

* * *

"Like hearings may also be had in cases where a verified petition signed by at least ten taxpayers has first been presented to the city or town council, including special charter cities or the boards of supervisors, as the case may be, or

where the state permit board from its investigation asks that a hearing be had on the revocation of a permit * * *."

We have set out only so much of the statute as we deem pertinent to the question herein involved. The entire section, however, may be read with profit in determining the legislative intent. The beer and malt liquor statute was originally passed as Senate File 320, Laws of the 46th General Assembly, and became known as Chapter 16 of the Acts of the Regular Session of said assembly. The title of the act, so far as material to your question, reads:

"An Act to amend Chapter 25, Acts of the 45th General Assembly in Extraordinary Session, relating to the manufacture, sale and distribution of beer; *creating a state permit board and defining its powers and duties:* * * *."

Thus it will be seen that it was clearly the intention of the legislature to specifically provide in the act as to what powers and duties the state permit board was to have. Such powers and duties are specifically set out in Section 1921.098. This section clearly states that "the state permit board may review the action of any city or town council * * * and boards of supervisors, in any case where a hearing has been had relative to the cancellation or revocation of a permit and it appears from the records of the hearing held by said city or town council or board of supervisors, *that the permit has not been revoked or cancelled.*"

It is clear, so it seems to us, that it was the intention of the legislature to invest the state permit board with power to review the action of the lower bodies only in case such bodies refused to revoke a permit. There is nothing in the statute that may be logically interpreted to confer power upon the state permit board to review the action where the lower body has revoked the permit. This statute provides in the last four lines of the first paragraph as follows:

"* * * and by a majority vote shall determine whether or not such permit shall be revoked and make an order accordingly, and said finding shall be final."

You will notice that this clause does not read: "shall determine whether or not such permit shall be revoked *or reinstated*," as we think it would be had the legislature intended that the state permit board should review the findings of the lower bodies in case the permit was revoked, as well as where it was not revoked. We have also quoted herein from the last paragraph of this section. This, too, we think, supports our conclusion. Therein, as you will note, provision is made that a petition may be presented to the city or town council or board of supervisors asking for a revocation of a permit and in case such bodies do not revoke the permit then an appeal may be taken to the state permit board. Reading the section as a whole, we think it is very clear that the legislature did not intend that the state permit board should have any jurisdiction of revocation or cancellation of permits except in cases where the lower bodies refused to cancel or revoke them.

BEER PERMIT HOLDER: REVOCATION OF PERMIT: LIQUOR WHERE BEER IS SOLD: Person who uses or keeps "hard liquor" on premises of Class B permittee may not be prosecuted under Section 1921.126, 1939 Code, as this section applies only to the permit holder himself, and not to persons frequenting the place of business of permit holder.

September 5, 1940. *Mr. Waldo E. Don Carlos, County Attorney, Greenfield, Iowa:* This will acknowledge receipt of your letter of the 31st ult., wherein

you ask the opinion of this department relative to the interpretation of Section 1921.126, Code of Iowa, 1939, insofar as the same relates to the keeping of alcoholic beverages containing more than four per cent of alcohol by weight. The specific question is as to whether or not B, who is the husband of A, the latter being the holder of a Class B permit, may be successfully prosecuted for using or keeping whiskey in his wife's place of business.

We are of the opinion that this section applies only to the holder of the permit. This statute reads as follows:

"No liquor for beverage purposes having an alcoholic content greater than four percent by weight, shall be used, or kept for any purpose in the place of business of class "B" permittees, or on the premises of such class "B" permittees, at any time. A violation of any provision of this section shall be grounds for revocation of the permit. This section shall not apply in any manner or in any way, to drug stores regularly and continuously employing a registered pharmacist, from having alcohol in stock for medicinal and compounding purposes."

You will notice that this section provides: "A violation of any provision of this section shall be grounds for revocation of the permit," and also: "This section shall not apply in any manner or in any way, to drug stores regularly and continuously employing a registered pharmacist, from having alcohol in stock for medicinal and compounding purposes."

The two clauses just above quoted, we think, throw considerable light on the legislative intent. The first clause, as you will note, provides that the permit will be revoked when liquor having an alcoholic content greater than four per cent by weight is used or kept in the place of business of Class B permittees. This, we think, clarly indicates that it was the intention of the legislature that this prohibition apply to the holder of the permit. The provision with reference to drug stores also, we think, supports the above interpretation.

We must bear in mind that this is a criminal statute and must be strictly construed in favor of the accused and in case of doubt such doubts are to be resolved in favor of the person charged with the violation thereof. No authorities need be cited on this proposition but we set forth the following:

State vs. Campbell, 217 Iowa 848;
State vs. Cooper, 221 Iowa 658;
State vs. Wignall, 150 Iowa 650;
U. S. vs. Gooding, 12 Wheaton 460.

Another rule which should be borne in mind is that a criminal statute must be so clearly written that one who reads it may govern his conduct so as to not violate its provisions.

Applying these principles to Section 1921.126, above quoted, we believe the conclusion is inescapable that such statute should be construed as to apply to the holder of the permit only, and immediately after the provision prohibiting the using or keeping of liquor on the premises of a Class B permittee the provision is inserted in the statute providing for the revocation of the permit in case of violation. The provision referring to the revocation of the permit would, of course, have no application to the customer, employees or other persons who might have occasion to visit the premises.

We reach the conclusion, therefore, that B, the husband may not be successfully prosecuted under Section 1921.126 for using or keeping whiskey or

other "hard liquor" on the premises operated by the wife and wherein she sells beer under a Class B permit.

CITIES AND TOWNS: BEER PERMITS: BOARD OF SUPERVISORS: Cities and towns may not refuse to issue Class "C" permit to applicant. However, board of supervisors may at their discretion grant Class "B" and "C" permits.

September 9, 1940. *Mr. Alden D. Avery, County Attorney, Spencer, Iowa:* This department is in receipt of your letter requesting an opinion on the following matter:

"Where the governing board of a municipality is satisfied that an applicant for a Class "C" beer permit has complied with the requirements of Code Section 1921.105, can they refuse to issue the permit on one or more of the following grounds?

"1. Because the license fee of $25.00 a year is not sufficient to pay for the proper and necessary police supervision.

2. Because, if Class "C" permits are issued, it is feared that many Class "B" permit holders, who are now paying a license fee of $200.00 per year, will not renew their Class "B" license, but will apply for Class "C" licenses instead, and thus reduce the total revenue to the municipality."

It is the opinion of this department that cities and towns may not refuse to issue a Class "C" permit to the applicant on either of the grounds stated above. Section 1921.105 provides in part as follows:

"Except as otherwise provided in this chapter, a Class "C" permit *shall* be issued by the authority so empowered in this chapter to any person who * * *"

Therefore, the issuance of a Class "C" permit to an applicant who properly qualifies under the statute is mandatory, except as may be otherwise expressly provided for by law.

The fact that the license fee may not be sufficient to defray the cost of police supervision, or that Class "B" permit holders may apply for Class "C" permits affords no legal excuse for the denial of the license. The license fee of $25.00 for Class "C" permits was fixed by the legislature. The legislature had the power to determine the amount of the fee. It is fixed by Section 1921.115 of the Code, and applies generally throughout the state to applicants for Class "C" beer permits.

Attention, however, is called to the fact that as to boards of supervisors, Section 1921.099 of the Code provides that: "Power is hereby granted to boards of supervisors to issue, *at their discretion*, Class 'B' and 'C' permits * * *," and that under this provision this department has held that the matter of the issuance of a beer permit by a county board of supervisors is entirely discretionary with the board. See 1938 A. G. 463.

SOLDIERS' RELIEF COMMISSION: EXPENSE FOR ATTENDING MEETINGS: MILEAGE: It is for each county soldiers' relief commission to determine the necessity of attending a conference of county soldiers' relief commission in Des Moines, and if they do determine that such meeting is necessary, they may attend and receive $2.00 per day for each day actually employed in the work of their commission at such meeting, together with the mileage that is paid to the members of the board of supervisors, and further that the per diem and mileage shall be paid out of the taxes raised under the provisions of Section 3828.051.

September 11, 1940. *Bonus Board. Attention: Edwin H. Curtis, Executive Secretary:* Your two letters of September 10, 1940, are herewith acknowledged. The propositions about which you inquire are so similar in nature that they are both considered in this opinion.

It appears that annually the soldiers' relief commission of each county meets with the Bonus Board in Des Moines, for the purpose of instruction and to school the commissioners on their various duties. Your inquiry is:

"May the county soldiers' relief commission use, of the county soldiers' relief fund, an amount to defray the necessary expense of a member of their commission to attend a conference of county soldiers' relief commission in Des Moines?"

The following sections of the 1939 Code of Iowa bear upon your question:

"3828.055 *Compensation.* The members of said commission shall be paid for their services the sum of two dollars per day for each day actually employed in the work of said commission, and also the same mileage that is paid to the members of the board of supervisors. Said per diem and mileage shall be paid out of the taxes raised under the provisions of section 3828.051.

"3828.057 *Meetings—report—levy.* The commission shall meet annually at the county auditor's office on the second Monday in June, and at such other times as may be necessary. * * *"

From a review of the quoted sections, it would appear that the soldiers' relief commission would be entitled to the sum of $2.00 per day for their services for each day actually employed in the work of said commission and that the same mileage that is paid to the members of the board of supervisors should be allowed to the members of the commission. It further appears that the commission shall meet annually at the county auditor's office on the second Monday in June and *at such other times as may be necessary.* With this in mind, if the county soldiers' relief commission determines that it is necessary for them to join in the annual meeting at Des Moines for the purpose as above set forth, then they should be allowed the compensation and mileage as provided by statute. This, however, must come from the taxes raised under the provisions of Section 3828.051.

It is, therefore, our opinion that it is for each county soldiers' relief commission to determine the necessity of attending the meeting in question and if they do determine that such meeting is necessary, they may attend and receive $2.00 per day for each day actually employed in the work of their commission at such meeting, together with the mileage that is paid to the members of the board of supervisors, and further that the perdiem and mileage shall be paid out of the taxes raised under the provisions of Section 3828.051.

MOTOR FUELS: TAXABILITY: FEDERAL GOVERNMENT CONTRACTS: INDEPENDENT CONTRACTORS: There is no basis for exemption of contractor from Iowa state gasoline tax for fuels sold by supplier for use by contractor in performance of contract between contractor and United States Government.

September 12, 1940. *Hon. W. G. C. Bagley, Treasurer of State:* We have your inquiry as to the taxability of motor fuels sold to contractors for use in connection with the performance of contracts with the Federal Government, which contracts are on a cost-plus basis. Two specific questions are stated. The first is as to whether the supplier of motor fuels to the purchasing contractor would be justified in accepting in lieu of the Iowa state gasoline tax,

U. S. Form 1094 executed by the designated contracting officer of the United States Government, the fuels being sold to the contractors by the suppliers for use by the contractor in the performance of work in accordance with the terms of the contract entered into by the contractor with the United States Government.

The second question is as to whether the transaction of purchase of motor fuels for the purpose of carrying out such contracts would be a transaction tax exempt inasmuch as the fuel is used by the contractor in his performance of the terms of his contract.

We shall answer your inquiries in inverse order inasmuch as answer to the second inquiry obviates the necessity of answering the first one.

It is the opinion of this department that the transaction would not be exempt from the Iowa Motor Vehicle Fuel Tax which is imposed by Section 5093.03 of the Code. Almost this identical question was passed on by this department in an opinion rendered under date of August 7, 1937, to the then treasurer of state, and found at page 438, Report of Attorney General for 1938. It is the opinion of this department that that opinion is correct in the conclusion reached therein.

The fact that the contractor in the situation outlined by you is contracting on a cost-plus basis, rather than on a lump sum basis, in no way alters the situation, and in no way changes his position as an independent contractor.

The sale is not made "to the United States or any of its instrumentalities or agencies," and there is, therefore, no basis for an exemption.

REGISTRATION: ABSENT VOTER'S BALLOT: CITIES: Affidavit upon absent voter's ballot envelope is not sufficient registration in city where permanent registration is required by law or has been adopted pursuant to ordinance.

