OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOL. XXII

January 1, 1933 through December 31, 1933

JAMES E. FINNEGAN
Attorney General

MADISON, WISCONSIN
1933

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ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee----from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee----from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison----from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point--from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh----from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay----from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee----from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown----from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona----from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam----from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point ----from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend---from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc ----from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison----from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau----from Jan. 7, 1895, to Jan. 2, 1899
EMMETT R. HICKS, Oshkosh----from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT, Neillsville ----from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison----from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock----from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson----from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel----from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee--from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison----from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay---from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Milwaukee--from Jan. 2, 1933

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* Leave of absence granted August 15, 1933.
** Appointed January 19, 1933.
*** Appointed November 13, 1933.

OPINIONS

OF THE

ATTORNEY GENERAL

OF

WISCONSIN

VOL. XXII

School Districts—Alteration of Union High School Districts—Appeal may be taken to state superintendent of public instruction growing out of action on petition for alteration of union free high school district in accordance with sec. 40.66, Stats.

January 4, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

In your communication of December 29, 1932, you inquire whether sec. 40.66, Stats., authorizes you to consider an appeal properly brought before the state superintendent in accordance with such section, or whether by the enactment of sec. 1, ch. 329, Laws 1923, the legislature abolished all appeals to the state superintendent of public instruction.

Subsec. (1), sec. 39.01, Stats. 1921, provided for an appeal to the state superintendent from any decision by "any school district meeting or by any town board in forming or altering or in refusing to form or alter any school district, * * *". Sec. 1, ch. 329, Laws 1923, repealed this section. Sec. 40.01, Stats. 1921, provided for the creation of

districts and the alteration of school district boundaries, for which an appeal was provided by subsec. (1), sec. 39.01, Stats. 1921, and was found in the statutes in the same form when the supreme court in 1923, in *State ex rel. Hermanson v. Callahan,* 179 Wis. 549, construing sec. 40.01, held that a special provision for changing the boundaries of a union high school district was found in sec. 40.51, Stats. 1921. Sec. 40.51, Stats. 1921, was renumbered by the 1927 session of the legislature to be sec. 40.66, Stats. 1927. That part of sec. 40.66, Stats., dealing with the right of appeal to the superintendent of public instruction, is substantially the same as the same part of sec. 40.51 Stats. to which the court referred in the case of *State ex rel. Hermanson v. Callahan,* 179 Wis. 549. Referring to sec. 40.51, Stats. 1921, (now sec. 40.66), the court, on page 553, said:

"* * * there is a special provision for changing the boundaries of a union high school district. * * *"

Subsec. (2), sec. 40.66, Stats., reads as follows:

"Said boards shall jointly act upon the petition [asking for an alteration of the union free high school district], but it shall not be granted except by a majority of each of the boards. Their decision shall be in the form of an order, and such order shall be subject to appeal to the state superintendent within thirty days."

In accordance with subsec. (2), sec. 40.66, Stats., it is the opinion of the attorney general that appeals taken to the state superintendent within the time prescribed and according to the procedure prescribed by this section, are properly before him for consideration.

JEF

School Districts—Under sec. 40.21, subsec. (2), Stats., where family is living in town B but is supported by town A children's residence for school purposes is in town B, but school district in town B is entitled to allowance from town A of "pro rata share of the year's expense of maintaining the school."

January 10, 1933.

CLAUDE F. COOPER,
District Attorney,
Superior, Wisconsin.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts:

"A family living in the town of A has removed to the town of B. They have not acquired a legal settlement in the town of B, and the town of A is furnishing them with relief. The children of this family are attending school in the town of B, and the town of B is required to transport such children to school."

You call attention to sec. 40.34, sec. 40.21, subsec. (2), and 40.04 (9), Stats.

You say:

"From the foregoing it would seem that the family in question has not acquired a voting residence in the town of B; has not acquired a legal settlement under section 49.03 in the town of B; that the town of A is chargeable for their support and maintenance.

"The question arises whether such family has gained a residence in the town of B so that said town is liable for the transportation. Or is the town of A liable for tuition and transportation?"

It is the opinion of this department that the school district in which the children live is liable for their support provided all of the conditions prescribed in sec. 40.34 exist.

Sec. 40.21 (2), would apply in determining the children's residence for school purposes. We do not regard chapter 49 of the statutes, to which our attention is directed, as applicable to any other than poor relief matters. Rules laid

down therein for determining legal settlement are not controlling or applicable to school matters. Under sec. 40.21 (2), the children's residence for school purposes is in the district in which they live. That district, however, is entitled to an allowance, under the same statute, from the town supporting them, which is the town of A, and which allowance shall be "a pro rata share of the year's expense of maintaining the school," which is not the same thing as "tuition and transportation."
JEF

Education—Vocational Schools—Under secs. 41.18 and 41.19, Stats., local board of education may give written approval for one of its high school graduates to attend vocational school in another municipality. Board of education in such municipality is required to pay tuition of such high school graduate to vocational school which he attends.

January 10, 1933.

EDWARD S. EICK,
District Attorney,
Chilton, Wisconsin.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts:

"A free high school which offers a commercial, domestic science and manual arts course is maintained in a municipality. Where such a free high school is maintained, can the local board of education give written approval for one of its graduates to attend vocational school? Is it compulsory for the board of a municipality in which a free high school is maintained to pay the tuition of high school graduates to a vocational school where no vocational school is maintained?"

You call attention to sec. 40.70, subsec. (2), secs. 41.18, 41.19 and 353.27 Stats., also XI Op. Atty. Gen. 397, 410, XVIII 538.

It is the opinion of this department that the local board of education may give written approval to one of its high school graduates to attend a vocational school in another municipality even though the municipal free high school offers a commercial, domestic science and manual arts course.

It is also the opinion of this department that it is compulsory for the local board of education of the municipality in which such a free high school is maintained to pay the tuition of high school graduates to a vocational school located in another municipality. See secs. 41.18 and 41.19, Stats., and XVIII Op. Atty. Gen. 538.

JEF

Bridges and Highways—County Highway Commissioner —County highway committee audits and approves expense of county highway commissioner but county board determines whether expense claims of highway commissioner as well as those of members of county highway committee are legal and should be allowed.

January 10, 1933.

WALTER A. GRAUNKE,
Ex-District Attorney,
Wausau, Wisconsin.

You inquire of the attorney general whether a committee of the county board has "authority to audit the personal expense accounts of the county highway commissioner and the county highway committee."

Subsec. (4), sec. 82.03, Stats., reads as follows:

"The salaries and the necessary traveling expenses of the county highway commissioner and assistants shall be paid monthly out of the general fund after being audited and approved by the county highway committee."

This section seems to answer the question you raise as to who shall audit the expense accounts of the county highway commissioner. It shall be the county highway committee.

The committee's duty to audit and approve expenses and disbursements, specifically authorized by the legislature, has been held, however, to be administrative in its character, and not to conflict with the duties imposed by law on the county clerk and the county board. *Rinder v. Madison,* 163 Wis. 525. Our court has said, page 533:

"* * * It is contended that this subsection delegates powers and authority to such committee which are conferred by the constitution on county boards and county clerks. These powers and duties of this committee are clearly administrative in their nature and in no way conflict with the duties imposed by law on county clerks. The committee can only carry out the road improvement authorized by the county board and perform administrative features connected therewith. It is suggested that they have the ultimate power to pass on the legality of claims for services and material furnished for the construction of roads and bridges. The duty to 'audit' such claims * * * is not to be interpreted as abrogating the duties imposed by law on county clerks, nor is it to be considered that such 'audit' implies that the committee is given power to finally pass on the allowance or disallowance of claims against the county. It is evident that their duties under this part of the act are to examine claims to ascertain whether or not they pertain to and properly itemize the charges for material furnished and work done, and to check the items as to their correctness in these respects to assist the county clerk and the county board to determine whether they are just and legal claims. * * *"

Your letter of inquiry would indicate that some committee of the county board audits the expense accounts of the county highway committee. However, on the telephone you were understood to have said the county highway commissioner makes this audit. Whatever procedure has been adopted, it is presumed to have been by resolution of the county board. Whether it is sound policy to have the highway commissioner make the audit of the accounts of the highway committee, who in turn audits the accounts of the highway commissioner, is not necessary to here determine. The audit is an administrative act, however, and final authority is in the board itself to determine whether the claims are "just and legal." *Rinder v. Madison, supra.*

JEF

Appropriations and Expenditures—Counties—University —While county may abolish position of county agricultural representative, it has no right to have such action take effect before end of period for which appropriation was made by 1931 board and agreement made with university.

Neither may county board rescind appropriation for extension work for period covered by agreement made for work between university and United States department of agriculture.

January 13, 1933.

K. L. HATCH,
Associate Director Agricultural Extension,
University of Wisconsin.

In your communication to this department you state that on November 16, 1931, the county board of Adams county received and subsequently passed the following resolution:

"Be It Resolved by the county board of supervisors of Adams county, Wisconsin, that there be and hereby is, appropriated out of any money in the county treasury not otherwise appropriated, the sum of twelve hundred dollars ($1200.00) per annum for two years to cover the share of said Adams county in payment of expense of maintaining the work of the agricultural representative in said county for two fiscal years commencing July 1st, 1932 and ending June 30th, 1933 and commencing July 1st, 1933 and ending June 30th, 1934, to be paid by the county treasurer upon the order of the county clerk; as provided in section 59.87 of the Wisconsin statutes as amended."

Pursuant to this resolution, the county requested the appointment of a county agricultural representative for the period designated.

It was agreed between the university and the county agricultural committee that $100 of the county appropriation should annually be applied to the salary of the agricultural representative and not to exceed $1100 used for travel and other expenses of the office within the county, as might be approved by the county agricultural committee. The board of regents agreed to pay $1700 annually toward the salary of the representative in monthly instalments direct from

university funds. In addition they agreed to pay not to exceed $100 annually for expenses of travel outside the county when authorized by the extension administration of the university. Such agreement was made in writing and signed by the agricultural committee for the county and the representative of the university, and the agreement was that the university of Wisconsin, co-operating with the United States department of agriculture in Adams county, will maintain in said county a county agricultural representative from July 1, 1932 to June 30, 1934 in accordance with sec. 59.87, Stats. The college of agriculture recommended, and the board of regents of the university confirmed the appointment of one A. C. Bartness as county agricultural representative for the two year period, July 1, 1932 to June 30, 1934. Said Bartness accepted the appointment and has been performing the duties of his position since July 1, 1932.

Of the $1800 allotted by the board of regents to this position, $1000 comes from state appropriations and $800 from federal supplementary Smith–Lever funds allotted to the state for extension work. All of this $1800 is paid directly to the representative through regular university channels. The approval of the use of the federal funds in this way was secured, as usual, through a request made to the office of co-operative extension work, United States department of agriculture, by the state director of the extension service, and the said Bartness became entitled, by virtue of said appointment, to use mails on official business without payment of postage.

On November 16, 1932, the Adams county board passed the following resolution:

"BE IT RESOLVED, by the county board of supervisors of Adams county, Wisconsin, that the office of the county agricultural agent be and the same is hereby abolished from and after January 1st, 1933.

BE IT FURTHER RESOLVED, that no appropriation be made either for salary or expense of maintenance of said office.

"BE IT FURTHER RESOLVED, that all resolutions heretofore passed or adopted by the board relating to said office in so far as the same may be inconsistent with the terms and intent of this resolution be and the same are hereby repealed."

Subsequently (November 22, 1932) thereto, the county representative received a communication from the county agricultural committee which reads thus:

"Pursuant to the terms of Resolution No. 7 passed by the Adams county board of supervisors, at its November 1932 regular session your services as county agricultural agent terminate on the first day of January 1933.

"In the event the attorney general should rule that it is necessary to give you sixty days' notice to terminate your services as county agent of this county, it is understood that your services will terminate sixty days from the date of this notice, otherwise they will terminate as herein before mentioned namely, January 1st, 1933."

You submit five questions, the first two of which read as follows:

"1. May the 1932 county board abolish the position of county agricultural representative to take effect *before* the end of the period for which the appropriation was made by the 1931 board and agreement made with the university?

"2. May the 1932 county board rescind the appropriation for extension work before the termination of the period covered by the agreement made for the work with the university and United States department of agriculture?"

Sec. 59.87, subsec. (1), Stats., provides:

"For the purpose of aiding in the agricultural development of the several counties in the state, any county is hereby authorized, through its county board, to establish and maintain an agricultural representative in accordance with the provisions of this section."

Subsec. (3) reads thus:

"For the partial maintenance of agricultural development of such county under the supervision of such agricultural representative, and for such other extension work as is provided for in an act of congress approved May 8, 1914, entitled 'an act to provide for co-operative agricultural extension work between the agricultural colleges in the several states receiving the benefits of an act of congress approved July second, eighteen hundred and sixty-two, and of acts supplementary thereto, and the United States department of agriculture,' authority is hereby given the county board to raise, by tax levy or otherwise, for periods of not less than two years each, such moneys as may be

deemed sufficient to cover the share of the county in such work. In no case shall the amount appropriated by the county for this work be less than one thousand dollars annually. Such moneys shall be disbursed by the county treasurer only upon orders of the county clerk which shall have been approved by the special committee on agriculture."

Subsec. (4) reads:

"To supplement the funds provided by the county for the agricultural development, state aid, in the sum of one thousand dollars annually, shall be given to each county in which the county board has made the required appropriation, and in which a county agricultural representative has been established. Such state aid shall be expended under the direction of the board of regents of the University of Wisconsin."

Subsec. (6) reads as follows:

"Immediately after the county board has voted to establish the position of county agricultural representative and has provided the necessary money for the share of the county therefor, the county clerk shall send the application of such county to the dean of the college of agriculture for the appointment and establishment of such county agricultural representative. All applications from the several counties shall be so made prior to December tenth of each year, or as soon thereafter as possible. In case the applications do not exceed the maximum limit of counties that can be provided for in this section, the board of regents shall select as soon as possible a properly qualified person to serve in each county in the capacity of county agricultural representative. If, however, more applications are received than can be acted on in accordance with the provisions of this act, the dean of the college of agriculture shall recommend to the board of regents a list of counties not in excess of the maximum number authorized by this section, taking into consideration in making such selection the best interests of the agricultural welfare of the state."

Sec. 59.08 provides concerning the special powers of the county board in subsec. (8):

"The county board, at any annual meeting, may abolish, create or re-establish any office or position (other than the county officers designated by section 59.12 of the statutes, judicial officers and the county superintendent of schools), created by any special or general provision of the statutes and the salary or compensation for which is paid in whole

or in part, by the county, and the jurisdiction and duties of which lie wholly within the county or any portion thereof, notwithstanding the provisions of any special or general law to the contrary."

It will be noted that the county board is given power to abolish an office, the jurisdiction and duties of which lie wholly within the county or any portion thereof. It seems to us that the duties of the office of agricultural representative in each county as given in subsec. (2) of sec. 59.87 indicate that the duties are wholly within the county and for that reason the county board may abolish this office, but still your first and second questions must both be answered in the negative, for you will note that it is expressly provided that under subsec. (3), sec. 59.87 above quoted, authority is given the county board to raise by tax levy or otherwise for periods of not less than two years each, such moneys as may be deemed sufficient to cover the share of the county in such work. This statute contemplates an appropriation for two years. An appropriation for less than two years would not be in compliance with this statute.

The statute also contemplates an agreement with the university authorities and co-operation with the United States department of agriculture. It must, therefore, follow that the agreement made with the university of Wisconsin is valid and binding upon the county and that the county is without authority to terminate the office of agricultural representative prior to the end of the period of two years, and it is also powerless to rescind the appropriation made for such purposes.

The arrangement for maintenance of the county representative is a truly co-operative one, arrived at by agreement between the county, the university and the United States department of agriculture, in which each party retains control of its own funds and expends them independently of the others in accordance with the agreement.

It was evidently the intention of the legislature to provide for continuance of definite arrangements for the work over periods sufficient to permit satisfactory accomplishment before alteration would take place. In conformity to this intention, and of necessity, representatives are em-

ployed, the university budget adjusted, and plans laid for work covering the period provided for. All these arrangements would be seriously disturbed or rendered abortive were the county board permitted to subsequently cancel such arrangements before they can be fully carried out.

To give subsec. (8), sec. 59.08 an interpretation so as to allow the county board broad authority to terminate the work at any time it might specify, regardless of obligations entered into by the county and the university for employment of personnel, payment of expenses and completion of plans of work, would mean that the county board is permitted to secure the assignment of state and federal funds to its county work and to get a person appointed on the university staff for the primary benefit of its county and then step out, leaving the other party to the agreement (the university) at a disadvantage, resulting in the misuse and waste of public funds. This would be contrary to good public policy. This extension work is educational and promotional. It requires some time to organize and carry out. If likely to be discontinued at any annual meeting of the county board to take effect before the expiration of the two years, only short-time, temporary projects could be undertaken.

We can see many reasons why the legislature enacted the statutes so as to require at least a two-year continuation of the work. Federal extension funds are received at the beginning of the fiscal year, on July 1, on the basis of budget previously submitted to and approved by the United States department of agriculture. Restrictions on the use of some funds make the building of the budget for use of federal funds a very complicated matter. Sudden changes will seriously interfere with the budget provisions of the federal government and also those of the university. The university budget for extension work is affected by county representative plans.

We believe that it is evident from the provisions of the statute that the county board can only abolish this position and terminate the work at the close of the minimum two year period. In this way public funds may be expended wisely and an orderly procedure is provided for either continuing or terminating the work.

We are clearly of the opinion that questions 1 and 2, as already stated, must be answered in the negative and it follows that the other questions submitted need not be answered, as they are predicated on the proposition that the first two questions are answered in the affirmative.
JEF

Prisons—Prisoner out on conditional pardon given into custody of state board of control by governor upon rearrest for violating his parole is still entitled to good time he had earned up to time of his rearrest.

January 17, 1933.

BOARD OF CONTROL.

You have submitted a request to this department from Oscar Lee, warden of the state prison, in which he says that he has a case No. 16192, who was sentenced on May 7, 1924, to the Wisconsin state prison for a period of fifteen years for the crime of assault and robbery—armed; that on December 28, 1928, he was released from custody on the governor's conditional pardon, dated November 17, 1928, the state board of control, being constituted his legal custodian under that conditional pardon, under the same terms and conditions as if he had been placed on parole by said board.

He also states that under date of August 11, 1932, his conditional pardon was revoked by the governor for violating its conditions, namely, leaving his places of employment without permission, his whereabouts being unknown; that on November 21, 1932, the prisoner voluntarily surrendered to the warden of the Wisconsin state prison and is being held in custody. During his confinement the prisoner earned an additional four months, twenty-four days for employment outside of the prison walls. This together with his state good time of six years, three months, brought his original final discharge date to September 13, 1932. The warden inquires whether any good time, either state good

time or extra farm good time, or both, may be taken away from the prisoner because of his violation. He invites our attention to an opinion of this department dated August 8, 1932 (XXI Op. Atty. Gen. 806).

There it was held that a prisoner out on conditional pardon and given into custody of the state board of control by the governor, upon reincarceration for violating his parole is still entitled to his good time he had earned up to the time of his reincarceration; the governor is given no power under our statute to take away this privilege from a prisoner.

The opinion was predicated on a former opinion in VI Op. Atty. Gen. 238 and XIX Op. Atty. Gen. 604. In the former it was held that a convict set at large pursuant to a conditional pardon, upon breach and recommitment is to be credited with the time during which he was out, and he cannot be deprived of the good time earned by him during his incarceration.

We have carefully considered these two opinions and we note that the statute has not been changed since said opinions were rendered upon this point. We see no reason for changing the conclusions arrived at and, therefore, you are advised that the good time that this prisoner has earned and his extra farm good time cannot be taken away from him because of his violation of the conditional pardon.
JEF

Criminal Law—Lotteries—Giving of services as prize by chance and for which consideration is paid is violation of sec. 348.01, Stats.

January 23, 1933.

JOHN R. BROWN,
District Attorney,
Racine, Wisconsin.

You inquire whether or not the giving of services comes under the head of real or personal property in sec. 348.01, Wis. Stats.

Sec. 348.01 is as follows:

"Any person who shall set up or promote any lottery for money, or shall dispose of any property of value, real or personal, by way of a lottery, or who shall aid, either by printing or writing, or shall in any way be concerned in setting up, managing or drawing any such lottery, or who shall, in any house, shop or building owned or occupied by him or under his control, knowingly permit the setting up, managing or drawing of any such lottery, or the sale of any lottery ticket, share of a ticket, or any other writing, certificate, bill, token or any other device purporting or intended to entitle the holder, bearer or any other person to any prize or interest or share of any prize to be drawn in a lottery shall be punished by imprisonment in the county jail not more than six months or by fine not exceeding one hundred dollars."

Webster defines a lottery as: "A scheme for the distribution of prizes by lot or chance; * * *"

Authorities seem to agree that there are three essential elements necessary to constitute a lottery: First, consideration; second, prize; and third, chance. To make a lottery, these three elements must be present; chance alone will not do so, nor will chance even when coupled with consideration alone. 17 R.C.L. 1122.

In your case the subscribers buy tickets or pay dues. There you have consideration even though each member receives work in full for all moneys paid in. There is a drawing each week. Here you have chance. In addition to the regular work they may get a certificate or a credit for five dollars' worth of additional service. Here you have the third element, the prize.

You will note from the statute that to dispose of property of value, real or personal by way of a lottery, is forbidden. The statute also forbids the sale of any lottery ticket, etc., intended to entitle the holder, bearer or any other person to any prize. It seems to me that the giving of the services is the prize in your case. It is my opinion that the party can be prosecuted under sec. 348.01.

JEF

Taxation—Reassessments—Statutes do not prescribe any limitation upon time within which county board may charge back illegal real estate taxes to municipality, except as necessarily implied from operation of express limitation in sec. 75.24, Stats., that county board may not grant refund on invalid tax certificates after six years from date of certificates.

Where county board makes reassessment under sec. 75.25 and charges tax as special tax to municipality in which lands are situated, said tax is required to be assessed in next assessment of county taxes and entered on next tax roll of municipality.

Where county board charges amount of tax back to municipality without making reassessment, municipality itself may make reassessment under sec. 70.74, but such reassessment by municipality must be made within three years after action taken by county board.

January 24, 1933.

R. A. FORSYTH,
District Attorney,
Hudson, Wisconsin.

You inquire whether there is any limitation on the time in which the county may charge back to the municipality wherein the real estate is located, real estate taxes which have been illegally assessed on account of erroneous descriptions in the local tax roll. You also inquire whether there is any limitation on the time in which the municipality may enter on the tax roll the corrected descriptions so as to make collection of the tax which has been charged back. The two questions will be considered together. They are broad, abstract questions, and it should, therefore, be borne in mind that the conclusions herein expressed may not fit every conceivable situation that may arise.

If prior to the sale of delinquent lands the county treasurer discovers the erroneous description, it is his duty to withhold the land from sale and to report the same to the county board "at the next session thereof," with his reasons for withholding the same. Sec. 74.39, Stats.

If after sale of the land and issuance of a tax certificate,

it is discovered that the sale or the certificate was invalid, the county board is authorized to cancel the certificate and make refund to the purchaser. Sec. 75.22. This section embraces a case where the land was misdescribed in the original assessment and the tax certificate. *Roberts v. Waukesha County,* (1909) 140 Wis. 593. This section is subject to the limitation that the county board may not grant a refund thereunder after six years from the date of the certificates, unless application for refund was made within the six years, except that such limitation does not apply to certificates held by the county. Sec. 75.24, Stats. So that, in any case where such limitation has run, the county could not make any refund nor could it charge any such tax back to the municipality.

Now, as to cases arising under sec. 74.39, and also under sec. 75.22 where no question of the limitation prescribed by sec. 75.24 is involved:

Sec. 75.25 confers upon the county board power to make reassessments in such cases as follows:

"If the county board, on making an order directing the refunding of money on account of the invalidity of any tax certificate or tax deed, shall be satisfied that the lands described in such certificate or deed were justly taxable for such tax or some portion thereof; or, when the treasurer shall have withheld from sale any delinquent lands under the provisions of section 74.39, they shall be satisfied that such lands were justly taxable for such tax or some portion thereof, they shall fix the amount of such tax justly chargeable thereon on each parcel thereof, and direct the same to be assessed in the next assessment of county taxes, with interest thereon at the rate of ten per cent per annum from the time when such tax was due and payable to the end of the year in which such tax will be levied; and the county clerk, in his next apportionment of county taxes, shall charge the same as a special tax to the town, city or village in which such lands are situated, specifying the particular tract of land upon which the same are to be assessed and the amount chargeable to each parcel and the year when the original tax was assessed, and certify the same to the clerk of the proper town, city or village; and the clerk receiving such certificate shall enter the same on the tax roll accordingly."

Except as previously pointed out, the statutes do not prescribe any limitation upon the time within which the county

board may act under secs. 74.39, 75.22 and 75.25, and none can be implied. However, when the county board does act under sec. 75.25, then the subsequent steps to be taken are expressly required to be taken within a specified time. The county board "shall" direct the tax to be assessed in the "next" assessment of county taxes; and the county clerk in his "next" apportionment of county taxes shall charge the same as a special tax to the municipality, after specifying the particular tract of land upon which the same are to be assessed and the amount chargeable to each parcel and the year when the original tax was assessed; and the local municipal clerk "shall enter the same on the tax roll accordingly."

It will be noted under the above quoted sec. 75.25 that it is not mandatory upon the county board to make a reassessment. The board is called upon to make a reassessment only if "satisfied" that the lands described were justly taxable for such tax or some portion thereof. The board may not be "satisfied" and in such case it may merely charge the amount of the tax back to the municipality without making a reassessment. In such a case it appears that the provisions of sec. 70.74, providing for reassessment by the *municipality*, may be called into operation. Sec. 70.74 provides to the effect that when the collection of any real estate tax or assessment shall have been prevented by the judgment of a court or "the action of the county board," then, if the real estate was properly taxable or assessable, if it be not a proper case to collect by a resale of the land, such tax may be reassessed upon such real estate; and the municipal governing body is authorized to make an order directing the same to be reassessed upon such real estate, and the clerk is directed to insert the same in the tax roll opposite such real estate, in a separate column as an additional tax. Said section contains a specific limitation to the effect that such reassessment by the municipality shall be made within three years after judgment or "such action of the county board."
JEF

Prisons—Prisoners—Parole—Person who was sentenced to five terms of one year each, to run consecutively, is not eligible for parole until he has served one half last sentence.

January 25, 1933.

BOARD OF CONTROL.

In your favor of December 28, 1932, you request an opinion as to when J. W. C. No. 18438, a prisoner who was received at the Wisconsin state prison on August 15, 1929, and was by executive clemency given a commuted term of five terms of one year each, to run consecutively, and one term of one year to run concurrently, would be eligible to parole consideration. You add that this man is a second offender, having previously served a term at the Illinois penitentiary.

Whether or not this prisoner is a first or second offender seems to be immaterial, for the reason that there is no minimum term provided in the sentence under which he is serving. Sec. 57.06, subsec. (1), Stats., provides that if he is a first offender and is sentenced for a general or indeterminate term, he shall be eligible to parole after he shall have served the minimum for which he was sentenced, etc. There being no minimum term here, that provision of the law will not apply in this case.

As to when he will be eligible to parole, so much of sec. 57.06 which provides as follows determines his status:

"The board of control, with the approval of the governor, may, upon ten days' written notice to the district attorney and judge who participated in the trial of the prisoner, parole any prisoner convicted of a felony and imprisoned in the state prison, * * * who, if sentenced for less than life, shall have served at least one-half of the term for which he was sentenced, not deducting any allowance of time for good behavior, * * *."

The sentence here, as far as applicable, is for five consecutive terms to run consecutively. Under a previous decision of this office, XVI Op. Atty. Gen. 83, it was held that where sentences run consecutively they must all be considered together in passing upon this question and under it we held

that the prisoner is not eligible for parole until he has served one-half of the last sentence. Applying the same rule, we hold that in this case the first four sentences must be served first and one-half of the fifth sentence, which in this case will be four and one-half years, before the prisoner is eligible for parole. That will be on February 15, 1934.

JEF

Indigent, Insane, etc.—Board of control is creditor of inmate of central state hospital for insane.

January 25, 1933.

BOARD OF CONTROL.

You have submitted with your request for an opinion a letter relating to A., No. 338, now confined in the central Wisconsin state hospital, sentence having expired December 27, 1925, from the attorneys for his mother. You request that we advise you as to the proper response to make.

Briefly, the letter recites that the mother of A. holds an interest in certain property in New Jersey, that A. will be entitled to one-seventh of a two thirds interest if she remarries and that A's interest is such a defect in title as to prevent her from selling the property or refinancing it. The letter, therefore, proposes that the interest of A. be sold on court order, under the New Jersey statutes which provide that such proceedings for sale can be instituted by any person or corporation (1) to whom the lunatic is justly indebted, or (2) who "shall have advanced monies, purchased necessaries or rendered services" on account of any such lunatic, for his care, support or maintenance.

The letter asks whether the central Wisconsin state hospital constitutes such a creditor and asks the co-operation of the authorities in charge in filing a petition for sale of A's interest.

It is our opinion that the central state hospital constitutes such a creditor under sec. 49.10, Wis. Stats. The stat-

ute gives authority to the board of control to "sue for and collect the value of" maintenance furnished inmates of "any state * * * institution." The central Wisconsin state hospital is such an institution and is not excepted. Also sec. 51.23, subsec. (1), Stats., provides as follows:

"The provisions of all statutes relating to state hospitals for the insane, except subsections (1), (2), (4), (5), and (6) of section 51.12 and section 51.13, are applicable to the central state hospital for the insane."

It is to be noted that sec. 49.10 is not included in the exceptions to the above statute.

The central state hospital, therefore, has such a claim against the property of A. as would enable it to file such a petition in the name of the state board of control under the New Jersey statute. Whether the board should do so in the manner proposed in the letter, however, is a matter of policy for the board and not a matter of law for this department to pass upon.

JEF

Criminal Law—Worthless Checks—Prisons—Prisoners—Parole—One whose only previous conviction was under sec. 343.401, Stats., is first offender under sec. 57.06.

January 25, 1933.

BOARD OF CONTROL.

You state that one B. was sentenced to state prison September 28, 1931, for a term of one to six years "for the crime of uttering forged paper conrary to sec. 343.57." You further state:

"Johnson was previously convicted and sentenced on March 13, 1929, for a term of not less than one (1) day, nor more than one (1) year, for the crime of issuance of worthless checks, contrary to section 343.401 of the Wisconsin statutes by the municipal court of Racine county. Execution of sentence was stayed and he was placed on pro-

bation to the state board of control. On June 11, 1929, his probation was canceled because of 'becoming intoxicated and cashing worthless checks.' He was received at this institution on June 15, 1929, as No. 18371, for violation of probation. He was discharged from here by expiration of sentence on April 29, 1930."

You ask whether Johnson is a first offender under sec. 57.06. You are advised that he is a first offender under sec. 57.06.

Under XVII Op. Atty. Gen. 585, a person who was previously convicted only of misdemeanors and not felonies is a first offender. Sec. 343.401 specifically classifies the crime there referred to as a misdemeanor. Applying the rule then of XVII Op. Atty. Gen., B. is a first offender.

We do not regard the fact that B. served time in the state prison for the previous sentence as material in this instance or as making the offense a felony under the definition given of a felony in sec. 353.31, for as stated in XXI Op. Atty. Gen. 506, 508, "there may be misdemeanors which are punishable by imprisonment in the state prison." Furthermore, any sentence to state prison for violation of sec. 343.401 was erroneous under *Veley v. State,* 194 Wis. 408, 216 N. W. 522, and XVI Op. Atty. Gen. 509.
JEF

Bridges and Highways—Snow Removal—County board has no authority to appropriate money for snow removal on town roads.

January 25, 1933.

G. ARTHUR JOHNSON,
District Attorney,
Ashland, Wisconsin.

You state that the county board of your county has appropriated certain sums for snow removal on town roads. You state that you have advised that they were without power to do so but ask our opinion on the matter.

This department agrees with your conclusions. A county has only such powers as are granted it by statute. *Frederick v. Douglas Co.*, 90 Wis. 44, 71 N. W. 798. No power is granted in the statutes enabling a county to appropriate sums for maintenance or snow removal on town highways. Your county board, therefore, had no authority to make such an appropriation.

We further agree with you in your statement that sec. 83.03, subsec. (6) Stats., quoted in part below is not applicable.

"The county board may construct or improve or aid in constructing or improving any road or bridge in the county. * * *"

Snow removal is "maintenance," XIX Op. Atty. Gen. 530, and not "construction" or "improvement" and is, therefore, not within the purview of the above statute.
JEF

Constitutional Law—Public Printing—Official State Paper—Publication of Laws—Constitution provides that legislature shall provide by law for speedy publication of statute laws and that no general law shall be effective until it is published.

Constitution does not require designation of any newspaper as official state paper.

Publication of laws may be had by letting work to lowest bidder, if proper statutes are enacted and if those at present control are repealed.

January 26, 1933.

R. A. COBBAN, *Chief Clerk,*
Senate.

You enclose copy of Resolution 8, S., wherein the attorney general is requested to advise the senate with reference to the constitutional requirements dealing with the publication of laws passed by the legislature, as follows:

"(1) Is the legislature required to designate any particular newspaper or publisher as the official state printer?

"(2) Under the constitution could the publication of the laws enacted by the legislature be let to the lowest bidder?"

Sec. 21, art. VII of the constitution, reads as follows:

"The legislature shall provide by law for the speedy publication of all statute laws, and of such judicial decisions, made within the state, as may be deemed expedient. And no general law shall be in force until published."

In accordance with this section of the constitution the legislature has enacted the following sections of the statutes:

Sec. 35.63:

"The legislature shall declare some newspaper published in Wisconsin to be the official state paper, in which shall be published all the laws, advertisements, proclamations and communications of every nature which may now or hereafter be required to be officially published. Any such publication from either of the state departments in such paper shall be deemed official. Until a further designation is made the Capital Times of Madison, Wisconsin, is declared to be the official state paper."

Sec. 35.64:

"Every law shall be published in the official state paper immediately after its passage and approval, in type not smaller than six point; and until so published shall not take effect."

Sec. 35.65:

"Publication in a single issue of the state paper shall constitute full publication under section 35.64."

The only constitutional requirement is that the statute laws shall be published speedily. The constitution further provides that no general law shall take effect until it is published. The constitution does not prescribe that any particular newspaper must be designated as the official state paper in which such publication shall appear; neither does it prohibit the legislature from determining that such publication shall be made to the lowest bidder.

Sec. 25, art. IV of the constitution provides as follows:

"The legislature shall provide by law that all stationery required for the use of the state, and all printing authorized and required by them to be done for their use, or for the state, shall be let by contract to the lowest bidder, but the legislature may establish a maximum price, no member of the legislature or other state officer shall be interested, either directly or indirectly, in any such contract."

Very early in the history of this state it was held that chapter 154, revised statutes of 1849, did not conflict with sec. 25, art. IV Const., just quoted. *Sholes v. State,* 2 Pinn. 499. The court held that sec. 21, art. VII was not dependent upon nor necessarily connected with sec. 25, art. IV of the constitution. I find nothing in the constitution, however, which would prevent the legislature from abolishing the policy of naming an official state paper and substituting therefor the necessary statutory authorization for the publication of the laws on the basis of the lowest bid, as long as such publication might be considered reasonably "speedy."

This would necessitate repealing the statutory provisions above quoted, which, until they are repealed, control.

If I have not gone into sufficient detail, or if you desire to be advised on other phases of this matter, I shall be glad to go into the matter further.

JEF

Indigent, Insane, etc. — Transient Paupers — City may either care for transient paupers and charge back expense to county or refer them directly for county relief under sec. 49.04, Stats.

January 26, 1933.

RANDAL J. ELMER,
District Attorney,
Monroe, Wisconsin.

You request our opinion on the care of transient paupers, whether the county must directly care for them or whether the municipality must do so and then charge back to the county.

You are advised that either method is allowable under the statutes. Sec. 49.03 provides for care first by the municipality and charging back to the county. Sec. 49.04, provides for care directly by the county.
JEF

Education — Public Officers — County Superintendent of Schools — Voters of city having city superintendent of schools may not vote for candidate for county superintendent of schools.

January 26, 1933.

N. H. RODEN,
District Attorney,
Port Washington, Wisconsin.

You ask the attorney general whether the voters of a city which has a superintendent of schools may vote for the county superintendent of schools at the coming election, and you refer to subsec. (5), sec. 39.01, Stats.

Subsec. (5), sec. 39.01, reads as follows:

"Cities which have a city superintendent of schools shall form no part of the county superintendent's district, shall bear no part of the expense connected with the office of county superintendent of schools; and shall have no part in the determination of any question or matter connected with or arising out of said office, nor shall any elector or supervisor of such city have any voice therein."

This statute, it seems, is very clear. It provides that cities shall not form a part of the county superintendent's district and provides further that an elector of such city shall have no voice in the determination of any question connected with the county superintendent's office.

The answer to your question, therefore, must be that the voters of the city to which you refer, under the facts stated, may not vote for a candidate for the office of county superintendent at the coming election.
JEF

Mortgages, Deeds, etc.—Public Officers—Sheriff—Mortgage foreclosure sale begun by advertisement before expiration of term of sheriff on fee basis may be conducted by him after expiration of his term.

January 27, 1933.

GLENN R. DOUGLAS,
District Attorney,
Spooner, Wisconsin.

You state that your county has changed from a fee basis to a salary basis in regard to its sheriff, that the sheriff whose term expired January 2, 1933, has a number of foreclosure sales advertised for January, 1933, and that question has arisen as to who shall conduct the sales.

You are advised that the former sheriff on the fee basis should conduct the sales since he has already begun execution of the orders in his hand before expiration of his term by advertisement. Sec. 59.33, Wis. Stats., applies. See also *Cord v. Hirsch,* 17 Wis. 403, wherein it was held that a mortgage foreclosure sale was properly made by a sheriff to whom the decretal order was originally delivered although his term of office expired before the sale.

JEF

Courts—Sentence of court of competent jurisdiction for minimum term less than that provided by sec. 359.07, Stats., controls unless and until modified by appropriate proceeding.

February 2, 1933.

BOARD OF CONTROL.

In response to your favor of November 26, in which you enclose a communication from Mr. Oscar Lee, warden of the Wisconsin state prison, relative to the case of an inmate of the prison, the following facts are submitted by the warden:

"One Prisoner 'A', was sentenced to this institution for the crimes of embezzlement and falsifying bank records, for four terms of three to six years to run concurrently. He was sentenced to this institution March 1 but was not received here until July 28, 1932.

"On November 12, the case was reopened and the judge vacated the original sentence, giving him a sentence that reads as follows: 'That you, Prisoner "A", be punished by imprisonment in the Wisconsin state penitentiary at Waupun, Wisconsin, on each of said counts for the indeterminate term of not less than one year nor more than three years, the said sentence to run concurrently; the term to begin as of the first day of March 1932.' "

We assume that the court was within its powers in passing the sentence above mentioned on November 12, 1932, and we also assume that there has been no appeal therefrom.

Under these circumstances, the judgment of the court must control the parties to the action and must be obeyed unless set aside in some appropriate proceeding.

In rendering this opinion, we are not unmindful of the fact that the court seemingly did not follow the direction contained in sec. 359.07, of the Wisconsin statutes.

JEF

Corporations — Common Law Trusts — Declaration of Trust—Secretary of state may determine necessary form of declaration of trust required under sec. 226.14, Stats. XII Op. Atty. Gen. 560 adhered to.

February 2, 1933.

DEPARTMENT OF STATE.

You have enclosed a copy of a letter dated October 7, 1932, from a certain law firm propounding questions in regard to filing requirements in your department for common law trusts.

The first question asks what the dividing line between a common law trust and a mere partnership is. This question is answered by XII Op. Atty. Gen. 560, wherein it was held, p. 562, "that wherever there is any control whatsoever reserved or placed in the hands of the owners of beneficial certificates" the association is a partnership. We know of no later decisions of the courts of this state which warrant a changing of such holding. Further, it seems to us that this question is immaterial to your department. If an association desires to do business in the state as a common law trust it should meet the requirements of sec. 226.14, Stats. If, however, after having met the requirements, the structure of the association should be such as to make it a partnership and its members personally liable, that need not concern your department.

The other question asks whether the declaration of trust required by sec. 226.14 should be executed by the trustee or the "founder," "settlor," "trustor," "creator," etc. of the trust. Since the statute, sec. 226.14 merely says that the "trustees named in said declaration of trust" shall cause to be filed the "original declaration of trust," and lays down no requirements as to the nature or form of such declaration, your department within its discretion may reasonably determine its necessary qualifications for filing purposes.

Our court has not defined a "declaration of trust." However, under the following authorities it could be executed by the trustee. In *Griffith v. Maxfield*, 51 S. W. 832, 834, 66 Ark. 513, it was held:

"* * * A declaration of trust or use is 'an act by which a person acknowledges that a property, the title to which he holds is held by him for the use of another.' 5 Am. & Eng. Enc. Law, 368; * * *."

And in *Porter et al. v. Woods,* 39 S. W. 794, 797, 138 Mo. 539, the court said, citing Bouvier's Law Dictionary:

"* * * A declaration of trust, without more, is not a contract. It is the act by which an individual acknowledges that property the title to which he holds in his own name in fact belongs to another, for whose use he holds it."

In *Snyder v. Snyder,* 280 Ill. 467, 469, 117 N. E. 465, the court said,

"Any writing signed by the party to be charged, if it contains the necessary elements, is sufficient to establish an express trust."

JEF

Taxation — Extension of Time for Payment of Taxes— Tax certificate for sale of lands for taxes assessed for year 1931 should bear date when such lands were actually sold.

Interest begins to run January 1, 1932.

Penalties are to be computed from first day of January, 1932, up to actual day of sale.

Amount of tax certificate shall include tax as returned by local treasurer, plus interest from January 1, 1932, to actual day of sale, plus all other charges authorized by law and incurred prior to actual day of sale.

February 2, 1933.

OLE J. EGGUM,
District Attorney,
Whitehall, Wisconsin.

In accordance with the proclamation of former Governor La Follette, the treasurer of Trempealeau county postponed the sale of land for delinquent taxes assessed for the year

1931 until February 1, 1933. The date for the tax sale now being close at hand, several questions have arisen upon which you are desirous of obtaining an opinion from this department. Those questions are listed below and answered *seriatim.*

1. Will each certificate of sale bear the date February 1, 1933?

In XXI Op. Atty. Gen. 732 and 784, this office rendered an opinion which held that a certificate of sale of each tract should be dated the day of the actual sale of that tract. On page 736 the following language was used:

"The tax certificate, by the express provision of sec. 74.46, is to be 'dated the day of the sale.' I am clearly of the opinion that this means the actual day of sale, and not the day of the commencement of the tax sales. This is confirmed by the charging of interest, * * * until the day of actual sale of the particular tract, and by the policy of the three year redemption period, which is 'three years from the date of the certificate of sale,' (sec. 75.01). * * *"

2. When does the interest begin to run?

The opinion quoted from above also discussed the date from which interest begins to run. It was held that interest in each instance was to be charged from the first day of January to the day of the actual sale of the particular tract. It was said, p. 735:

"The interest, by the express terms of sec. 74.39 is 'at the rate of twelve per cent per annum * * * from the first day of January * * *.' In the absence of any other language or circumstance, this must be construed to be until the actual day of sale. * * *"

This opinion referred to the first postponement of the tax sale from June until the 15th day of October, 1932, and the January referred to therein could only mean January of the year 1932. It is realized that the specific provisions of sec. 74.39 would require that interest be charged "from the first day of January next preceding the day of sale." The legislature, in enacting this statute, of course, did not have in mind any such postponement as took place in the last year. A literal conformity to sec. 74.39 would result in a gross inequality, which the legislature certainly never contem-

plated or intended. It is our opinion, and that opinion has now been confirmed by the state supreme court, that, even though the sale is held on or subsequent to February 1, 1933, interest shall be computed from the first day of January, 1932.

Any doubt which may possibly have been entertained concerning the correctness of the above holdings has now been conclusively dissipated by a decision of the state supreme court handed down January 27, 1933, in the case of *Milwaukee County and Patrick McManus v. City of Milwaukee, et al.*, which was an original action. The supreme court made the following holding:

"We are asked, in case we declare the continuance of the sale legal, to declare the date which the several tax certificates shall bear and the date from which interest shall be computed. This is not a subject for declaratory relief. It is obvious, however, that each certificate should bear date and recite the date of sale according to the fact. Sec. 74.47, statutes. Interest should be computed from January 1st, 1932, the date from which it would have been collected had the sale been concluded as soon as might have been after June 14, 1932."

3. Are the accumulated penalties added up to February 1?

As indicated above, the penalties are to be computed up to the actual day of the sale.

4. Is the amount of the penalty to be added to the original tax and placed in the tax certificate, or does the tax certificate simply state the amount as returned by the local treasurer?

Sec. 74.33, Stats., provides that the county treasurer shall publish a notice to the effect that on a certain day and succeeding days, lands upon which taxes have been returned delinquent will be sold "for the payment of taxes, interest and charges thereon."

Sec. 74.46 provides a form of tax certificate which the county treasurer shall issue to each purchaser of lands sold for delinquent taxes. That form is one in which the county treasurer certifies that he did, on a certain day, sell lands for the sum of _____ dollars and ____ cents, "said sum being the amount due and unpaid for taxes, interest and

charges on said land * * *." The language of these two statutes clearly indicates that the tax certificate shall bear upon its face the amount of the taxes, the accumulated interest and all legal charges up to the actual day of the sale.

JEF

Public Officers—Banking Commissioner—Present term of banking commissioner of Wisconsin expires May 15, 1933.

February 2, 1933.

HONORABLE A. G. SCHMEDEMAN,
Governor of Wisconsin,
Capitol.

An opinion is requested from this office concerning the date upon which the present term of the banking commissioner of Wisconsin expires.

Sec. 220.02, subsec. (1), Wis. Stats., as amended by ch. 10 of the laws of the Special Session, 1931, provides as follows:

"The commissioner of banking shall be appointed by the governor, by and with the advice and consent of the senate, and shall hold his office for the term of five years, and until his successor shall have been appointed and qualified. The commissioner of banking may appoint a deputy, and revoke such appointment at pleasure. The term of office of the commissioner of banking assuming the duties of that office on the first day of February, 1911, shall be deemed to have expired on the fifteenth day of May, 1913, and the term of office of the commissioner of banking confirmed by the senate on the tenth day of June, 1913, shall expire on the fifteenth day of May, 1918; thereafter, the term of office of the commissioner of banking shall expire on the fifteenth day of May in the fifth year succeeding his appointment and confirmation."

As may be seen from an examination of the statute, circumstances may arise which would make the provisions of that statute inconsistent and create an ambiguity which justifies the use of rules of statutory construction. The first part of the statute clearly states that the term of the com-

missioner of banking for the state of Wisconsin shall be for a period of five years and until his successor shall have been appointed and qualified. A subsequent part of the statute provides that the term of the office of banking commissioner shall expire on the 15th day of May, in the fifth year succeeding his appointment and confirmation. It is not believed that the legislature intended that the *term* of the banking commissioner should be increased by the existence of a vacancy for any period of time, by the failure of the appointing power to fill a vacancy previous to the expiration of the year in which the vacancy occurred, or by the failure of the senate to confirm an appointment until the year following the year in which the appointment was made.

The primary consideration in the construction of statutes, of course, is to determine and effectuate the legislative intent. Other considerations must yield to that aim. In construing statutes a court will look to the whole and every part of the statute and its apparent intent, to its effects and consequences, and so construe it as to harmonize and give a sensible effect to every portion. *State ex rel. McGrael v. Phelps,* 155 Wis. 1.

Judicial rules of construction may properly be applied when the real intent of the law can be determined even though the construction is contrary to the letter of the law. *State ex rel. Minneapolis, St. Paul & S. S. M. R. Co. v. The R. R. Comm.,* 137 Wis. 80.

It is apparent that it was the intention of the legislature in enacting the statute to provide a clear and definite term for the banking commissioner of Wisconsin, irrespective of the particular date upon which any individual appointment may have been made or confirmed.

Such construction not only gives effect to the legislative intent but also provides a clear and satisfactory working rule for the appointment of banking commissioners for the state of Wisconsin. Furthermore, it precludes any future doubt which might arise as to the date of the expiration of any particular term due to a tardy appointment or confirmation. The fact that the legislature provided that the term of the commissioner of banking confirmed by the senate on the 10th day of June, 1913 should expire on the 15th day of May, 1918, indicates that the period of time during which

any individual commissioner holds office need not total five years.

It is our opinion, therefore, that the *term* of the commissioner of banking of the state of Wisconsin is five years, those periods of five years to be computed from the 15th day of May in the year 1918. By this rule of computation the present term of the banking commissioner expires on the 15th day of May, 1933.

JEF

Constitutional Law—Taxation—Semiannual Payment of Taxes—Bill providing for payment of taxes in semiannual instalments but excluding from its operation cities, towns and villages in counties having population of 350,000, allowing such municipalities to proceed under sec. 74.03, subsec. (2), Stats., would be invalid under provisions of art. VIII, sec. 1 and art. IV, sec. 31, Wis. Const., and under "equal protection" clause of Amendment XIV, U. S. Const.

Constitutional Law—Loans from Trust Funds—Diversion of Funds—Bill providing for postponement of payments due state trust funds lent under ch. 25, Stats., is invalid as diversion of such funds.

February 2, 1933.

EDWIN E. WITTE, *Chief,*
Legislative Reference Library.

You have requested an opinion from this department upon the validity of a proposed bill, provisions of which exclude cities, towns and villages in counties having a population of 350,000 or more, from the general law providing for payment of all taxes in semiannual instalments.

The validity of such exception must be tested not only by the state constitutional requirement that "the rule of taxation shall be uniform" (Wisconsin constitution, art. VIII, sec. 1), but also by the "equal protection" clause of the Amendment XIV of the United States constitution.

It has been stated by various text writers that the rule

as to uniformity is not applicable to the procedure of enforcing or collecting taxes. Cooley, The Law of Taxation (4th ed., 1924) 638, secs. 303–308; 26 R. C. L. 246, sec. 218. Thus the courts have upheld various statutes providing for different times of assessment or of payment of taxes upon particular classes of property. *St. Louis, I. M. & S. R. Co. v. Worthen,* 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374 (1890); *Rode v. Siebe,* 119 Cal. 518, 51 Pac. 869, 39 L. R. A. 342 (1898); *Grossfeld v. Baughman,* 148 Md. 330, 129 Atl. 370 (1925); *Commonwealth v. Brown,* 91 Va. 762, 21 S. E. 357, 28 L. R. A. 110 (1895).

The Wisconsin court, however, has expressed some reluctance to the adopting of such a broad statement, and declared in *State ex rel. Owen v. Donald,* 161 Wis. 188, 195–196, 153 N. W. 238, (1915):

"* * * 'The rule of taxation' does not, I think, extend to all steps in enforcing collection of the tax. But it does extend to those important steps which are essential parts of the tax proceedings. Collection by demand or collection by enforcement process are such, and it would be intolerable, for illustration, that a certain favored class should have six months in which to pay their taxes while others must pay in six days. * * *"

The "equal protection" clause of the federal constitution has been interpreted as requiring a *reasonable classification* in the field of taxation.

Further, it may be questioned as to whether or not the proposed law does not fall within the prohibition of art. IV, sec. 31, of the state constitution:

"The legislature is prohibited from enacting any special or private laws in the following cases:
"* * * 6th. For assessment or collection of taxes or for extending the time for the collection thereof,"

such matters to be legislated upon only by "general laws * * * uniform in their operation throughout the state". Wis. Const., art. IV, sec. 32.

The Wisconsin court has frequently set forth the elements of such requirement:

"Where legislation upon a give subject is required to be by general law, such requirement is complied with by proper

classification and the law relating to the subject being made applicable to all within the class created." *Hjelming v. La Crosse,* 188 Wis. 581, 584, 206 N. W. 885, (1926); *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 98 N. W. 954 (1904).

In brief the touchstone to be applied to the proposed enactment is the doctrine of "reasonable classification."

Under such test the validity of the proposed enactment is extremely doubtful. It would seem that there is no valid reason, only present convenience, for making the proposed exception, and that consequently such a statute would fail to meet the requirements set up by both state and national constitutions. This result is even more evident upon considering the ultimate effect of the act, namely that the taxpayers of the excepted municipalities are required to pay a higher *rate* of taxation, by reason of the interest provision of sec. 74.03, subsec. (2), than are taxpayers elsewhere in the state.

Secondly, you inquire as to the validity of postponing payments due the trust fund established by the Wisconsin constitution, art. X, sec. 2.

It is the duty of the state, as trustee of such fund, to invest the moneys thereof for the purpose of earning income. That the state has no power to divert in any way such funds has been explicitly declared by the Wisconsin court. *In re Payne's Estate,* 242 N. W. 553, (Wis. 1932). If the effect of the act in question is to deprive the *cestui* of the fund of some of its earning power by delayed payment, the act is clearly beyond the limits of the legislative authority.

JEF

Taxation—Extension of Time for Payment of Taxes— Penalty and interest which attach by reason of tax delinquency constitute lien upon real estate which can be discharged only by payment of penalty and interest or sale of lands in satisfaction of said lien.

February 3, 1933.

CURT W. AUGUSTINE,
District Attorney,
Eau Claire, Wisconsin.

The county treasurer of Eau Claire county, acting in consonance with the proclamation of Governor La Follette postponing the tax sale for the year 1931 to February 1, 1933, accepted the payment of taxes assessed for the year 1931 after they had become delinquent without the penalty or the interest which had attached, and issued tax receipts for the taxes without the interest and penalty.

The question now arises whether the county treasurer is obliged to sell the lands upon which the tax has been paid but upon which the accrued penalty and interest were not paid, at the tax sale commencing February 1, 1933, in those cases where the person to whom the taxes were assessed is now unable or unwilling to pay the penalty and the interest which had accrued previous to the time at which he paid the taxes.

Sec. 74.33, Stats., provides that the county treasurer shall on a specified day publish a list of the lands which will be sold "for the payment of taxes, interest, and charges thereon."

Sec. 74.46, Stats., provides the form of tax certificate which may be issued by a county treasurer in Wisconsin. That form states that the county treasurer certifies that lands therein described were sold for a specified sum of money, "said sum being the amount due and unpaid for taxes, interest and charges on said land * * *."

These two sections of the statutes indicate that the land should be sold not only for the taxes which were assessed against it, and which have become delinquent, but also for the interest and legal charges which have accrued.

Looking at the provisions of sec. 74.39, Stats., the following language is found:

"On the day designated in the notice of sale the several county treasurers shall commence the sale of those lands on which the taxes, *interest and charges* shall not have been paid * * *."

It is our opinion that the language of this section is mandatory and that once taxes assessed against a specified piece of property have become delinquent, the interest and penalties which attached by reason of such delinquency also constitute a further lien against the real estate upon which the tax was assessed, and that the lien against the property cannot be completely discharged until the penalties and interest have been paid as well as the taxes or until the land is sold to satisfy the lien.

In XXI Op. Atty. Gen. 736, at 738–739, this office held,

"In the opinion with reference to income tax payments, I said that the treasurer might accept the tax less penalty and interest, and that the penalty and interest would still be owing. It is clear also that they would continue to be a lien upon the realty in the case of real estate taxes."

It is our opinion, therefore, that it is the duty of the county treasurer, in cases where delinquent real estate taxes were paid to him without penalty and interest, to sell the lands at the tax sale for the amount of the penalty and interest where the person to whom the taxes were assessed is now unable or unwilling to pay the penalty and interest.

The other questions asked in your letter are all based upon hypotheses concerning what the legislature may or may not do. At the present time, therefore, they are moot questions which this department must decline to answer. When the legislature takes definite action one way or the other, this office will be glad to answer any question based upon that action.

JEF

Public Officers—City School Board—School Districts—Taxation—Moneys once raised and apportioned for city school purposes can be expended only by city school board, regardless of whether fiscal year has expired.

February 3, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

You ask (1) whether the board of education of a city of the third class can borrow money for current school expenses, and (2) whether the balance on hand of school funds belong to the city at the end of the fiscal year.

Since the city is of the third class it must necessarily be operating under the city school plan in accordance with secs. 40.50 to 40.60, Stats. In answer to your first question we refer you to XXI Op. Atty. Gen. 1032. See also opinion rendered to you December 30, 1932, XXI Op. Atty. Gen. 1129.

In regard to your second question, the following statutes are applicable.

Sec. 74.15, subsec. (2), Stats.:

"Out of the taxes collected the treasurer shall first pay the state tax to the county treasurer, then the equalization tax levied by the county for school purposes, and shall then set aside all sums of money levied for school taxes, then moneys levied for the payment of judgments, then all sums raised as special taxes in the order in which they are levied, then taxes for the payment of principal and interest on the public debt, then taxes for bridge purposes, then for fire purposes, then for streets and other public improvements, and lastly county taxes. Delinquent returns shall be made to the county treasurer in all respects as required by the statutes, and thereafter such proceedings shall be had with reference to the delinquent taxes so returned as are provided for in case of delinquent returns from towns."

Sec. 40.55:

"The school board shall annually, before October, make an estimate of the expenses of the public schools for the ensuing year, and of the amount which it will be necessary to raise by city taxation, and certify the same to the city clerk who shall lay the same before the common council at its next meeting. It shall be the duty of the common council to con-

sider such estimate, and by resolution determine and levy the amount to be raised by city taxation for school purposes for the ensuing year, which amount shall be included in the annual city budget and be called the 'City School Tax.'"

Sec. 40.57:

"The city treasurer shall keep separate accounts of all moneys raised and apportioned for city school purposes. Said moneys shall be paid out as follows: The school board shall present to the city clerk a certified bill, voucher or schedule signed by its president and secretary, giving the names of the claimants and the amount and nature of each claim. The city clerk shall issue proper orders upon such certification, to the city treasurer, who shall pay them from the proper funds."

We call particular attention to the last section quoted. That section prescribes the only manner in which money raised by school taxes and set aside, and "apportioned for school purposes" can be disbursed. Under this statute the money can be expended only upon claims properly presented by the school board. We therefore hold that moneys once raised and apportioned for city school purposes can be expended only by the city school board regardless of whether or not the fiscal year has expired.
JEF

Corporations — Foreign Corporations — Consolidation— New York corporation did not acquire license to do business in this state by reason of acquisition of company holding such license.

February 3, 1933.

THEODORE DAMMANN,
Secretary of State.

You state that a Maine corporation was licensed to do business in this state; that it merged with a New York corporation not licensed to do business in this state, and that the New York corporation now desires to do business in this state by virtue of the license of the Maine corporation (now

extinct by reason of the merger) by merely filing a copy of the merger in your office.

You are advised that the New York corporation cannot acquire a license in such a manner. It must follow the procedure outlined in chapter 226 of the Wisconsin statutes. Sec. 226.02, subsec. (1), Stats., provides in part:

"No foreign corporation shall transact business or acquire, hold, or dispose of property in this state until it shall have filed in the office of the secretary of state a copy of its charter, articles of association or incorporation and all amendments thereto certified by the proper officer of the state wherein the corporation was organized, and shall have been licensed in this state. * * *."

Applying the above statute, we find that the New York corporation has not filed a copy of its charter or articles of association with you, nor does it hold a license. We do not regard the license held by the Maine corporation as authorizing the New York corporation to do business in this state. That license was issued only to the Maine corporation, which has since become extinct by reason of its merger with the New York corporation, and the license was not transferable either by its wording or by statute.

I quote from Fletcher on Corporations, Vol. 7, p. 8304;

"* * * A merger, using the word in its strict legal sense, exists only where one of the constituent companies remains in being, absorbing or merging into itself all the other constituent companies, * * *."

I quote also from Vol. IV Op. Atty. Gen. 361, wherein facts very similar to yours were under consideration, p. 365:

"* * * If, however, there is a merger, then the corporation merged loses its existence while the corporation into which it is merged continues its existence. Taking the case before us, it appears that the transaction, legally considered, is to be effected by an amendment of the articles of the Colorado corporation. This corporation never was admitted to do business here. So far as this amendment shows, it would appear that there is a merger of the Kansas corporation into the Colorado corporation. As the latter never was admitted to do business in this state it is difficult to see wherein the mere fact that it has absorbed a corporation which was admitted to do business in this state will help it any."

JEF

Public Officers—School Board Member—Village Clerk—Offices of village clerk and member of village school district board are incompatible.

February 4, 1933.

DEPARTMENT OF PUBLIC INSTRUCTION.

It appears from correspondence with your department that necessity has arisen for an opinion upon the question of the compatability of the offices of village clerk and membership on the village school district board. It appears that "A" is a joint school district, and a high school is maintained in the village which is a part of said district. It occurs that one member of the board has found it necessary to move outside the limits of this district, thus leaving two members on the board, the village clerk and one other. The power of appointment to fill the vacancy under sec. 17.26, Stats., rests with the remaining two members of the board. The village clerk and the other member being unable to agree within ten days after the occurrence of the vacancy, sec. 17.26, subsec. (1), places the responsibility for filling the vacancy upon the village clerk. In the particular situation which gave rise to the request for an opinion, the village clerk is opposed to several members of the faculty, notwithstanding the fact that they have served for several years and the school is considered to be operating satisfactorily by the great majority of persons locally interested as well as by your department.

Although the situation above described is the only one in which the duties of these two offices clashed in this particular case, the duties of these two officers, as prescribed by the Wisconsin statutes, may possibly bring about other conflicts. In one case it is the duty of the clerk of the school district to make a report to the village clerk. This duty is more ministerial than discretionary and, in itself, possibly would not form a basis for declaring the duties of the two offices incompatible. In some cases, however, it would be the duty of the school board or of the village board to bring legal action against the other for the collection of moneys or to compel the levying of taxes. Although the village clerk would not be entitled to a vote in this matter, it would

be difficult, if not impossible, for him to remain absolutely impartial, and his influence would undoubtedly be asserted for or against the school district or the village.

There is no statute at the present time which specifically prohibits one person from holding the offices of village clerk and member of the village school district board. It thus becomes necessary to consider the common law principles relating to the compatibility of offices. That principle, as understood and interpreted in Wisconsin, was enunciated by our supreme court in the case of *State v. Jones,* 130 Wis. 572. It was there said, pp. 575–576:

"* * * It was not an essential element of incompatibility at common law that the clash of duty should exist in all or in the greater part of the official functions. If one office was superior to the other in some of its principal or important duties so that the exercise of such duties might conflict, to the public detriment, with the exercise of other important duties in the subordinate office, then the offices are incompatible. *State ex rel. Metcalf v. Goff,* 15 R. I. 505, 9 Atl. 226; *State v. Buttz,* 9 S. C. 156; *Rex v. Tizzard,* 9 B. & C. 418; *People ex rel. Ryan v. Green,* 58 N. Y. 295; *State ex rel. Walker v. Bus,* 135 Mo. 325, 36 S. W. 636. * * *."

It may be doubted whether the appointment of a member of the village school district board would be held to be one of the "principal" duties of the village clerk, but the present situation clearly furnishes an example of a duty which is "important" to the locality involved. The conflict of duties in the particular instance is also apparent. It is our opinion that the duties of village clerk and member of the village school district board are actually, in the present case, and potentially, in all cases, such as to render the two offices incompatible.

JEF

Indigent, Insane, etc.—Legal Settlement—Voluntary departure of person from this state and subsequent imprisonment for such period of time as to constitute total continuous absence from this state for period of one year is voluntary absence within meaning of sec. 49.02, subsec. (7), Stats., and results in loss of legal settlement in Wisconsin.

February 4, 1933.

L. E. GOODING,
Ex-District Attorney,
Fond du Lac, Wisconsin.

Your letter of December 28 discloses that a young man who has resided in your county for a number of years voluntarily left his father's farm in the town of Oakfield and went to Chicago in search of work. Shortly after his arrival there he was arrested and sentenced to the Illinois state reformatory for a term of not less than one nor more than ten years. Your information is to the effect that this term was later commuted to one to four years, but at the present time the young man in question is still in the reformatory. While so incarcerated he contracted tuberculosis. The Illinois authorities are willing to parole the young man to his father in your county provided the father can have him hospitalized at one of your tubercular sanatoriums. Question now arises whether the young man has a legal settlement in some county in this state so that he is entitled to any public assistance while and if placed in a county sanatorium in this state.

In order that a person may be entitled to public assistance under the provisions of ch. 49 of the Wisconsin statutes, relating to the relief and support of the poor, it is necessary that the individual should have, at the time of the application for aid, a legal settlement in some town, village or city of this state.

Sec. 49.02, subsec. (4), provides in part:

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; * * *."

The young man in question, being of the age of twenty three at the time that he left Wisconsin and having lived

upon his father's farm in the town of Oakfield for some years previous to the time that he left, undoubtedly had a legal settlement in the town of Oakfield.

Sec. 49.02 (7) provides:

"Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town, village, or city in which such legal settlement shall have been gained for one whole year or upward; and upon acquiring a new settlement or upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost."

The question is thus squarely presented whether the voluntary departure of the young man in question from Wisconsin to the state of Illinois and his subsequent incarceration in the latter state for such a period of time as to total an absence from this state of more than a year has resulted in his loss of a legal settlement in the state of Wisconsin.

In XII Op. Atty. Gen. 490, a question similar to the present one was passed upon, and the following language was used, p. 491:

"* * * Since she left Wisconsin voluntarily, I believe that her absence was 'voluntary' within the quoted provisions of the statute, notwithstanding that during part of the time she was a public charge in California and probably could not have come back to Wisconsin had she wanted to do so."

It is true that poverty was the factor which prevented the return in the case involved in the opinion quoted from, but the language in that opinion is broad enough to cover the present situation. I believe that the conclusion therein arrived at is sound, and the principle therein enunciated is hereby affirmed. The absence in the present case was originally an entirely voluntary one. It cannot be said with certainty that the young man in question would have returned to Wisconsin within one year from the time that he left had his actions been subject to his volition. Certain it is that he was absent from the state of Wisconsin by reason of his own conduct.

It is our opinion, therefore, that the absence of the young man from the state of Wisconsin was "voluntary" within

the meaning of sec. 49.02 (7) and that he thereby lost the legal settlement which he formerly had in this state. It follows that he is not entitled to any public assistance while and if in a tubercular sanatorium in your county or any county of this state.
JEF

Appropriations and Expenditures—Dogs — Pheasants— County board is not authorized under provisions of sec. 174.11, Stats., to reimburse owner of pheasants which have been killed by dogs.

February 4, 1933.

ROSCOE GRIMM,
District Attorney,
Janesville, Wisconsin.

It appears that numerous claims have been filed with Rock county under the provisions of sec. 174.11 of the Wisconsin statutes for damage done by dogs in the killing of pheasants raised on a commercial basis. The question now arises whether Rock county is authorized, under the provisions of sec. 174.11, to reimburse the owners of the pheasants for any portion of the value of those pheasants.

Sec. 174.11, subsec. (1), provides as follows:

"The owner of any domestic animals (including poultry) * * * killed by a dog or dogs may within ten days after the owner shall have knowledge or notice thereof, file a written claim for damages with the clerk of the town, village or city in which the damage occurred."

The statute further provides that the officer of the municipality to which the claim is presented shall investigate the same and certify and return to the county clerk "said claim a report of the investigation * * * and the amount of damages suffered by the owner of said animals." The statute further provides that the county clerk shall lay the claim before the county board, which is authorized to act upon the same and pay a certain amount of damages if the action by the board is favorable.

Sec. 174.11 (4) provides:

"The amount allowed by the county board upon any such claim shall in no case exceed * * * three dollars for each fowl."

Inasmuch as the damage done in this case by the killing of the pheasants would constitute no liability of the county at common law any payment to the owner of the pheasants must be specifically authorized by statute.

In XVIII Op. Atty. Gen. 116 this department held

"* * * in order to arrive at the true legislative intent as to what animals may be included in the phrase, 'domestic animals' as there used, subsec. (4) of the same section must be read in connection therewith, and when the two subsections are read together they form very persuasive argument that only those animals specifically enumerated in subsec. (4) were meant to be included in such phrase."

Subsec. (4) does not specifically provide for reimbursement for loss of pheasants, unless they can be included in the generic term "fowl." As held in the previous opinion, sec. 174.11 (1) and (4) must be read together for the purpose of determining the legislative intent. The term "fowl" is generally held to be a broader term than "poultry." Consequently it is not believed that the legislature intended that the word "poultry" as used in the statute was intended to comprehend all birds which may be included within the term "fowl." The specific wording of sec. 174.11 (1) would indicate that the legislature intended that the word "domestic" should modify "poultry" as well as "animals" and in effect indicates that the word "animals" as therein used was considered as including poultry. The statute involved is one that was enacted previous to the time when there was any considerable, if any, propagation of pheasants for domestic purposes. The industry is still so young, and the nature of pheasants such that it is extremely doubtful whether pheasants could be considered domestic animals in any sense of the word. In view of the fact that the payment of money under sec. 174.11 involves the expenditure of public funds, it is our opinion that the legislature should make a more specific declaration of its intention in the matter before any county should expend money to reimburse the owners of pheasants which have been killed by dogs.

JEF

Public Printing—Opinions of Attorney General—Bound volumes of opinions of attorney general furnished to district attorneys should remain in office of each district attorney and are not personal property of any individuals who may occupy office when volumes are delivered.

February 6, 1933.

HERBERT J. GERGEN,
District Attorney,
Beaver Dam, Wisconsin.

In your letter of January 19 you inquire whether the opinions of the attorney general furnished to the district attorney's office become personal property or whether these opinions are to remain permanently in the office of the district attorney. You inquire also whether you are able to obtain a complete set of the opinions.

The legislature has provided for the printing of various publications in ch. 35 of the statutes. The bound volumes of the opinions of the attorney general are printed in accordance with the provisions in ch. 35 and paid for out of the appropriation to the attorney general. The purpose of this expenditure is to furnish the district attorney advice, as well as to supply the office with such official opinions as may pertain to questions arising at the office of the district attorney in the future. An intelligent use of these opinions avoids the necessity of much correspondence and relieves the attorney general of going over the same ground more than once. The bound volumes of the opinions of the attorney general become just as much the property of the office as the volumes here in the office of the attorney general are property of the office. You are advised, therefore, that the volumes of the opinions of the attorney general belong to the office of the district attorney and should remain in that office.