September 17, 1940. *Mr. James P. Irish, Assistant County Attorney, Des Moines, Iowa:* This is in answer to your letter of the 11th inst., wherein you ask the opinion of this department relative to the following legal question:

The city of Des Moines, under Chapter 39.1, Code of Iowa, 1939, is the only city in this state wherein permanent registration is required. Other cities, however, with a population of 10,000 or over may, by ordinance, provide for permanent registration and when such ordinance is passed all laws pertaining to permanent registration apply in the same manner and with the same force and effect as do such laws to cities where permanent registration is required.

The question now has arisen as to whether or not the affidavit upon the ballot envelope, where one votes by absent voter's ballot, constitutes a sufficient registration of the voter in cities where permanent registration is required by law or where such registration has been adopted by ordinance.

We are of the opinion that the affidavit upon the ballot envelope referred to it not sufficient to constitute registration in any case where permanent registration is required by statute or has been adopted by ordinance.

We hereinafter set out our reasons for so holding. Section 718.03, Code of Iowa, 1939, provides:

"From and after July 1, 1928, no qualified voter shall be permitted to vote at any election unless such voter shall register as provided in this chapter."

The chapter referred to is Chapter 39.1, Code of Iowa, 1939, setting forth the various provisions with reference to permanent registration.

Section 954, Code of Iowa, 1939, provides:

"The affidavit upon the ballot envelope shall constitute a sufficient registration of the voter in precincts where registration is required."

This registration clearly pertains to what may be designated as "ordinary registration," i. e., the registration provided under Chapter 39, Code of Iowa, 1939. In this connection, as you suggest, we think it should be borne in mind that the permanent registration law, to wit, Chapter 39.1, was passed after the ordinary registration law and subsequent to the absent voter's law. Therefore, we think the fair interpretation of Section 718.03 is that where permanent registration is required by law or has been adopted pursuant to an ordinance, the affidavit upon the ballot envelope referred to in Section 954 is not a sufficient registration. This interpretation, we think, imposes no hardship and makes the law entirely workable, in view of Section 718.12, Code of Iowa, 1939, which provides:

"Any person entitled to register who is permanently disabled by sickness or otherwise, or who will be absent from the election precinct until after the next succeeding election, may * * * apply in writing to the commissioner of registration who shall * * * forward * * * registration cars which shall be executed by the voter before a notary public and returned to the commissioner of registration. If such registration cards are properly executed and show that the voter is duly qualified, then such cards shall be placed in the registration lists."

It is our conclusion, therefore, that the affidavit upon the ballot envelope is not a sufficient registration in any city where permanent registration is required, to wit, all cities having a population of 125,000 or over, or where permanent registration has been adopted by ordinance as by law provided.

ELECTIONS: COUNTING BOARD: CHALLENGERS: Challengers may not be present during the counting of the ballots by the counting board while the polls are open. After polls are closed they may be present.

September 20, 1940. *Mr. William J. Kennedy, County Attorney, New Hampton, Iowa:* This is in answer to your letter of July 5, 1940, answer to which has been delayed for the reason that you indicated in your letter that it was not necessary to honor the request for an opinion until near election time.

You ask whether, under Section 897, Code of Iowa, 1939, challengers may be present during the counting of the ballots by the counting board prior to the closing of the polls.

Section 897, Code of Iowa, 1939, provides:

"No person shall be admitted into the space or room where such ballots are being counted until the polls are closed, except the counting board."

This section first appeared in the Code of 1924.

Section 821, Code of Iowa, 1939, provides:

"1. * * *

"2. * * *

"3. Any number of persons not exceeding three from each of such political parties, appointed and accredited in the same manner as above prescribed for challenging committees, to witness the counting of ballots."

This section first appeared in the Code of 1897.

It is our opinion that under the provisions of Section 897 challengers may not be present during the counting of the ballots by the counting board while the polls are open. After the polls are closed it is clear that they may be present. The statute so specifically provides. Section 821, subsection 3, clearly has reference to such counting as is done after the closing of the polls and

is, therefore, not in conflict with Section 897. If any conflict exists Section 897, having been passed after Section 821, has modified the latter section insofar as challengers are concerned.

NATIONAL GUARD: ASSISTANT CHIEF IOWA HIGHWAY PATROL: PAY: (Conley.) The assistant chief of the Iowa Highway Patrol is entitled to receive pay from the State of Iowa during the twenty-one (21) days of his absence on active service with the Iowa National Guard at Camp Ripley, Minnesota.

September 24, 1940. *Hon. Charles H. Grahl, Adjutant General of Iowa:* This will acknowledge your letter of September 16, 1940, making inquiry as to the following matter:

"Lieutenant Colonel Edward A. Conley is now and has been, for the last 17 years, a member of the National Guard of the State of Iowa. He is also assistant chief of the State Highway Patrol of the State of Iowa. Lieutenant Colonel Conley was ordered by the governor, under authority of the War Department, to participate in the Fourth Armp Maneuvers at Camp Ripley, Minnesota, from August 4 to 24, 1940, with his organization, the 168th Infantry, Iowa National Guard, during which time he was paid by the Federal Government, the pay and allowances of his grade.

"When Colonel Conley returned from the maneuvers, he did not receive his state pay for the period August 15th to 24th. He did receive state pay from August 4th to August 15th.

"An opinion is requested as to whether or not this officer would be entitled to state pay for the full time spent in attendance at war maneuvers."

The pertinent statutes of the Code of Iowa, 1939, are as follows:

"467.21 *Compensation for services, death and injury.* Officers and enlisted men while in active service of the state shall receive the same pay and allowances as paid for the same rank or grade for service in the army of the United States. If the said active service is under martial law or is aid to civil authorities, enlisted men shall receive an additional sum of one dollar per day; provided, however, that no officer or enlisted man who is an employee of the state and receives compensation from the state as such employee during said active service shall receive the compensation herein provided. * * *

"467.25 *State and municipal officers and employees not to lose pay while on duty.* All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence."

It appears that Colonel Conley is an assistant chief of the Iowa Highway Patrol and was on duty for twenty-one (21) days with the Iowa National Guard, taking part in the Fourth Army Maneuvers at Camp Ripley, Minnesota, and that during such period he received officer's compensation from the Federal Government.

Section 467.25 authorizes active service by all officers and employees of the state who are members of the National Guard without loss of pay during the first thirty (30) days of such duty. Section 467.21 limits 417.25 in that no officer or employee of the state while on active service of the state, may also receive National Guard pay by the state.

The limitation of Section 467.21 has no application to the case of Colonel Conley for the reason that he was not engaged in active service of the State of Iowa, and for the further reason that he received no National Guard pay

from the State of Iowa but only from the Federal Government, the National Guard of Iowa then being in the Federal service.

It is, therefore, our opinion that Colonel Conley is entitled to receive pay from the State of Iowa as assistant chief of the Iowa Highway Patrol during the twenty-one (21) days of his absence on active service with the Iowa National Guard at Camp Ripley, Minnesota.

NATIONAL GUARD: OFFICERS RESERVE CORPS: STATE EMPLOYEES: POLITICAL OFFICE: MILITARY SERVICE: Officers and enlisted men of the National Guard holding elective or appointive offices either in the state or a political subdivision thereof, should be granted a leave of absence for the period of the emergency. Officers and employees of the state, its subdivisions or municipalities who are members of the Officers Reserve Corps, are not, when called to military service, as a matter of statutory rights entitled to leave of absence without loss of status or efficiency rights, but the employer or the appointing power of such officer or employee may authorize such leave of absence without loss of status or efficiency rating unless statutory provision exists to the contrary.

September 24, 1940. *Hon. Charles H. Grahl, Adjutant General of Iowa:* Your letter of September 4, 1940, inquiring our opinion upon the following matter, is herewith acknowledged:

"The Congress of the United States has passed and the president has signed a joint resolution authorizing the president of the United States to order into active military service of the United States for a period of twelve consecutive months each, any and all members and units of any and all reserve components of the Army of the United States which includes Nnational Guard and Reserve Units. Under this resolution, in all probability, the National Guard and Reserve in this state will be called to active military service.

"An opinion is respectfully requested concerning the status of all officers and men in the National Guard and Reserve who are officers and employees of the State of Iowa or a political subdivision thereof. A great many of the officers and enlisted men of the Iowa National Guard hold elective and appointive positions in the State of Iowa or a political subdivision of the state. If these officers and employees are called to active service, what will be their status while in the active service? I particularly call your attention to sections 467.02 and 467.25 of the 1939 Code of Iowa."

Analyzing your inquiry, it appears that there are two questions to be answered. First, are the officers and employees of the state, its subdivisions or municipalities who are members of the National Guard entitled to leave of absence from such employment when called into the military service of the United States for the period of such service without loss of status or efficiency rating, and second, are the officers and employees of the state, its subdivisions or municipalities who are members of the Officers Reserve Corps entitled to leave of absence from such employment when called into the military service of the United States for the period of such service without loss of status or efficiency rating. If the answer to the last question is in the negative, may leaves of absence without loss of status or efficiency rights be granted by the proper authorities.

In answer to your first question, the Army of the United States as provided in the National Defense Act is composed of three components—the Regular Army, the National Guard and the Officers Reserve Corps. All commissioned officers of any of these components hold commissions in the Army of the United States.

We quote the following sections of the Code of Iowa, 1939:

"467.01 *Military forces.* The military forces of this state shall consist of those persons subject to military duty in the militia as defined in the constitution of the state, and those persons subject to duty in the national guard as defined in the national defense act (39 Stat. L. ch. 134) of the United States, except that honorably discharged soldiers, sailors, and marines of the United States shall be exempt from military service in this state at their election.

"467.07 *Composition of national guard.* The national guard shall consist of such organizations as may be specified by the secretary of war, with the approval of the governor, in accordance with federal law and regulations.

"467.08 *Regulations governing.* The national guard shall be subject to the provisions of federal law and regulations relating to the government, discipline and uniforming thereof, and to the provisions of the military code of Iowa, and to regulations published pursuant thereto."

It will be observed that the National Guard has a dual status in that it is not only the National Guard of the State of Iowa, but is in addition the National Guard of the United States. The National Guard of the State of Iowa is recognized by the legislature as a component part of the Army of the United States. Chapter 28.1 of the 1939 Code of Iowa, known as the Military Code of the State of Iowa, contains a law applicable to the National Guard in its state status, such as compensation for services, death and injury while in service, qualifications for officers, authority of the governor to call the troops into the service of the state and other provisions applicable to the National Guard in state service, as well as providing for the induction or order by the president into the service of the United States.

Public Resolution No. 96 of the 76th Congress authorizing the president to call the National Guard and Officers Reserve Corps to active military service of the United States provides in part as follows:

"In the case of any such person who has left a position or by reason of being ordered into such active military service is required to leave a position, other than a temporary position, in the employ of any employer and who (1) received such certificate of satisfactory service, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such service—

"(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like status and pay;

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

"(C) if such position was in the employ of any State or a political subdivision thereof, it is hereby declared to the sense of the Congress that such person should be restored to such position or to a position of like status and pay."

Title 32, Section 81a, the Federal Code Annotated, provides for the order and call of the National Guard components of the Army to active service. Subsection e, provides as follows:

"*Order into federal service*—When Congress shall have declared a national emergency and shall have authorized the use of armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination as he may prescribe, order into the active military service of the United States, to serve therein for the period of the war or emergency, unless sooner relieved, any or all units and the members thereof of the National Guard of the United States. All persons so ordered into the active military service of the United States shall from the date of such order

stand relieved from duty in the National Guard of their respective States, Territories, and the District of Columbia so long as they shall remain in the active military service of the United States, and during such time shall be subject to such laws and regulations for the government of the Army and the United States as may be applicable to members of the Army whose permanent retention in active military service is not contemplated by law. The organization of said units existing at the date of the order into active Federal service shall be maintained intact insofar as practicable. * * *"

It will be observed that when the National Guard is ordered by the president into active military service of the United States, they stand relieved from duty in the National Guard of their respective states. Section 467.25 of the Code of Iowa, 1939, provides as follows:

"*State and municipal officers and employees not to lose pay while on duty.* All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence."

This section "when ordered by proper authority to active service," is applicable to officers and enlisted men of the National Guard when ordered by proper authority into either state or Federal service.

It is, therefore, our opinion, in answer to the first question, that officers and enlisted men of the National Guard holding elective or appointive offices either in the state or a political subdivision thereof, should be granted a leave of absence for the period of the emergency.

The second question presents rather a different problem. Public Resolution No. 96 of the 76th Congress provides in part:

"In the case of any such person who has left a position or by reason of being ordered into such active military service is required to leave a position, other than a temporary position, in the employ of any employer and who (1) received such certificate of satisfactory service, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such service—

"(C) if such position was in the employ of any State or a political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like status and pay."

The statutes of Iowa provide no authority by virtue of which it is mandatory upon the state, its subdivisions or municipalities to save to its employees who are members of the Officers Reserve Corps when called to military service, their status or efficiency rating. The statutes do not, on the contrary, prohibit or prevent the appointing authorities or the employer from authorizing or granting to such officer a leave of absence without a loss of such status or efficiency rating.

The Congress so far as it was able, attempted to protect all individuals employed by the state or its subdivisions who might be called to military service, from such loss of status and rating and sought to suggest to such authorities that its employees or officers be granted the same privilege as those engaged in Federal or private employment.

The relation of master and servant applies generally alike to public, as well as private employment, and unless statutory requirements exist to the contrary, the employer may grant leaves of absence upon any condition he may determine.

It is, therefore, our opinion, in answer to your second question, that officers and employees of the state, its subdivisions or municipalities who are members of the Officers Reserve Corps are not, when called to military service, as a matter of statutory right entitled to leave of absence without loss of status or efficiency rights, but the employer or the appointing power of such officer or employee may authorize such leave of absence without loss of status or efficiency rating unless statutory provision exists to the contrary.

LEGAL SETTLEMENT: WIDOW'S PENSION: Widow who receives widow's pension from Mitchell County moves from Mitchell to Worth County. Her legal settlement was Worth County before she married so she may elect to resume Worth County as her legal residence. In that event Mitchell County is no longer under obligation to pay this woman widow's pension, but if she is entitled to a pension Worth County would be liable.

September 30, 1940. *Mr. Donald P. Chehock, County Attorney, Osage, Iowa:* This is in answer to your letter of the 25th inst., wherein you ask the opinion of this department on the following legal question. The facts are substantially as follows:

A and B, husband and wife, have three minor children. They were residents of Mitchell County, Iowa, where A, the husband, died during the month of July, 1936. Several years prior to that time the husband and wife had purchased a forty-acre farm in Worth County, Iowa, and were paying for it on the installment plan. In October of 1936 the widow, continuing to reside in Mitchell County, applied for a widow's pension, which was granted. Such pension was again renewed in 1938 as by law provided and she has been receiving widow's pension from Mitchell County since that time. In March of 1937 she moved with her three children to the forty-acre farm in Worth County and has resided there ever since. *Worth County was the residence and legal settlement of the wife prior to her marriage.*

The question is as to whether or not Mitchell County continues to be liable for widow's pension to B.

Section 3641, Code of Iowa, 1939, provides, so far as material to this question:

"* * * No payment (widow's pension) shall be made after said child reaches the age of 16 years, or after the mother has remarried, or after she has acquired a legal residence in another county, or after she has become a non-resident of the state."

Subsection 4 of Section 3828.088, Code of Iowa, 1939, provides:

"4. A married woman has the settlement of her husband, if he has one in this state; if not, or if she lives apart from or is abandoned by him, she may acquire a settlement as if she were unmarried. Any settlement which the wife had at the time of her marriage may at her election be resumed upon the death of her husband, or if she be divorced or abandoned by him, if both settlements were in this state."

We see no escape from the positive provisions of subsection 4 just quoted. It specifically provides that any widow may resume the legal settlement which she had at the time of her marriage. In the instant case B had a legal settlement in Worth County at the time of her marriage to A. A is now deceased. It is clear, therefore, that B has, under the provisions of said subsection 4, the right to resume the legal settlement which she lost at the time of her removal from Worth County with her husband.

We have quoted from Section 3641 to the effect that no payment (widow's pension) shall be made after the mother has acquired a legal residence in another county. May it be logically said that B has not acquired a legal

residence in Worth County? We think not. She actually resides there and has no intention of returning to Mitchell County and, furthermore, her legal settlement is there by virtue of the provisions of subsection 4 of Section 3828.088.

We reach the conclusion, therefore, that Mitchell County is not under any further obligation to continue widow's pension payments to B. As to whether or not B is at this time in such necessitous condition as to entitle her to a widow's pension from Worth County is a matter, of course, for the district court to determine, if and when an application is filed in Worth County. We think it clear, however, that if B is entitled to a widow's pension under the facts, Worth County would be liable therefor.

TAXATION: BOARD OF SUPERVISORS: INSTALLMENT CONTRACT: If the default in the installment contract renders the land subject to such action as might have been had before the filing of the installment contract, then clearly the board of supervisors would have a right to proceed under the provisions of Section 7265 and sell or assign the certificate of purchase with, of course, the approval of the tax-levying and tax-certifying bodies.

October 1, 1940. *Mr. R. A. Knudson, County Attorney, Fort Dodge, Iowa:* You have requested an opinion from this office as to whether the board of supervisors can, under the provisions of Section 7265 of the 1939 Code, compromise and assign the certificate of purchase when the property described in the certificate of purchase has been the subject of a redemption contract providing for ten-year installment payments under the provisions of Chapter 191, Acts of the 47th General Assembly.

Section 7265 provides in part as follows:

"When the county acquires a certificate of purchase and has the same in its possession for one year, or more, the board of supervisors may compromise and assign the said certificate of purchase, with the written approval of all tax-levying and tax certifying bodies having any interest in said general taxes. All money received from assignment of said certificates shall be apportioned to the tax-levying and certifying bodies in proportion to their interests in the taxes for which said real estate was sold."

That part of Section 7265 quoted above constitutes the amendment of the 48th General Assembly by House File 317 and it went into effect July 4, 1939. It will be noted that this portion of the statute purports to give the board of supervisors, with the written consent of all tax-levying and tax-certifying bodies, the right to compromise the tax where the county still has possession of the certificate. Where the county has entered into the ten-year plan of installment payments, the county has possession of the certificate, but so long as the contract is in full force and effect, this certificate could not be transferred or assigned for the county must remain in possession to carry out the terms of the contract. One of these terms is to suspend all proceedings upon the certificate and when the contract is fully paid to issue a certificate of redemption as provided for under the provisions of Section 7276 of the 1939 Code.

In the event the contract for the redemption payments in installments is in default, then under the provisions of Section 4 of Chapter 191, Acts of the 47th General Assembly, that the land is subject to such action as might have been had thereon before the filing of said agreement. Provision is made

that if the installment due is not paid within sixty days after the default the county auditor shall forthwith serve notice of the termination of the right of redemption.

If the default in the installment contract renders the land subject to such action as might have been had before the filing of the installment contract, then clearly the board of supervisors would have a right to proceed under the provisions of Section 7265 and sell or assign the certificate of purchase with, of course, the approval of the tax-levying and tax-certifying bodies.

STATE BOARD OF SOCIAL WELFARE: FOOD STAMP PLAN: POOR FUND: BOARD OF SUPERVISORS: WPA: The issuance of proposed warrant of $20,000 on poor fund is not an expenditure. Inasmuch as warrant is being placed in revolving fund, it will never be spent. Appanoose County may issue warrant for $20,000 in order to establish revolving fund which will enable Appanoose County to qualify under Federal surplus food stamp plan.

October 9, 1940. *Mr. Charles L. Johnston, County Attorney, Centerville, Iowa:* This will acknowledge receipt of your letter of October 4th, in which you ask our opinion on the following proposition:

"The board of supervisors of this county have adopted a resolution authorizing and approving the participation by this county in the Federal surplus food stamp plan. One of the requirements upon this county is that they create a revolving fund for the purchase of stamps, in the sum of $20,000.00. No doubt, your office is familiar with this food stamp plan.

"On January 1, 1940, the poor fund was $3,625.55 overdrawn. The maximum three-mill levy for this year produces $44,608.00. So far in 1940, warrants have been issued on the poor fund in the sum of $53,483.58. Our property valuation for this county for the year 1940 is approximately $15,000,000.00. The present total indebtedness of the county is approxamitely $702,000.00, as of September 30, 1940. We do not have sufficient money in the general fund, nor is the anticipation in that fund sufficient to create the revolving fund of $20,000.00.

"The question that the board of supervisors of this county and the county auditor desire an opinion on is as follows:

"May the board of supervisors authorize and the county auditor issue a warrant on the poor fund in the sum of $20,000.00 for the purpose of creating a revolving fund for the purchase of stamps to be used in participating in the food stamp plan? The issuance of the warrant in the amount above stated, $20,000.00, will cause the expenditures in the poor fund to exceed that estimated in the budget for this year, and also exceed the anticipated revenue in said fund. However, I believe that such expenditure could be permitted by virtue of the exemptions in the budget law and also the exemptions in Section 5258 of the Code.

"As I understand it, persons on WPA, relief, old age pensioners, recipients of widow's pensions, and blind pensions, are eligible to participate in the food stamp plan. The only question in my mind is whether or not a person on WPA is a person entitled to support from public funds, as mentioned in Section 5258."

While there is some doubt in our minds as to whether Section 5258 and subsection 4 of Section 5259 of the 1939 Code might apply in any event, it is our opinion that the issuance of the proposed warrant for $20.000.00 is not an expenditure. It is our opinion that as long as the proposed warrant is being placed in the revolving fund, it will never be spent and will remain intact.

It follows that it is our opinion that Appanoose County may issue the proposed warrant for $20,000.00 in order to establish a revolving fund which

will enable Appanoose County to qualify under the Federal surplus food stamp plan.

CONSERVATION COMMISSION: BIOLOGICAL BALANCE: SEASONS: It is within the authority of the Conservation Commission to extend by administrative order the season set out by statute for any species if it finds that the population of any such species is at variance with the biological balance.

October 9, 1940. *M. L. Hutton, Director, State Conservation Commission, Des Moines, Iowa:* This will acknowledge your letter of October 7, 1940, in which you ask our opinion upon the following matter:

"Under the provisions of law, the open season for taking certain species of wildlife, such as, e. g., quail, Hungarian partridges, and pheasants, is fixed by law.

"Under the provisions of Section 1794.002, Code of Iowa, 1939, the Commission is 'designated the sole agency to determine the facts' as to whether the biological balance for each species or kind does or does not exist.

"We are writing to inquire if the Commission has the authority to extend by administrative order the season set by statute for any species if it finds that the population of any such species is at variance with the biological balance."

Section 1794.002, Code of Iowa, 1939, is as follows:

Biological balance maintained. The open seasons, closed season, bag limits, catch limits, possession limits and territorial limitations set forth herein pertaining to fish, game and various species of wildlife are based upon a proper biological balance as hereinafter defined being balanced for each species or kind. The seasons, catch limits, bag limits, possession limits and territorial limitations set forth herein shall prevail and be in force and effect for each and every species of wildlife to which they pertain as long as the biological balance for each species or kind remains such as to assure the maintenance of an adequate supply of such species. The commission is hereby designated the sole agency to determine the facts as to whether such biological balance does or does not exist. If the commission, after investigation finds that the number and/or sex of each or any species or kind of wildlife is at variance to aforesaid condition, the commission shall by administrative order extend, shorten, open or close seasons and/or change catch limits, bag limits and/or possession limits or areas in accordance with said findings. For the purpose of this section, biological balance is defined as that condition when all losses to population are compensated by natural reproductive activity or artificial replenishment, replacement or stocking."

You will observe that the legislature contemplated that the biological balance of game might vary from time to time and that because of such changing conditions the open seasons or closed seasons or other matters pertaining to such game which are made a part of statutory regulation might require adjustment from time to time, and that recognizing such situations it made the Iowa State Conservation Commission the sole and only agency to make such adjustment. Within the contemplation of the statute is the adjustment of open seasons. It would appear that the legislature had in mind that such seasons might be reduced, extended or closed at the discretion and in the best judgment of the Conservation Commission if they determine it would be well to do so in order to determine the proper biological balance. It would appear that the Commission must first determine the facts as to whether such biological balance does or does not exist and that after this has been determined, then it is within their authority to allow the season to remain as is designated by statute if the biological balance does exist, or to alter the

season as the biological balance would seem to require if such biological balance has ceased to exist.

It is, therefore, our opinion that it is within the authority of the Conservation Commission to extend by administrative order the season set by statute for any species if it finds that the population of any such species is at variance with the biological balance. This conclusion is predicated upon the theory that an adjustment of the population by the extension of the season would tend to create a proper biological balance.