If you do not have a complete set, and cannot complete the set in any other way, you may communicate with the director of purchases in the capitol, who will indicate whether the volumes you need are available for distribution and at what price.

JEF

Fish and Game—Confiscation—State conservation commission or its deputies or agents are only ones with authority to sell goods confiscated for violation of game laws.

February 6, 1933.

PAUL D. KELLETER,
Conservation Director.

You state that a certain district attorney proposes to seize goods confiscated for violation of game laws and sell the same for the benefit of his county. You ask for advice on the situation.

You are advised that the district attorney acts without authority. The statute, sec. 29.06, Stats., is mandatory, requiring:

"*All* confiscated * * * apparatus, * * * *shall* * * * be sold * * * *by the state conservation commission or its deputies,* * * *."

We do not regard sec. 29.07, to which our attention is called, as granting the power of sale of confiscated goods to the county officers therein enumerated. Under that section the officers can only assist the conservation department upon its request, and then only in cases of violation of some section of chapter 29 of the statutes. Sale of goods under sec. 29.06 by the conservation commission is, of course, no violation. Further, if they are officers of the conservation commission they are under the direction of the commission. The commission then may direct which of its deputies are to have charge of the sale of the goods and where the proceeds are to go. If the goods cannot be obtained peaceably from the district attorney, we suggest that you start an appropriate action of law against anyone in whose hands the goods or the proceeds therefrom are.

JEF

Counties—County Board—Municipal Corporations—Municipal Borrowing—Resolution of county board adopted on motion, without yea and nay vote, purporting to authorize county chairman and county clerk in event of necessity to borrow such sum of money as in their judgment may be necessary for payment of current and ordinary expenses of county, not exceeding specified sum, is invalid.

February 6, 1933.

HELMAR A. LEWIS,
District Attorney,
Lancaster, Wisconsin.

You inquire as to the validity of a resolution for temporary borrowing, adopted at the last session of the Grant county board, the record of which resolution is as follows, omitting such provisions as are not material to the present inquiry:

"Whereas, it may be necessary for the county of Grant, state of Wisconsin, to borrow money during the fiscal year of 1933, to pay its current and ordinary expenses as follows: highway expenses, expenses of running the county home and asylum, officers' salaries, children's and blind aid, and other ordinary and necessary expenses.

"Now, Therefore, be it Resolved, by the county board of Grant county, that if it becomes necessary to borrow money to pay the current and ordinary expenses for said county during the fiscal year of 1933, the chairman and county clerk of said county, in anticipation of the money to be raised by the tax levy for the fiscal year 1933, be and they are hereby authorized and directed to borrow such sum of money as in their judgment shall be necessary for the payment of the current and ordinary expenses of the county during the fiscal year of 1933, not exceeding in the amount the sum of fifty thousand dollars, ($50,000), * * *.

"* * *

"On motion of Mr. Walker, seconded by Mr. Williams, the resolution was adopted."

This resolution is intended to authorize temporary borrowing under subsec. (7), sec. 67.12, Stats., which provides:

"At any legal meeting a county board by a yea and nay vote of at least two-thirds of its members-elect may borrow money and issue county orders therefor to pay current

expenses at the times and in amounts and manner specified as follows:

"(a) In counties having two hundred thousand inhabitants or more, in any year, a sum not exceeding fifty per centum of the last tax levy for county purposes, such money to be repaid with interest at the agreed rate on or before the fifteenth day of April of the next following year.

"(b) In other counties, at any time a sum not exceeding fifty per cent of the last tax levy for county purposes. Such sum shall be repaid, with interest at the agreed rate, on or before the first day of April following the next tax levy."

From a reading of the statute it is considered that the resolution in question is invalid for the following reasons:

First: The record does not affirmatively show that the resolution was adopted by a yea and nay vote of at least two-thirds of the members of the board elect.

Second: The resolution attempts to delegate to the county chairman and the county clerk the power to determine the necessity of making loans and the power to determine the amount and time of making loans. For earlier opinions covering somewhat similar resolutions, see XVIII Op. Atty. Gen. 287 and XX Op. Atty. Gen. 184, 186.

The procedure provided by sec. 67.12 must be strictly complied with. *Swiss v. United States Bank,* 196 Wis. 171, 173–174.

JEF

Banks and Banking — Counties — Public Depositories — Liability of personal sureties on county depository bond is dissolved at termination of year for which depository was designated and bond furnished or thereafter when new depository has qualified.

February 6, 1933.

JOHN G. TARAS,
District Attorney,
Portage, Wisconsin.

You request an opinion from this department upon the following problem:

"In accord with chapter 34 of the Wisconsin statutes as enacted by the special session laws of the year 1931, some

of the funds of Columbia county were deposited in the X bank, a certain public depository in the county. The percentage required by subsec. (2), sec. 34.06 has been paid into the state depository fund. Prior to January 1, 1932, the X bank was, in accord with sec. 59.74 designated a public depository, and in accord with subsec. (3), sec. 59.74 a personal surety bond was furnished. This bond does not contain a definite expiration date, and the sureties on this bond have never been officially released. The X bank, during the year 1932, had financial difficulties and adopted the waiver plan of liquidation. The sureties on the bond are asking that they be officially released and it is their contention that after January 1, 1932, the bond was no longer in force. It is their contention that the bond was merely given for one year, regardless of the fact that the bond contained no definite expiration date, and furthermore that after January 1, 1932, the funds at the bank were secured by the state depository fund. The question is, did the surety bond expire on January 1, 1932, or is the same still in force and effect, so that the county can hold the sureties liable on the same?"

If a bond contains no provision on the subject, the period of time for which the sureties remain liable on such bond must be determined by the continuance of the relationship between the county and the depository, since such relationship is the basis for the sureties' undertaking.

An analysis of sec. 59.74 clearly indicates the intent that any designation thereunder should continue only for the period of one year.

Subsec. (1) provides that the county board, or committee in certain instances, *"shall annually designate"* county depositories.

Subsec. (2) provides:

"The county clerk shall annually advertise * * * for at least two weeks before the annual meeting of the county board, *for proposals to receive on deposit the county funds for one year* from the first day of the following January. * * *"

Or in lieu of such advertisement, under subsec. (6) the board or committee "may offer the county funds to the several banks and banking institutions of the county *for deposit for one year* from the first day of the following January."

By the provisions of subsec. (5), where no bond has been filed or where such bond has been deemed insufficient, the committee "shall have power to designate a depository or depositories *for the remainder of the calendar year.*"

The contract being entered into with a view to the above statutory provisions, the liability of the sureties must be understood to dissolve with the discontinuance of the relationship between county and depository at the termination of the year or, at the most, as this department held in XX Op. Atty. Gen. 3, liability will continue until a new depository is qualified. Whether such depository be a different bank or whether the same be redesignated is immaterial on this point.

When the X bank was designated in 1932 and complied with the state depository fund law, the relationship which had formed the basis of the sureties' liability was terminated between the bank and the county and a new one was entered into, thereby releasing the sureties from their liability under the personal bond.

JEF

Courts—Indians — State courts have no jurisdiction of misdemeanors committed on Indian reservation by members of tribe.

February 7, 1933.

RALPH R. WESCOTT,
District Attorney,
Shawano, Wisconsin.

In your letter of January 30 you inquire as follows:

"Have the state courts jurisdiction over misdemeanors committed by Indians on the state trunk highways on their own reservation?"

This department agrees with your conclusion that the jurisdiction of state courts does not extend to a prosecution of an Indian under the circumstances you mention, for the reasons the court has expressed in *State v. Rufus,* 205 Wis. 317. I am assuming that the status of the Indian whom you have

been asked to prosecute corresponds to the status of the Indian under consideration in the *State v. Rufus* case.
JEF

Counties — County Board — Courts — Estates — County board has no power to compromise debt against estate of deceased person where assets are sufficient to make payment in full.

February 8, 1933.

R. C. TREMBATH,
District Attorney,
Hurley, Wisconsin.

You request an opinion on the following statement of facts:

The county has a claim against the estate of a deceased person for $5,000, which claim was duly allowed in probate proceedings by the county court some five or six years ago.

The executors of the estate now propose to settle the claim by conveying to the county certain real estate, provided the county gives back a land contract to one of the persons interested in the estate.

You request an opinion as to whether it is within the power of the county board to make such a deal.

In our opinion the county board has no right to make such a contract as suggested, unless and until all legal remedies have been exhausted to collect the claim. *Washburn Co. v. Thompson,* 99 Wis. 585.

From what information you have given us it is not apparent that the real estate is not sufficient to pay the claim of the county.

There is an appropriate proceeding provided by statute for the collection of the debt and the proceeding contemplated in sec. 316.01 of the Wisconsin statutes should be resorted to in the first instance upon the application of the county and the court should be requested to sell the real estate to pay the debts.

It seems to me the clear duty of the district attorney to resort to such proceedings.
JEF

Counties—County Board—School Districts—County Superintendent of Schools—Proposed action of county board of Iron county on February 10, 1933, fixing salary of county superintendent of schools to be elected April 4, 1933, would be valid.

Schools in joint school district No. 1 of Hurley not being under supervision of city superintendent, electors of district are entitled to vote for county superintendent of schools to be elected in April, 1933.

February 8, 1933.

R. C. TREMBATH,
District Attorney,
Hurley, Wisconsin.

You inquire whether the action of the county board of Iron county would be legal if on the 10th day of February, 1933, at an adjourned annual meeting, it attempted to set the salary of the county superintendent of schools who is to be elected in April of this year.

Sec. 39.01, subsec. (3), Stats., provides as follows:

"The county board, at its annual meeting next preceding the election of such school superintendent, shall fix his annual salary and when so fixed, it shall continue to be the salary of said officer until changed by the board or by operation of law. * * *."

The language of this section is almost identical to that of sec. 59.15 (1), which provides as follows:

"The county board at its annual meeting shall fix the annual salary for each county officer, including county judge, to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. * * *."

In XXI Op. Atty. Gen. 602, this office had occasion to construe the provisions of the latter section and rendered an opinion which held that the county board could, at an adjourned annual meeting held on May 10, fix the salary to be paid to an elective county officer to be elected during the year in which such action was taken. The holding of that opinion was based upon several decisions of our supreme court which were cited in the opinion.

In the case of *Hull v. Winnebago County,* 54 Wis. 291, the court, construing the provisions of sec. 59.15 (1), held that the salary of the county treasurer to be elected in the year following the November in which the annual meeting is begun might be fixed at an adjourned annual meeting of the county board as late as the 12th day of March next following. The court expressed itself in the following language, pp. 293–294:

"* * * It is quite clear that the statute contemplates that the power shall be exercised at a period remote from the time when such officers were to be chosen, in order to prevent the influence of partisan bias or personal feeling on the part of the members of the board in fixing the salary. And, furthermore, it was probably deemed desirable that candidates for office should know precisely what compensation was attached to the office. Hence the statute provided that the board should fix, at its annual meeting, the amount of annual salary which each county officer should receive. * * *

"* * * The plaintiff, long before his election, had full notice what his salary was to be. He accepted the position with full knowledge on his part of what compensation was attached to the office, and no wrong has been done him. And we fully agree with the counsel for the county that the spirit of the statute was complied with by the board when it changed the salary in March."

In the case of *Appleton v. Outagamie County,* 197 Wis. 4, the court held that a statute specifying that a certain act should be done at the annual meeting was directory rather than mandatory.

The writer of the opinion in XXI Op. Atty. Gen. 602, having reached the decision given above, concludes, p. 605:

"* * * Having in mind the language of the case of *Hull v. Winnebago Co.,* above quoted, it would seem that a definite time limit, after which the salary of such elective officials cannot be fixed, would be the date fixed by statute for the beginning of the circulation of nomination papers. At that date, the legally recognized campaign for office starts. That date is fixed at June 10, for the present year, by secs. 5.05 (4) and 5.26 (6)."

It is our opinion that the question involved at present is governed by the opinion given above, and by the decisions of the supreme court referred to herein.

Sec. 39.01 (1), provides that a county superintendent of schools shall be chosen at the election held in each county on the first Tuesday in April in the year 1929 and every four years thereafter.

The election of a county superintendent of schools will thus take place in Iron county this year on the 4th day of April.

The county superintendent of schools is nominated as an independent or nonpartisan under the provisions of sec. 5.26. Sec. 5.26 (6) relates to the filing of nomination papers by independent or nonpartisan candidates and provides as follows:

"* * * for candidates to be voted for wholly within one county, in the office of the county clerk, not more than forty nor less than twenty-five days before such election, * * *."

No specific date is fixed by statute for the circulation of nomination papers for a candidate for the office of county superintendent of schools. Sec. 5.26 (6) places a limitation only upon the date of the filing of those papers. The 10th day of February is twelve days previous to the earliest date upon which nomination papers for the office of county superintendent of schools may be filed under the provisions of the statute and it is twenty-seven days previous to the last date upon which such papers may be filed.

Any candidate for the office of county superintendent of schools would certainly find a period of twenty-seven days to be ample time for the circulation of nomination papers. In case the county board fixed the salary on the 10th day of February, every prospective candidate for the office of county superintendent would know for a period of approximately two weeks previous to the earliest date of filing nomination papers just what salary was to be attached to the office for which he contemplated running. Thus any candidate for the office could make his decision to run with full knowledge on his part as to the salary to be attached to that office, and he would not be entitled to raise the contention that any wrong had been done him.

It is not the intention of this office to set a definite date subsequent to which a county board is not authorized to set

the salary of the county superintendent of schools. It is our opinion, however, that if the county board of Iron county acts on the 10th day of February, 1933, to fix the salary of the county superintendent of schools to be elected on the 4th day of April, 1933, such action will be legal and the salary of the county superintendent must be paid in accordance with any resolution passed upon that date.

You raise the further question as to whether the electors of joint school district No. 1, Hurley, Wisconsin, should have a voice in the election of the county superintendent of schools to be elected at the coming election in April.

Hurley is a city of the fourth class, and is located in joint school district No. 1, composed of the cities of Hurley and Montreal and the towns of Carey, Kimball, Oma and Pence.

In XXI Op. Atty. Gen. 951, this office held that this joint school district No. 1 at Hurley, Wisconsin, composed of two cities of the fourth class and other rural territory was not subject to the provisions of secs. 40.50 to 40.60, Stats., which provide for a city school plan, but that it should continue to operate as a joint school district.

The holding of that opinion was to some extent contrary to *obiter dictum* of the supreme court in the case of *State ex rel. Grelle v. Carroll,* 203 Wis. 602, which held that the city school plan applied to fourth class cities constituting a part of a joint school district.

The holding of the *Grelle* case, however, was definitely overruled by our supreme court in the case of *State ex rel. Geneva School District No. 1 v. Mitchell,* handed down by our supreme court December 6, 1932 (245 N. W. 640). It was there said, p. 541:

"* * * We think the court was in error in holding as it did in State ex rel. Grelle v. Carroll, supra, that the city school plan applies to every city of the fourth class the same as it does to every city of the second and third class, no matter whether the city of the fourth class constitutes an entire school district. We now hold that the city school plan applies only to cities of the fourth class whose territory constitutes an entire school district, and does not apply where the territory of the city of the fourth class constitutes but a portion of a school district."

The opinion of this department in XXI Op. Atty. Gen. 951, is thus shown to be correct.

The city school plan, secs. 40.50 to 40.60, authorizes the board in charge of the city to employ a city superintendent of schools. In the vast majority of cases only those cities which are operating under city school plans have a city superintendent of schools. Sec. 40.43, however, makes provision to this effect:

"In all school districts which embrace all of the territory of any city, however organized, and including joint districts * * * the district board, board of education or other board in charge may employ a superintendent to examine and license teachers, and under the direction of such employing board to supervise and manage the schools of said city."

It will thus be seen that conceivably the schools of the city of Hurley could be under the jurisdiction of a city superintendent.

I am informed by the department of public instruction that neither the city of Hurley nor the city of Montreal has a city superintendent of schools.

Sec. 39.01 (5) provides,

"Cities which have a city superintendent of schools shall form no part of the county superintendent's district, * * * and shall have no part in the determination of any question or matter connected with or arising out of said office, nor shall any elector or supervisor of such city have any voice therein."

While, as stated above, the great majority of the city superintendents are found in cities operating under the city school plan, a city superintendent might be found in some cities not operating under that plan.

Sec. 39.01 (5) provides, however, that the determining factor as to the right of the electors of a city to vote for the county superintendent is the presence or absence of a city superintendent and not the fact that the city is or is not operating under the city school plan.

In view of the fact that no city superintendent supervises the schools in joint school district No. 1 of Hurley, it is our opinion that the electors in the said joint school district are entitled to cast their vote for the county superintendent of schools to be elected in the coming April election.

JEF

Education—Teachers' Certificates—State superintendent of public instruction is authorized to consider application for unlimited state teachers' certificate upon completion of two years' successful teaching in public schools of Wisconsin, such two years to be computed in accordance with practice in use in his department over long period of time.

February 9, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

You state that two people graduated from one of the teachers' colleges in the fall of 1931 and received their first license in November of that year. They received their second license to teach in November, 1932. You say that subsec. (5), sec. 39.29, Stats., provides that these people shall be eligible to apply for an unlimited state certificate and that the superintendent of the department of public instruction is authorized to consider such application when, among other things, the applicant shall have completed two years of successful teaching. You state you have followed a definite procedure in calculating what constituted two years of teaching but that you desire the opinion of the attorney general on the method of determining when two years of teaching have been completed, and when the superintendent is authorized to consider the application for an unlimited license.

Subsec. (5), sec. 39.29, reads as follows:

"The state superintendent, upon application therefor, and the presentation to him by the graduate of the University of Wisconsin, of a state normal school or the Stout institute, of such certified statement [showing completion of certain approved courses] and satisfactory evidence of good moral character, and of two years' successful teaching in the public schools of this state, shall issue to the applicant, an unlimited state certificate, but such certificate shall qualify the holder to teach only the subjects or pupils included in the license authorized by this section."

The answer to your question turns on the meaning and use of "two years' successful teaching" as it is used in subsec. (5), above quoted. Nowhere in ch. 39 am I able to find

any indication of what the legislature might have meant by a school year or by a year of teaching. In different places in the statutes, the term school year is used and where the term is defined, its meaning seems to have been restricted to the use in each particular instance. Consequently, such definition and use of the term are not uniform.

In the absence of any statutory guide as to what the legislature had in mind when it said "two years' successful teaching" in subsec. (5), sec. 39.29, it is my opinion that for your purpose, the practical construction and definition for a period of time as to what "two years' successful teaching" means in this subsection, is controlling. In my opinion, you should use the same method of calculating the time when the second license of the two graduates of the teachers' college expires in 1933 that you have used heretofore, in determining when you are authorized to receive and consider the application for an unlimited state certificate.
JEF

Contracts—School Districts — Transportation of School Children—Sec. 40.34, Stats., authorizes school district to transport children, to arrange for transportation and to make arrangements for board, lodging and house rent. If parents transport their children in accordance with this section school district shall pay them at rate specified in statutes and no contract may be made by district and parents in violation of terms of section.

February 9, 1933.

JOHN CALLAHAN, *State Superintendent, Department of Public Instruction.*

You have enclosed a copy of an agreement entered into the 5th day of November, 1926, by the X school district and John G. Werlein and others of Y town, which agreement provides that for certain consideration the parents, John and Mary Werlein, agree to see that their children of school age attend school as required by law and to save X school district transportation and other expense while attending

school in X district or in any other district so long as the Werleins may reside in said school district. You inquire whether said contract is enforceable against the Werleins in order to deprive them of transportation which the Werleins would otherwise be entitled to.

Subsec. (1), sec. 40.34, Stats., reads as follows:

"The school district meeting may authorize the board to provide transportation for all the children of school age residing in the district. The board of every consolidated school district shall provide transportation to and from school for all school children residing in the district and over one mile from the schoolhouse. The board shall provide transportation to and from school for all school children residing in the district and over two miles from the schoolhouse, in case of a common school and three miles in case of a union high school. And if it fails to provide such transportation the parents may provide suitable transportation for their children, and shall be paid therefor by the district, at the rate of thirty cents per day for the first child, twenty cents per day for the second child, and ten cents per day for each child in excess of two in the family; provided, the child shall have attended not less than one hundred and twenty days during the school year unless prevented by absence from the district; provided further, that any child residing more than four miles from the school of his district may attend the school of another district, in which case the home district shall pay the tuition of such child. The district shall be entitled to state aid on account of such transportation at the rate of ten cents per day for each child transported."

Subsec. (3) authorizes school districts to enter into contracts for the transportation of children, and subsec. (4) authorizes arrangements to provide board and lodging in lieu of transportation for the children attending school. Subsec. (5a) authorizes the board under conditions prescribed therein to rent a house for the family of children required to be transported in lieu of transportation.

It is my opinion that the alleged contract, a copy of which you enclose, is not made in accordance with any provisions of sec. 40.34 and that the agreement does not relieve the school district of complying with all provisions of sec. 40.34, including the one requiring the school district to pay the parents for the transportation of their children at the rate stipulated therein. But conceding that the contract was

otherwise legal, it is my opinion that the statutory benefits relating to transportation fall within the well established exception to the general rule that a person may lawfully waive by agreement the benefit of a statutory provision. A public policy is involved as well as rights of a third party, namely the public, and they may not be waived by agreement.

JEF

Trade Regulation—Grain and Warehouse Commission—Wisconsin grain and warehouse commission has been given broad powers to effectively accomplish its functions and has specific authority to establish department for purpose of registering and canceling warehouse receipts.

February 9, 1933.

W. R. MCCABE, *Chairman,*
Wisconsin Grain and Warehouse Commission,
Superior, Wisconsin.

You present to the attorney general a question of law relative to which you wish to be advised. It reads as follows:

"Can this commission, under the provisions of chapter 126, Wis. Stats., set up a department for the purpose of registering and canceling of warehouse receipts? Does your interpretation of section 126.16 give the Wisconsin grain and warehouse commission the power to establish such register?"

Sec. 126.16, Stats., reads as follows:

"Every warehouseman within the provisions of sections 126.01 to 126.55, inclusive, of the statutes, shall on or before Tuesday morning of each week cause to be made out, and shall keep posted up in a conspicuous place in the business office of his warehouse a statement of the amount of each kind and grade of grain in store in the warehouse up to the close of business on the previous Saturday, and shall also on each Tuesday morning render a similar statement to the grain and warehouse commission, which statements shall be made under oath by one of the principal owners or operators of said warehouse, or by the bookkeeper thereof having personal knowledge of the facts. Every warehouseman

shall also be required to furnish daily to said commission a correct statement of the amount of each kind and grade of grain received in store in the warehouse on the previous day; also the amount of each kind and grade of grain delivered or shipped by him during the previous day, and the warehouse receipts that have been canceled upon which the grain has been delivered on such day, giving the number of each such receipt and the amount and kind of grain and the grade thereof received or shipped on each; also, how such grain, if any, was so delivered or shipped, and the amount, kind and grade of it, on which warehouse receipts have not been issued; when and how much unreceipted grain was received by them; the aggregate amount of such receipted cancellations and delivery of unreceipted grain corresponding in amount, kind and grade with the amount so reported delivered or shipped; every warehouseman shall also at the same time report what receipts, if any, have been canceled and new receipts issued in their stead, as herein provided for, and in making such statements he shall in addition furnish such commission such further information regarding receipts issued or canceled as may be necessary to enable said commission to keep a full and correct record of all receipts issued and canceled and of all grain received and delivered."

It will be noted that this section specifically requires the warehouseman to daily furnish the Wisconsin grain and warehouse commission with information showing what the warehouse's previous day's grain receipts and shipments have been. The information daily supplied the grain and warehouse commission includes a record of the warehouse receipts issued for grain received, showing the amount and kind of grain and the grading thereof, as well as a record of the warehouse receipts that have been canceled for grain delivered. In order for the information which is supplied the grain and warehouse commission to be effectively used, the commission must, of course, have facilities in the way of personnel and procedure to properly check, reconcile, and use the information for the purposes anticipated by the statute, and for which purpose the information is required to be submitted by the warehouseman. There seems to be no question but that the commission has the authority to make the necessary provision by establishing a department, or in whatever way the commission deems it expedient and efficient, to carry out the function provided for by this section.

In subsec. (3), sec. 126.05 there is "granted to said commission full power and authority to make such further regulations as will enable them to fully comply with all the provisions" of chapter 126 of the statutes creating the grain and warehouse commission and legislation pertaining thereto.

At the end of ch. 126, in sec. 126.72, the legislature further said:

"A liberal construction shall be given to all of the provisions of this chapter to the end that an honest inspection, grading and weighing of grain between any and all sellers and purchasers thereof in the market at Superior, and of all grain received, stored or delivered to or by any elevator in said city and to prevent fraud therein."

The intention of the legislature was to give broad powers to the commission in order to place full responsibility for an effective and honest regulation and inspection of grain in the warehouses at Superior.

JEF

Prisons — Prisoners — Probationers—Expenses of temporarily lodging probation violator in county jail are proper charge against county if probationer was convicted in that county.

If probation violator was not convicted in county whose sheriff is requested to apprehend him expense is chargeable to state.

State board of control is authorized to issue order requiring sheriff to apprehend probation violator and it is duty of sheriff to obey such order.

February 10, 1933.

FULTON COLLIPP,
District Attorney,
Friendship, Wisconsin.

You state that "parole" violators are often brought to your county jail and kept there pending investigation and action by the state board of control. You ask whether the

county or the state board of control should pay the expenses thus incurred by the county and whether it is the duty of the sheriff to take these violators.

It is assumed that you refer to "probation" rather than "parole" cases, since there is no investigation or action taken by the board in parole cases immediately after the parole is broken, but action is sometimes taken up by the board at a later date and after the prisoner has been reincarcerated at the state institution from which he was taken. You are advised that in the case of a probation violator whose offense was committed and whose conviction was secured in your county the expense incurred by this temporary incarceration in the county jail should be borne by your county.

Sec. 353.25, Stats., provides as follows:

"* * * In all criminal cases when the costs cannot be collected from the defendant on his or her conviction or when the defendant shall be acquitted such costs shall be paid from the county treasury."

It is our opinion that the expense in question is a part of the cost of the criminal case and as such is chargeable to the county. If the criminal proceedings had not been temporarily interrupted by placing the criminal on probation he would have been taken directly to the state institution and all expense incurred previous to his incarceration would have been a charge against the county. The county would also be liable in a case where the court suspended or deferred the sentence and held the criminal in the local jail, pending final disposition of the case.

Although sec. 57.02, subsec. (2), provides that except as therein stated criminals placed on probation shall be subject to the control and management of the state board of control, this authority, which is given to the board, does not operate to relieve the county of the duty of bearing the expense of the temporary incarceration at the request of the board or place upon the state the duty of reimbursing the county for this expense.

Where the board of control requests the sheriff to apprehend and hold a person who was not convicted in the county over which the sheriff has control a different rule prevails.

The expense incurred in such a case cannot be said to be a part of the cost of the criminal case chargeable to the county where the conviction was secured.

Sec. 59.31 applies in such a case. It provides:

"All fees to which sheriffs or their deputies are entitled for attendance required by law upon any court of record shall be paid out of the treasury of the county wherein such services were rendered in the manner that fees of jurors attending such courts are paid; and whenever any such officer is required to perform any service for the state, which is not chargeable to his county or some officer or person, his account therefor shall be paid out of the state treasury."

The service which the sheriff renders in taking a probation violator who was not convicted in his county is one which he performs for the state, is not chargeable to his county or any officer or other person and should, therefore, be paid out of the state treasury.

By sec. 20.17 (1) there is appropriated from the general fund to the state board of control an amount of money "for general expenditures incurred in the execution of the functions of said board."

The issuance of an order to a sheriff to apprehend a probation violator is certainly one of the functions of the state board of control and any expense incurred by virtue of such order should be paid out of the appropriation made under sec. 20.17 (1). See VI Op. Atty. Gen. 474.

Under the provisions of sec. 57.03 (1) the board of control is given authority to order a probation violator to be brought before the court for sentence upon a former conviction, or if already sentenced, may order his imprisonment without further delay. Administrative officers, in addition to the powers which are expressly delegated, have by implication such powers as are necessary to the proper discharge of the powers expressly delegated. *Kasik v. Janssen*, 158 Wis. 606. The state board of control must be held to have the authority to issue an order for the apprehension of a probation violator.

Under the provisions of sec. 59.23 (4) it is the duty of the sheriff to "personally, or by his undersheriff or deputies, serve or execute according to law all processes, writs, pre-

cepts and orders issued or made by lawful authority and to him delivered."

It is our further opinion that it is the duty of a sheriff to apprehend and keep probation violators when he is ordered to do so by the state board of control.

JEF

Public Officers — Register of Deeds — Public Records — Register of deeds can require persons desiring to examine chattel mortgages filed in her office to consult index and ask for mortgage desired.

February 11, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

You ask whether the register of deeds of your county "can restrict attorneys from handling the chattel mortgages on file in her office by requiring the attorneys to consult the index and then ask the register of deeds for the mortgage in question." The query is prompted by the fact that a number of attorneys have come to the office of the register of deeds and taken the mortgages directly from the file without consulting the register of deeds herself. As a result of this practice and the failure of the attorneys to exercise proper care in replacing the chattel mortgages in the file a number of such mortgages have been misplaced and considerable trouble and delay has resulted.

You are advised that the register of deeds can impose the requirement mentioned in your letter. Sec. 59.14, subsec. (1), Stats., relates to the duties of the register of deeds, and provides as follows:

"Every * * * register of deeds * * * shall keep his office at the county seat * * *. All such officers shall keep such offices open during the usual business hours each day, * * *, and with proper care shall open to the examination of any person all books and papers required to be kept in his office * * *."

Sec. 59.51 (12) also provides:

"Every register of deeds shall keep these chattel documents in consecutive numerical arrangement, for the inspection of all persons, * * *."

In the case of *Hanson v. Eichstaedt,* 69 Wis. 538, our supreme court discussed the provisions of sec. 59.14, subsec. (1) given above, and held, p. 547:

"* * * our statute in question extends such right of examination, etc., to 'any person' applying to such custodian of public records in a proper manner, subject, however, to * * * such reasonable supervision and control by such officer as are essential to the convenient performance of his duties, and the current business of the public. * * *."

In the case of *Kasik v. Janssen,* 158 Wis. 606, reference was again made to the making of rules and regulations by administrative officers. The following quotation is taken from that case, p. 610:

"Administrative officers have a limited power to make and enforce rules and regulations consistent with and supplementary to the statutes under which they act. This power varies according to the nature and necessities of the office, embracing in one extreme the humble office and limited powers of the register of deeds of a county * * *."

This attitude of the court sustains the principle that a public officer has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or such as may be fairly implied from the statute granting express powers. In the case of *People ex rel. The German-American Loan and Trust Company v. Richards,* 99 N. Y. 620, the question arose as to the supervision and control which the register of deeds might exercise over the records, documents and files which he is obliged to keep in his office. It was there said of the register of deeds, p. 623:

"* * * he must necessarily have control of his office and of the records, and must have some discretion to exercise as to the manner in which persons desiring to inspect, examine and copy the records may exercise their rights. He must transact the current business of the office and allow all persons reasonable facilities to exercise their rights in

his office. * * * each person must exercise his rights in the office consistently with the exercise of similar rights by others. * * *."

Quite obviously the register of deeds cannot keep the chattel documents in consecutive numerical arrangement at all times if attorneys persist in replacing the chattel mortgages promiscuously. When an attorney or any one else places a mortgage in the file in an improper manner, he is not exercising his rights in the office consistent with the exercise of rights which are held by other persons. Such improper replacements result in great delay to the register of deeds in his conduct of the office and prevent the "convenient performance of his duties." It is our opinion that the imposition of the requirement desired by the register of deeds of your county would be a "reasonable supervision and control by such officer" of his office and is authorized by the statutes and court decisions given above.
JEF

Public Officers — District attorney may not receive per diem in addition to his salary nor collect rent for use of his private law library.

District attorney is allowed necessary traveling expenses, but how much they are is question of fact and not of law.

February 13, 1933.

JOHN W. KELLEY,
District Attorney,
Rhinelander, Wisconsin.

You ask the opinion of the attorney general on the following questions of law:

"1. Is the district attorney entitled to any compensation, per diem, for time spent on work connected with the duties of the district attorney?

"2. Is the district attorney entitled to any compensation for rental of his private law library?

"3. Under section 59.15 (c) of the Wisconsin statutes, can the county board allow the district attorney compensation for the use of his car, and if so, how much?

"4. Is the district attorney entitled, under section 59.15 (c), Stats., to compensation for the use of his car, when used in connection with duties pertaining to his office?"

Sec. 59.15, Stats., reads, in part, as follows:

"(1) The county board at its annual meeting shall fix the annual salary for each county officer, including county judge, to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer's term, and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions:

"* * *

"(c) Reimbursement to the district attorney of the amount of his expenses actually and necessarily incurred in briefing and arguing criminal cases before the supreme court, as required by subsection (7) of section 59.47, and in traveling within and without his county in the performance of his official duties."

Your first question must be answered in the negative. The statute above quoted specifically provides that the salary shall be in lieu of any per diem or other compensation for services rendered.

Whether a contract between the county and the district attorney for rental of his private law library would be in violation of sec. 348.28, Stats., it is unnecessary to determine in connection with your second question. I understand no such contract exists. If depreciation of the district attorney's personal law library be considered as an expense, the expense is not authorized by the above quoted section. I think it is commonly accepted in this state that an attorney who offers himself as a candidate for district attorney, if successful, will have the use and access of the law library belonging to the county, and that his own personal library will be available as it may become necessary to use such personal library. In the absence of more information, the answer to your second question is in the negative; the district attorney is not entitled to rent for the use that he, himself, makes of his own private law library while he was district attorney.

This is in accordance with an opinion previously rendered, holding that the county board may not, during a dis-

trict attorney's term, allow him any sum in addition to his salary for office rent. XI Op. Atty. Gen. 388.

The subsection above quoted specifically provides for reimbursement to the district attorney of necessary expenses for travel within and without his county while performing his official duties. The expense of operating a car, such as disbursements for oil and gas, if operated in the performance of his official duties, is an expense incurred in travel and one for which the district attorney is to be reimbursed. How much that expense is, is a question of fact. It would seem that the proper procedure for reimbursement to a claim of this kind is to file a claim with the county board and to have such claim acted on by the county board as other claims are acted on. This, it seems, disposes of both the third and fourth questions.

JEF

Taxation—Boy Scouts of America—County board has no authority to cancel tax certificate held by county merely because Boy Scouts of America, tax exempt organization, later purchased land.

February 13, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

You state that in July of 1928 the Boy Scouts of America of Highland Park, Illinois, purchased certain land situated in Langlade county. At that time the county owned and held three tax certificates against the land. Said three certificates are still outstanding and held by the county. The Boy Scouts of America are petitioning the county board to cancel the three certificates, and the question is whether the board is required or authorized to do so, because subsec. (36), sec. 70.11, Stats., exempts from taxation all real property owned by the Boy Scouts of America.

The answer is, No. The Boy Scouts did not acquire the land until 1928 and, therefore, the land was not exempt from taxation until 1928. Prior to 1928 the land was sub-

ject to taxation. The three tax certificates held by the county were acquired at sales of the land for valid taxes of years prior to 1928. The certificates were valid, and they did not cease to be so because a tax exempt organization later purchased the land. The county board has authority only to cancel *in*valid tax certificates. Sec. 75.22, Stats. There is nothing in the facts presented to indicate that the certificates in question are invalid.
JEF

Fish and Game—Conviction for violation of rules and regulations of commission made under sec. 23.09, subsecs. (7), (9) and (11), Stats., cannot be construed as violation under ch. 29, so as to cause revocation of license of defendant under sec. 29.63 (3).

February 15, 1933.

PAUL D. KELLETER, *Conservation Director, Conservation Department.*

In your recent letter you refer to sec. 29.63, subsec. (3), Stats., which provides:

"Conviction for a violation of this chapter, in addition to all other penalties, revokes any license theretofore issued pursuant to this chapter to the person convicted, and no license shall be issued to such person for a period of one year thereafter."

Sec. 23.09 gives the conservation commission power to make rules and regulations which, if violated, subject a person to arrest and conviction for a violation of the particular rule or regulation. See subsecs. (7), (9), and (11).

It will be noted that a conviction for a violation of sec. 29.63 subjects the defendant to the revocation of his license. As the rules and regulations are made under sec. 23.09 and the penalties are prescribed under the same chapter, it follows that a conviction of such rules is not a conviction under sec. 29.63. The conclusion is inevitable that a revocation cannot result in such a case. It does not come within the letter of the law.
JEF

Indigent, Insane, etc. — Legal Settlement — Absence of husband for period in excess of year while incarcerated in state prison does not operate to deprive him or his wife of legal settlement which they had previous to his imprisonment.

February 15, 1933.

ROBERT L. WILEY,
District Attorney,
Chippewa Falls, Wisconsin.

It appears that Mrs. "X" and her two children two years ago lived in Waukesha county and received support from said county. At that time her husband was, and he still is, confined in the state prison at Waupun. Eighteen months ago Mrs. "X" moved to Chippewa county with her children, remaining there about three or four months, then moving to Clark county, where she remained for a period of four or five months. She then returned to Chippewa county, where her last stay does not exceed eight months. During her absence from Waukesha county she received no aid from either Clark or Chippewa county. The question has now arisen as to where Mrs. "X" has a legal settlement.

It is assumed, although not stated in your letter, that Mrs. "X" had a legal settlement in Waukesha county two years ago when she received assistance from that county.

Sec. 49.02, subsec. (1), Stats., provides:

"A married woman shall always follow and have the settlement of her husband if he have any within the state * * *."

No statute specifically provides that a person shall lose his legal settlement by reason of the fact that he is confined in the state prison. The legal settlement of Mrs. "X" 's husband and consequently the legal settlement of Mrs. "X" herself remained in Waukesha county, unless it was lost by virtue of sec. 49.02 (7), which provides:

"Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town, village or city in which such legal settlement shall have been gained for one whole year or upward; and upon

* * * such voluntary and uninterrupted absence all former settlements shall be defeated and lost."

The absence of Mr. "X" from Waukesha county has quite obviously been for a period in excess of one year and has likewise been uninterrupted. The sole point for determination, therefore, is whether or not this absence was "voluntary" within the meaning of sec. 49.02 (7). In *Derden v. State,* 120 S. W. 485, the court passed upon the meaning of the word "voluntary" as applied to the word "absence" and concluded that it meant "by the free exercise of the will; done by design; purposely." It was held that a voluntary act proceeds from one's own free will unconstrained by external interference, force or influence. It was definitely stated that an unavoidable absence would not be a voluntary one. This interpretation is also in accord with the popular understanding of the word "voluntary."

Sec. 370.01 (1) relates to the construction which shall be given words when found in any statute whenever such construction would not be inconsistent with the manifest intent of the legislature. It provides:

"All words and phrases shall be construed and understood according to the common and approved usage of the language, * * *"

It is our opinion that inasmuch as the absence of Mr. "X" from Waukesha county was not prompted by the free exercise of his will his absence was not a "voluntary" one within the meaning of sec. 49.02 (7). Mr. "X" therefore still retained his legal settlement in Waukesha county during the time that he was incarcerated at Waupun. By virtue of sec. 49.02 (1), therefore, it must be held that Mrs. "X" now has a legal settlement in Waukesha county.

JEF

Minors—Wisconsin Statutes—Commitment of boy until he became eighteen years of age after sec. 48.15 was amended to require all commitments to time when minor is twenty-one years of age is valid for matter which arose prior to amendment of statute, for sec. 370.04, Stats., saves penalty in this case.

February 16, 1933.

BOARD OF CONTROL.

You state that one A, a minor, was committed to the industrial school for boys at Waukesha; that the commitment was dated October 28, 1929; that the laws of Wisconsin at that time provided that all commitments of such children and of delinquent children to any industrial school should be to the age of twenty-one years or until paroled. You state that this boy was brought before the juvenile court under date of June 11, 1929, and was at that time placed on probation. You state that subsequently he was brought before the court again and committed to the industrial school for boys, and the judge in his sentence provided that this commitment should be until he was eighteen years of age.

You submit the following questions:

"1. Did the court have the right to make this commitment order, dated October 28, 1929, retroactive to June 11, 1929?

"2. Is the order of the court proper, requiring that this boy be discharged from the industrial school when he has reached the age of eighteen years?"

It appears that sec. 48.15, Stats., was amended by ch. 439, Laws 1929. This statute went into effect August 31, 1929. Sec. 370.04 provides:

"The repeal of a statute hereafter shall not remit, defeat or impair any civil or criminal liability for offenses committed, penalties or forfeitures incurred or rights of action accrued under such statute before the repeal thereof, whether or not in course of prosecution or action at the time of such repeal; but all such offenses, penalties, forfeitures and rights of action created by or founded on such statute, liability wherefor shall have been incurred before the time of such repeal thereof, shall be preserved and remain in force notwithstanding such repeal, unless specially and ex-

pressly remitted, abrogated or done away with by the repealing statute. And criminal prosecutions and actions at law or in equity founded upon such repealed statute, whether instituted before or after the repeal thereof, shall not be defeated or impaired by such repeal but shall, notwithstanding such repeal, proceed to judgment in the same manner and to the like purpose and effect as if the repealed statute continued in full force to the time of final judgment thereon, unless the offenses, penalties, forfeitures or rights of action on which such prosecutions or actions shall be founded shall be specially and expressly remitted, abrogated or done away with by such repealing statute."

In *Halbach v. State,* 200 Wis. 145, 150, the supreme court held:

"Under a former statute it was held in *Dillon v. Linder,* 36 Wis. 344, that the general saving statute as it then existed did not save the cause of action itself but merely saved the right of action, and in order to be effectual in such case the right of action as well as the cause of action must be saved. Subsequently the statute was amended for the very purpose of avoiding the effect of the decision as in *Dillon v. Linder, supra. Miller v. Chicago & N. W. R. Co.* 133 Wis. 183, 113 N. W. 384; *H. W. Wright L. Co. v. Hixon,* 105 Wis. 153, 80 N. W. 1110, 1135. It would be difficult to use language which would more clearly express the legislative intent that causes of action, whether civil or criminal, should not be affected by the subsequent repeal of the statute creating the cause of action as distinguished from the right of action, unless rights accrued under the repealed statute are expressly abrogated by the repealing statute. * * *"

It appears that the judge here decided that the cause of action arose prior to the repeal of the statute and that the matter was already pending in his court and for that reason the limitations of the former statute were still in force so far as the said case was concerned. While we do not believe that the court had the right to make the commitment ordered, dated October 28, 1929, retroactive to June 11, 1929, still we believe that the answer to your second question must be in the affirmative. The former statute required a commitment to the industrial school until the minor should reach the age of eighteen years. We believe the commitment as changed is, therefore, valid.

JEF

Counties—County Board — County Board Resolutions—Taxation—Tax Sales—Resolution of county board purporting to authorize sale of county owned land at price to be fixed by committee, whether or not price equals amount county has in said land for delinquent taxes, is void.

County board may authorize county clerk to sell land owned by county under tax deed for specified per cent less than amount which county has in such land for delinquent taxes.

County board may, by resolution, give continuing authority to county clerk to convey county owned land in accordance with terms of sale fixed by county board.

In absence of specific statutory authority, one not member of county board is not authorized to function as member of committee of board.

February 16, 1933.

FULTON COLLIPP,
District Attorney,
Friendship, Wisconsin.

You enclose a copy of a resolution passed by the county board of Adams county and wish to be advised whether Adams county is safe in deeding land under it. The resolution recites that Adams county is the owner of considerable land acquired by tax deed which it desires to sell and get back on the tax roll. It further provides that the county clerk, county treasurer and that member of the county board of Adams county living in the district wherein any particular tract of land desired to be sold is located are appointed as a committee on appraisal for the sale of county owned tax title lands. A prospective purchaser of any of this land may negotiate with this committee, which the resolution attempts to authorize to fix such a price for this land "as they deem reasonable or just and whether the same equals the amount the county has in said land for delinquent taxes or not." If the price thus fixed by the committee is satisfactory to the prospective purchaser, the county clerk of Adams county is authorized and directed to transfer said land to the purchaser by good and sufficient quitclaim deed.

The resolution concludes with the provision that the procedure given above shall govern and be followed out in all lands owned by Adams county which were acquired by tax deed.

Sec. 75.35, Stats., provides as follows:

"The county board may, by an order to be entered in its records prescribing the terms of sale, authorize the county clerk or the county treasurer to sell and assign the tax certificates held or owned by the county, and also the county clerk to sell and convey by quitclaim deed, duly executed and delivered by such clerk under his hand and the county seal of such county, any such lands for which a deed has been executed to such county as provided in the next section."

Two questions arise: 1. Whether or not the county board could legally delegate to the persons named in the resolution the power which the resolution attempts to give; and 2. Whether or not the resolution is a sufficient compliance with the statute in the matter of "prescribing the terms of the sale."

In XVI Op. Atty. Gen. 420 this office had occasion to consider a resolution similar to the one submitted by you. That opinion stated:

"* * * I think that a resolution of a county board directing the county clerk * * * to sell and quitclaim lands to which the county holds tax deeds 'for any sum or sums of money the said clerk, with the assistance and advice of the special committee on tax certificates shall deem reasonable,' is void.

"* * *

"* * * The board has no power to delegate to the county clerk or to other persons such powers as are contemplated by the resolution which you submit."

The conclusion reached in that opinion is in accordance with the opinion held by this office at the present time.

In the case of *Platter v. the Board of Commissioners of Elkhart Co.*, 2 N. E. 544, the court passed upon a statute which read:

"The board of county commissioners shall not be authorized to sell any county property, either real or personal, except at auction, after advertising said property for sale sixty days, *giving the terms,* time, and place *of sale,* and a description of the property to be sold."

The court held, pp. 554–555:

"It must be kept in mind that the county corporation is an artificial person, receiving all its powers from the statute which gave it existence. There is an essential difference between the rights of natural and artificial persons respecting the disposition of property. Natural persons have an inherent right of disposing of their property, while public corporations can only acquire and dispose of property by virtue of some positive law. Where the law designates the method in which a corporation may dispose of its property the method designated must be pursued, for there is no inherent right of disposition in corporate bodies. This general rule applies with peculiar force to officers placed in charge of the property of a governmental corporation. These officers have no direct private interest in the corporate property, and there is an absence of the influence of self-interest which impels men to vigilantly guard their private property. In order to supply, in some measure at least, the place of that influence, the statute has imposed restraints upon the authority of the corporate officers,—the commissioners,—and has cast upon them duties which, if faithfully performed, will prevent loss to the political corporation. * * *.

"* * *

"From what we have said it is evident that the statute upon the subject of sales of county property must be applied in its full force and vigor; and thus applying it, we must hold that the notice ordered by the commissioners, and given by the auditor, does not state the terms of sale. Whatever might be the just conclusion in other cases, we can see no way to avoid the conclusion that in such a case as this, and under the statute which governs it, the notice of sale is insufficient because it omits to name any price. We suppose it clear that the price of the property is one of the most important terms of a contract of sale. * * *

"* * *. We think that the statute means that the board shall designate a minimum price, state that in the notice as one of the terms of sale, and offer the property at public auction, for the purpose of securing, if possible, a greater price than that fixed."

In accordance with the opinion and case given above this office now holds that the resolution passed by Adams county is invalid for the reason that the county board of Adams county did not have authority to delegate the power which the resolution attempts to provide for and for the reason that the resolution did not prescribe the terms of sale.

It is not our intention to hold that the county board of Adams county must pass upon each prospective sale of land and name a specific amount which might be taken as the minimum price. The county board may, for example, pass a resolution authorizing the proper person to dispose of lands held by the county under tax deeds for a certain per cent less than the amount which the county has in the individual tract of land. The county board may pass a resolution which would constitute a continuing authority to the proper person, that is, the county clerk, to dispose of property owned by the county in accordance with terms of sale prescribed by the board. *Mead et al. v. Nelson,* 52 Wis. 402; *Bemis v. Weege et al.,* 67 Wis. 435; and XIII Op. Atty. Gen. 274.

The point it is our intention to emphasize is that the duty of prescribing the terms of sale is upon the county board itself.

In conclusion, your attention is called to the fact that our supreme court has condemned committees whose personnel and functions were similar to those of the committee named by the resolution which you have submitted.

In *Forest County v. Shaw,* 150 Wis. 294, the county board attempted to appoint one not a member of the board to act on a committee. The court said, pp. 301–302:

"* * * A properly constituted committee of members of the county board could act only as an agency of the county board to execute and perform a duty of the board. This, however, can only be lawfully done by a committee composed of board members, and no power or authority existed to appoint the defendant a member of such a committee. The result is that no authority was conferred on the defendant as a member of such a committee; nor was he invested with any power to perform a function of the county board. * * *"

This holding was affirmed in *State ex rel. Nehrbass v. Harper,* 162 Wis. 589, where it was again said, p. 593:

"A county board cannot delegate to one not a member of the board the power and authority to act as a member of a committee of the board. * * *"

Inasmuch as it is here held that the county board itself must prescribe the terms of sale, and sec. 75.35 authorizes only

the county clerk to convey the land, there is no authority for any committee, even if composed of county board members, to function for the purpose of fixing the terms of sale or of conveying the property held by the county under tax deed. JEF

Public Lands—Taxation—Lands acquired in name of county for state-federal highway after first Monday in August of 1932 are subject to taxes for year 1932.

Such lands are lands "acquired by the state" within meaning of sec. 74.57, subsec. (1), Stats. They cannot be sold for taxes but such taxes are collectible from state.

February 16, 1933.

HANS HANSON,
District Attorney,
Black River Falls, Wisconsin.

You submit the following statement of facts: In the latter part of August, 1932, the state highway commission through Jackson county purchased from private owners several parcels of land in the village of Merrillan, Jackson county, for the purpose of carrying out improvements on state–federal trunk highway No. 12. The lands were purchased under authority of sec. 83.08 and ch. 84, Stats., and pursuant thereto the lands were deeded to the county, so that legal title is in the county. At the time when the lands were deeded to the county they had been assessed by the village assessor in the name of the private owners for taxes of 1932, the local board of review had met and completed its work, and the assessor had delivered the completed assessment roll to the village clerk in accordance with sec. 70.50, Stats., which requires that except in cities of the first class the assessor shall by the "first Monday in August" deliver the completed assessment roll to the local clerk. The lands thus assessed were carried into the tax roll which was delivered to the village treasurer in December, 1932, for the collection of the taxes.

The question presented is whether the county treasurer should credit the village treasurer with the amount of said taxes in case the same are unpaid and returned as delinquent by the village treasurer.

Lands owned by either the state or the county are exempt from taxation. Subsecs. (1) and (2), sec. 70.11, Stats. However, lands of which the state or the county becomes the owner *after* the first Monday in August of any year, on which date the assessment roll is completed and filed with the local clerk, are *not* exempt from taxation for that year, as the subsequent formal levy of taxes for that year is regarded as relating back to the first Monday in August. *Petition of Wausau Inv. Co.*, 163 Wis. 283; XVI Op. Atty. Gen. 713; XV Op. Atty. Gen. 3; XI Op. Atty. Gen. 434; X Op. Atty. Gen. 489; IX Op. Atty. Gen. 224.

In the instant case the lands were deeded to the county *after* the first Monday in August, 1932. Therefore said lands were subject to taxes for 1932. Such being the case, it must be considered that the village treasurer will be entitled to credit for the amount of said taxes if the same are unpaid and are returned to the county treasurer as delinquent.

The question then arises as to the collection of the taxes. Subsec. (1), sec. 74.57, Stats., forbids the county treasurer to sell any lands which shall have been "acquired by the state" after the taxes become a lien thereon. Provision is made for collection of the taxes from the state after the same have been returned delinquent to the county treasurer. Lands acquired for state-federal trunk highway purposes are in fact "acquired by the state," although the deeds name the county as grantee. The county acts in such matters merely as an agency of the state. The county is not the real owner of lands acquired for such purposes. The county is but a nominal title holder, and the state is the real party in interest. All this is apparent from a reading of the various provisions of ch. 84, Stats., relating to state-federal trunk highway improvements, and sec. 83.08, Stats., relating to the acquisition of lands for such purposes. It is considered, therefore, that the above referred to provisions of sec. 74.57, Stats., apply in the instant case, and that the taxes are collectible from the state.

JEF

Mortgages, Deeds, etc.—Omission of grantee's name in deed to conservation commission is such serious defect that deed cannot be accepted until defect is cured by insertion of names and thereafter new execution of deed.

Abstract accompanying deed shows clear title to October 14, 1930, but title cannot be accepted until abstract has been brought up to date, showing that no new incumbrances have been effected on land.

February 16, 1933.

PAUL D. KELLETER,
Conservation Director.

You have submitted a warranty deed and abstract of title to the northwest quarter of the northeast quarter of section nineteen (19) township forty-two north of range seven east, which land is to be deeded to the state in accordance with an authorization of exchange approved by the conservation commission, and you ask us to examine this deed and abstract and advise whether they are adequate to pass a clear title to the state. You direct our attention to the omission of the name of the grantee in the deed.

I have examined the abstract of title and I find that it shows that on the 14th day of October, 1930, the title was in William Paquette. I find that all the mortgages are satisfied and that the title is clear. I note that the deed is dated the 3d day of February, 1933. It will be necessary to have the abstract made up to date in order to be certain that the title is clear at the time when the deed is transferred to the state.

Concerning the omission of the grantee's name in the deed, I will say that we cannot accept the deed under such conditions. The principle of law applicable to sealed instruments concerning this matter is stated as follows in 2 Am. & Eng. Encyc. of Law (2d) 254:

"Since the right to fill blanks left in an instrument is based wholly upon the assumption of a consent thereto on the part of the maker, his consent being in the absence of express authority implied from the delivery of the instrument containing blank spaces, it is clear that no authority to fill blanks left in a specialty can be implied, if it is true, as is held in some jurisdictions, that blanks left in a sealed

instrument cannot be filled up after delivery in pursuance of any authority of a lesser dignity than the instrument itself."

In the case of *Lawe v. Hyde,* 39 Wis. 345, our court held that the omission of the grantee's name immediately after the operative words of grant in the conveyance is cured by the habendum to the grantee, his heirs and assigns. We have not been able to find any other decision of our court in which a different rule has been made. In the present deed the grantee is not named in the habendum of the deed, so that the omission of the name is not cured under the rule of *Lawe v. Hyde.* See also as to the omission of grantee's name, 8 R. C. L. 956; 18 C. J. 176. Under these authorities, we must hold that the deed is defective by reason of the omission of the grantee's name in the deed and that it cannot be accepted until the deed is again executed after the name is inserted in it, and the title cannot be accepted until the abstract is brought up to the date of the delivery of the deed after it is executed.

JEF

Criminal Law — Embezzlement — Prisons—Prisoners — Probation—One who is convicted of embezzlement under sec. 343.20, Stats., and is sentenced by trial court and thereafter placed on probation to board of control, upon violation of said probation should be brought before board of control instead of circuit court for revocation of his probation period and to be placed in prison, as provided in sec. 57.03.

Order of circuit court in county where he was convicted, revoking probation, especially in absence of defendant, is null and void, as circuit court has no jurisdiction of defendant under circumstances.

February 18, 1933.

BOARD OF CONTROL.

One, A, was sentenced December 13, 1929, by the Honorable J. E. Uselding, judge of the county court of Ozaukee county, to a term of five years in the Wisconsin state prison upon a plea of guilty to a charge of embezzlement.

Sentence was stayed and A was placed on probation to the board of control. While on probation, October 23, 1931, he forged a check, was arrested November 4 and pleaded guilty. He was sentenced by the municipal court of Milwaukee county to two years in the Milwaukee county house of correction.

The board of control terminated his probation period on learning of his second sentence on January 18, 1932, and issued an order for his incarceration in the state prison at the conclusion of his term in the house of correction.

In October, 1932, the circuit judge took action to cancel A's probation period. At the time this order was issued A was in the house of correction, but so far as you have learned, he was not brought before the court.

Embezzlement is defined in sec. 343.20, Stats., and the penalty is therein prescribed. Said section is not exempt from the provision of sec. 57.01, Stats., and therefore said secs. 57.01 and 57.03, Stats., are applicable to a case where the defendant is convicted of embezzlement.

In view of these circumstances, you submit the following questions which I will answer seriatim:

"1. The prisoner having been convicted, sentence stayed, and placed on probation to the state board of control under the provisions of section 57.01, was any court clothed with power to revoke the probation?"

Sec. 57.01, Stats., provides as follows:

"(1) Whenever any adult is convicted of a felony, convictions under sections 340.02, 340.03, 340.04, 340.05, 340.06, 340.07, 340.09, 340.39, 340.40, 340.56, 343.09, 343.121, 343.122, 351.16, 351.30 excepted, and it appears to the satisfaction of the court that the character of the defendant and the circumstances of the case indicate that he is not likely again to commit crime, and that the public good does not require that he shall suffer the penalty provided by law, said court may, except as otherwise provided for by law, by order suspend the judgment or stay the execution thereof and place the defendant on probation, stating therein the reasons for the order, which shall be made a part of the record, and may impose as a condition of making the order or of continuing the same in effect that the defendant shall make restitution or pay the costs of prosecution, or do both.

"(2) Such adult may be returned to such court on the

original charge for sentence, at any time within such period of probation; and upon the expiration of such period he may be sentenced, discharged, or continued under probation for an additional period to be then fixed by the court, subject to like return, discharge, sentence, or further probation thereafter."

Sec. 57.03, Stats., provides:

"(1) Whenever it appears to the board of control that any such probationer in its charge has violated the regulations or conditions of his probation, the said board may, upon full investigation and personal hearing, order him to be brought before the court for sentence upon his former conviction, which shall then be imposed without further stay, or if already sentenced to any penal institution, may order him to be imprisoned in said institution, and the term of said sentence shall be deemed to have begun at the date of his first detention at such institution. A copy of the order of the board shall be sufficient authority for the officer executing it to take and convey such probationer to the court or to the prison, but any such officer may, without order or warrant, whenever it appears to him necessary in order to prevent escape or enforce discipline, take and detain the probationer and bring him before the board for its action.

"(2) Whenever, in the judgment of the board the probationer has satisfactorily met the conditions of his probation, he shall be discharged from further supervision, and said board shall issue to him a certificate of final discharge; but the period of probation shall not be less than the minimum nor more than the maximum term for which he might have been imprisoned."

Under the statement of facts submitted by you, A was sentenced by the trial court and placed on probation under the board of control. The above quoted statute provides that if a person placed on probation under jurisdiction of the board of control violates said probation, the board may terminate the same. There is no provision which requires that the probationer be brought back to the circuit court and the probation revoked. Under these provisions your first question must be answered "No."

Your second question reads thus:

"What is the effect, if any, of the order of the court in October, 1932, which purports to terminate the probation?"

In answer, I will say that the circuit court had no jurisdiction, and his order will have no effect whatever.

Your third question reads:

"The probation of A having been terminated pursuant to the statutes by the state board of control on January 18, 1932, and the order remanding him to the prison having been issued as of that date, would same be affected in any manner by the purported order of the court issued in October, 1932?"

This question must be answered "No." The court having no jurisdiction, his order is of no validity.
JEF

Physicians and Surgeons — Public Health — Dentistry — Physician duly licensed may extract teeth without being licensed as dentist.

February 18, 1933.

ROBERT E. FLYNN, M. D.,
Board of Medical Examiners,
La Crosse, Wisconsin.

Under date of January 18 you have submitted the following question: "Has a physician, duly licensed under sec. 147.14 a right to extract teeth?"

Sec. 152.02, subsec. (1), Stats., provides:

"One who was engaged in the lawful practice of dentistry in this state on September 30, 1885, may continue if he has annually registered. No other person shall practice dentistry unless he is licensed and annually registered, except that a physician or surgeon residing in this state may extract teeth or operate upon the palate or maxillary bones, a bona fide student, in regular attendance at a dental school may practice under direct supervision of a teacher in the school infirmary, and a legal practitioner of another state may demonstrate before an incorporated dental society or school for instruction and without pay. * * *"

Under this statute, a physician is exempt from the regulation for the practice of dentistry so far as extracting teeth is concerned.

Your question is therefore answered in the affirmative.
JEF

Corporations—Public Utilities—Taxation—Taxation of Utilities—Under sec. 76.38, Stats., which imposes upon telephone companies annual license fee computed upon "gross receipts from the operation of the business during the preceding calendar year," term "gross receipts" is not confined to cash but means total amount of billings for services rendered during preceding calendar year, even though not actually paid for by end of year.

February 20, 1933.

HONORABLE ROBERT K. HENRY,
State Treasurer.

You submit the question, stated below, as to the meaning of the term, "gross receipts," as used in sec. 76.38, Stats. The statute imposes upon telephone companies an annual license fee computed upon the amount of the "gross receipts from the operation of the business during the preceding calendar year." A statement must be furnished to the state treasurer, which must show separately the amounts of "gross receipts" from the toll line service, including all "receipts" on toll line business beginning and ending within the state, and a proportion based upon the mileage within the state to the entire mileage over which such business is done, of "receipts" on all interstate business passing through, into or out of the state, and from the service of the local and rural exchange property of the company and the town, city or village in which any portion of such local or rural exchange property is located, and any portion of the "gross receipts" therefrom are derived, with the true amount of the "gross receipts" of each such local or rural exchange derived from such exchange business in each town, city or village. Subsec. (1). Every company operating one or more telephone exchanges is required to pay an annual license fee to be computed upon the "total gross receipts" from each exchange. Subsec. (3). Every company operating a toll line or furnishing toll service is required to pay an annual license fee to be computed upon the "gross receipts" from toll business attributable to Wisconsin. Subsec. (4).

The specific question is whether the term "gross receipts" is confined to cash received during the preceding calendar year, or whether it means the total amount of billings for

services rendered during the preceding calendar year, even though not actually paid for by the end of the year.

The statute was originally enacted by ch. 345, Laws 1883. It does not now and never has contained any definition of the term "gross receipts." The term does not appear to have been the subject of judicial construction in this state, but it has been construed by courts in other jurisdictions as including more than cash. It has been held that the term "gross receipts from operation," as used in the California constitution, providing a tax upon such receipts of public service corporations, means the *entire operative income* without deductions of any sort. *Pacific Gas & Electric Co. v. Roberts,* 167 Pac. 845, 846–848, 176 Cal. 183. In a later case the same court held that the "gross receipts" of a railroad company includes the amount of transportation furnished to the government *for which the company had not been paid. Payne v. Richardson,* 207 Pac. 547, 189 Cal. 103. In *State v. Illinois Cent. R. R. Co.,* 92 N. E. 814, 847–848, 246 Ill. 188, it was held that "gross receipts" as used in a taxing statute is equivalent to "gross income" or "gross proceeds" and means total receipts before taking any deductions, and *includes uncollected charges for services.* See also *Eppstein v. State,* 143 S. W. 144, 146, 105 Tex. 35. It has been held that "gross earnings" for the purpose of taxation includes *credit* balances where the company exchanges service with other companies. *State v. Minnesota & I. Ry. Co.,* 118 N. W. 679, 106 Minn. 176; *State v. Great Northern Ry Co.,* 203 N. W. 453, 454, 163 Minn. 88; and it *seems* to have been held to the same effect by the supreme court of this state under a statute imposing a tax computed upon "gross earnings." *State ex rel. Abbot v. McFetridge,* 64 Wis. 130, 145. It is true that the statute under consideration in the instant case does not use the term "gross earnings" but uses the term "gross receipts." However, it has been held that "gross receipts" is equivalent to "gross earnings." *Philadelphia & R. R. Co. v. Commonwealth,* 104 Pa. 80, 82; *Pittsburg Life & Trust Co. v. Young,* 90 S. E. 568, 571–572, 172 N. C. 470.

In 28 C. J. 828 it is stated to the effect that "gross receipts" means "ordinarily, the gross amount of cash received," but the single case cited by the text does not in fact

so hold, and the above cited cases indicate to the contrary, although it should be observed that none of them directly passed upon the precise question that is presented here.

It is considered, therefore, that the term "gross receipts," as used in the statute in question, is not confined to cash received during the preceding calendar year but means the total amount of billings for services rendered during the preceding calendar year, even though not actually paid for by the end of the year. While the correctness of this conclusion may not be free from doubt, yet there is nothing in the context of the statute that indicates to the contrary. It appears, too, that in the past the telephone companies have reported on the basis which is herein indicated as the proper one. It will be observed, further, that the annual license fee is computed on the amount of the gross receipts "from the operation of the business during the preceding calendar year." If "gross receipts" were confined to cash, then, strictly speaking cash collected in a later year for services rendered in a prior year would not be used in the computation, as such collections would hardly constitute gross receipts "from the operation of the business during the preceding calendar year." If the legislature desires to limit "gross receipts" to cash, it can easily amend the statute so to provide.

JEF

Corporations—Public Utilities—Taxation—Taxation of Utilities—Under facts stated unincorporated telephone company is held to be subject to annual license fee imposed on gross receipts, as provided by sec. 76.38, Stats.

February 20, 1933.

HONORABLE ROBERT K. HENRY,
State Treasurer.

You ask whether the Atlasta Telephone Company, unincorporated, is subject to payment of the annual license fee required by sec. 76.38, Stats., from telephone companies, whether incorporated or unincorporated, which license fee

is computed on the gross receipts from the operation of the business during the preceding year.

The instant company reports to the state treasurer with regard to its operation as follows:

"The Atlasta Telephone Co. (so-called) is merely a name by which the Northern States Power Company and C. T. Bundy jointly subscribed for the use of six 'phones with the Wisconsin Telephone Company. It does no business except to send and answer calls on their respective 'phones. It has no receipts or disbursements except to pay the prescribed rate to the Wisconsin Telephone Co. It is not a corporation or copartnership. C. T. Bundy uses two of the six 'phones at his 'Atlasta Farm' and summer home near the dam of the Power Company at Cedar Falls and the Power Company uses the other four in its power house and in the houses of its operators. C. T. Bundy pays one-third of the rental and the Power Company pays two-thirds."

The company is in fact something more than a mere name. Although unincorporated, it is organized in some form, has officers, and owns telephone equipment which is furnished for the use of its members. The records of the public service commission indicate that the company is classified as a "road line," that is, a company which owns a line and telephones but which does not own or operate a switchboard and which obtains switching service from another telephone company. The company in question owns one line, consisting of twelve miles of wire, and six telephones. The company's 1932 report to the public service commission shows that its receipts for 1932 were $116.40 and that its expenditures were the same amount. It seems apparent that the company is a nonprofit organization. However, it seems equally apparent that the arrangement in question must give some advantage to its members.

Under the facts stated, it does not appear that the company in question is distinguishable from those considered in XIII Op. Atty. Gen. 267, wherein it was ruled that small local telephone companies operating under a similar plan are subject to said license fee. That ruling is adhered to. *Compare* VI Op. Atty. Gen. 178 and III Op. Atty. Gen. 826.

JEF

Bonds—Public Officers—County Abstractor—County Clerk—County Treasurer—Statutes are not mandatory in regard to county's paying for bonds of elective officers except where county board requires bonds furnished by county clerk, treasurer and abstractor to be surety company bonds.

February 21, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

You ask whether there is any section of the statutes that makes it mandatory for the county to pay for the bonds that are furnished by the elective officers.

The statutes on the subject read as follows:

Sec. 59.13, subsec. (3), Stats.: "Each such bond shall be guaranteed by the number of personal sureties prescribed by law, or if not prescribed, by the number fixed by the county board within the limitations, if any, prescribed by law, or by a surety company as provided by section 204.01. In the case of the county clerk, county treasurer and county abstractor the county board may by resolution require them to furnish bonds guaranteed by surety companies and direct that the premiums therefor, agreed upon between the board and the companies, be paid out of the county treasury."

Sec. 204.20: "The state, any county, town, village, city or school district may pay the cost of any official bond furnished by an officer or employe thereof, pursuant to law or any rules or regulations requiring the same, if said officer or employe shall furnish a bond with a surety company or companies authorized to do business in this state, said cost not to exceed the current rate of premium per annum on the amount of said bond or obligation by said surety executed. The cost of any such bond to the state shall be charged to the appropriation for the state officers, department, board, commission or other body, the officer or employe of which is required to furnish the bond."

You will note that the language employed in each of these sections is not mandatory with certain exceptions found in sec. 59.13 (3). It is to be noted that under sec. 59.13 if the county board requires the county clerk, county treasurer and county abstractor to furnish surety company bonds, it must then pay the costs out of the county treasury. In other

words, if the county board makes the requirement mentioned above, the statute is then mandatory compelling the county to pay the costs of the bonds. Such was the interpretation placed on this section in XX Op. Atty. Gen. 3, wherein it was stated, p. 5:

"With respect to the officials there named, it is clear that the county board may require a surety company bond if it directs that the premiums therefor be paid from county funds. * * *."

Also, in VII Op. Atty. Gen. 606, it was stated, p. 608:

"* * * There is probably special reason why a surety bond should be required in those two cases, and the power vested in the county board to require surety bonds in those two cases is accompanied in the statute by the reasonable provision that when so required the expense thereof shall be paid by the county."

JEF

Banks and Banking—Public Officers—Banking Commissioner—It is not permissible to allow assessor of incomes or any other state auditor to audit books or accounts of delinquent bank or to furnish him with any of bank records at his request.

If order of court is given for such disclosure matter should be submitted to attorney for steps to be taken to vacate said order by appeal or otherwise.

February 23, 1933.

BANKING DEPARTMENT.

You have submitted to this department the following questions:

"Is it permissible to allow the assessor of incomes, or any other state auditor, to audit the books or accounts of a delinquent state bank or to furnish him with any of the bank's records at his request?

"Would this be permissible if done under authority of an order of the circuit court for the county in which the bank was located?"

In an official opinion in XV Op. Atty. Gen. 287 it was held that in the case of a bank in the process of liquidation by the commissioner of banking, such commissioner should not permit books and accounts of the bank to be inspected by an accountant unless such accountant has authority from a stockholder and is acting on behalf of a stockholder of said bank; even then, such inspection should not be permitted if the commissioner of banking is satisfied that the inspection has for its purpose an injury to the banking institution. This opinion is predicated on the provisions of sec. 220.06 which provides as follows:

"(1) No commissioner of banking, deputy or examiner shall examine a bank in which he is interested as a stockholder, officer, employe or otherwise. No commissioner of banking, deputy or examiner shall examine a bank located in the same village, city or county with any bank in which he is interested as stockholder, officer, employe, or otherwise. The commissioner of banking, his deputy, and every clerk in this department shall be bound by oath to keep secret all of the facts and information obtained in the course of such examinations, except so far as the public duty of such officer requires him to report upon or take special action regarding the affairs of any bank, and except when called as a witness in any criminal proceeding or trial in a court of justice; and except that such commissioner, deputy or examiner may in his discretion and under such rules and regulations as prescribed by such commissioner compare notes as to names of borrowers, lines of credit, and other matters affecting a bank, with a national bank examiner, a clearing house examiner, or an examiner for an insurance company duly licensed in the state of Wisconsin to insure or guarantee depositors of deposits in banks or trust companies, and having such insurance in force.