NATIONAL GUARD: OFFICERS RESERVE CORPS: STATE EMPLOYEES AND OFFICIALS: ACTIVE SERVICE: 30 DAYS' PAY: State employee or official who is member of National Guard is entitled to leave of absence without loss of status or efficiency rating, and to pay during first 30 days thereof, each time when ordered by proper authority to *active service.*

Ames, Iowa, Oct. 9, 1940. *Iowa State Highway Commission, Ames, Iowa. Attention: W. H. Root:* This will acknowledge receipt of your request for opinion on the following question.

"Section 467.25 of the Code of 1939 provides that when state employees are called to active service in the National Guard we shall continue to pay them the first 30 days' leave of absence. Under this clause we have paid a number of our employees who were called to Camp Ripley during the summer. Now what will be the status of these employees if they are again called out for service this fall under the new National Defense Act—will we be under obligation to pay them another 30 days?"

Section 467.25 of the 1939 Code provides as follows:

"State and municipal officers and employees not to lose pay while on duty. All officers and employees of the state, or a subdivision thereof, or a municipality therein, who are members of the national guard, shall, when ordered by proper authority to active service, be entitled to a leave of absence from such civil employment for the period of such active service, without loss of status or efficiency rating, and without loss of pay during the first thirty days of such leave of absence."

Section 467.02 provides in part as follows:

"The term 'active service' shall be understood and construed to be service on behalf of the state, in case of public disaster, riot, tumult, breach of the peace, resistance of process, or whenever the same is threatened, whenever called upon in aid of civil authorities, or under martial law, or at encampments whether ordered by state or federal authority, or upon any other duty requiring the entire time of the organization or person, except when called or drafted into the federal service by the president of the United States."

It is first noted that the definition of "active service" distinguishes between service "at encampments whether ordered by state or federal authority" and service "when called or drafted into the federal service by the president of the United States."

Service covered by the last phrase quoted is not included within the definition of "active service" as contemplated by the provisions of Section 467.02.

Section 467.02 places no limitation on the number of times leaves of absence shall be granted from civil employment for the period of service without loss of status and without loss of pay for the rst thirty days thereof.

We therefore conclude that on each occasion that the officer or employee is ordered by proper authority to active service—as defined by Section 467.02, quoted above—such officer or employee is entitled to leave of absence without

loss of status or efficiency rating, and to pay during the first thirty days thereof.

With respect to the status of members of the National Guard and of the Reserve Corps, you are referred to the opinion of this department under date of September 24, 1940, a copy of which is hereto attached.

GENERAL ELECTION: LIST OF VOTERS IN PRECINCT: CHALLENGERS: There is no restriction as to what the challenging committee may have with them in the way of lists of voters for the purpose of aiding them in the performance of their duties as challengers.

October 19, 1940. *Mr. G. K. Thompson, County Attorney, Cedar Rapids, Iowa:* We have your request for an opinion on the question as to whether party challengers in a general election may be permitted to have in their possession while in the voting places, lists of voters of the precinct, to be used by them in connection with the performance of their duties as challengers.

Your second inquiry has to do with the duty of the judges or clerks of election to announce the name of each voter.

Directing attention to your first inquiry, Section 821 of the Code provides as follows:

"Persons permitted at polling places. The following persons shall be permitted to be present at and in the immediate vicinity of the polling places, provided they do not solicit votes:

"1. Any person who is by law authorized to perform or is charged with the performance of official duties at the election.

"2. Any number of persons, not exceeding three from each political party having candidates to be voted for at such election, to act as challenging committees, who are appointed and acredited by the executive or central committee of such political party or organization.

"3. Any number of persons not exceeding three from each of such political parties, appointed and accredited in the same manner as above prescribed for challenging committees, to witness the counting of ballots."

Paragraphs 2 and 3 of the foregoing quoted section specifically provide for each political party to keep at the polls challenging committees appointed and accredited by the political party committee. There is no restriction as to what the challenging committee may have with them in the way of lists of voters for the purpose of aiding them in the performance of their duties as challengers. It is entirely reasonable that a party challenger should have a list of voters of that precinct with him for the purpose of aiding him in the performance of these duties. This does not mean, however, that a party challenger would be permitted to distribute literature or cards of candidates or solicit votes. It is our considered opinion that a party challenger may have in his possession a list or lists of voters while present in the polling place.

Answering your second inquiry: Section 794 of the Code provides:

"Ballot furnished to voter. The judges of election of their respective precincts shall have charge of the ballots and furnish them to the voters. Any person desiring to vote shall give his name, and, if required, his residence, to such judges, one of whom shall thereupon announce the same in a loud and distinct tone of voice."

The latter part of this section specifically requires one of the judges of election to announce the name and residence of each voter *in a loud and distinct tone of voice* immediately after the voter has given his name and resi-

dence to the judges. This permits everybody in the polling place to know who is presenting himself to vote, and permits a challenge on the part of any judge or challenger including a challenger of a political party.

Insofar as the foregoing may be in conflict with any previous holding of this department, such previous holding is overruled.

INSANE PERSONS: COUNTY LIABLE FOR EXPENSE DURING VACATION OF PATIENT FROM STATE INSTITUTION: When an insane person is granted a leave or vacation from a state institution for a period of from one to four weeks the county liable for the cost of support of such patient is liable for costs during the time of patient's absence, since the facilities for the care of such person must be available during such time.

October 22, 1940. *Board of Control of State Institutions. Attention: Mr. Huebner, Secretary:* This is in answer to your letter of the 17th inst., wherein you ask the opinion of this department with reference to the following legal question. You state:

"May a county refuse to pay the expenses as provided by law for the care of a patient while the payment is on vacation from the institution?

"It has been the practice of the state institutions to permit certain patients to spend their vacations not exceeding one month with their relatives, when request is made by such relatives, recommended by the superintendent of the institution and approved by the board of control.

"In considering the above question, it should be remembered that our state institutions are crowded to capacity, and any space vacated by reason of a patient on vacation for one to four weeks cannot be filled, but that space must be preserved for the return of the patient.

"The opinion herein requested is the result of a patient, the support of whom is chargeable to Bremer County for the quarter ending September 30, 1940, amounting to $47.09. Bremer County is now disputing the charge on the ground that said patient was on vacation from the State Hospital during the month of July."

It is our opinion that the county is liable for such expenses, notwithstanding the fact that the patient may be temporarily absent from the institution.

We call your attention to Section 3581, Code of Iowa, 1939, which provides:

"The necessary and legal costs and expenses attending the arrest, care, investigation, commitment, and support of an insane person committed to a state hospital shall be paid:

"1. By the county in which such person has a legal settlement.

"2. * * *"

Section 3600, Code of Iowa, 1939, provides:

"Each superintendent of a state hospital where insane patients are cared for shall certify to the state comptroller on the first days of January, April, July, and October, the amount not previously certified by him due the state from the several counties having patients chargeable thereto, and the comptroller shall thereupon charge the same to the county so owing. * * *"

Section 3601, Code of Iowa, 1939, provides:

"The county auditor, upon receipt of such certificate, shall thereupon enter the same to the credit of the state in his ledger of state accounts, and at once issue a notice to his county treasurer, authorizing him to transfer the amount from the insane or county fund to the general state revenue, which notice shall be filed by the treasurer as his authority for making such transfer, * * *"

Section 3602, Code of Iowa, 1939, provides:

"Should any county fail to pay these bills within sixty days from the date of certificate from the superintendent, the state comptroller shall charge the

delinquent county the penalty of one percent per month on and after sixty days from the date of certificate until paid."

It is our thought that a patient, temporarily absent from the institution on vacation, is still under the supervision of said institution. As has been pointed out all of the facilities for the care of this patient must be reserved notwithstanding the fact that he is temporarily absent. He may, because of his mental condition becoming aggravated and for other reasons, be returned to the institution at any time.

We reach the conclusion, therefore, that the temporary absence from the institution of an insane patient does not alter in any manner the liability of the county for the care of such patient therein.

SHERIFF: FEES FOR LODGING PRISONERS: If a sheriff is paid $250.00 for lodging prisoners and then resigns, the county may not pay his successor in office any further amounts for lodging prisoners during the same year. The statute provides "the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of $250.00 for any calendar year."

October 22, 1940. *Mr. Chet B. Akers, Auditor of State. Attention: Mr. Truax:* This will acknowledge receipt of your letter of the 19th inst., wherein you ask the opinion of this department relative to the following legal question:

"During the year 1939 two men served as sheriff of Jasper County. Earl Shields servide as sheriff from January 3, 1939, to August 5, 1939, inclusive, and then resigned. Ray Barber was appointed sheriff and served from August 6, 1939, to December 31, 1939, inclusive.

"During the period January to May, 1939, inclusive, Earl Shields had earned and was paid the maximum amount of $250.00 for lodging as provided in Section 5191, Code of 1939.

"On December 18, 1939, Ray Barber filed claim against county and was paid the sum of $102.12 for lodging prisoners from August 6, 1939, to December 31, 1939, inclusive, computed on the basis of the number of days he served as sheriff in the year 1939, namely 146, and at the rate of $250.00 per year.

"We desire your opinion on the question of whether the county can legally pay more than $250.00 for lodging prisoners in the Jasper County jail for the calendar year 1939; and secondly if it cannot be done, on what basis of calculation is the $250.00 to be paid in a case where the office of sheriff is held by two men during the same calendar year?"

We are of the opinion that the payment of $102.12 for lodging prisoners from August 6, 1939, to December 31, 1939, inclusive, to Ray Barber, sheriff, is an illegal expenditure.

Section 5191, Code of Iowa, 1939, provides:

"The sheriff shall charge and be entitled to collect the following fees:

"* * *

"11. For boarding a prisoner, a compensation of twenty cents for each meal, and not to exceed three meals in twenty-four consecutive hours; and fifteen cents for each night's lodging. But the amount allowed a sheriff for lodging prisoners shall in no event exceed in the aggregate the sum of two hundred fifty dollars for any calender year. * * *"

We think the above subsection answers the question set out in your letter. A fair interpretation of this section, we believe, is that in no event may more than $250.00 be paid out in any one calendar year for lodging prisoners. We do not believe that the fact that one sheriff resigns and another is appointed to succeed him increases the liability of the county to the sheriff for this service.

Let us assume that the county had several sheriffs in one year, which is within the realm of possibility. Could each draw $250.00? To ask the question is to answer it.

We reach the conclusion that the statute was intended to limit the liability for lodging prisoners to the sum of $250.00 and that no more may be legally collected.

CCC CAMPS: ENROLLEE QUALIFIED TO VOTE: An enrollee of a CCC camp is not a resident within the provisions of Section 1 of Article II of the Constitution of the State of Iowa so as to qualify him to vote in the precinct and county where the camp is located, unless the camp is located in the precinct and county where he resided at the time of enrollment.

October 29, 1940. *Mr. John A. Cherny, County Attorney, Independence, Iowa:* We have your request of October 28th, for an opinion on the question as to whether a voter who is an enrollee in a CCC camp is qualified to vote in the precinct and county in which the camp is located.

The qualifications for voting in the State of Iowa are provided for in Section 1 of Article II of the Constitution, which provides as follows:

"Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote, sixty days, shall be entitled to vote at all elections which are now, or may hereafter be authorized by law."

The term "resident," as used in the above provision of the Constitution, is used in the sense of or as synonymous with "domicile," and in the case of State vs. Savre, 129 Iowa 122, the supreme court of Iowa concluded that the word "residence," as employed in the Constitution and statutes of the state with reference to elections, was synonymous with "home" and "domicile."

In Vanderpoel vs. O'Hanlon, 53 Iowa 246, the court had before it an action wherein the plaintiff was suing for damages for having been refused by the judges of election the right to vote. Plaintiff, at the age of 19, was living with his father in Mitchell County, Iowa, when he was sent by his father to the State University at Iowa City, and three years later while attending the school he offered to vote at Iowa City. Plaintiff returned to his father's home in Mitchell County during vacations. On the witness stand he testified that he did not know what he would do after he graduated; that he was not aware that he ever would live at Iowa City, and said: "I was at that time (when he offered to vote) without any intention." The court, in its opinion, said:

"If it was the intention of the plaintiff to return to Mitchell County when he had finished his education, it would probably be conceded that his place of residence, within the meaning of the constitution, continued to be in Mitchell County during all the time he was absent. And, on the other hand, it would probably be admitted, if, when he went to Iowa City, or at any time thereafter, before he offered to vote, his intention was to make that place his home and residence when he ceased to attend the University, that such place was and became his place of residence in such sense that he would have become a legal voter in Johnson County.

"The case is somewhat different from these, for the plaintiff had not formed any intention of either staying or leaving Iowa City when he ceased to attend the University. But in legal contemplation, we think, there is no difference between the case before us and the first proposition above stated."

In the case of Harris vs. Harris, 205 Iowa 108, the plaintiff brought an action for divorce. The defendant filed a special appearance denying the jurisdiction of the district court of Iowa, in and for Polk County, on the ground that plaintiff was not a resident of the State of Iowa. Plaintiff was an officer in the United States Army. He was born in Poland, and came to Des Moines with his parents, his father becoming a naturalized citizen before the plaintiff reached his majority. The parents continued to reside in Des Moines. Plaintiff attended high school in Des Moines, and was appointed to the United States Military Academy from Des Moines, and graduated therefrom, and returned to Des Moines to await orders. Thereafter he was ordered to various places throughout the United States and its possessions, continuing in the military service. In 1925 he was ordered to Fort Banks, Massachusetts, where he was stationed at the time of the hearing of this case. He testified that when the Government released him from his duties he intended to return to Des Moines. The supreme court sustained the lower court in denying the special appearance, and in the course of its opinion, said:

"The one controlling question, although novel, finds easy solution. The question is whether a person who is an officer in active service in the army of the United States can acquire a domicile in the army post or camp where he is stationed, even though he establishes his family there.

"The numerical weight of judicial authority answers the question in the negative. (Authorities cited.) The legal principle is declared and approved by the American Law Institute. See Conflict of Laws, Restatement No. 1, Topic 3.

"A naval officer cannot acquire a domicile at his station or on his vessel, for the same reason, *that his going and staying at his post when so ordered are not a matter of his choice.* Knowlton vs. Knowlton, 155 Ill. 158 (39 N. E. 595) (reversing 51 Ill. App. 71); Brown vs. Smith, 15 Beav. 444.

"An officer may ask for his post, and may, on his application, be assigned to it; but this is entirely in the will of his superior officer, and the choice is not in the power of the applicant. Nor does an officer under martial discipline, when detailed for special duty in a certain place, acquire a domicile there, although he may take his family there. (Knowlton vs. Knowlton, supra; Remey vs. Board of Equalization, 80 Iowa 470); and a person who enters the army of another country gets no domicile in the country whose army he joins. Ex parte Cunningham, 13 L. R. Q. B. D. (1883-84) 418. Therefore, a person under such circumstances cannot, in any proper sense of the term, have a residence anywhere other than the home he has left, *since he has no choice as to where he goes, the time he can remain, or when he shall return. To gain either an actual or a legal residence, there is, of necessity, involved at least the exercise of volition in its selection,* and this cannot be affirmed of the residence of either a soldier or a sailor in active service. Radford vs. Radford, supra."

A domicile once acquired continues as the domicile of this individual until a new one is acquired. Two elements are essential to the acquiring of such new domicile; first, the living at a particular place, and second, the voluntary intent that the old domicile be abandoned and the new one taken up.

As was said in the quotation above, "to gain either an actual or a legal residence, there is, of necessity, involved at least the *exercise of volition in its selection.*"

Enrollees in a CCC camp come to the camp from all parts of the country. When a man enrolls in the Civil Conservation Corps he does not know where he may be sent; he has nothing to do with his location from that time on

until he is released from the CCC, and his presence in any particular CCC camp, or the location of the camp, is entirely beyond his control.

It necessarily follows that the domicile of a CCC enrollee remains at the place where he was domiciled at the time of his enrollment until such time as he begins living at another place with the intention voluntarily exercised in the selection of that place as his permanent abode. His right to vote is not impaired, but it cannot be exercised at a place where he is not domiciled.

It is, therefore, our opinion that an enrollee of a CCC camp is not a resident within the provisions of Section 1 of Article II of the Constitution of the State of Iowa so as to qualify him to vote in the precinct and county where the CCC camp is located, unless the camp is located in the precinct and county where he resided and was domiciled at the time of his enrollment.

LICENSE: VILLAGE: TOWNSHIP TRUSTEES: ROADHOUSE: A roadhouse operated in a village must obtain license from township trustees, as village is unincorporated. See Section 5582.

October 30, 1940. *Mr. H. Wayne Black, County Attorney, Audubon, Iowa:* This is in answer to your letter of the 25th inst., wherein you ask the opinion of this department relative to the following legal question. You say:

"Recently in the town of Hamlin, Iowa, *which is an unincorporated village*, a man has opened up a place called the Deer Head which specializes in the serving of steaks and other foods. It is also my understanding that some dancing is permitted at his place of business. He has done this without first getting a township license from the township trustees."

The question is: Can he lawfully operate this establishment without a license from the township trustees?

It is our opinion that the above question should be answered in the negative and we hereinafter give our reasons for so holding.

Section 5582, Code of Iowa, 1939, provides:

"No person shall, for himself or for any other person, firm, or corporation, keep or operate for hire or for profit any theater, moving pictue show, pool or billiard room, roadhouse, amusement park, or bowling alley, *outside the limits of cities and towns* without first procuring a license therefor from the township trustees. * * *" (Italics supplied.)

Section 5582.1, Code of Iowa, 1939, provides:

"A roadhouse, for the purposes of section 5582, shall be construed to mean any building or establishment open to the public and located on or accessible to a road or public highway outside the limits of an incorporated town or city where entertainment, prepared food or drink is furnished to he public generally for hire, sale or profit."

Section 5583, Code of Iowa, 1939, provides:

"The granting of a license shall be discretionary with the trustees; provided, however, that a license to operate a theater or moving picture show shall not be denied in any unincorporated village having a population of one thousand or more except for good cause. * * *"

Section 5623, Code of Iowa, 1939, provides:

"The municipal corporations referred to in this title shall be divided into cities of the first class, cities of the second class, and towns.

"1. *First class.* Every municipal corporation now organized as a city of the first class, or having a population of fifteen thousand or over, shall be a city of the first class.

"2. *Second class.* Every municipal corporation now organized as a city of the second class, or having a population of two thousand, but not exceeding fifteen thousand, shall be a city of the second class.

"3. *Towns.* Every municipal corporation having a population of less than two thousand shall be deemed a town.

"4. Villages. Town sites platted and unincorporated shall be known as villages."

We are of the opinion, in view of the statutes above quoted, that the operation of the establishment known as the "Deer Head" in Hamlin, Iowa, is unlawful unless a license is obtained from the township trustees.

Section 5582 specifically provides that a roadhouse shall not be operated for hire or for profit "outside the limits of cities and towns" without first procuring a license therefor from the township trustees. Clearly the "Deer Head" is a roadhouse operated outside the limits of a city or town for it is operated within the limits of a village. As we have pointed out in Section 5623, a village is a town site platted and unincorporated, therefore, Hamlin, Iowa, is a village and the operator of a roadhouse in such village must have a license from the township trustees. That the place in question is a roadhouse can not be doubted, in our opinion. Section 5582.1 provides:

"A roadhouse * * * shall be construed to mean any building or establishment *open to the public and located on or accessible to a road or public highway* outside the limits of an incorporated town or city where entertainment, prepared food or drink is furnished to the public generally for hire, sale or profit."

It is clear, so it seems to us, that the "Deer Head" comes within the definition of "roadhouse." You do not say whether the "Deer Head" is located on a road or public highway, but that is immaterial for clearly it is accessible to a road or public highway. If it is a roadhouse, accessible to a road or public highway, a license must be obtained, providing also, of course, that such roadhouse is located outside the limits of a city or town.

Aside from all this, however, there is a further and more compelling reason for coming to the conclusion herein reached. We call your attention to Section 5583. Therein we find the following provision:

"The granting of a license shall be discretionary with the trustees; provided, however, that a license to operate a theater or moving picture show shall not be denied in any unincorporated village having a population of one thousand or more except for good cause."

This last quoted clause, we think, shows conclusively the legislative intent as to the law's application to unincorporated villages.

It is our view that the last quoted portion from Section 5583 makes it clear that roadhouses can not be operated in unincorporated villages without first procuring a license from the township trustees.

We reach the conclusion, therefore, that the operation of the "Deer Head" in Hamlin, Iowa, without a license as by law provided is unlawful.

REGISTRATION OF VOTERS: ELECTIONS: AFFIDAVIT INSUFFICIENT: A person who fails to register in cities where such is required is ineligible to vote, and an affidavit before the election judges will not establish his qualification as a voter. The burden of proving his registration is upon the voter.

November 5, 1940. *Mr. L. O. Linstrum, County Auditor, Des Moines, Iowa:* This will acknowledge receipt of your letter of the 4th inst., wherein you ask the opinion of this office in reference to the following legal question:

"The city of Des Moines by ordinance adopted a permanent registration system under Chapter 39.1 of the Code of Iowa, 1939.

"The question has arisen as to whether or not a voter who has failed to register under the provision of such chapter, and the ordinance passed pursuant thereto by the city of Des Moines, may at the time he appears before the judges of election to vote, make affidavit as to his qualifications as a voter, and thereupon be allowed to vote irrespective of his failure to register as provided in said statute and ordinance."

It is our opinion that if a person has failed to register as provided by Chapter 39.1, Code of Iowa, 1939, he is ineligible to vote.

It is very clear, so it seems to us, that under the provisions of said chapter a person who has failed to register may not make affidavit before the election judges as to his qualifications as a voter and by such means become entitled to vote. To so hold would be to nullify the registration law. If a person's name does not appear on the registration list, it is presumed that he is not registered. It is fundamental that if he had registered the officer is presumed to have performed his duty and placed his name upon the list. The burden of proving registration is upon the person asserting that he is registered. Clearly such burden is not met by the simple expedient of taking an oath as to his constitutional qualifications before the judges of election. To so hold would be to open the door to fraudulent voting.

STATE BOARD OF SOCIAL WELFARE: MERIT SYSTEM COUNCIL: HEALTH DEPARTMENT: UNEMPLOYMENT COMPENSATION COMMISSION: STATE SERVICES FOR CRIPPLED CHILDREN: RESIDENCE QUALIFICATIONS: Merit System Council may not require residence in Iowa as a requirement for admission to examinations unless requested by Department of Health, Unemployment Compensation Commission and State Services for Crippled Children. State Department of Social Welfare must follow residence requirements of Code, and such residence requirements should be followed by Merit System Council in giving examinations for said department.

November 13, 1940. *Dean Anston Marston, Chairman, Merit System Council, Insurance Exchange Bldg., Des Moines, Iowa:* This will acknowledge receipt of your letter of November 6th, wherein you ask our opinion on the following question:

"The Iowa Merit System Council respectfully requests a legal opinion by the Iowa attorney general, as to whether the Merit System Council has authority:

"1. To require residence in Iowa as a requirement for admission to the examinations it is required to give to establish 'registers' (lists of eligibles) for appointments to positions under the Iowa State Department of Social Welfare, the Iowa State Department of Health, the Iowa Unemployment Compensation Commission, and Iowa State Services for Crippled Children.

"2. To stipulate the length of such state residence prior to admission to examinations.

"A copy of the Regulations under which the Council is working enclosed. Attention is directed to Article VIII, Section 6, and Article II, Section 1 (a).

"Chapter 181.1 of the Code of Iowa establishes certain state residence requirements for employees of the State Department and county boards of social welfare prior to appointment. As shown by the enclosed correspondence, the Unemployment Compensation Commission is making a similar requirement for its employees, and the State Department of Health and State Services for Crippled Children are agreeable to such a requirement for their employees other than professional personnel."

Article III of the Regulations for the Merit System as approved by the four agencies concerned, reads in part as follows:

"Classification Plans

"Section 1. *Preparation of plans.* Each state agency shall formally adopt and make effective a comprehensive classification plan for all positions. Such plan shall be based upon investigation and analysis of the duties and responsibilities of each position and each position shall be allocated to its proper class in the classification plan. The plan shall be developed after consultation with supervisory officials, classification specialists, and persons technically familiar with the character of the work. When complete, the classification plan shall include for each class an appropriate title, a description of the duties and responsibilities, *and the minimum requirements of education, experience, and other qualifications.*"

It is our opinion that the residence requirement is properly within the scope of the employing agency. The employing agency sets up the minimum requirements of education and experience *and other qualifications.* One of the other qualifications which should be within the province of the employing agency is that of the length of residence in the state, because that agency from past knowledge knows how much local experience is necessary.