"(2) If any commissioner of banking, deputy, examiner or clerk in such department shall disclose the name of any debtor of any bank, or anything relative to the private accounts or transaction of such bank, or shall disclose any fact obtained in the course of his examination of any bank, except as herein provided, he shall be subject, upon conviction thereof, to forfeiture of his office, and to the payment of a fine of not less than one hundred dollars nor more than one thousand dollars, or imprisonment in the state prison not less than six months nor more than two years, or to both such fine and imprisonment."

In said opinion it was stated concerning this statute that it has drastic provisions and said, p. 289:

"* * * you will note that it creates a felony and that the opinion of this department would not protect you if you should violate the law, although you acted in good faith on the advice of the attorney general. I have been unable to find a statute which authorizes the tax commission to examine and inspect the books of banking institutions when it is making a legal audit for school districts or municipalities."

It will be observed that the commissioner of banking will be guilty of a felony under said statute if he shall disclose the name of any debtor of any bank or anything relating to the private accounts or transactions of such accounts as when he discloses any fact obtained in the course of his examination, of any bank.

Your first question should be answered in the negative. The second question must be looked at from a different angle as it could be in contempt of court if you should violate a lawful order of the circuit court. In such case, however, it would be well for you to submit the matter to this department and see whether steps should be taken to vacate the said order on appeal or otherwise.

JEF

Loans from Trust Funds—When commissioners of public lands have approved loan from trust funds and advanced portion of such loan they cannot refuse to advance balance thereof.

Commissioners are vested with full discretion in determining investment of these moneys as between any of authorized loans and investments.

February 24, 1933.

COMMISSIONERS OF PUBLIC LANDS.

A. D. Campbell, *Chief Clerk*

You have requested an opinion from this department upon the following questions:

I. When the commissioners of public lands have approved a loan from the trust funds and advanced a portion of such loan can it avoid advancing the balance?

Under the authority of art. X, sec. 8, Wis. Const., the legislature has provided in ch. 25, Stats., a scheme for the management and investment of the constitutional trust fund.

Said chapter authorizes the commissioners of public lands to lend such funds to certain municipalities for certain purposes and upon certain conditions.

In order to obtain a loan the municipality is required by sec. 25.05, Stats., to file an application therefor, setting forth certain statutory requirements. Subsec. (6) of such section provides:

"The aforesaid application, statement and all accompanying exhibits and documents shall be recorded in the office of said commissioners and thereupon be filed in the office of the secretary of state and shall, together with the record thereof, be conclusive evidence of the facts therein stated."

This application so filed is then subject to the approval of the commissioners. Sec. 25.06 reads:

"If the application shall be approved by said commissioners they shall forthwith cause certificates of indebtedness to be prepared in proper form and transmitted to the municipality submitting the same. Every such certificate shall be executed and signed for a school district by its director, for a town by its chairman, for a village by its president, for a city by its mayor, for a board of education by its president, and for a county by the chairman of its board, shall be countersigned by the clerk of the municipality executing the same, returned to the commissioners, and deposited with the secretary of state, who shall thereupon draw his warrant upon the state treasurer for the amount of such loan, payable to the treasurer of the municipality making the loan or as he may direct; and said certificate of indebtedness shall then be conclusive evidence of the validity of such indebtedness and that all the requirements of law concerning the application for the making and acceptance of such loan have been complied with."

These provisions seem to make it clear that the commissioners have no authority to refuse to advance a loan once approved. Upon the granting of such approval by the commissioners of public lands a binding contract is created as between the commissioners and the borrowing municipality.

A study of ch. 25 thus makes it apparent that when the commissioners of public lands have once approved a loan

from the constitutional trust funds and have advanced a portion thereof it cannot refuse to advance the balance.

II. Secondly, you inquire as to the discretion of the commissioners of public lands in making loans from the constitutional trust funds, and further as to whether a mandamus would lie to compel such commissioners to lend these funds for the support of the schools or to prohibit their investing such funds elsewhere.

Art. X, sec. 8, Const., reads:

"Provision shall be made by law for the sale of all school and university lands after they shall have been appraised; and when any portion of such lands shall be sold and the purchase money shall not be paid at the time of the sale, the commissioners shall take security by mortgage upon the lands sold for the sum remaining unpaid, with seven per cent interest thereon, payable annually at the office of the treasurer. The commissioners shall be authorized to execute a good and sufficient conveyance to all purchasers of such lands, and to discharge any mortgages taken as security, when the sum due thereon shall have been paid. The commissioners shall have power to withhold from sale any portion of such lands when they shall deem it expedient, and shall invest all moneys arising from the sale of such lands, as well as all other university and school funds, in such manner as the legislature shall provide, and shall give such security for the faithful performance of their duties as may be required by law."

This section gives the commissioners exclusive power to administer such funds, but it places their authority under the control of the legislature in so far as the investment of the moneys of such fund are concerned.

In accordance with such provision the legislature has enenacted laws regulating the investment and loan of these moneys by the commissioners of public lands. Sec. 25.01 authorizes certain investments and loans.

Sec. 25.01, subsec. (4), provides:

"So far as practicable the loans sought by school districts and boards of education shall be supplied before any other loan or investment authorized by this section is made, and such applications shall be acted upon in the order of time in which they have been filed."

The legislature evidently intends by these provisions to vest in the commissioners a great discretion. The above quoted, sec. 25.01 (4) does not seem to divest the commissioners of discretion in the matter of loans. This would seem to be a directory rather than a mandatory provision. The determination of the practicability of investing such moneys in loans to school districts and boards of education rather than in other authorized investments and loans rests with the commissioners.

Under the general rule well established in Wisconsin mandâmus will not issue to compel the performance of a duty requiring discretion. *State ex rel. Gill v. Common Council,* 9 Wis. 254 (1859); *State ex rel. Gericke v. City of Ahnapee,* 99 Wis. 322, 74 N. W. 783 (1898); *State ex rel. Connors v. Zimmerman,* 202 Wis. 69, 231 N. W. 590 (1930).

Subject, therefore, to the statutory requirements authorizing specified investments and loans, it would seem that the commissioners have full authority to determine in which of these authorized investments they will place the moneys. This being so, it is clear that the commissioners can not be compelled to loan the moneys for the support of schools nor can they be prohibited from placing such funds elsewhere, and that nothing short of a clear breach of duty could subject these officers to any control by the courts.

JEF

Bonds—Municipal Borrowing—Statute authorizing city to issue bonds to refund prior indebtedness does not authorize city to refund bonds nor to refund indebtedness incurred for unlawful purpose nor to refund liability to restore unlawfully diverted special municipal fund, nor liability to remit for state and county special taxes.

Bond issue to refund prior indebtedness must be submitted to electors.

February 24, 1933.

E. J. DONNELLY, *City Manager,*
Two Rivers, Wisconsin.

JEF

Charitable and Penal Institutions—Jails—Courts—Commitments—All commitments, including those to county jail, by court must be in writing.

February 24, 1933.

HUGH G. HAIGHT,
District Attorney,
Neillsville, Wisconsin.

You ask whether a commitment to the county jail by a court must be written.

Your question is answered in the affirmative. Statutes applicable are secs. 359.02, 360.07, 355.16, 360.24 and 361.11. Secs. 359.02, 360.24 and 360.11 require that the commitment be under the hand and seal of the court which is in writing, of course. Secs. 355.16 and 360.07 contain no such specific requirement.

However, the subject matter of these statutes is covered by sec. 361.11, which requires a written order. We quote also the following authority setting forth the common law.

"* * * From the earliest times, as appears from the reported cases on the subject, this process was required to contain a statement of the nature of the crime with which the prisoner was charged. The legal requisites of such a process are thus described by an acknowledged authority on the subject of crimes and criminal procedure as defined by the common law: 'It must be in writing, under the hand and seal of the person by whom it is made and expressing his office or authority, and the time and place at which it is made, and must be directed to the jailor or the keeper of the prison. It may be made either in the name of the King, and only tested by the person who makes it, or it may be made by such person in his own name. It may command the jailor to keep the party in safe and close custody; for if every jailor be bound by the law to keep his prisoner in such custody, surely it can be no fault in a mittimus to command him so to do. It ought to set forth the crime alleged against the person with convenient certainty, whether the commitment be by the privy council or any other authority; otherwise the officer is not punishable by reason of such mittimus for suffering the party to escape; and the court before whom he is removed by habeas corpus ought to discharge or bail him. And this doth not only hold where no cause at all is expressed in the commitment, but also where it is so

loosely set forth that the court cannot adjudge whether it were a reasonable ground of imprisonment.' (2 Hawkins Pleas of the Crown, chap. 16, p. 119). In another authority the rule in regard to this process is stated as follows: 'But it is necessary to set forth the particular species of crime alleged against the party with convenient certainty, whether the commitment be by a justice of the peace, a secretary of state, the privy council or any other authority.' (1 Chitty's Crim. Law, chap. 3, p. 111.) * * *" *People ex rel. Allen v. Hagan,* 170 N. Y. 46, 49–50, 62 N. E. 1086.

All commitments should, therefore, be in writing.
JEF

Peddlers—Christmas Tree Dealers—Person who acquires Christmas tree dealer's license from conservation commission as required by sec. 348.386, subsec. (3), Stats., is also required to have peddler's license if he peddles Christmas trees or transient merchant's license if he disposes of trees as transient merchant.

February 24, 1933.

THOMAS MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

You have submitted the following as a basis for an opinion:

"A is engaged in the business of transporting and selling Christmas trees outside the county where the same are cut. He obtains a written consent of the owner of the land from which such trees are cut, and also a license as a Christmas tree dealer from the conservation commission as required by section 348.386, subsection (3). He intends to go to cities and other sections of this state transporting the trees by truck and sell them. In addition to the $5.00 license fee as a Christmas tree dealer required by the section above quoted, is he required to have a peddler's license, or transient merchant's license as required under the provisions of chapter 129, Wisconsin statutes?"

This question must be answered in the affirmative. That is, if he intends to peddle these Christmas trees, he will be required to have a peddler's license and if he intends to dis-

pose of them as a transient merchant, he will be required to have a transient merchant's license, but if he disposes of the same in such a way that he is not a peddler nor a transient merchant, he is not required to have either of such licenses.

There is nothing in the provision of sec. 348.386 subsec. (3) which would in any way indicate that the license there required does away with the necessity of having a peddler's license or a transient merchant's license if the party intends to peddle the same or sell them as a transient merchant.
JEF

Prisons—Prisoners—Escaped prisoner may be followed by warden and recaptured without new warrant being issued. If warden has reasonable grounds to believe that prisoner is in house he has right to break into house, but should first ask for admittance in case of misdemeanor.

February 25, 1933.

C. J. DORSCHEL,
District Attorney,
Green Bay, Wisconsin.

You have referred us to sec. 53.13, Stats., which provides:

"The warden may adopt such measures as he may deem proper to aid in detecting and capturing escaped convicts."

You inquire whether such section would give the warden of the state reformatory power to search private property where he thinks a prisoner may be in hiding and if not, what power, if any, has a warden to search private property for escaped prisoners.

This section refers to the recapture of escaped convicts from state prison.

Sec. 346.44 provides as follows:

"Any person who may be in any prison in this state under sentence of imprisonment in the state prison, the Wisconsin state reformatory, or in the house of correction of Milwaukee county and who shall break such prison and escape shall be punished by imprisonment in the state prison, the Wis-

consin state reformatory, or the house of correction of Milwaukee county one year in addition to the unexpired term for which he was originally sentenced."

In 10 R. C. L. 590 the right to recapture an escaped criminal is stated as follows:

"At common law a prisoner who escaped from prison and was recaptured was subject to reimprisonment without a new judicial direction for a sufficient length of time to make, with his service prior to the escape, the full term of confinement at hard labor contemplated by his sentence. No new award of execution was necessary or proper. This is a very general rule and has become the law in many jurisdictions through statutory enactment. A sheriff, or any other person acting under and by his authority, has the right to recapture a prisoner escaping from lawful arrest and custody, and has the right to use such force as may be necessary to overcome resistance to his lawful authority in making such rearrest. The force that he may use however is no greater than he could have used in making the original arrest; and it has been held that where the law confers power upon an officer having the custody of a convicted felon to take the life of the prisoner to prevent his escape, such right does not extend to an officer attempting to rearrest an escaped convict."

In *In re McCauley,* 123 Wis. 31, our court, speaking through Justice Marshall, said on page 35:

"Our conclusion is that by the common law a prisoner escaping from custody, while serving his sentence for a criminal offense, is liable to recapture and reconfinement to serve out his sentence, the time of his voluntary absence not being counted in his favor, and that judicial direction other than that contained in the original judgment is unnecessary, while for the offense of escape or prison breach and escape a trial and sentence is necessary in order to punish the offender, the same as in case of other offenses; that our statutes, secs. 4490 and 4494 and ch. 75, Laws of 1901, were framed to cover these common-law features; and that the words in sec. 4490 'in addition to his former sentence' and in sec. 4494 'in addition to the unexpired term' were used *ex industria,* to indicate that the punishment for the second offense is not deemed to abridge the execution of the judgment theretofore pronounced. * * *"

In 2 Am. & Eng. Encyc. of Law (2d) 856, it is provided:

"In the case of a criminal who escapes to his dwelling house after having been once lawfully arrested, notification

of purpose need not be given, nor admittance refused, but the officer may proceed at once to break and enter.

"An officer acting under a criminal warrant may break the outer door of another person's house, after he has been refused admittance, in order to arrest the person against whom the warrant is directed, if he has reasonable ground for believing that he is there."

In 5 C. J. 427 it is said:

"Under the familiar rule that no man can have a castle against the king, a person who is armed with a warrant of arrest is entitled, after due demand, to break * * * the outer or inner doors of a dwelling of another in which the person described in the warrant has taken refuge. This right may be exercised in the night as well as in the day. * * *

"After due demand either a peace officer or a private person may, without a warrant, break open doors for the purpose of apprehending a felon, or for the purpose of preventing the commission of a felony.

"When the arrest is upon suspicion of felony, it seems that a peace officer may break doors for the purpose of apprehending the suspected party, but that a private person may not."

We believe sec. 53.13, Stats., clothes the warden or his deputies with power to recapture escaped prisoners as officers. In the case of misdemeanor, there should be a demand for an admittance into a house before breaking into the house. The officer should have reasonable grounds for believing that the escaped prisoner is in the house before breaking in.

JEF

Counties — Municipal Borrowing — Under language of temporary borrowing resolution by county board which does not specify time for making loan but which was adopted prior to county tax levy of 1932, loan is repayable by April 1, 1933, and borrowing must be done before that date.

February 25, 1933.

ALOYSIUS W. GALVIN,
District Attorney,
Menomonie, Wisconsin.

You submit for consideration the following temporary borrowing resolution, which you state was adopted by the county board of Dunn county at its regular November, 1932, meeting:

"Resolved, That Dunn county borrow to pay current expenses the sum of $50,000.00 under and by virtue of authority invested in it by section 67.12 of the statutes of Wisconsin for 1931 and amendments thereto at rate of interest not exceeding 6% per annum and such sum be repaid with interest at the agreed rate, on or before the first day of April following the next tax levy.

"There is hereby levied on all taxable property of Dunn county the sum of $50,000.00 together with such additional sum as shall be required to pay the interest on such sum at the agreed rate to the time of repayment of said loan, said sum to be placed in the next tax roll and collected as other taxes are collected.

"It is Further Resolved, That the chairman of the county board and the county clerk be, and they hereby are, instructed to carry out the foregoing resolution and to execute county orders or such other evidence of indebtedness so created as shall be proper."

You call attention to the fact that the resolution does not prescribe *when* the loan is to be made, that the first paragraph provides to the effect that the loan is to be repaid "on or before the first day of April following the next tax levy," and that the second paragraph levies a tax to repay the loan, the amount of such tax to be placed "in the next tax roll and collected as other taxes are collected."

The question submitted is: "If the resolution is valid, when is the loan to be made?"

Sec. 67.12, Stats., as amended by ch. 9, Laws of Special

Session, 1931, authorizes a county temporarily to borrow money either under the provisions of subsecs. (1) to (4) thereof or under the provisions of subsec. (7) thereof. The requirements and limitations under subsecs. (1) to (4) are somewhat different from those under subsec. (7). The resolution in question refers only to sec. 67.12 generally, but it is fairly inferable that the resolution is one to borrow under subsec. (7), as it is a resolution to borrow money to pay "current expenses" and it provides that the loan is to be repaid "on or before the first day of April following the next tax levy," the language indicated in quotation being identically the same as appears in that subsection. It provides, omitting the provisions of par. (a), which relate to counties of two hundred thousand inhabitants or more:

"(7) At any legal meeting a county board by a yea and nay vote of at least two-thirds of its members-elect may borrow money and issue county orders therefor to pay current expenses at the times and in amounts and manner specified as follows:

"(a) * * *

"(b) In other counties, at any time a sum not exceeding fifty per cent of the last tax levy for county purposes. Such sum shall be repaid, with interest at the agreed rate, on or before the first day of April following the next tax levy."

It appears, therefore, that the resolution is one under subsec. (7) and is valid provided it was adopted by the required two-thirds yea and nay vote and provided the amount does not exceed fifty per cent of the "last tax levy for county purposes."

Under subsec. (7) the amount must not exceed fifty per cent of the "last tax levy for county purposes," and it must be repaid on or before the first day of April following the "next tax levy." Although the instant resolution does not specify when the loan shall be made, it does provide that the amount shall be repaid on or before the first day of April following the "next tax levy," and it levies a tax for repayment, with a direction that such tax be placed in the "next tax roll." Accordingly, given the date on which the resolution was adopted (not furnished to the attorney general), the time within which the loan must be made is readily deducible. Thus, if the resolution was adopted prior to the

county tax levy of 1932, authority to make the loan would expire on the first of April, 1933. See XVIII Op. Atty. Gen. 287. Actually the loan would have to be made before April 1, 1933, because if the resolution was adopted prior to the county tax levy of 1932 the loan would have to be repaid by April 1, 1933.
JEF

Counties—County Board Proceedings—Public Printing —Words and Phrases—Newspapers—Publication issued by merchants of city to advertise their merchandise and wares, which contains some news items, is not "newspaper" within meaning of sec. 59.09, subsec. (2), Stats.

February 25, 1933.

JOHN G. TARAS,
District Attorney,
Portage, Wisconsin.

This is to acknowledge receipt of your recent communication in which you request the official opinion of this department upon the following statement of facts:

The county board, under the provisions of sec. 59.09, Stats., passed a resolution to the effect that its proceedings be published in one of the county newspapers and that the job be let to the lowest and best bidder. The lowest bid is that of a newspaper published by the Portage Printing Company and is known as the "Portage Merchants Shopping Guide." You say:

"The first issue of this newspaper was published December 15, 1932. There are no paid subscribers. However, 7,000 copies are printed each week. Approximately 3,052 go out in the rural district in this county and in the vicinity of Portage; approximately 1,800 copies are distributed in the city of Portage, and approximately 2,100 copies are each week distributed in the nearby villages in this county. * * *"

A newspaper is defined as a publication which is issued at regular stated intervals and which contains, among other things, current news, or news of the day, and is designed to be read by the public generally. *Times Printing Company v. Star Publishing Company,* 51 Wash. 667, 99 Pac. 1040, 1041; *Crowell v. Parker,* 22 R. I. 51, 46 Atl. 35; *Rosewater v. Rinzenscham,* 38 Nebr. 835, 57 N. W. 563, 566; *Lynch v. Durfee,* 101 Mich. 171, 59 N. W. 409; *Hanscom v. Meyer,* 60 Neb. 68, 82 N. W. 114; *Hull v. King,* 38 Minn. 349, 37 N. W. 792.

In *Hall v. Milwaukee,* 115 Wis. 479, 483, 91 N. W. 998, in discussing the recognized legal definitions of a "newspaper," it was said that a newspaper is defined,

"* * * Rap. & L. Law Dict.: 'A periodical publication containing intelligence of passing events.' Black, Law Dict.: 'A publication in numbers, consisting commonly of single sheets, and published at short and stated intervals, conveying intelligence of passing events.' Am. Ency. Dict.: 'A printed paper published at intervals, * * * containing intelligence of past, current, or coming events, and, at the option of the conductors, presenting also expressions of opinion by editorial and other contributors, and business announcements and advertising.' 21 Am. & Eng. Ency. of Law (2d. ed.) 533: 'A publication issued at regular stated intervals, containing, among other things, the current news, or the news of the day.' * * *"

From the foregoing definitions, it is apparent that the term "newspaper" used in different surroundings, may have different meanings, but it is apparent that the primary object of a newspaper is to disseminate or convey news. The primary purpose of the Portage Merchants Shopping Guide, as is indicated by its name, is to advertise merchandise of the merchants who contribute to the support of this publication. It will also be noted that this publication has no paid subscribers, and the copies thereof are distributed free within the city of Portage, and in the nearby villages and rural districts of Columbia county.

While it is true, as was pointed out in XIX Op. Atty. Gen. 409, 410, that "the dominant purpose of the various sections is that the material be brought to the attention of the residents of the county," it is likewise true that the legislature intended that such material be brought to the attention

of the residents through the medium of a "newspaper." Can it be argued that the requirements of sec. 59.09 (2) would be satisfied by publication of the proceedings of the county board in a single sheet, or handbill advertisement issued by a group of merchants in the city of Portage? We think not. We think that the statute clearly requires the publication of the proceedings of the county board in a publication which the average person would deem to be such, and wherein the people of the county would look for such news. Thus, while many publications such as literary, scientific, religious, medical and legal journals, which obviously are intended for only one class of people, have been held to be newspapers within the legal and ordinary meaning of the law, yet such publications disseminate, primarily, news—even though such news is limited in its character. The sole object of the "Portage Merchants Shopping Guide" is to advertise merchandise and wares of certain merchants who have sponsored its publication. While it does contain some news items, it is apparent that such news items are mere "fillers" and only incidental to the advertisements contained therein.

In view of the foregoing, we are constrained to hold that the "Portage Merchants Shopping Guide" is not a newspaper within the meaning of subsec. (2), sec. 59.09.

JEF

Minors—Child Protection—No person has authority to bring feeble-minded child into this state for purpose of placing it in state institution.

February 28, 1933.

BOARD OF CONTROL.

You state that a certain couple, residents of Illinois, had a child, that they were later divorced, and the child was given to the custody of the mother, that the mother placed the child in an Illinois institution for children. You further state that the mother later moved to Wisconsin, where she now resides, that it was later determined that the child was feeble-minded and that the Illinois authorities now propose

that the child be brought to Wisconsin and committed to a Wisconsin institution for the feeble-minded, on the theory that the mother has a residence in this state. You ask for our opinion in the matter.

You are advised that the proposal of the Illinois authorities is illegal. When the child was committed to the Illinois institution the state of Illinois became its guardian and was responsible for its care. After that the residence of its mother became immaterial in determining jurisdiction over the child.

I quote from *Wisconsin Industrial School for Girls v. Clark County,* 103 Wis. 651, 665:

"* * * Every statute which is designed to give protection, care and training to children, as a needed substitute for parental authority and performance of parental duty, is but a recognition of the duty of the state, as the legitimate guardian and protector of children where other guardianship fails."

On page 669, it is said:

"The helplessness and indiscretion of minority are amply sufficient to call into exercise the power of the state, if necessary, to relieve and so care for, protect, and give to the being so circumstanced an opportunity to become a worthy member of the community in which it may reside on coming to the years of discretion."

Likewise in *McLean v. Humphreys,* 104 Ill. 378, 383:

"* * * It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae,* to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, * * * are unable to take care of themselves."

See also 12 C. J. 1210, sec. 986.

The mere presence of the child in Illinois raises the duty of the state of Illinois to care for it and protect it.

The Illinois authorities would be prohibited from bringing a child into this state for the purpose of placing it in an institution by secs. 48.42, 48.47 and 49.06, of the Wisconsin statutes.

The mother of the child would be the only one who could

lawfully bring it into this state since sec. 48.42 does "not apply to a resident who brings a child for adoption in his own family." However, even she would be prohibited from bringing the child into the state with intent to place it in a state institution.

JEF

Appropriations and Expenditures—Diversion of Funds—Bonds—Bridges and Highways—Money raised by means of bond issue under sec. 87.02, subsec. (1). par. (b), Stats., cannot be used for any other purpose after bonds have been sold and money is obtained and placed in county treasury. If, however, bonds have not been sold action for raising money by bond issue may be rescinded and county's share of bridge may be paid out of general fund if there is sufficient money to pay it.

County's share of such bridge may be paid out of general fund of county without levying county tax for that specific purpose. It may also be paid out of other funds of county that are not specifically raised by bond issue for certain purpose, and in that case also it may be used if statute should expressly so provide concerning special fund.

March 1, 1933.

JOHN J. SLOCUM, *Chief Clerk,*
Assembly.

You have sent me Resolution No. —, A., which contains the following:

"RESOLVED by the assembly, that the attorney general be requested for an early opinion on the following three points:

"1. Under section 87.02 of the Wisconsin statutes, as passed by the special session of 1931, is it legal for a county board, after they have provided for the payment of the county's share toward the cost of large bridges under paragraph (b) of subsection (1) of section 87.02, by means of a bond issue, to rescind such action at a later meeting and provide for the payment of the county's share of the cost of such bridges out of other available county funds?

"2. Is it legal for the county board to provide for the payment of the county's share of the cost of such bridges out of the general fund of the county, without levying a county tax levy for that specific purpose?

"3. Is it legal for the county board to provide for the payment of the county's share of the cost of such bridges out of any unexpended county highway machine shop fund or out of any unexpended balance in any other county fund not a part of the general fund?

"* * *"

In answer to your first question, I will say that it depends upon whether the bonds have been sold and turned into cash into the county treasury. If they have not been sold, and no money has been obtained for any sale of the bonds, then I am of the opinion that the county's share may be provided out of other available county funds and the action to raise the money by bond issue may be rescinded. If, however, money has been raised for a certain purpose by the issue of bonds, the funds so acquired must be used for that purpose as provided in sec. 67.11 of the Wisconsin statutes.

Your second question must be answered in the affirmative. I see no reason why it is necessary to raise money for a share of building a bridge when there is money in the treasury for that purpose. In the case of *Montague v. Horton,* 12 Wis. 599, 603, it was held:

"* * * By law all money belonging to the county as such, and not coming into its hands in the capacity of trustee, is treated as one fund, out of which all its liabilities are to be discharged."

We have held that one county board can no more bind a future county board than one legislature can bind a future legislature. See XXI Op. Atty. Gen. 1056.

In answer to your third question, I will say that I know of no fund except the one above indicated raised by the sale of bonds which must be kept intact and your question must therefore be answered in the affirmative.

JEF

Counties—Forest Crop Lands—Forest Reserves—County has power to withdraw lands from operation of forest crop law.

March 4, 1933.

A. C. BARRETT,
District Attorney,
Spooner, Wisconsin.

You submit the following questions for our opinion thereon.

No. 1. "On withdrawal by a county of lands from entry under the forest crop law, after contributions have been made by the state to town and schools, is the county required to repay such amounts to the state?

No. 2. "Has a county power to withdraw any lands from a county forest reserve, created under section 59.98, after contributions have been paid by the state, and if so, must the county repay such contributions to the state?"

Question 1 is answered by XX Op. Atty. Gen. 1150, and we see no reason for changing it at this time. We note your suggestions for changing the law so as to make it clear, which are commendable and would make unnecessary the above cited opinion.

In regard to question 2, although a county is not given the right to withdraw under sec. 59.98, it could do so under the following statutes quoted in part:

Sec. 77.10, subsec. (2), par. (a). "Any owner of any forest crop lands may elect to withdraw all or any of such lands from this chapter, * * *."

Sec. 77.13. "Any county which has title to any lands eligible to registration as forest crop lands shall be deemed an owner as this term is used in this chapter and may register such lands under the provisions of this chapter in the same manner and on the same basis as other owners, except that any such county shall not be required to pay the acreage share prescribed in section 77.05 on any of its lands registered as forest crop lands."

See also XX Op. Atty. Gen. 1150, wherein the right of a county to withdraw is assumed.

JEF

Minors—Legal Settlement—Child living with her aunt though never legally adopted takes legal settlement of her mother.

March 4, 1933.

EARL F. KILEEN,
District Attorney,
Wautoma, Wisconsin.

You state that question has arisen as to the legal settlement of L. F. According to the facts submitted, L. F. is a minor whose mother, a widow, has a legal settlement in the town of Oasis. L. F. has not lived with her mother for many years, but has lived with an aunt who has a legal settlement in Mosinee, Wisconsin. The aunt, however, has never legally adopted L. F. You ask whether L. F.'s legal settlement is in the town of Oasis or Mosinee. You call our attention to sec. 49.02, subsec. (2) and subsec. (6), Stats., which provide:

"(2) Legitimate children shall follow and have the settlement of their father if he have any within the state until they gain a settlement of their own; but if the father have no settlement they shall in like manner follow and have the settlement of their mother if she have any."

"(6) Every minor who shall be bound as an apprentice to any person shall, immediately upon such binding, if done in good faith, thereby gain a settlement where his or her master or mistress has a settlement."

Under your statement of facts L. F. was not bound as an apprentice to her aunt, and hence subsec. (6) above quoted is inapplicable. Since L. F. is a minor whose father is dead, her settlement follows that of her mother; and the mere fact that she has been living with an aunt does not, in the absence of adoption, prevent the application of the rule stated in subsec. (2), sec. 49.02.
JEF

Automobiles—Common Carriers—Law of Road—Under sec. 85.40, Stats., heavy motor vehicles (passenger busses and trucks) completely equipped with pneumatic tires and having gross weight of more than six thousand pounds and less than twelve thousand pounds shall not be operated at greater speed than thirty miles per hour.

March 4, 1933.

PUBLIC SERVICE COMMISSION.

In your recent communication you refer this office to secs. 85.40 and 194.05, Stats. You then ask:

"Are heavy motor vehicles (passenger busses and trucks) limited to a maximum speed of thirty miles per hour as defined in section 85.40 or are these vehicles permitted to exceed thirty miles per hour under section 194.05 so long as the average speed between terminal points does not exceed thirty miles per hour?"

It is the opinion of this department that heavy motor vehicles (passenger busses and trucks) completely equipped with pneumatic tires and having a gross weight of more than six thousand pounds and less than twelve thousand pounds shall not be operated at a greater speed than thirty miles per hour, under the provisions of sec. 85.40.

Subsecs. (10) and (11), sec. 85.40 provide:

"Subject to the regulations of this section, no vehicle which is equipped with two or more solid tires, having a gross weight of less than twelve thousand pounds, shall be operated at a speed greater than twenty miles per hour, and no vehicle completely equipped with pneumatic tires and having a gross weight of more than six thousand pounds and less than twelve thousand pounds shall be operated at a speed greater than thirty miles per hour; nor shall any vehicle having a gross weight greater than twelve thousand pounds if completely equipped with pneumatic tires be operated at a speed greater than twenty-five miles per hour and if such vehicle is equipped with two or more solid tires, the speed shall not exceed fifteen miles per hour.

"The speed limits for motor busses completely equipped with pneumatic tires shall be the same as the speeds permitted vehicles in this section. Motor busses equipped with two or more solid tires shall conform to the speeds specified in subsection (10) of this section."

The last sentence of sec. 194.05 provides:

"* * * No interurban motor vehicle or bus shall be operated on the public streets or highways of this state at a greater speed than the rates provided in chapter 85, nor at a speed greater than will result in an average speed of thirty miles per hour over the route described in the application for registration thereof."

The first speed law in this state which applied specifically to heavy motor vehicles was adopted in 1919 (see ch. 493, Laws 1919) and became sec. 1636—57*h*, Stats. 1919. Prior to the year 1919, sec. 1636—49 of the statutes regulated the speed of all types and weights of motor vehicles. Thereafter sec. 1636—57*h*, regulating the speed of heavy motor vehicles became sec. 85.18 (8). See Stats. 1925, sec. 85.18 (8).

In 1929 sec. 85.18 (8) was consolidated and became a part of the present sec. 85.40.

The last sentence of sec. 194.05 was put into the laws of this state by ch. 395, Laws 1927, and at that time limited the average rate of speed of interurban motor vehicles or busses to twenty-five miles per hour. Ch. 227, Laws 1931, amended sec. 194.05 to raise the average speed of interurban motor vehicles and busses from twenty-five miles per hour to thirty miles per hour.

Ch. 213, Laws 1931, amended sec. 85.40.

An examination of secs. 85.40 and 194.05 would seem to indicate that there is an apparent conflict between the two, inasmuch as heavy motor vehicles would necessarily have to exceed the speed limit of thirty miles per hour fixed by sec. 85.40 if such motor vehicles were to average thirty miles per hour over their fixed route, under sec. 194.05.

However, a careful examination of the history of both of these sections and of the weights and types of heavy motor vehicles licensed under ch. 194, Stats., discloses that it was the apparent intent of the legislature to limit the speed of interurban motor vehicles and busses weighing less than three tons to an average speed of thirty miles per hour. Records in the office of the motor transportation division of the public service commission disclose that out of about five hundred busses having permits under ch. 194, thirty-nine weigh less than three tons, and out of about four hun-

dred and seventy-six trucks having permits under ch. 194, about one hundred and eighty-eight weigh less than three tons. Inasmuch as sec. 85.40 applies only to passenger busses and trucks weighing more than three tons and less than six tons, it is clear that the busses and trucks weighing less than three tons would be subject to no precise maximum speed limit on the public highways of this state if the last sentence of sec. 194.05 had not been enacted.

In the construction which we have adopted there is no conflict between sec. 85.40 and sec. 194.05, inasmuch as all passenger busses and trucks weighing between three and six tons are limited to a maximum speed of thirty miles per hour under the provisions of sec. 85.40, while interurban passenger busses and trucks licensed under ch. 194 and weighing less than three tons are limited to an average speed of thirty miles per hour over the route described in the application for registration. This construction gives effect to the whole and every part of the statutes involved, and particularly to that part of sec. 194.05 which requires interurban motor vehicles and busses to conform to the rates of speed provided in ch. 85 and to subsec. (11) of sec. 85.40. *Ekern v. McGovern,* (1913) 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796.

We have carefully weighed the consideration that a limitation upon heavy motor vehicles (passenger busses and trucks), such as that imposed by sec. 85.40, might seriously curtail the time schedules of the companies operating such heavy motor vehicles. We cannot, however, be concerned with the burdens imposed by the legislature and must construe the law to carry out the intent of the legislature, for it is the duty of the courts to give full effect to legislative enactments. *Kosidowski v. Milwaukee,* (1913) 152 Wis. 223, 139 N.W. 187.

We have also given consideration to the fact that ch. 213, Laws 1931, amending sec. 85.40, was adopted and passed a few days before ch. 227, Laws 1931, which amended sec. 194.05, but do not believe that this can overcome the evident intent of the legislature as disclosed by a consideration of the whole law dealing with speed limits. It will be noted that prior to 1931 there was no conflict between the two sections in question, inasmuch as the average speed for in-

terurban motor vehicles and busses fixed by sec. 194.05, was twenty-five miles per hour, while the maximum speed fixed for heavy motor vehicles weighing between three and six tons and completely equipped with pneumatic tires was thirty miles per hour.

You are therefore advised that it is the opinion of this department that heavy motor vehicles (passenger busses and trucks) having a gross weight of more than six thousand pounds and less than twelve thousand pounds and completely equipped with pneumatic tires shall not be operated upon the highways of this state at a greater speed than thirty miles per hour.

JEF

Municipal Corporations—Villages — Taxation — Special Assessments—Subd. 1, par. (h), subsec. (1), sec. 62.21, Stats., does not authorize county to charge back as tax to village amount of delinquent annual instalments from 1924 to 1931 of special assessments made by village in 1923 for water mains.

March 6, 1933.

R. A. FORSYTHE,
District Attorney,
Hudson, Wisconsin.

You submit the following statement of facts: St. Croix county has recently charged back against an incorporated village the sum of $700.00, representing unpaid annual instalments from 1924 to 1931, of special improvement assessments levied by the village in 1923. The county, having been unable to collect these unpaid instalments, now claims the right to charge them back against the village in accordance with the provisions of subd. 1, par. (h), subsec. (1), sec. 62.21, Stats., and the question is whether the provision in question confers upon the county the right to do this. It provides:

"All *special assessments and instalments* of special assessments which are returned to the county treasurer as delin-

quent by any city, town or village treasurer and *accepted by the county treasurer in lieu of cash, under paragraph (d) of subsection (1)* of this section, shall be set forth in a separate column of the delinquent return *and shall likewise be plainly distinguished in such return from special assessments or instalments of special assessments issued under laws prior to the passage and publication of chapter 406 of the laws of 1927.* Such assessments and instalments may be separately advertised and sold by the county treasurer, but if more than one special assessment certificate shall be issued on the same tract only the fees legally chargeable to one certificate for advertising and certificate fee shall be included in the amounts for which the certificates are sold, and such fees shall be equally distributed between such certificates. If certificates issued under the provisions of this section are necessarily bid in at the tax sale by the county and are not sold, redeemed or otherwise disposed of within three years of the date of the sale thereof, *the amount of the redemption value thereof at the time may be charged back as a tax to the proper city, town or village;* but the county shall retain such certificates and if at any time thereafter the same shall be sold, redeemed or otherwise disposed of, the county treasurer shall pay the city, town or village which returned the same the full amount received therefor including interest and fees, or if the county shall take tax deeds upon such certificates the amount of the redemption value of said certificate shall be credited to the respective town, city or village which returned the same."

It will be noted that the above quoted provision refers to ch. 406, Laws 1927.

It will be noted, also, that the above quoted provision refers to par. (d), subsec. (1) of the same section, which par. (d) provides:

"If any instalment so entered in the tax roll shall not be paid to the city treasurer with the other taxes it shall be returned to the county as delinquent and accepted and collected by the county in the same manner as delinquent general taxes on real estate."

It is stated in your request that the special assessments levied by the village in 1923 were with reference to a waterworks system, i.e., the laying of water mains. Authority to levy such special assessments was given by subsec. (30), sec. 61.34, Stats. 1923, which authorizes the village to "levy special assessments therefor in the manner pro-

vided in section 62.16." By reference to sec. 62.16, and also to secs. 61.41, 62.20 and 62.21, all Stats. 1923, it appears that instalments of such special assessments, if returned as delinquent, were not required to be accepted by the county as a payment to it but that the county treasurer only received them as agent to collect the same. See XIV Op. Atty. Gen. 382.

The above referred to ch. 406, Laws 1927, however, repealed said "old" sec. 62.21, and created a "new" sec. 62.21. "New" sec. 62.21, by the above quoted par. (d), subsec. (1) thereof, changed the rule so that delinquent instalments of special assessments levied thereunder (i.e., special assessments levied *subsequent* to the passage and publication of ch. 406, Laws 1927) are required to be accepted by the county treasurer as payment, that is, in lieu of cash. See XVII Op. Atty. Gen. 201. It would seem, however, that "new" sec. 62.21 did not intend to change the rule with regard to delinquent instalments of special assessments levied *prior* to the passage and publication of ch. 406, Laws 1927, as otherwise it does not appear why the legislature should have provided in the first sentence of subd. 1, par. (h), subsec. (1), to the effect that special assessments and instalments of special assessments which are returned as delinquent by any city, town, or village treasurer *and accepted by the county treasurer in lieu of cash under paragraph (d) of subsection (1)* shall be plainly *distinguished* in the delinquent return from special assessments or instalments of special assessments *issued under laws prior to the passage and publication of chapter 406 of the laws of 1927.* If this be sound, then it follows that the last sentence of subd. 1, par. (h), subsec. (1), to the effect that the county may charge back the amounts as a tax to the proper city, town or village, has no application to delinquent instalments on special assessments levied in the year 1923, as is the case here. Said last sentence was manifestly intended to allow the county to charge back the amounts as a tax against the municipality only where the delinquent assessments or instalments were required to be accepted by the county treasurer in lieu of cash. There would be no reason for allowing the county to impose a tax on the municipality on account of delinquent assessments or instalments with

respect to which the county was not required to credit the municipality.

Although the foregoing construction is adopted as expressive of the legislative intent it must be conceded that the provisions of subd. 1, par. (h), subsec. (1), sec. 62.21 are somewhat ambiguous and, in closing, it should be noted that while subd. 1, par. (h) speaks of delinquent special assessments from a city, *town or village,* its applicability in any given case of a delinquent special assessment from a town or village can be ascertained only by reference to the particular section of the statutes giving the town or the village the authority to make the special assessment, Sec. 62.21 is not such a section. Preceding the provisions of subd. 1, par. (h), subsec. (1), sec. 62.21 contains seven other separate provisions, all of which relate only to the making of special assessments by a *city.*

JEF

Automobiles—Law of Road—Canceled Licenses—Person operating motor vehicle with license plates issued on license subsequently canceled is subject to arrest under sec. 85.01, Stats. His license plates may be retaken by inspector under authority granted in sec. 85.04 if inspector can do so peaceably and without entry into private home.

March 7, 1933.

THEODORE DAMMANN,
Secretary of State.

You state that under sec. 14.68, Stats., your department accepts checks in payment of motor vehicle license fees; that in the event a check is not paid by the bank on which it was drawn, the license granted upon it is canceled. You ask how to proceed in the event the licensee refuses to comply with instructions of the secretary of state to return the license plates and title for destruction.

If the holder of a license which has been canceled refuses to return the plates the local police officers should be notified with the request that any person found operating the

vehicle bearing such license plates be arrested under sec. 85.01, subsec. (1). The judge, upon finding the defendant guilty of "operating an unregistered motor vehicle upon any highway of this state in violation of law," (sec. 85.08 (10) (h), could order a surrender of the plates and registry certificate.

You ask also whether a motor vehicle inspector acting under authority vested in that officer by sec. 85.04 is privileged to seize the license plates, the title, or both, without process of law.

If the inspector can do so without the use of force or violence or without entry into private homes, he may retake the license plates and certificates, without other process at law, under the authority granted him in sec. 85.04. The license plates upon cancellation of the license belong to the state. The inspector acting as agent for the state, the owner, could recapture them. The rule is stated in *Prigg v. Pennsylvania,* 41 U. S. (16 Pet.) 539, 613, 10 L. ed. 1060, wherein the court, quoting Blackstone, defining recapture says:

"* * * This happens when any one hath deprived another of his property in goods or chattels personal, * * * in which case the owner of the goods, * * * may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner or attended with a breach of peace."

See also *Arpin v. Burch,* 68 Wis. 619, *Brownell v. Durkee,* 79 Wis. 658, *Larson v. Furlong,* 63 Wis. 323.

JEF

Courts — Juvenile Court — Minors — Child Protection— Juvenile court has no jurisdiction to find child over age of eighteen years delinquent and sentence based upon such finding is void.

March 9, 1933.

BOARD OF CONTROL.

Attention A. W. Bayley, *Secretary.*

It appears that one F. S., born on October 24, 1913, was sentenced to the Wisconsin industrial school for boys on August 27, 1932, by a juvenile court, which found that he was a delinquent child. Sentence was stayed and F. S. was placed on probation. It has now become necessary to terminate the probation of this person and to commit him in accordance with the original court order.

The question has been raised, however, as to the legality of the commitment because of the fact that the boy was more than eighteen years of age at the time the juvenile court decided that he was delinquent.

You also ask what means of correction are open to the board in the event that the sentence is held to be not in accordance with the statutes.

Sec. 48.01, Stats., relates to child protection and reformation, and provides for the juvenile court and its jurisdiction.

The juvenile court has jurisdiction over neglected dependent and delinquent children. Jurisdiction in the present case is purported to have been acquired because F. S. was a delinquent child.

Sec. 48.01, subsec. (1), par. (c), Stats., provides in part:

"The words 'delinquent child' shall mean any child under the age of eighteen years who * * *."

As F. S. was born on October 24, 1913, he was more than eighteen years of age on August 27, 1932, and the juvenile court was without jurisdiction over him.

The juvenile court having acquired no jurisdiction over F. S., the sentence and the order of commitment are void, and may be ignored by the board of control.

In regard to the treatment of a void order issued by a court without jurisdiction, we quote the following from *Fischbeck v. Mielenz,* 162 Wis. 12, pp. 17–18:

" 'A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. * * *.'

"And again: 'A judgment pronounced by a tribunal having no authority to determine the matter in issue is necessarily and incurably void, * * *"

"The rule has been stated just as strongly by this court:

" 'If the court exceeded its jurisdiction of the subject matter, then the judgment is no protection whatever. It may be ignored altogether. *Peck v. School Dist.*, 21 Wis. 516; *Blodgett v. Hitt*, 29 Wis. 169; *Damp v. Dane*, 29 Wis. 419; *Mathie v. McIntosh*, 40 Wis. 120; *O'Malley v. Fricke*, 104 Wis. 280, 80 N. W. 436; *Harrington v. Gilchrist*, 121 Wis. 127, 228, 99 N. W. 909; *Hughes v. Cuming*, 165 N. Y. 91, 58 N. E. 794; *Cooper v. Reynolds*, 77 U. S. 308. The rule is elementary, that if the matter dealt with by the judgment in this case was entirely outside of the court's jurisdiction, then, * * *, the result was not merely erroneous * * * but was a usurpation and, as said in *Damp v. Dane, supra*, the proceedings void in the broadest sense of the term.' *Will of Rice*, 150 Wis. 401, 440, 441, 136 N. W. 956, 137 N. W. 778 * * *."

In view of the fact that the whole proceeding was void *ab initio*, the board of control is powerless to correct the sentence which the juvenile court purported to make.

JEF

Architects—Corporations — Words and Phrases — Word "corporation" as used in subsec. (6) and subsec. (7), par. (e), sec. 101.31, Stats., does not include municipal corporations.

March 9, 1933.

BOARD OF EXAMINERS OF ARCHITECTS AND CIVIL ENGINEERS,
Madison, Wisconsin.

You call attention to subsec. (6) and subsec. (7), par. (e), sec. 101.31, Stats., and ask whether the word "corporation" as used in this statute was intended to include municipal corporations.

It is our opinion that the word "corporation" as used in this statute does not include municipal corporations.

Sec. 101.31 (6), provides in part,

"A firm, or a copartnership, or a corporation, or a joint stock association may engage in the practice of architecture or civil engineering in this state only provided * * *."

An examination of Words and Phrases will reveal the fact that authority can be found for holding that the word "corporation" when used in various types of statutes has been construed both to include and to exclude municipal corporations. The courts generally hold, however, that the word "corporation" must be restricted to mean private or ordinary business corporations and not extended to embrace municipal corporations and bodies politic and corporate. *Emes v. Fowler,* 89 N. Y. S. 685, 43 Misc. Repts. 603; *Fennister v. City of Tupelo,* 83 So. 804, 121 Miss. 733; *City of Tyler v. Texas Employers' Ins. Assn.,* 288 S. W. 409.

Aside from the provisions of sec. 101.31 (6) there is no statute delegating to municipal corporations the right to practice the profession of architecture or engineering as defined by sec. 101.31. The practice of architecture and engineering, as therein defined, has all of the aspects of a private business enterprise.

The language of sec. 101.31 (6) is not sufficiently clear to justify a holding that the word "corporation" as used therein was intended to include municipal corporations. In the absence of the use of unequivocal language by the legislature attempting to delegate to municipal corporations the right to practice architecture and engineering as defined in sec. 101.31, it is our opinion that these municipal corporations do not have that right.

Sec. 101.31 (7) (e) provides, "Any person who practices the profession of architecture or engineering, exclusively as a regular employe of a private company or corporation, by rendering to such company architectural or civil engineering services in connection with its operations, * * *" shall be exempt from registration requirements.

It is quite evident from a reading of the statute that the words "such company" were intended to refer to the pre-

ceding word "corporation" as well as the preceding word "company." A municipal corporation being strictly a public corporation and in contrast to a private corporation, the employees of a municipal corporation were not intended to be included under the provisions of sec. 101.31 (7) (e).
JEF

Indigent, Insane, etc. — Legal Settlement — Where husband has abandoned his wife and lives in another county for period of one year without receiving aid from such county, he establishes legal settlement there for himself and family, even though his family was receiving support from county where husband formerly had legal settlement.

March 9, 1933.

L. A. BUCKLEY,
District Attorney,
Hartford, Wisconsin.

You state that one M and his family were residents of X county and received aid in X county in June, 1930. Shortly thereafter M left his family, and in November, 1930, his wife had him arrested for abandonment. He was convicted in X county and placed on probation for two years. Shortly after his conviction M left X county and moved to Y county, his family remaining in X county and continuing to receive aid there. M received no aid in Y county until January, 1933. M's family have received support in X county continuously since June, 1930.

The question arises: In which county do M and his family have their legal settlement?

It is our opinion that M and his family now have a legal settlement in Y county.

Sec. 49.02, subsec. (1), Stats., provides:

"A married woman shall always follow and have the settlement of her husband if he have any within the state; * * *."

This rule prescribed by sec. 49.02 (1) obtains even where the husband has abandoned the wife or they voluntarily live apart. *Monroe County v. Jackson County*, 72 Wis. 449.

Sec. 49.02 (4) provides:

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein."

M resided in Y county for a period in excess of one year without receiving support either from Y county or X county, and consequently obtained a legal settlement therein, unless the support of his wife and family in and by X county can be considered as the support of M and thus prevent M from gaining a settlement in Y county. The statutes do not contemplate or provide that a married woman whose husband had a legal settlement in this state can acquire or have a legal settlement separate and distinct from his so long as the marriage relationship exists.

It is to be noted that sec. 49.02 (4) states that no *residence* of a *person* while supported as a pauper shall operate to give *such person* a settlement in any town, village or city where he resides.

No reference is made either specifically or by implication to a person who is not actually residing in a town, village or city, and it is not believed that any authority exists for extending the clear and unambiguous provisions of the statute.

It is our opinion that inasmuch as M resided in Y county for a period of over a year without receiving aid, he established a legal settlement in Y county, and that the provisions of sec. 49.02 (1) operate to give M's family a legal settlement in Y county also.

JEF

Counties—Education—County Superintendent of Schools —One who has lost residence in Wisconsin by having lived in another state for twenty years and who returned to Wisconsin last August is not qualified elector under sec. 1, art. III, Wis. Const. Such person may run for office of county superintendent of schools in April election even though at present disqualified to hold such office.

March 9, 1933.

JOHN CALLAHAN, *State Superintendent, Department of Public Instruction.*

You request an official opinion from this office upon the following statement of facts:

"A woman holding a Wisconsin unlimited state certificate left the state about twenty years ago, married, and lived all of that time in another state. She returned to Wisconsin last August * * *. Is she eligible to run for the office of county superintendent of schools in a Wisconsin county?"

Upon the foregoing facts it is manifest that the prospective candidate for the office of county superintendent of schools is not a qualified elector in Wisconsin because she has not resided in this state for one year next preceding the election. Art. III, sec. 1, Wis. Const. She lost her residence in Wisconsin by removal from the state some twenty years ago and by having acquired a residence in another state. See subsecs. (5) and (6), sec. 6.51, Stats.

The question then presents itself as to whether the right of suffrage is a prerequisite to eligibility to hold a public office. There is a diversity of opinion in America upon the question whether one must be a qualified elector in order to be eligible to hold an elective public office. In Wisconsin it is the rule that none but qualified electors can hold public offices. *State ex rel. Off v. Smith,* (1861) 14 Wis. 497; *State ex rel. Schuet v. Murray,* (1871) 28 Wis. 96, 9 Am. Rep. 489; *State v. Trumpf,* (1880) 50 Wis. 103, 5 N. W. 876.

The reason for this rule is well stated in *State ex rel. Off v. Smith,* (1861) 14 Wis. 497, 501, where it is pointed out that it would lead to an absurdity "that a person who, by the organic law of the state, has not one voice among thousands

in designating by whom an office shall be filled, may himself be elected to such office and enjoy its franchises and perform its duties. * * *."

In the last named case it was held that a person who is an alien and, hence not a qualified elector of the county in which he resides is ineligible to the office of sheriff in this state.

Having determined that one must be a qualified elector in order to be eligible to hold an elective public office in Wisconsin, we now turn to the question whether a person who is not a qualified elector may be a candidate for public office.

In some jurisdictions it is held that the term "eligible" as applied to an elective public office means capable of being chosen, and that, therefore, the qualification must exist at the time of the election or appointment. 20 C. J. 401 and 46 C. J. 938. However, in other jurisdictions including Wisconsin it is held that the word "eligible" applies to the fitness or qualification present at the time of entering upon the duties of the office. *State ex rel. Off v. Smith,* (1861) 14 Wis. 497; *State ex rel. Schuet v. Murray,* (1871) 28 Wis. 96, 9 Am. Rep. 489; *State v. Trumpf,* (1880) 50 Wis. 103, 5 N. W. 876; *State ex rel. Barber v. Circuit Court,* (1922) 178 Wis. 468, 190 N. W. 563.

In other words, the disqualification goes only to the holding of public office and not to the election to office.

In *State ex rel. Barber v. Circuit Court,* (1922) 178 Wis. 468, 190 N. W. 563, it was held that where the legislature of the state of Wisconsin had not imposed, as a condition precedent to a candidate's right to have his name placed upon the official ballot, that he be eligible to the office if elected, the courts of the state have no jurisdiction to do so. It was further held in that case that the only requirement in the statute as a condition precedent to the right of a nominee to a place upon a ballot is that found in subsec. (3), sec. 5.17, Stats., that such nominee shall file a declaration that, if elected, he will accept the office and qualify therefor; and a condition that the nominee shall be eligible to the office sought will not be implied.

In that case the provisions of subsec. (2), sec. 5.14, which

reads as follows, either were not considered or were not thought controlling:

"If a person whose name is printed on the primary ballot shall die or file a declination to accept the nomination after the ballots are printed, or if he shall be disqualified to accept such nomination, the votes cast for him shall be counted and returned; and if he shall receive the greatest number of votes, as provided by section 5.15, the vacancy shall be filled by the party committee, as aforesaid."

It is our opinion that this case is decisive of the question submitted by you.

In XXI Op. Atty. Gen. 925 this office held that the county clerk may place on the ballot for the general election in November the name of the person receiving the highest number of votes for sheriff in the primaries, despite the fact that such person is not a citizen of the United States and hence is ineligible to office, where such person may become a citizen and so qualify for that office before the commencement of his term.

In IV Op. Atty. Gen. 228 it was held that a person may be a *candidate* for the county office, though not a resident of the county, for, if elected, he may thereafter and before assuming office become such resident and become qualified to hold the office.

In that opinion it was said, at pp. 229–230:

"In an official opinion by my predecessor, (Opinions of Attorney-General for 1912, p. 762), it was held that, if a woman is not eligible to the office of county treasurer, she still has the right, if her nomination papers are duly filed with the county clerk, nominating her for the office of county treasurer, to have her name placed upon said ballot as a candidate. It is not for the clerk to pass upon the eligibility of the candidate. This is a question for the court to pass upon. If a candidate has filed the necessary papers required by the statute which entitle her to a place on the ticket, it is the duty of the clerk to place said name on the ticket, although the person at that time may be ineligible for the office. 15 Cyc. 347; *Wells v. Munroe,* 86 Md. 443; *Miller v. Davenport,* (Ida.) 70 Pac. 610."

While we are of the opinion that the decision in the case of *State ex rel. Barber v. Circuit Court,* (1922) 178 Wis. 468, 190 N. W. 563, is probably decisive of the question sub-

mitted, it may be that the court might reverse its opinion if the provisions of subsec. (2), sec. 5.14 were brought to its attention. However, in the present state of the law we are constrained to hold that the prospective candidate for the office of county superintendent of schools is eligible to run for the office of county superintendent of schools even though she is in fact not eligible to hold that office at the present time. It should be pointed out, also, that in order to be eligible to the office of county superintendent of schools, such person must be a resident of the county, have taught eight months in a public school of this state and after July 1, 1929, must hold an unlimited state certificate entitling him to teach in any public school; provided that the last requirement shall not disqualify any person who held the office of county superintendent on June 30, 1929. See subsec. (2), sec. 39.01.

JEF

Fish and Game—Deer—Individual who carries deer in his automobile or other vehicle on first day of open season or after period of three days after closing of season for deer violates law.

March 9, 1933.

CONSERVATION COMMISSION.

Attention Matt Patterson, *Deputy Director.*

You request an opinion as to whether an individual who carries a deer in his automobile or other vehicle on the first day of the open season for deer, or after a period of three days after the closing of the season for deer, would be considered as transporting deer in violation of the law.

It is our opinion that such an individual would be transporting deer in violation of the Wisconsin statutes.

Sec. 29.45, subsec. (2), Stats., provides:

"Each holder of a resident hunting license, settlers' hunting license, or nonresident general hunting license, may transport or cause to be transported one deer legally taken, between the second day of the open season for hunting deer

and eleven o'clock P. M. of the third day after the close of said season; but must accompany the same from the point of shipment to the point of destination."

The above quoted statute by implication forbids the transportation of deer at any other time or in any other manner than is mentioned in this special law on deer transportation.

A statute limiting a thing to be done in a particular manner implies that it shall not be done otherwise. *Scott v. Ford,* 97 Pac. 99, 52 Oregon, 288; *Taylor v. Taylor,* 66 S. E. 690, 66 W. Va., 238, *Johnston v. Baker,* 139 Pac. 86, 167 Cal. 260, *Fancher v. Board of Comm'rs Grant County,* 210 Pac. 237, 28 N. Mex. 179. See *Eikhoff v. Charter Comm. of City of Detroit,* 142 N. W. 746, 176 Mich. 535.

JEF

Elections — Nominations — Prohibition Party — Unless prohibition party acts under provisions of sec. 5.05, subsec. (6), par. (e), Stats., it will not be entitled to separate primary election ticket as political party for state officers in September, 1934 primary.

If prohibition party candidate for office at last general election in any subdivision of state secured one per cent of total vote cast for office for which he ran, prohibition party is entitled to separate primary election ticket as political party in such subdivision.

March 9, 1933.

THEODORE DAMMANN,
Secretary of State.

You wish to be informed whether, in view of the fact that none of the candidates of the prohibition party at the last November election appear to have received one per cent of the total vote cast, they will be entitled to a party ticket in the September primary of 1934. You have enclosed a tabulation of the votes cast at said last November election.

Sec. 5.05, Wis. Stats., provides for primary nomination papers, except for city primaries, and states that the name of no candidate shall be printed upon an official ballot used

at any September primary unless nomination papers are filed in accordance with subsequent provisions of that section. Sec. 5.05, subsec. (6), par. (d) provides in part:

"* * * any political organization which at the last preceding general election was represented on the official ballot by either regular party candidates or by individual nominees only, may, upon complying with the provisions of this act, have a separate primary election ticket as a political party, if any of its candidates or individual nominees received one per cent of the total vote cast at the last preceding general election in the state, or subdivision thereof, in which the candidate seeks the nomination, * * *."

The tabulation of the votes which you submitted shows that no prohibition candidate for a state office received one per cent of total vote cast for that state office for which the candidate ran. It is our opinion, therefore, that the provisions of sec. 5.05, subsec. (6), par. (d), prevent such party from having a separate state primary election ticket as a political party at the September 1934 primary except by compliance with the provisions of sec. 5.05, subsec. (6), par. (e). Compliance with the one per cent requirement is a condition precedent to the securing of a separate primary election ticket. It is a definite rule of statutory construction that a statute limiting a thing to be done in a particular manner implies that it shall not be done otherwise. *Scott v. Ford,* 97 Pac. 99, 52 Oregon, 288; *Taylor v. Taylor,* 66 S. E. 690, 66 W. Va., 238, *Johnson v. Baker,* 139 Pac. 86, 167 Cal. 260, *Fancher v. Board of Comm'rs Grant County,* 210 Pac. 237, 28 N. Mex. 179. See *Eikhoff v. Charter Comm. of City of Detroit,* 142 N. W. 746, 176 Mich. 535.

The enunciation of the method by which a political organization can secure a separate primary ticket implies that that method alone must be followed, and that any other method not specifically enumerated is not permissible.

It is apparent from the language of sec. 5.05, subsec. (6), par. (d), that the one per cent requirement is to be applied to the total vote cast for all candidates for any state office, and also to the total vote cast for all candidates for any office in any subdivision of the state. The tabulation which you submitted covered only the total vote cast for all candidates for the state offices and did not purport to cover the

total vote cast for all candidates for office in the various subdivisions of the state. It will be necessary, therefore, to determine from a computation of the vote cast in the subdivisions of the state whether the prohibition party is entitled to a separate primary ticket in any one or more of those subdivisions.
JEF

Criminal Law — Gambling — Pin ball machine may be gambling device within meaning of Wisconsin gambling laws, whether such machine is game of skill or not.

March 9, 1933.

OLE J. EGGUM,
District Attorney,
Whitehall, Wisconsin.

You state that a number of pin ball machines have been installed in business places located in your county and that the owners of these business places are putting up prizes and encouraging betting in connection with the use of these machines.

You inquire whether these machines are covered by the gambling statutes of this state, particularly in view of the fact that the owners of the business places represent these machines to be games of skill.

It is our opinion that these machines are covered by sec. 348.085, subsec. (1), Stats., which provides as follows:

"All devices or things whatever, whereby any person shall or may be induced to believe that he will or may receive any money, thing or consideration whatever as the result, in whole or part, of any *contest of skill,* speed or power of endurance *of man* or beast, are hereby declared to be gambling devices and to be public nuisances. * * *."

Sec. 348.07 provides a penalty for any person who shall set up, keep, manage or use any device or thing of any name or description adapted or which can or shall be used for gambling purposes and permit any person to use the same.

Sec. 348.09 provides a penalty for any person who shall knowingly permit any gambling device to be set up on premises owned, occupied, or controlled by him.

It is our opinion that the pin ball machines are covered by the statutes cited above, whether the machines be held to be games of skill or not.

JEF

Banks and Banking—Bonds—Public Depositories—Municipality is prohibited from requiring and public depository from giving bond or security for funds properly deposited in accordance with provisions of ch. 34, Stats.

March 9, 1933.

SAMUEL GOODSITT,
District Attorney,
Ladysmith, Wisconsin.

You ask whether a municipality is now prohibited from requiring, or public depository from giving, the usual depository bond for public deposits in accordance with the provisions of ch. 1, Laws of the Special Session, 1931.

Sec. 34.06 (6), Wis. Stats., enacted by ch. 1, Laws 1931, Special Session provides:

"Except as provided in section 34.025 no bond or other security shall be required of or given by any public depository for any public deposits, and compliance with the provisions of chapter 34 shall be in lieu of any requirement of a bond or other security from any public depository."

Sec. 34.025, as enacted by ch. 1, Laws 1931, Special Session, provides:

"Sections 34.03 to 34.07 shall not apply to deposits of public funds which are secured by bonds or other security furnished under statutes heretofore in effect so long as such bonds or other security shall remain in force. No such bonds or other security shall be renewed."

You will note that the language of sec. 34.06 (6) above quoted, specifically prohibits the requiring of or the giving

of bonds by public depositories. It is the rule of statutory construction that negative words used in a statute make that statute mandatory. *State ex rel. Doerflinger v. Hilmantel,* 21 Wis. 574; *Attorney General v. Baker,* 9 Rich. Eq. 521; *State v. Dunbar,* 231 P. 33, 9 Idaho 691; *Conn. Mut. Life Ins. Co. v. Wood,* 74 N. W. 656, 115 Mich. 444.

The language of the above quoted statutes being mandatory, your question is answered in the affirmative.

The only exception is given in sec. 34.02 (5). See also XX Op. Atty. Gen. 1258, 1261.

JEF

School Districts—Municipal Borrowing—School district may not borrow money under provisions of sec. 67.04, subsec. (9), Stats., without issuing bonds and levying irrepealable tax.

March 9, 1933.

HANS HANSON,
District Attorney,
Black River Falls, Wisconsin.

A number of school districts in your county have deposited money in banks which have been taken over by the state banking commission. In many instances these districts have plenty of money on hand and only levied two or three hundred dollars to maintain their schools, expecting their state money in March. The banks now being closed, they find themselves without any money to run their schools until they receive the money from the state.

You desire to know whether a school district can borrow money under sec. 67.04 (9), Stats., without levying a tax to repay the sum borrowed.

Your question must be answered in the negative.

Sec. 67.04, Stats., provides:

"Municipalities are empowered to borrow money, subject to the general limitations of amounts prescribed by section 67.03, and subject in some specific cases to the further limitations prescribed by this section, and to issue bonds there-

for, for the purposes enumerated in this section. Such bonds may be issued:

"* * *

"(9) By any municipality to provide a sum not exceeding the amount of all funds belonging to such municipality which have lawfully been deposited in a bank, and which are not available to such municipality because such bank has been placed in the hands of the commissioner of banking as provided in section 221.26 of the statutes."

Subsec. (9) is limited and governed by the introductory words of sec. 67.04 itself, which specifically states that the municipalities enumerated thereinafter may borrow money and *issue bonds therefor.*

No municipality borrowing money under sec. 67.04, can do so without the issuance of bonds. A municipality issuing bonds must, in accordance with the provisions of sec. 67.05 (10) levy a direct annual irrepealable tax for the purpose of retiring those bonds when they mature and paying the interest upon them.

JEF

Public Officers—District Attorney — Malfeasance — District attorney may receive rent money paid by city poor relief officers for support of indigent tenants living in his house.

March 9, 1933.

R. C. LAUS,
District Attorney,
Oshkosh, Wisconsin.

You state that you are the district attorney of Winnebago county and that you are the owner of two houses which are occupied by poor families whose rent is paid by the city of Oshkosh through vouchers submitted by you to the poor commissioner.

Winnebago county is not operating under the county system of poor relief.

You ask whether you can continue to accept the rent

money from the city of Oshkosh while acting as district attorney.

You are advised that there is nothing illegal in your accepting the rent in the above circumstances. We are not unmindful of sec. 348.28, Wis. Stats., known as the public officers malfeasance law, but we do not believe it applicable in your case, since no contract is made with you in your official capacity as district attorney.

The transaction by which you receive the rent, if it can be said to be one between yourself and the city, rather than one between the city and the occupants of your houses, is between the city and yourself as an individual. You are not making any contract in your official capacity.

It is our opinion that the city relief authorities have no such connection with the activities of the office of district attorney as would make you guilty of violating sec. 348.28, Stats., by accepting the rent money paid for the support of indigent tenants living in your houses. See also XVII Op. Atty. Gen. 192.

This holding is in line with the interpretation which this office has placed upon sec. 348.28 for a number of years. That construction, together with the fact that the legislature has not seen fit to alter the statute for the purpose of changing the meaning which the attorney general has attached to it, is persuasive to the conclusion that the legislature intended the interpretation which has been given to be the correct one.

JEF

Mothers' Pensions—Legal Settlement—Woman receiving mother's pension from one municipality may gain legal settlement in another municipality.

March 9, 1933.

GILES V. MEGAN,
District Attorney,
Oconto, Wisconsin.

It appears that a married woman and her family whose legal settlement was in Oconto county moved to the town of

Beaver in Marinette county and resided there continuously and uninterruptedly for a period of fourteen months, during which period the mother received $10.00 per month as mother's pension from Oconto county, and received no other aid from any municipality during this fourteen months' period. At the end of that time Oconto county cut off the mother's pension, and the family thereafter received aid from the town of Beaver as indigents and paupers.

You inquire whether the woman gained a legal settlement in the town of Beaver by residing there continuously and uninterruptedly for a period of fourteen months while receiving a mother's pension from Oconto county.

Sec. 49.02, subsec. (4), Stats., provides:

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein."

In XV Op. Atty. Gen. 186, the question which you raise was passed upon directly by this office. It was there said:

"So-called mother's pension is not relief given to the mother, but is an aid granted to the children. The statute calls it 'aid for dependent children.' Sec. 48.33, subsec. (5), Stats.

"The aid given is called a pension, and I am of the opinion that a mother receiving a so-called mother's pension is not a pauper within contemplation of the above-quoted sec. 49.02, subsec. (4)."

Pertinent statutes are practically the same at the present time as they were when the above referred to opinion was written, and I do not find any reason for overruling the previous opinion at this time.

It is our opinion, therefore, that the woman in question gained a legal settlement in the town of Beaver by living there continuously and uninterruptedly for a period of fourteen months while receiving a mother's pension from Oconto county.

I am aware of the opinion written by this office in XX Op. Atty. Gen. 320, which, by implication at least, seems to hold that a legal settlement cannot be gained under the circumstances which you have recited. The opinion in XX

Op. Atty. Gen. 320 did not purport to overrule the opinion in XV Op. Atty. Gen. 186.

If the implication made by the opinion in XX Op. Atty. Gen. 320 was necessary to a decision upon the facts therein recited and was taken as holding that a legal settlement could not be required by one receiving a mother's pension, it is our intention to rebut that inference and to reaffirm the conclusion arrived at in XV Op. Atty. Gen. 186.

JEF

Education—Supervising Teachers—Words and Phrases —Schools—Sec. 39.14, subsec. (1), Stats., is mandatory in respect to appointment of supervising teachers.

Word "schools" as used in sec. 39.14 (1) refers to educational establishments maintained by school district and does not mean separate departments of such establishments.

Where county superintendent has no more than one hundred two schools under his supervision he is not required to employ two supervising teachers.

March 9, 1933.

GILES V. MEGAN,
District Attorney,
Oconto, Wisconsin.

Oconto county has eighty-two single-room schools, fifteen two-room schools, three three-room schools, two four-room schools. Such being the case, you desire an opinion upon the question of whether or not it is compulsory for the county superintendent to employ more than one supervising teacher.

Sec. 39.14, subsec. (1), Stats., provides as follows:

"The county superintendent shall employ a supervising teacher, and, if there are more than one hundred twenty-five schools under his supervision, he shall employ two supervising teachers."

The statute uses the word "shall," which, using the ordinary meaning and understanding of the word, would ren-

der the statute mandatory. *Equitable Life Ass. Society v. Host,* 124 Wis. 657.