The Code is silent as to the length of residence necessary for any employee of the Department of Health, the Unemployment Compensation Commission and the State Services for Crippled Children. It is our opinion that the three above named agencies may pass reasonable regulations concerning residence requirements and request the Merit System Council to include such residence requirements in its requirements for admission to examination.

Insofar as the State Department of Social Welfare is concerned, the length of residence of employees is covered by statute. Under Section 3661.009, it provides: "All employees of the State Board shall have been residents of the State of Iowa for at least two years immediately preceding their employment * * *." Also, under Section 3661.013, in regard to county board employees, it provides: "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." The wording of Section 3661.009 is sufficiently clear to show that there is a residence requirement of two years immediately preceding employment. The wording of Section 3661.013 is sufficiently different from Section 3661.009 that it is our opinion that an employee of a County Board of Social Welfare need not have been a legal resident of the State of Iowa for the two years immediately preceding employment, but may at any time during his life have been a legal resident of the state for two years. Obviously, the State Board of Social Welfare could not pass any regulation in conflict with the state law and could not authorize the Merit System Council to adopt a residence requirement for the taking of examinations which would nullify the provisions of the law.

It is, therefore, our opinion that the Merit System Council may not require residence in Iowa as a requirement for admission to the examinations it must give unless such residence requirement is requested by the Department of Health, the Unemployment Compensation Commission and the State Services for Crippled Children.

It is further our opinion that the State Department of Social Welfare must follow the residence requirements as set out by the Code, and that such residence requirements should be followed by the Merit System Council in giving examinations for appointments to positions to said department.

TAXATION: AUTOMOBILE UNDERWRITERS: (Section 6943.066.) The exemption from the business tax as provided in Section 6943.066 should extend to the Automobile Underwriters, the attorney-in-fact for the State Automobile Insurance Association.

November 14, 1940. *State Tax Commission, Des Moines, Iowa. Attention: Mr. Kenneth Johnson:* You have requested an opinion upon the following question:

"Section 6943.066 of the 1939 Code of Iowa exempts from the business tax on corporations 'insurance companies and/or insurance associations, reciprocal or interinsurance exchange, fraternal beneficial associations, etc. * * *.'"

The question is whether or not the Automobile Underwriters is exempt from such tax on the business done by this company as attorney-in-fact for the State Automobile Insurance Association; the latter company being a reciprocal or inter-insurance exchange.

Upon examination of the statutes we find the State Automobile Insurance Association is a reciprocal organized under the provisions of Chapter 408 of the Code of 1939. Here provision is made that the inter-insurance contracts may be executed by an attorney designated in the law as attorney-in-fact. Provision is also made that such an attorney-in-fact may be a corporation. Obviously, there could be no reciprocal without an attorney-in-fact. The attorney-in-fact is an integral part of the reciprocal and upon this attorney is also placed the duty of payment of taxes on account of business done in this state, entering into reinsurance contracts and in fact all of the duties placed upon insurance companies generally. It is true that this corporation which acts as an attorney-in-fact is not an insurance company, but it is so closely associated with the reciprocal or inter-insurance exchange that we feel it was the legislative intent to give to such a company the exemption provided for insurance companies under the income tax law.

Provision is made in Section 9100 that the payment there made by the attorney-in-fact of the taxes therein provided shall be "in lieu of all other taxes, licenses, charges and fees whatsoever * * *."

In view of this language and the mention of the inter-insurance exchange in Section 6943.066, we are of the opinion that the exemption from the business tax as provided in Section 6943.066 should extend to the Automobile Underwriters, the attorney-in-fact for the State Automobile Insurance Association.

TAXATION: VETERAN: EXEMPTION: No exemption in excess of $1,800 can be obtained by a veteran of both the Spanish-American War and the War with Germany.

November 20, 1940. *Mr. Henry J. TePaske, County Attorney, Orange City, Iowa:* We are in receipt of your request for an opinion as to whether or not a veteran of both the Spanish-American War and the War with Germany is entitled to an exemption of $1,800 or $2,300 under the provisions of Section 6946 of the 1939 Code of Iowa.

It will be noted that under the provisions of Section 6946 the exemption from taxation is in the following language:

"The property, not to exceed $..... in actual value * * *."

Such language does not indicate a legislative intent that the exemptions shall be cumulative.

Some authority for a legislative intent to the contrary is found in the history of this soldier's exemption with reference to the homestead tax credit. After the passage of the homestead tax credit law it was argued that in case the homestead was owned by a soldier, the exemption and credit were cumulative. The department held otherwise and the 48th General Assembly in Chapter 188 amended the homestead credit law by inserting what is now subsection 3 in Section 6943.152 of the 1939 Code. This Act of the 48th General Assembly does render the homestead credit and soldier's exemption cumulative, but it is significant that it took an act of the legislature to secure this result.

We need not cite authorities to show that these exemption statutes must be strictly construed against the exemption. Without a clear statement in the law that the exemptions should be cumulative, we feel the total exemption is governed by the maximum allowance, or $1,800.00.

It is therefore the opinion of this department that no exemption in excess of $1,800.00 can be obtained by the veteran of the two wars.

PODIATRISTS: NARCOTICS: A podiatrist may use whatever narcotic drugs as may be necessary to produce local anesthesia in the treatment and surgery of the foot.

November 20, 1940. *Department of Health. Attention: Herman Carlson:* Your letter of November 15, 1940, in which you make the following inquiry, is herewith acknowledged.

"* * * The Bureau of Narcotics is desirous of an opinion from your office with respect to the use of narcotics by a podiatrist in the practice of his profession."

For your information, we quote the following sections of the 1939 Code of Iowa:

"3169.07 *Professional use of narcotic drugs.* 1. A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe on a written prescription, administer or dispense narcotic drugs or may cause the same to be administered by a nurse or interne under his direction and supervision * * *

"3169.01 *Definitions.* The following words and phrases, as used in this chapter, shall have the following meanings, unless the context otherwise requires:

"2. 'Physician' means a person authorized by law to practice medicine in this state and any other person authorized by law to treat sick and injured human beings in this state and to use narcotic drugs in connection with such treatment.

"12. 'Coca leaves' includes cocaine and any compound, manufacture, salt, derivative, mixture, or preparation of coca leaves, except derivatives of coca leaves which do not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

"15. 'Narcotic drugs' means coca leaves, opium, and cannabis.

"2546 *Amputations—general anesthetics.* A license to practice podiatry shall not authorize the licensee to amputate the human foot or perform any surgery on the human body at or above the ankle, or use any anesthetics other than local."

Reviewing the above statutes, it appears that the legislature contemplated the use of local anesthesia by podiatrists in the treatment or surgery of the foot. The legislature further contemplated that those authorized by law to treat sick and injured human beings might use narcotic drugs. It is recog-

nized generally that cocaine and perhaps other narcotic drugs are frequently used to produce a local anesthesia.

Inasmuch as the legislature has granted the podiatrists authority to use local anesthesia, it would seem that it had in mind the use of whatever narcotic drugs as may be necessary to produce such a local anesthesia.

It is, therefore, our opinion that a podiatrist may use whatever narcotic drugs as may be necessary to produce local anesthesia in the treatment and surgery of the foot.

BOARD OF SUPERVISORS: QUALIFICATION: A county supervisor elected to succeed himself may move from the township wherein he was elected without in any way affecting the incumbency of his present office or prevent him from qualifying for the term to which he was elected.

December 2, 1940. *Mr. John L. Mowry, County Attorney, Marshalltown, Iowa:* This is in answer to your letter of the 29th ult., wherein you ask the opinion of this department in reference to the following legal question:

Marshall County elects three supervisors at large. A is a resident of Marshalltown and has been such for some considerable time. B is a farmer and resides in X township. He has lived there for a number of years. B was recently elected to succeed himself. He desires to move to Marshalltown.

The question is: What effect will such removal have upon his present term or his qualifying for the term to which he was elected November 5th, last?

In answering this question, we think the following statutes must be given consideration.

Section 521, Code of Iowa, 1939, provides:

"There shall be elected, biennially, in counties and townships, members of the board of supervisors and township trustees, respectively, for a term of three years to succeed those whose terms of office will expire on the second secular day of January following said election; there shall also be elected a member or members for a term of three years to succeed those whose terms will expire on the second secular day in January one year later than the aforesaid date. It shall be specified on the ballot when each shall begin his term of office."

Section 522, Code of Iowa, 1939, provides:

"No person shall be elected a member of the board of supervisors who is a resident of the same township with any of the members holding over, except that:

"1. A member-elect may be a resident of the same township as a member he is elected to succeed.

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

Section 1146, Code of Iowa, 1939, provides:

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

"1. * * *

"2. * * *

"3. 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 exercised.

"4. * * * 5. * * * 6. * * *."

Section 5106, Code of Iowa, 1939, provides:

"The board of supervisors in each county shall consist of three persons, except where the number has been or may hereafter be increased in the manner provided by this chapter. They shall be qualified electors, and be elected by the qualified voters of their respective counties, and shall hold their office for three years."

Section 5107, Code of Iowa, 1939, provides the machinery for increasing the membership of the board of supervisors to five or seven. Section 5108 provides the machinery for reducing the membership from seven to five or from five to three, as the case may be.

Section 5111, Code of Iowa, 1939, provides:

"The board of supervisors may, at its regular meeting in January in any even-numbered year, divide its county by townships into a number of supervisor districts corresponding to the number of supervisors in such county; or, at such regular meeting, it may abolish such supervisor districts, and provide for electing supervisors for the county at large."

Section 5112, Code of Iowa, 1939, provides:

"Such districts shall be as nearly equal in population as possible, and shall each embrace townships as nearly contiguous as practicable, each of which said districts shall be entitled to one member of such board, to be elected by the electors of said district."

It will be noted that Section 522 provides: "No person shall be elected a member of the board of supervisors who is a resident of the same township with any of the members holding over, except that: * * *." It is clear that when B was elected he was not a resident of the same township with any of the members of the board of supervisors holding over. It is true that subsection 2 of Section 522 by inference prohibits two members of the board of supervisors from residing in the same township except in counties where there are five or seven supervisors and then only if the city has a population of 35,000. Of course, Marshalltown does not have a population of 35,000, nor has Marshall County five or seven members on its board of supervisors. It might be argued that it was the intention of the legis'ature when it enacted Section 522, to prohibit two supervisors from residing in the same township, except under the conditions therein prescribed. Such argument, however, is effectively destroyed by the holding of our court in *State vs. Boyles*, 199 Iowa 398. It is our opinion that this case disposes of your question and after having carefully read the same, we reach the conclusion that B may move to Marshalltown without such removal in any manner affecting his present term or the one to which he was elected on November 5th last. We quote from this case that part of the opinion which we believe sustains our view.

"The position of appellant is that Supervisor Adamson was elected for the term beginning January 2, 1923, and that he therefore became, within the meaning of this statute, a member of the board of supervisors 'holding over,' as to the appellee, whose term of office began January 2, 1924. Appellant urges that, under the language of the statute, the time of residence is to be determined as of the date of the election, the statute providing that:

" 'No member shall be elected who is a resident of the same township with either of the members holding over.'

"It appears in this case that appellee moved from the township in which he resided at the time of the election, and that, at the time he sought to qualify as a member of the board of supervisors, he was not a resident of the same township as Supervisor Adamson, who was elected at the same time that he was, and who took his office the year before.

"*We cannot enlarge the terms of the statute* (italics ours). The time fixed by the legislature for determining the qualification was, for some reason, the time of the *election*, and not the time for taking the office. The prohibition which the legislature saw fit to fix is against the *election* of one from the same township as a member of the board of supervisors 'holding over.' The legislature evidently was of the opinion that the man who was elected as a member of the board of supervisors from a certain township would continue his residence

in said township during his term of office; and no provision was made in the statute in regard to the situation where a man elected from one township became a resident of another township before the time when he should qualify as a member of the board of supervisors. Appellant's contention is that, under the facts stated, Adamson, who was elected the same day as appellee, but who took office one year before the term of appellee began, was, as to appellee, 'holding over,' within the meaning of this statute, at the time appellee's term began. As before stated, the legislature fixed the time to determine the qualification of members of the board of supervisors as of the date of the *election*. That is the language of the statute, and no reference to the time of taking office is made therein.

"If, at the time of the election, appellee and Adamson were both residents of the same township, and Adamson was then 'holding over,' as a member of the board of supervisors, the statute would apply according to its terms. This is its language, and we cannot abrogate its provisions by judicial construction. But, at the time of the election, Adamson was not 'holding over,' and in fact he had never been an incumbent of the office.

"Appellant argues, with much force and plausibility, that the purpose of the legislature was to prevent two persons from being members of the board of supervisors who were residents of the same township. If this be deemed to have been the purpose of the legislature, the statute is not free from ambiguity and inconsistency in expressing such purpose. It is not so written."

We reach the conclusion, therefore, that B may move to Marshalltown and that such removal will in no way affect the incumbency of his present office nor prevent him from qualifying for the three-year term to which he was elected on November 5th, last.

INSANE: HOSPITALS FOR INSANE: FEEBLE-MINDED: IDIOTS: Section 3604.1 applies to expenses for the care of feeble-minded patients confined in the hospitals at Woodward and Glenwood as well as to patients in the hospitals for the insane.

November 13, 1940. *Mr. Harlan J. Williamson, County Attorney, Manchester, Iowa:* We are in receipt of your letter of the 9th inst., wherein you ask the opinion of this department relative to the following legal question. We quote from your letter:

"Section 3604.1 provides a lien for 'any assistance furnished under this chapter.' The chapter is entitled 'Support of Insane.' However, Section 3595 and 3598 and possibly others in the chapter include idiotic persons in placing liability for support. Does the indebtedness and lien provided for in Sections 3604.1 and 3604.2 include payments made for institutionalized idiots? If it is the latter what are to be considered idiots? Are they the same as those committed as feebleminded as being mentally defective from birth or an early age under Chapter 171?"

It is our opinion that Section 3604.1, Code of Iowa, 1939, applies to expenses for the care of feeble-minded patients confined in the hospitals at Woodward and Glenwood, as well as to the patients in the hospitals for the insane. We believe that the following sections from the Code support our view.

Section 3403, Code of Iowa, 1939, provides:

"The superintendent shall receive a salary of three thousand dollars per year."

Section 3406, Code of Iowa, 1939, provides:

"The business manager shall supply all inmates (Glenwood State School) with clothing when not otherwise supplied. The actual cost thereof, together with the cost of transporting said inmate, shall be certified by the business manager to the auditor of the county of the inmate's residence, and the board

of supervisors shall allow the same and cause the amount to be remitted to the treasurer of state * * *."

Section 3407, Code of Iowa, 1939, provides:

"A duplicate of said certificate shall be forwarded to the state comptroller who shall charge the county accordingly, and the treasurer and comptroller shall credit the home with the same amount."

Section 3409, Code of Iowa, 1939, provides:

"Said inmate and those legally liable for his support shall be liable to the county for all clothing aforesaid and for all costs of transporting said inmate."

Section 3595, Code of Iowa, 1939, provides:

"Insane persons and persons legally liable for their support shall remain liable for the support of an insane or idotic person shall include the spouse, father, mother, and adult children of such insane or idootic person * * *. The county auditor, subject to the direction of the board of supervisors, shall enforce the obligation herein created as to all sums advanced by the county."

Section 3598, Code of Iowa, 1939, provides:

"The estates of insane or idiotic persons who may be treated or confined in any county asylum or home, or in any private hospital or sanatorium, and the estates of persons legally bound for their support, shall be liable to the county for the reasonable cost of such support."

Section 3600, Code of Iowa, 1939, provides:

"Each superintendent of a state hospital where insane patients are cared for shall certify to the state comptroller on the first days of January, April, July, and October, the amount not previously certified by him due the state from the several counties having patients chargeable thereto, and the comptroller shall thereupon charge the same to the county so owing. A duplicate certificate shall also be mailed to the auditor of each county having patients chargeable thereto. *This section shall apply to all superintendents of all institutions having patients chargeable to counties.*"

Section 3601, Code of Iowa, 1939, provides:

"The county auditor, upon receipt of such certificate, shall thereupon enter the same to the credit of the state in his ledger of state accounts, and at once issue a notice to his county treasurer, authorizing him to transfer the amount *from the insane or county fund* to the general state revenue, which notice shall be filed by the treasurer as his authority for making such transfer * * *."

Section 3604.1, Code of Iowa, 1939, provides:

"Any assistance furnished under this chapter shall be and constitute a lien on any real estate owned by the person committed to such institution or owned by either the husband or the wife of such person."

A reading of the statutes above quoted, we think, leads irresistably to the conclusion that Section 3604.1 applies to assistance furnished to insane persons and also to those who are committed to the hospitals for the feebleminded at Glenwood and Woodward.

We, therefore, hold that the lien for assistance provided under Section 3604.1 covers the expense chargeable to the county for the patients of the four state hospitals and the school for the feebleminded at Glenwood and the hospital for epileptics and school for feebleminded at Woodward. We want to point out also that the county's liability, so far as Glenwood is concerned, is confined to clothing and trasportation. As to Woodward, however, the county's liability is substantially the same as for the care of patients at the hospitals for the insane.

PRINTING: BALLOT: COUNTY: Printing of separate ballot must be borne by the county.

November 13, 1940. *Mr. Joseph P. Hand, County Attorney, Emmetsburg, Iowa:* Received your letter of the 9th inst., asking the opinion of this department relative to the following legal question. We quote from your letter:

"The question has arisen here as to whether the county or state should stand the expense of printing the separate ballot upon which appeared the question: 'Shall there be a convention to revise the Constitution, and amend same?' "

It is our opinion that the expense of printing this separate ballot must be borne by the county. This is part of the election expense as is any other printing made necessary by the holding of the election.

MUNICIPALLY OWNED UTILITIES: OVER-RUN: SALES TAX COLLECTIONS: The right to transfer any so-called overrun of sales tax collections by a municipally owned utility occupies the same status as the right to transfer the revenues of a municipal utility to purposes other than the purpose of the utility.

November 27, 1940. *Hon. C. Fred Porter, State Comptroller:* We have your letter of November 25th, requesting the opinion of this department as to the disposition of over-run on sales tax collected by municipally owned utilities.

Utilities, including the municipally owned utilities, under the sales tax law are taxed two per cent of their gross receipts, and are required to add the tax imposed to the sale price. An over-run results in many instances by reason of the bracket system of the administration of the tax. The question which has arisen is as to whether the accumulation of over-run may be transferred to other municipal funds and used for purposes other than the purposes of the municipally owned utility.

The first question to be determined is the status of this over-run. The mere fact that it might be carried in a separate account or fund by any particular municipally owned utility is not determinative of its character.

Section 6943.075 levies a tax of two per cent upon the gross receipts from the sales, furnishing or service of gas, electricity, water and communication service, including the receipts from such sales by any municipal corporation. Section 6943.079 provides that "retailers shall, *as far as practicable*, add the tax imposed upon this division, *or the average equivalent thereof*, to the sales price or charge and when added such tax shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts."

From the foregoing it is evident that the sales tax is imposed upon the retailer on the basis of two per cent of his gross sales, and he is required to pass it on, add it to, and include it in the purchase price. If the retailer is short in his collections, he still has to pay the two percent on his gross sales. It follows that any so-called overage is a part of the receipts or revenue of the retailer, and is clothed with the same character as the normal receipts, and in the case of the municipally owned utility is as much a part of the revenue as any other receipts of the utility.

It is therefore our opinion that the right to transfer any so-called over-run of sales tax collections by a municipally owned utility occupies the same status as the right to transfer the revenues of a municipal utility to purposes other than the purposes of the utility, which right of course is dependent

upon the facts in each particular case as they may be applied to the statutes on the subject.

TAXATION: CANCELLATION OF ASSESSED TAX: EXEMPT ORGANIZATION: No cancellation of the assessed tax should be allowed when the exempt organization purchased the property after the September levy.

December 3, 1940. *Mr. Edward C. Schroeder, County Attorney, Boone, Iowa:* We have your request for an opinion upon the following situation:

"We understand that certain property was purchased by a church board and title taken on October 1, 1940, and the question is whether or not under the provisions of Section 6944 Subsection 9 the tax for the year 1940 be cancelled. We understand that the property had been assessed by the assessor in the name of the former owner and the levies made, as provided by law, in September of 1940."

We are of the opinion that this 1940 tax assessment cannot be cancelled. At least no decision in the Iowa supreme court has gone so far as to hold that the assessment can be cancelled when the property is acquired by the exempt organization after the date of the levy. All that is held in the case of Iowa Wesleyan College vs. Knight, 207 Iowa 1240, is that if the property is acquired before the September levy, the exemption statute becomes operative in favor of the exempt organization that purchased the property. Even in this case no consideration was given to an earlier decision of the Iowa supreme court where an opposite conclusion was reached when the church purchased the property in August, this case being the First Congregational Church of Cedar Rapids vs. Linn County, 70 Iowa 396. As we have stated, no case seems to have gone so far as to hold the exemption applicable on a transfer after the levy is made. One reason for the conclusion that the exemption should not apply is that after the levy is made the parties to the sale transaction can with reasonable certainty determine the amount of the tax that will be due.

In view of the above, we are of the opinion that there should be no cancellation of the assessed tax in this case.

TAXATION: MONEY AND CREDIT TAX: FOREIGN CORPORATION: Mortgages or conditional sales contracts owned by foreign corporations doing business in this state could not be subjected to the money and credit tax.

December 4, 1940. *Mr. Clinton H. Turner, County Attorney, Clarinda, Iowa:* We have received your request for an opinion upon the following facts:

"Certain incorporated finance companies maintain branch offices in the State of Iowa and engage in the automobile finance business. In the conduct of the business four duplicate originals of the finance company's mortgages or conditional sales contracts are signed by the mortgagor or contract purchaser. One is placed on file in the office of the recorder where the mortgagor or contract purchaser lives and the other copies are sent to some central office of the company located outside of the State of Iowa. The question is whether or not these mortgages or conditional sales contracts should be subjected to the Iowa money and credits tax in the counties where they are filed for record."

It will be noted that under the provisions of Section 6985, credits shall be assessed and collected where the owner resides. In Chapter 331 various provisions are made for the listing of property by agents. These statutes were all passed upon in the case of *Crane Co. vs. City Council of Des Moines*, 208 Iowa 164. In this case the Iowa supreme court held the credits of the

Crane Company located in Iowa arising by virtue of the business done by the Des Moines agency had a business situs in Iowa. This case held it was clearly within the power of the State of Iowa to subject such credits to a money and credit tax, but it will be noted that the court reviewed Sections 6963, 6966, 6984 and 6985 of the Code of 1927 and quoted from Section 6958 of the same Code. All of these sections bear the same number in the 1939 Code and are the only sections which could be relied upon for the contention that these credits would be subjected to the tax. After reviewing these Code sections the court, in the Crane case, concluded that although it would be within the province of the State of Iowa to so tax such credits, the statutes of Iowa did not exercise this power to tax such credits. The conclusion of the case seems to be that the Iowa statutes only tax credits in the possession or under the control of an agent with a view to investing or loaning the same for pecuniary profit for the agent or owner within the provisions of Section 6958. The court then held that the book accounts owned by the nonresident and held by the agent in this state were not held for investment, loaning or pecuniary profit and therefore not subject to the tax.

By applying the rule laid down in this case to the fact situation here, we believe that a similar result must obtain. From the facts admitted to us, it does not appear that the local branch holds any money or credits for investment. We understand the local branch acts as agent in the finance transaction, but no money is in the hands of the local branch, for when the transaction is completed, such as the buying of finance paper, the money is received from a central office located outside the State of Iowa to which office duplicate originals of the finance papers are sent. It is perhaps true that the local branch has certain duties with respect to the servicing of the loan or foreclosure proceedings, or other collection duties, but this was also true in the Crane case where the local office had the duty of collecting the book accounts. If the manner of doing business of the finance company is such that the local branch or agency has money on deposit or in its possession in the State of Iowa for the purpose of investing or loaning, then such deposit or such money in the possession of the Iowa branch is subject to taxation. In the situation submitted to us, it does not appear that the local branch has such deposit, as we are only asked whether the mortgages or conditional sales contracts should be subjected to the tax.