If, therefore, the county superintendent of Oconto county has more than one hundred twenty-five schools under his supervision, it is his duty to employ two supervising teachers.

The answer to the question hinges upon the meaning which must be attached to the word "schools" as used in sec. 39.14 (1).

In XIV Op. Atty. Gen. 580, this office directly passed upon the question and rendered an opinion holding that the word "schools" as used in subsec. (1), sec. 39.14, referred to educational establishments maintained by a school district and did not mean separate departments of such establishments.

The following excerpt is taken from the opinion just referred to, p. 581:

"Subsec. (1), sec. 39.14, does not define the word 'schools.' A 'school' is a generic term and denotes an institution for instruction or education. 35 Cyc. 811; *State v. Kalaher,* 145 Wis. 243, 247. A 'school' is an educational institution; a place where instruction is carried on. Standard Dictionary. A 'school' is an educational establishment. *Omaha Medical College v. Rush,* 35 N. W. 222. A school or institution of learning is not measured by the walls of the building. It may occupy one building or it may occupy two or more. *State v. Kalaher,* 145 Wis. 243, 248."

In XV Op. Atty. Gen. 110, this question was again discussed, and the holding of the former opinion was reversed, it being decided that the definition of the term "school" in par. (d), subsec. (1), sec. 20.31, Stats. (1925), applied to sec. 39.14 (1). That definition read as follows:

"Unless the context or subject matter clearly requires otherwise, the word 'school' where used as a noun in this section shall relate to a public school and shall be construed to be a collective body of pupils assembled in a room or rooms which are wholly or principally under the control, management, direction and instruction of a legally qualified teacher who is wholly or chiefly responsible for the control, management, direction and instruction of such pupils and whose duty it is to keep a complete and special school register for his room or department."

By tracing the legislative history of this definition the conclusion was made that the legislature intended this definition to apply to the word "schools" as used in sec. 39.14 (1), and the soundness of the opinion itself could only have been upheld upon the correctness of this conclusion.

By ch. 67, Laws 1931, the legislature revised sec. 20.31 (1) (d) of the statutes of 1929, which was identical in wording with the same section of 1925 statutes, so that the definition upon which the conclusion in XV Op. Atty. Gen. 110 was based no longer appears in the statutes. At the present time, therefore, there is no statutory definition whatsoever for the word "schools" as it is used in sec. 39.14 (1). Sec. 370.01 (1), provides:

"All words and phrases shall be construed and understood according to the common and approved usage of the language; * * *."

It is our opinion that XIV Op. Atty. Gen. 580 correctly defined the common understanding of the word "schools" and that such definition is now applicable to the word as used in sec. 39.14 (1). As the word is now held to refer to educational establishments maintained by a school district rather than the separate departments of such establishments, the county superintendent of Oconto county must be held to have no more than one hundred two schools under his supervision, and is, therefore, not required to employ two supervising teachers.

JEF

Public Officers — Deputy County Clerk — Notary public who is also deputy county clerk may acknowledge signature of county clerk on tax deeds.

March 9, 1933.

B. O. REYNOLDS,
District Attorney,
Lake Geneva, Wisconsin.

You ask the question as to whether a notary public who is also a deputy county clerk may acknowledge the signature of the county clerk on tax deeds.

Nothing is found in the statutes or in the decisions of the courts of this state which would prevent the foregoing from being done, and on the basis of decisions in other jurisdictions it is considered that the same may be done. It has been held that a notary who is also deputy sheriff may take the sheriff's acknowledgment of a deed of foreclosure made by the latter. *Ewing v. Vannewitz,* 8 Mo. App. 602. It has also been held that a deed of foreclosure executed by an undersheriff may be acknowledged before the sheriff, acting as a notary public. *Cook v. Foster,* (Mich.) 55 N. W. 1019, 1021. See also 1 C. J. 808 and the note in 33 L. R. A. 332, *et seq.*

In *Cook v. Foster,* it was said that

"* * *. Mr. Wood, in taking the acknowledgment, did not act as sheriff, but as a notary public. We think the acknowledgment valid."

JEF

Indigent, Insane, etc.—Legal Settlement — Under facts stated, indigent person who receives work from municipality and is paid therefor in cash cannot be said to be supported as pauper solely as result of receiving such work.

March 9, 1933.

N. H. RODEN,
District Attorney,
Port Washington, Wisconsin.

One A was a resident of the town of X. He moved to the village of Y, but before doing so, he became destitute and required aid for himself and family. He applied for aid to the chairman of the town of X, who had him work on the highways for the town and paid him for his services. The money so earned was used by A for the support of himself and his family. This arrangement continued for some period of time after A and his family resided in the village of Y. A has now lived in the village of Y a total period of one year and four days, and is in destitute circumstances so that both he and his family require aid.

The question arises whether A has a legal settlement in the town of X or in the village of Y.

The answer to the question hinges upon the proposition of whether the giving of work which is paid for by a municipality to a destitute applicant means that such recipient "is supported as a pauper."

Sec. 49.02, subsec. (4), Stats., provides:

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein."

A and his family have unquestionably lived in the village of Y for over a year and have established a legal settlement therein, unless the fact that the town of X has furnished work to A and paid for the same means that A has been supported as a pauper.

Sec. 49.01, Stats., provides:

"Every town, village or city shall relieve and support all poor and indigent persons lawfully settled therein whenever they shall stand in need thereof, * * *."

This section of the Wisconsin statutes is mandatory. *Meyer v. Prairie du Chien,* 9 Wis. 233.

A and his family were destitute and were poor and indigent persons who were entitled to be supported by virtue of the provisions of sec. 49.01. That section of the statutes contemplates the furnishing of relief as a charity measure and does not contemplate that this aid should be furnished upon a contract basis.

Secs. 49.10 and 49.11, provide the only means by which a municipality may be reimbursed for expenditures made under the provisions of sec. 49.01.

This department held some time ago that a county cannot require a needy person, as a condition of relief, to contract to reimburse the county and to convey present and future property as security for aid. XXI Op. Atty. Gen. 596.

During the time that A was employed by the town of X he was paid in cash for his services and with this money

supported himself and his family. It does not appear but that the town of X received full value from A for any money which it expended to pay him for his labor or that the work would not have been done by the town except as a means of assisting A or some other indigent person.

Under the circumstances, therefore, it is our opinion that A cannot be said to have been supported as a pauper by reason of receiving work from the town of X. A consequently established a legal settlement for himself and his family in the village of Y.

JEF

Indigent, Insane, etc.—Legal Settlement—Military Service—Soldier's Relief—Ex-service man receiving aid under provisions of sec. 45.10, Stats., cannot gain legal settlement in town where he resides.

March 9, 1933.

ALEX L. SIMPSON,
District Attorney,
Fond du Lac, Wisconsin.

It appears that an ex-service man in your county has been receiving aid under the provisions of sec. 45.10, Stats. This man has lived in one township for over a year and has received no aid except as provided by sec. 45.10.

The question now arises whether this ex-service man has gained a legal settlement in that township while receiving aid.

Sec. 49.02, subsec. (4), Stats., provides as follows:

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein."

If the ex-service man in question can be said to have been "supported therein as a pauper" he has not gained a legal

settlement in the town in which he has lived for over a year while receiving aid under sec. 45.10, Stats.

In *Juneau County v. Wood County*, 109 Wis. 330, it was held in reference to aid under the provisions of sec. 1529*b* (now sec. 45.10), p. 333:

"* * * It will be observed that, to entitle any person to such relief, he must be 'needy' or 'indigent.' The language is similar to the statutes for the 'relief and support of the poor,' where, with certain exceptions, relief and support are only to be given to 'poor and *indigent* persons' who 'shall stand in *need* thereof'—'poor' persons. Secs. 1499–1516, Stats. 1898. As stated by Mr. Justice Pinney: 'The word *poor* in the statute has a restricted and technical meaning, and it is practically synonymous with 'destitute,' denoting extreme want and helplessness.' *Rhine v. Sheboygan*, 82 Wis. 354; *Ettrick v. Bangor*, 84 Wis. 259; *Wisconsin K. I. Co. v. Milwaukee Co.*, 95 Wis. 158. Webster defines the word 'indigent' as a person 'destitute of property or means of comfortable subsistence; needy; poor.' Other dictionaries define it in substantially the same way. So Webster defines 'needy' as a person 'distressed by want of the means of living; very poor; indigent; necessitous.' Others give similar definitions.

"The trial court was clearly right in finding that Spies and his family received aid out of the soldiers' relief fund, 'as poor and indigent persons.'"

The fact that the ex-service man in question was attempting to gain a legal settlement in a town rather than in a county, as was the case in *Juneau County v. Wood County, supra*, would not alter the legal conclusions.

It is our opinion, therefore, that the ex-service man was supported in the town as a pauper and was thereby prohibited under the provisions of sec. 49.02 (4) from gaining a legal settlement therein.

JEF

Minors—School Districts—Tuition—Minor who has been put on probation and placed in home in rural district, not primarily for purpose of attending school in that district, has residence for school purposes in such district and school board has no right to deny him privileges of school by not paying tuition.

March 11, 1933.

BOARD OF CONTROL.

You state that a young man, a minor, whose parents reside in Madison, was found guilty of a misdemeanor and put on probation; that the probation officer handling this case placed this young man with a farmer, who lives near W—, county, Wisconsin; that in order that the education of this young man be continued, this farmer of W— sent this boy to the district school, which he, the farmer, helped to maintain through school taxes paid by him and others residing in that district.

You also state that the district school clerk has refused to permit the continuance of this young man in that school unless tuition is paid for him. You submit the following questions:

"1. Is tuition chargeable for the education of a minor under circumstances such as are stated above?
"2. If tuition is payable, who should pay such tuition?"

The first question must be answered in the negative. I assume that this young person is of school age as provided in art. X, sec. 3 of the Wisconsin constitution. In XX Op. Atty. Gen. 666 on page 668 it is said:

"* * * it is well established that where a child of school age is sent or goes into a certain school district with the primary purpose of securing a home with a particular family, such child is entitled to the benefits of the public schools of such district free of charge. *State ex rel. School District No. 1 v. Thayer,* (1889) 74 Wis. 48, 59, 41 N. W. 1014; *State ex rel. Smith v. Board of Education,* (1897) 96 Wis. 95, 100, 71 N. W. 123. In the present case, the children in question are all of school age and have been sent into the Winneconne school district with the primary purpose of securing a home in the institution known as the Adams

School for Girls and Boys, and hence, such children are entitled to the benefits of the public schools of the school district of the village of Winneconne free of charge."

In a late opinion of this department dated February 4, 1932, XXI Op. Atty. Gen. 117, it is held that the children of school age may, for school purposes, have residence apart from that of their parents. In that opinion the following was quoted from a former opinion, XVIII Op. Atty. Gen. 549–550:

" 'While it may be the general rule that a minor child's residence is the same as that of his parents, yet, for school purposes, such child may have a residence other than that of his parents. Where a child of school age is sent or goes into a school district with the primary purpose of securing a home, as distinguished from the primary purpose of locating in such district to participate in the advantages which the public schools therein afford, the supreme court has held he is a resident of the district for school purposes and entitled to admission to the public school therein. *State ex rel. School District No. 1 v. Thayer,* 74 Wis. 48. See also *State ex rel. Smith V. Board of Education,* 96 Wis. 95, 100.' "

In view of the fact that this minor was not sent into the school district primarily for the purpose of attending school, but for the purpose of having a home and a place to work, he has established in that district a residence for school purposes under the decisions of our court as cited in the above quotation, and the district board has no right to deny him the right to attend school without paying tuition. In view of the answer given to your first question, the second question need not be answered.

JEF

Indigent, Insane, etc. — School Districts — Under sec. 42.21, subsec. (2), Stats., school district in one county is entitled to be reimbursed pro rata share of year's expense of maintaining school in case where indigent pupils attend such school but are maintained as public charges by town in another county.

March 11, 1933.

L. W. BRUEMMER,
District Attorney,
Kewaunee, Wisconsin.

You state that certain children who are and have been supported for years by a town in Brown county and who reside with the paternal grandparents in a certain school district in Kewaukee county, attend school in Kewaukee county. You state that, in your opinion under sec. 40.21, Stats., the school district in Kewaukee county is entitled to reimbursement from the town in Brown county for a pro rata share of the year's expense of maintaining that school.

It is the opinion of this department that under the provisions of subsec. (2), sec. 40.21 the school district in Brown county is entitled to reimbursement of a pro rata share of the year's expense of maintaining that school and that the town in Brown county is liable therefor. XX Op. Atty. Gen. 742; XVI Op. Atty. Gen. 570.

The opinion dated July 29, 1932, to Honorable John Callahan, state superintendent, XXI Op. Atty. Gen. 796, to which you refer is not in point. That opinion merely held that children of parents who receive poor aid from a city but who reside in another village are entitled to attend school in that village free of charge provided the primary purpose is to secure a home in that village. It will be noted that in that opinion the children themselves were not *indigent* pupils while in the present case and in the opinions referred to above, the children were indigent pupils and were maintained as public charges. Thus the opinions are not in conflict, but, on the contrary, relate to entirely different situations.

JEF

Public Health—Board of Health—Health officer or board of health, or its employees or agents, is not protected in abating nuisance or destroying property if in fact no nuisance exists or private property is not injurious or dangerous to health.

March 11, 1933.

DR. C. A. HARPER,
State Health Officer.

You inquire what the liability is of the state board of health or any member thereof in its earnest endeavor to carry out the public health program as indicated by the statutes and rules and regulations adopted in compliance with the provisions of the statutes. You say that sec. 140.05, Stats., gives broad powers to the state board of health; that said board has a number of divisions and bureaus with supervisors at the head of such divisions or bureaus; that the board also has a considerable number of employees, clerks, stenographers and representatives in the field like the deputy state health officers, plumbing inspectors, barber inspectors, beauty parlor inspectors, etc., all of whom are assigned to and carry on certain duties. You say that in order to better understand the responsibility and possibly the liabilities of the board as a whole or any of its members, an opinion would be greatly appreciated.

Your question is rather broad and it will be impossible to cover the whole field in an opinion, especially in view of the limited time that we have for preparation of the same. It will, however, be instructive for you to know what the decision of our court has been in an important case, *Lowe v. Conroy*, 120 Wis. 151. In that case the health officer destroyed some meat and hides near the city of Neillsville, which he had reason to believe were infected with anthrax, which was said to be one of the most virulent and deadly diseases known to science, and infectious and epidemic in character to a high degree. The owner of said meat brought suit against the health officer for damages for the destruction of his property, and proved to the satisfaction of a jury that there was in fact no infection of anthrax. The court held that the health officer was liable for damages.

It was held that where quasi-judicial officers, such as a health officer or board of health, have summarily destroyed private property on the ground that it constituted a menace or cause of sickness dangerous to public health the owner thereof may recover its value from the person responsible for its destruction, if such property was not in fact such a menace or source of danger, the judgment or discretion vested in such officers being no protection to him, in such a case, for an invasion of the private property rights of others if they have no redress except an action against the officers. On pages 158–159, the court said:

"Appellant contends that he is not liable in this action upon the ground that the powers vested in members and officers of a board of health are discretionary in character, and that the duty of determining what are causes of sickness affecting the public health are *quasi*-judicial in character. The acts of appellant, as appears from the above statement of facts, were within the scope of his duty as health officer, and come within the class of *quasi*-judicial acts. It is the general rule that such officers are not liable in damages to private persons for injuries which may result from their official action done in the honest exercise of their judgment within the scope of their authority, however erroneous or mistaken that action may be, provided there be an absence of malice or corruption. Dillon, Mun. Corp. sec. 277, and note; *Steele v. Dunham,* 26 Wis. 393; *Druecker v. Salomon,* 21 Wis. 621; *Smith v. Gould,* 61 Wis. 31, 20 N. W. 369; *Gates v. Young,* 82 Wis. 272, 52 N. W. 178. The facts and circumstances show, however, that respondent's private property rights have been unjustifiably invaded, and that he will be remediless in the law, unless it be that appellant and those who actually committed the trespass in wrongfully destroying his property are liable. Under such circumstances *quasi*-judicial officers have been held liable to respond in damages upon the ground that the exercise of this discretion is limited by the superior right guaranteeing to every person immunity from having his private property rights invaded except under the regular course of law, sanctioned by the established customs and usages of the courts. The discretion in which such officers are protected must be limited to the line where their acts invade the private property rights of another, for which invasion the law affords no redress other than an action against the one actually committing the trespass. *Hubbell v. Goodrich,* 37 Wis. 84; *Houston v. State,* 98 Wis. 481, 74 N. W. 111; *Cubit v. O'Dett,* 51 Mich. 347, 16 N. W. 679; *Miller v. Horton,* 152 Mass.

541, 26 N. E. 100; *Pearson v. Zehr*, 138 Ill. 48, 29 N. E. 854; *McCord v. High*, 24 Iowa 336. The circuit court proceeded upon this principle, and held appellant liable in damages resulting from the destruction of the property, because it was *not in fact* a nuisance or cause of sickness endangering the public health. * * *"

The rule laid down here by our court has never been modified by any subsequent decision and it may be considered as a guide for health officers and boards of health. Before private property is destroyed by any board of health or health officers or its employees or agents on the ground that the same is a nuisance, it is necessary to ascertain the facts showing that a nuisance actually exists, and that is jurisdictional. If no nuisance exists in fact, then the officer is without authority to act and damages may be recovered against him.

JEF

Elections—Nominations—Verification to nomination paper in question, under sec. 5.26, subsec. (3), Stats., is sufficient although word "electors" is used instead of word "persons," as found in statutes.

March 11, 1933.

WALTER B. MURAT,
District Attorney,
Stevens Point, Wisconsin.

You state that a petition has been filed with the city clerk of the city of Stevens Point signed by more than fifteen per cent of the electors in the city, as required by statute, the petition being for the purpose of changing from the city manager plan of government to the aldermanic form of government.

The petition is made in conformity with sec. 10.43, Stats., in subsec. (2) of which it is stated:

"* * * The preparation of such petition shall be governed as to the use of more than a single piece of paper, * * * the places of residence of signers, and the verification thereof, by the provisions of section 5.26 so far as applicable."

Sec. 5.26, subsec. (3), reads as follows:

"To each separate nomination paper shall be appended the affidavit of a qualified elector to the effect that he is personally acquainted with all the *persons* who have signed the foregoing nomination paper, * * *."

You state that in the form of verification on the petition enclosed are found the following words:

"That he is personally acquainted with the above signed *electors.*"

You state that it is now claimed by reason of the fact that the word "electors" is used in this verification instead of the word "persons" the petitions are defective by reason thereof. You ask for our opinion on this matter.

We are of the opinion that this variation is of so little import that it cannot affect in any way the validity of the paper. The word "persons" is a broader designation than the word "electors" and must necessarily include electors. In order to be an elector, it is of course necessary to be a person. You are therefore advised that the verification is, in our opinion, sufficient.

JEF

Prisons — Prisoners — Legal Settlement—Where one is sentenced on burglary charge but sentence is suspended and such person is placed on probation, time during which he is out on probation cannot be counted in determining his legal settlement in town where he has been placed by board of control. It will be necessary for him to reside in town one full year after expiration of his probation before he can acquire legal settlement in such town.

March 11, 1933.

N. H. RODEN,
District Attorney,
Port Washington, Wisconsin.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts:

"A legal resident of the city of Port Washington, Wisconsin, was convicted about eighteen months ago in the circuit court of Ozaukee county on a charge of burglary and was sentenced, but sentence was suspended and he was put on probation with the state board of control.

"Afterwards the state board of control obtained a job for him with a farmer in the town of Port Washington, Ozaukee county and he was furnished room and board and also earned a small sum of money every month. He worked in the town of Port Washington for over a year and he is now returned to the city of Port Washington, and the question arises, whether the city or the town of Port Washington is liable for his support.

"The question also, of course, arises whether he is a legal resident of the city of Port Washington, or whether by leaving and going to the town of Port Washington, he has acquired a new legal residence."

It is the opinion of this department that the time during which a prisoner is out on probation cannot be counted in determining his legal settlement in a town in which he has been placed by the state board of control. It will be necessary for such person to reside in such town one full year after the expiration of his probation before he can acquire a legal settlement in such town. It necessarily follows, therefore, that if he was a legal resident of the city of Port Washington and had a legal settlement therein prior to the time that he was convicted of the charge of burglary and sentenced therefor, but placed on probation, the city of Port Washington is liable for his support. See XXI Op. Atty. Gen. 186; XIX Op. Atty. Gen. 41.

You also ask whether he is a legal resident of the city of Port Washington or whether by living and going to the town of Port Washington he has acquired a new legal residence. If by residence you do not mean legal settlement under the poor laws, then it is certain that the prisoner has a residence in the town of Port Washington but, as we have indicated above, it would be necessary for such person to live in the town for one year after the expiration of his probation before he acquires a *legal settlement* so as to obligate the town to support him as an indigent.

JEF

Indigent, Insane, etc.—Military Service—World War Veterans' Compensation — County may not recover its share paid for support of insane person committed to central state hospital for criminal insane where only means such person has were derived from his total disability compensation as World War veteran paid under Title 38 U. S. C. A., (43 Stats. at Large 607, Titles II, III and IV).

March 14, 1933.

A. C. BARRETT,
District Attorney,
Spooner, Wisconsin.

A World War veteran, brought up for trial on a charge of first degree murder, was found, on application and examination, to be insane at the time of trial and was committed by the circuit court of Washburn county to the central state hospital for the criminal insane.

He has for some time received disability compensation from the United States government and his estate now amounts to approximately $3,700, all derived from such compensation.

With the consent of his guardian, appointed by the county court of Washburn county, that court entered an order January 31, 1933, authorizing and directing the guardian to pay the county's share of the expense and maintenance of the veteran, starting February 1, 1933, under the provisions of sec. 469 of the World War veteran's act.

The county now desires to collect the amount of its claim for past support of this man out of his estate. You ask whether the claim can be collected from that fund and what the proper procedure is for collecting it.

Sec. 454 of the World War veteran's act (38 U. S. C. A., sec. 22, 43 Stats. at Large 613) provides that the compensation insurance, maintenance and support allowance, payable under Titles II, III, IV of said act shall not be assignable, shall not be subject to the claims of creditors of any person to whom an award is made, and shall be exempt from all taxation. I am of the opinion that such claim cannot be allowed as it is expressly provided that it is not subject to the claims of creditors under said statute.

As this party has no other means than the disability compensation which he receives from the government, I see no way of reimbursing the county under present statutes. JEF

Public Officers—County treasurer may appoint more than one deputy if county board authorizes him to do so.

March 14, 1933.

ROSCOE GRIMM,
District Attorney,
Janesville, Wisconsin.

You submit the question as to whether a county treasurer may appoint more than one deputy county treasurer.

Under subsec. (1), sec. 59.19, Stats., the county treasurer is authorized to appoint only one deputy. However, subsec. (3), sec. 59.15 authorizes the county board at any time to fix or change the number of *deputies,* clerks and assistants that may be appointed by *any* county officer and fix or change the annual salary of each such appointee. It follows, therefore, that the county treasurer may appoint more than one deputy if the county board authorizes him to do so. JEF

Taxation—Motor Vehicle Fuel Tax—Words "original invoice" as used in sec. 78.09, Stats., refer to invoice obtained at time of purchase; if such original invoice does not accompany affidavit claim for refund of motor vehicle fuel, taxes must be denied by treasury department.

March 14, 1933.

ROBERT K. HENRY,
State Treasurer.

You request the opinion of this department upon the following statement of facts: Sec. 78.09, Stats., provides that any person who buys or uses any motor vehicle fuel for the

purpose of operating stationary gas engines, tractors used for agricultural purposes, motor boats, etc., shall be entitled to a refund in the amount of such tax paid upon presenting to the state treasurer on a form prescribed by him, a sworn statement, "accompanied by the original invoice showing such purchase," setting forth the total amount of such fuel purchased and used by such consumer. You state further that it has been the ruling of the treasury department since the enactment of that section that the words "original invoice," as used in that section, refer to the invoice obtained at the time of purchase, and that if the original invoice does not accompany the affidavit the refund is refused by the treasury department. You wish to be advised as to whether the ruling of the treasury department in this regard is correct.

It is the opinion of this department that the words "original invoice," as used in sec. 78.09, refer to the invoice obtained at the time of purchase of the motor vehicle fuel. It is manifest that the legislature, in enacting the requirement that the "original invoice" should accompany the affidavit submitted to the state treasurer by the person claiming a refund of motor vehicle fuel taxes paid pursuant to the provisions of ch. 78, Stats., intended that something more than a mere sworn statement accompanied by *any* invoice be submitted to the state treasurer. The legislature intended, by the requirement that the original invoice accompany the affidavit, to prevent fraud in the filing of claims for refunds under the provisions of sec. 78.09.

It is clear that if *any* invoice would suffice, many refunds would be fraudulently claimed and the state would lose a great deal of revenue in this way.

It would be an easy matter for an unscrupulous individual to secure from an oil dealer, at the end of a year, an invoice which might include many hundreds of gallons of motor vehicle fuel which were never purchased by such individual. Obviously, the dealer cannot recall every sale of gasoline made during the year and it would be an easy matter for an unscrupulous person to take advantage of this fact. On the other hand, it would be much harder to manipulate the original invoice at the time of purchase. The requirement that the original invoice, that is, the one

issued at the time of purchase, should be submitted, is a salutary one and will not work a hardship on anyone. It is a simple matter to obtain an invoice at the time of the purchase of the gasoline. This must be done if a refund is claimed.

It is well settled that statutes granting exemptions from taxation and statutes granting refunds are to be strictly construed. Lewis' Sutherland on Statutory Construction, Vol. 2, sec. 539; *Aberg v. Moe,* (1929) 198 Wis. 349, 224 N. W. 132.

In view of the foregoing, we are constrained to hold that the words "original invoice," as used in sec. 78.09, refer to the invoice obtained at the time of the purchase of the motor vehicle fuel; and if such original invoice does not accompany the affidavit the claim or refund must be denied by the treasury department.

JEF

Counties — County Board — County Board Committee Member—Words and Phrases—In Session—Under subsec. (2), sec. 59.06, Stats., member of committee of county board may be allowed per diem for committee service rendered during period of temporary adjournment of annual meeting of board, except where adjournment is merely one from day to day.

"In session" as used in said statute means in actual session.

March 14, 1933.

SCOTT LOWRY,
District Attorney,
Waukesha, Wisconsin.

You direct attention to sec. 59.06, Stats., subsec. (1) of which authorizes the appointment of committees of the county board, such committees to be composed of members of the board, and subsec. (2) of which provides to the effect that the members of any such committee shall receive such compensation for their services as the board shall allow, not

exceeding the per diem and mileage allowed to members of the board, but

"* * * No supervisor shall be allowed pay for committee service while the board is *in session*, * * *."

In view of the above quoted limitation, you submit the question whether a member of a committee of the county board may receive pay for committee services rendered during periods of temporary *adjournments* of the annual November meeting of the board and prior to the time when the board adjourns *sine die*.

It is considered that the answer is, Yes, except where the adjournment is merely one from day to day.

While our own supreme court has said that for all general purposes a court is considered as *in session* from the commencement till the close of its term, and that an adjournment from day to day does not suspend its functions as a court, *Barrett v. State*, 1 Wis. 175, it must be kept in mind that the meaning of the term "in session" in any given case depends upon the context in which it is used, 4 Words & Phrases 3484. So it has been held that a Massachusetts statute authorizing a commissioner to admit a prisoner already convicted to bail "when the court is not in session" means when the court is not in *actual* session, so that a temporary adjournment is a time when the court is not in session. *Commonwealth v. Gove*, 24 N. E. 211, 151 Mass. 392.

When the limitation contained in subsec. (2), sec. 59.06, to the effect that no member of the county board shall be allowed pay for committee service while the board is in session, is considered in connection with the provision in subsec. (2) (f), sec. 59.03, to the effect that a member of the county board shall be allowed a per diem of four dollars per day for the time he actually attends meetings of the board, it seems apparent that the limitation in question has reference only to times (days) when the board is in *actual* session. The sense of the limitation is to prevent the payment of double compensation. In other words, no member of the county board is to be allowed, for the same day, both the per diem for attendance at a meeting of the board and the per diem for committee service.

JEF

Fish and Game—Ice fishing is not legal in waters enumerated in sec. 29.28, subsec. (1), par. (ua), Stats. Provisions of sec. 29.28, subsec. (2), as re-enacted by ch. 10, Laws 1933, relating to open season for fish, apply only to ice fishing.

March 14, 1933.

WENDELL MCHENRY,
District Attorney,
Waupaca, Wisconsin.

You request our opinion on the legality of ice fishing in Chain O'Lakes, Waupaca county. You refer us to the following statutes:

Sec. 29.28:

"(1) No person shall take, catch or kill fish, or fish for fish of any variety through the ice on the following named waters:

"* * *

"(ua) Waupaca county: White lake in the town of Royalton and Chain O'Lakes in the towns of Dayton and Farmington."

"* * *

"(2) (as re-enacted by ch. 10, Laws 1933) There shall be no close season to catch or kill fish, or fish for fish of any variety through the ice on the following named waters:

"* * *

"(n) Waupaca county: All waters."

Your comment on the above statutes follows:

"It seems to me that these two clauses of section 29.28 are absolutely repugnant to each other in so far as they apply to fishing in this particular county. It further appears to me that subsection (2) of section 29.28 as amended not only permits of ice fishing in the Chain O'Lakes in this county but also permits of fishing for all varieties of fish irrespective of the provisions of section 29.19 relating to closed seasons on certain varieties of fish."

It is a familiar rule that statutes should be construed, if possible, in such a manner as to make their meaning consistent and not repugnant or conflicting. Sec. 29.28, subsec. (1), par. (ua), is a special statute, relating to the particular waters named therein. Sec. 29.28, subsec. (2) (n), as re-enacted, applies to all waters in Waupaca county and is a

general statute. Under the familiar rule of statutory construction that specific provisions of a statute are controlling over general provisions, *Wisconsin Gas & Electric Co. v. City of Fort Atkinson,* 193 Wis. 232, 213 N. W. 873, sec. 29.28, subsec. (1) (ua) prevails in this case, and ice fishing is therefore illegal in "White lake in the town of Royalton and Chain O'Lakes in the towns of Dayton and Farmington, Waupaca county."

In regard to the other point raised by you regarding sec. 29.28, (1) (n) and sec. 29.19 setting forth the closed seasons for certain varieties of fish, our construction of these statutes is that for ice fishing there is no close season for any variety of fish in the waters of Waupaca county with the exceptions enumerated in sec. 29.28, subsec. (1) (ua). However, sec. 29.28 relates specially to ice fishing only, and at those times of the year when there is no ice fishing the provisions of sec. 29.19 would apply.

JEF

Public Officers — County Superintendent of Schools — Person may be *candidate* for office of county superintendent of schools although not resident of county, and he is entitled to have his name placed on ballot.

March 14, 1933.

JOHN G. TARAS,
District Attorney,
Portage, Wisconsin.

You submit the question as to whether a person, otherwise qualified, but who is not a resident of Columbia county, may be a candidate for the office of superintendent of schools of that county, and whether such person is entitled to have his name placed upon the ballot.

The answer is, Yes, adhering to the ruling in IV Op. Atty. Gen. 228, to the effect that a person may be a candidate for the office of county superintendent though not a resident of the county, and that, if elected, he may thereafter and before qualification, become such resident, and qualified to hold the office.

See also XXI Op. Atty. Gen. 925 and *State ex rel. Barber v. Circuit Court,* 178 Wis. 468.

The provision in subsec. (2), sec. 39.01, Stats., to the effect that, "to be eligible *to the office*" of county superintendent a person must be a resident of the county, does not change the rule above stated.

JEF

Indigent, Insane, etc.—State board of control may charge and collect actual per capita cost of maintenance of patient at one of state hospitals for insane. Interest may be charged upon cost of maintenance, at least from date of demand for payment of such maintenance charge.

March 15, 1933.

BOARD OF CONTROL.

Attention B. M. Linke, *Statistical Department.*

You inquire as to the rate per week which may be charged by the Wisconsin state board of control in the case of insane persons who are properly committed to one of the state hospitals for the insane, Milwaukee county hospital for mental diseases, Milwaukee county asylum, and all county asylums. You refer specifically to the case of insane persons properly committed (not voluntary patients) who are able to pay for their maintenance or who have relatives legally liable and willing to pay for such maintenance.

It is the opinion of this department that the Wisconsin state board of control may charge for the maintenance of insane persons properly committed to one of the state hospitals for the insane, the actual per capita cost of the maintenance of such person in the institution where he is confined. See XII Op. Atty. Gen. 307; XV Op. Atty. Gen. 187.

The $4.80 rate per week mentioned in sec. 51.08, Stats., refers to the rate which is chargeable to the state and the county and does not limit the amount which may be recovered for the care and maintenance of patients in one of the institutions mentioned above.

In XV Op. Atty. Gen. 187 this department held that in

cases arising under sec. 49.10, it is the duty of the board of control to determine the actual value of the maintenance of the patient and to collect the same. In XII Op. Atty. Gen. 307, it was held that where the actual cost of the maintenance of a patient at the state hospital for the insane was $6.00 per week, such amount could be recovered against the estate of such person to cover the cost of such maintenance.

You are therefore advised that the board of control may lawfully collect the actual per capita of the maintenance of a patient confined in the state hospital for the insane and that the board of control is not limited by the $4.80 per week rate mentioned in sec. 51.08.

You also inquire as to whether interest may be collected on these maintenance charges. It is the opinion of this department that interest may be collected on the maintenance charges from the date that a demand for the amount of the maintenance cost was made, either upon the relatives legally liable for such maintenance charges or upon the guardian of such insane person.

In early times the taking of interest was looked upon with great disfavor and was actually prohibited not only by the Mosaic law but also by severe penalties of the old English law. Later, during the reign of Queen Elizabeth, the allowance of interest was finally sanctioned in England by statute.

In the United States the courts seemed from the outset to have favored the view that interest should be allowed either upon an implication regarded as arising from the mere delivery of a money debt or specifically as damages for the nonpayment of a debt due.

In Wisconsin the rule relative to the allowance of interest is well stated in *State v. Milwaukee,* (1914) 158 Wis. 564, 573–574, where it is said:

"Where no time of payment is fixed, or where a claim is unliquidated, or where the question of liability is so involved in doubt that there are reasonable grounds for believing that no liability exists, a demand is, in the absence of peculiar equitable considerations, necessary to set interest running. *Marsh v. Fraser,* 37 Wis. 149; *Gammon v. Abrams,* 53 Wis. 323, 10 N. W. 479; *Tucker v. Grover,* 60 Wis. 240, 19 N. W. 62; *Farr v. Semple,* 81 Wis. 230, 51 N. W. 319; *Ryan D. Co. v. Hvambsahl,* 92 Wis. 62, 65 N. W.

873; *Laycock v. Parker,* 103 Wis. 161, 79 N. W. 327; *State ex rel. Att'y Gen. v. N. P. R. Co.,* 157 Wis. 73, 99, 147 N. W. 219. But where the time of payment is fixed by contract or by law and the amount to be paid is easily ascertainable and the duty to pay plain, no demand is necessary to start the running of interest, whether the claim be against an individual or a municipality. *Laycock v. Parker,* supra; *Land, L. & L. Co. v. Oneida Co.,* 83 Wis. 649, 53 N. W. 491; *Travelers' Ins. Co. v. Fricke,* 99 Wis. 367, 375, 74 N. W. 372, 78 N. W. 407; *State v. McFetridge,* 84 Wis. 473, 530, 531, 54 N. W. 1, 998. * * *."

In view of the foregoing we are constrained to hold that the board of control may charge interest upon the cost of the maintenance of patients, at least from the date of the demand for such payment.

JEF

Appropriations and Expenditures — Counties — County Fairs—Agricultural Associations—Under sec. 59.86, Stats., county board has authority to appropriate money for indebtedness incurred in past by county fair association.

March 15, 1933.

O. L. RINGLE,
District Attorney,
Wausau, Wisconsin.

You request the opinion of this department upon the following statement of facts:

Prior to the November session of the county board the Marathon County Fair Association had incurred an indebtedness of six thousand dollars, which was evidenced by notes upon which the eleven directors of the association had become personally liable.

At the last session of the county board a resolution was passed appropriating six thousand dollars for the purpose of assuming responsibility for the repayment of the loans and ordering that such sum be included in the tax levy for 1933 and that interest on the notes be paid from the general fund of the county until the money from the tax levy

is available to pay the notes. The sum appropriated comes within the legal limitation authorized by sec. 59.86, Stats.

You call our attention to the following opinions of the attorney general: XVIII 73, 695; XX 34, 210, 250.

It is the opinion of this department that the county board may appropriate money, within the limitation of sec. 59.86, Stats., to aid organized agricultural societies or county fair associations and that this would include the payment of a debt already incurred for past exhibitions as well as for future exhibitions. You are therefore advised that the sum appropriated by the Marathon county board to pay for an indebtedness incurred by the Marathon County Fair Association for a public exhibition given by such fair association in the past is a valid appropriation. See XVIII Op. Atty. Gen. 73, 695; XX Op. Atty. Gen. 34, 250.

This conclusion is based upon the assumption that the sum appropriated by the county board comes within the legal limitation fixed by sec. 59.86.

JEF

Corporations—Patronage dividend cannot be distributed to preferred creditors by corporation organized under provisions of ch. 180, Stats.

March 16, 1933.

THEODORE DAMMANN,
Secretary of State.

You enclose proposed articles of incorporation of the "X" Oil Company and request an opinion upon whether or not its articles are in proper form for filing in accordance with ch. 180 of the Wisconsin statutes, considering the statement made in the last sentence of article III, page 2 in regard to a patronage dividend and, if this provision is not permissible, whether there is any method by which a patronage dividend can be paid to holders of preferred stock under ch. 180.

In our opinion the articles are not in proper form for filing nor can a patronage dividend be paid to the holders of

preferred stock in any corporation organized under the provisions of ch. 180. Article III, page 2 of the documents of the proposed corporation which you have submitted provides as follows:

"* * * Subject to the foregoing provisions said preferred stock shall not be entitled to participate in any other or additional earnings or profits of the corporation, except a patronage dividend based on the gallonage purchased, such dividend to be given not until a fair profit has been given the common stock."

Ch. 180 is entitled, "Domestic corporations. Organization and powers." Laws are set forth in this chapter for the organization of corporations in general. No statute of this chapter either specifically or by implication permits the organization of a corporation providing for patronage dividend to a preferred stockholder.

Ch. 185 Stats., is entitled, "Domestic corporations. Co-operative associations." No definition of a co-operative association is found in that chapter. In accordance with sec. 370.01, subsec. (1), therefore, the words "co-operative association" must be construed and understood according to the common and approved usage of the language. A co-operative association is one in which the individuals composing it work together toward the same end and usually share in the profits in proportion to the capital or labor they contribute. *Finnegan v. Noernberg,* 53 N. W. 1150, 52 Minn. 239; *Mooney v. Farmer's Mercantile & Elevator Co. v. Madison,* 164 N. W. 804, 138 Minn. 199.

According to the proposed articles of incorporation some sort of a patronage dividend was to be distributed, based upon the gallons of gasoline which the members of the co-operative association purchased from the association. The provision itself is very indefinite and quite probably is so indefinite as to prevent the filing of the articles. In any event it is our opinion that a patronage dividend of this sort can only be provided for in an association organized under the provisions of ch. 185.

Sec. 185.16 provides in respect to co-operative associations:

"* * * the directors may distribute all remaining net proceeds uniformly to stockholders of the association in pro-

portion to the volume of business conducted by such stockholders with the association. * * *"

At the common law the formation of corporations by individuals was prohibited. The right of citizens to associate themselves together for the purpose of forming a corporation, therefore, is in the nature of an exception to or exemption from the general rule of the common law. *Turner v. Goetz*, 184 Wis. 508, 199 N. W. 155. Consequently corporations may come into existence only on such terms as the legislature of the state of their creation may prescribe. Moreover, a corporation has only such powers as the legislature sees fit to delegate to it. The legislature has not seen fit to delegate to corporations organized under the provisions of ch. 180 any right to distribute a patronage dividend but has specifically given that right to co-operative associations organized under the provisions of ch. 185.

It is a rule of statutory construction that when a new right of power is given by an affirmative statute to a certain person or class of persons by the designation of those persons all others are excluded from the exercise of that power. *Conroe v. Bull*, 7 Wis. 408. See also *State ex rel. Owen v. Reisen*, 164 Wis. 123, 159 N. W. 747.

The correspondence which you have submitted with the proposed articles of incorporation shows quite plainly that the individuals seeking to form the "X" Oil Company do not wish to use the name "co-operative" because of certain disadvantages which it will entail, but wish to distribute a patronage dividend which is of the very essence of co-operative dealing. It is our opinion, therefore, that the proposed articles of incorporation are not in the proper form and that ch. 180 does not authorize the formation of any corporation which can distribute a patronage dividend to preferred stockholders such as that contemplated by the proposed articles of incorporation.

JEF

Agriculture — Counties — County Agricultural Agent — Referenda—Question of abolishing office of county agricultural agent can be made contingent upon approval of electors when definite action has been taken by county board.

Whether office of county agricultural agent can be abolished by resolution, query.

March 16, 1933.

R. A. FORSYTHE,
District Attorney,
Hudson, Wisconsin.

It appears that:

"At the last session of the county board a resolution was passed abolishing the office of the county agricultural agent, to become effective at the expiration of the present contract on March 15, 1934. This resolution was upon the condition that the resolution should be approved by a majority of the electors upon a referendum vote to be submitted at the spring election this year."

You enclose a copy of the resolution and inquire whether the question can legally be submitted to the voters.

This question was directly passed upon by this office in XXI Op. Atty. Gen. 146, which held that a county board may create, abolish, or re-establish the office of county agricultural agent by making its action in that respect contingent upon the result of a referendum vote. This question was again discussed in XXI Op. Atty. Gen. 207 and the opinion in XXI Op. Atty. Gen. 146 approvingly cited and qualified to the extent of holding that the question which the county board submits to referendum must be one upon which it has taken definite action itself. In the first opinion the following language is found:

"* * * the legislature has delegated to the various county boards the power to '* * * abolish, create or re-establish any office or position (other than the county officers designated by sec. 59.12 of the statutes, judicial officers and the county superintendent of schools) * * *.' Sec. 59.08, subsec. (8), Stats.

"Further, the legislature has enacted a specific statute providing for a county agricultural representative, commonly known as county agent. Sec. 59.87 (1) provides:

" 'For the purpose of aiding in the agricultural development of the several counties in the state, any county is hereby authorized, through its county board, to establish and maintain an agricultural representative in accordance with the provisions of this section.'

"The provisions of sec. 59.08 (8) and sec. 59.87 (1), above quoted, are specific and conclusive, vesting power and authority in the county board to 'create, abolish or re-establish' the office of county agent. * * *"

Sec. 59.08, subsec. (8), cited in the opinion just quoted from, is found in that provision of the Wisconsin statutes relating to the *special* powers of the county board. As indicated in the opinion in XXI Op. Atty. Gen. 146, the office of county agricultural agent provided for in sec. 59.87 is created or abolished by virtue of this special power. Sec. 59.08, subsec. (5) provides:

"* * * All powers conferred upon county boards by this section shall be carried into effect by the enactment of ordinances, which shall be in the ordinary form of laws passed by the legislature, and shall commence as follows: 'The county board of supervisors of the county of _____ do ordain as follows:' "

The paper which you have submitted showing the action taken by the county board is very definitely in the form of a resolution and in fact is designated as a "resolution" at the top of the paper. In *Meade v. Dane County,* 155 Wis. 632, 642, it was held.

"While there are in some instances and for some purposes fundamental distinctions between an ordinance and a resolution there is no such broad distinction between a resolution, and other acts of an administrative or *quasi*-legislative board. Almost any one of these acts *not required to be by ordinance* may be in the form of a resolution. *Alma v. Guaranty Sav. Bank,* 60 Fed. 203, 8 C. C. A. 564."

The implication here is quite strong to the effect that in certain cases action can be taken by a county board only in the form of an ordinance.

It is not the practice of this office to raise or pass upon questions except as they are submitted. It is possible that sec. 59.08, subsec. (5) would be satisfied by the resolution

which you have submitted, but it was thought best to call your attention to the matter in view of the fact that the statutes, at least, raise a reasonable doubt.
JEF

Public Officers—County Superintendent of Schools—Candidate for office of county superintendent of schools who is resident of city in which school system is managed by city superintendent is eligible to hold such office provided he can comply with requirements of subsecs. (2) and (4), sec. 39.01, Stats.

March 16, 1933.

R. A. FORSYTHE,
District Attorney,
Hudson, Wisconsin.

You request the opinion of this department upon the following statement of facts: There is a candidate in your county for the office of superintendent of schools and said candidate is a resident of the city of Hudson. The school system in the city of Hudson is managed by a city superintendent. The question presented is whether or not this candidate, if elected, can qualify for the office of county superintendent of schools.

It is the opinion of this department that a candidate for the office of county superintendent of schools who is a resident of a city in which the school system is managed by a city superintendent can qualify for the office of county superintendent of schools.

Sec. 39.01, subsec. (2), Stats., relates to eligibility, and provides:

"To be eligible to the office of county superintendent of schools a person must be a resident of the county, have taught eight months in a public school in this state and after July 1, 1929, must hold an unlimited state certificate entitling him to teach in any public school; provided that this last requirement shall not disqualify any person who held the office of county superintendent on June 30, 1929."

Sec. 39.01, subsec. (4) provides:

"No county superintendent of schools shall teach or absent himself from the county or engage in any business, profession, occupation or pursuit which will in any wise interfere with the proper discharge of his duties. (Violation of this subsection shall subject the superintendent to removal from office and loss of salary during the time of such violation.)"

Sec. 39.01, subsec. (5), provides:

"Cities which have a city superintendent of schools shall form no part of the county superintendent's district, shall bear no part of the expense connected with the office of county superintendent of schools; and shall have no part in the determination of any question or matter connected with or arising out of said office, nor shall any elector or supervisor of such city have any voice therein."

It will be noted that if the candidate for the office of county superintendent is eligible for that office under the provisions of subsec. (2), sec. 39.01, and if he is not disqualified under the provisions of subsec. (4), sec. 39.01, then such candidate can qualify for that office.

It should also be noted that the eligibility to hold a public office goes only to the holding of the office and not to the election to office. See XXI Op. Atty. Gen. 925; IV Op. Atty. Gen. 228 and opinion dated March 14, 1933 addressed to John Taras, district attorney of Columbia county.*

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* Page 163 of this volume.

JEF

Appropriations and Expenditures—Bridges and Highways—Unexpended balance raised by town under provisions of sec. 83.14, Stats., and remaining in county treasury may be expended by county for construction work in town designated by town board.

March 16, 1933.

HELMAR A. LEWIS,
District Attorney,
Lancaster, Wisconsin.

You state that a certain township, acting under the provisions of sec. 83.14, Stats., appropriated a sum of money "to pay for two ten-foot strips of concrete, * * * one on each side of the twenty foot slab, that will be put in by the state of Wisconsin." Subsequent to the raising of the money the county board of Grant county appropriated a sum equal to the amount raised for the purpose of assisting the town in paying for the contemplated improvement. The money was voted by the town before any survey was made of the area in which it was contemplated that the strips would be placed. After the work was commenced it was determined to be inadvisable to make the strips ten feet wide because of the fact that it would necessitate the making of a fill in order to support the outer edge of one of the strips. Upon the advice of the state highway engineers and after a survey had been made the strips were made eight feet in width instead of the ten feet mentioned in the appropriation. The improvement consisting of the two eight-foot strips was approved and accepted upon completion by the state highway commission as being entirely satisfactory. There now remains three hundred fifty dollars from the moneys raised by the town and county for the improvement discussed above. It is now proposed to spend this balance of three hundred fifty dollars, plus a like amount to be furnished by the county, for the purpose of constructing a curb and gutter along the edge of the concrete strips provided for in the original appropriation. You state that the members of the town board "hesitate to take the step until they are sure they will not exceed their authority." You ask "whether the balance of the fund

already authorized and voted upon can be legally expended in the manner herein set out."

It does not definitely appear whether the town board or the county contemplates the expenditure of the balance of money and the money which the county is willing to contribute at the present time.

As stated above, the money was originally raised upon the authority of sec. 83.14. Subsec. (6) provides:

"Construction shall not begin until the funds to pay for the same are in the county treasury and the plans and specifications have been approved by the state highway commission. * * *."

Subsec. (5) provides:

"The improvement shall be performed, supervised and paid for and accepted in the same manner as state aid work."

In XXI Op. Atty. Gen. 676, 677, it was held in respect to subsec. (5) just quoted:

"This provision obviously refers back to the provisions of sec. 83.04, Stats., which provides that state aid work shall be done by contract unless the county highway committee and the state highway commission shall agree that some other method would better serve the public interest. It is apparent from that section that the county highway committee, subject to the approval of the state highway commission, has complete control of the work."

Sec. 83.14 does not specifically provide for the expenditure of any balance remaining from an appropriation made under its provisions. It is felt, therefore, that the provisions of sec. 83.04 providing for unexpended balances shall govern in view of the reference and provision made by sec. 83.14 (5) above quoted.

Sec. 83.04 (6) provides:

"When final payment has been made upon any highway improvement, any funds remaining in the county treasurer's hands which were provided by the state or by any subdivision of the county for that particular improvement, shall be placed together with the county's balance available for that job to the credit of such subdivision of the county,

and shall be used to increase the funds available for the next construction job in said subdivision, * * *."

This office has previously ruled that money deposited with the county treasurer by the town under the state highway law cannot be withdrawn by the town. V Op. Atty. Gen. 399. See also IV Op. Atty. Gen. 337.

It has also been held that a town meeting could change the designation of the highway to be improved in the absence of objection from the state or county providing that no money had been expended at the time the designation was changed. IV Op. Atty. Gen. 629. But that after construction had actually been begun town meetings may not by resolution delay completion of the project. XXI Op. Atty. Gen. 676. The opinion above quoted in IV Op. Atty. Gen. 629, 630, holds:

"* * * I will say that it appears to me that the intention of the State Aid for Highways Law is that the electors of a town shall designate in the resolution voting the tax the portion of the system of prospective state highways in the town upon which the money is to be so expended. I do not think the town board has anything to say about where the money shall be expended * * *."

In accordance with the opinions cited above the town board does not have any right to withdraw from the county treasury any of the money appropriated for the concrete strips and construct the curb and gutter entirely upon its own initiative. It is our opinion that this building of the curb and gutter would be "construction" as that word is used in sec. 83.04 (6). Inasmuch as the construction of the concrete strips was inspected and accepted as being entirely to the satisfaction of the state highway commission it is our opinion that the balance of the fund now remaining in the county treasury is an unexpended balance whose use is covered by the provisions of sec. 83.04 (6). This balance, therefore, may be expended by the county highway committee in a manner which is approved by the state highway commission in the town which made the original appropriation under sec. 83.14. Although the town board does not have authority to spend this money upon its own initiative, sec. 81.01 (8) provides:

"* * * It shall be the duty of each town board and it is given power:
"* * *

"(8) To direct when and where all town moneys received from highway taxes and *other available highway funds* shall be expended."

If the town board now votes to expend the balance remaining from the original appropriation for the curb and gutter it is our opinion that the money may legally be expended for this purpose by the county with the approval of the state highway commission.
JEF

Education—Teachers' Pensions—Annuity and investment board need not recognize partial assignment of death benefit made by one subject to teachers' retirement act.

March 16, 1933.

ALBERT TRATHEN, *Director of Investments, Annuity and Investment Board.*

You have informed this office that you are in receipt of an order drawn by one X, who is subject to the teachers' retirement act, upon funds which will be due as a death benefit under the teachers' retirement law. This order is made payable to one Y, a creditor of X, to the extent of X's indebtedness and in the event that the death of X occurs before the indebtedness is discharged.

You inquire whether the annuity and investment board is obligated to recognize this order and to pay money out in accordance with its provisions upon the death of X and the existence at that time of the same set of facts which now prevail. You have submitted a memorandum by interested persons who seek to show that a creditor has an insurable interest in the life of one subject to the teachers' retirement law and that the board should recognize the order mentioned above.

You are advised that the board is not authorized to recognize the order which has been submitted or to pay out money in accordance with its provisions. The only stat-

utes involved are secs. 42.52 and 42.50, which provide as follows:

42.50 "(1) Any member may, by written notice to the retirement board having jurisdiction, in such form as it shall approve, designate any person or persons having an insurable interest in the life of the member as a beneficiary to whom any death benefit payable at the death of the member shall be paid. The member may, from time to time, by a like written notice, change the beneficiary. If no beneficiary shall have been named by the member, such death benefit shall be payable to the estate of the member. Such death benefit shall be the full amount of the accumulation in the retirement deposit fund to the credit of the member from all member's deposits and all state deposits and interest thereon.

"(2) Such death benefit payment shall be made, as the member shall have directed, either

"(a) As an annuity payable monthly during the life of a beneficiary;

"(b) As an annuity payable monthly during the life of a beneficiary with additional payment, if any, to another beneficiary until one hundred eight monthly payments in all have been made; or

"(c) To such beneficiary or to the estate of such member in a number of instalments during a time certain or in a single sum."

42.52 "The benefits payable to, or other right and interest of any member, beneficiary, or distributee of any estate under any provision of the state retirement law shall be exempt from any tax levied by the state or any subdivision thereof, and exempt from levy and sale, garnishment, attachment or any other process whatsoever, and shall be unassignable except as specifically provided herein."

It will be noted that sec. 42.50, subsec. (1) provides that a member may "designate any person or persons having an insurable interest in the life of a member as a beneficiary. * * *"

It has been held that a creditor has an insurable interest in the life of his debtor. *Fehr v. Cathon,* 293 Fed. 152; *Connecticut Mutual Life Insurance Co. v. Schaefer,* 94 U. S. 457. The language of the Wisconsin supreme court in the case of *Opitz v. Karel,* 118 Wis. 527, would indicate that the same holding would be made in this state if the question were directly presented. The question which you raise

would not be concluded, however, by holding that a creditor has an insurable interest in the life of his debtor. It is our opinion that the words "person or persons" used in sec. 42.50, subsec. (1) do not authorize a member to name more than one person as a beneficiary except in the alternative, and that the election which this statute seemingly authorizes refers to sec. 42.50, subsec. (2), par. (b), which permits monthly payment of an equity to a beneficiary during the life of that beneficiary with additional payments to another beneficiary after the death of the first one.

Sec. 42.50 refers a number of times to a "beneficiary," but never uses the plural form of that word. The rule of statutory construction enunciated in sec. 370.01, subsec. (2), which might indicate that the singular should include the plural, seems to be rebutted by the fact that the legislature has seen fit to use the plural where the word "person" was used. The statute, moreover, definitely provides that the death benefit shall be the "full amount" of the accumulation in the fund to the credit of the member. Without this provision of the statute the full amount would have to be paid by the annuity board anyway. Quite obviously the full amount cannot be paid to more than one individual.

Secs. 42.50 and 42.52 were enacted by ch. 459, Laws 1921, in exactly the same form which they have at the present time. The whole set-up of the statutes relating to the benefit under this law indicates that the same was intended to be exempt from any and all process and to be unassignable except as especially provided in the act itself. It was evidently intended not only to protect this fund for the benefit of the member, but also to relieve the administrative agency of the necessity of dealing with complicated legal questions in its distribution of the fund. The law makes no provision for priority or pro rata payment in the event that orders are received by the board in excess of the amount which the drawer has or can have to his credit.

It is our opinion that the law did not intend to place upon the state annuity and investment board the duty of passing upon the legality of these orders or of subjecting the matter to court litigation in order to secure a protecting judgment. Moreover, it has been the uniform interpretation of the annuity and investment board that it had neither the right

nor the duty to recognize orders issued for the benefit of creditors and pay out money in consonance therewith. Such an administrative interpretation is entitled to great weight and is frequently held to be conclusive. *Wright v. Forrestal,* 65 Wis. 341, 27 N. W. 52; *State ex rel. Bashford v. Frear,* 138 Wis. 536, 120 N. W. 216; *In re Appointment of Revisor of Statutes,* 141 Wis. 592, 124 N. W. 670; *State ex rel. Hayden v. Arnold,* 151 Wis. 19, 138 N. W. 78; *State v. Johnson,* 186 Wis. 59, 202 N. W. 319.

In the absence of more specific language it must be held that the annuity board does not have to make payment of a death benefit of any individual member to more than one beneficiary, except as provided by sec. 42.50, subsec. (2) (b). If the intention of the legislature was contrary to the conclusion herein expressed legislative action can correct this opinion or if the member desires to name more than one beneficiary he can do so by virtue of the provisions of sec. 42.50, subsec. (2) (b) or by allowing the death benefit to accrue to his estate and distribute that estate by will.
JEF

Banks and Banking—Public Deposits—Indigent, Insane, etc.—Relief Funds—Funds distributed to local units of government or committees by industrial commission are public deposits and are covered by ch. 34, Stats.

March 17, 1933.

A. C. BARRETT,
District Attorney,
Spooner, Wisconsin.

You state:

"Mr. John Putz, poor commissioner of Washburn county, who is in charge of the care of the poor in this county under the industrial commission, has in his possession considerable funds at different times, which he receives from the industrial commission and which he deposits in banks in the county, subject to check. He has today made inquiry of this office as to whether or not these funds come under the state guaranty of deposits."

You request an opinion upon the question thus raised.

You are advised that this money does come under the state guaranty of deposits. The public deposits law, ch. 34, Wis. Stats., was enacted by ch. 1 of the Special Session Laws of 1931. Sec. 34.01, subsec. (1) states that as used in ch. 34

" 'Public deposit' shall mean moneys deposited by the state or any county, city, village, town, drainage district, power district, school district, sewer district or other governmental subdivision or any commission, committee, board or officer thereof in any state or national bank, banking institution or trust company in this state."

The bureau of unemployment relief of the state industrial commission of Wisconsin has published a bulletin relating to the relief work which it has done and is doing in Wisconsin at the present time. This bulletin was published in February of 1933. On page 21 it is stated:

"Federal funds will not be distributed to smaller units than county governments or cities of approximately ten thousand population or more or combinations of neighboring cities, towns and villages whose total population is approximately ten thousand or more unless special showing is made that such centralization is impracticable."

This same method of distribution has been used by the industrial commission when the funds came from the state as well as when they came from the federal government through the Reconstruction Finance Corporation. It will thus be seen that, except in special instances, the money is distributed to: 1. A county, 2. a city, or 3. combinations of neighboring cities, towns and villages whose total population approximates ten thousand. In those cases where the money is distributed to the counties and cities the money is sent directly to the treasurer of the municipality, who deposits it as part of the municipal funds. It is our opinion that money so deposited is clearly comprehended by the language of sec. 34.01, subsec. (1) and constitutes public deposits within the guaranty of ch. 34. Upon consulting the industrial commission I have been informed that your statement is incorrect when you say that Mr. John Putz receives money from the industrial commission and deposits it in banks in the county. I have been informed that Mr. John Putz operates under the direction of a poor committee

and has charge of the administration of relief over all of Washburn county. The money sent by the industrial commission, however, is directed to the county treasurer and is deposited by him.

In those cases where the relief work is handled by a committee which represents combinations of municipalities the funds frequently are sent to the committee and deposited in a bank by that committee. It is our opinion that the funds so deposited by this type of committee are also public deposits and covered by ch. 34 of the Wisconsin statutes. It is true that sec. 34.01, subsec. (1) defining "public deposit" enumerates the various governmental subdivisions and includes in addition "any * * * committee * * * thereof."

It is true that this committee does not have to be and usually is not composed of persons from any one municipality for which they act. Strictly speaking, therefore, the committee cannot be said to be one *of* any individual municipality. This committee, however, functions for the benefit of each and every municipality over which it has jurisdiction and to that extent can be said to be the poor committee of each and every municipality for which it acts.

The duty of administering ch. 34 lies with the board of deposits. It has been the interpretation of this administrative body that all of the relief funds distributed by the industrial commission are covered by ch. 34. The construction given to a statute by the body of men or officers who are directed to act upon it is always entitled to weight and should not be overridden unless it be contrary to the clearly expressed meaning of the law. *Wright v. Forrestal,* 65 Wis. 341, 27 N. W. 52; *State ex rel. Bashford v. Frear,* 138 Wis. 536, 120 N. W. 216; *In re Appointment of Revisor of Statutes,* 141 Wis. 592, 124 N. W. 670; *State ex rel. Hayden v. Arnold,* 151 Wis. 19, 138 N. W. 78; *State v. Johnson,* 186 Wis. 59, 202 N. W. 319.

JEF

Counties—County Board—County board members are entitled to mileage in going to and returning from adjourned sessions of board.

March 17, 1933.

L. A. BUCKLEY,
District Attorney,
Hartford, Wisconsin.

You ask for our opinion on the "legality of the practice of paying members of the county board mileage in going to and returning from adjourned sessions of the board."

We quote below the statute applicable.

Sec. 59.03, subsec. (2), par. (f): "Each member of the county board, of each county to which this subsection is applicable, subject to the limitations herein provided, shall be allowed and paid by the county a compensation for his services and expenses in attending the meetings of the board at the rate of four dollars per day for the time he actually attends, excepting Sundays, and mileage for each mile traveled in going to and returning from the place of meeting by the most usual traveled route at the rate prescribed in paragraph (f) of subsection (6) of section 14.71; * * *."

You will note that the above statute is not limited to regular sessions, or annual meetings. It therefore applies to "adjourned" meetings as well as the regular annual meeting, and supervisors are entitled to mileage in attending such meetings. See Op. Atty. Gen. for 1906, 596, 597.

JEF

Public Officers—City Marshal—Electors may not change term of office of city marshal by petition provided for in sec. 62.09, subsec. (3), par. (b) 3, Stats.

March 18, 1933.

H. J. BEARDSLEY,
District Attorney,
Darlington, Wisconsin.

You state that at least fifteen days prior to the last spring election in the city of Darlington a petition was duly circulated, signed by at least thirty per cent of the electors and

filed with the city clerk, providing for the election of the city marshal, in lieu of the appointment of said official by the mayor subject to confirmation by the council. The petition further attempted to provide that the term of office should be for a period of one year, and that said official should be elected each year thereafter at the spring election.

The question has arisen whether the said petition was sufficient to change the term of the office of city marshal.

You are advised that the said petition was not sufficient to change the term of the office of city marshal and that the said term is two years instead of one.

Sec. 62.09, subsec. (3), par. (b) 3, Stats., provides:

"In cities of the fourth class, upon petition therefor by thirty per cent of the electors filed with the clerk not less than fifteen days before any regular city election, any such other officer shall be elected by the people at the succeeding election and thereafter. Upon like petition signed by a majority of the electors the council may by ordinance provide for appointment by the mayor subject to confirmation by the council."

As the city of Darlington is a city of the fourth class, the above quoted section is applicable. In referring to this section in XXI Op. Atty. Gen. 350, 351, it was said:

"Answering the second question we will say the last quoted section does not make any provision for changing the term of the office by this petition."

The statute simply authorizes the percentage of the electors to petition to have a specified officer elected rather than selected in some other manner. It does not authorize the electors to change the term of the office from the term provided for by the statute.

Sec. 62.09 (5) (b) provides:

"Except as otherwise specially provided the regular term of elective officers except supervisors shall be two years. * * * The council may by ordinance provide a different term for such officers or any of them, * * *."

There is no special provision authorizing the electors to change the term of the city marshal. Any change in this term must be made by the city council, which, in the instant case, has not as yet seen fit to act in the matter.

JEF

Bonds—Municipal Corporations—Sewage Disposal—City may issue bonds for construction of sewage disposal plant without submitting proposition to vote of electors, unless petition for referendum is filed as provided by sec. 67.05, subsec. (7), par. (b), Stats.

XVI Op. Atty. Gen. 353 overruled.

March 18, 1933.

DR. C. A. HARPER,
State Health Officer.

You ask the attorney general to reconsider so much of the opinion found in XVI Op. Atty. Gen. 353 as ruled to the effect that a city council may not issue bonds for the construction of a sewage disposal plant without submitting the proposition to a vote of the electors.

By sec. 67.05, subsec. (7), par. (b), Stats., it is provided that an initial resolution adopted by a city council for an issue of bonds for purposes enumerated in subsec. (5) thereof need not be submitted to the electors unless within thirty days after the recording of the resolution there is filed in the office of the city clerk a petition requesting such submission. Among the purposes enumerated in said subsec. (5) (b) is "sewerage."

It will be noted that the above mentioned provisions do not give to a city the *power* to issue bonds for any of the purposes enumerated therein, but that said provisions constitute merely a *limitation* on the power of the city to issue bonds for said purposes without first submitting the proposition to the electors.

The *power* to issue bonds is given to a city by the provisions of sec. 67.04 (2). That subsection gives the city power to issue bonds for a large number of purposes. Par. (e) thereof gives the city power to issue bonds for the construction and improvement of "sewers and drains" and for the construction and improvement of a "sewage disposal plant" but it does not anywhere mention the word "sewerage." The context is, therefore, that the word "sewerage" as used in the limitation statute was intended as a broad general term to include all lesser but related terms as used in the grant of power statute, such as "sewers and drains"

and "sewage disposal plant." Such construction was followed by the attorney general in practice prior to the opinion in XVI Op. Atty. Gen. 353, as he earlier approved municipal bond issues for sewage disposal plants without requiring that the proposition be submitted to a vote of the electors.

The opinion in XVI Op. Atty. Gen. 353 was based on the view that the word "sewerage" means only a system of sewers and drains. It is now considered that that view involved too narrow a conception of the meaning of the word in question. No doubt a system of sewers and drains constitutes a "sewerage," but it does not necessarily follow therefrom that a "sewerage" is confined to a system of sewers and drains. The following comprehensive definition, appearing in Funk & Wagnalls New Standard Dictionary, indicates clearly that the word "sewerage" includes not only a system of sewers and drains but also a sewage disposal plant, where such a plant is used in connection with the disposition of sewage.

"Sewerage" is defined in the text as:

"Systematic draining by sewers; * * *. The most common method of sewerage is simple flow by gravity to the nearest river or body of water. Sometimes the configuration of the land makes pumping necessary to cause or aid the flow. Where such disposal is impractical the sewage is sometimes filtered on a large scale or chemically deodorized, or precipitated, the solid part being used in the preparation of fertilizers."

It is considered, therefore, that so much of the opinion in XVI Op. Atty. Gen. 353 as ruled that a city may not issue bonds for the construction of a sewage disposal plant without submitting the proposition to a vote of the electors should be overruled.

The conclusion now made is that a city may issue bonds for the construction of a sewage disposal plant without submitting the proposition to a vote of the electors, unless a petition for a referendum is filed as provided by sec. 67.05 (7) (b).

JEF

Public Health—Optometry—Witnesses—Board of examiners in optometry does not have right to subpoena witnesses to testify before board and/or to pay them for services.

Board is its own judge of question of proof in revocation proceedings and may accept whatever evidence it wishes.

March 18, 1933.

DR. EARL W. JOHNSON, *Secretary,*
Board of Examiners in Optometry,
Berlin, Wisconsin.

You state that a hearing will soon be had before your board on a case of misleading advertising. It has been stated to you that it is necessary that the publisher of the paper in which the advertising was carried appear before the board and testify, and that you are not permitted to take a copy of the paper as evidence.

You request an opinion as to whether such is the case, and also as to the power of the board to summon witnesses to testify before it.

Sec. 153.06, subsec. (2), Stats., authorizes the board to revoke a certificate obtained through error or fraud or if the recipient is guilty of unprofessional conduct, which by sec. 153.06 (4), is defined as including misleading advertising.

Sec. 153.06 (2) provides that the holder of the certificate

"* * * shall have notice in writing enumerating the charges and specifying a date not less than thirty days after the service of the notice for a hearing and he shall have opportunity to confront witnesses against him, and to produce testimony. * * *."

The above quoted provision is the only one in the Wisconsin statutes which relates to the question of witnesses who appear and testify before the board. The statutes do not authorize the board to call any witnesses to appear before it and give testimony. If any witnesses were called by the board they would, of course, be entitled to compensation for their services.

Sec. 20.47, Stats., provides for the only appropriation

which is made to the board of optometry. The money therein appropriated is allowed

"To each member of the board, as compensation, eight dollars for each day actually spent in performing the duties of said office, and his actual and necessary expenses" (subsec. (1))

and

"To the secretary of the board such additional compensation as may be determined by the board" (subsec. (2)).

There is no specific provision made for the payment of money to any witnesses that might be summoned by the board, and it is our opinion that the words "actual and necessary expenses" would not authorize any expenditure by the board for the purpose of compensating witnesses summoned by it.

The board of optometry is entirely a creature of the statutes and has only such powers as are specially delegated to it. It is our opinion, therefore, that the board does not have authority to summon witnesses or to pay them for their services, but that the witnesses referred to by sec. 153.06 (2) are such persons as voluntarily appear before the board to give their testimony.

The board is authorized to revoke the certificate when any one of the practices or situations condemned by the statute exists. The existence of such practices or conditions is a matter of proof, and the board makes its revocation after it has received what it deems to be sufficient proof. The board is its own judge of what proof is sufficient, and it may accept the newspaper as evidence if it wishes to do so.

If the person whose certificate has been revoked is dissatisfied with the conclusion reached by the board, or with any action which it has taken in connection with the revocation, he is given the right to appeal to the circuit court, where the decision of the board may be either affirmed or reversed.

JEF

Indigent, Insane, etc.—Poor Relief—Form of poor relief which is in part county system and in part township system is not authorized by law in this state.

March 18, 1933.

JAMES L. MCGINNIS,
District Attorney,
Amery, Wisconsin.

Polk county is operating under the county system of poor relief. In several of the towns in the county are Indians who have legal settlement in those towns.

You ask whether, in case the county goes back to the town system of poor relief, the county board can by resolution provide for the support of these Indians from county funds and leave the towns to take care of the other indigents.

You call attention to the provisions of ch. 49, Stats., and particularly to sec. 49.04, subsec. (3), which latter, you say, does not apply, for all the Indians cannot be committed to the county home.

It is the opinion of this department that where a county is operating under the township system of poor relief, a regulation by the county board to support certain classes of resident indigent persons is not a valid ordinance.

Under the provisions of ch. 49, Stats., the legislature has provided two distinct types or systems of poor relief, to wit, the county system of poor relief and the town system of poor relief.

Under sec. 49.01 every town, city or village is charged with the relief or support of poor and indigent persons lawfully settled therein. When a county adopts the county system of poor relief the county takes over such liability. See sec. 49.15. Where the county system is not established the towns remain liable for the support of the poor. *Mapes v. Supervisors,* 47 Wis. 31, 1 N. W. 359. But see sec. 49.14.

The statutes do not provide for a system of poor relief which is in part the township system and in part the county system. See *City of Milwaukee v. Diller,* 194 Wis. 376, 382.

Paraphrasing the language in the *Diller* case, *supra,* we say that Polk county had the option to proceed under sec.

49.15 or leave the primary liability for poor relief on the towns, cities and villages, as provided in sec. 49.02,

"* * * but no option is given to it to create a different scheme from either by selecting part of one scheme and part of the other and thus create a plan of its own. Such a proceeding is condemned by the decisions of this state. *State ex rel. Manitowoc L. & F. Co. v. Kelley,* 167 Wis. 91, 97, 166 N. W. 782. Also, see *Mt. Clemens v. Macomb Circuit Judge,* 119 Mich. 293, 77 N. W. 936; *Big Rapids v. Big Rapids F. M. Co.,* 210 Mich. 158, 177 N. W. 284."

In view of the foregoing, we are constrained to hold that an ordinance passed by the county board to support certain classes of indigents in a county where the township system of poor relief is in force is not a valid ordinance. If each of the Indians referred to in your letter has a legal settlement in a town, city or village in Polk county, such Indian is entitled to poor relief if he is in fact indigent and poor. XIV Op. Atty. Gen. 24; XX Op. Atty. Gen. 534; XII Op. Atty. Gen. 343.

JEF

Courts—Juvenile Courts—Witness Fees—Minors—Child Protection—Regular witness fees may be paid to witnesses in juvenile court and also to person summoned to bring child into court; but no per diem for bring child to court is allowed.

March 22, 1933.

CARL CHRISTIANSON,
Assistant District Attorney,
Madison, Wisconsin.

You refer in your recent letter to sec. 48.06, subsec. (3), Stats., which contains the following:

"* * * The judge may authorize the payment of necessary traveling expenses incurred by any person summoned or otherwise required to appear at the hearing of any case coming within the provisions of sections 48.01 to 48.12, and such expenses when approved by the judge shall be a charge upon the county."

You also refer to the last sentence in subsec. (3), of sec. 48.07, which provides:

"* * * No costs shall be assessed against nor fines imposed upon any child in the juvenile court."

You state that the question has come up in the juvenile court for Dane county as to the amount with which witnesses in such cases shall be paid. You state that you find nowhere in chapter 48 anything specifying per diem for either witnesses or custodians who are summoned to appear in juvenile court.

While there is no provision in the statute anywhere to pay the custodian who brings a child into the juvenile court on the summons of the court, we do believe that witness fees may be paid under secs. 325.05 to 325.08, inclusive. We believe that the statute is broad enough to cover the civil proceedings before a juvenile court for witnesses, and the person who is summoned to bring the child, if used as a witness, may also be given witness fees.

JEF

Minors—Child Protection—School Districts—Tuition— Sec. 40.21, subsec. (2), Stats., applies to common school but not to ordinary high school or union free high school.

Child placed with private agency or in home other than that of parents, under provisions of sec. 48.07, is maintained as public charge within meaning of sec. 40.21 (2), where compensation for care of such child is made charge upon county.

Child placed in foster home under provisions of sec. 48.07, where no compensation charge is made upon county, has residence where located, for school purposes. In latter case child may attend high school in district where located free of charge but where such child attends high school out of district where located tuition is chargeable as for any other nonresident pupil.

March 22, 1933.

CARL CHRISTIANSON,
Assistant District Attorney,
Madison, Wisconsin.

The juvenile court, under sec. 48.07, subsec. (1), pars. (a) and (b), Stats., has power directly and indirectly

through agencies to place a child in a private home, other than the child's parental home. In a number of instances this has meant that a child has been transferred from one school district to another. Ages of these children as provided by ch. 48, may run up to eighteen years.

The question has arisen as to who pays the school tuition of these children with respect to: (1) Ordinary common schools; (2) High schools; and (3) Union free high schools.

The Wisconsin statutes relating to *common schools* provide for charging tuition both for nonresident pupils and for indigent pupils, while in the case of the high schools provision is made only for tuition for nonresident pupils, unless sec. 40.21 (2), applies to high schools.

Sec. 40.21 (2), Stats., provides:

"Every person of school age, maintained as a public charge shall, for school purposes, be deemed a resident of the district in which he lives, and if maintained by the county the county board shall annually allow the district in which such person attended school, a pro rata share of the year's expense of maintaining the school, such share to be computed upon the basis of the total enrollment, and in case such person be maintained by the town, such town board shall allow a like amount to such district."

Sec. 40.21 is entitled "Conduct of *common* schools." This section was passed in 1873 by ch. 156, and was entitled "An Act in Relation to the Education of Children of the County Poor." This chapter was condensed into section 512 in the statutory revision of 1878. While changes were later made in this law, it was placed in its present position among statutes relating to common schools.

In XVI Op. Atty. Gen. 570, it was stated:

"Provision is made in sec. 40.21, subsec. (2), for the tuition of public charges being educated at *grade* schools." (Italics ours.)

It was evidently assumed by the writer of that opinion that sec. 40.21 (2) applied to the common school composed of the first eight grades. The method provided by sec. 40.21 (2) for determining the amount of tuition to be charged indicates an intention that it should be applied only to the common school district. It is not adaptable to a high school for the reason that the tuition would be unusually high if

the high school district were permitted to charge "a pro rata share of the year's expense of maintaining the school."

It is our opinion, therefore, that sec. 40.21 (2), applies only to the common school of eight grades, and does not apply to the ordinary high school or to the union free high school.

Your letter does not state whether all of the children placed in various homes or agencies by the juvenile court are supported by the county. It is our understanding that in some cases they are, and in other cases they are not.

In XX Op. Atty. Gen. 742, 743, it was held:

"* * * Where a person of school age is committed by the court under the provision of sec. 48.07, Stats., to the custody other than that of his parents and where compensation for the care of such child is by court order made a charge upon the county such pupil is a 'person of school age maintained as a public charge' within the meaning of sec. 40.21 (2), Stats., and the pro rata share of the year's expense of maintaining the school shall be allowed by the county to the school district."

In cases where the child is not supported by the county, it is our opinion that the school district is not entitled to any tuition because the child, under the doctrine of *State ex rel. School District No. 1 of Waukesha v. Thayer,* 74 Wis. 48, and *State ex rel. Smith v. Board of Education,* 96 Wis. 95, gains a residence in the district, and is thus entitled to go to the school without tuition charge. See opinion written to state board of control, March 11, 1933.*

You indicate some doubt as to whether the provisions of sec. 40.21 (2), do not abrogate the doctrine enunciated in the *Thayer case, supra.*

Sec. 40.21 (2) was in force and effect in substantially its present form at the time that the *Thayer case* was decided by the court in 1889. An examination of the briefs in that case discloses the fact that this statute was not called to the attention of the court, probably because it was not thought to be controlling or even pertinent.

The facts presented in the *Thayer case, supra,* do not indicate that the child involved there was a public charge in any sense of the word, but do indicate on the other hand,

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that the child, although not living with its mother, was supported by her. It is the absence of any indication that the child was a public charge which removed the case from the operation of the statute above referred to.

The provisions of sec. 48.07 indicate very definitely that the child is taken away from its parents and placed in some other family for its own best interests and in the hope that it will be given a temporary home with care superior to that which it previously had. The child, therefore, is sent to its new location for the primary purpose of securing a home as distinguished from the primary purpose of locating in a school district to participate in the advantages which the public schools therein afford. As stated above, therefore, the child gains a residence in the district for school purposes which removes the necessity for paying tuition *as a nonresident.* If the district in which he locates has a high school, he is entitled to attend that high school free of charge by reason of the fact that he is a resident. He can, of course, be a resident of only one district for school purposes at any one time.

If the pupil goes outside the district to attend a high school in another district, he is a nonresident of the second district, and is subject to the payment of tuition under the conditions imposed by the second district relating to tuition for nonresident pupils. Such provisions relating to tuition payment are governed by secs. 40.47 and 40.535. The latter two sections are both applicable, whether the high school is an ordinary one, or a union free high school.

JEF

School Districts—State Aid—Under sec. 40.87, Stats., maximum amount of state aid which may be paid by state to any school district or city is six hundred dollars per elementary teacher, taking into account both two hundred fifty dollars per teacher payable under subsec. (1) and equalization aid payable under subsec. (2) of said section.

March 22, 1933.

R. A. COBBAN, *Chief Clerk,*
Senate.
JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

By Joint Resolution No. 56, S., the attorney general is requested to advise the legislature and the state superintendent of public instruction whether, under sec. 40.87, Stats., the maximum amount of aid which may be paid to any school district or city is six hundred dollars per teacher, taking into account both the two hundred and fifty dollars per teacher payable under subsec. (1) and the equalization aid payable under subsec. (2) of said section.

It is considered that the question submitted must be answered, "Yes."

Subsec. (1), sec. 40.87, provides that there shall be paid by the state annually to each school district or city of the state two hundred fifty dollars for each elementary teacher employed by such district or city in the preceding school year. Subsec. (2) of said section provides that, in addition to the amount provided in subsec. (1), there shall be paid to school districts or cities in which the assessed valuation back of each pupil is insufficient to properly support an elementary school, an amount to be determined in accordance with a method therein prescribed and based in part upon the number of elementary teachers employed in the preceding school year. The last sentence of subsec. (2) contains the following limitation:

"But in no event shall such apportionment under *this and the preceding subsection* exceed six hundred dollars for each such teacher employed in the preceding school year; * * *."

Such limitation is made expressly applicable to the apportionment under subsec. (2) *and* subsec. (1) of sec. 40.87 and its literal meaning is that the maximum amount which may be paid to any school district or city under both subsections is six hundred dollars per elementary teacher.

In 1929 the provisions relating to the above subject matter were contained in subsec. (4), sec. 20.245, Stats. 1929. Subd. 1, par. (b), subsec. (4), sec. 20.245, Stats. 1929, provided for the two hundred fifty dollars per teacher, while subd. 2 of the same paragraph provided for the so-called equalization aid. The limitation then contained in said subd. 2 read as follows:

"But in no event shall such apportionment exceed six hundred dollars for each such teacher employed in the preceding school year; * * *."

It is thus seen that the limitation as it existed in the statutes of 1929 did not in terms refer to the two hundred fifty dollars per teacher provided for in then subd. 1, and it would, therefore, seem that such limitation then applied only to the equalization aid provided for in then subd. 2.

However, ch. 67, sec. 49, Laws 1931, which was the executive budget bill for the biennium July 1, 1931 to June 30, 1933, renumbered subsec. (4), sec. 20.245, Stats. 1929, to be sec. 40.87 and revised the same to read as it now does. In other words, ch. 67, sec. 49, Laws 1931, provided, among other things, that the limitation contained in subsec. (2), sec. 40.87, Stats. 1931, should read as above indicated, namely,

"But in no event shall such apportionment under *this and the preceding subsection* exceed six hundred dollars for each such teacher employed in the preceding school year; * * *."

Therefore, even though under the statutes of 1929 the limitation of six hundred dollars per teacher did not include the two hundred fifty dollars per teacher but only the equalization aid, it is made clear under the statutes of 1931 that such limitation now does include both.

It has not been overlooked that the executive budget bill of 1931, which became ch. 67, Laws 1931, and sec. 49 of

which revised the statute here under consideration, contained the following note:

"This section is changed only as necessary to the plan of paying the aids herein provided directly from the general fund."

While the above note indicates that there was no intent to change the meaning of the limitation provision, yet the legislature did in fact change the language, when it expressly provided in the 1931 revision:

"But in no event shall such apportionment under *this and the preceding subsection* exceed six hundred dollars for each such teacher employed in the preceding year."

The limitation in its present form is plain and unambiguous, and it does not appear to be open to construction.

The intent of the legislature, as expressed in the note above quoted was that no change in the meaning of the limitation provision was being made. At that time, 1931, it might well have been argued that the legislative intent, as thus expressed, should be given effect, even though the literal meaning of the language used in the revised statute was at variance with the intent as expressed in the note (see supreme court citations collected in XX Op. Atty. Gen. 1153). However, since that time the supreme court has laid down the following very definite rule: Where there is an *ambiguity* in a statute which has been revised, the statute will be construed as expressing the law as it was prior to the revision, but where there is *no ambiguity,* the statute must be construed as it reads. The statute as revised may be the result of error, but if it suggests no ambiguity it affords no opportunity for construction and it must be interpreted as it reads. *Oconto County v. Town of Townsend* (Wis. 1932), 244 N. W. 761, 765. In that case a statute had contained the expression, "in addition to all other *highway taxes.*" A revisor's bill struck out the word *"highway,"* and the revisor's note stated to the effect that no change in meaning was intended. The court, nevertheless, held that a change in meaning was made, and that the expression as revised meant what it said, namely, "in addition to all other *taxes.*"

Under the rule as laid down and applied in the above cited

case, no escape is seen from the conclusion that the limitation provision as contained in sec. 40.87, Stats. 1931, must be interpreted as it reads.
JEF

Indigent, Insane, etc.—Poor Relief—Advancement by town of groceries and rent with requirement that recipient perform work to value of such advancements constitutes poor relief.

March 22, 1933.

SIDNEY J. HANSON,
District Attorney,
Richland Center, Wisconsin.

The following statement is quoted from your letter:

"Mr. A is living in the town of Dayton and has his legal residence in the town of Rockbridge, Richland county, Wisconsin. The town of Rockbridge is furnishing him with groceries and also paying his rent with a town order stating thereon that it is for poor relief and is payable out of the general fund of said Rockbridge township. Mr. A walks back and forth between the two townships and does a little work for which Rockbridge is paying him twenty cents an hour. He continues this work until he has repaid the township what they have advanced. In other words, the relief is advanced before Mr. A works it out.

"The town of Rockbridge contends that they are not giving him aid and it would appear that the purpose is to eventually shift the burden of relief upon the town of Dayton, if Rockbridge township can avoid the statute in this manner by having him out of their township for one year without furnishing aid."

You ask whether the legal residence of Mr. A may be changed in the manner indicated. Under the facts stated, Mr. A is receiving poor relief from the town of Rockbridge and his legal residence will remain in that town. In XXI Op. Atty. Gen. 893, it was held that where a person has legal settlement in one municipality and then removes to another municipality for more than one year, but during that entire

time continued to receive aid from the first municipality, his legal settlement continued in the first municipality.

The only new question presented by your statement of facts is whether the advancement of groceries and rent with the requirement that the recipient perform work to the value of such advancements constitutes poor relief.

In subsec. (2), sec. 2, ch. 29, laws of special session 1931, relating to the emergency relief appropriation, this definition occurs:

"* * * The term 'outdoor poor relief' as used in this act shall include so much of the labor costs of public works undertaken to provide employment for the unemployed as the industrial commission finds represented the equivalent of outdoor poor relief."

See *State of Wisconsin ex rel. City of Madison v. Industrial Comm.*, 207 Wis. 652 (1932).

In view of the statutory recognition that the furnishing of work to unemployed may constitute poor relief, it seems clear that the method used by the town of Rockbridge in assisting Mr. A constituted the furnishing of relief and consequently prevents the acquisition of a new legal settlement in the town of Dayton.

JEF

Taxation—Delinquent Taxes—All taxes returned as delinquent belong to county, and county is entitled to retain from collections made by it amount of unpaid county taxes due it. After county has collected amount thus due to it, then any excess, *when collected,* must be returned to proper town, city or village treasurer.

March 22, 1933.

F. W. HORNE,
District Attorney,
Crandon, Wisconsin.

You submit the following question: Where the delinquent tax return of a town, city or village includes unpaid local school taxes, must the county treasurer, upon making

collections, first pay over amounts due to the school district, or may he, from said collections, first retain for the county the taxes due to the county for unpaid county taxes?

The matter of the county's rights and liabilities with respect to collections of delinquent taxes is expressly covered by subsec. (3), sec. 74.19, Stats., which provides:

"All taxes so returned as delinquent shall belong to the county and be collected, with the interest and charges thereon, for its use; and all actions and proceedings commenced and pending for the collection of any personal property tax shall be thereafter prosecuted and judgments therein be collected by the county treasurer for the use of the county; but if such delinquent taxes, exclusive of the penalty provided by section 74.23, exceed the sum then due the county for unpaid county taxes such *excess, when collected,* with the interest and charges thereon, shall be returned to the town, city or village treasurer for the use of the town, city or village."

By the above statute it is plain that all taxes returned as delinquent belong to the county; that the county is empowered to collect the same; that out of said collections the county is entitled to retain the unpaid county taxes due it; that any *excess* collected is required to be returned to the proper town, city or village treasurer; that the county is not liable for the return of any amounts to such town, city or village until the county has collected the unpaid county taxes due to it from such town, city or village.

Thus, if a town treasurer returns $7,000 of delinquent taxes to the county treasurer, and $2,000 of unpaid county taxes is represented therein, the county treasurer is entitled to retain for the county the collections up to $2,000 (plus interest and charges thereon), regardless of whether or not the balance of said delinquent taxes includes amounts ultimately due to some school district in the town. When the county treasurer collects any excess over and above the amount due the county as aforesaid, he pays the excess over, not to a school district, but to the proper town treasurer. The county treasurer's accounting is with the town treasurer, and not with the school district. The county treasurer has no way of determining the amount, if any, that may be due to the school district. That is a matter for the town treasurer.

See the following citations: *Spooner v. Washburn Co.*, 124 Wis. 24, 31–32; *Town of Iron River v. Bayfield Co.*, 106 Wis. 587, 591–592; *Town of Bell v. Bayfield Co.*, 206 Wis. 297, 304; XVI Op. Atty. Gen. 673.

JEF

Agriculture — Constitutional Law — Municipal Corporations—Detachment of Farm Lands—Bill No. 191, A., relating to detachment of farm lands in cities and villages, if enacted into law will be constitutional legislation.

March 22, 1933.

JOHN J. SLOCUM, *Chief Clerk,*
Assembly.

Resolution No. 27, A., relates to a request for an opinion from the attorney general on the constitutionality of Bill No. 191, A. This resolution reads as follows:

"RESOLVED by the assembly, That the attorney-general is hereby requested to give this house an opinion in writing on the constitutionality of Bill No. 191, A., as amended relating to the detachment of farm lands from cities and villages. Be it further

"RESOLVED, That this resolution be transmitted to the attorney-general immediately upon adoption with the request that he give this request his prompt attention."

It is my opinion that Bill No. 191, A., as amended, if enacted into law, would be constitutional legislation.

Bill No. 191, A., provides for the detachment of farm land from cities and villages. It provides in substance that, when land used for agricultural purposes of an area of forty acres or more in a city or village and adjoining and contiguous to the boundary of any city or village shall have been within the corporate limits of such city or village for ten years or more, and during all of said time shall have been used for agricultural purposes, the circuit court of the county in which such land is situated shall enter judgment detaching such land from such city or village and

annexing it to an adjoining town or towns. The procedure for such detachment is then provided in the bill.

The 1929 legislature enacted ch. 353, Laws 1929, which became sec. 62.075 and provided in substance that when land used for agricultural purposes of an area of two hundred acres or more contiguous to the boundary of any city of the fourth class shall have been within the corporate limits of such city for twenty years or more, and during all of said time shall have been used for agricultural purposes, the circuit court of the county in which such land is situated shall enter judgment detaching such land from such city and annexing it to an adjoining town or towns.

The constitutionality of ch. 353, Laws 1929, was attacked upon the ground that it violated sections 1 and 22 of art. I of the constitution of Wisconsin and the XIVth Amendment to the constitution of the United States. In the cases of *Christoph et al. v. City of Chilton,* (1931) 205 Wis. 418, 237 N. W. 134, and *Lunde v. City of Watertown,* (1931) 205 Wis. 429, 237 N. W. 138, the Wisconsin supreme court held such legislation unconstitutional as based on arbitrary and unreasonable classification in violation of sections 1 and 22 of art. I of the Wisconsin constitution and the XIVth Amendment to the constitution of the United States. In those cases the court pointed out that the law providing for detachment of farm lands from cities of the fourth class was violative of both the uniformity and equality provision of the Wisconsin and United States constitutions because based on a classification which was arbitrary and unreasonable. As the court pointed out, there is no difference or distinction between agricultural lands located in cities of the fourth class and similar lands located in cities of other classes. Accordingly, the court held that ch. 353, Laws 1929, which granted privileges only to those residing in cities of a certain class and denying such privileges to others residing in cities of other classes, was clearly unconstitutional.

The feature which made ch. 353, Laws 1929 (which became sec. 62.075, Stats. 1929) unconstitutional has been eliminated in Bill No. 191, A. Bill No. 191, A., applies to all cities and villages and is not limited to cities of the fourth class as was ch. 353, Laws 1929.

It is well settled that if Bill No. 191, A., is enacted into law it will be clothed with a presumption of constitutionality. As was pointed out in *Brodhead v. Milwaukee,* (1865) 19 Wis. 624, 652, 88 Am. Dec. 711, a statute will not be declared unconstitutional unless its unconstitutionality is "so clear and palpable as to be perceptible by every mind at the first blush."

It is also well established that the legislature may make classifications of persons, occupations, or industries and select for them special regulation if there are reasonable and proper economic, political, or social reasons for so doing. *Christoph et al. v. City of Chilton,* (1931) 205 Wis. 418, 421, 237 N. W. 134. The classifications of persons or property must be based upon reasonable differences which distinguish the members of one class from those of another in respects germane to some public purpose. *State ex rel. Milwaukee S. & I. Co. v. R. R. Comm.,* (1921) 174 Wis. 458, 464, 183 N. W. 687; *State v. Whitcomb,* (1904) 122 Wis. 110, 118–119, 99 N. W. 468.

As was pointed out in *Christoph et al. v. City of Chilton,* (1931) 205 Wis. 418, 426, 237 N. W. 134:

"The court is in entire sympathy with the purpose of the legislature to free purely agricultural lands not required for city development or extension, from the burdens of city taxation; but such a law, in order to be valid, must apply to agricultural lands similarly located in all cities of the state to the end that the constitutional provisions as to uniformity and equality shall not be violated."

In the view that we take of this matter, we deem it unnecessary to discuss other constitutional objections which might be raised. After a careful examination of Bill No. 191, A., we are constrained to hold that if this bill is enacted into law, it will be constitutional legislation.

JEF

Appropriations and Expenditures—Public Officers—Lieutenant Governor—Where constitutional provision fixing salary of lieutenant governor was submitted by referendum to vote of people at general election in November, 1932, and by that election constitution was amended so that salary of lieutenant governor is to be established by law, and present incumbent of office was elected at same election, it is unreasonable to assume that legislature, in submitting amendment to vote of people to be voted upon at same time that lieutenant governor so chosen would receive no compensation, did not expect next legislature to fix his salary; and upon considerations of justice and public policy, it is considered that legislature now has right and duty to determine compensation of that officer at its present session.

March 23, 1933.

JOINT FINANCE COMMITTEE,
Legislature.

Answering your inquiry concerning the law relating to compensation for the lieutenant governor, will say that I have investigated the law and I hand you herewith my opinion based on such investigation.

A study of this question requires an examination of the constitution, the amendments thereto, and such expressions of the court as may have a bearing on the question.

Prior to November 8, 1932, the Wisconsin constitution, sec. 9, art. V provided:

"The lieutenant governor shall receive during his continuance in office an annual compensation of one thousand dollars."

The 1931 legislature agreed to Joint Resolution No. 53, which was published on April 3, 1931, whereby that body resolved to submit to vote of the people at the general election in November 1932 the question:

"Shall section 9 of article V of the constitution be repealed so that the salary of the lieutenant governor shall be established by law?"

This referendum was therefore submitted to vote of the electors at the November, 1932, general election, and the

question was answered in the affirmative, and sec. 9 was thereby repealed.

Since November 8, 1932, there has been no provision for compensation for the lieutenant governor either by the constitution or by statute.

At the same time that the electors voted to repeal sec. 9 they elected the present lieutenant governor.

It is unreasonable to assume that the legislature of 1931, when it proposed to submit Joint Resolution No. 53 to vote of the people in November, 1932, would expect that the lieutenant governor who would be chosen at the same election would receive no compensation in case the referendum was ratified. It would be more reasonable to assume that that body would expect that if the resolution was ratified at the November election the 1933 legislature would promptly establish by law the compensation for the lieutenant governor, such compensation to be applicable to the officer who would be elected at the same general election. Justice and common sense would suggest that such would be the plain duty of that body. As was said by the court in *State ex rel. Zimmerman v. Dammann,* 201 Wis. 84, 100:

"* * * It must be assumed that the legislature of 1931 will discharge a duty so obviously indicated by considerations of justice and public policy."

It may be said that the legislature now in session is without power to establish a salary which would be applicable to the present lieutenant governor, because of sec. 26, art. IV of the constitution, which reads as follows:

"The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office."

This section of the constitution imposes no disability on the legislature to establish the compensation of a public officer during his term of office where no salary or compensation is provided, either by the constitution or by statute. In this case, where no salary was provided at the time the term of office began in January, 1933, legislative action pro-

viding a salary for such officer would not contravene sec. 26, of art. IV for the reason that it would not be increasing or diminishing such compensation, for the very obvious reason that there was no compensation which could be increased or diminished. The salary so established by the present legislature would be applicable to the present incumbent of the office. This question was settled by the court in *State ex rel. Zimmerman v. Dammann,* 201 Wis. 84, 100, where a similar situation arose. In that case the argument was made by the respondents that the repeal of sec. 21, art. IV of the constitution, relating to compensation of members of the legislature, would leave the holdover senators of the 1931 legislature without salaries during the last two years of the term for which they were elected. On this subject the court said:

"* * * This is true if the legislature of 1931 fails to take any action with respect to such salaries. The provisions of sec. 26 of art. IV, however, will not prevent the legislature from providing for the holdover senators * * *"

The court clearly recognized legislative power to establish the salary of a public officer during his term of office where no salary had been provided.

It is my opinion that the 1933 legislature has power to establish the salary of the present lieutenant governor, and more than that, it is "obviously a duty indicated by considerations of justice and public policy."

No limitation is placed on the amount which the legislature may determine as compensation for that officer.

JEF

Public Printing — Newspapers — Green County Herold, published in German, and Green County Herald, published in English, are one newspaper under sec. 331.20, Stats., but all legal notices should be published in both editions.

March 25, 1933.

RANDAL J. ELMER,
District Attorney,
Monroe, Wisconsin.

The following statement of facts is taken from your letter:

"* * * for many years last past the Green County Herold has been published at Monroe, Wisconsin and is a paper of general circulation, printing news of a general character with a circulation of approximately 1200.

"About two or three months ago the publisher, under the name of 'The Green County Herald' has published an English edition of what purports to be the same newspaper with qualifications, that is to say, the English edition is not a literal translation of the German edition and differs in many other respects from the German edition, although it carries generally the same type of news. Both editions are published and delivered to approximately the same readers."

You request an opinion as to whether either one or both of these publications is eligible as a newspaper within the meaning of sec. 331.20, Wis. Stats.

Sec. 331.20, Stats., provides:

"No publisher of any newspaper in the state of Wisconsin shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice, * * * unless such newspaper has all the requirements enabling it to be entered by the United States post-office department as entitled to second class mailing privileges and has a bona fide paid circulation to actual subscribers of not less than three hundred copies at each publication, if in villages or in cities of the third and fourth class, * * * and further that such newspaper shall have been regularly and continuously published in such city and county for at least two years immediately before the date of such notice * * *. A newspaper in the contemplation of this section is a publication appearing at regular intervals, which would be at least once a week, containing reports of happenings of recent occurrence of a varied character, such as political, so-

cial, moral and religious subjects, and designed for the information of the general reader. * * *."

Monroe is a city of the fourth class. It does not appear from your statement of facts how many subscribers receive both publications or how many receive only the English or the German edition.

The two publications are circulated by authority of one mailing privilege. It is our opinion that these publications constitute one newspaper, and that the German publication and the English publication are merely *editions* of the one paper.

In VIII Op. Atty. Gen. 869, it was held that a newspaper printed in a foreign language a sufficient length of time, and then printed in English, was eligible to publish tax sale notices. In that case, however, the German newspaper changed hands and the publication was continued by the new owner under substantially the same name, but exclusively in the English language.

It was held in the opinion, p. 870:

"The Antigo Herold has at all times been a newspaper published at Antigo. The change in the language used has not made it a different newspaper. It enjoys the same rights and privileges as second class matter under the federal statute. * * * It continues to be published weekly, is published for the same purpose as before, and enjoys substantially the same circulation and goes to the same subscribers. * * *"

In that case, however, any person searching for a legal notice in the Antigo Herold would be entitled to rely upon an examination of the one edition in English.

If the subscribers to the Green County Herold learned that that newspaper had been designated for the publication of legal notices, any of its subscribers should be entitled to expect to find any legal notice given to that paper for publication in either edition which the subscriber might read.

It is our opinion, therefore, that the Green County Herold, published in German, and the Green County Herald, published in English, are one and the same "newspaper" as that word is used in sec. 331.20, Stats., but that any legal notices given to such paper for publication should appear

in both the German and the English editions. Publication in either of the editions alone is not sufficient.

The legal notice itself, however, must be published in the English language.

See *Hyman v. Susemihl,* 137 Wis. 296, 300, where the court says:

"The utmost that has been decided in the cases referred to is that where a statute either authorizes or directs a publication to be made in a newspaper, and is silent as to the language in which such paper must be printed, publication may be made in a newspaper habitually printed in a foreign language, provided the publication authorized or directed is made in the English language."

JEF

Appropriations and Expenditures—Banks and Banking —Scrip—Expenses incurred by banking commissioner under ch. 30, Laws 1933, may be paid from appropriation made by ch. 35, Laws 1933.

March 27, 1933.

HONORABLE THEODORE DAMMANN,
Secretary of State.

Section 1, ch. 35, Laws 1933, provides as follows:

"There is appropriated from the general fund to the commissioner of banking as a non-lapsible appropriation, on the effective date of this act, twenty-five thousand dollars for the manufacture, guarding, distribution and other expenses connected with the issuance of scrip, pursuant to sections 220.20 and 220.21 of the statutes, created in chapter 30, laws of 1933."

This chapter will be published March 24, 1933, and become effective on the following day. See X Op. Atty. Gen. 1099.

The question is presented whether bills incurred prior to the effective date of the act can be paid out of this appropriation.

You are advised that such bills may be paid out of this appropriation.

The following statutes relate to the question presented:

Sec. 20.75, Stats., reading in part, as follows:

"It shall be unlawful for any state officer, department, board, commission, committee, institution, or other body, or any officer or employe thereof, to contract or create, either directly or indirectly, any debt or liability against the state or for or on account of any state officer, department, board, commission, committee, institution or other body, for any purpose whatever, without authority of law therefor, or prior to an appropriation of money by the state to pay the same, or in excess of an appropriation of money by the state to pay the same. * * *."

Sec. 20.77, subsec. (6):

"No appropriation shall be available for payment of any indebtedness incurred prior to the time as of which such appropriation is to take effect or for any other purpose than that for which it is made *unless otherwise specifically provided by law.*"

Sec. 20.75, a portion of which is quoted above, is a criminal statute, a violation of which would subject the offender to prosecution, and would, in addition, render any contract entered into in violation thereof wholly void. No recovery upon such a void contract could be had by the individual with whom the purported contract was made. It was the intention of the above statute to punish public officers, departments, boards, etc., for rash expenditures, and to relieve the state of liability for them. The prohibition of that section, of course, does not apply to the legislature itself.

Sec. 20.77 (6), recognizes that expenses incurred prior to an appropriation may, in certain cases, be paid for out of the appropriation.

If it be assumed (but not here decided) that the expenses incurred by the commissioner of banking relating to the issuance of scrip were a violation of sec. 20.75, there is nothing in the law which prevents the legislature from appropriating money to pay for services rendered the state where legal liability might not exist.

Under the provisions of ch. 30, Laws 1933, the banking review board was given the right to "authorize the commissioner of banking to print and issue scrip." To this extent the expenses were incurred by "authority of law."

Sec. 1, ch. 35, Laws 1933, makes an appropriation for "expenses connected with the issuance of scrip" and *specifically refers back* to ch. 30, Laws 1933, by virtue of which the scrip was issued.

It is our opinion that the legislature meant and intended to include all expenses incurred in connection with the issuance of this scrip, and that ch. 35 constitutes authority given by the legislature to the banking commissioner to pay these expenses, whether previously or subsequently incurred.

JEF

Counties—Claims — County Board — Member of county board may act as arbitrator in claim against county.

March 27, 1933.

SIDNEY J. HANSON,
District Attorney,
Richland Center, Wisconsin.

You state that the county board of your county voted to refer a claim filed against the county to arbitration and you ask whether a member of the board may act as arbitrator in this matter.

A member of the county board may, if properly designated, act as an arbitrator in a claim filed against the county.

A county board may submit a claim against the county to arbitration. *Joyce v. Sauk County,* 206 Wis. 202. There is no reason why a member of the board cannot serve as an arbitrator on a claim in which the county is interested. See *Kane v. The City of Fond du Lac,* 40 Wis. 495, where a city alderman acted as one of the arbitrators in a claim against the city.

JEF

Taxation—Tax Sales—Tax deed may be taken to undivided interest and such interest may be legally conveyed to third person.

March 27, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

The taxes on a tract of land in Langlade county owned by two men became delinquent. One of the men, however, kept paying his half of the taxes to the county, and the county took a tax deed to the undivided half. Later the county sold this land to a third person. The question arises whether the county had the right to sell any interest in the land and whether the party who paid his undivided one-half of the taxes still has an interest in it.

You are advised that the county had a right, by proper conveyances, to take title by tax deed to the undivided half interest on which the taxes were unpaid and to convey that interest to a third person, leaving the title to the other undivided half in the original owner who paid his proper share of the taxes.

61 C. J. sec. 1609, p. 1194, relates to the sale of estates or interests in lands by the tax collector, and reads as follows:

"* * * The statutes in some states permit the owner of a specified and determinate fraction of a tract of land assessed as a whole to discharge the tax lien as respects that portion by paying a proportionate share of the gross tax, and, where this is the case, a sale of the entire tract for the taxes assessed on it as a whole, after payment of the tax of [on?] such a portion or *interest*, is void. * * *." (Italics ours.)

Sec. 74.32, Stats., provides,

"Any person may discharge the taxes on any parcel of land returned to the county treasurer as delinquent or on any part thereof or *undivided share* therein, by paying the same, with interest at twelve per centum from the first day of January previous and all lawful charges thereon, to such county treasurer at any time before the same shall be sold as hereinafter provided; * * *."

The obvious intention of this section to benefit the person who pays his share of the tax assessed against any specified parcel of land would be completely nullified if the county treasurer were permitted to sell a one hundred per cent interest in the land upon which a portion of the taxes had been paid.

It is, of course, a rule of statutory construction that a law will not be assumed to have been passed uselessly, but that, if possible, meaning shall be given to every part and portion of it. *State v. Columbian National Life Ins. Co.*, 141 Wis. 557.

A code of statutes relating to one subject is governed by the same spirit and is intended to be consistent and harmonious, and they must be construed together as if parts of the same statute. *State ex rel. Sweet v. Cunningham*, 88 Wis. 81; 57 N. W. 1119; *Lamont, et al. v. Hibbard, Spencer, Bartlett & Co.*, 88 Wis. 109, 59 N. W. 456.

The statutes relating to taxation are in *pari materia* and subject to the application of the above rules of statutory construction.

Sec. 75.01, relating to redemption from tax sale, provides that the owner or occupant of land sold for taxes may, under certain conditions, redeem the same "or any part thereof or interest therein."

There is no statute which prohibits the tax collector from selling an undivided interest in land, and the statutes above cited furnish very strong indication that such a practice is contemplated and permitted by the Wisconsin law.

In *Hobe v. Rudd*, 165 Wis. 152, our supreme court referred to the provisions of sec. 1047, Wis. Stats. (now sec. 70.25) and held that a tax deed, reading as follows, was valid upon its face, p. 156:

" 'The following described piece or parcel of land, lying and being situated in the county of Jackson, state of Wisconsin, to wit: Undivided one-half of the southwest quarter and undivided one-half of the southwest quarter of the southeast quarter of section 11, township 21 north, range 1 west.' "

It does not appear that the question which you have raised was presented to the court in the *Hobe* case, *supra*, but the transaction involved there was certainly not so glar-

ingly in violation of the law as to receive the unsolicited condemnation of the court.

In *Atkinson v. Hewett, et al.*, 51 Wis. 275, the court again reviewed a transaction involving a tax deed to an undivided interest with no unfavorable comment about the practice.

In *Peirce v. Weare*, 41 Iowa 378, the following holding was made at p. 382:

"The sale of an undivided half of the land upon which the taxes remained unpaid, the taxes having been paid upon the other undivided half by the owner thereof, was competent and proper."

In support of the rule given in 61 C. J. 1194, it was held in the case of *Jones v. Gilson*, 4 N. C. 480, that where a tax had been paid on an undivided one-third interest, a sheriff's sale of the entire tract was void.

In the case of *Wells v. Burbank*, 17 N. H. 393, a large tract of land owned by various individuals, but undivided, was assessed as a whole. One of the owners paid one-sixtieth of the tax assessed against the land, and the court held that a sale of the remaining interest was proper.

In the light of the holdings which have thus been made, and considering the obvious intention of the legislature in passing sec. 74.32, it is our opinion that the county treasurer can sell an undivided interest in land. It follows, therefore, that Langlade county could transfer to a third person, by proper conveyance, the undivided interest which it acquired, and that the original owner who paid the taxes on his undivided half interest still retains the interest which he previously had.

JEF

Intoxicating Liquors — Sale of beer containing 3.2 per cent alcohol by weight is lawful after April 7, 1933, under XVIII Amendment, national prohibition act and its amendments, and under state statutes; sale of beer containing 3.2 per cent of alcohol by weight is prohibited under certain municipal ordinances; legality of sale of such beer under other municipal ordinances is question of fact.

March 28, 1933.

FRED RISSER,
District Attorney,
Madison, Wisconsin.

You state that numerous inquiries have been made of you relative to the right to sell 3.2 per cent beer, and in this connection you submit several questions which will be answered seriatim.

You ask whether, under existing statutes, beer containing 3.2 per cent alcohol by weight may be sold in Wisconsin after April 7, 1933.

There is to-day no statute in Wisconsin which prohibits the manufacture or sale of intoxicating liquors for beverage purposes. The Severson law (the old state prohibition act) was repealed in 1929. To-day the only statutes now in effect relating to the question submitted by you are secs. 66.05, subsec. (9), of statutes granting to municipalities the power to regulate the sale of nonintoxicating liquors and some statutes relating to drunkenness in public places and on railroad trains, and busses (sec. 351.59 and sec. 351.60, Stats.)—the latter of which are of no importance in the consideration of the above question.

The XVIIIth Amendment to the United States constitution, which prohibits the manufacture and sale for beverage purposes of intoxicating liquors, is still in full force and effect. It is generally conceded, however, that this amendment in and of itself is not self-executing. In order to make it effective, some legislation, either federal or state, is necessary.

Enactments on beverages containing a lower per cent of alcohol by weight than 3.2 per cent can come through state

legislation under the concurrent power clause of the XVIIIth Amendment. To carry out the provisions of the XVIIIth Amendment, congress enacted the national prohibition act, (see 27 U. S. C. A.,). Since the enactment by congress of the recent amendment to the national prohibition act, there is no federal statute prohibiting the manufacture and sale of beverages containing 3.2 per cent of alcohol by weight. It should be noted that in the new federal enactment there is no definition of the term "intoxicating liquor." However, congress has provided that the penalties of the national prohibition act shall apply to beverages containing more than 3.2 per cent of alcohol by weight. Thus, congress has pre-empted the field down to 3.2 per cent of alcohol by weight.

The question whether 3.2 per cent beer by weight is an intoxicating beverage or not, is one of fact which must be determined upon proof. The line which divides intoxicating from nonintoxicating liquors is a shadowy one and authorities are by no means in agreement on this subject as a scientific fact. Hence, legislative enactments which would declare a beverage of 3.2 per cent of alcohol by weight nonintoxicating would be entitled to great weight by the court in the consideration of the question. This matter was discussed in the opinions in the National Prohibition Cases in the United States supreme court, 253 U. S. 350, 40 S. Ct. 486.

With reference to local dry ordinances, there are two classes of municipal ordinances which have been called to our attention:

(a) A series of ordinances such as exist in Wisconsin which prohibit the sale of intoxicating liquor and regulate the sale of nonintoxicating liquors where the ordinance provides that the term "nonintoxicating liquor" includes all liquors, liquids, and compounds fit for beverage purposes containing alcohol in any degree but less than one-half of one per cent by volume.

I am of the opinion that, under such an ordinance, beer containing 3.2 per cent of alcohol by weight could not lawfully be sold until such ordinance is changed or so long as sec. 66.05 (9), Stats., remains in its present form. I am of

the opinion that under the grant of power in the section above quoted and in the home rule amendment to the Wisconsin constitution (sec. 3, art. XI, Wis. Const.), the city has the same power to determine for itself and within its borders what constitutes a nonintoxicating liquor that the state legislature or the federal congress might have. See *In re City of Janesville v. Heiser,* (1933) ____ Wis. ____, 246 N. W. 701; *In re Simmons,* (1926) 196 Cal. 590, 250 Pac. 684.

Sec. 66.05 (9), giving to the cities, towns and villages power to pass ordinances and to regulate the sale of nonintoxicating beverages, coupled with the home rule amendment to the Wisconsin constitution, gives to the cities, towns and villages under the present state of the law, the right to legislate on the subject of nonintoxicating liquors. In the recent case of *City of Janesville v. Heiser,* (1933) ____ Wis. ____, 246 N. W. 701, the question of the power granted under the home rule amendment has been commented upon and the Wisconsin supreme court in that case said, in substance, that very broad powers had been vested in the cities.

(b) The second class of ordinances are those where the prohibition is simply against the manufacture and sale of "intoxicating liquors" and which contain no definition of the words "intoxicating liquors." Under such ordinances, I am of the opinion that it is a question of fact whether beer containing 3.2 per cent of alcohol by weight is intoxicating. If a 3.2 per cent beer is nonintoxicating, in fact, such beer may be sold in those cities, towns and villages having this form of ordinance.

You have also submitted the question whether a city by ordinance may prohibit the sale of intoxicating liquors and whether a city may regulate the sale of nonintoxicating liquors.

These questions, I think, are answered by my answers to the former questions. A city not only has the right, under sec. 62.11 Stats., to prohibit the sale of intoxicating liquors but a city has no power to grant, so long as the XVIIIth Amendment to the United States constitution is in effect, the right to manufacture or sell intoxicating liquors. *Hack v. Mineral Point,* (1931) 203 Wis. 215, 233 N. W. 82; *City*

of Janesville v. Heiser, (1933) ____ Wis. ____, 246 N. W. 701.

In conclusion I invite your attention to the fact that there are now pending before the legislature a number of bills, which in their terms, repeal the provisions of sec. 66.05 (9). Unless and until the state legislature passes some new legislation affecting sec. 66.05 (9) and makes such legislation of state-wide concern so as to take the same out of the delegation of power under the home rule amendment (art. XI, sec. 3, Wis. Const.), I am of the opinion that cities, towns and villages have the power to enact ordinances permitting the manufacture or sale of nonintoxicating beverages and have the right to define what is a nonintoxicating beverage within their respective territorial limits.

JEF

Indigent, Insane, etc.—Poor Relief—Indigent person who receives employment from village operating under Reconstruction Finance Corporation and industrial commission outdoor poor relief plan receives poor relief within meaning of ch. 49, Stats.

March 29, 1933.

HELMAR A. LEWIS,
District Attorney,
Lancaster, Wisconsin.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts:

"Mr. X. is now living at Patch Grove, Wisconsin, and has lived there for approximately seven months. Mr. X. is a former resident of the village of Bloomington, Wisconsin, but has been gone from there for approximately eleven months. During most of the time that Mr. X. has been living at Patch Grove the village of Bloomington has employed him. The village of Bloomington is operating their poor relief system under the Reconstruction Finance Corporation and industrial commission plan. The officials of the village of Bloomington are wondering whether or not they would be entitled to give Mr. X. employment under

the above plan and still keep from claiming him as one of their poor after Mr. X. has been gone from their village a year."

The answer to your question is dependent upon whether the giving of work by a municipality under the outdoor relief plan to a destitute applicant constitutes poor relief so that such recipient is supported as a pauper within the meaning of ch. 49, Stats.

Sec. 49.02, subsec. (4), Stats., provides:

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein."

It is the opinion of this department that an indigent person who receives work from a municipality and is paid therefor in cash, which money is paid from the municipality's "outdoor poor relief fund," is supported as a pauper within the meaning of ch. 49, Stats., so that such person does not lose his legal settlement in a municipality where he is so supported and wherein he has his legal settlement.

In an opinion dated March 22, 1933,* given by this department to Sidney J. Hanson, district attorney of Richland county, it was held that an advancement by the town of groceries and rent with the requirement that the recipient perform work to the value of such advancement constitutes poor relief.

It is manifest that under the facts stated the employment furnished to the indigent person by the village of Bloomington, which operates under the Reconstruction Finance Corporation and industrial commission poor relief plan, is but one form of poor relief and that the recipient thereof does not lose his legal settlement in the village of Bloomington wherein he is so supported, even though he resides for more than a year in the village of Patch Grove. But see also opinion dated March 9, 1933, given by this department to N. H. Roden, district attorney of Ozaukee county.**

JEF

* Page 198 of this volume.
** Page 145 of this volume.

Banks and Banking—American National Red Cross—Preferred Claims—Money deposited by American Red Cross in state bank on insolvency of such bank or when such bank goes on waiver plan is not entitled to priority in payment of deposits.

March 29, 1933.

HELMAR A. LEWIS,
District Attorney,
Lancaster, Wisconsin.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts:

"A question has arisen in several places in Grant county relative to Red Cross funds on deposit in banks under liquidation and in banks operating under the waiver plan. The Grant County Chapter of the American Red Cross is under the jurisdiction of the national organization acting only as agent of the national Red Cross. No bond is furnished by the chapter treasurer.

"The American Red Cross operates under a congressional charter and I am wondering whether or not the Red Cross funds in banks such as referred to above would be considered preferred claims."

It is the opinion of this department that the funds of the American National Red Cross Society are not entitled to preference in banks under liquidation or banks operating under the waiver plan.

The American National Red Cross is a society incorporated under a national charter by an act of congress dated January 5, 1925 (see 36 U. S. C. A., secs. 1–2) for the relief of suffering by war, pestilence, famine, flood, fires and other calamities of sufficient magnitude to be deemed national in character. See the Americana, Vol. 23, pp. 278-280; The New International Encyc., Vol. 19, pp. 616-617.

The American National Red Cross derives its revenue from private subscriptions through a nation-wide campaign for funds. Its membership today is very large.

The United States government gives no regular financial support to the Red Cross. However, in 1882 congress appropriated $1,000 for the printing of various Red Cross

literature and since then, from time to time, congress has contributed various amounts for special purposes.

The Red Cross is required to file annual reports with the secretary of war and the accounts of this organization are audited annually by the war department. However, the war department is reimbursed by the Red Cross for auditing its accounts and the sum so paid is put into the treasury of the United States as a miscellaneous expense.

The governing body of the American National Red Cross consists of eighteen persons, six of whom are appointed by the president of the United States (see 36 U. S. C. A., sec. 5).

The foregoing history of the American Red Cross indicates clearly that it is not a department of the United States government but is merely a patriotic society which has achieved national recognition by reason of its work in relieving and alleviating the sufferings of mankind. The mere fact that its accounts are audited by the war department and that it is required to file an annual report with the secretary of war, does not stamp it with the character of a branch of the federal government so that its funds would be entitled to a preference in an insolvent state bank under the statutes and laws of the United States. See *Spicer v. Smith,* (decided March 13, 1933) U. S. Daily's Law Journal, Vol. 1, No. 1, page 28; *State v. Ind. Comm.,* (1925) 186 Wis. 1, 202 N. W. 191.

It should be pointed out that the United States contributes no regular funds to the American Red Cross and that its revenue is derived from private subscriptions secured through a nation-wide appeal for funds.

In view of the foregoing, we are constrained to hold that money deposited by the American National Red Cross in a state bank, on insolvency of such bank, or on such bank going on the waiver plan, is not entitled to priority in the payment of the deposits on the theory that the money deposited belonged to the United States to which the bank was indebted therefor under sec. 3466 of the United States Revised Statutes which provides that whenever any person indebted to the United States is insolvent the debts due to the United States shall be first satisfied.

JEF

Indigent, Insane, etc.—Legal Settlement—Under stated facts A did not acquire legal settlement in either town of Polar or town of Norwood and did not lose his legal settlement in city of Antigo.

March 29, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts:

A had a legal settlement in the city of Antigo from August, 1929, to April 9, 1931, and in the spring of 1931 received aid from that city. From April 9, 1931 to April 8, 1932, he lived in the town of Polar and on March 1, 1932, received aid from that town although he had not acquired a legal settlement there. The town clerk, however, failed to charge the city of Antigo for that aid and gave no notice to the city of having given it. On April 8, 1932, A moved to the town of Norwood but continued to receive aid from the town of Polar, including medical attention.

You call attention to ch. 49, Stats., and ask whether A has acquired a new legal settlement or whether the doctor's bill is chargeable to the city of Antigo.

It is the opinion of this department that A did not lose his legal settlement in the city of Antigo.

It is clear that A did not acquire a new legal settlement in either the town of Polar or the town of Norwood because he was supported as a pauper in both of these places before he had been there a year. See sec. 49.01, Wis. Stats.; XIII Op. Atty. Gen. 212, 503; XI Op. Atty. Gen. 419. See also XXI Op. Atty. Gen. 893.

Under the provisions of sec. 49.01, Stats., the town, village or city is liable for the support of needy poor persons lawfully settled therein. Sec. 49.02 relates to the manner in which a legal settlement may be acquired. Subsec. (4) thereof provides:

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; * * *."

The same subsection then goes on:

"* * * but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein."

See also: *Town of Scott v. Town of Clayton,* 51 Wis. 185; *Town of Saukville v. Town of Grafton,* 68 Wis. 192; *Sheboygan County v. Town of Sheboygan Falls,* 130 Wis. 93.

It is clear, therefore, that under the facts stated in the present case A had not acquired a legal settlement in either the town of Polar or the town of Norwood.

The question then presents itself whether A lost his legal settlement in the city of Antigo.

Subsec. (7), sec. 49.02 provides:

"Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town, village or city in which such legal settlement shall have been gained for one whole year or upward; and upon acquiring a new settlement or upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost."

A strict interpretation of the words "by voluntary and uninterrupted absence" would mean that in every case where a person voluntarily left the city of his legal settlement for more than one year, such person would lose his legal settlement in such city. However, the Wisconsin supreme court has held that this "voluntary and uninterrupted absence" is to be construed to mean an absence "during which the party is not a pauper needing and receiving support." *Town of Scott v. Town of Clayton,* (1881) 51 Wis. 185, 191.

The court in discussing that point said, p. 193:

"* * * The residence out of the town in which the settlement is, must be uninterrupted for one year. In our view of the meaning of the statute, such residence was interrupted in the fall of 1875, and before a year from the date of her removal had expired; and, in order to relieve the defendant town under this statute, she must have remained voluntarily and uninterruptedly absent for one year or more after it ceased to provide support for her in 1877, *and during that year not have received support as a*

poor person either from the town in which she resided or from the town of Scott. The evidence at least tended to show that she needed support within the year, and received such support from the plaintiff town. If she did need support, and such support was provided by the town of Scott, within a year from October 8, 1877, then her absence was again interrupted, and the defendant town is not relieved from her support." (Italics ours.)

In the present case it is manifest that A had not lost his legal settlement in the city of Antigo because he needed and received support as a pauper during his stay in the towns of Polar and Norwood. In other words, A was never voluntarily and uninterruptedly absent from Antigo for one whole year, during which year A received no support as a poor person.

On the question of liability for hospital and doctor bills, see IV Op. Atty. Gen. 1015; XIII Op. Atty. Gen. 123.

JEF

Taxation—Tax Collection—Under sec. 74.19, subsec. (3), Stats., county retains advertising fee, certificate fee and redemption fee.

March 31, 1933.

CURT W. AUGUSTINE,
District Attorney,
Eau Claire, Wisconsin.

It appears that collections on delinquent taxes turned over to the treasurer by one of the townships have exceeded the county apportionment of taxes levied in that township for the year 1928 or sale of 1929.

Sec. 74.19, subsec. (3), Stats., reads:

"All taxes so returned as delinquent shall belong to the county and be collected, with the interest and charges thereon, for its use; and all actions and proceedings commenced and pending for the collection of any personal property tax shall be thereafter prosecuted and judgments therein be collected by the county treasurer for the use of the county; but if such delinquent taxes, exclusive of the penalty provided by section 74.23, exceed the sum then due the county

for unpaid county taxes such excess, when collected, with the interest and charges thereon, shall be returned to the town, city or village treasurer for the use of the town, city or village."

The question arises as to what is meant by "interest and charges thereon." You state that the charges as they are collected by the county treasurer are as follows: two per cent penalty, one per cent per month interest, twenty-five cents advertising fee, twenty-five cents certificate fee, and a redemption fee. You feel, as does the county treasurer, that the last three items should not be considered as coming under the phrase "interest and charges thereon," but should be retained by the county as part of the county funds. You are advised that such interpretation of the law is correct. The two per cent penalty upon the whole delinquent tax list is retained by the county. See sec. 74.51, Stats. This two per cent penalty is the successor of the old five per cent collection fee which was allowed the county treasurer for his work in collecting the delinquent taxes. The county retains the one per cent per month interest upon all amounts which it collects up to the amount which is due it from the town. Thereafter the one per cent per month goes to the town. After the county has received the amount due it from the town the county retains the twenty-five cent advertising fee, twenty-five cent certificate fee, and the redemption fee.

JEF

Minors—Child Protection—Minor child in custody of mother, who lives in Beloit and who has placed child in orphanage in Illinois, has her legal settlement in Beloit, with her mother.

March 31, 1933.

BOARD OF CONTROL.

You refer to an official opinion of this department dated February 28, 1933, XXII Op. Atty. Gen. 110, in which it was held that no person has authority to bring a feeble-minded child into this state for the purpose of placing it in

a state institution. You state now that the child in question was placed in an orphanage in Illinois by the mother, who had received custody of the child in a divorce proceeding, and that the mother is now living in Wisconsin.

You inquire whether the child will take the legal settlement of the mother, who has lived in Beloit for several years, or whether it will have the settlement of its father, in Illinois.

Sec. 49.02, Stats., provides:

"Legal settlements may be acquired in any town, village, or city so as to oblige such municipality to relieve and support the persons acquiring the same in case they are poor and stand in need of relief, as follows:

* * *

"(2) Legitimate children shall follow and have the settlement of their father if he have any within the state until they gain a settlement of their own; but if the father have no settlement they shall in like manner follow and have the settlement of their mother if she have any."

The father in this case has no legal settlement in Wisconsin. The mother has placed this child in an orphanage in Illinois but she herself lives in Beloit. The real residence of the child then is with the mother, in Beloit, where she has a legal settlement. I believe this answers your question.

JEF

Corporations—Methodist Episcopal Church—Ch. 58, Private and Local Laws 1871, was not expressly repealed by ch. 158, Laws 1923, and is still in full force and effect except where it conflicts with later statute, which must prevail over earlier in so far as there is any conflict.

It is suggested that ch. 58, Private and Local Laws 1871, be repealed by bill introduced for that purpose.

March 31, 1933.

THEODORE DAMMANN,
Secretary of State.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of

facts: You state that in 1922 the Wisconsin Conference and the West Wisconsin Conference of the Methodist Episcopal Church, appointed a joint commission to prepare, and present for passage to the legislature, a law revising and consolidating the incorporation laws of said church under which both local church property and the property of the two Methodist Conferences of this state had been and could be held, transferred, etc. Ch. 158, Laws 1923, was the result.

Ch. 158, Laws 1923, was an act to repeal ch. 89, Laws 1849, ch. 379, Private and Local Laws 1868 as amended by ch. 385, Laws 1885, and ch. 123, Private and Local Laws 1872; to amend sec. 1997 of the statutes; and to create sec. 2001—25 of the statutes, relating to the incorporation of the Methodist Episcopal church.

It appears that ch. 58, Private and Local Laws 1871 was not expressly repealed.

Upon the foregoing, you ask the following questions, which will be answered seriatim:

"First. If chapter 58, P. & L. Laws 1871, is still in effect and governing over ch. 158, Laws 1923, relating to the powers and duties of the Wisconsin Conference Board of Trustees of the Methodist Episcopal Church."

It is clear that ch. 58, Private and Local Laws 1871, was not expressly repealed by ch. 158, Laws 1923. The question then presents itself as to whether ch. 58, Private and Local Laws 1871, was repealed by implication. This will be considered in the answer to the second question.

"Second. What effect, if any, does ch. 158, sec. 3, Laws 1923, have upon the Wisconsin Conference Board of Trustees?"

It is well settled that repeals and changes of existing laws by implication are not favored, therefore if two laws conflict and the earlier will admit of a reasonable construction, leaving the later one in force, such construction will be adopted, otherwise the later law will prevail. *State ex rel. Hayden v. Arnold,* 151 Wis. 19, 138 N. W. 78; *State ex rel. McManman v. Thomas,* 150 Wis. 190, 136 N. W. 623; *State ex rel. Trustees of La Crosse Public Library v. Bentley,* 163 Wis. 632, 158 N. W. 306.

If a supposed incongruity between statutes can be avoided by reasonable construction, such construction should be adopted, but where it is manifest that two statutes conflict, the later statute supersedes the earlier so far as full effect cannot be given to both. *Hite v. Keene,* 137 Wis. 625, 119 N. W. 303; *State ex rel. M. A. Hanna Dock Co. v. Wilcuts,* 143 Wis. 449, 128 N. W. 97.

In view of the foregoing we suggest that inasmuch as ch. 58, Private and Local Laws 1871, is still in full force and effect except in so far as it clearly conflicts with ch. 158, sec. 3, Laws 1923 (now sec. 187.15, subsec. (3), Stats.), ch. 58, Private and Local Laws 1871, be repealed.

"Third. If chapter 58 is still intact what would be the method of securing an amendment if desired?"

It is suggested that, inasmuch as ch. 58, Private and Local Laws 1871, is still intact, a bill be introduced at the present session of the legislature expressly repealing this chapter.

JEF

Contracts—Criminal Law—Embezzlement—Where lessor leases farm to lessee under agreement that at end of each month each is to receive half of net proceeds and where landlord expressly consents that lessee use part of money belonging to him first three months and thereafter lessee continues to use more than his share of money until end of year, and second year division is made equally each month, no prosecution for embezzlement will lie against lessee, as relation under circumstances is that of debtor and creditor.

March 31, 1933.

J. C. DAVIS,
District Attorney,
Hayward, Wisconsin.

In your letter you state that a farmer in your county rented to two parties a 200-acre farm with the proviso that the lessor was to get half of the proceeds and the lessees the

other half. You state that during the first three months the farmer permitted one of the lessees, who was handling the money, to use part of the lessor's share of the rent for each month; that thereafter during the first year nothing was said, but the said lessee retained a great deal of the money. The second year a division was made at the end of each month. When they left the farm, at the end of two years, there was still due to the landlord over $406, and the landlord is now asking that the lessee be prosecuted for embezzlement. You inquire whether he is guilty of embezzlement.

Under the facts stated, I do not believe that a conviction for embezzlement can be obtained. I believe the relation of debtor and creditor exists in that case. The landlord expressly gave him permission to use part of the money the first three months of the first year and during the other nine months I think it can be fairly inferred that the lessee acted under an implied consent.

JEF

Automobiles — Public Officers — Prohibition Officers — Federal prohibition officer is required to comply with law providing for registration of automobiles and carrying of license plates same as any other person; cannot operate automobile under license plate used on another car at another time.

March 31, 1933.

JOHN W. KELLEY,
District Attorney,
Rhinelander, Wisconsin.

You have submitted the following question:

"Is it a violation of law for employees of the federal government, and particularly federal prohibition agents, to operate an automobile on the public highways in the state of Wisconsin while using auto license plates on the automobile other than those issued for that particular car?"

You speak of employees of the federal government in a general way and you do not state whether the automobile

is owned by the federal government or by the officer using it.

In an official opinion in XX Op. Atty. Gen. 1152, to the secretary of state, it was held that automobiles owned and operated by a federal land bank are instrumentalities of the federal government not subject to license fees, which are in the nature of a tax. In XVIII Op. Atty. Gen. 169 it was held that automobiles of Spanish consular officers in the state of Wisconsin are exempt from taxation. In an early opinion dated August 19, 1919, found in VIII Op. Atty. Gen. 628, it was held that motor vehicles received from the federal government by the highway commission and used by state employees in services for the state are not required to be registered. The statute has been amended, however, since that time.

You will note that these authorities apply to automobiles owned by the federal government or state. When, however, an officer of the federal government, such as prohibition agent, uses his own automobile he is required to be licensed the same as any other person using the public highway and he cannot use license plates in any other manner than other persons in the state.

Under sec. 85.01, subsec. (8), par. (a), Stats., it is provided that the number plates issued for any calendar year shall be valid for use on the identical vehicle for which they were issued during said calendar year, notwithstanding the sale or sales of such vehicles. A person who has not the license plate issued for that particular automobile during that year cannot use said automobile under any other license plate.

JEF

Bridges and Highways — Damages — Condemnation — County is liable to lessee for damages for crops destroyed on land taken for highway purposes.

March 31, 1933.

MR. C. M. LAMAR,
District Attorney,
Baraboo, Wisconsin.

Your letter states as follows:

"A certain piece of farm land was owned by a man who had leased it to another person, who then had the crop in on the land. Sauk county obtained a release, a copy of which is herewith enclosed, from the owner of the land but had no arrangement whatsoever with the lessee. This land was obtained for highway purposes and in taking the land for that purpose some crops were destroyed. The lessee claims damage from the county."

You inquire whether the county is liable to the lessee for the damage done after having obtained the release of the land owner, or whether the land owner is liable to the lessee.

This question was passed on directly by our supreme court in *Putney Bros. Co. v. Milwaukee L. H. & T. Co.,* 134 Wis. 379, on p. 383, as follows:

"* * * But the fact that Mr. Frame [owner and lessor] released damages does not affect the plaintiff's [lessee's] right to recover." Citing 2 Lewis Em. Dom. (2d ed.), p. 1408, sec. 649, and the cases in note 83.

In 2 Lewis, on Eminent Domain, p. 1408, the law is stated as follows:

"* * * The lessee may have trespass for any injury to his possession, though settlement has been made with the lessor, who has given a license to enter. [Citing in note 83: *Baltimore & O. R. R. Co. v. Thompson,* 10 Md. 76; *Brown v. Powell,* 25 Pa. St. 229; *Penn. R. R. Co. v. Eby,* 107 Pa. St. 166; *Lafferty v. Schuylkill Riv. etc.,* 124 Pa. St. 297, Atl. Rep. 869; *Johnson v. Ontario R. R. Co.,* 11 U. C. Q. B. 246.]"

See also 3 ed. Lewis, on Eminent Domain, p. 1635, sec. 931 and note No. 51.

For a good discussion of what the measure of damages is in condemnation of leaseholds, see the very recent decision of the court in *Fiorini v. City of Kenosha,* (June 20, 1932) 243 N. W. 761.
JEF

Military Service—Soldiers' and Sailors' Relief—One who during war time was member of S. A. T. C. of university of Wisconsin is entitled to obtain aid from soldiers' and sailors' relief commission pursuant to provisions of secs. 45.10 to 45.19, Stats.

March 31, 1933.

SCOTT LOWRY,
District Attorney,
Waukesha, Wisconsin.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts:

"I would appreciate your forwarding an opinion as to whether or not one who during the war time was a member of the S. A. T. C. of the university of Wisconsin at Madison can obtain aid from the soldiers' and sailors' relief commission by reason of his membership in the S. A. T. C. as stated."

The answer to your question depends upon whether one who served in the S. A. T. C. during the war time is a soldier within the meaning of sec. 45.10, Stats.

Sec. 45.10 provides:

"It shall be the duty of every county board to annually levy, in addition to all other taxes, a tax sufficient to carry out the purposes of this section, such tax to be levied and collected as other county taxes for the purpose of providing relief to needy soldiers, sailors or marines, who performed military or naval service for the United States in time of war, the indigent wives, widows, minor and dependent children of such deceased soldiers, sailors and marines, and the indigent parents of such soldiers, sailors or marines, who have not left surviving them widows or children entitled to relief under the provisions of sections

45.10 to 45.19, inclusive. At the end of each fiscal year, any unexpended balance in such fund shall be used as a fund for the purpose of this section for the next ensuing year."

It appears that the units of the S. A. T. C. at the various educational institutions, including the university of Wisconsin, were established by Order No. 79 issued by the secretary of war. The members of the S. A. T. C. were inducted into the military service of the United States in the fall of 1918 and were discharged about two months later, after the armistice was signed on November 11, 1918. The members of the S. A. T. C. in the various educational institutions in the country were recognized as soldiers of the United States by the federal government and as such, received the federal cash bonus of sixty dollars. The members of the S. A. T. C. did not receive the cash bonus or the educational bonus provided by the state of Wisconsin under ch. 667, Laws 1919, because they did not serve the required length of time. Ch. 667, Laws 1919, provided that one must have served for three months in order to become eligible to either the cash or the educational bonus granted by the state of Wisconsin. However, it is very clear that the members of the S. A. T. C. were soldiers. Inasmuch as the term "soldiers," as used in sec. 45.10 is not defined, it must be considered to have been used in the common or ordinary sense. See *Wadhams Oil Co. v. State of Wisconsin,* (1932) ___ Wis. ___, 245 N. W. 646; (1933) ___ Wis. ___, 246 N. W. 686.

In view of the foregoing, we are constrained to hold that one who served during the war time as a member of the S. A. T. C. of the university of Wisconsin is entitled to obtain relief from the soldiers' and sailors' relief commission under the provisions of secs. 45.10 to 45.19.

JEF

Appropriations and Expenditures—Constitutional Law —Courts—Circuit Judges' Salaries—Legislative act requiring payment of salaries of additional circuit judges out of county treasury would be of doubtful validity.

March 31, 1933.

IRVING P. MEHIGAN, *Chairman,*
Interim Committee on the
Consolidation of the Courts of Milwaukee County,
Senate Chamber.

You state that the interim committee on the consolidation of the courts of Milwaukee county has before it a proposal to the effect "that the civil courts of Milwaukee county be abolished and an equal number of branches of the circuit court be created, the change to be made as the terms of the various civil court judges expire" and that the salaries of the new circuit judges be paid by Milwaukee county "as it now pays the salary of the civil court judges."

You inquire "whether it would be constitutional to provide that the salaries of additional circuit judges in Milwaukee county be paid by the county and not by the state."

You are advised that the proposed method of paying the salary of the new circuit judges would be of very doubtful validity.

The circuit courts are provided for by art. VII, sec. 5 of the state constitution. The election of circuit judges is provided for by art. VII, sec. 7. It is unnecessary that a circuit judge live in any particular county of the circuit in which he holds office, but merely in that circuit. The oath prescribed by law is to be taken by these judges, all vacancies are filled by the governor, and the judges may be removed by the legislature by impeachment. In certain cases the circuit courts have jurisdiction over the entire state of Wisconsin. The provisions of art. VII provide that the circuit judges shall "receive such compensation as the legislature shall prescribe," (sec. 7), which is "payable at such time as the legislature shall fix," (sec. 10). It seems very clear that a circuit judge is a state officer. See also *Milwaukee County v. Halsey,* 149 Wis. 82.

The constitutional provisions relating to circuit judges in-

dicate that the people, by the constitution, made a decided effort to divorce the circuit courts from any private or local influences and to establish a judiciary uncontaminated by prejudice or partisan favor.

The question of whether a judge's salary is to be paid by the state or the county generally depends upon whether he is a state or county officer. *Coburn v. Dodd,* 14 Ind. 347; *State v. Atherton,* 19 Nev. 332; *Shephard v. Commissioners of Wake,* 90 N. C. 115; *Shelby Co. v. Six Judges,* 3 Tenn. Cas. 508.

In the case of *Colbert v. Bond,* 75 S. W. 1061, 1064, the court held:

"* * * To hold that the payment of a salary of a judge is a county purpose would be to hold it a municipal purpose, for the General Assembly has the same power in relation to both classes of public corporations. To hold that a judge's salary is a county or municipal purpose would be to hold that the payments of all state officers and all three of the co-ordinate departments of the government are county and municipal purposes * * *"

In *Hayes v. Douglas Co.,* 92 Wis. 429, it was held that a county tax to pay the expense of placing stones from the county in the state building at the Columbian World's Fair was unauthorized, and in the case of *State ex rel. Board of Education of Haben,* 22 Wis. 660, it was held that money raised in a city by taxation for the purpose of erecting a high school could not be diverted by an act of the legislature without the consent of the city and its inhabitants for the purchase of a site for a normal school in the city. The latter holding was made on the theory that the legislature could not take money raised for a municipal purpose and apply it to a general state purpose.

In the case of *Lund v. Chippewa Co. et al.,* 93 Wis. 640, it was held that although a proposed state home for the feeble-minded was to be purely a state institution and the state could not by direct action compel the county in which it should be located to pay an additional amount or levy a special tax to establish and build it, yet it might give such county authority so to do. It was said, p. 648:

"* * * It is sought to bring the case within the condemnation of the constitutional provision quoted, on the

theory that the proposed home is to be a state institution; * * * that the state would have had no power, by direct action, to compel one or more counties of the state, less than the whole, to pay an additional amount for such establishment, building, and maintenance; and hence that the legislature could not, by delegating such authority to such municipalities, do indirectly what, under the constitution, it could not have done directly. It is certainly to be a state institution; to be governed, controlled, and managed by the state; and to be established, built, and maintained by the state. But it does not follow that the state could not authorize a municipality in which it should be located to do what the state itself could not do directly. * * *"

The court here at least strongly implies that a mandatory statute, leaving an additional burden upon the county to support a state institution, would be invalid by virtue of art. VIII, sec. 1 of the state constitution declaring that "the rule of taxation shall be uniform."