It is our opinion that under the rule of the Crane case, such credits owned by the foreign corporation doing business in this state could not be subjected to the money and credit tax.

NOTICE TO DEPART: LEGAL SETTLEMENT: One notice to depart upon an indigent family is sufficient even though family moves out of county and back in again, if the family has not filed with the board of supervisors an affidavit stating they are no longer paupers.

December 5, 1940. *Mr. O. E. Anderson, County Attorney, Creston, Iowa:* This is in answer to your letter of the 4th inst., wherein you ask the opinion of this department on the following legal question:

"'A' family had a legal settlement in Union County. In 1937 said family moved to Polk County and a notice to depart was served upon them there. In September, 1937, 'A' family moved back to Union County and remained until August, 1939, when they moved back to Polk County. The family has resided

continuously since in Polk County and no further notice to depart has been served upon them.

"The question is: Has 'A' family a legal settlement in Polk County or Union County?"

We are of the opinion that "A" family has a legal settlement in Union County. We base our opinion upon Section 3828.088, subsection 1, which provides:

"Any person continuously residing in any one county of this state for a period of one year without being warned to depart as provided in this chapter acquires a settlement in that county, but if such person has been warned to depart as provided in this chapter, then such settlement can only be acquired after such person has resided in any one county without being warned to depart as provided in this chapter for a continuous period of one year from and after such time as such persons shall have filed with the board of supervisors of such county an affidavit stating that such person is no longer a pauper and intends to acquire a settlement in that county."

Inasmuch as "A" family has not complied with this provision and filed the affidavit with the board of supervisors of Polk County, we hold that the notice served upon "A" family in June, 1937, continued to be effective in preventing "A" family from acquiring a legal settlement in Polk County. To hold otherwise would be to require that, notwithstanding the service of the notice provided for under Section 3828.088, the county authorities would be required to maintain a constant vigilance as to the whereabouts of the family. We believe that this statute should be so construed as to relieve the county authorities from all further responsibility after the service of the notice to depart until the affidavit required by the subsection above set out is filed with the board of supervisors.

It is our conclusion, therefore, that the legal settlement of "A" family is in Union County.

TAXATION: EXEMPTION: SOLDIERS: Property tax exemption is contingent upon an honorable discharge showing service in the military forces of the United States during the period from the declaration of war on April 5, 1917 to November 11, 1918.

December 5, 1940. *State Tax Commission, Des Moines, Iowa. Attention: Mr. Ben Hall:* You have requested an opinion with respect to the provisions of paragraph 3, Section 6946 of the 1939 Code of Iowa. You will note that this section provides for a property tax exemption for honorably discharged soldiers of the war with Germany. The question has arisen as to whether or not this exemption should extend to those soldiers whose period of service was after November 11, 1918, the date of the Armistice with Germany and June of 1921, the date when formal peace was concluded by joint resolution of Congress.

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

We also find that this paragraph 3 of Section 6946 was first passed by the 39th

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

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

TAXATION: TAX SALE CERTIFICATE: ASSIGNEE: The owner of property can be the assignee of the tax sale certificate acquired under the public bidder law and assigned under Section 7265 of the Code.

December 18, 1940. *Mr. Raymond H. Wright, County Attorney, Burlington, Iowa:* We are in receipt of your request for an opinion upon the following situation:

"May the owner of property be the assignee of the tax sale certificate acquired by the county under the provisions of Section 7265 of the 1939 Code of Iowa?"

Section 7265 provides in effect that the certificate of purchase shall be assignable and when acquired by the county the certificate of purchase can be compromised and assigned with the written approval of the tax levying and tax certifying bodies having any interest in the general taxes.

Clearly there is no limitation as to who could be the assignee under this section. The owner of the property, it is true, could not be a bidder at the scavenger sale under the old statutes prior to the public bidder act, but it has always been held that the owner of property could receive by assignment a tax sale certificate upon the property he owns. When he acquires such tax sale certificate it amounts to a redemption. See *Bowman et al vs. Eckstien*, 46 Iowa 583.

We cannot see any reason why the owner should be barred from acquiring the tax sale certificate which admittedly could be acquired by a stranger to the title, even though the consideration be less than the amount of taxes for which the property was sold. It will be noted here that the written approval of all the tax levying and tax certifying bodies must be obtained before the assignment can be made. Other statutes providing for the distribution of the property after the county has acquired title requires the approval of only a majority of such taxing bodies. Sufficient safeguards to prevent fraud are contained in the provisions of the statute requiring this unanimous approval, and since the statute contains no restrictions that would bar the owner from being the assignee, we are of the opinion that the owner can be the assignee of such tax sale certificate acquired under the public bidder law and assigned under Section 7265 of the Code.

INDEX TO CITATIONS AND OPINIONS ON CODE SECTIONS

Attorney general opinions usually quote or interpret Code sections or Acts of the General Assembly. Following in numerical order are indexed the sections and pages where reference or opinions are made in chapters and sections of the 1935 Code, the 1939 Code, and Acts of the 47th and 48th General Assembly.

CHAPTERS OF 1939 CODE

SECTIONS OF 1939 CODE

SECTIONS OF 1939 CODE

SECTIONS OF 1939 CODE

CHAPTERS OF 47TH GENERAL ASSEMBLY

SECTIONS OF 47TH GENERAL ASSEMBLY

SECTIONS OF 47TH GENERAL ASSEMBLY

CHAPTERS OF 48TH GENERAL ASSEMBLY

SECTIONS OF 48TH GENERAL ASSEMBLY

CHAPTERS OF 1935 CODE

SECTIONS OF 1935 CODE

SECTIONS OF 1935 CODE

SECTIONS OF 1935 CODE

SECTIONS OF 1935 CODE

SECTIONS OF 1935 CODE

SECTIONS OF 1935 CODE

Index to Opinions

CHAPTER 98, ACTS OF THE 48TH GENERAL ASSEMBLY PAGE

CITIES AND TOWNS

COUNTIES PAGE

EXCESS COST PAGE

Iowa State Highway Commission—Missouri Highway Authorities—Interstate Connection—Share of Cost—Iowa State Highway Commission has authority to enter into agreement with Missouri highway authorities to pay its share of cost of interstate connection—such agreement may provide for payment by State of Iowa of sum in excess of improvement within Iowa..... 545

EXEMPT ORGANIZATION

Taxation—Cancellation of Assessed Tax—No cancellation of the assessed tax should be allowed when the exempt organization purchased the property after the September levy..... 604

EXEMPTION

From Taxation—Taxation—Property Owned by Trustees of Pension Fund for Teachers—Property owned by the trustees of a teachers' pension fund does not fall within the exemption section of the statute and would, therefore, be taxable..... 29

Government Lands—Taxation—Government lands purchased from the state in 1938 would be exempt from taxation in the year 1938. Such property cannot be assessed for taxation until 1939 for the taxes that will be payable in 1940..... 506

Soldiers—Taxation—Property tax exemption is contingent upon an honorable discharge showing service in the military forces of the United States during the period from the declaration of war on April 5, 1917, to November 11, 1918..... 606

Taxation—Veteran—No exemption in excess of $1,800 can be obtained by a veteran of both the Spanish-American War and the War with Germany 597

Veteran—Estate of Civil War Veteran may not claim exemption which was not claimed during his lifetime. Under Section 6946 exemption enures only to the benefit of the veteran and certain others. It may not be claimed by veteran's estate..... 497

EXPENDITURES OF COUNTY OFFICIALS

Sheriff—County Funds—Auto and criminal expense incurred in connection with operation of courts may, if proper, be legally paid by board of supervisors. Insane commitments can be paid only to extent of amount remaining in insane fund and claim of motorcycle expense can be paid only to extent of money remaining in county fund, at close of year..... 69

EXPENSE

For Attending Meetings—Mileage—Soldiers' Relief Commission—It is for each county soldiers' relief commission to determine the necessity of attending a conference of county soldiers' relief commission in Des Moines, and if they do determine that such meeting is necessary, they may attend and receive $2 per day for each day actually employed in the work of their commission at such meeting, together with the mileage that is paid to the members of the board of supervisors, and further that the per diem and mileage shall be paid out of the taxes raised under the provisions of Section 3828.051..... 575

Incident to Apprehension of Criminals—Chief of Police—Board of Supervisors—County should pay long distance telephone and telegraph charges and other expenses reasonably incurred by chief of police in apprehension of criminals charged with violation of state laws.... 96

Of Maintenance—Road Improvements—Highway Commission—It is mandatory on the board of supervisors to grade, drain, bridge, gravel or maintain any road or street which is a continuation of the county

FIRE FIGHTING EQUIPMENT PAGE

State Fire Marshal—Contract for Rental of Fire Equipment—Legislature may give city authority to make a contract for an unlimited period. Municipal council may bind its successors in office. Election placing levy on township to support fire department is binding on new board of trustees and they must pay the town for services.. 338

FIRST FISCAL YEAR

Unexpended Balances—Primary Road Fund—State Treasurer—Unexpended balances in the primary road maintenance, and engineering, inspection and administration funds from the first fiscal year shall revert to the primary road fund and may be carried over and used during the second fiscal year of the biennium instead of reverting to the general fund in the state treasury..... 531

FOOD STAMP PLAN

State Board of Social Welfare—Board of Supervisors—Poor Fund—WPA (Sections 5258, 5259, Code, 1939)—The issuance of proposed warrant of $20,000 on Poor Fund is not an expenditure. Inasmuch as warrant is being placed in Revolving Fund, it will never be spent. Appanoose County may issue warrant for $20,000 in order to establish revolving fund which will enable Appanoose County to qualify under Federal Surplus Food Stamp Plan..... 585

FORECLOSURE

Receivers—Conservators—Chapter 243, Acts of the 48th General Assembly does not apply to receivers or conservators in foreclosure actions 468

Assessment—The holder of a mortgage turned in for assessment before foreclosure proceedings were commenced, should make his appeal to have the assessor remove it from his books to the board of review. In failing to get results he should then take his appeal to the district court as the board of supervisors has no jurisdiction to review an individual assessment..... 193

Extension—Sale—School Fund Mortgage—Extension of time of sale on property acquired through the foreclosure of a school fund mortgage would be direct violation of the statute..... 74

Of Property—H. Tamerius—Taylor County—Board of Supervisors—Contract between Taylor County board of supervisors and H. Tamerius an unwise procedure. Waiver and estoppel do not apply to public officers; neither can state officials waive legal requirements. Statute should be complied with, which would involve "doing over" work of previous administration of county attorney's office..... 274

FOREIGN CORPORATION

Taxation—Money and Credit Tax—Mortgages or conditional sales contracts owned by foreign corporations doing business in this state could not be subjected to the money and credit tax..... 604

FOREIGN LICENSES

Special Mobile Equipment—Registration—Motor Vehicle—Bill of Lading—(1) If a motor vehicle transporting goods is foreign and carries foreign license plates only, it is violating Section 85 and the bill of lading showing intrastate carriage is sufficient evidence to warrant the filing of charges against the operator of the truck. (2) A truck erected with a three-legged derrick and special motor on the rear, used for setting poles and shifting or moving them along the roadside, comes within the definition of special mobile equipment. (3) Exemption from registration shall only extend to those foreign motor vehicles which are properly registered and licensed

NAME OF CHILD PAGE

NARCOTICS

NATIONAL GUARD

NATIONAL ORGANIZATION

NEGLIGENT OPERATION OF COUNTY AUTOMOBILE

NEWSPAPERS

NOTARY PUBLIC PAGE

NOTICE

PUBLIC OFFICES PAGE

PUBLICATION

PULLING AND TOWING

PURCHASE OF BUILDING

PURCHASE OF TEACHERAGE OR HOME FOR SUPERINTENDENT

QUACK GRASS

QUALIFIED ELECTORS

QUALIFICATION PAGE

QUALIFICATION OF TOWNSHIP TRUSTEES

QUARRYING

REAL ESTATE

ROADS

REFUSAL TO BURY PAGE

REGISTRATION

SALES TAX PAGE

SCHOOLS

SMALL LOANS PAGE

SOLDIER'S EXEMPTION

SOLDIERS' RELIEF COMMISSION

SOLDIERS' RELIEF

SOLDIERS

SOLICITING

SPECIAL ASSESSMENT CERTIFICATE

TAXATION—Continued PAGE

TAXATION—Continued PAGE