It is true that in the case of *Milwaukee County v. Halsey, supra,* the court sustained the validity of a law providing that Milwaukee county should be compelled to pay a portion of the salary of the judge of that circuit. The law was sustained seemingly upon the theory that a county with a population in excess of one hundred thousand had such a tremendous amount of litigation that it caused a great deal more trouble and expense than the litigation coming from other counties and that such fact justified the imposition of an additional tax upon that county. It would seem that where the legislature seeks to impose *all* of the salary as a burden upon one county the reason for this rule would fail. At most, the opinion held that the legislature could require Milwaukee county to pay a *portion* of the salary of a circuit judge. Justice Barnes, dissenting strongly from the majority opinion in that case, used the following language, p. 95:

"* * * When all is said in the opinion that can be said in support of the acts that are challenged, we have the bare, bald question of the right of the legislature to single out a single county or a single circuit and arbitrarily compel it to pay a part of the salary of a state officer, when no other county or circuit in the state is required so to do. If this can be done I see no good reason why Dane county could not be obliged to pay the whole or a part of the salary

of the governor or of the other state officers mentioned, or why any single senatorial district might not be called upon to pay the salary of the senator who represented it. Under the law which has been upheld the *County of Milwaukee* is compelled to levy $6,000 a year to assist in paying the salaries of state officers, while no other county or circuit in the state is mulcted with any such charge. This is not my idea of uniformity of taxation. * * *"

Secs. 252.07, subsecs. (4) and (5) and 252.07 (1) authorize a county to pay a portion of the salaries of certain circuit judges. But, as stated by Justice Barnes in his dissent, p. 96:

"* * * there is a wide difference between saying to a county, you may make a donation for the benefit of the general public if you see fit, and saying you *must* do so. * * *" (Italics ours.)

It is our opinion, therefore, that if the question which you raise were squarely presented to the court there would be great likelihood that the court would hold that the proposal to make Milwaukee county pay the entire salary of certain circuit judges would be offensive to constitutional provisions.

JEF

Municipal Corporations — Public Utilities — Water and Light Plant—Water and light commission, rather than city council, should fix compensation of manager of water and light plant and employees of commission.

March 31, 1933.

PUBLIC SERVICE COMMISSION.
Attention Wm. M. Dinneen, *Secretary*.

The city of Clintonville, Wisconsin, under date of April 16, 1931, passed an ordinance providing for the management of the water and electric light plant, a public utility owned by the city of Clintonville, by a nonpartisan board of five commissioners, pursuant to the provisions of sec. 66.06 (10), Stats. Under date of February 7, 1933, the common

council of that city passed an ordinance fixing the salaries of the superintendent of the water and light plant and the employees of the water and light commission without consulting the members of that commission and contrary to the wishes of said commission. It does not appear that any action was taken by the city of Clintonville under the home rule provisions or under sec. 62.09 (3). You inquire whether the city council had the right to fix these salaries or whether such right is vested in the water and light commission.

It is our opinion that the right of fixing these salaries rests with the water and light commission, not with the city council.

Sec. 66.06, subsec. (10), pars. (a) and (c), Stats., provide:

"In towns, villages and cities owning a public utility, the board or council shall provide for a nonpartisan management thereof, and shall create for each or all such utilities, a board of three or five or seven commissioners, to take entire charge and management of such utility, to appoint a manager and fix his compensation, and to supervise the operation of the utility under the general control and supervision of the board or council."

"The commissioners shall choose from among their number a president and a secretary. They may command the services of the city engineer and may employ and fix the compensation of such subordinates as shall be necessary. They may make rules for their own proceedings and for the government of their department. They shall keep books of account, in the manner and form prescribed by the railroad commission, which shall be open to the public."

The above quoted paragraphs specifically authorize the water and light commission to fix the compensation of the manager, as well as the compensation of such subordinates as shall be necessary. It is our opinion that sec. 66.06 (10) (a) and (c) are special statutes relating to the manager and employees of the water and light commission and supersedes any other statute which might allow the common council to fix the salaries of these persons.

JEF

Loans from Trust Funds—Public Officers—Town Treasurer—School Districts—Town treasurer must pay state special charges for loans to some of school districts located in town before paying sum due other school districts which have obtained no loan.

April 1, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

In your letter of March 8 you request an opinion upon the question of payment of tax moneys, to wit, whether the town treasurer of a town comprising several school districts, some of which have obtained state loans for the purpose of erecting school houses, must first pay the state special charges for such loans out of tax money collected from all the school districts, or whether he must first pay the amount due to the school districts which have obtained no loans.

The funds from which such loans are made are the various school funds contemplated by art. X of the Wisconsin constitution and objects of special care by the state.

Sec. 25.04, Stats., providing;

"The annual interest and instalments of principal of all loans from the trust funds shall be payable into the state treasury with other state taxes,"

would be sufficient, in conjunction with sec. 74.15, which requires the town treasurer to pay out of the taxes collected the full amount of the state tax to make clear the legislative intent that these loans must be paid first.

This intent is made manifest in other sections of ch. 25, relating to the loan of school funds. Thus sec. 25.07 makes the loan "a special charge to be paid next after the state tax out of any moneys collected as taxes within" any municipality which has obtained a loan from the state. Sec. 25.08 (which provides the manner of collecting the principal and interest of loans made to school districts other than joint as declared in sec. 25.09 (1)) provides that the principal and interest of state loans: "shall be levied, charged and inserted in the several tax rolls and collected

and paid over with and in the same manner as the state tax until paid into the treasury; and in case of neglect or refusal to pay any sum or sums when due, the same shall be subject to all the provisions of law applicable to cases of default in payment of state taxes."

Throughout the statutes, in such chapters as deal with the assessment and collection of taxes, may be found sections which further strengthen the legislative purpose to require prior payment of state loans, e. g., secs. 70.60 and 70.63, regulating the apportionment of state and county taxes, provide that "special charges" be collected with state taxes.

The result of the above statutory provision is that the town treasurer is required by law to pay the state special charges for loans on the tax money collected prior to paying the school district taxes which have been raised in the various districts.

JEF

Bridges and Highways—Drawbridges—Responsibility for operating movable span bridge located on state trunk highway system and constructed under sec. 1317*m*—5, subsec. 1, par. (a), Stats. 1921, belongs to state.

April 1, 1933.

M. W. TORKELSON, *Director of Regional Planning, Highway Commission.*

You have requested an opinion upon the specific problem of responsibility for the operating costs of the Fremont bridge.

From the statement of facts as given in your letter of March 7, it appears that the said bridge is located on a state trunk highway in the village of Fremont, Waupaca county. The bridge is constructed with a movable span to permit navigation. The cost of operating this span has been heretofore borne by Waupaca county.

The Fremont bridge was built in 1921 under the provisions of subsec. 1 (a) sec. 1317*m*—5 of the Wisconsin statutes.

This subsection was created by ch. 556 of the laws of 1917 to become a part of sec. 1317*m*—5, which contemplated the providing of state aid and supervision for the improvement of public highways.

Sec. 1317*m*—5, 1 (a), Stats. 1921, reads:

"The county boards are given authority to construct or improve, or aid in constructing or improving any road or bridge within the county. In case the county board shall determine that any portion of the county system of prospective state highways shall be constructed by the county, upon county initiative, the county shall, subject to the provisions of subsection 1*a* of this section, contribute not less than sixty per cent and the state not more than forty per cent of the cost thereof * * *."

The county assumed the responsibility of operating this bridge as required by sec. 1317 1. (a) of the statutes which provided:

"On and after May 1, 1918, each county shall adequately maintain the whole of the trunk system lying within the county in accordance with the directions, specifications, and regulations made for such maintenance by the commission. * * *"

In 1918 (VII Op. Atty. Gen. 231) this department rendered an opinion which held that such section obligated the county to operate a drawbridge which was part of the highway system within the county.

The control and the burden of maintaining the state trunk highway system has been recently assumed by the state (ch. 22, Laws 1931). Sec. 84.07 (1), Stats., provides:

"The state trunk highway system shall be maintained by the state and all the expense of such maintenance shall be borne by the state. The state highway commission shall prescribe regulations and specifications for such maintenance. The commission may arrange with the county highway committee of any county to have the state trunk highways within such county maintained by the county forces. Such maintenance shall include such measures as shall be deemed necessary to keep the state trunk highways open for travel at all seasons, including the removal of snow from the highways and the prevention of snow drifts upon the highways."

Sec. 87.05 (1), Stats., relieves the state of responsibility for the operation of certain bridges:

"The operation of any bridge constructed, reconstructed, or purchased under the provisions of section 87.02, shall be under the management of the governing bodies of the respective municipalities in which it is located and such municipalities shall assume all operating costs including the cost of lighting. Any matters relating to the operation of such bridges upon which the said governing bodies cannot agree shall be determined by the state highway commission."

The bridges included within the scope of said subsection are further specified in sec. 87.06 (4):

"All bridges which have been or shall be constructed, reconstructed or purchased pursuant to proceedings initiated by petitions heretofore filed with the state highway commission, or by the commission on its own motion, under the provisions of sections 87.02, 87.03, 87.04, 87.05, or 87.055 of pre-existing statutes, shall be construed to have been constructed, reconstructed, or purchased under the provisions of section 87.02 or 87.03, and shall be operated and maintained as provided by section 87.05, and all proceedings, findings and determinations and all contracts for bridge projects now being or to be constructed, reconstructed or purchased with funds now available, are declared to be valid and in full force and effect."

To free the state of responsibility for the operation of a bridge located on the trunk highway system, the bridge must have been built under sec. 87.02 of the present statutes or under secs. 87.02 to 87.055, inclusive, of previous statutes.

The history of sec. 1317*m*—5 1. (a), shows that it has no connection with any of the sections enumerated in sec. 87.06 (4) of the 1931 statutes.

Ch. 108, 1923, renumbered and revised the provisions of sec. 1317*m*—5, and by sec. 134, ch. 108, subsec. 1 (a) of 1317*m*—5, became sec. 83.03, Stats. 1923.

The original purpose of the section under which the Fremont bridge was constructed was apparently to empower counties to construct bridges and to grant them state aid for the construction of such bridges as were a part of the prospective state highway system. But a remnant of this provision now stands on the statute book. Sec. 83.03 (6),

still vests in the county board the authority to construct bridges.

The statutory provisions, on the other hand, referred to in subsec. (4), sec. 87.06, were statutes providing for the construction, improvement, etc. of bridges by municipalities under the supervision of the state highway commission. Such provisions were "a part of the general policy to establish an efficient state highway system." (*State ex rel. Owen v. Stevenson,* 164 Wis. 569, 573, 161 N. W. 1 (1917).)

The divergent histories of sec. 1317*m*—5, 1 (a) and of secs. 87.02 to 87.055, show that a bridge constructed under the provisions of the former section is not intended to be included within the exception expressed in sec. 87.05 (1) of the present statutes.

This department has formerly ruled that statutes which attach the obligation to maintain a highway carry with them the obligation to operate a drawbridge, located thereon. VI Op. Atty. Gen. 293 (1917); VII Op. Atty. Gen. 231 (1918). The present statutes bear out this interpretation by making an exception as to the operating cost of certain bridges located on the state trunk highway system.

As the Fremont bridge is not included within the scope of sec. 87.05 (1), the responsibility for the operation thereof has been assumed by the state.

JEF

Elections—Tuberculosis Sanatoriums—Patients at Wisconsin state sanatorium at Wales (who come from places outside of town in which sanatorium is located) are not entitled to vote in town in which sanatorium is located, but they are entitled to vote at their home residence in town, village or ward from which they came to sanatorium.

April 3, 1933.

BOARD OF CONTROL.

Attention A. W. Bayley, *Secretary.*

You state that certain of the patients at the Wisconsin state sanatorium, Wales, Waukesha county, who reside in counties other than Waukesha county but who have been at

the sanatorium for some length of time have expressed a desire to vote in the town in which the sanatorium is located, and you ask whether they are entitled to do so.

The answer is, No, for the reason that such patients do not acquire a voting residence in the town while they are at the sanatorium merely in the capacity of patients. They will be entitled to vote at their home residence in the town, village or ward from which they came to the sanatorium.

Among the tests laid down in sec. 6.51, Stats., for determining residence for voting purposes are the following, the number appearing in parentheses being the number of the particular subsection in which the test is found: (2) That place shall be considered the residence of a person in which his habitation is fixed, without any present intention of removing therefrom, and to which, whenever he is absent, he has the intention of returning; (3) A person shall not be considered to have lost his residence who shall leave his home and go into another county, town or ward for temporary purposes merely, with an intention of returning; (4) A person shall not be considered to have gained a residence in any town, ward or village into which he shall have come for temporary purposes merely; (9) Mere removal without intention to acquire a new residence shall avail nothing.

It is apparent from the foregoing tests that in order to work a change of residence for voting purposes there must be both in fact and intention an abandonment of the former residence and a new domicile acquired by actual residence, coupled with an intention to make it a permanent home; and that the mere act of abiding in a place for a specific or temporary purpose, with no present intention of making it a permanent home, does not constitute such a residence as entitles one to vote. *State ex rel. Hallam v. Lally*, 134 Wis. 253, 257–258; *State ex rel. Small v. Bosacki*, 154 Wis. 475, 477–478; *Seibold v. Wahl*, 164 Wis. 82, 85–86; *State ex rel. Catlin v. Galligan*, 167 Wis. 487.

While intention is largely a question of fact in each individual case, yet it may be safely asserted with regard to the vast majority of patients at the Wisconsin state sanatorium: That, although they actually live at the sanatorium during the course of receiving treatment, nevertheless, they do not

come to the sanatorium with the intention of abandoning their prior residence nor with the intention of making the sanatorium or the town in which it is located their permanent home; that they come to the sanatorium for a specific and temporary purpose, namely, to receive treatment; that they intend, when such purpose is consummated, to leave the sanatorium, and presumably, to return to the home residence from which they came.

JEF

Education—Normal Schools—Board of regents of normal schools has no authority to exempt students who are being supported by state through rehabilitation department from payment of incidental fees in state teachers colleges.

April 3, 1933.

EDGAR G. DOUDNA, *Secretary,*
Board of Regents of Normal Schools.

You state that at the meeting of the board of regents of normal schools held on February 16, a request was received from the rehabilitation department that students who are being supported by the state through the rehabilitation department be exempt from paying incidental fees in the state teachers colleges. Pursuant to such request the board of regents of normal schools passed a resolution with the proviso that an opinion of the attorney general be secured as to its legality.

It is the opinion of this department that the board of regents of normal schools has no power to exempt students attending the state teachers colleges from paying the incidental fees in cases where such students are supported by the state through the rehabilitation department.

It is well settled that the board of regents of normal schools has only such powers as may be found within the four corners of the instrument creating such board. See *Chicago, Milwaukee & St. Paul R. Co. v. Railroad Comm.*, 157 Wis. 287, 146 N. W. 1129. *State ex rel. Priest v. Regents*, 54 Wis. 159, 11 N. W. 472.

Under the powers conferred upon the board by the provi-

sions of sec. 37.11, Stats., the board has authority to impose an incidental fee charge upon students covering special costs, such as laboratory fees, book rentals, fees for special departments, and the like. It is manifest, however, that the board has no authority to exempt certain classes of students from the payment of such fees. All students must be treated alike and the board has no authority to discriminate in favor of or against certain classes of students.

The law does not favor exemptions. As an illustrative case we invite your attention to *State v. Whitcom,* (1904) 122 Wis. 110, 99 N. W. 468, where the supreme court pointed out, *inter alia,* that an exemption in favor of partially disabled veterans of the Civil War in the old peddlers' license law was a discrimination which was not based upon any legitimate classification germane to the purpose of the law and, therefore, denied to persons not so exempted the equal protection of the laws.

We fail to see that the board has any authority to make the exemptions proposed in the resolution passed by the board.

You are, therefore, advised that the board of regents of normal schools has no authority to exempt students attending state teachers colleges from paying incidental fees where such students are being supported by the state through the rehabilitation department.

Oil Inspection—Tractor distillate is subject to inspection under ch. 168, Stats., as "power distillate."

April 4, 1933.

J. U. LUETSCHER, *State Supervisor,*
State Oil Inspectors.

You make the following quotation and ask for our opinion thereon:

"We are manufacturing a tractor distillate which has a minimum flash of 95. Inasmuch as this material is unfit for illuminating purposes and is for use in tractors only, we are wondering if you would have any objection to our

shipping this into the state of Wisconsin, and what the requirements would be. We would like to have your ruling on this before soliciting business in Wisconsin."

You are advised that the product is subject to inspection as a "power distillate" under the following statutes:

Sec. 168.05 (1): "All mineral or petroleum oil, or any oil or fluid substance which is the product of petroleum, or into which any product of petroleum enters or is found as a constituent element, whether manufactured within this state or not, shall be inspected as provided in sections 168.03 to 168.14, inclusive, before being offered for sale or sold for consumption or used for illuminating or heating purposes within this state. For the purposes of sections 168.03 to 168.14, inclusive, all gasoline, benzine, naphtha, or other like products of petroleum under whatever name called, used for illuminating, heating, or power purposes, shall be deemed to be subject to the same inspection and control as provided for in sections 168.03 to 168.14, inclusive, for illuminating oils, except that the inspectors are not required to test it other than to ascertain its gravity, and it shall be unlawful for any person, dealer or vendor to sell or offer for sale any such petroleum products for any of such purposes, that has not been so inspected and approved. * * *"

Sec. 168.13: "Nothing contained in this chapter shall be construed to prevent manufacturers, refiners or dealers in this state from keeping in their warehouses or tanks for transshipment to other states illuminating oil of a grade below the test prescribed; nor shall this chapter be construed to apply to crude petroleum, gas oil or fuel oil; but the terms gas oil and fuel oil shall not be construed to include kerosene, gasoline, benzine, naphtha, *power distillate,* motor spirits or any other like products of petroleum by whatever name called. It is the true intent and meaning of this chapter that the terms oils, illuminating oils, oils used for illuminating and heating purposes and all similar words, terms and expressions shall be held to mean any mineral or petroleum oil or any fluid or substance which is the product of such oil or of petroleum, or in which oil or fluid or other substance so obtained, mineral or petroleum shall be a constituent part of whatsoever name or title such oil, fluid or other substance may be known or called."

JEF

Taxation—Special Assessments—Real property owned by county, located in city, is subject to special assessments for local improvements by city.

April 4, 1933.

JOHN P. MCEVOY,
Assistant District Attorney,
Kenosha, Wisconsin.

You submit the following statement of facts: Kenosha county courthouse and the county jail building occupy one square block in the city of Kenosha, bounded on the east by Sheridan Road. Several years ago the city of Kenosha widened Sheridan Road, the project covering the block running past the county building on the east. The city levied an assessment of two thousand four hundred dollars against the county as benefits accrued by such widening. This money was not paid directly by the county but was deducted by the city treasurer from the amount of tax money which he turned over to the county treasurer on March 22 following said assessment.

The question which you present is whether said property of the county could lawfully be subjected to a special assessment of the foregoing character.

The question is answered, Yes, by the express provisions of sec. 75.65, Stats., which has existed since 1903.

That section provides in part:

"The property of every *county,* city, village, town, and school district within this state, * * * shall be in all respects subject to all special assessments for local improvements and certificates and improvement bonds therefor may be issued and the lien thereof enforced against such property in the same manner and to the same extent as the property of individuals. * * *."

It will be noted, further, that sec. 75.66, Stats., expressly provides for the enforcement and collection of such special assessments against the county.

JEF

Courts—Magistrates' Dockets—Public Officers—Justice of the peace is not entitled to fees or mileage for delivering docket to county auditing committee or official.

April 5, 1933.

HAROLD M. DAKIN,
District Attorney,
Watertown, Wisconsin.

You inquire what fees and mileage justices of the peace are entitled to for appearing with their dockets before the county auditing committee or auditor or clerk, as the case may be, in accordance with sec. 59.82, Stats.

Sec. 59.82, Stats., makes it the duty of the magistrates mentioned therein to appear with their dockets at such time and place as may be designated for the purpose of audits or examinations as prescribed therein. It is made the duty of the county board at their annual meeting to compare such audits with the reports previously made by the magistrates directly to the county treasurer. One of the purposes of the audit, if indeed it is not *the* purpose, is to enable the county board to annually determine whether all fines collected by such magistrates have been turned over to the county treasurer as required by law. No fee or compensation is authorized by this section for the delivery of the docket to the auditing committee.

Sec. 360.34, Stats., which authorizes the magistrates concerned to impose and receive fines, makes no provision for compensation for this delivery.

Ch. 35, Laws 1929, amended sec. 59.82, Stats. Previous to the time this section was amended, it was made the duty of each member of the county board to personally "inspect the docket of every justice of the peace, police justice, municipal judge or other magistrate who" was authorized to receive fines, under sec. 360.34 and to ascertain from such inspection the amount of the fines received by each such magistrate during the preceding year, ending October 31, and to "make a separate written report for each such magistrate"; such report to be verified, and to "embrace the title of each case in which any such fine was received, the

date of conviction and the total amount of fines received during the period covered by such report."

Before the amendment, there was no occasion for the justice of the peace to expect either a fee or mileage, for each member of the county board inspected the dockets of the magistrate in his ward or town, and there was no requirement that the magistrate do anything or deliver the docket any place. The amendment relieved the individual members of the county board of the burden of these examinations and provided instead for an examination by one person or committee. In order to accomplish this with the least inconvenience to the examining committee, the amendment provided that the justice take his docket to the examiner.

If the legislature had intended by the amendment that the justice of the peace was to receive a fee or mileage allowance for so delivering the docket, such intention would be found in this section of the statutes.

In the absence of any statutory provision, it must follow that such justices of the peace are not entitled to fees or mileage when complying with the provisions of sec. 59.82.

The provision for mileage in sec. 307.01 has not been overlooked; it is felt the delivery of the docket is not such a service as is contemplated by sec. 307.01.

JEF

Taxation—Exemption from Taxation—Real property, not exceeding ten acres, of fraternal association operating under lodge system and used exclusively for purpose of such association, is exempt from property taxation.

Whether organization is operating under lodge system is question of fact.

Organization claiming exemption should furnish definite proof that it is operating as fraternal association under lodge system.

April 5, 1933.

N. H. RODEN,
District Attorney,
Port Washington, Wisconsin.

You state that the Modern Woodmen of America, a fraternal insurance organization, owns real property which comprises one and one-half acres and also a building thereon.

You submit the question as to whether such real property is exempt from property taxation.

Subsec. (4), sec. 70.11, Stats., exempts from taxation personal property owned by "fraternal societies, orders or associations *operating under the lodge system,*" which is used exclusively for the purposes of such association "and the *real property* necessary for the location and convenience of the buildings of such institution or association and embracing the same, not exceeding ten acres; provided, such real or personal property is not leased or otherwise used for pecuniary profit."

Subsec. (4a) of the same section gives a partial exemption where such real property owned by fraternal societies, orders or associations operating under the lodge system is used in part for exempt purposes and in part for pecuniary profit.

Whether the above described real property of the organization in question is entitled to either total or partial exemption from taxation under the above mentioned statutory provisions is seen to depend upon whether the organization is a fraternal association operating under the lodge system. That presents primarily a question of fact which the attorney general is not called upon to decide. In *Trustees Ona-*

laska Camp v. Onalaska M. W. H. Asso., (1923) 179 Wis. 486, 491, it was indicated that, while the dominant purpose of the Modern Woodmen of America is to furnish insurance to its members, the lodge system is part of its plan. Whether the organization is at present operating under the lodge system does not appear from your request, and it is not incumbent upon the attorney general to investigate the fact. If the organization claims exemption it should be required to furnish definite proof that it is operating as a fraternal association under the lodge system. See XXI Op. Atty. Gen. 1026.
JEF

Criminal Law—Felony—Elections—Suffrage—Elector convicted of offense of indecent assault does not forfeit right to vote.

April 5, 1933.

CLIVE J. STRANG,
District Attorney,
Grantsburg, Wisconsin.

You state that a certain person was convicted and served a sentence under sec. 351.41, Stats., for committing the offense of indecently assaulting and taking improper liberties with a minor. The punishment prescribed for this offense is imprisonment in the county jail not less than thirty days nor more than six months, or imprisonment in the state prison not exceeding two years.

The question which you submit is whether such person has forfeited his right to vote.

The question is answered, No.

Art. III, sec. 2, Wis. Const., provides, in part:

"* * *; nor shall any person convicted of * * * *felony* be qualified to vote at any election unless restored to civil rights."

As the offense in question is punishable by imprisonment in state prison it is a felony as defined by our statutes, sec. 358.31, but that does not settle the question as to whether

the offense is a felony within the meaning of such term as used in the *constitutional* provision above quoted.

The attorney general has previously ruled that the term "felony" as used in the constitutional provision is limited to such offenses as were felonies at the time the constitution was adopted. XIII Op. Atty. Gen. 141. That ruling is adhered to.

The offense in question was not a specific offense nor a felony by statute in this state until 1897. Ch. 198, Laws 1897.

The question then remains as to whether such offense was a felony at common law. This question is resolved in the negative. At common law the offense in question was not a specific offense, but came under the classification of assault. 5 C. J. 732. At common law an assault was considered a misdemeanor rather than a felony. In 5 C. J. 716 it is stated:

"At common law an assault or an aggravated assault is ordinarily held to constitute merely a misdemeanor."

JEF

Appropriations and Expenditures—School Districts—State Aid—There is no authority to make apportionment of state aid to high school for teachers' training course, which apportionment should have been made in 1931 but was not made due to absence of report by proper school officer.

April 10, 1933.

JOHN CALLAHAN, *State Superintendent, Department of Public Instruction.*

You ask whether you may at this time apportion state aid to a high school for a teachers' training course, which aid should have been apportioned in 1931 but was omitted because the necessary report was not submitted by the proper school official.

State aid to high schools is provided for in sec. 20.27, Stats., which reads in part as follows:

"There is appropriated from the general fund, payable upon certification of the state superintendent:
"* * *

"(4) Annually, on July 1, for state aid to free high schools or public schools whose course of study is equivalent to that of a free high school, for a teachers' training course maintained, pursuant to section 40.45, for a period of not less than nine months during the school year in a manner satisfactory to the state superintendent, an amount equal to the sum expended for the wages of the fully approved and qualified teachers employed in such teachers' training course, not to exceed an aggregate total to all high schools of twenty-five thousand dollars."

Sec. 20.27, Stats., as it now reads, was enacted by ch. 67, Laws 1931, and especially sec. 54 thereof, which reads in part as follows:

"Section 20.27 of the statutes is consolidated with section 20.29 and revised to read; * * *"

Sec. 57, ch. 67 consolidated sec. 20.29 with sec. 20.27 as referred to in sec. 54.

Previous to the consolidation, sec. 20.27, Stats., dealt with state aid to high schools, and sec. 20.29 dealt, among other things, with state aid for special training courses in high schools. Previous to the consolidation, sec. 20.27, contained subsec. (3), par. (f), which made provision for granting state aid after the regular apportionment was made, where such aid was omitted owing to failure to make the necessary report.

Sec. 20.29 contained no such provision for a later apportionment for aid to high schools for special training courses. In the consolidation of these sections, effected by ch. 67, Laws 1931, subsec. (3), par. (f) of former sec. 20.27 was dropped.

Subsec. (2), sec. 40.39, Stats., provides that state aid to high schools shall be granted under certain circumstances after the regular apportionment is made, but such state aid after the regular apportionment is made, by reason of an omitted report, is restricted to the state aid with which this section deals, and it does not deal with state aid to high schools for teachers' training courses.

Sec. 40.87 (7) provides that common school equalization aid shall be granted under certain circumstances at any time

within two years, notwithstanding certain reports were not made as required, but such state aid by reason of a corrected or an omitted report is restricted to the aid granted by sec. 40.87.

The legislature through ch. 67, Laws 1931, in enacting sec. 20.27, having dropped the provision formerly found in one of the two sections consolidated, which provision authorized an apportionment where such apportionment was omitted due to the failure of proper officers to make reports, and having enacted in the same chapter similar provisions found in secs. 40.39 and 40.87, but not having made them applicable to state aid of the type under consideration, there is no authorization after the regular apportionment is made for apportioning state aid for teachers' training courses which would have been apportioned in 1931 but for the omission related in your letter.

JEF

Counties—County Board Resolutions—Municipal Borrowing—Resolution of county board attempting to borrow money temporarily is invalid where it is attempted to delegate to county treasurer power of determining time and amount of loan.

April 11, 1933.

CHAS. M. PORS,
District Attorney,
Marshfield, Wisconsin.

You submit the following copy of a resolution passed at an adjourned meeting of the county board March 7, 1933. You ask our opinion on whether "this method of borrowing under section 67.12 (7), or any other statute is legal."

"WHEREAS, the funds of the county are decreasing rapidly, and

"WHEREAS, the delinquent tax to be returned will be in excess of the county's share of said taxes, and

"WHEREAS, it is now necessary for the county to temporarily borrow money to pay the current expenses of the county, such as salaries, highway maintenance, care of

county charges and prisoners, expenses of maintaining the courts and other necessary and current expenses.

"NOW THEREFORE, BE IT RESOLVED, by the county board of supervisors of Wood county in legal meeting assembled that the county of Wood, borrow the sum of not more than sixty thousand dollars, from individuals, corporations, banks, or partnerships, upon county orders to be issued and signed by the county clerk, county treasurer, and chairman of the county board and that said officers be authorized to sign such order in such amount and at such times as is necessary in the opinion of the county treasurer. The total to amount to not more than sixty thousand dollars, said orders to be due on or before April 15th, 1934, and to bear interest at the rate of not to exceed 6% per annum from the date of issuance to the date of payment."

You are advised that the resolution is invalid, and does not furnish any authority for borrowing of money thereunder.

The county may borrow money temporarily under the provisions of sec. 67.12, subsecs. (1) to (4), Stats., as amended by ch. 9, Laws of the Special Session 1931, or under subsec. (7), or under subsec. (9) as created by ch. 45, Laws 1933. The requirements of each method are different. Any resolution purporting to authorize the borrowing of money temporarily should state the statutory authority for such resolution, and then follow the requirements of that statute.

From the language of the resolution it was fairly to be inferred that it was passed in an attempt to borrow money under sec. 67.12 (7). It does not appear whether the resolution was passed by a yea and nay vote of at least two-thirds of the members, or whether the sum stated in the resolution is "a sum not exceeding fifty per cent of the last tax levy for county purposes."

The resolution, however, is clearly invalid under authority of XIX Op. Atty. Gen. 124 and XVIII Op. Atty. Gen. 287, for the reason that it attempts to delegate to the county treasurer the power of determining the time and amount of the loan.

The issuance of interest-bearing county orders is valid under XIX Op. Atty. Gen. 591. The resolution which you submitted indicates that the orders were to be due on April 15, 1934. This is a later date for repayment than is

allowed under sec. 67.12 (7) (b), Stats. which is applicable to your county, and provides that the sum borrowed is to be repaid "on or before the *first day* of April following the next tax levy."
JEF

Counties—Real Estate—Mediation Board—Sec. 281.23, subsec. (1), Stats., created by ch. 15, Laws 1933, rather than sec. 59.06, Stats. 1931, governs compensation to be paid mediation board.

Members of mediation board are not limited to ten days in which they may act and for which they may be compensated.

April 13, 1933.

EDWARD S. EICK,
District Attorney,
Chilton, Wisconsin.

You call our attention to ch. 15, Laws 1933, wherein the county board is authorized to create a mediation board for the purpose of arbitrating mortgage problems. You also call our attention to sec. 59.06, Stats., and inquire our opinion as to the correctness of your conclusion that under this latter section the members of the mediation board are limited to ten days in which they can act in their official capacity as a mediation board and be compensated.

It is our opinion that your conclusion in this matter is incorrect.

Sec. 281.23, Stats., created in sec. 1, ch. 15, Laws 1933, provides in part:

"* * * The county board shall determine what compensation, if any, the members of said board shall receive for their services upon such board, such compensation, if any, to be paid by the county in the same manner that other employes of the county are paid. * * *."

In this special statute relating to mediation boards the county board may provide for compensating the members of the mediation board for each day that said board works, whether in excess of ten days or not.

It is our opinion that sec. 59.06, Stats., is not controlling in respect to the compensation of the mediation board. Sec. 59.06 contemplates a committee composed entirely of members of the county board appointed by the chairman before the first day of November by a resolution designating the purposes and duties of the committee. The local mediation board, if it can be said to be a committee at all, is not necessarily composed entirely of members of the county board. The mediation board is appointed by a majority of the county board, not by the chairman. The duties of that board are specifically provided for by ch. 15.

The members of the mediation board, therefore, are not limited to ten days in which they can act and for which they can be compensated.

JEF

Courts—Clerk of Circuit Court—Naturalization Proceedings—Clerk of circuit court need not turn into county treasury fees received by him from naturalization proceedings.

April 13, 1933.

JOHN W. KELLEY,
District Attorney,
Rhinelander, Wisconsin.

It appears that an audit is now being made in the office of the clerk of the circuit court for your county. The auditor has asked you to advise him whether the fees paid to the clerk of the circuit court in naturalization proceedings belong to the clerk or whether they belong to the county.

Also your attention has been called to sec. 59.42, Stats. and to ch. 361, Laws 1913, and to the case of *Barron County v. Beckwith,* 142 Wis. 519.

I assume that the clerk of the court in your county is compensated upon a salary basis.

It is the opinion of this department that the fees paid to the clerk of the circuit court in naturalization proceedings belong to the clerk rather than to the county.

The case of *Barron County v. Beckwith,* 142 Wis. 519,

held that the act of congress authorizing and permitting the clerks to retain one-half of the fees collected in naturalization proceedings referred merely to the adjustment between such clerks and the bureau of immigration, and did not permit clerks on a salary basis to hold such fees as against the county.

The holding of that case was based upon the language of sec. 747*a*, Stats., Supp. 1906, passed by ch. 411, Laws 1901. That section provided that the county board might by resolution change the method of compensating the clerk of the circuit court from a fee to a salary basis. The section concluded with the following language:

"* * * And the salaries of the clerk of the circuit court, his deputies and clerks, so paid, shall be in lieu of all fees, per diem, and compensation for services rendered by them."

The language of this section quite obviously did not make any exception with respect to fees which might be retained by the clerk of the court. Ch. 361, Laws 1913, added to the section just quoted the following language: "* * * except such work as is done by them under the supervision and direction of the government of the United States, or by the special permit of the congress of the United States."

By ch. 242, Laws 1915, sec. 747*a* as it appeared in the statutes of 1913, was repealed, and sec. 694 of the statutes was amended to read substantially the same as sec. 59.15, Stats. 1931.

Sec. 59.15, subsec. (1), and par. (d), Stats. 1931, provide as follows:

"(1) The county board at its annual meeting shall fix the annual salary for each county officer, including county judge, to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer's term, and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions:

"(a) * * *

"(b) * * *

"(c) * * *

"(d) Compensation received by the clerk of the circuit court for work done for the United States government or for congress."

The language of this section makes a very definite exception to the rule that the salary fixed by the county board for the clerk of the circuit court shall be "in lieu of all fees, per diem and compensation for services rendered."

Title 8 U. S. Code, relating to aliens and citizenship, imposes definite duties upon the clerks of the circuit courts with respect to naturalization proceedings. Sec. 402 of that Title relates to the amount of the fees which the clerk of the court shall collect and the disposition to be made of them. It provides in part,

"Except as hereinafter mentioned in this section, the clerk of any court collecting such fees is authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are required to render the Bureau of Naturalization, and paid over to such bureau within thirty days from the close of each and every fiscal year, * * *."

The portion of the federal act relating to the disposition of fees received by the clerk of the circuit court in naturalization proceedings is substantially the same now as at the time the *Barron County* case, *supra,* was decided.

It is our opinion that service performed by the clerk of the circuit court in naturalization proceedings is "work done for the United States government or for congress."

The only purpose which the legislature could have had in making the exception provided for in sec. 59.15 (1) (d), Stats., would be to allow the clerk of the circuit court to personally retain his half of the fees which he charges in naturalization proceedings. It is not necessary, therefore, that he turn these fees into the county treasury.

JEF

Indigent, Insane, etc.—Poor Relief—Municipal Corporations—Common Council Resolutions—Resolution of common council providing that sums furnished for poor relief shall be entered upon tax roll as special charges against recipient of relief is invalid.

April 13, 1933.

MISS FLORENCE PETERSON, *Supervisor of Unemployment Relief,*
Industrial Commission.

You submit a copy of a resolution passed by the common council of the city of Horicon, which provides as follows:

"1. That the city clerk be and he is hereby authorized and directed to enter all charges of the city of Horicon against any person or persons who may owe the city of Horicon for any relief received by such person or persons, in the tax roll as of November 1st, each year, where any such person or persons has or have either real or personal property within the said city of Horicon, subject to the levy of taxes, except as hereinafter provided.

"2. That no such charge shall be entered where the person has deposited and left with the city clerk any approved security for such amount as may be owing.

"3. That any quit-claim deed on deposit with the city of Horicon as security for money owing may be withdrawn whenever the person depositing the same makes demand therefor.

"4. That this resolution shall take effect and be in force from and after its passage and publication."

You ask our opinion as to its validity.

You are advised that the portion relating to the giving of security in return for poor relief is invalid, under the opinion rendered you on June 8, 1932, XXI Op. Atty. Gen. 596. The part relating to the entry of the charges in the tax roll is also invalid. No authority for such a special assessment can be found in the statutes.

Sec. 49.10, Stats., provides the method of recovery for sums expended for poor relief. Under the familiar rule of statutory construction that the expression of one method excludes all other methods, the resolution was passed without authority of law.

You are advised that it is invalid, and that any charges entered thereunder are likewise illegal.
JEF

Public Officers—County Board Member—Malfeasance—Under sec. 348.28, Stats., hardware dealer who is member of county board may sell one hundred dollars worth of merchandise to county highway committee in one year.

April 13, 1933.

EDWARD T. VINOPAL, Jr.,
District Attorney,
Mauston, Wisconsin.

You present the question of whether a hardware dealer who is a member of the county board may sell his merchandise to the county highway committee.

You are advised that this question is answered by sec. 348.28, Stats. This section prohibits a county board member from selling hardware to the county highway committee for an amount in excess of one hundred dollars in any one year.

In XXI Op. Atty. Gen. 537, the section above cited was discussed and the following language used in reference to it, pp. 538–539:

"The above quoted section clearly prohibits a member of the county board * * * from making a contract with the county board for the sale of milk in excess of one hundred dollars, and our court has repeatedly held that no valid claim on such a sale or a commodity to the county board * * * can arise against the county. [Extensive citations of authorities.]

"Prior to the year 1915, this section of the statutes made any contract which came within its terms null and void, but at that session of the legislature this statute was amended so that its provisions would not apply to such a contract for commodities not exceeding one hundred dollars in any one year. In other words, a sale of such commodities by a member of the county board to the county could be made if the aggregate amount did not exceed one hundred dollars. If it exceeded one hundred dollars in any one year, then the contract would be absolutely void, at least

for all amounts in excess of one hundred dollars and no claim could exist against the county in favor of such a county board member for commodities supplied to the county * * *."

Hardware would, of course, be a "commodity" as the word is used in sec. 348.28 and the sale of the same to the county highway committee would be covered by the language taken from the opinion in XXI Op. Atty. Gen. 537.
JEF

Public Health—Dentistry—Employment by dentist of persons merely to distribute handbill advertising does not constitute employment of "cappers" or "streeters" to obtain business, within meaning of sec. 152.06, subsec. (3), Stats.

April 14, 1933.

BOARD OF DENTAL EXAMINERS,
W. I. MACFARLANE, *President*,
Tomahawk, Wisconsin.

You ask whether the distribution of handbills, as from house to house, by or on behalf of a dentist, constitutes the employment of "cappers" or "streeters" to obtain business, within the meaning of subsec. (3), sec. 152.06, Stats.

The question is answered, No.

The statute provides that unprofessional conduct, which furnishes cause for revocation of a dentist's license, includes:

"* * * Employing what are known as 'cappers' or 'streeters' to obtain business, * * *"

It seems plain that the above clause does not prohibit the circulation of advertisements, as another clause of the same statute recognizes that it is permissible to advertise the dental business, if the advertisement is truthful. Such clause provides that the advertisement of dental business constitutes unprofessional conduct only as to an advertisement "in which untruthful or impossible statements are made."

Handbills are a form of advertising. The statute permits advertising, if truthful, and it should make no difference whether the advertising is by handbills or by newspaper or by radio.

It is considered, therefore, that handbill advertising is not within any of the inhibitory provisions of the statute, and that the employment of persons merely to distribute such handbills does not constitute the employment of "cappers" or "streeters" to obtain business.

Under a similar California statute a dentist employed a radio broadcasting station to advertise his business. In holding that this did not constitute the employment of "cappers or steerers" to obtain business, the California court used the following language, which seems apropos here:

"It is urged by appellants that the acts complained of constituted the employment of persons as cappers or steerers within the meaning of section 13 of the act which provides that 'any dentist may have his license revoked or suspended by the board of dental examiners for any of the following causes: * * * (3) For unprofessional conduct or for gross ignorance or inefficiency in his profession. Unprofessional conduct is hereby defined to be: The employment of persons known as cappers or steerers, to obtain business. * * *.' It is not contended that any of the statements contained in the announcements were untrue, and we may say at the outset that other than the provisions of the above subdivision of the section by which advertising under any false, assumed, or fictitious name, or in any name other than the name under which he was licensed, was denominated unprofessional conduct, no law of the state prohibited advertising by a licensed dentist. A 'capper' has been defined as a decoy or lure for the purpose of swindling (Standard Dictionary; Century Dictionary). A 'steerer' has been held to be one who gains the confidence of the person intended to be fleeced (People v. Simmons, 125 App. Div. 234, 109 N. Y. S. 190), and who may be said to steer or lead the victim to the place where the latter is to be robbed or swindled. It is the rule that the words of a statute unless they have a technical meaning are to be interpreted according to their common acceptation and will be read and understood in their natural, ordinary, and popular sense. Ex parte Galivan, 162 Cal. 331, 122 P. 961, Ann. Cas. 1913C, 1349; Corbett v. State Board of Control, 188 Cal. 289, 204 P. 823. Whatever abuse the legislature intended to correct by the above provisions of the act, it is

clear that truthful advertising, whether by newspaper or radio, cannot by any reasonable construction of the statute be brought within its inhibitory provisions. And it is well settled that, where a board is granted the power to revoke a license for certain reasons set forth in the statute, it may not be revoked for any other or different causes not clearly within the provisions of law or by implication included therein. * * *." *Barron v. Board of Dental Examiners of California,* 293 Pac. 144, 145, 109 Cal. App. 382.

In closing it is noted that while the Wisconsin statute and the California statute use the word "capper," the Wisconsin statute uses the word "streeter" whereas the California statute uses the word "steerer." The words in question were added to the Wisconsin statutes by ch. 436, Laws 1915, and the word "streeter" appears in the original typewritten draft of the bill, No. 182, S., 1915. Whether this involved a mistake on the part of the draftsman is not clear. However, it is clear that the word "streeter" is not a word that is found in any standard dictionary nor does it appear to have received any judicial construction. The word "steerer," on the other hand, is a word that is found in standard dictionaries and it has received judicial construction, as see the above quoted citation. In Funk & Wagnalls New Standard Dictionary the word "steerer" is defined as including a person who serves as a decoy in bunco (a swindling game) to bring in victims, usually by claiming acquaintance with strangers on the *street.* Under all the foregoing circumstances it is assumed that the word "streeter," as used in the Wisconsin statutes, was intended as synonymous with the word "steerer."

JEF

Fish and Game—Inland Waters and Outlying Waters—Question of dividing line between inland and outlying waters under sec. 29.01, subsec. (4), Stats., is one of fact. It is suggested that conservation commission adopt rule as to dividing line, make surveys and place posts or markers at mouths of rivers so that fishermen may know when they are fishing in outlying waters and when not.

April 14, 1933.

CONSERVATION COMMISSION.
Attention Paul D. Kelleter, *Director.*

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts:

"A question has recently arisen relative to what would constitute the dividing line between inland and outlying waters, particularly dealing with the Oconto and Menomonie rivers where they empty into Green Bay.

"Under the provisions of the statutes both of these rivers are defined as inland waters and Green Bay as outlying waters. In outlying waters commercial fishing nets are allowed to be used wherein they are properly licensed and in inland waters such nets are prohibited.

"Will you please advise this department as soon as possible how under the statutes or through supreme court decisions we can determine where the dividing line shall be on the before mentioned and similar other streams wherein they are connected with Green Bay, Lake Superior or Lake Michigan?"

Subsec. (4), sec. 29.01, Stats., reads as follows:

"All waters within the jurisdiction of the state are classified as follows: Lakes Superior and Michigan, Green Bay, Sturgeon Bay, Sawyer's Harbor, and the Fox river from its mouth up to the dam at De Pere are 'outlying waters.' All other waters, including the bays, bayous and sloughs of the Mississippi river bottoms, are 'inland waters.' "

The legislature has not laid down a rule as to the dividing line between outlying waters and inland waters. A question of fact is involved in determining this point. We suggest that either one of two rules may be adopted by the conservation commission in determining the dividing line

between outlying and inland waters. The dividing line may be measured in a straight line across the mouth of the river, such line to extend from the extreme outer point on the left bank of the river to the extreme outer point on the right bank of the river, or the dividing line between outlying and open waters may be measured by extending a line at right angles to the center of the stream at the mouth of the river.

It is suggested that the conservation commission determine this question and place posts at the mouths of the streams in order that the fishermen may be able to sight between the posts and so determine whether they are fishing in outlying or inland waters. A determination of the question submitted by you would seem to be governed quite largely by practical considerations. That is, because of penalties fixed by the statutes for illegal fishing it would seem to be important to the fishermen to know precisely where the outlying waters begin and the inland waters end. Inasmuch as there are not so very many streams involved, it would seem that it would be an easy matter for the conservation commission to adopt a proper rule, make the surveys and place posts or markers at the mouths of the rivers.
JEF

Loans from Trust Funds—School Districts—Annexed Territory—Where school district obtains loan from state trust funds under ch. 25, Stats., territory subsequently annexed to district is liable for proportionate share of tax raised annually to pay principal and interest on loan.

April 14, 1933.

CHARLES A. COPP,
District Attorney,
Sheboygan, Wisconsin.

You ask the question whether territory which is annexed to a school district after the district has borrowed money from the state trust funds under ch. 25, Stats., is liable for a proportionate share of the tax which is annually levied to

raise money to pay the principal and interest on the loan as the same become due.

The question is answered, Yes.

Under the plan provided by ch. 25, Stats., the loan is repaid in annual installments together with interest. The secretary of state annually certifies to the proper county clerk the amount that is to be currently raised for the payment of principal and interest. Subsec. (1), sec. 25.08. The county clerk in turn certifies the amount to the proper local clerk, whose duty it is to apportion the same on the local tax roll. Subsec. (2), sec. 25.08. See also subsec. (1), sec. 25.09. Under this arrangement the amount to be raised is apportioned against all of the taxable property in the school district. No exception is provided for in favor of territory which has become annexed to the school district subsequent to the making of the loan.

Sec. 25.07 provides to the effect that all the taxable property in any school district or other municipality which obtains a loan from the state trust funds shall stand charged for the payment of the principal and interest thereon. Construing that section, the supreme court has held that territory *detached* from a school district after the district has made such a loan remains liable for its proportionate share of the amount annually raised for the payment of principal and interest. *State ex rel. Owen v. Rogers,* 166 Wis. 628. It does not follow, however, that territory which is *annexed* to the school district after the district has made the loan is not liable for a proportionate share of the amount annually raised. Sec. 25.07 does have the effect of preventing any territory which is a part of the school district at the time when the loan is made from escaping liability for a proportionate share of the amount annually raised. Such section does not, however, by any of its terms provide any exception in favor of territory which is annexed to the school district subsequent to the making of the loan, and no such exception should be implied.

JEF

Appropriations and Expenditures—Indigent, Insane, etc. —Old-age Pensions—Payments under old-age pension law are to be out of general fund in county treasury, regardless of sum appropriated by county board.

April 14, 1933.

WM. M. GLEISS,
District Attorney,
Sparta, Wisconsin.

I quote the following statement of facts from your letter:

"Under the provisions of sec. 49.20, subsec. (2), the so-called old-age pension law goes into effect in this county on July 1, 1933. The county board at its November session appropriated the sum of $1.00 to carry out the provisions of this law. Under the circumstances herein, would the county judge be warranted to carry out the provisions of the pension law because no appropriation had been made and in the event that he is not so warranted, then is the county treasurer required to pay the orders which may be drawn for old-age pensions out of any funds in the county treasury?"

The appropriation of the county board was not a compliance with sec. 49.37, subsec. (1), Stats. As was held in XXI Op. Atty. Gen. 1035, wherein a similar amount was appropriated to carry out the provisions of the soldiers' relief law, such an appropriation "is not compliance with * * * law, but plain legal duty of county board is to estimate, reasonably and not arbitrarily, amount that will be required and to levy tax for that amount."

When the old-age pension law goes into effect, a county judge is required to grant pensions to those legally entitled thereto. See secs. 49.28 and 49.29, wherein mandatory language is employed. Such pensions should be paid out of the county treasury out of any funds therein.

This was the ruling of XV Op. Atty. Gen. 201, wherein it was held:

"Payments may be made out of general fund to cover expenditures under old-age pension law in excess of amount appropriated by county board to carry out provision of law."

See also V Op. Atty. Gen. 5.

JEF

Counties—County Board Resolutions—Education—Public Officers—County Superintendent of Schools—Under stated facts, salary of $1,600, as fixed in resolution adopted at adjourned meeting of county board of Rock county, was legally fixed.

Resolution of January 10, 1928, fixing salary of county superintendent of schools, was lawfully adopted.

Salary fixed by action of county board in 1921 is not controlling for term of county superintendent of schools commencing on first Monday of July, 1933.

April 14, 1933.

ROSCOE GRIMM,
District Attorney,
Janesville, Wisconsin.

You request the opinion of this department upon the following statement of facts: Your questions will be answered seriatim:

"The county superintendent of schools, Mr. X ————, has asked for an opinion regarding the legality of his salary as fixed by the Rock county board.

"On February 8, 1933, at an adjourned meeting of the November session of the Rock county board of supervisors, a salary committee was selected by the chairman of the board to fix the salary of the superintendent of schools for the four year term beginning on the first Monday of July, 1933.

"This committee was composed of Supervisor Magill of Beloit, Supervisor Cronin of Janesville, and Supervisor Broughton of Magnolia township. Supervisors Magill and Cronin are both from cities having a city superintendent of schools. The other member of the committee, Supervisor Broughton, was absent and took no part in the deliberations of the committee which reported to the board a recommendation reducing the salary of the county superintendent of schools from $2,400 to $1,600. This report was adopted by the entire board including the city supervisors, by an aye and nay vote with no dissenting votes. There are 156 rural schools under the supervision of the Rock county superintendent of schools.

"Q. 1. Was this salary of $1,600 legally fixed in accordance with the Wisconsin statutes?"

It is the opinion of this department that the salary of $1,600 was legally fixed in accordance with the Wisconsin

statutes, inasmuch as it appears that when the salary resolution was passed a quorum of qualified county board members was present and a majority of such qualified quorum voted in favor of such resolution, not counting the votes of the county board members who represent cities which have city superintendents of schools and who were, therefore, not qualified to vote upon that question.

Subsec. (5), sec. 39.01, Stats., provides:

"Cities which have a city superintendent of schools shall form no part of the county superintendent's district, shall bear no part of the expense connected with the office of county superintendent of schools; and shall have no part in the determination of any question or matter connected with or arising out of said office, nor shall any elector or supervisor of such city have any voice therein."

It is clear that under the existing law members of the county board representing cities which have city superintendents of schools may not properly vote upon the question of fixing the salary of a county superintendent of schools. Sec. 39.01 (5), Stats.; XXII Op. Atty. Gen. 26; XXI Op. Atty. Gen. 1002; XII Op. Atty. Gen. 460; IX Op. Atty. Gen. 400.

The question then presents itself as to whether the fact that members of the county board who had no authority to vote upon a particular question did vote upon such question invalidated the resolution fixing the salary of the county superintendent of schools.

It appears to be settled that the vote cannot be counted of members of the county board who are disqualified to vote upon a particular proposition. However, if enough qualified members of the county board to constitute a quorum are present and a majority of such quorum vote favorably on such a resolution it is a valid resolution, notwithstanding the fact that certain disqualified members also voted thereon. *Supervisors of Oconto County v. Hall,* 47 Wis. 208, 2 N. W. 291.

We are therefore constrained to hold that the resolution fixing the salary of the county superintendent of Rock county at $1,600 is valid.

"The records of the proceedings of the Rock county board of supervisors show that on January 10, 1928, a salary com-

mittee composed of three rural supervisors fixed the salary of the county superintendent of schools at $2,400. The board adopted the recommendation of this committee with city members voting on the question. The salary was adopted by aye and nay vote, with but one negative vote.

"Q. 2. Was this salary of $2,400 legally set at that time in accordance with the Wisconsin statutes?"

In view of what was said hereinbefore it appears that the salary of $2,400 which was fixed for the superintendent of schools of Rock county on January 10, 1928, was valid.

"The records further show that on November 23, 1921, committee number 5 recommended: 'that the following amounts be placed on the tax levy for 1922 for the expenses connected with the office of the county superintendent * * * superintendent's salary $2,400. * * *.' This recommendation was signed by a committee of three rural members and was adopted by a vote of only the rural members of the board. The ayes 18; nays 0; absent 2.

"Q. 3. Would the salary that was set by the action of the board on November 23, 1921, still be controlling for the term of the county superintendent of schools commencing on the first Monday of July, 1933?"

Your third question must be answered in the negative. See the answer to question No. 1.

"Q. 4. If the salary fixed by the board on November 23, 1921, and the salary fixed on January 10, 1928, and the salary fixed on February 8, 1933, were all erroneously set contrary to Wisconsin statutes so that the salary has never been legally fixed by the board, will the superintendent's salary revert to the minimum outlined by statute?"

In view of what was said hereinbefore it is not necessary to answer this question.

JEF

Fish and Game—Hunting—Indians—Tribal Indian is not liable under state laws for hunting grouse while within territorial limits of Odanah Indian reservation but while on highway which passes through such reservation.

Tribal Indian is not liable under sec. 29.22, Stats., for having loaded gun in his possession while within territorial limits of Odanah Indian reservation but while on highway which passes through such reservation.

April 14, 1933.

PAUL D. KELLETER,
Conservation Director.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts:

"A tribal Indian, who is a storekeeper on the Odanah reservation and with full reservation rights thereon, having not as yet received competence, has been found shooting and killing two grouse during the closed season for these birds while they were sitting in trees beside a state highway. The same were shot by him from a truck being driven along highway number two, which passes through the Odanah Indian reservation.

"This department and District Attorney Johnson of Ashland county respectfully request an opinion from you as to whether Indians can lawfully and rightfully shoot game on a highway such as highway number two during the closed season for such game and whether they would be violating the provisions of section 29.22 by having a loaded gun in their possession in an automobile while such automobile was traversing a state road passing through an Indian reservation."

It is the opinion of this department that tribal Indians are not liable under state laws for hunting grouse while within the limits of the Odanah Indian reservation but on a highway which passes through such reservation; nor are tribal Indians liable under sec. 29.22, Stats., for having a loaded gun in their possession while within the limits of the Odanah Indian reservation but on a highway which passes through such reservation.

This department held in XX Op. Atty. Gen. 982 that tribal

Indians are not liable under state laws for hunting deer on an Indian reservation.

In *State v. Rufus,* 205 Wis. 317, it was held that so far as criminal acts which have been committed within the territorial limits of an Indian reservation are concerned, tribal Indians are not subject to the state laws. See also: *United States v. Kagama,* 118 U. S. 375, 6 S. Ct. 1109; *In re Black Bird,* 109 Fed. 139; 18 U. S. C. A. 548; X Op. Atty. Gen. 154; IV Op. Atty. Gen. 42, p. 44.

It appears from a consideration of the above authorities that the two determining factors to be considered in this connection are: (1) the *locus in quo* of the offense, whether committed off or on the Indian reservation, and, (2) the status of the offender, whether a tribal Indian or a white person or an Indian who has received his certificate of competency.

Upon the first point there is no dispute. The alleged offenses were committed within the territorial limits of the Odanah Indian reservation but on a highway which passes through such reservation. It is manifest that such portions of the highway as are wholly within the territorial limits of the Odanah Indian reservation are a part of such reservation. It is clear, therefore, that the alleged offenses were committed upon the reservation.

As to the second point: It is undisputed that the offender is a tribal Indian who has not yet received his certificate of competency and who resides on the Odanah Indian reservation.

We are therefore constrained to hold: (1) that tribal Indians are not liable under state laws for hunting grouse while within the territorial limits of the Odanah Indian reservation but while on a highway which passes through such reservation; (2) that tribal Indians are not liable under sec. 29.22, Stats., for having a loaded gun in their possession while within the territorial limits of the Odanah Indian reservation but while on a highway which passes through such reservation.

JEF

Agriculture — Nursery Stock — Words and Phrases — Dealer—Storekeeper handling nursery stock for resident nurseryman, where nursery stock on display is property of nurseryman who assumes responsibility of quality of stock and conditions under which it is being sold, is agent and not dealer.

April 17, 1933.

E. L. CHAMBERS,
State Entomologist.

You inquire whether a storekeeper is acting as an agent or dealer in handling nursery stock for a resident nurseryman under the following circumstances:

(a) Where the nursery stock is the property of the nurseryman who assumes the responsibility of the quality of the stock and conditions under which it is being sold, but which is sold by the storekeeper on a commission basis;
(b) In the second instance the sale not to be made from stock on display.

In neither instance is the storekeeper the owner of the stock. In all cases the stock will be sold under the name and the certificate of and as the property of the resident nurseryman.

Sec. 96.44, subsecs. (1) and (3), provide:

"(1) Every dealer before offering nursery stock for sale in this state, or distributing or soliciting orders for nursery stock within this state, shall secure a dealer's certificate, which he may do by furnishing an affidavit that he will buy and distribute only stock which has been duly inspected and certified by a state inspector; and that he will maintain with the state entomologist a list of all sources from which he secures his stock. Upon compliance with the provisions of this section, a dealer's certificate shall be issued upon the payment of a registration fee of five dollars."

"(3) All agents selling nursery stock, or soliciting orders for nursery stock, shall secure from the state entomologist and carry an agent's certificate bearing a copy of the certificate held by the principal. Said agent's certificate shall be issued only to agents authorized in writing or upon request of their principal. Names and addresses of such agents shall not be divulged by the department."

Webster defines dealer as " * * * a person who makes a business of buying and selling goods, * * *." Agent is defined as, "One who acts for, or in the place of, another, by authority from him; * * *."

In the case of *In re I. Rheinstrom & Sons Co.*, (D. C. Ky.) 207 Fed. 119, 136–137, the court says:

"A dealer, in the popular * * * sense of the word, is * * * one who buys to sell again. He stands intermediately between the producer and consumer, and depends for his profits, * * * upon the skill and foresight with which he watches the markets."

Our statute, sec. 96.33 (5) provides:

"The term 'dealer' shall not include a grower of nursery stock."

The statute does not give any assistance, but if we trace the origin and legislative history, we find that when the law was first enacted, in 1915, the following language was used, ch. 413, sec. 4, par. (f), laws 1915:—

"The term 'dealer' shall be construed to apply to any person not a grower of nursery stock who buys nursery stock for the purpose of reselling and reshipping, independently of any control of a nursery."

In 1923 the law was amended and the word "dealer" was defined as in the present statute. This amendment was part of the bill of the revisor of statutes and an examination of the bill discloses the fact that no substantial change in the law was intended. That being the case, the definition given in the original act of 1915 is the one that is controlling, and it is my opinion that in both instances that you refer to the person is an agent and not a dealer.

JEF

Contracts—Indigent, Insane, etc.—Poor Relief—County may require applicants for poor relief to furnish labor on public projects.

County board may fix wage scale on such projects.

County board may require work of applicants for poor relief.

Applicants for poor relief cannot be compelled to sign agreement providing for pledging of property or reimbursement of amounts expended.

April 18, 1933.

B. O. REYNOLDS,
District Attorney,
Lake Geneva, Wisconsin.

You state that your county board has passed a resolution whereunder "men on outdoor relief" may be called upon to furnish labor on public works, where the furnishing of such labor will not displace regularly employed men. You also have submitted a copy of an agreement which is required of applicants, which agreement provides, in part,

"That applicant agrees to reimburse the commissioners of the poor, and/or the county hospital trustees, and/or Walworth county with interest for all sums advanced for such relief, and to assign or convey all property which applicant now owns or which * * * he may hereafter acquire, to Walworth county, as collateral to said agreement, and expressly waives all homestead or exemption rights.

"That * * * he agrees to accept employment at the county farm or elsewhere if same can be procured for applicant by the commissioners."

In connection with this resolution and agreement, you ask the following questions, which will be answered seriatim:

Q. 1. Is the resolution of the county board providing for public work by these people constitutional and permissible under the laws of the state in view of the contracts entered into by the applicants?

A. 1. You are advised that the county board may require work of these persons who apply for poor relief. Under the provisions of sec. 49.01, Stats., poor relief authorities of

the various municipalities are required to furnish relief only to "poor and indigent persons lawfully settled therein whenever they shall stand in need thereof." Any able-bodied, healthy person who has the opportunity to work for his living whether it be for the county or some other employer does not "stand in need" of aid.

Q. 2. If this plan of work is carried out, should credit be given on relief allowances at a regular scale of wages?

A. 2. The method of payment is a matter of policy, rather than of law and, strictly speaking, is not one upon which this department should pass. Relief agencies frequently pay in allowances, just as a private employer sometimes pays his employees by furnishing board and lodging. It would seem to be wise, however, to have an understanding with the employees at the outset as to what the character of the compensation is to be. Unless some method of giving credit is used, and some record can be kept of the number of hours that each man is employed, an unequal amount of services will be furnished by various individuals for the same relief.

Q. 3. Has our county board or poor commissioners authority to fix such a wage scale?

A. 3. In XX Op. Atty. Gen. 909, it was held that a county board may enact a reasonable wage scale for public work done by or for the county. The fact that the work may be public projects undertaken as relief measures would not furnish any reason for altering the conclusion arrived at in the opinion cited.

Q. 4. Can our poor commissioners or supervisors deny relief to any applicant who refuses to sign the agreement work?

A. 4. This query is partly answered in our reply to question 1. As was said in XXI Op. Atty. Gen. 596, however, "A rule of reason must guide in these matters" (p. 599) and a person or his family should not be allowed to starve because of his refusal to sign the agreement when properly drawn.

It is noted that the present agreement contains the clause set out above requiring the pledging of property and a promise to reimburse the county for sums furnished as re-

lief. These clauses are quite obviously attempts by the poor relief officials to place the furnishing of assistance under ch. 49 upon a contract basis, something which is not contemplated or permitted by the statutes. Practices of this sort received the unqualified condemnation of this office in the opinion found in XXI Op. Atty. Gen. 596. In that opinion reference was made to sec. 49.10, Stats., which gives a municipality furnishing relief the right, under certain conditions, to recover the amount expended for relief. The writer of that opinion then proceeds as follows in discussing an agreement similar to the one which you have submitted, p. 599:

"I am of the opinion that the poor relief officials may not require the agreement above described for the reason that the rights and liabilities, of the municipality or county on the one hand and the needy person on the other, are fixed by statute and may not be subtracted from or added to by the officials,—particularly the needy person cannot be required to contract away the discretion of the court to preserve his property for the reason that he has dependents, as provided in sec. 49.10.

"I am further of the opinion that such an agreement, entered into under the duress of necessity and the refusal to provide for that necessity without the agreement, would be unenforceable."

JEF

Indigent, Insane, etc.—Minors—Legal Settlement—Minor child cannot acquire legal settlement in county where she stays with her grandmother so long as one of her parents has legal settlement in another county.

April 21, 1933.

BOARD OF CONTROL.

You submit the following statement of facts for an opinion:

"Minor legitimate children are brought into county A by their grandmother. The children have previously been residing in county B with their mother, who has just been legally committed as chronically insane and a charge of

county B. The father of the children, who had a legal settlement in B, deserted the family more than one year ago. Query: Is it possible for the minor children to acquire a legal settlement in county A to enable them to receive aid under the dependent children's law?"

In sec. 49.02, subsec. (2), Stats., it is provided:

"Legitimate children shall follow and have the settlement of their father if he have any within the state until they gain a settlement of their own; but if the father have no settlement they shall in like manner follow and have the settlement of their mother if she have any."

Subsec. (5), sec. 49.02 provides:

"Every minor whose parent and every married woman whose husband has no settlement in this state who shall have resided one whole year in any town, village, or city in this state shall thereby gain a settlement therein."

Subsec. (7), sec. 49.02 provides:

"Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town, village, or city in which such legal settlement shall have been gained for one whole year or upward; and upon acquiring a new settlement or upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost."

This family had a legal settlement in county B. We do not know whether the father has acquired a new settlement in some other county in the state, but he has been voluntarily absent from county B for over a year, so he has lost his legal settlement in county B. The mother had a legal settlement in county B and she has never voluntarily left it but was committed to a hospital for the chronically insane. She still has her legal settlement in county B, so that the children will have the settlement of their mother if the father has not acquired a legal settlement in any other county in the state. In any event the minor child cannot under the above statutes acquire a legal settlement on her own account in county A so long as one of the parents has a legal settlement in county B.

JEF

Prisons—Prisoners—Parole—Person who has been sentenced and placed on parole but violates his probation and is ordered to prison is required to serve full sentence of his term beginning from time he enters prison. His time for good behavior as provided by statute may, however, be deducted.

April 21, 1933.

BOARD OF CONTROL.

You have submitted a letter from Mr. Oscar Lee with the request that we answer his question.

He states that prisoner A was sentenced to the state reformatory at Green Bay, Wisconsin on January 14, 1926; that sentence was imposed and stayed for from one to three years. He was placed on probation to the state board of control for three years.

He also says that on February 28, 1926, A forged a check for $25 and absconded. His probation was canceled by the board on September 27, 1927. The next thing that was heard of him was from Michigan state prison, Jackson, Michigan, where he had been sentenced to serve two to fourteen years for forgery; he was received at Michigan state prison on September 18, 1929.

He states that on September 21, 1931, A was paroled from Michigan state prison in custody of Wisconsin authorities and given final discharge from that institution and turned over to Wisconsin authorities on January 25, 1931. September 26, 1931, on the strength of the board's order revoking his probation, dated September 27, 1927, he was taken to the reformatory at Green Bay to begin the sentence imposed on January 14, 1926. Because he was a second offender he was transferred to this institution on October 8, 1931.

Mr. Lee asks to be informed as to the exact date on which A's sentence will expire.

Sec. 57.03, Stats., provides:

"(1) Whenever it appears to the board of control that any such probationer in its charge has violated the regulations or conditions of his probation, the said board may, upon full investigation and personal hearing, order him to

be brought before the court for sentence upon his former conviction, which shall then be imposed without further stay, or if already sentenced to any penal institution, may order him to be imprisoned in said institution, and the term of said sentence shall be deemed to have begun at the date of his first detention at such institution. A copy of the order of the board shall be sufficient authority for the officer executing it to take and convey such probationer to the court or to the prison; but any such officer may, without order or warrant, whenever it appears to him necessary in order to prevent escape or enforce discipline, take and detain the probationer and bring him before the board for its action."

You will note that this states that if the person is already sentenced to any penal institution, the board may order him to imprisonment in said institution and the term of said sentence shall be deemed to have begun at the date of his first detention at such institution. Under said statute the term of imprisonment of this person began on September 26, 1931. He will have to serve three years from that date with time deducted for good conduct, as provided by statute.

JEF

Courts—Criminal Law—Execution may issue to collect fine, but sentence of justice cannot be changed after six months have elapsed since entry of judgment.

April 21, 1933.

JOHN A. CONANT,
District Attorney,
Westfield, Wisconsin.

You state that a man was arrested some time ago charged with violation of the game laws; that he pleaded guilty and was fined fifty dollars and costs. You also state that he requested thirty days to pay the fine, and with the consent of the district attorney the justice agreed to give him thirty days. The usual judgment was entered and the defendant was permitted to go home.

You say that at the expiration of the thirty days you supposed he had paid his fine and you paid no more atten-

tion to it. You now find the fine was not paid and more than six months have elapsed. You inquire whether the justice would have jurisdiction to issue a commitment or whether the defendant could be re-arrested.

I do not know what you mean by saying that the usual judgment was entered. Sec. 353.25, Stats., provides:

"When a fine is imposed as the whole or any part of the punishment for any offense by any law the court shall also sentence the defendant to pay the costs of the prosecution and the costs incurred by the county at request of the defendant, and to be committed to the county jail until the fine and costs are paid or discharged; but the court shall limit the time of such imprisonment in each case, in addition to any other imprisonment, in its discretion, in no case, however, to exceed six months; and the court may also issue an execution against the property of the defendant for said fine and costs. In all criminal cases when the costs cannot be collected from the defendant on his or her conviction or when the defendant shall be acquitted such costs shall be paid from the county treasury."

I do not believe that the judge can change his sentence as late as this, but if the sentence was that in default of payment of the fine he was to be imprisoned for a definite time less than six months, then I believe he can be re-arrested to serve the sentence. If, however, the judgment was simply a fine and costs, then I believe it is too late to change the judgment of the court, but execution may issue under the above section to collect the fine.
JEF

Corporations—Domestic Corporations—Nonpar Stocks— Provision of sec. 182.14, subsec. (1), Stats., fixing fee of five cents on account of each share of nonpar stock applies where corporation amends its articles so as to change its capital stock of par value to equal number of shares of nonpar stock.

April 21, 1933.

THEODORE DAMMANN,
Secretary of State.

You enclose a proposed amendment to the articles of incorporation of a certain Wisconsin corporation which

amendment changes its authorized capital stock from 47,000 shares of par value of $5.00 each to 47,000 shares without par value. The amendment is as follows:

"RESOLVED that the authorized capital stock of the ———— Brewing Company be changed from forty-seven thousand (47,000) shares of the par value of five dollars ($5.00) per share to forty-seven thousand (47,000) shares, each of which shares shall be without par value as provided by section 182.14 of the Wisconsin statutes of 1931 and the acts amendatory thereof."

After the adoption of the above amendment, the stockholders of the corporation adopted the following resolution:

"RESOLVED that if and when the foregoing resolution changing the capital stock of the company from forty-seven thousand (47,000) shares of the par value of five dollars ($5.00) per share to forty-seven thousand (47,000) shares, of no par value, has been approved, and allowed by the secretary of state of the state of Wisconsin, that the proper officers of the company be and they are hereby directed to call in and cancel all of the forty-thousand (40,000) shares of stock of the par value of five dollars ($5.00) per share, now outstanding, and in lieu thereof issue to each owner of such cancelled stock one share of no par value stock for each share of stock called in and cancelled."

On behalf of the corporation it is claimed that since the effect of the amendment will be merely to accomplish an exchange of par value shares for nonpar value shares, and no increase in value will result, the provisions of subsec. (2), sec. 182.14, Stats., fixing a fee of five cents per share for each share of nonpar value stock, should not apply.

The position of the secretary of state is that the provisions of subsec. (2), sec. 182.14, do apply.

The attorney general agrees with the position taken by the secretary of state.

Subsec. (1), sec. 182.14 authorizes any corporation, if so provided in its articles of incorporation or in an amendment thereto, to issue shares of stock without any nominal or par value. Subsec. (2) of the same section provides to the effect that there shall be paid a fee of "five cents on account of each share of nonpar stock."

It is at once apparent that the fee is not made to depend upon the purpose to be accomplished by the issuance of non-

par stock, nor upon value, nor upon increase in value, but only upon the fact that the articles of incorporation provide for nonpar stock. When the articles of incorporation provide for nonpar stock, then the provision fixing a fee of five cents on account of each share of this character becomes applicable under the plain terms of the fee statute.

In closing it may be added that the position taken by the secretary of state and herein adopted by the attorney general represents an expression of administrative construction which has been uniformly applied by the secretary of state ever since the creation of sec. 182.14 in 1919.

JEF

Courts—Public Officers—Garnishment—Quasi-garnishment—County officer who has certified copy of judgment filed against him cannot, after beginning of next term of office, assign his entire salary to his deputy. County officer is entitled to exemption, and balance of his salary is to be paid to judgment creditor.

April 21, 1933.

WM. E. THURSTON,
District Attorney,
Durand, Wisconsin.

You submit for the consideration of the attorney general the following statement of facts:

"A certified copy of a judgment against 'X' a county officer, was filed in the office of the county clerk during November, 1932. 'X' filed an affidavit setting out his exemptions. The county clerk issued a check to 'X' during the month of December, for the amount of exemption and a check was issued the judgment creditor for the balance of the salary of 'X' for the month of December, 1932. 'X' was re-elected and on January 4th 'X' appointed a deputy, which deputy performs all the duties of the office; 'X' also made an assignment of his entire salary to his deputy and filed the same in the office of the county clerk. 'X' demands that his entire salary be paid to his deputy and that such assignment takes precedent over the claim of judgment creditor. * * *"

You inquire whether such assignment has precedence over the judgment.

Sec. 304.21, Stats., reads, in part, as follows:

"(1) Whenever any person, * * * shall recover a judgment against any person, * * * and said judgment debtor at the time of the rendition of said judgment, or at any time thereafter during the life of said judgment, shall have money due, or to become due, from the * * * county, * * * said judgment creditor may file a certified copy of such judgment with the * * * clerk of such county * * *.

"(2) It shall thereupon become the duty of the proper officers of such * * * county, * * * after the expiration of thirty days from the date of filing the certified copy of said judgment, to pay to the owner of such judgment such sum as at the time of said filing is due, and thereafter and until said judgment is fully paid to pay to the owner of said judgment such sum or sums as may at any time or times be due from the * * * county, * * * and to deduct the sum or sums so paid as aforesaid from the amount due; provided that if the sum or sums due as aforesaid is for salary or wages of any officer or employe of any * * * county, * * * the same shall be exempt from the provisions of this section to the same extent as salaries and wages are by law exempt from garnishment; provided further, that if any such judgment debtor shall have appealed from said judgment, at the date of the filing of said certified copy of said judgment, or if the time for appealing has not expired at the date of said filing, then and in either such case, if the said judgment debtor shall within thirty days from the date of filing of said certified copy of said judgment file with such * * * clerk an affidavit, that an appeal has been, or will be taken from such judgment within the time prescribed by law, such payment shall not be made until the final determination of such appeal, and if such affidavit is not filed, payment made as herein provided shall be a final discharge of any liability of the * * * county, * * * to such officer or employe to the extent of such payment. * * *

"(3) Notwithstanding priority of filing, a judgment filed under this section shall have precedence over an assignment, filed subsequent to the commencement of suit upon which such judgment is obtained."

You do not disclose when "X" made the assignment of his salary to his deputy, but it appears such assignment was made and filed after "X's" election and after the deputy was appointed. It was "filed subsequent to the commence-

ment of the suit upon which" the judgment was obtained, and therefore, according to subsec. (3) the judgment has precedence. The judgment would have precedence even if the assignment had been filed first, but subsequent to the commencement of the suit upon which the judgment was obtained. It does not appear from what you have stated that "X" filed with the clerk the necessary affidavit that an appeal had been or would be taken from the judgment within the time prescribed by law. If such affidavit had been filed, payment to the judgment creditor should not be made until the final determination of "X's" appeal.

Upon the statement of facts as you have presented it, you are advised that "X" is entitled only to his exemption and that the remainder is to be paid to the judgment creditor, and that such payment made to the judgment creditor will be a final discharge of any liability of the county to the extent of such payments made by the county.
JEF

Agriculture—Counties—Agricultural Agent—Referendum—County board may at adjourned annual meeting repeal appropriation for maintenance of county agricultural agent and abolish office provided it is done before agreement has been made between university and United States department of agriculture covering coming two years.

Question submitted directly to electors for referendum vote on question of abolishing office of county agent is only advisory and not binding upon county board. In order to make it binding upon county board, board should pass resolution abolishing office and make it contingent upon subsequent favorable referendum vote by electors.

April 24, 1933.

G. L. BROADFOOT,
District Attorney,
Mondovi, Wisconsin.

In your communication of March 17 you enclose a copy of a resolution passed by the county board at the November meeting of said board. Said resolution reads as follows:

"We, the undersigned agricultural committee of Buffalo county report that the program as arranged by the committee for the past year has been successfully carried out as stated in the county agricultural agent's report.

"We find that the sum of $1,800 per annum for the next two years is necessary to defray the expenses and pay the county's part of the salary of the county agent.

"We further recommend that this sum be annually placed on the county's budget for the next two years for that purpose."

The county board then made the following appropriation:

"There is hereby levied upon all of the taxable property of Buffalo county the following sums for the purposes hereinafter enumerated:

"Sec. 4. (G) County agent, salary and expense $1,900.00."

You also state that the county board adjourned its annual meeting from November to the third Tuesday in May, 1933, so that when they meet again in May, it will be a resumed session of the annual meeting. You inquire whether the county board could change its action at an adjourned session of its annual meeting and appropriate the money so raised for the salary of the county agent and for his expenses to some other use. You also ask the question whether the county clerk may submit to a referendum vote of the electors of the county the question of whether the county board should appropriate money for a county agent.

The form in which the question submitted in the referendum is put shows that it is not in proper form so as to be binding upon the county board. The definite action that was taken by the county board is not to be contingent upon approval of the electors. Instead of that the following resolution was passed:

"RESOLVED, that the following question shall be submitted to the voters of Buffalo county at the coming election in November:

" 'Shall the office of county agricultural agent be continued?' "

In an official opinion, XX Op. Atty. Gen. 276, it was held that the county board may make its action of abolishment contingent upon the result of a referendum. *Burgess v. Dane County,* 148 Wis. 427, *State ex rel. Smith v. Outagamie*

County, 175 Wis. 253, 263. These cases were cited in said opinion. It was also held in said opinion that the county board at an adjourned annual meeting may repeal an appropriation for maintenance of the county agricultural agent and abolish the office, but the county board has no right to rescind the appropriation for extension work for a period covered by an agreement made for work between the university and the United States department of agriculture. See XXII Op. Atty. Gen. 7.

I believe, however, your county board has not yet made the agreement covering the period from July, 1933, to 1935. The form in which the matter was to be submitted to the voters of the county is not in compliance with the law and if the question has been submitted the result of the vote would have no effect on the county board's action except that the county board may take it as advisory. The definite action of the county board is necessary.

JEF

Public Officers—Justice of Peace—Village Clerk—Offices of justice of peace and village clerk are compatible.

April 24, 1933.

CARL CHRISTIANSON,
Assistant District Attorney,
Madison, Wisconsin.

You request the opinion of this department as to the compatibility of the offices of village clerk and justice of the peace in the village.

In XII Op. Atty. Gen. 41, the question was raised as to whether a village clerk could act as justice of the peace, and it was said in that opinion:

"As to the first question, were it an original proposition, I should be inclined to the opinion that it should be answered in the affirmative. However, this department has heretofore held that the two offices are incompatible. IV Op. Atty. Gen. 600, 957."

Sec. 61.25, subsec. (2), Stats., provides that it shall be the duty of the village clerk to transmit to the clerk of the circuit court immediately after their election or appointment and qualification a statement of the time and term for which every justice of the peace of the village is elected or appointed.

Under the provisions of sec. 60.58 (2) it is the duty of the clerk of the circuit court to transmit to the village clerk a certified copy of the bond of the justice of the peace in the village. The village clerk, therefore, might be the custodian of a certified copy of his own bond, were he to hold both offices.

The statute does not provide, however, that he is to be the custodian of the original bond itself. The holding of a certified copy would seem to be more of an administrative duty than anything else. The notification to be made by the provisions of sec. 61.25 (2), would also seem to be an administrative duty.

It is our opinion, therefore, that the sentiment expressed in XII Op. Atty. Gen. 41 to the effect that the offices are compatible, is correct. We believe, therefore, that the offices of justice of the peace and village clerk may be held by the same person.

JEF

Taxation—In making settlement under sec. 74.15, subsec. (2), Stats., local treasurer should pay county treasurer state property tax (when one is levied), loans from state funds, and state special charges levied under sec. 46.10, in order stated.

April 24, 1933.

A. J. CONNORS,
District Attorney,
Barron, Wisconsin.

You call the attention of this office to sec. 74.15, subsec. (2), Stats., relating to the apportionment of taxes and delinquent returns which are to be made by the local treasurer

to the county treasurer. That section of the statutes provides that

"Out of the taxes collected the treasurer shall first pay the state tax to the county treasurer, then the equalization tax levied by the county for school purposes, and shall then set aside all sums of money levied for school taxes, then moneys levied for the payment of judgments, then all sums raised as special taxes in the order in which they are levied, then taxes for the payment of principal and interest on the public debt, then taxes for bridge purposes, then for fire purposes, then for street and other public improvements, and lastly county taxes. * * *."

As there was no state property tax levied in 1932, you inquire whether the words "state tax" means the state special charges and taxes levied to repay loans from trust funds of the state.

Sec. 70.60, provides:

"The secretary of state shall compute the state tax chargeable against each county basing such computation upon the valuation of the taxable property of the county as determined by the tax commission pursuant to section 70.57 and the rate as fixed by the governor pursuant to section 70.59. On or before the fourth Monday of October in each year he shall certify to the county clerk of each county the amount of taxes apportioned to and levied upon his county, and all special charges which he is required by law to make in any year to any such county to be collected with the state tax. He shall then charge to each county the whole amount of such *taxes* and *charges*, and the same shall be paid into the state treasury as provided by law."

It is our opinion that the words "state tax," as used in secs. 70.60 and 74.15 (2), Stats., strictly speaking, comprehend only the state property tax provided for in sec. 70.59. Ch. 25 of the statutes, relating to trust funds and their management, provides for loans which may be made to municipalities from the state trust funds.

Sec. 25.04, Stats., provides:

"The annual interest and instalments of principal of all loans from the trust funds shall be payable into the state treasury with other state taxes."

Sec. 46.10 relates to the state special charges for public institutions and directs that the secretary of state shall

charge the amounts due from the various counties, which amounts—subsec. (2)—"shall be certified, levied, collected, and paid into the state treasury with the state tax as a special charge."

It is to be noted here that the language of the two statutes quoted from provides that the loans from the trust funds and the state special charges are to be paid into the treasury *with* the state taxes.

It is obvious that the legislature did not intend that the words "state tax" themselves should include either the repayment of money to the trust funds or the amounts levied under sec. 46.10, and, in fact, in the latter case very definitely provided that these amounts were to be paid as a "special charge."

Secs. 25.04 and 46.10 thus seem to place these two types of assessments upon a parity rather than to give priority to either. Sec. 25.07, relating to the repayment of the trust fund loans, provides, however, that the annual irrepealable tax levied to repay the loan "shall be a special charge to be paid *next after the state tax* out of any moneys collected as taxes within said municipality." This statute very clearly states that the repayment of the state trust fund loan shall come immediately after the state tax, meaning the state property tax.

On April 1 of this year* this department held that a town treasurer must pay the loans made to some of the school districts located in the town before paying the sum due the other school districts which have obtained no loan.

It is our opinion that when the legislature provided that the trust fund loans and the state special charges were to be paid with the state tax the word "with" referred to the time of payment, and had no bearing on the question of priority *as between these two types of assessments.* The local treasurer, therefore, should first pay the state property tax (none this year), secondly, the loans from the state trust funds, and thirdly, the state special charges. These are all to be paid in the order stated, before any of the other taxes enumerated in sec. 74.15 (2) are paid or set aside.

JEF

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Public Officers—Justice of Peace—Town Chairman—Offices of justice of peace and town chairman are compatible in county operating under commission form of government.

April 24, 1933.

SAMUEL GOODSITT,
District Attorney,
Ladysmith, Wisconsin.

You request the opinion of this office upon the question of the compatibility of the offices of town chairman and justice of the peace in your county. At the same time you call our attention to the fact that Rusk county is operating under the county commissioner system of government and does not have the county board form which prevails in most of the counties in this state.

It is our opinion that these two offices would be compatible in your county. I have been unable to find duties imposed upon the town chairman and the justice of the peace in your county which would bring about any serious conflict in the administration of those offices or would render a person holding both offices prejudiced in performing the functions of either the town chairman or the justice of the peace. This fact, together with the absence of any statutory prohibition, leads to the conclusion that the two offices may be held by one and the same person in Rusk county.

JEF

Public Officers—School District Treasurer—Town Treasurer—Offices of school district treasurer and town treasurer are incompatible.

April 24, 1933.

HANS HANSON,
District Attorney,
Black River Falls, Wisconsin.

You inquire whether the offices of town treasurer and school district treasurer are incompatible.

In VII Op. Atty. Gen. 424 it was held that these two

offices were incompatible. The opinion was based upon sec. 40.19, subsec. (3), Stats. 1917, which provided that the school treasurer should prosecute the treasurer of the town for the recovery of any money belonging to the district which the town treasurer refused or neglected to pay over in the manner prescribed. It was there held that this fact would render the offices incompatible because the school treasurer could not sue himself as town treasurer.

Since the writing of that opinion, sec. 40.19 (3), Stats. 1917, has been altered. Sec. 40.10 (2) of the present statutes provides, however, in respect to the duties of the school district treasurer,

"He shall apply for, and receive, and if necessary sue for all money appropriated to or collected for the district, * * *."

The school money is, of course, collected in the first instance by the town treasurer. Any action brought for this money would still have to be brought against the town treasurer. The reasoning of the former opinion would still obtain, therefore, and would render these two offices incompatible.

JEF

Appropriations and Expenditures—Bridges and Highways—Street Improvements—Town board may revoke authorization to county to perform town road work by merely failing to notify state highway commission to pay town allotment into county treasury, thereby allowing town allotment to be paid into town treasury.

April 24, 1933.

EDWARD T. VINOPAL, Jr.,
District Attorney,
Mauston, Wisconsin.

You refer us to sec. 20.49, subsec. (8), Stats., which provides that each town shall annually receive from the highway commission the sum of fifty dollars per mile and that such sums are to be paid into the county treasury where the

town board has authorized the work to be done by the county. You state that there is no procedure outlined as to how the towns may withdraw their town roads from the county patrol, and you ask to be advised as to "what procedure should be taken by the towns."

We suggest that the town board revoke the authorization in the same manner that it authorized the county to perform the work for it. We are informed by the state highway commission that the allotment is annually paid into the town treasury unless the commission is previously notified to pay the sums into the county treasury. As far as the state highway commission is concerned, no notification of revocation is necessary, for in the absence of any notice at all, the allotment will be paid into the town treasury. If the money is paid into the town treasury, the county should not perform the work for the town. If the town authorizes it to do the work, the county should demand that the money be paid into the county treasury.

JEF

Counties—County Board Proceedings—Public Printing— Newspaper having no circulation whatever in eighty-five per cent of area of county does not qualify under sec. 59.09, subsec. (2), Stats., as one having general circulation in county.

April 24, 1933.

RALPH R. WESCOTT,
District Attorney,
Shawano, Wisconsin.

The following facts have been submitted by you as a basis for an opinion.

The county board, pursuant to sec. 59.09, subsec. (2), Stats., received competitive bids for the publication of a certified copy of the proceedings of the board. The Shawano County Leader Publishing Company, publishing a paper in the city of Shawano known as the Leader Advocate, submitted a bid for the proceedings at 48¢ per folio.

The Birnamwood News, a newspaper published in the village of Birnamwood, submitted a bid for 40¢ per folio.

The contention is made that the Birnamwood News is not a newspaper which can qualify under the provisions of sec. 59.09 (2), in that this paper is not one having a general circulation in Shawano county. Shawano county consists of twenty-five towns, ten villages, and the city of Shawano, and is forty-eight miles long by twenty-four miles wide. The Birnamwood News is published in the village of Birnamwood, a small village located on the western boundary line of Shawano county six miles south of the Langlade county line. It has a small localized circulation, part of which extends into Marathon county, and that portion that is covered in Shawano county, liberally estimated, would not cover more than two or three towns at the most, *with no circulation whatsoever* in the remaining portion of Shawano county. In other words, territorially speaking, the Birnamwood News has subscribers in not to exceed fifteen per cent of the area of Shawano county, and has no subscribers at all in the remaining area.

Under the provisions of sec. 370.01 (1), Stats.:

"All words and phrases shall be construed and understood according to the common and approved usage of the language. * * *."

Referring to the words—"general circulation" Webster's Dictionary defines the word "general" to mean:—

"Pertaining to, affecting, or applicable to, many, or the greatest number of, persons, cases, or occasions; prevalent; * * * extensive, though not universal. * * *"

Pursuing the definition further we find that it is defined as follows in reference to the word "circulation":

"Circulation, as of a newspaper, among readers not confined to a narrow class in business or interests."

It might be contended in the present case that the Birnamwood News could qualify under the latter definition of "general circulation," because it is not confined to a narrow class in business or interests in the two or three towns in which it does circulate. Sec. 59.09 (2), however, provides that the publication shall be made in a newspaper having

"a general circulation *in the county.*" It cannot be seriously contended that the Birnamwood News has an extensive or wide-spread circulation in Shawano county in view of the fact that it has no circulation whatsoever in eighty-five per cent of that area.

It is our opinion, therefore, that the Birnamwood News does not qualify under sec. 59.09 (2) as a newspaper having a general circulation in Shawano county.

JEF

Public Health—Basic Science Law—Chiropractic—Applicant for certificate of registration in basic sciences who attended professional school prior to February 1, 1925, but who was not attending such school on that date is not excepted from requirement of high school education under sec. 147.05, Stats.

"Professional school" as used in sec. 147.05 means school teaching basic sciences, namely anatomy, physiology, pathology and diagnosis and does not include school teaching massage and hydrotherapy.

April 26, 1933.

ROBERT N. BAUER, *Secretary,*
Board of Examiners in the Basic Sciences,
Milwaukee, Wisconsin.

1. You ask whether an applicant for a certificate of registration in the basic sciences who attended a professional school *prior* to February 1, 1925, but who was not attending such a school on that date is required to possess the equivalent of a high school education.

The question is answered, Yes.

The basic science law, comprising secs. 147.01 to 147.12, Stats., was created by ch. 284, Laws 1925. It deals with examination of persons in the basic sciences and licensing such persons to treat the sick. Sec. 147.01, subsec. (1), par. (a), defines to "treat the sick." Par. (c) of the same subsection provides to the effect that the "basic sciences" are anatomy, physiology, pathology and diagnosis. Sec.

147.02 prohibits any person to treat, or attempt to treat, the sick unless he shall have a certificate of registration in the basic sciences.

Sec. 147.05 provides to the effect that an applicant shall present to the board of examiners in the basic sciences sufficient and satisfactory evidence of good moral character and preliminary education equivalent to graduation from an accredited high school of this state, but that

"* * * If the applicant was on February 1, 1925, attending a professional school, high school education shall not be required."

In the plainest possible language the legislature has thus excepted from the requirement of a high school education only such persons as were attending a professional school on February 1, 1925. Whether the legislature overlooked the fact that there were some persons who had attended a professional school prior to February 1, 1925, but who were not attending such a school on that date, is not known. At any rate the legislature has not provided for excepting such persons from the high school education requirement. If such persons are to be excepted, the remedy lies with the legislature.

2. You also ask the following question: If a person was, on February 1, 1925, attending a school teaching massage and hydrotherapy, and he now is an applicant for a certificate of registration in the basic sciences to present to the board of examiners in chiropractic, is such a school to be considered as a "professional school" within the meaning of the above quoted provision of sec. 147.05?

This question is answered, No.

Under the chiropractic law, sec. 147.23, a chiropractor is required, among other things, to have a certificate of registration in the basic sciences. However, the question which you submit as to the meaning of "professional school" as used in sec. 147.05 of the basic science law is not in any way limited to cases involving prospective chiropractors.

Under the basic science law the "basic sciences" are anatomy, physiology, pathology and diagnosis, and it is in such basic sciences that an applicant for a certificate of registration in the basic sciences is required to be examined. When

the legislature excepted from the requirement of a high school education applicants who were attending a "professional school" on February 1, 1925, the logical inference is that the term "professional school" as there used was intended to mean a school teaching such basic sciences. It is considered, therefore, that a school teaching massage and hydrotherapy is not a "professional school" within the meaning of sec. 147.05 of the basic science law.
JEF

Fish and Game—Damages—Deer—Conservation commission may approve claim for damage done by deer to plate glass window or automobile when same are on land of claimant in either city or country.

April 26, 1933.

CONSERVATION COMMISSION.

You refer us to an opinion rendered to your department under date of December 13, 1932, XXI Op. Atty. Gen. 1070, in which it was held that claims for damages done by deer may be allowed only for damage to property on the land of the claimant.

You now inquire whether the conservation department should approve a claim for a plate glass window broken by a deer and for damage done by a deer to an automobile both of which were upon the land of the claimant. You wish the questions answered both as to claims for such damages incurred on land situated in a town and on land lying in a city.

Sec. 29.596, subsec. (1), Stats., provides:

"Any person claiming damage to his property caused by deer shall file a verified statement of his damage with the state conservation commission within ten days from the time such damage is alleged to have been incurred. * * *."

It is to be noted that the section above quoted uses the words "any person." This, of course, does not limit the individual claimant to a person living in the country, as

distinguished from one living in the city. The above quoted section further uses the word "property."

Under sec. 370.01, subsec. (32), Stats.,

"The word 'property' includes property real and personal."

Both the plate glass window and the automobile, therefore, are comprehended by sec. 29.596 (1) and the commission is authorized to approve claims in these two cases when satisfied as to their truth and amount.

Sec. 29.596 (2) (a):

"The state conservation commission shall investigate and settle all such claims."

Par. (b) of the same subsection provides that

"* * * where the commission and the claimant cannot agree upon the amount of the damage sustained, the commission shall refer such question to the town board of the town wherein the claimant resides. * * *."

This subsection is a modification of the general rule that it is the duty of the conservation commission to investigate and settle all claims. No special provision is made in the case of claims made by persons residing in cities. In such cases no body is named to which questions as to the amount of the claim shall be referred. Therefore, it is the duty of the commission to determine the amount due the claimant.

It has been suggested that it was the intention of the legislature in enacting sec. 29.596 to compensate persons for damages caused by deer to growing crops. The language of the section, however, does not substantiate this contention and plainly covers damage to "property" without specifying any particular kind.

A statute is open to construction only when there is some ambiguity in it. The statute now under consideration is not ambiguous in so far as this one point is concerned. If the legislature had intended to include only crops, the word "crops" might very easily have been inserted in place of the word "property."

This department can find no justification for limiting the statute to the construction suggested.

JEF

Public Officers — Conservation Commission — Acts by Agents—Conservation commission may by resolution authorize persons to sign orders which commission enacts.

April 26, 1933.

CONSERVATION COMMISSION.

Sec. 23.09, Stats., pertains to the authority, duties and activities of the conservation commission.

In the execution of their duties, the commission must enact orders pertaining to the acceptance of land under the forest crop law, enact orders closing seasons, orders to establish fish and game refuges and various other orders, etc.

The commissioners desire an opinion upon the question of their power by resolution to authorize the following persons to sign orders which they (the commission) may have enacted: The chairman, the secretary, if not individually the chairman or secretary, both the chairman and secretary, the director, the deputy director.

The statutes very clearly authorize the conservation commission to enact the orders above referred to. These orders are ordinarily enacted by means of resolutions signed by the commissioners themselves. It would expedite certain administrative features, however, if the administrative duty of attaching the signatures could be performed by a person or persons other than the commissioners.

Sec. 370.01, subsec. (20), Stats., provides:

"When a statute requires an act to be done which may by law as well be done by an agent as by the principal such requisition shall be construed to include all such acts when done by an authorized agent."

Enactment of the various orders within the power of the commission is, of course, discretionary, and involves the exercise of the personal judgment of the members of the commission. The attaching of the signatures to the orders which have already been properly passed is a ministerial act rather than one exercising judgment and discretion. It is a duty which can properly be delegated to any one or all of the persons above named.

JEF

Indigent, Insane, etc.—Legal Settlement—Prisons—Prisoners—Where man having legal settlement in Door county is sentenced to Waupun for term of one to three years his wife cannot gain legal settlement apart from that of her husband.

April 26, 1933.

GROVER M. STAPLETON,
District Attorney,
Sturgeon Bay, Wisconsin.

One A had a legal settlement in Door county, and was sentenced from there to Waupun for a term of one to three years. His wife, while living and residing in Door county, was granted a mother's pension for herself and infant child. She then moved to N county, and has resided there more than a year while receiving mother's pension from Door county. The question arises as to whether she did not gain a legal settlement in N county while living therein for more than one year and receiving mother's pension from Door county during such residence.

It is our opinion that the legal settlement of A's wife remains in Door county, and that she did not gain a legal settlement in N county.

Sec. 49.02, subsec. (1), Stats., provides:

"A married woman *shall always* follow and have the settlement of her husband if he have any within the state; * * *." (Italics ours.)

In XXI Op. Atty. Gen. 780, it was held that time spent in prison by a person who has a residence in a certain county will be counted in establishing his legal settlement and that of his wife and children although his wife and children may live in another locality.

In XX Op. Atty. Gen. 231, it was held that the voluntary and uninterrupted absence of a wife from her husband when not legally divorced or separated from him does not operate to change the legal settlement of the wife from that of the husband.

In the case in XXI Op. Atty. Gen. 780, a man moved with his family into Adams county, and after being there a period

of two weeks was sentenced to Waupun. The opinion held, p. 781:

"If A was in prison a full year, his residence has continued in Adams county for one year, which gives him a legal settlement therein. In an official opinion by this department, XIX Op. Atty. Gen. 150, it was held that the legal settlement of the wife and children of a man who is committed to a state tuberculosis sanatorium at Wales remains in the county where he resided when he was committed. The settlement of the wife and the children follows that of the husband under sec. 49.02, subsecs. (1) and (2)."

Inasmuch as the wife in the present case was not separated from the husband who had a legal settlement in Door county, the wife could not gain a legal settlement apart from her husband irrespective of whether she received mother's pension.

JEF

Taxation—Compromise of Illegal Taxes—Excessive assessed valuation of real estate does not make tax illegal so as to authorize compromise of delinquent taxes under sec. 75.60, Stats.

Officers mentioned in sec. 75.60 do not constitute board of review to reassess property.

Only lack of jurisdiction by assessor to make assessment constitutes such illegal tax as may properly be compromised under sec. 75.60.

Facts submitted do not justify conclusion that assessed valuation was necessarily excessive.

April 28, 1933.

CURT W. AUGUSTINE,
District Attorney,
Eau Claire, Wisconsin.

You state that an application has been made to the county treasurer, county clerk, and yourself, as district attorney of Eau Claire county, for the compromise of delinquent taxes under sec. 75.60, Stats., involving taxes for the years

1928, 1930 and 1931, and you submit a set of facts substantially as follows: In 1909 the E. C. Trunk Company purchased a parcel of land in the city of Eau Claire for $2,000. The land was assessed for taxation in 1909 at $2,000. In 1910 the Trunk Company erected a building on the land at a cost of $20,000. Thereafter the assessor assessed both the land and the building, entering the valuation of each separately on the assessment roll as required by law. Up to and including the year 1919, the assessment was relatively low, the maximum on the land being $3,000 in 1919 and the maximum on the building being $13,000 in 1919. In 1919 the property was sold to the M. Manufacturing Company for $40,000, and shortly thereafter it built an addition to the building at a cost of $8,000. In 1920 the company installed *machinery* in the building at a cost of nearly $37,000, *but all of this machinery was sold and removed prior to January 1, 1924.* In 1929 there was added to the building by the then occupant, a warehouse company, a loading platform at a cost of $1,631. Beginning with 1920 the assessor assessed the land at $4,500 and the building at $43,500, totaling $48,000, and this continued for each succeeding year up to and including 1931, with slight variations. For the years for which a compromise of delinquent taxes is sought the assessments were:

Year	Land	Building	Total
1928	$4,500	$41,500	$46,000
1930	4,500	42,500	47,000
1931	4,500	42,500	47,000

For the year 1932 the land was assessed at the same figure of $4,500, but the valuation of the building was lowered to $35,500, totaling $40,000. It appears that during all these years no protest regarding said assessments was ever made in any year to the local board of review of the city of Eau Claire, although the right to do so existed by virtue of sec. 70.47, Stats.

The question asked is whether the foregoing situation presents a proper case for compromise under sec. 75.60, which provides:

"If it shall appear from any tax roll or tax proceeding that any sum of money is due from any person or is charged

against any lands or other property, and such taxes have been returned as delinquent to the county treasurer of the proper county, and such person or the owner of the lands or property so charged with such taxes shall claim such taxes to be illegal for any cause the county treasurer, county clerk and district attorney of such county may, *if they shall deem that there is reasonable cause to believe such taxes illegal,* compromise with such person or owner and receive in lieu of the whole tax so appearing due or charged as aforesaid such part thereof as the said county treasurer, county clerk and district attorney, or a majority of them, shall determine to be equitable and for the best interest of such county."

It is considered that the question should be answered, No.

The claim of the taxpayer is that these were illegal assessments and illegal taxes in that the assessor did not lower the assessed valuation of the building after the *machinery,* of the value of $37,000, had been removed therefrom in 1924, and the claim is, further, that these were illegal assessments and illegal taxes on *machinery* that was not in the building. As it seems to me, the taxpayer's claim is untenable both in law and in fact.

1. It will be noted that the statute in question authorizes the county treasurer, county clerk and district attorney to compromise delinquent taxes only "if they shall deem that there is reasonable cause to believe such taxes illegal." Referring to this language it was said and ruled in XV Op. Atty. Gen. 205, 206:

"This raises the question as to what is an illegal tax, and when the county treasurer, county clerk and district attorney have reasonable cause to believe a tax illegal.

"It is the opinion of this department that the only case in which the county treasurer, county clerk, and district attorney would have reasonable grounds to believe a tax illegal is *where the* person or *subject so assessed was without the jurisdiction of the assessor.*" (Italics ours.)

In the instant case the subject assessed was plainly within the jurisdiction of the assessor. Although the machinery, while in the building, was no doubt a part of the building, yet it was not machinery but the building that was assessed. The assessor had jurisdiction to assess this real estate, comprising land and building. He had jurisdiction to assess the land and the building, and this he did. Having jurisdiction

to assess, the assessor had jurisdiction to err in the matter of the valuation placed on the building. In the last analysis the case presents no more than a possible case of too high an assessed valuation, and this does not constitute an illegal assessment so as to authorize a compromise under the statute in question. The statute does not make the officers therein mentioned a board of review for the purpose of reassessing property. Op. Atty. Gen. for 1910, 675; II Op. Atty. Gen. 818.

2. The taxpayer apparently assumes to show that the element of value attributable to the machinery was in fact necessarily considered and included in the assessed valuation of the building at a time when the machinery was no longer in the building, namely, in 1924 and subsequent years, and he claims, in effect, that such element of value should be deducted from the assessed valuation as made. Under the facts submitted it does not appear that such a conclusion is warranted. Rather the facts submitted indicate that the element of value attributable to the machinery may not have been considered in arriving at the assessed valuation of the building even when the machinery was in the building. In 1919 the property was sold for $40,000, and in 1920 an addition to the building was added at a cost of $8,000 and machinery was installed at a cost of $37,000, thus making a total of $85,000. Yet the assessor assessed the property in 1920 at only $48,000, which was equal only to the sum of the first two items mentioned. Under those circumstances it might well be said that the assessed valuation for the years 1920 to 1923, when the machinery was in the building, was too low, and that the assessed valuation beginning with the year 1924, when the machinery had been removed from the building, was correct. At any rate, the assessed valuation for all of these years might well be justified without any reference to the item of machinery. *At the time* when these various assessments were made they seem to have been regarded as proper in amount even by the parties interested in the property, as no objection was ever made before the local board of review of the city of Eau Claire.

JEF

Bridges and Highways—Highway commission has no power to convey or grant rights in land acquired for highway purposes.

April 28, 1933.

HIGHWAY COMMISSION.

Attention M. W. Torkelson, *Director of Regional Planning.*

You submit the following statement of facts, with a request for an opinion thereon: You state that the highway commission has had occasion to purchase a considerable amount of right of way. In a considerable number of cases triangles bounded on three sides by highways have been purchased, solely with the view of keeping structures off these triangles. In some of these cases, where the area of land in the triangle is sufficient to permit, great pressure has been brought on the commission to sell this land or to permit the erection upon it of business establishments, especially filling stations.

You ask our opinion as to the right of the commission to dispose of the land in the suggested manner or to grant such rights regarding it.

The state highway commission would have no power to convey the land or grant such rights concerning it. The state highway commission is given the power in sec. 82.02, subsec. (16), Stats.:

"To acquire any lands or rights of lands that the commission may deem necessary to carry out any highway improvement made by the state, * * *."

However, nowhere in the statutes can be found any power granted to the commission to convey such lands or lease or grant any rights in such lands to private parties. The commission, being of statutory creation, has only such powers as are granted it by statute and no power to convey, lease or grant real property being found in the statute, none exists. *Monroe v. Railroad Comm.*, 170 Wis. 180, 187; *State ex rel. Priest v. Regents*, 54 Wis. 159, 165.

You suggest that if such rights were granted "it might automatically release the land to the original owner or his

successor." This might have been true formerly under *Gardiner v. Tisdale,* 2 Wis. 153; *Harrison v. Brown,* 5 Wis. 27; *Kimball v. Kenosha,* 4 Wis. 321; *Goodall v. Milwaukee,* 5 Wis. 32.

However, sec. 80.01 (3), enacted in 1931, which reads in part as follows, would prevent the reversion in this case:

"No lands abutting on any public highway, heretofore or hereafter acquired or held for highway purposes, shall be deemed discontinued for such purpose so long as such lands continue to abut on any public highway. * * *."

Nevertheless, the commission is limited in its authority over such lands to the powers granted it by statute as indicated above.

JEF

Public Officers—County Board—Highway Patrolman—Malfeasance—Chairman of town is not member of county board until he has qualified by taking oath of office.

Person who has been hired by county highway committee to work on road as local patrolman may qualify as member of county board and retain that job without violating any statute.

April 29, 1933.

EARL F. KILEEN,
District Attorney,
Wautoma, Wisconsin.

Under date of April 27 you submit the following three questions:

"1. Is a person who has been elected as chairman of the town also a member of the county board before he takes the oath of office as a member of such board?

"2. Can a member of the county board be lawfully employed in a position created by the board prior to the beginning of his term of office, the selection of which is vested in a county committee elected by the board prior to the beginning of his term of office?

"3. Since the county board will again elect a highway committee at the November 1933 meeting, in case you hold

that this man can continue this employment for this season, will it be legal for the new committee to re-engage him before the expiration of his term as a member of the county board?"

In answer to your first question permit me to say that I believe that until the man has qualified by taking his oath of office he is not a member of such board.

In answer to your second question, permit me to say that you refer to the county highway committee, which I draw from your other statements in the letter. Said county highway committee is appointed under sec. 82.05 and it has been held by this department that the members of such committee need not be composed of members of the county board. XIX Op. Atty. Gen. 302.

The answer to your second question must be in the affirmative as the action of the committee cannot be considered the action of the board. The right has not been delegated to them by the county board, but it is a power that the committee exercises by virtue of the statute. I have not overlooked the provisions of sec. 348.28, nor the decisions and opinions of the attorney general under it. I am of the opinion, however, that the ruling of the attorney general in 1910 Atty. Gen. 607 is correct. It is only a violation of said section when the contract is entered into by the officer in his official capacity. That is not the case here.

Your third question must also be answered in the affirmative. There will be no objections to the committee's hiring him for another term.

JEF

Criminal Law—Sentences on four counts in complaint to which plea of guilty was entered is to effect that sentences on first three counts run concurrently as stated by court and that on fourth count runs consecutively with first three, although not so stated in sentence, in view of provisions of sec. 359.07, Stats.

May 3, 1933.

BOARD OF CONTROL.

You have submitted a commitment sent to you by Oscar Lee, warden of the Wisconsin state prison, of X, who is convicted on his plea of guilty on four counts. The commitment, as originally entered, sentenced him on each of the first three counts by an indeterminate sentence of from one to five years, the commitment containing the sentence, after the first three counts, as follows:

"Sentence on these three counts to run concurrently."

The fourth count originally read as follows:

"Upon the plea of guilty it is the judgment and sentence of the court that you be punished by confinement in the state prison at Waupun, Wisconsin, at hard labor for the general indeterminate term of not less than one year nor more than five years."

When X arrived at the prison he stated to the warden that the sentence on the first three counts was to run concurrently and the sentence on the fourth consecutively, but there was no such statement that the sentence on the fourth count was to run consecutively in the commitment or sentence. The clerk of the court informed Mr. Lee that the sentence on the last count was to run consecutively and that he should return the sentence and it would be amended. The warden sent the sentence back to the clerk of the court and it came back to him with the following sentence added to the sentence on the fourth count:

"Sentence on this count to run consecutively with the sentence on the first, second and third counts."

Doubt is expressed whether the sentence of the prisoner could be amended without the prisoner's being present in court at the time the addition is made.

Sec. 359.07, Stats., contains the following:

"* * * All sentences shall commence at twelve o'clock, noon, on the day of such sentence, but any time which may elapse after such sentence, while such convict is confined in the county jail or is at large on bail, or while his case is pending in the supreme court upon writ of error or otherwise, shall not be computed as any part of the term of such sentence; provided, that when any person is convicted of more than one offense at the same time the court may impose as many sentences of imprisonment as the defendant has been convicted of offenses, each term of imprisonment to commence at the expiration of that first imposed; whether that be shortened by good conduct or not. * * *"

Under the provisions of the above statute the sentences on the four counts would run consecutively unless otherwise stated by the court. The court stated that the first three should run concurrently, but made no statement as to the last. Therefore, the last must run consecutively. In view of that fact we believe the sentence as it originally read before it was amended would have the effect of having the last sentence on the fourth count run consecutively with the first three. The addition of the last statement to the sentence on the fourth count did, therefore, not add anything to the sentence that was not already contained therein in view of the provisions of the statute. You are, therefore, advised that the sentence of this prisoner is from one to five years on the first three counts, to run concurrently, and the sentence on the fourth from one to five years, to run consecutively with the first three counts.

JEF

Minors—Legal Settlement—State Public School—Court of competent jurisdiction may commit to state public school child having no legal settlement in any county of state. In such case cost of child's support must be borne by state.

May 3, 1933.

BOARD OF CONTROL.
Attention A. W. Bayley, *Secretary.*

In your letter of April 18 you present the question (1) as to whether a child can be committed to the state public school at Sparta, as a state at large case, that is, whether a child can be committed to that institution by a court of competent jurisdiction if the child does not have a legal settlement within any county of the state.

If our reply to question (1) is in the affirmative, you desire further enlightenment as to how the provisions of the statutes can be met which provide that the county in which the child has legal settlement shall bear one-half of the cost of the care of the child while at the said school.

It is our opinion that a child can be committed to the state public school at Sparta by a court of competent jurisdiction when the child does not have a legal settlement within any county of the state. Inasmuch as the child does not have a legal settlement in any county in the state, there is no county to which the state can charge one-half of the cost of the support. The result must be that the child is virtually a state-at-large case.

In VI Op. Atty. Gen. 500, it was held that a dependent child may be committed to the state school for dependent children even though not a resident. That opinion contains the following language:

"There is nothing in the provisions of the statute concerning dependent children which requires their residence in this state in order to be committed to the state school for dependent children. If there is a child in this state that is a dependent in contemplation of the statute, it may be sent to the said institution. * * *"

Since the writing of that opinion numerous changes have been made in the statutes relating to the commitment of

children to the state public school. An examination of the present statutes, however, does not reveal any sound reason for altering the previous conclusion.

Sec. 48.19, Stats., provides:

"The object of the state public school shall be to care for and educate physically, intellectually, vocationally and morally such dependent or neglected children as may be placed therein until such times as temporary or permanent homes can be procured in good families for those who are eligible for such placing."

Sec. 48.20, subsec. (1), provides, in part:

"The board of control shall admit to said school dependent and neglected children under sixteen years of age, * * *."

By virtue of sec. 48.01 the juvenile court is granted jurisdiction over dependent and neglected children, and the statutes contain a definition of what is meant by a "neglected child" and a "dependent child." The definitions do not provide that a neglected child or a dependent child is one having a legal settlement in this state, nor do the provisions of secs. 48.19 and 48.20 (1) indicate that neglected or dependent children who may be committed to the state's public school are only such children as have a legal settlement in some county in this state.

Sec. 48.20 (4), provides, in part:

"One-half of the net cost of caring for a child committed to the state public school shall be paid by the county of his legal settlement *pursuant to section 46.10* * * *."

Sec. 20.17 (15) makes an appropriation for the operation of the state public school at Sparta. The cost of operating the school from day to day is paid out of this appropriation.

Under the provisions of sec. 46.10 (2) the state board of control prepares a statement of the amounts due from the various counties of the state for the support of persons sent to state institutions from the counties; the amounts found to be due are certified to the secretary of state, who charges those amounts to the counties, and they are collected with the state tax as a special charge. The amounts so collected

by virtue of sec. 46.10 (2) are reimbursements to the state by the various counties. Where a child having no legal settlement in any county in this state is committed to the state public school at Sparta, the state of Wisconsin must bear the cost of that support because the statutes do not provide that any portion of this cost may be charged to any county of the state.

JEF

Appropriations and Expenditures—State Aid—Education—Supervising Teachers—Where county erroneously hires extra supervising teacher state superintendent, under sec 39.14, Stats., can apportion to county salary and expenses of only one supervising teacher.

May 3, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

You call our attention to the opinion rendered in XXII Op. Atty. Gen. 142, in which it was held that the word "schools" as used in sec. 39.14, (1), Stats., refers to educational establishments maintained by a school district and does not mean separate departments of such establishments, as was held in XIV Op. Atty. Gen. 580. The latter opinion was based upon the language of a special statute defining the word "schools." The opinion rendered this year, seemingly reaching an opposite conclusion from the one in XIV Op. Atty. Gen. 580, was based upon the fact that the definition above referred to had been repealed by the legislature since the rendering of the previous opinion.

It appears that seventeen counties in this state, relying upon the opinion in XIV Op. Atty. Gen. 580, and assuming that the law had not been altered, hired two supervising teachers, whereas the present state of the law makes provision for only one. The two supervising teachers in most, if not in all of the cases, doubtless were hired with the thought in mind that the county would be reimbursed by the state to the extent of their salaries and expenses.

You state that it will become your duty as state superintendent of schools to apportion to the different counties the amount of the salaries and expenses of the supervising teachers in accordance with sec. 39.14 (7).

Having in mind the opinion recently rendered in XXII Op. Atty. Gen. 142, you now ask whether you have authority to apportion the salaries and expenses of two supervising teachers in the seventeen counties for the entire year of ten months, or the salary and expenses of one supervising teacher for ten months and the other supervising teacher for the time she served up to the date of the opinion, or the salary and expenses of only one supervising teacher for the contract term of ten months.

Sec. 39.14 (1), (6) and (7), provides:

"(1) The county superintendent shall employ a supervising teacher, and, if there are more than one hundred twenty-five schools under his supervision, he shall employ two supervising teachers.

"* * *

"(6) The county superintendent shall in July of each year make a report to the state superintendent of the name and qualifications of each supervising teacher employed in the county, the number of months employed, the total amount of her salary and actual and necessary expenses paid during the year ending the preceding June 30th and such other facts as may be required by the state superintendent.

"(7) On receipt of such report, and it appearing from an actual inspection by direction of the state superintendent that the work of such supervising teacher has been efficient, and that she has devoted her time exclusively to the duties of the position, the state superintendent shall certify in favor of the county which employed her, the amount of the salary and actual and necessary expenses paid to her in the year preceding, and file it with the secretary of state, whereupon he shall draw his warrant for the amount of the certificate and in favor of the proper county treasurer."

Subsecs. (6) and (7), sec. 39.14, above quoted, do not specifically provide that the supervising teachers therein referred to shall be supervising teachers hired in accordance with the provisions of subsec. (1), sec. 39.14. Such an implication, however, must be read into the statute to avoid an absurd result which would follow if it were held

that the county superintendent could employ any number of supervising teachers for whose salary and expenses the county must be reimbursed by the state.

Presumably the supervising teachers in the seventeen counties furnished valuable services to the county which hired them. The counties are, therefore, obligated to pay for the services which they received. This obligation, however, goes only to payment by the county, and does not in any sense affect the legal obligation of the state to reimburse the county.

It is our opinion that, although the extra supervising teachers were hired by the county in good faith, and perhaps through a mistake of law, you are authorized by the statutes to apportion to each of the seventeen counties the salary and expenses of only one supervising teacher for the contract term of ten months.

JEF

Education—Blind—Insurance—Words and Phrases—Income—Monthly payments by insurance company under facts stated are held to be "income" within meaning of sec. 47.08, Stats.; no pension for blind is authorized, because annual income is not less than four hundred eighty dollars.

May 3, 1933.

KENNETH C. HEALY,
District Attorney,
Manitowoc, Wisconsin.

In your letter to the attorney general you state, in substance, as follows:

B, a resident of Two Rivers, Manitowoc county, was an employee of the H Company and as such employee carried a policy of life insurance in the face value of two thousand dollars, under the group insurance plan of the A Life Insurance Company. The H Company paid approximately one-half of the premium and B the other half.

About two years ago, B, while in the employ of the H Company, began to grow blind. The A Company, on July

8, 1932, approved the permanent disability of B due to blindness, upon his application, and awarded him fifty-eight dollars and forty-eight cents a month for three years beginning June 18, 1932. In case of the death of B before the expiration of three years the unpaid balance is to be paid to his wife.

B has recently made application to Manitowoc county for a pension under sec. 47.08, Stats. B's attorney contends that the amount now being received by B is not income but is the using up of his estate; the county contends that it was not the intention of the legislature that a blind person should receive a pension if he has an estate sufficient to maintain him.

You inquire whether or not Manitowoc county is liable to pay a pension under the above circumstances.

Sec. 47.08 reads in part as follows:

"(1) Any male person over the age of eighteen, and any female person over the age of eighteen years, who is declared to be blind or blind and deaf as hereinafter provided, shall receive from the county of which he or she is a resident an annual pension payable quarterly. Such pension shall be an amount which, when added to any amount received as an income from other sources, shall not exceed seven hundred and eighty dollars. In no event, however, shall any pension exceed three hundred and sixty dollars if the person receiving the pension is blind, and four hundred and eighty dollars if both blind and deaf.

"(2) In order for any person to receive such pension he must: (a) Have been a resident of this state at the time he lost his sight, or have been a resident of this state for ten years or more, and of the county in which such application is made for at least one year immediately next preceding date of application before making application for such pension, and

"(b) His annual income, exclusive of any amount received under the provisions of this section, must be less than four hundred and eighty dollars if blind and seven hundred and twenty dollars if both blind and deaf, and

"* * *

"(e) He must not have relatives who can be compelled to support him under the provisions of sections 49.11 to 49.13, both inclusive."

The pension granted by this section to blind, and to blind and deaf persons, has been held to be mandatory under conditions and qualifications specified therein, but the amount of such pension, it has been held, is within the discretion of the county board within such limitations as prescribed by this section. XVII Op. Atty. Gen. 221, XXI Op. Atty. Gen. 300.

Whether B's annual income is less than four hundred eighty dollars depends upon the meaning of the word "income" as the legislature used it in the above section. How is the use of the word "income" determined? Our supreme court has stated the rule as follows:

"The fundamental rule in the construction of statutes is to ascertain and give effect to the intention of the legislature. * * *" *Dagan v. State,* 162 Wis. 353, 355.

Justice Owen, as attorney general, when passing on the same question and ascertaining the intention of the legislature, said:

"* * * it was the manifest intention of the legislature in the enactment of this statute to provide for aid and relief to blind persons who have not otherwise sufficient means of support. * * * Except upon grounds of indigency or pauperism, or the prevention of pauperism the statute, providing, as it does, for a donation of public funds to private individuals, could not be sustained. * * *

"* * * it is not a public purpose to aid persons who are neither indigent nor likely to become indigent merely because they have the misfortune to be blind."

Also, as follows:

"* * * I am of the opinion that the legislature intended, in using the word 'income' here, to include such means of support as the blind person might have and be legally entitled to. * * *" Vol. V Op. Atty. Gen. 830, 831–832.

If we apply the same reasoning to your question, and I discover no reason why Justice Owen's above quoted remarks are not applicable in arriving at the meaning of the word "income" as used in the above statute, it makes little difference what meaning has been given to the word

"income" in the field of taxation, in the construction of wills, or in any one of a number of other ways that the word is commonly used and has been judicially defined. The monthly payment of $58.48 which the insurance company is making to B for the period of three years is certainly a "means of support." At the rate of $58.48 per month, B's annual income or means of support while such payments are made is a trifle over seven hundred dollars. His annual income must be less than four hundred eighty dollars in order for him to be eligible to receive a pension within the terms of the statute above quoted. B is not eligible to receive, and Manitowoc county may not pay, blind pension under the circumstances you recite.
JEF

Banks and Banking—Public Deposits—Commerce—Reconstruction Finance Corporation moneys deposited by governor or unemployment relief trustees are public deposits under ch. 34, Stats.

May 3, 1933.

INDUSTRIAL COMMISSION.
Attention Florence Peterson, *Supervisor of Unemployment Relief.*

You request a ruling from this office "as to whether Reconstruction Finance Corporation moneys turned over to the unemployment relief trustees can be considered public moneys."

Sec. 605a, par. (a) of ch. 14, Title 15 U. S. C. A., relating to the reconstruction finance corporation act and emergency relief and construction act of 1932, provides:

"The Reconstruction Finance Corporation is authorized and empowered to make available out of the funds of the corporation the sum of $300,000,000, under the terms and conditions hereinafter set forth, to the several States and Territories, to be used in furnishing relief and work relief to needy and distressed people and in relieving the

hardship resulting from unemployment, but not more than 15 per centum of such sum shall be available to any one State or Territory. Such sum * * * shall, * * * be available for payment to the governors of the several States and Territories for the purposes of this section, * * *."

Par. (c) of the same section provides:

"The governor of any State or Territory may from time to time make application for funds under this section, and each application so made shall certify the necessity for such funds and that the resources of the State or Territory, including moneys then available and which can be made available by the State or Territory, its political subdivisions, and private contributions, are inadequate to meet its relief needs. All amounts paid to the governor of a State or Territory under this section shall be administered by the governor or under his direction, and upon his responsibility. * * *"

Under par. (b), sec. 605a the amounts advanced by the Reconstruction Finance Corporation for relief purposes are to be reimbursed to the corporation, if in no other manner, by means of deducting each year a certain portion of the amounts due to the *state* from the federal highway apportionments.

Par. (a) of the above section, part of which is quoted above, provides that the money is available to the *state*. The state obtains the money through an application and certification made by the governor, who is thus acting for the state in his official capacity. Although the amounts are actually received by the governor, the advancements are made to the state as such, and not to the governor as an individual.

Sec. 34.01 (1), Stats., passed by ch. 1, Laws 1931, Special Session, provides:

"'Public deposit' shall mean moneys deposited by the state * * * or any commission, committee, board or *officer* thereof, in any state or national bank, banking institution or trust company in this state."

It is our opinion that the amounts received by the governor from the Reconstruction Finance Corporation for re-

lief purposes when deposited in a bank or trust company in this state are moneys deposited by an officer of the state and constitute a "public deposit" as those words are used in ch. 34. The legal status of these amounts is not altered by virtue of the fact that the actual deposit of the money is sometimes made by the unemployment relief trustees. The deposit is still made by the governor indirectly, through authorized agents acting within the scope of their authority.

JEF

Public Officers—City Officials—County Officials—Malfeasance—City official who is merchant violates sec. 62.09, subsec. (7), par. (d), Stats., in receiving any money appropriated by city for relief purposes.

County official who is merchant violates sec. 348.28 in selling relief supplies to value of more than one hundred dollars in one year.

May 3, 1933.

INDUSTRIAL COMMISSION.

Attention Florence Peterson, *Supervisor of Unemployment Relief.*

It appears that certain city and county officials have been receiving money appropriated for unemployment relief for their merchandise. You wish an opinion from this office concerning the legality of this practice.

With reference to city officials, sec. 62.09, subsec. (7), par. (d), Stats., provides:

"No city officer shall be interested, directly or indirectly, in any improvement or *contract* to which the city is a party, and whenever it shall appear that such is the case such contract shall be absolutely null and void and the city shall incur no liability whatever thereon. * * *"

It is the practice of the relief officials and agencies to issue orders to the indigent persons, which order entitles the person to a certain amount of merchandise at Mr. X's

store. The city or county, depending upon the relief system used, has an agreement directly with Mr. X, whereby Mr. X will receive from the city or county, whichever the case may be, payment for the merchandise which he distributes upon the strength of the orders.

It is our opinion that in those cases where Mr. X is a city official he has an interest in a contract with the city, and is violating sec. 62.09 (7) (d).

Sec. 348.28, Stats., provides, in part:

"Any officer, agent or clerk of the state in any county, town, school district, school board or city therein, * * * who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner, in any purchase or sale of any personal * * * property or * * * contract * * * made by, to or with him in his official capacity or employment, * * * shall be punished * * *; but the provisions of this section shall not apply to * * * contract for the sale of printed matter or any other commodity, not exceeding one hundred dollars in any one year * * *."

Under the provisions of this section, a county official occupying the position of Mr. X above mentioned, would be acting in violation of sec. 348.28 if he sold merchandise to the value of more than one hundred dollars in any one year.

It may be noted that sec. 348.28 includes city officials also. This section, however, is a general provision, whereas sec. 62.09 (7) (d) is a special provision relating to city officers and governs them. This has the effect of permitting Mr. X, a county official, to sell one hundred dollars worth of merchandise in one year, while forbidding Mr. X, a city official, from selling any merchandise in the manner described.

JEF

Taxation—Beer Tax—Total beer sales shown in monthly reports of brewers may be converted into barrel lots and paid for at rate of one dollar per barrel. Any fraction of barrel shown in such total sales must be paid for at rate of three and one-quarter cents per gallon.

May 5, 1933.

HONORABLE ROBERT K. HENRY,
State Treasurer.

You invite the attention of this department to chapter 59, sec. 1, Laws 1933, pursuant to which a beer tax is imposed. You state that the monthly reports which have come into your department show "sales by containers of barrels, half-barrels, quarter-barrels, etc., and in the final tabulation the total amount sold has been converted into barrel lots and the tax paid at the rate of $1.00 per barrel."

Upon the foregoing statement of facts you ask:

"Does the law permit the paying of the beer tax on the containers less than barrel lots at the rate of tax charged on barrel lots, or must this be paid at the rate of three and one-quarter cents per gallon?"

It is the opinion of this department that the tax may be paid on the total amount sold on the basis of the rate set for barrels. That is to say, the total amount of beer sold may be divided by thirty-one gallons and in this way the total number of barrels will be determined and the tax computed at the rate of $1.00 per barrel for the total amount so determined and for any other quantity or fractional parts, at the rate of three and one-quarter cents per gallon.

The pertinent sentence of ch. 59, sec. 1, Laws 1933, reads as follows:

"* * * The rate of such tax shall be one dollar per barrel of thirty-one gallons, or three and one-quarter cents per gallon for any other quantity or fractional parts thereof. * * *."

It will be noted from an examination of the act that the tax is imposed upon the brewers and not upon the barrel or gallon. The language of the act is that the "rate of such

tax shall be one dollar per barrel of thirty-one gallons, or three and one-quarter cents per gallon for any other quantity or fractional parts thereof." Moreover, the tax is to be paid on the monthly total by the brewer rather than on each individual barrel or fractional part thereof so sold by the brewer. This would seem to indicate that it was the intention of the legislature to impose the tax rather upon the total quantity of barrels sold by each brewer than upon each individual sale. Thus, it is manifest that the proper way to determine the total sales of the brewer is to convert such sales into barrel lots and for the brewer to pay at the rate of one dollar per barrel of thirty-one gallons and for any fractional parts thereof at the rate of three and one-quarter cents per gallon.
JEF

Banks and Banking—Corporations—Stockholders of corporation holding bank stock are jointly and severally liable for assessment.

May 5, 1933.

A. C. KINGSTON,
Commissioner of Banking.

You call the attorney general's attention to sec. 221.56, subsec. (3), Stats., and ask whether the stockholders of a corporation holding bank stock as contemplated by this subsection are liable for an assessment jointly, or severally, or whether they are liable jointly and severally.

Sec. 221.56, subsec. (3), reads in part as follows:

"Every domestic corporation and every foreign corporation authorized to do business in this state which shall purchase, own or in any manner control the voting of any stock in a state bank or trust company shall be liable to the creditors of such bank or trust company for any assessment made against the stockholders of such bank or trust company to the par value of the stock so purchased, owned or controlled in the same manner as is provided for individual stockholders of such banking corporation under the provisions of section 221.42. * * * In case the

double liability of any such corporation against which an assessment may be made as provided herein shall not be fully paid by such corporation, then the stockholders of such corporation shall be liable for an assessment sufficient to cover the full amount of the assessment against such corporation."

Sec. 221.42, Stats., reads in part as follows:

"The stockholders of every bank shall be individually liable, equally and ratably, not one for another, for the benefit of creditors of said bank to the amount of their stock at the par value thereof, in addition to the amount invested in said stock. * * *"

The amount of assessment a corporation as a stockholder in a bank is liable for is restricted to the par value of the bank stock purchased, owned or controlled; and the manner in which such corporation is liable is outlined in sec. 221.42, only the first part of which is quoted above. In case an assessment is made against such corporation owning bank stock, but such assessment is not fully paid by the corporation, "then the stockholders of such corporation shall be liable for an assessment sufficient to cover the full amount of the assessment against such corporation." The manner in which the individual stockholders of such corporation shall be liable is not specifically prescribed. The manner of liability stated in sec. 221.42 is not made applicable to the liability of the individual stockholders of the corporation as such manner is made applicable to the liability of the corporation itself. The manner of liability for assessment as specifically prescribed by statute for owners of bank stock is not the manner of liability for assessment when the stockholders of a corporation are assessed as stockholders of a corporation owning bank stock rather than being assessed as owners of bank stock themselves.

All the statute says is that "the stockholders of such corporation shall be liable for an assessment sufficient to cover the full amount of the assessment against such corporation." Such assessment to the stockholders is not limited to the par value of their stock in such corporation. The assessment is, however, limited by sec. 221.42 to the amount of bank stock at its par value held by the corpora-

tion. Nothing is said about the stockholders of the corporation being "equally and ratably, not one for another" liable. If the legislature intended that the same manner of liability should apply to the stockholders of such corporation owning bank stock, it would have been so stated. Either that or, in enacting subsec. (3), sec. 221.56, the legislature thought the manner of liability prescribed for the corporation owning bank stock was also applicable to the manner of liability for the stockholders of such corporation, if the corporation did not pay the assessment. It is not reasonable to conclude that the legislature thought and intended the latter; the manner of liability of the stockholders of the corporation is, therefore, different from the manner of liability of the corporation itself.

The general rule of liability of stockholders of an ordinary corporation has been stated as follows, p. 838:

"The nonliability of stockholders for the debts of the corporation except to make good unpaid subscriptions for their shares is the established rule, both at common law and in the American states; and the attempted departure therefrom, in the instant case, cannot be upheld without 'provisions of positive law' for its support. Gray v. Coffin, 9 Cush. (Mass.) 192, 199; 3 Thomp. Con. on Law of Corp. sec. 2925; Cook on Stock & Corp. Law, sec. 242." *Central Wisconsin Trust Co. v. Barter,* 194 Fed. 835, affirming *Harris v. Northern Blue Grass Land Company,* 185 Fed. 192;

See also *La Paper Co. v. Waples,* 3 Woods 34, Fed. Cases No. 8540.

In discussing statutory liability of stockholders, our supreme court said:

"Several classes of actions have come to this court under various statutes to enforce the statutory liability of stockholders: (1) the personal liability of stockholders in banks, (2) for unpaid subscriptions to stock, (3) for the indebtedness to laborers, (4) under sec. 1773, [180.06] the statute in question, for liability because fifty per cent. of the stock had not been subscribed." *Shadbolt & Boyd Iron Co. v. Long,* (1920) 172 Wis. 591, 595.

Later in the opinion, referring to these classes, the court continued as follows (pages 595–596):

"In the first of these classes of cases the liability of the stockholder is for the benefit of creditors generally to an amount equal to the stock held in addition to the amount invested in the stock, and the time of such liability is limited. The statute provides for the mode of bringing the action, and, under certain conditions, for the reimbursement of the stockholders. Sec. 2024—44, Stats.

"The liability of a stockholder for unpaid subscriptions is limited to the amount unpaid. The amount unpaid as well as the amount paid is regarded as a trust fund pledged for the payment of the debts of the corporation. The liability of a stockholder for the debts to employees is limited to the amount of stock held by him, and is confined to six months' service by the employee. Sec. 1769, Stats. The liability for doing business before fifty per cent. of the stock is subscribed is different from that in any of these, because there is no limitation or qualification as to the liability of the stockholder. * * * It does not depend on the amount of the stock, nor the continued ownership of the stock, nor upon the solvency of the corporation. The statute in no way limits the period of the liability."

Likewise, in the statute under consideration, 221.56 (3), the liability is different from the liability in the first three classes of cases referred to for the same reasons given by Justice Jones in *Shadbolt & Boyd Iron Co. v. Long, supra.*

"Whether the promises are several or joint, or joint and several, depends on the construction of the language used, and the intention of the parties as manifested by the language used must be followed by the court. * * *" 13 C. J. 577, citing *Dill v. White,* 52 Wis. 456, 9 N. W. 404; *Fond du Lac Harrow Co. v. Haskins,* 51 Wis. 135, 8 N. W. 14.

See also 6 Fletcher Cyclopedia of the Law of Private Corporations (1919 ed.), page 7242, sec. 4179, on whether the liability is joint or several, or joint and several.

See also Leake on Contracts page 302.

The liability of the stockholders of a corporation owning bank stock is

"* * * strictly and distinctively contractual, but contractual not because of express agreement, but because of the statute * * *. Every individual who brings himself within its terms must be held to have contracted and agreed that he will pay all liabilities under which the bank

may at any time labor while he continues that relation, * * *.

"Since this contract is implied from the statute, its scope is limited thereby. That statute imposes the liability upon stockholders, and no others. * * *" *Rehbein et al. v. Rahr et al.*, 109 Wis. 136, 140–141.

Also,

"* * * Substantially all courts, as above stated, have declared this statutory liability to be primary and absolute, a contract debt from each stockholder, * * *." *Rehbein et al. v. Rahr et al.*, 109 Wis. 136, 151.

In the *Fond du Lac Harrow Company v. Haskins* case, *supra,* our court held a promise which was expressed in the body thereof in the singular number but executed by two or more persons as being joint and several. In the *Dill v. White* case, *supra,* a promissory note in the form of "I promise to pay," etc., signed by two or more persons was held to be joint and several.

There is no expression of the court on the statute under consideration which can be used as a basis for an answer to your question. On the basis of what contracts our court has held to be joint and several, and on the basis of what the court has said in connection with other classes of contractual liabilities imposed by different statutes, I conclude that it would be held that the liability imposed upon stockholders of a corporation owning bank stock is joint and several.

JEF

Indigent, Insane, etc.—Expense of transferring to proper county by board of control persons committed to Milwaukee county hospital for mental diseases who are found to have legal settlement in some other county than Milwaukee may not be included in legal six months bill as submitted under provisions of sec. 51.24, Stats., and paid out of appropriation provided by sec. 20.18, subsec. (2), par. (b).

May 6, 1933.

BOARD OF CONTROL.

In your communication of April 19 you state that inmates are committed to the Milwaukee county hospital for mental diseases whose legal settlement, after due investigation has been made, is found not to be in Milwaukee, and that accordingly, under the provisions of sec. 51.12, Stats., the board of control authorizes transfer to one of the state hospitals for the insane.

You inquire whether the Milwaukee county hospital for mental diseases can properly include such expense of transfer on their regular six months bills as submitted under the provisions of sec. 51.24 and paid for out of sec. 20.18, subsec. (2), par. (b).

You state that it is your position that such transfer expense should be included and that authority exists under secs. 51.07 and 51.12; that the transfer expense is properly a charge that Milwaukee county should be reimbursed for, and it is reasonable to use the same procedure now in effect in our state hospitals and county asylums.

It is our opinion that your conclusion in this matter is not correct, as there is no appropriation to cover this. Sec. 20.18 (2) (b), Stats., to which you refer, reads as follows:

"Annually, beginning July 1, 1931, such sums as may be necessary, for any compensation to the trustees of any hospital for mental diseases in any county having a population of two hundred fifty thousand chargeable against the state as provided in subsection (2) of section 51.23 and section 51.24 of the statutes."

A careful reading of subsec. (2), sec. 51.23 and sec. 51.24, discloses the fact that the appropriation is not broad enough to include the expense of the transfer of the patients as referred to by you. The expense of the transfer cannot be taken out of the appropriation of sec. 20.18 (2) (b).

JEF

Criminal Law—Machine Guns—Classes of machine guns enumerated in sec. 164.06, Stats., except those used by military forces and officers of United States, are not exempted from registration under ch. 76, Laws 1933.

May 6, 1933.

THEODORE DAMMANN,
Secretary of State.

I have examined ch. 76, Laws 1933, which creates ch. 164, relating to machine guns and to making uniform the law with reference thereto.

Sec. 164.08, Stats., reads thus:

"Every machine gun now in this state adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber shall be registered by the owner in the office of the secretary of state, on the effective date of this act, and annually thereafter. If acquired hereafter it shall be registered within twenty-four hours after its acquisition. Blanks for registration shall be prepared by the secretary of state, and furnished upon application. To comply with this section the application as filed must show the model and serial number of the gun, the name, address and occupation of the person in possession, and from whom and the purpose for which, the gun was acquired. The registration data shall not be subject to inspection by the public. Any person failing to register any gun as required by this section, shall be presumed to possess the same for offensive or aggressive purpose."

You inquire whether all the classes of machine guns enumerated in sec. 164.06, of said law, are exempted from such registration, or whether you are to understand that

while such machine guns are required to be registered, the law merely declares as a public policy that such registration is not intended to interfere with or to discourage the manufacture and possession of such guns for military, police, scientific, exhibition, ornamental or keepsake purposes.

Said sec. 164.06, Stats., provides:

"Nothing contained in this chapter shall prohibit or interfere with the manufacture for, and sale of, machine guns to the military forces or the peace officers of the United States or of any political subdivision thereof, or the transportation required for that purpose; the possession of a machine gun for scientific purpose, or the possession of a machine gun not usable as a weapon and possessed as a curiosity, ornament, or keepsake; the possession of a machine gun other than one adapted to use pistol cartridges of 30 (.30 in. or 7.63 mm.) or larger caliber, for a purpose manifestly not aggressive or offensive."

You are advised that there was no intention of exempting those enumerated, but they are required to be registered and the law merely declares as a public policy that such registration is not intended to interfere with or to discourage the manufacture and possession of such guns for military, police, scientific, exhibition, ornamental or keepsake purposes. Of course, the state not having power to prescribe regulations for the United States military forces and officers, those will not come under this law; but all military forces in the state and peace officers of the state come within the provisions of the law.

JEF

University—Regents of university of Wisconsin have power to grant use of university buildings to public bodies and nonprofit-making associations having educational program on charge basis and at times not interfering with other university uses.

May 9, 1933.

REGENTS OF THE UNIVERSITY OF WISCONSIN.
Attention M. E. McCaffrey, *Secretary*.

You state that at a meeting of the regents of the university of Wisconsin held on March 18, 1933, the following action was taken:

"VOTED, That the use of university buildings by public bodies and nonprofit-making associations having an educational purpose be approved on a charge basis and at times not interfering with other university uses, the basis to be agreed on between those in charge of such buildings and the high schools and other public bodies and associations desiring such use, provided that such bodies and associations are not profit-making bodies and that the use appears to be to the advantage of the university in carrying out its educational program, it being understood that this authority is permissive, not mandatory, and does not prohibit the officers of the university from granting, at cost, the use of a university building for an approved public meeting for which no admission is charged."

You wish to be advised as to whether the board of regents of the university of Wisconsin are permitted to grant the use of the buildings on the basis outlined in the above quoted resolution.

It is the opinion of this department that the regents of the university of Wisconsin is authorized to adopt a resolution providing that the use of the university buildings by public bodies and nonprofit-making associations having an educational program be approved on a charge basis and at times not interfering with other university uses.

It is well settled that the regents have no powers except such as are conferred by statute. *State ex rel. Priest v. Regents,* 54 Wis. 159, 11 N. W. 472.

Sec. 36.03, Stats., provides in part:

"The board of regents * * * shall possess all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law, and shall have the custody of the books, records, buildings and all other property of said university. * * *."

Sec. 36.06 provides in part:

"(1) The board of regents shall enact laws for the government of the university in all its branches; * * *.
"* * *

"(3) The board may prescribe rules and regulations for the management of the libraries, cabinet, museum, laboratories and all other property of the university * * *."

While no statute in express terms confers the power and authority upon the regents to adopt the resolution outlined above, it is manifest that such power and duty follows as an incident to the power and duties expressly conferred on the regents to take charge of the buildings and property of the university and to prescribe rules and regulations for the management of the buildings and property of the university.

You are therefore advised that the regents are permitted to grant the use of buildings on the basis outlined in your inquiry.

JEF

School Districts—Detachment of Territory—Under sec. 40.85, Stats., clerk of school board shall call joint meeting of school board and of board of town in which territory to be detached is located, and boards of towns in which joint school districts are located to which this detached territory is to be annexed need not be notified of nor be present at such meeting.

May 11, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts:

"A certain district maintaining a free high school comprises an incorporated village and territory outlying such limits. An application has been filed with the clerk of the school board in accordance with sec. 40.85 (2), (3) and (4). The territory to be detached lies entirely within a township.

"According to (5) the clerk shall call a joint meeting of the school board and of the board of the town, or boards of the towns, in which the territory to be detached is located, said meeting to be held within twenty days from the date of filing. It is the wish of the town board to annex this detached territory to adjacent school districts in accordance with (5) (b). One or more of these districts is a joint school district.

"Therefore, is it necessary for the clerk of the school board to call a joint meeting of the school board and of the boards of the towns in which the joint school districts are located."

It is the opinion of this department that the clerk of the school board need call a joint meeting only of the school board and of the board of the town in which the territory to be detached lies.

Sec. 40.85, Stats., relates to detachment of land and subsec. (5) thereof provides in part:

"Upon the filing of such application the clerk shall call a joint meeting of the school board and of the board of the town or boards of the towns in which the territory to be detached is located, said meeting to be held within twenty days from the date of filing. Notice of such meeting shall be given to each member of said board or boards personally, if to be found within the county, at least two days before the date set for such meeting. * * *."

Par. (b), subsec. (5), sec. 40.85, provides in part:

"(b) The town board or boards shall forthwith make and enter a written order creating a new school district of such detached territory or any part thereof or attaching all or part of such territory to some adjacent existing district or districts. If the territory detached is located in two or more towns, the supervisors of such towns shall vote jointly, and a majority vote of those present shall control. * * *."

It is quite apparent from a reading of the above quoted section of the statutes that the legislature contemplated

that the clerk of the school board should call a joint meeting of the school board and of the board of the town in which the territory to be detached lies if such territory lies wholly within one township, or if such territory does not lie wholly within one township a meeting of the school board and of the boards of the towns in which the territory to be detached is located.

It is apparent from your statement of facts that the territory to be detached in the instant case lies wholly within one township. Therefore it is necessary to notify only the board of such township. If the legislature had thought it necessary to call a meeting of the boards of the towns in which the joint school districts are located, to which such detached territory is to be annexed, it would have made provision therefor. In the absence of such direction by the legislature we are constrained to hold that the clerk need call a joint meeting of only the school board and the board of the town within which the territory to be detached is wholly located. This conclusion is strengthened by the fact that the boards of the towns in which the joint school districts are located, but within which no part of the territory to be detached is located, have no function to perform in making the detachment or attachment order. The town board, or town boards, in which the territory to be detached is located make and enter the order. See sec. 40.85 (2), (3), (4) and (5). See also subsec. (6), sec. 40.85.

JEF

Mothers' Pensions—County board has no authority to appoint or compensate committee to investigate claims made by those seeking aid for dependent children under sec. 48.33, Stats.

May 11, 1933.

CLARENCE J. DORSCHEL,
District Attorney,
Green Bay, Wisconsin.

The Brown county board of supervisors has organized a committee to investigate the claims of those seeking aid for dependent children in an attempt to conform to sec. 48.33 subsec. (2), Stats., but no county children's board has been organized under sec. 48.29. The board of supervisors passed a resolution that such committee members shall be paid at the rate of four dollars per day and their mileage at the rate of twelve cents per mile actually traveled.

The question has now arisen as to whether this procedure is legal and correct.

It is the opinion of this office that the county board had no right to make this provision for compensating the committee and that the procedure is in violation of the Wisconsin statutes.

Sec. 48.33 relates to the granting of aid to dependent children by the juvenile court or county court. Subsec. (2), sec. 48.33, provides:

"The said judge shall make or cause to be made an investigation and examination of the circumstances of such child, which shall include a visit to the home of such child, before the granting of aid. A report upon such investigation, examination, and visit shall be made in writing and become a part of the record in such case. To assist in making such investigations, examinations and visits, the judge may designate a probation officer, if there be one in the county, or may call upon the county children's board, if such board has been organized in the county."

The statutes vest with the juvenile court or county court the right of determining in what cases aid to dependent children may properly be granted. The statute above quoted provides that he may secure the assistance of (1)

the probation officer, or (2) the county children's board. The statute does not make any provision for the furnishing of assistance by a committee appointed by the county board.

It is not the duty of the county board to make an investigation of this sort, and consequently it has no authority to appoint a committee to act as an agent of the board.

Sec. 48.33 does not make any specific provision for compensating either the probation officer or the county children's board for any assistance which it may render to the court in investigating claims for aid to dependent children. Other sections of the statutes, however, do make provision for compensating the probation officer and the children's board for performance of duties.

In the event that a request was made by the court to assist in investigating under the provisions of sec. 48.33 (2), it would be the duty of the probation officer or the county children's board to make the investigation.

It is our opinion that the Brown county board of supervisors had no authority to appoint a committee to investigate a family having a child or children for whom aid is sought under the provisions of sec. 48.33. It follows, of course, that there was no authority to make any provision for compensating this committee.

JEF

Courts—Witnesses—Indigent, Insane, etc.—Public Officers—District attorney has no duty or right to pass upon question of allowing expenses of bringing in witnesses for indigent prisoner. Under sec. 325.10, Stats., such duty rests with presiding magistrate.

May 11, 1933.

HANS HANSON,
District Attorney,
Black River Falls, Wisconsin.

In a preliminary investigation being held in your county it appears that the defendant has been charged with the

crime of statutory rape. You have had a competent physician examine the girls involved in the case. The defendant's attorney wishes to have another doctor examine the girls, and also desires to have a witness subpoenaed from Marshfield, Wisconsin, outside of Jackson county. The defendant is an indigent person, and unable to pay for witnesses in his behalf.

You state that you have refused to allow any bill which the second doctor might present as a charge against the county, and have also refused to allow the cost of subpoenaing the witness from Marshfield as a charge against the county. Reference is made to secs. 325.10, 361.12 and 361.13 of the Wisconsin statutes, with a request for an opinion as to the correctness of the position which you have taken.

Sec. 325.10 provides:

"Upon satisfactory proof of the inability of the defendant to procure the attendance of witnesses for his defense, the judge, court commissioner, or justice of the peace, in any criminal action or proceeding to be tried or heard before him, may direct such witnesses to be subpoenaed as he shall, upon the defendant's oath or affidavit, or that of his attorney, deem proper and necessary. And witnesses so subpoenaed shall be paid their fees in the manner that witnesses for the state therein are paid."

It is our opinion that, under the provisions of this section, it is the duty of the presiding magistrate to determine the propriety and necessity of subpoenaing witnesses for indigent defendants, and that it is not the duty of the district attorney to pass upon the question of allowing the expense attached thereto as a charge against the county.

An examination of secs. 361.12 and 361.13 does not reveal anything which would cast doubt upon the conclusion given above. These sections relate to the examination of witnesses after they have been subpoenaed or produced in some other manner and do not relate to the method of bringing witnesses before the magistrate for the purpose of giving testimony.

JEF

Public Officers—Special Deputy Sheriffs—Special deputies appointed by sheriff in grave emergency, although there has been no prior authorization by county board, have valid claim for compensation against county.

May 11, 1933.

FRED RISSER,
District Attorney,
Madison, Wisconsin.

You inquire whether in the milk strike emergency the sheriff has authority to employ a number of extra deputies and whether the county can legally pay the compensation of such deputies even though the county board had at no time passed any resolution granting specific authority for their employment nor fixed the salaries of any such deputies.

It is the opinion of this department that special deputies appointed by the sheriff, in the absence of prior authorization by the county board during an emergency, such as the impending milk strike, have a valid claim for compensation against the county.

At the outset we invite your attention to the opinions in V Op. Atty. Gen. 448; IX Op. Atty. Gen. 316 and XVIII Op. Atty. Gen. 335, in which it was held that special deputies appointed by a sheriff, in the absence of prior authorization by the county board, have no claim for compensation against the county. The rule as laid down in those cases would probably be correct except in so far as it applies to an emergency, such as the impending milk strike. And we are of the opinion that anything in such opinions which is contrary to what is ruled in this opinion must be overruled.

In the case of *Vilas Co. v. Industrial Comm.*, 200 Wis. 451, the Wisconsin supreme court held that a member of a *posse comitatus* organized by direction of a deputy sheriff, although such a member was not specially deputized or directed or sworn in, and who was wounded while attempting the arrest of fugitives from justice, is entitled to com-

pensation from the county under the workmen's compensation act. See also *Krueger v. State,* 171 Wis. 566, 583.

It is apparent that in the above cited cases the members of the *posse comitatus* were rendering services at the time of their injury which entitled them to compensation. See *National Film Service v. Terek,* 206 Wis. 12, 238 N. W. 904. See also *Wojahn v. National Union Bank,* 144 Wis. 646, 667, and Page on Contracts, Vol. 3, p. 2466, sec. 1442.

After a full examination of the statutes and authorities, we are constrained to hold that in a grave public emergency the sheriff has authority to employ a number of extra deputies for duty in such emergency and the county is legally liable to pay the compensation of such deputies even though the county board had not prior to such employment of the special deputies by the sheriff passed any resolution granting specific authority for their employment. See also secs. 347.05, 347.06 and 66.07, Stats.

JEF

Words and Phrases—Peaceable picketing is mere act of inviting attention to existence of strike as by signs or banners, and seizure or destruction of property or use of force or threats and calling of vile names is not peaceable picketing.

May 11, 1933.

F. F. WHEELER,
District Attorney,
Appleton, Wisconsin.

You request the opinion of this department as to what constitutes "peaceable picketing." You state that in view of the approaching farm holiday or milk strike, it is essential that the term "peaceable picketing" be defined.

It is the opinion of this department that "peaceable picketing" is the act of indicating by sign the fact that a strike is in existence. Anything beyond the carrying of a sign to indicate the existence of a strike would not be peaceable picketing. In other words the destruction or seizure of private property, the blocking of roads so as to

prohibit the transportation of persons and merchandise, the seizure of persons and the like, would be a violation of peaceable picketing. "Peaceable" is defined:

"Being in or at peace; quiet; free from, or not disposed to war, disorder or excitement; not quarrelsome; peaceful. Syn.—Tranquil, quiet, undisturbed." See Webster's New International Dictionary.

In *Michaels v. Hillman,* 183 N. Y. Supp. 195, 200, 112 Misc. Rep. 295, it was held that "picketing" by a large crowd of strikers surrounding factories and calling those going to work vile names and using expressions and gesticulations of violence was not peaceable picketing.

We are, therefore, constrained to hold that the use of force or the use of threats or the calling of vile names or expressions of violence, the seizure, or destruction of property and the like, would not be peaceable picketing.

JEF

Trade Regulation—Trade-marks—Name "Sailor Boy Ice Cream Bar" would infringe trade name "Soldier Boy Ice Cream Bar."

May 16, 1933.

THEODORE DAMMANN,
Secretary of State.

Some time ago you registered as a trade-mark the name "Soldier Boy Ice Cream Bar." Application is now made for registration of the name "Sailor Boy Ice Cream Bar." You desire an opinion as to whether you are warranted in registering the new application.

Your question must be answered in the negative.

Sec. 132.09, Stats., provides, in part,

"* * * The secretary of state shall not record any * * * trade-mark * * * that may reasonably be mistaken for anything theretofore filed in his office under the provisions of this chapter."

Justice Jenkins, in *Pillsbury v. Flour-Mills Co.,* 64 Fed. 841, uses the following language in discussing the question of infringement, p. 847:

"A specific article of approved excellence comes to be known by certain catch-words easily retained in memory, or by a certain picture which the eye readily recognizes. The purchaser is required only to use that care which persons ordinarily exercise under like circumstances. He is not bound to study or reflect; he acts upon the moment. He is without the opportunity of comparison. It is only when the difference is so gross that no sensible man acting on the instant would be deceived, that it can be said that the purchaser ought not to be protected from imposition. Indeed, some cases have gone to the length of declaring that the purchaser has a right to be careless, and that his want of caution in inspecting brands of goods with which he supposes himself to be familiar ought not to be allowed to uphold a simulation of a brand that is designed to work fraud upon the public. However that may be, the imitation need only to be slight if it attaches to what is most salient, for the usual inattention of a purchaser renders a good will precarious if exposed to imposition."

A few of the words used as trade-marks, together with the words which were held to be an infringement, are listed below:

The trade-mark or trade name	Held to be infringed by
"Alba"	"Antique"
"Black Diamond"	"Diamond Gem"
"Cashmere Bouquet"	"Violets of Cashmere"
"Cyclops Machine Works"	"Cyclops Iron Works"
"Golden Crown"	"Golden Chain"
"Miller's Chicken Cock Whiskey"	"Miller's Game Cock Rye"
"Morse's Compound Syrup of Yellow Dock Root"	"Dr. Morse's Improved Yellow Dock and Sarsaparilla Compound"
"Moxie Nerve Food"	"Standard Nerve Food"
"Old Mill Soap"	"Old Stone Mill Soap"
"Paragon"	"Pebble"
"Pepto-Mangan"	"Pepto-Manganate of Iron"
"Sawyer's Crystal Blue and Safety Box"	"Sawin's Soluble Blue and Pepper Box"

Some idea of the attitude which a court might take may be gathered from a comparison of the names in the above

table. It will be noted that in many cases the nonidentical words have no similarity in sound, but there was declared to be an infringement even when the full trade name consisted of only a very few words.

In the case under consideration, four of the five words used in the trade names are identical. There is a very distinct similarity between the fifth word of the proposed trade-marks, namely., "Soldier" and "Sailor."

It is our opinion that this similarity would be likely to lead to confusion, and certainly would be an excuse for mistake upon the part of the purchaser.

JEF

Tuberculosis Sanatoriums—Operation on tubercular patient committed to county sanatorium can be performed away from sanatorium only upon order of county judge.

May 16, 1933.

R. C. LAUS,
District Attorney,
Oshkosh, Wisconsin.

You state that sometimes it becomes advisable in the treatment of patients at your county tuberculosis sanatorium to perform an operation called "phrenicotomy" or "thoracoplasty." The operation becomes advisable in certain cases where the lungs of the patient have collapsed. If the operation is successful, the stay of the patient at the hospital is greatly reduced. The surgical work in connection with the operation is performed by a specialist outside of the county sanatorium, and in an institution to which the patient is removed. Inquiry is made as to whether it is necessary to get a special order from the county judge before this operation can be performed or whether the county sanatorium authorities have the right to order this surgical work themselves.

You are advised that the operation referred to should be performed outside of the county sanatorium only after a special order has been obtained from the county judge.

Sec. 50.07, subsec. (2), Stats., provides:

"Any such person who is unable to pay for his care may be admitted and maintained in such institution at the charge of the county in which he has his legal settlement, pursuant to subsection (2) of section 50.03, except that the county chargeability shall be determined by his legal settlement in the county charged. Such maintenance shall include necessary traveling expenses including the expenses for an attendant when such person cannot travel alone, necessary clothing, toilet articles, emergency surgical and dental work, and all other necessary and reasonable expenses incident to his care in such institution.

Under the provisions of sec. 50.03, the commitment of indigent persons to the county sanatorium is within the discretion of the county judge.

In making the commitment the county judge takes into consideration the condition of the patient, and also the financial condition of the county which is to be responsible for the expense attached to the treatment.

Under the provisions of sec. 50.07 (2), above quoted, maintenance at the institution includes various enumerated expenses "incident to his care *in such institution.*"

The performance of the operation in an institution other than the county sanatorium certainly is not a treatment *in* the county sanatorium.

It is our opinion that the sanatorium authorities are not granted statutory authority for contracting obligations for the treatment of tubercular patients outside of the county sanatorium, but that such expense can be a legal charge against the county only when authorized by an order of the county judge.

JEF

Legislature—Neither house of legislature can authorize committee to function beyond regular session. Such authority may be granted committee by concurrent action of both houses.

May 16, 1933.

ORLAND S. LOOMIS, *Chairman,*
Committee on Legislative Procedure,
Senate.

A question has been submitted by you as to whether the organization of the senate and assembly created at a regular session of the legislature holds over for a special session without a reorganization being effected at the special session.

In the case of *Tipton v. Parker,* 71 Ark. 193, it was held that under the Arkansas constitution the senate alone could not extend the powers of a committee beyond the session. It was said in that case, pp. 195, 196:

"The senate has no power, by resolution of its own, to extend its session, and neither did it have power by such separate resolution to continue its committee as a mere agency of the body beyond the term of the body itself which created it.

"* * *

"The committee, being the mere agency of the body which appointed it, dies when the body itself dies, unless it is continued by law; and it is not within the power of either house of the general assembly to separately enact a law, or pass a resolution having the force and effect of a law. To do this requires a majority of each house voting in its favor. * * *"

In *Ex parte Caldwell,* 61 W. Va. 49, it was held that the lower branch of the state legislature had no power, *by its independent action,* to create a committee of investigation, with power to sit during the recess of the legislature after the close of the session.

In *Marshall v. Harwood,* 7 Md. 466, the supreme court held, p. 482:

"* * * Committees have no power to act as such during the recess of the Legislature, unless they are specially authorized to do so. * * *"

In *Commercial & Farmers Bank v. Worth,* 117 N. C. 146, it was held, p. 152:

* * *

"Inasmuch as the existence of all committees in the absence of legislation necessarily determines upon the adjournment of the body to which they belong, certainly there must be an explicit enactment that the sessions of the committee can be held after such adjournment, or at least a clear unmistakable implication to that effect from the words used in the act or resolution creating the committee."

In *In re Davis,* 58 Kan. 368, the court upheld the authority of a legislative investigating committee to sit after the adjournment of the legislature, using the following language, p. 370:

"* * * The general rule undoubtedly is that the powers of committees of legislative bodies cease on the final adjournment of the body, unless express provision is made for their continuance; but that the houses of the Legislature have power to confer authority on a committee to continue its labors after adjournment is not questioned. * * *"

A circuit court in this state in the case of contempt proceedings against Philip E. Nelson (circuit court, Dane county), held substantially as set forth in the quotations given above.

It is our opinion that neither house of the legislature acting independently can authorize its committees to function beyond the adjournment of the regular session, but that such authorization may be given by a concurrent action of both houses by a specific enactment purporting to grant this power.

JEF

Taxation—Exemption from Taxation—Real estate title to which has been acquired and is held by state annuity and investment board is exempt from taxation under subsec. (1), sec. 70.11, Stats.

May 16, 1933.

TAX COMMISSION.

You ask to be advised whether real estate the title to which has been acquired by the state annuity and investment board, acting under secs. 25.15 to 25.17, Stats., is exempt from taxation.

Subsec. (1), sec. 70.11, exempts from taxation:

"That owned exclusively by the United States or by this state except lands contracted to be sold by the state; but lands purchased by counties at tax sales shall be exempt only in the cases provided in section 75.32. No real estate belonging to or held in trust for the state which is exempt from taxation shall be subject to special taxes or assessments for local improvements, any different or inconsistent provision in any city charter notwithstanding."

Under that provision, it is considered that real estate the title to which has been acquired and is held by the state annuity and investment board is exempt from taxation as land owned by the state. The board is but an arm of the state and it holds the lands on behalf of the state. The attorney general has previously ruled that land the title to which is held by the board is exempt from taxation. XIX Op. Atty. Gen. 536, and that ruling is adhered to. See also *Fulton v. State Annuity & Investment Board,* 204 Wis. 355, 359–360, *Aberg v. Moe,* 198 Wis. 349; XIX Op. Atty. Gen. 424.

While it is the general rule that statutes exempting property from taxation are to be construed strictly against exemption and doubts are to be resolved in favor of taxability, such rule is not applicable where the exemption is in favor of the state. *Aberg v. Moe,* 198 Wis. 349, 358; XIX Op. Atty. Gen. 424, 428.

In closing, attention is called to Bill No. 197, S., which, if passed, will make real estate used for agricultural purposes the title to which is held by the state annuity and investment board subject to taxation.

FCS

Trade Regulation—Unfair Discrimination—Price discrimination merely for purpose of meeting local competition does not constitute offense under sec. 133.17, Stats.

May 17, 1933.

DEPARTMENT OF AGRICULTURE AND MARKETS.
Attention O. J. Thompson, *Secretary*.

You have submitted the following statement of facts and inquire if the various practices outlined therein constitute a violation of sec. 133.17, Stats.

"The Standard Oil Company has a bulk plant at Wisconsin Rapids from which it supplies service stations in that area and from which it operates tank wagons into the surrounding rural territory. Johnson and Hill Company owns a bulk plant at Wisconsin Rapids, has a service station at its bulk plant, but does not operate a tank wagon service in the surrounding rural territory.

"Johnson and Hill established a special price on kerosene at Wisconsin Rapids on Fridays and Saturdays for amounts of 25 gallons or more when called for at the bulk station at Wisconsin Rapids and paid for in cash. This price was below that effective in the territory around Wisconsin Rapids.

"Farmers around Wisconsin Rapids took their barrels into Wisconsin Rapids to have them filled at the Johnson and Hill plant, and to meet this competition the Standard Oil Company reduced its price to that of the Johnson and Hill Company.

"When the Standard Oil Company reduced its price, however, it made the reduction effective not only on deliveries at Wisconsin Rapids, but also on deliveries from its tank wagon in the territory around Wisconsin Rapids. It is on the validity of the extension of the reduced price to tank wagon deliveries that we wish the opinion.

"The independents and co-operatives operating tank wagons in the rural territory around Wisconsin Rapids allege that the extension of the price reduction to this territory constitutes a further reduction not required to meet competition. It is their contention that the Standard should be limited to meeting the price at Wisconsin Rapids in the manner it is operative at the Johnson and Hill plant.

"The Standard Oil Company on the other hand makes the point that it is not equipped to meet all kinds of local competition in just the manner that they are operative, but must meet it as nearly as possible with the facilities

and methods of operation which it has. The Standard Oil Company has employed tank wagon drivers to serve the rural territories, delivering there on a commission basis. If it were to establish a special cash and carry price at Wisconsin Rapids, the agent would lose his business which is all on delivered basis and the tank wagon service would be disrupted. As a further point, the Standard Oil Company does not have an attendant present at all times at many of its bulk stations. The tank wagon driver is there only to fill his tank wagon and the rest of the time there is no attendant present. To meet a special cash and carry price it would be necessary to have an attendant present at all times with the additional expense that this would involve. For these reasons the Standard Oil Company believes that it should be allowed to meet the price in Wisconsin Rapids as best it can with its present method of doing business."

The statute on the subject follows:

"Sec. 133.17 (1) Any person, firm or corporation, foreign or domestic, doing business in this state and engaged in the production, manufacture or distribution of any commodity in general use, that shall intentionally, for the purpose of injuring or destroying the competition of any regular, established dealer in such commodity or to prevent competition of any person, who, in good faith, intends or attempts to become such dealer, discriminate between different sections, communities, or cities of this state, or between persons, firms, associations or corporations in any locality of this state, by selling such commodity at a lower rate or price in one section, community, or city, or any portion thereof, or to any person, firm, association or corporation in any locality of this state, than the rate or price at which such person, firm or corporation, foreign or domestic, sells such commodity in another section, community, or city, or to another person, firm, association or corporation in any locality of this state, shall be guilty of unfair discrimination, which is hereby prohibited and declared unlawful.

"(2) Any person, firm, company, association or corporation, and any officer, agent or receiver of any firm, company, association or corporation, or any member of the same, or any individual violating any of the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than two hundred dollars, nor more than five thousand dollars for each offense, or by imprisonment in the county jail not to exceed one year, or by both such fine and imprisonment."

In order for the above quoted statute to be constitutional it is necessary to construe it as though it contained the word "substantially" or "unreasonably" before the word "injuring" of the statute. Any broader construction would necessarily cause the statute to be unconstitutional. This rule was laid down in the case of *Fairmont Creamery Co. v. Minnesota,* 274 U. S. 1, where the court had under consideration a similar Minnesota statute. The case is annotated in 52 A. L. R. 169. It is therein stated, p. 169:

"* * * The courts have, however, sustained the constitutionality of statutes prohibiting price discriminations between localities by the buyer or seller of commodities for the purpose of preventing or eliminating competition; but it has been held that a statute is unconstitutional where it is so broad as to prohibit the fixing of different prices in different localities, regardless of the purpose involved. * * *"

The fact, therefore, that the Standard Oil Company in this case is selling its product in the Wisconsin Rapids area for a price lower than that asked in other communities is not in itself sufficient to constitute a violation of sec. 133.17. There must also exist an intent to substantially or unreasonably injure or destroy competition. *S. S. Kresge Co. v. Champion Spark Plug Co.,* 215 Fed. (2d) 415; 41 C. J. 139.

The question of intent is a question of fact and is primarily one for a jury. XIV Op. Atty. Gen. 306. However, we suggest that from your statement of facts it would not appear that such intent existed. The price was reduced in the first instance to meet the competition of the locality, the Johnson and Hill Company, which is allowable, *Western Lumber Co. v. State,* 17 Okla. Crim. Rep. 427, 189 Pac. 868, 52 A. L. R. 169.

It also appears that the additional delivery service is furnished without such intent but rather because the company is not equipped for cash and carry service.

Without a further showing that the price reduction in this case was undertaken for the purpose of substantially injuring or destroying competition, we must hold that there is no violation of sec. 133.17.

JEF

Taxation—Exemption from Taxation—Articles purchased by county from dealer are not exempt from federal excise tax. Articles purchased by county direct from manufacturers are exempt.

May 17, 1933.

HERBERT J. GERGEN,
District Attorney,
Beaver Dam, Wisconsin.

You state:

"Dodge county is required to pay federal taxes on various articles purchased by it. This includes such articles as repairs for trucks, tires, tubes, etc."

You request our opinion "as to whether or not counties are liable for federal taxes on truck repairs and other articles against which a federal tax has been collected at the source."

You are advised that the county would be liable where the purchase was from a retail dealer. In such cases the tax has merely become part of the purchase price with the tax already paid by the manufacturer not the county. We quote from VIII Op. Atty. Gen. 516, where facts similar to those under consideration were involved:

"* * * The tax in question is imposed when the manufacturer disposes of the automobile and thereafter would form part of the sales price. Should the state purchase from a dealer, the tax would already have been paid and there is no provision of law for a refund. * * *" (pp. 516–517).

In that opinion, however, it was held that where the purchase was direct from the manufacturer, it was exempt from the tax. The same is true under the present law. The taxing provisions of the present law on the various articles read as follows: "There is hereby imposed upon the following articles sold by the manufacturer, producer or importer * * *." (Title IV, sec. 602, 26 U. S. C. A., 1932 Supplement).

We quote also from the United States treasury department regulations 46, relating to excise taxes on sales by

the manufacturer, under secs. 602 to 611, inclusive, 613 and 614 of the revenue act of 1932:

"Art. 17. * * * The tax does not attach to sales of any articles to States or political subdivisions thereof to be used in the exercise of an essential governmental function, provided such sales are made direct by the manufacturer to a State or a political subdivision thereof without any intervening sale to a dealer or distributor."
JEF

Fish and Game—Shooting of rough fish is not violation of sec. 29.29, Stats., prohibiting taking, capturing or killing of fish by means of dynamite or other explosives.

May 17, 1933.

PAUL D. KELLETER,
Conservation Director.

In your communication of May 5 you refer to sec. 29.29 of the fish and game laws and you state that provision is made otherwise in chapter 29, Stats., whereby game fish can be taken only by hook and line which would, of course, bar the shooting of game fish. You state that you would like our opinion on whether we consider the shooting of rough fish is killing them by means of an explosive.

Said sec. 29.29, subsec. (1), provides:

"No person shall take, capture or kill fish of any variety in any waters of this state by means of dynamite or other explosives or poisonous or stupefying substances; or place in any waters of this state explosives which might cause the destruction of fish, except for the purpose of raising dead bodies whenever ordered by the public authorities, or for the purpose of clearing a channel or breaking a log jam; or have in his possession or under his control, upon any inland waters, any dynamite or other explosives for the purpose of taking, catching or killing fish. Violations of this subsection shall be punished by a fine of not less than two hundred nor more than five hundred dollars, or by imprisonment in the county jail not less than nine months nor more than one year, or by both such fine and imprisonment."

We believe that under the wording of this statute the lawmakers did not have in mind the shooting of fish. While in a sense explosives are used in guns, I believe in this chapter the word "explosives" was used as meaning substances similar to dynamite, which is placed in the water and exploded there. The law was enacted for the purpose of preventing the wholesale destruction of fish by explosives which kill them in all directions from the center from which the explosion takes place. By means of a gun a particular fish is aimed at and killed or wounded, while no other fish is destroyed.

You will note that the statute enumerates dynamite a particular explosive which is followed by the general language "or other explosives." Under a well-known rule of construction the general words are limited to the same kind and nature as those enumerated. This also helps us somewhat in arriving at the above conclusion. You are therefore advised that we do not consider the shooting of rough fish in violation of this statute.

JEF

Municipal Corporations—Town Meeting—Pub'ic Officers—Town Officers—Salary of town officers fixed by resolution at annual town meeting takes effect at once and is applicable to town officers elected on same day.

May 17, 1933.

WALTER B. MURAT,
District Attorney,
Stevens Point, Wisconsin.

You request the opinion of this department upon the following statement of facts: At the annual meeting of the town board of a town in Portage county he'd on April 4, 1933, the electors voted to reduce the compensation of all town officers twenty-five per cent. Prior to the annual meeting the town officers were nominated either by caucus or the circulation of petitions. On April 4, election day,

the polls were opened in the morning and continued to be open except during the time of the town meeting, until the evening of that day. Approximately one-half of the ballots had been cast prior to the fixing of the salaries by the town electors.

Upon the foregoing statement of facts you ask when the action of the electors in fixing the salaries takes effect, that is, whether the reduced salaries apply to the officers elected on the same day that the salaries are fixed or whether such action would be deferred until a new set of officers are elected at the spring election next year.

In answer to this I will say that sec. 60.60, Stats. provides as follows:

"The compensation of supervisors shall be four dollars per day unless a different sum is fixed by the annual town meeting. Supervisors of towns situated in counties having a population of not less than three hundred thousand, shall be paid such salary as shall be fixed by the electors at the annual town meeting, not to exceed fifteen hundred dollars per annum, which shall be in lieu of compensation per diem. The clerks of the polls and town clerks shall be entitled to a compensation of three dollars per day, and at the same rate for parts of a day actually and necessarily devoted by them to the service of the town and in the discharge of any of the duties of their respective offices required of them by law, unless a different compensation shall have been fixed by the town board. No town officer shall be entitled to pay for acting in more than one official capacity or office at the same time."

It is the opinion of this department that the salary schedule as fixed on April 4, 1933, is applicable to the officers elected on that day. It should also be noted that this salary schedule as fixed by the town electors at the annual town meeting on April 4 is applicable only for the ensuing year and that the salary schedule as fixed by statute (see Op. Atty. Gen. for 1912, p. 879, and XXI Op. Atty. Gen. 475) would take effect for the term beginning one year from that date unless the town electors again vote to reduce the salaries or otherwise fix them at the annual town meeting.
JEF

Banks and Banking—Trade Regulation—Scrip sample submitted is not in violation of sec. 348.18, Stats., nor of ch. 30, Laws 1933.

No state department has jurisdiction over regulation of scrip issued by commodity exchange which is association of unemployed.

May 17, 1933.

PUBLIC SERVICE COMMISSION.

Attention Geo. Mathews, *Director, Securities Division.*

You state that there have been established certain incorporated commodity exchanges, nonprofit associations of the unemployed, and that "credit units" or scrip is used as a medium of exchange "between the members thereof" which "represents completed labor or commodities." You further state that one of these organizations desires to know whether, (1) the scrip it issues is in violation of sec. 348.18, Stats., and whether (2) "there is any constituted state authority" through which the issuance of this scrip could be controlled or regulated.

We have examined the enclosed sample of scrip. It plainly states on its face that it will be honored in "trade" by the Commodity Exchange "in work or commodities, if, when, and after it has services or commodities mutually transferable pursuant to its rules and regulations" and "this is a credit unit and not money," and, hence, we do not believe that it is issued "as money or as an equivalent for money" within the meaning of sec. 348.18, Stats., and is, therefore, not in violation of it.

We have likewise carefully examined the provisions of ch. 30, Laws 1933, and are of the opinion that the issuance of credit units by the Commodity Exchange does not violate the provisions of ch. 30, which prohibit the issuance or distribution of "any paper instrument or document of any kind for use as scrip under the provisions of sections 220.20 to 220.23, which has not been authorized as provided" in those sections. The credit unit issued by the Commodity Exchange is not the type of scrip regulated by ch. 30, Laws 1933.

Regarding the second part of the question, you are ad-

vised that there is no state department or commission which has jurisdiction over the issuance and control of such scrip. At the present time the subject is unregulated by state laws. In view of this fact the regulation must come from the organizations themselves. This does not seem particularly unreasonable since the scrip in each instance is issued only for circulation among the members of the association and not among the general public.

The point has been raised that there may be "a chance for fraudulent issuance and racketeering organizations." In this event, the only suggestion we can make is that appropriate criminal proceedings be instituted through the local district attorney.

JEF

Courts—Jurors—Grand and petit jurors are entitled to four dollars for each day's actual attendance upon any circuit court, but are not entitled to it when not in actual attendance.

Jurors are entitled to mileage of four cents for each mile actually traveled in going to and returning from court by most usual route. This does not authorize mileage for traveling home every evening during session of court, but only in those cases where juror has been excused from attendance on day or days when court is in session. In such cases court is justified in allowing extra mileage.

May 18, 1933.

JOHN P. MCEVOY,
Assistant District Attorney,
Kenosha, Wisconsin.

You have submitted the following four questions for an official opinion:

"(1) If jurors are in continuous attendance during a week, or for several days of a week, returning to their homes each night and to the court each morning, are they entitled to mileage for each day, or for one round trip for such session?

"(2) If jurors are excused over a day during such session, are they entitled to mileage for two round trips or for only one round trip?

"(3) Are jurors excused at the end of a session lasting during the week or a portion thereof and reporting for duty the following week entitled to mileage for one round trip or for two round trips?

"(4) A regular term of court begins and continues one week. The court then adjourns to a stated time thereafter, when a resumed session is held. Are jurors entitled to mileage for each session, or to but one mileage for the 'term'?"

The statute involved is sec. 255.31, which reads as follows:

"Every grand and petit juror summoned upon any venire shall receive four dollars for each day's actual attendance upon any circuit court, * * * and four cents for each mile actually traveled in going and returning by the most usual route; * * *."

You will note that the statute gives to the juror four dollars for each day's actual attendance upon the court. This limits the per diem to actual attendance upon the court and we believe the court is not authorized to allow a per diem for any day when the juror is not in attendance upon the court. You will also note that four cents for each mile actually traveled in going and returning by the most usual route is allowed.

While it is not expressly so stated, it is our belief that only necessary travel calls for mileage and what is necessary travel is a matter that must be determined by the court under the different facts and circumstances in each individual case. The statute clearly allows mileage going to the court at the beginning of the term and returning home at the end of the term. Whether a juror is allowed mileage for traveling to and from the court to his home during the term depends upon the facts and circumstances in each case.

We believe that your first question should be answered to the effect that the juror is entitled to mileage for one round trip for each session. We believe that this is the construction that has been placed upon it by the courts of the state, and the statute bears such construction. It is not

necessary that the juror should go home every evening. Such travel is for his own personal convenience rather than required by the statute.

We believe that your second question should be answered to the effect that the juror is entitled to mileage for two round trips but no per diem for the day when not in attendance upon the court. It is a reasonable construction of the statute to hold that when they are not in actual attendance upon the court and are excused by the court it may be considered as necessary travel when they go home.

We believe that the third question must be answered thus, that the juror is entitled to mileage for two round trips when he has been excused by the court or was not in attendance upon the court on a day when the court was in session. Such juror is, however, not entitled to mileage for traveling home to spend Sunday with his family when he has not been excused from attendance on a day when the court was in session.

The answer to your last question is that jurors are entitled to mileage for each session. While we have not found any decision of any court on these questions submitted by you, we have made some investigation. From that investigation we have found that the practice in the different parts of the state has not been entirely uniform. This is due to the fact that the circumstances and facts in individual cases may sometimes differ, but we believe a reasonable construction of the statute will justify the answers to the questions as given.

JEF

Corporations—Criminal Law—Corporate Name—Sec. 343.722, Stats., is applicable to such names as "Reliable Laundry," "West Side Garage" or "National Photo Studio" or other similar names.

May 18, 1933.

JOHN P. MCEVOY,
Assistant District Attorney,
Kenosha, Wisconsin.

You have referred us to sec. 343.722, Stats., and you inquire whether any firm name of which "Company," "Co." or "Inc." is not made a part need be recorded under the provisions of sec. 343.722. For example, you ask whether the law is applicable to such names as Reliable Laundry, West Side Garage and National Photo Studio. Said section reads thus:

"Any person or persons who shall engage in or advertise any mercantile or commission business under a name purporting or appearing to be a corporate name, with intent thereby to obtain credit, and which name does not disclose the real name or names of one or more of the persons engaged in said business, without first filing in the office of the register of deeds of the county wherein his or their principal place of business may be, a verified statement disclosing and showing the names or names of all persons using such name, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not to exceed one thousand dollars or by imprisonment in the county jail not more than one year."

The only restriction on the name that a corporation incorporated in the state of Wisconsin may use is found in sec. 180.02, subsec. (1), par. (b), Stats. which provides:

"The name of such corporation, but such name shall not contain the names of individuals in the manner in which they are ordinarily used in partnership or business names, and shall be such as to distinguish it from any other domestic corporation and from any corporation licensed in this state. In case of reorganization, the name of the old corporation may be used."

It thus appears that a corporation may take any name that is not the name of an actual individual and it may use

that even if "Inc." follows the name. The statute apparently has the purpose of compelling persons who do a mercantile or commission business under a name other than their individual name and who are not incorporated to disclose the persons or partners interested in the business.

The words "Reliable Laundry," "West Side Garage," "National Photo Studio" and other similar names do not disclose the persons or partners interested. These names may be used by a corporation.

You are therefore advised that it is our opinion that the law is applicable to any name used by partners in said business when the name does not disclose all the persons or partners interested in the business, irrespective of whether the name "Company," "Co." or "Inc." is attached to said name.

JEF

Appropriations and Expenditures—School Districts—State Aid—In absence of proper certification under sec. 40.87, subsec. (5), Stats., partial payment of money under equalization law should not be made.

May 19, 1933.

ROBERT K. HENRY,
State Treasurer.

The superintendent of public instruction wishes to certify to the secretary of state a partial payment of the public school apportionment in which he would certify the number of teachers in each county and would pay the county at the rate of fifty dollars per teacher. He would then make the final apportionment after the legislature has acted upon the bill affecting the apportionment which is now before the legislature.

Sec. 40.87, Stats., makes provision for the common school equalization aid. Subsec. (5) thereof provides that the state superintendent shall certify to the secretary of state the amount due to each county.

On January 10, 1933, the state superintendent certified

to the secretary of state an apportionment based upon a maximum amount of eight hundred fifty dollars for any school district.

On March 22, this office rendered an opinion holding that under sec. 40.87 the maximum amount of state aid which could be paid by the state to any school district was six hundred dollars per teacher. This holding was based upon a change in the law effected by ch. 67, sec. 49, Laws 1931.

No apportionment based upon the six hundred dollar maximum has been certified by the superintendent of public instruction to the secretary of state.

The question now is whether the state treasurer has any legal right to make the partial payment on the basis of the apportionment made under the law prior to 1931, and before receiving an apportionment certified in accordance with the opinion rendered by the attorney general March 22, 1932.

It is our opinion that it would be in violation of the law to make this partial payment.

Subsecs. (5) and (6), sec. 40.87, provide:

"(5) Immediately upon determining the amount of state aid payable under this section the state superintendent shall certify to the secretary of state and to the state treasurer the amount thereof which each county is entitled to receive, and he shall at the same time certify to each county clerk and county treasurer the amount thereof which each town, city and village in their respective counties is entitled to receive, and a statement of the number of teachers employed in each such town, village and city."

"(6) At the time when taxes levied for other state purposes are required by law to be paid into the state treasury, each county treasurer shall pay to the state treasurer the moneys, arising from the tax levied under section 70.58 in excess of the amount such county is entitled to as state aid under this section; but if the amount so due to any county be larger than the amount such county is required to so pay, the state treasurer shall pay to the county treasurer, at said time, the amount so in excess. The secretary of state shall thereupon draw his warrants covering the total amount of the aid payable to the several counties."

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The opinion of the attorney general rendered on March 22 invalidates the apportionment certified by the superintendent of public instruction on January 10. No other apportionment has been certified since that date.

The clear and explicit provisions of sec. 40.87 (5), therefore, have not been satisfied. Under the provisions of sec. 40.87 (6), the secretary of state is authorized to draw his warrants only after a proper certification has been made by the superintendent of public instruction.

Sec. 14.31 (1) provides:

"All claims against the state, when payment thereof out of the state treasury is authorized by law, shall be audited by the secretary of state."

Sec. 14.35 provides:

"The secretary of state shall draw his warrant on the state treasurer payable to the claimant for the amount allowed by him upon every claim audited under sec. 14.31, specifying from what fund to be paid, the particular law which authorizes the same to be paid out of the state treasury, and the post-office address of the payee; and he shall not credit the treasurer for any sum of money paid out by him otherwise than upon such warrants."

Sec. 14.42 (4) provides that the state treasurer shall

"Pay out of the treasury, on demand, upon the warrants of the secretary of state and not otherwise such sums only as are authorized by law to be so paid, * * *."

As stated in *Wadhams Oil Co. v. Tracy,* 141 Wis. 150, 159:

"* * * there must be an auditing by the secretary of state before the state treasurer can rightly pay out money intrusted to his custody. * * *"

There being no proper certification made by the superintendent of public instruction to the secretary of state, there would be no authority for the secretary of state to draw warrants for the partial payment of fifty dollars per teacher and no authority for the state treasurer to pay out this money.

JEF

Indigent, Insane, etc.—Legal settlement of wife and her children is in Rock county under facts stated, where it has been agreed her husband has his legal settlement.

May 22, 1933.

CLARK J. A. HAZELWOOD, *Assistant Corporation Counsel, Office of District Attorney,*
Milwaukee, Wisconsin.

In your letter of recent date you give the following facts:

"Mrs. N. and children have lived in Milwaukee since 1929. In 1933 Mrs. N. and children are in need of charitable aid.

"Mr. N. is a resident of Beloit, Rock county. He married Mrs. N. in 1911 and the children are theirs. In June, 1929, a judgment of legal separation (not a divorce except 'from bed and board') was granted and the husband ordered to pay $22. a week for his wife's support.

"Since the separation, Mr. and Mrs. N. became reconciled and admit having cohabited as man and wife, assuming that this action automatically set aside the divorce from bed and board. Mr. N. has been employed in Milwaukee at various times for short periods of time, not sufficient to disturb his legal settlement in Beloit. The last time he worked here was between 2/15/32 and 6/9/32. Then he returned to Beloit. He voted in Beloit in November, 1932.

"The Rock county outdoor relief department agrees that Mr. N. is their charge, but thinks Mrs. N. belongs in Milwaukee. We take the position that the separation judgment has been nullified by their reconciliation regardless of the lack of court proceedings to set the same aside, and that, under the statutes, the wife and children have legal settlement in Beloit, following that of the husband."

You inquire whether the wife and children have legal settlement in Beloit or Milwaukee. Sec. 49.02, Stats., makes provision for legal settlements, and subsec. (4) thereof reads as follows:

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein."

Subsec. (2) of the same section reads as follows:

"Legitimate children shall follow and have the settlement of their father if he have any within the state until they gain a settlement of their own; but if the father have no settlement they shall in like manner follow and have the settlement of their mother if she have any."

You state that those in charge of relief in Rock and Milwaukee counties agree that Mr. N. is a charge of Rock county. This means that the two counties agree that Mr. N's legal settlement is in Rock county. It is clear from the two subsections quoted that if N's legal settlement is in Rock county, according to subsec. (2), sec. 49.02, legal settlement of the children, who apparently have been staying with their mother in Milwaukee, is also in Rock county. VII Op. Atty. Gen. 302 and 350.

One other question remains to be determined: Where is Mrs. N's legal settlement? If Mrs. N. is a married woman, within the meaning of sec. 49.02, her legal settlement is the settlement of her husband in accordance with subsec. (1), sec. 49.02, which reads in part as follows:

"A married woman shall always follow and have the settlement of her husband if he have any within the state; * * *."

You state that in June, 1929, a judgment of legal separation was granted and it appears from your statement of facts that since such time Mrs. N. has lived in Milwaukee and, under such circumstances, that she has gained a legal settlement in Milwaukee unless by operation of the law her settlement follows that of Mr. N.

There are two kinds of divorces — the kind which you state was granted in this instance is, "divorce from bed and board, or divorce *a mensa et thoro*," according to subsec. (2), sec. 247.04.

"A 'divorce a mensa et thoro' does not dissolve the marriage relations between the parties; it grants a mere separation for the time, leaving all the other marital rights and obligations still subsisting between the parties as husband and wife. The husband is still bound for the support and maintenance of the wife; * * * Miller v. Clark, 23 Ind. 370, 372." 3 Words & Phrases, page 2150.

"A 'divorce a mensa et thoro' is a qualified or partial divorce, by which the parties, while separated and forbidden to cohabit, remain married. The term presupposes a pre-existing valid marriage, and such a divorce is founded on some cause subsequent to the marriage. Zule v. Zule, 1 N. J. Eq. (Saxt.) 96, 99." 3 Words & Phrases, page 2150.

It is clear that where a "divorce *a mensa et thoro*" is granted, the man and woman nevertheless continue as married; all the marriage relations are not dissolved. According to subsec. (1), sec. 49.02, Stats., a married woman's legal settlement *always* follows that of her husband. XXII Op. Atty. Gen. 128.

Our supreme court said in passing on the question of where the legal settlement was of a wife who lived voluntarily apart from her husband:

"* * * The statute not having made any exception to the general rule stated, we are not at liberty to make one. If the present rule is unjust, it is for the legislature, and not for the courts, to correct such injustice." *Monroe County v. Jackson County,* 72 Wis. 449, 456, 40 N. W. 224.

I must advise you, therefore, that it is my opinion, upon the basis of the facts presented in your letter, that Mrs. N's legal settlement as well as the legal settlement of the children is in Rock county, where it has been agreed Mr. N. has his legal settlement.

JEF

Education—Teachers' Pensions—Public Officers—State treasurer is merely custodian of funds and securities of annuity board and state retirement system and must make such disposition of funds and securities deposited with him as may be directed by annuity board. He may refuse permission to withdraw said securities to anyone without order from annuity board.

May 22, 1933.

ROBERT K. HENRY,
State Treasurer.

You request the opinion of this department upon the following statement of facts:

"As the state treasurer of Wisconsin I am the custodian of certain securities belonging to the state insurance fund deposited in the state treasury vault by Mr. Albert D. Trathen, director of investments for the annuity and investment board.

"Mr. Trathen wishes to perfect his records of said securities, and in order to do so, he wishes to withdraw from time to time the mortgages and notes and other papers in connection therewith, keeping them in his own office for the time required to complete his records of said loans. At the time of withdrawing the securities mentioned, Mr. Trathen will give a receipt for every withdrawal.

"Will you please render a written opinion as to whether I have, as the custodian of the securities of the state insurance fund deposited in the vault in this department, the right to permit said securities to be withdrawn by Mr. Trathen for the purpose above stated."

It is the opinion of this department that the state treasurer, as ex-officio treasurer of the annuity board and of the state retirement system, must make such disposition of the fund and securities deposited with him as may be directed by the annuity board. The state treasurer is merely the custodian of these funds and securities, the management of which is vested in the annuity board. However, while such fund and securities are in the custody of the state treasurer, it being his duty to safely keep such securities, the state treasurer may refuse to grant permission for the withdrawal of such securities unless so directed by the annuity board, in which event the state treasurer would incur no liability if he acts upon the order of the board.

In this connection your attention is invited to the following statutory provisions, to wit, secs. 42.24, 42.31 and 42.32, together with the holding of the Wisconsin supreme court in the case of *Attorney General ex rel. Blied et al. v. Levitan, State Treasurer,* 195 Wis. 561 where the court says, at p. 563:

"Sec. 42.24, Stats., provides that 'The state treasurer shall be *ex officio* treasurer of the Annuity Board and of the State Retirement System, * * *.' This is all we find in the State Retirement Law relating to the *duties* of the state treasurer *with reference to the funds belonging to the State Retirement System.* This provision of law does no more than make the state treasurer *the mere custodian* of the funds and securities belonging to the State Retire-

ment System. *He is merely the treasurer of the Annuity Board.* He is charged with no responsibility concerning the investment or management of the funds and securities belonging to the State Retirement System. Being *merely the custodian* of these funds and securities, the management of which is vested exclusively and comprehensively in the Annuity Board, he can incur no liability in making such disposition of the funds and securities deposited with him as may be directed by the Annuity Board. *His duty is to safely keep such securities while in his custody, and there his duty ends.*" (Italics ours.)

In view of the foregoing we are constrained to hold that while the fund and securities of the annuity board and of the state retirement system are in the custody of the state treasurer, he may refuse the withdrawal of such securities to anyone except upon order and direction of the annuity board, in which case he would incur no liability in making disposition of the funds and securities deposited with him as directed by the said board.

JEF

Commerce—Interstate Commerce—Taxation—Beer Tax —Importing distributor located in Wisconsin who sells beer to customers living in another state is not subject to tax imposed by ch. 59, Laws 1933, for such sale, where beer is shipped to customers in such other state.

May 22, 1933.

ROBERT K. HENRY,
State Treasurer.

You refer to ch. 59, Laws 1933, and ask:

"If a Wisconsin importer receives beer from another state, and later sells it to customers living across the state line in another state, is the Wisconsin jobber liable for the Wisconsin tax?

"An instance of this is where a Racine jobber buys Chicago beer and distributes some of it to customers living in northern Illinois."

It is the opinion of this department that where a jobber in Racine buys Chicago beer and later sells some of it to customers living in northern Illinois, such jobber would not be liable for the Wisconsin tax on the beer so sold.

The pertinent provisions of ch. 59, Laws 1933, are as follows:

"SECTION 1. EMERGENCY STATE TAX ON FERMENTED MALT BEVERAGES. (1) An emergency occupational tax is imposed and levied upon brewers, bottlers and importing distributors of fermented male beverages sold by such brewers, bottlers or importing distributors other than for shipment in interstate commerce beyond the borders of this state. The rate of such tax shall be one dollar per barrel of thirty-one gallons, or three and one-quarter cents per gallon for any other quantity or fractional parts thereof. The tax herein imposed and levied shall apply to all fermented male beverages sold, shipped or delivered after the effective date of this act.

"* * *

"(4) * * *

"* * *

"(c) 'Importing distributor' shall mean any person, firm or corporation who imports for sale or causes to have imported for sale in this state any fermented malt beverages.

"* * *."

It is manifest that the emergency state tax on fermented malt beverages is not imposed or levied upon importing distributors of beer sold by such importing distributors for shipment in interstate commerce beyond the borders of Wisconsin. The language of the act merely imposes the tax on sales in this state. Under the circumstances outlined above, it is clear that the sale by the Racine distributor to residents in northern Illinois is a sale in interstate commerce, which the legislature did not contemplate should be taxed. You are therefore advised that an importing distributor in Wisconsin who sells beer to customers in northern Illinois is not liable to pay to the state treasurer the tax imposed by ch. 59, Laws 1933, where such beer is shipped to customers in such other state.

JEF

Trade Regulation—Trading Stamps—Advertising scheme by which every cash purchaser of merchandise receives cash slip bearing date and amount of purchase, holders of which are entitled on particular day selected by merchant to receive free from merchant merchandise equal to amount of cash slip bearing particular date merchant selects, is violation of trading stamp law.

May 22, 1933.

CHAS. M. PORS,
District Attorney,
Marshfield, Wisconsin.

You request the opinion of this department upon the following statement of facts:

"A merchant issues to each cash purchaser at his store, a cash slip bearing the date and amount of the purchase. At the end of each month the merchant himself selects a date during the past month and then advertises that any person who has a cash slip issued on that particular day will receive free from the merchant, merchandise equal to the amount of the cash slip, by calling at the store and presenting his cash slip bearing that particular date. The merchant himself, of course, designates the day the cash slips are redeemable in merchandise."

The question raised in this connection is whether the operation of the advertising plan as outlined above is in violation of sec. 134.01, Stats.

It is the opinion of this department that the scheme outlined above is in violation of sec. 134.01. The cash slips mentioned in the advertising scheme would clearly come under the definition of a token or other similar device within the purview of sec. 134.01. The statute clearly provides that such tokens or other similar devices shall have a stated cash value and shall be redeemable only in cash. In the instant case the tokens or slips are redeemable in merchandise and this makes the plan illegal. See the following XII Op. Atty. Gen. 76, 606; XIII Op. Atty. Gen. 331 and 475.

JEF

Taxation—Extension of Time for Payment of Taxes— Ch. 16 and 81, Laws 1933, do not authorize payment of delinquent taxes after June 1, 1933, and before tax sale on first Tuesday of August, 1933, without penalty, interest and other charges.

May 22, 1933.

JOHN J. SLOCUM, *Chief Clerk,*
Assembly.

Resolution No. 48, A., requests the attorney general's opinion as to the legal effect of chs. 16 and 81, Laws 1933, with reference to penalty, interest and charges on delinquent taxes paid *after June 1, 1933, but before tax sale on the first Tuesday of August, 1933.*

The answer is as follows: Neither ch. 16 nor ch. 81, Laws 1933, has any legal effect on penalty, interest and charges on delinquent taxes paid after June 1, 1933, but before tax sale on the first Tuesday of August, 1933. In other words, delinquent taxes paid after June 1, 1933, but before tax sale on the first Tuesday of August, 1933, are not by either of said chapters relieved from the customary penalty, interest and charges e'sewhere provided for in the statutes.

By the terms of secs. 74.03, 74.33, 74.39 and 74.51, delinquent taxes are subject to a penalty of two per cent, interest at the rate of twelve per cent per annum from January first, and other charges. Under those provisions, when lands are sold for delinquent taxes, they are sold for the amount of unpaid taxes, plus penalty, interest and other charges.

Ch. 16, Laws 1933, authorizes the governing body of any city, village or town to extend the time for the payment of taxes on real estate for the year 1932 up to and including June 1, 1933. Such act allows taxpayers who filed an affidavit in order to take advantage of such extension to pay the tax up to and including June 1, 1933, without penalty, interest, or other charges, except as to the fee for advertising the same at tax sale. Such act has a definitely limited application. It applies only in communities where the governing body has authorized the extension; it applies only

to taxpayers who have filed the required affidavit; and it makes the remission of penalty, interest, and other charges conditioned on such taxes being paid by June 1, 1933. As regards such taxes *not paid by June 1, 1933*, the act expressly provides:

"* * * *They* * * * *shall be subject to the same interest, penalties and charges as other delinquent taxes.*"

Ch. 81, Laws 1933, provides to the effect that the county treasurer shall on the *fourth Monday in June* in the year 1933 make out a statement of all lands upon which the taxes have been returned as delinquent and which then remain unpaid, with an accompanying notice stating that the same will be sold commencing on the *first Tuesday in August* next thereafter "for the payment of taxes, interest and charges thereon"; and such act also provides as to the manner of publication of said statement and notice. Sec. 74.33, Stats., on the other hand, directs that such statement and notice be made on the *fourth Monday of April* in each year and that the sale commence on the *second Tuesday in June* next thereafter. The dates mentioned in sec. 74.33 would be operative for the year 1933 were it not for the enactment of ch. 81, Laws 1933. Th act in question has the effect of extending the date of the statement and notice and the date of the tax sale in the year 1933. The act does not, however, deal in any way with remission of penalties, interest or other charges, and it does not authorize any remission of the same.

JEF

Taxation—Tax Collection—Statutes confer no express authority on county to offer for sale in 1933 lands upon which taxes remained unpaid in 1928 where county treasurer withheld such lands from sale upon receipt of portion of tax.

May 22, 1933.

R. C. TREMBATH,
District Attorney,
Hurley, Wisconsin.

You request the opinion of this department upon the following statement of facts: The taxes on a certain build-

ing and land in the city of Hurley, Iron county, Wisconsin, remained unpaid for the year 1928. In 1929 the county treasurer received a portion of the tax and he withheld the tax certificate pending receipt of the balance of the tax. The question now raised in this connection is whether the land can now be advertised for the delinquent taxes of 1928 and the sale gone ahead with.

We have carefully examined the statutes and we are unable to find any express authority for the procedure you outline above. It is clear that if the tax assessment for 1928 were invalid for any reason, the invalid tax certificates for the sale of 1929 could be canceled and a reassessment ordered by the county board. See sec. 75.25, Stats.; XVI Op. Atty. Gen. 33. However, we assume such is not the case here.

Sec. 74.39, Stats., gives no authority to the county to proceed in the manner indicated above, and sec. 75.345 would seem to negative any idea that the county now has the power to advertise for sale the lands in question to collect the delinquent taxes for the year 1928.

We are likewise unable to find any decision of a court of last resort directly in point. Inasmuch as there is considerable doubt as to the authority of the county board in this matter we suggest that the lands be offered for sale now for the 1928 taxes and in this way this question may be tested in the courts.

JEF

Automobiles—Public Officers—Torts—State is not liable for negligent or tortious acts of its agents or officers while they are engaged in discharge of governmental function.

May 24, 1933.

ROBERT K. HENRY,
State Treasurer.

You request the opinion of this department as to the liability of the state for negligence of a beer inspector work-

ing out of the state treasurer's office on official business when driving his own automobile.

It is the opinion of this department that the state of Wisconsin is not liable for the tortious acts of its agents and officers while engaged in the discharge of a governmental function. *Apfelbacher v. State,* (1915) 160 Wis. 565; *Morrison v. Fisher,* (1915) 160 Wis. 621.

In general the employee as well as the master is liable to third persons for injuries sustained by them through the negligence of such employee. Liability is based on the grounds that the employee is a wrongdoer. 39 C. J. 1311; 18 R. C. L. 817; 2 Cooley on Torts, 3d edition, pp. 1171–1172. However, the doctrine of *respondeat superior* is not applicable to the state when exercising a governmental function. This does not relieve the person injured without a remedy, for such injured person has a cause of action against the person or persons actually committing the wrong. *Apfelbacher v.* State, (1915) 160 Wis. 515; *Morrison v. Fisher,* (1915) 160 Wis. 621; *Houston v. State,* (1898) 98 Wis. 481; XIII Op. Atty. Gen. 387, 415; XVI Op. Atty. Gen. 345; XX Op. Atty. Gen. 585.

JEF

Appropriations and Expenditures—School Districts—State Aid—Plan for partial certification by state superintendent of public instruction of amounts to be distributed under sec. 40.87, Stats., is not authorized by law.

May 24, 1933.

ROBERT K. HENRY,
State Treasurer.

In your letter you enclose a communication from Honorable John Callahan, state superintendent, and you request the opinion of this department as to whether or not the plan submitted by the state superintendent of schools is legal. Mr. Callahan's letter reads as follows:

"I have read the attorney general's opinion in regard to your making a partial payment of the public school fund.

I agree that it may be held that I have not made a legal certification in line with the attorney general's opinion rendered March 22, 1933. That was after I had made the regular certification on January 10, 1933.

"I will during the next day or two make a partial certification of $200.00 per elementary teacher to each district village and city. This will be well under the certification I filed with the secretary of state on January 10, 1933, and, also, under the one which I now have ready and which I will file if the legislature fails to validate the certification of January 10, 1933.

"Under this proposal I am guaranteeing you that no district village or city will receive all of what will be due under either total certification.

"There is nothing the legislature can do other than validate the certification of January 10, 1933, or allow 40.87 to stand as passed in 1931. For that reason neither you nor I are taking any chances with this proposal.

"I wish to call your attention to the fact that I have never certified the total fund available. I have always held back some for supplementary apportionments due on account of errors of district clerks which the law provides may be corrected any time within two years."

It is the opinion of this department that the plan proposed by Mr. Callahan for a partial certification under the provisions of sec. 40.87, Stats., is not valid. The statutes make no express provision for a partial certification and no such provision can be read into the statutes. It is manifest from a careful reading of sec. 40.87, and particularly subsecs. (5), (6) and (7) thereof, that the legislature contemplated that the certification by the state superintendent of schools should be in the full amount. The statutes do not permit of a partial certification and such authority cannot be read into the statutes. We are, therefore, constrained to hold that the plan by the state superintendent of schools under which he proposed to make a partial certification of $200 per elementary teacher to each town, city and village finds no support in the statutes and is not valid.

JEF

Municipal Corporations—Public Utilities—Right of treasurer to insert in tax roll delinquent bills for electric service furnished by municipal utility is repealed by ch. 102, Laws 1933.

May 25, 1933.

WILLIAM M. DINNEEN, *Secretary,*
Public Service Commission.

The following question is taken from your request of May 15, 1933.

"Can delinquent bills for electric service furnished by a municipal utility which became delinquent prior to the passage of chapter 102, laws of 1933, but after the last tax roll was made up, be placed upon the tax roll and collected as a delinquent tax against the property to which the service was furnished?"

It is our opinion that such delinquent bills may not be placed upon the tax roll.

Sec. 66.06, subsec. (11), par. (b), Stats., provides:

"On the first day of January and July in each year the department in charge of the utility shall furnish the treasurer with a list of all lots or parcels of real estate to which water has been furnished by the city during the preceding six months and the amount due for the same. If such amount is not paid within ten days thereafter a penalty of ten per cent shall be added and the treasurer shall proceed to collect the said dues with said penalty, together with five per cent thereon for his fees. He shall have all the authority in collecting said tax vested in him for the collection of general city taxes. Said dues shall be a lien on the real estate to which the water was furnished from the time said list is placed in the hands of said clerk, and all sums that have accrued during the preceding year and are not paid by the first day of November in any year shall be reported by the treasurer to the clerk, who shall insert the same in the tax roll as a delinquent tax against the property. All proceedings in relation to the collection, return and sale of property for delinquent city taxes shall apply to said tax. This section shall apply also to other public utility service as far as practicable."

Ch. 102, Laws 1933, amended the above section by striking therefrom the last sentence, leaving the section applicable only to water furnished by a municipal utility.

Under the statute quoted, it becomes the duty of the treasurer to insert in the tax roll sums owing for water furnished by a municipal utility, which sums have become a lien upon the real estate to which the water was furnished. This insertion in the tax roll is made some time after the first of November at the time that the tax roll is made up. The treasurer's authority for making this insertion must be found in some law. In so far as the insertion for water service is concerned, that authority is still found in sec. 66.06 (11) (b). In so far as the insertion for electric service is concerned, the authority once granted by the statute above quoted has been repealed. The section above quoted was operative after the making up of the last tax roll for such a period of time that some dues for electric service became liens upon the real estate to which the electric service was furnished, but that portion of the statutes granting to the treasurer the authority to insert those dues in the next tax roll to be made up subsequent to November 1, 1933, has been repealed.

The delinquent bills for electric service furnished by a municipal utility which became delinquent prior to the passage of ch. 102, Laws 1933, but after the last tax roll was made up, cannot be placed upon the tax roll made up after November 1, 1933, and collected as a delinquent tax against the property to which the service was furnished.

JEF

Public Officers—Water and Light Commission—Members of city water and light commission can be removed from office only for cause.

May 25, 1933.

WILLIAM M. DINNEEN, *Secretary,*
Public Service Commission.

You inquire whether members of a city water and light commission provided for by an ordinance enacted under the provisions of sec. 66.06, subsec. (10) Stats., can be removed

from office arbitrarily at the whim of councilmen, or whether they are officials with a fixed tenure of office who can be removed only for cause shown.

It is our opinion that members of the city water and light commission are city officials and can be removed only for cause.

Sec. 66.06 (10) (a), Stats., provides:

"In towns, villages and cities owning a public utility the board or council shall provide for a nonpartisan management thereof, and shall create for each or all such utilities a *board* of * * * commissioners * * *."

Sec. 62.09 (1) (a) provides in respect to cities:

"The officers shall be * * * and such officers or *boards* as are created by law or by the council."

The water and light commission being a board, members thereof are city officers under the provisions of sec. 62.09 (1) (a).

An opinion rendered by this office in XVII Op. Atty. Gen. 498, relating to the compatibility of the offices of city supervisor and member of water and light commission was based upon the assumption that a member of the water and light commission was a city officer.

Sec. 17.12 (1) (c) relates to the removal and suspension of city officers and provides:

"Appointive officers, by whomsoever appointed, by the common council, for cause, except officers appointed by the council who may be removed by that body, at pleasure. * * *."

It was held in *State ex rel. Pieritz v. Hartwig,* 201 Wis. 450, 452–453:

"* * * '"It is conceded, in all the cases, that where a fixed term is assigned to the office, the appointing power has no absolute power of removal. . . . At common law in all cases except where an office is held absolutely at pleasure, an officer could be removed only for cause and after a hearing." . . . One might call the roll of all the highest courts of the country which have dealt with the subject in support of the foregoing. It is no exaggeration to say . . . that there is practical unanimity in the adjudica-

tions in this country in respect to the matter.' *Ekern v. McGovern,* 154 Wis. 157, 244, 142 N. W. 595.

"In the absence of a clear expression of legislative intention to change this well established rule of the common law, it must be assumed that the legislature intended to confine the power of removal at pleasure to those cases where there was an absence of both confirmation by the common council and a fixed term of office. We find no such clear expression of a legislative intent in sub. (1) (c) of sec. 17.12 of the Statutes."

Under the provisions of sec. 66.06 (10) (b) the members of the water and light commission are given a definite term of office. That term consists of as many years as there are commissioners.

It is our opinion, therefore, that the members of the water and light commission may not be removed by the city council at pleasure, but only for cause.

JEF

Military Service—Grand Army Home—Spanish-American war veteran who was resident of this state but who enlisted and served in another state cannot be admitted to G. A. R. Home.

May 25, 1933.

RALPH M. IMMELL,
Adjutant General.

The opinion of this office is requested as to whether or not applications of veterans of the Spanish-American War who were, prior to their enlistment, residents of this state but who enlisted and served with troops from some other state would be eligible under the present law for admission to the Grand Army Home for Veterans.

It is our opinion that they would not be eligible for admission to the Grand Army Home under the present state of the law.

Sec. 45.07 of the Wisconsin statutes relates to admission to the Grand Army Home.

Subsec. (2), par. (a), Stats. 1929, provided as follows:

"(2) The allowances appropriated by subsection (3) of section 20.15 are for the maintenance of employes who are actually maintained in the Grand Army Home for Veterans, and for the following members of the home:

"(a) Indigent soldiers, sailors and marines of the civil war, Spanish-American War, Philippine insurrection, China relief expedition, the World War and all other wars and military expeditions of the United States, who have been honorably discharged from the service of the United States, and who are residents of this state or have served in any Wisconsin regiment or command, or in the navy of the United States being credited to Wisconsin."

By Bill No. 396, S., which became ch. 347, Laws 1931, the subsection of the statute above quoted was changed to read as follows:

"(2) The allowances appropriated by subsection (7) of section 20.03 are for the maintenance of employes who are actually maintained in the Grand Army Home for Veterans, and for the following members of the Home:

"(a) Soldiers, sailors and marines who have served at least seventy days in the civil war, Spanish-American War, Philippine insurrection, China relief expedition, the world war, or in any other war or military expedition of the United States, who were honorably discharged from such service, and whose services were credited to Wisconsin, and who are fifty years of age or over. Veterans otherwise eligible for admission but who served less than seventy days, shall be likewise eligible if such service was terminated as a result of physical disability in line of duty, and disabled veterans under fifty years of age may be admitted if unable to secure adequate care from the federal government."

By said ch. 347, the Grand Army Home was opened for veterans of the world war. At the time of enlistment for service in the world war, certain cards were submitted to the prospective soldier upon which data concerning him were furnished. Among those data was a requirement that the place of residence be listed. The state which the soldier listed as being that of his residence received credit for his services in the official army records of the federal government.

The United States army during the world war was not composed of regiments or commands from various states,

but one division was composed of individuals from various states, and the division was given a numerical designation.

During the Spanish-American war soldiers who enlisted in Wisconsin served with a Wisconsin regiment or command and Wisconsin was given credit for their services. This was true irrespective of the residence of the individual. No cards were furnished at the time of his enlistment upon which he was required to state his residence. The files and records concerning soldiers of the Spanish-American war which are now in the possession of the federal government are based upon documents and records obtained by the federal government from the various states.

The change in wording in sec. 45.07 (2) (a) made by ch. 347, Laws 1931, was thus for the purpose of making the law conform to the conditions under which world war veterans enlisted and served. The change was not made for the purpose of altering the status of Spanish-American war veterans and no presumption of such an intention can be read into the statute in the light of this history.

Under the law as found in the statutes of 1929, a Spanish-American war veteran who was a resident of Wisconsin, but who enlisted from some other state, did not serve "in any Wisconsin regiment or command" and consequently was not eligible for admission to the G. A. R. Home.

As will be seen from the above discussion, no presumption of an intention to change this rule is apparent.

In the official war records of the federal government the services of Spanish-American war veterans are credited to the state in which the soldier enlisted without regard to his place of residence.

It is our opinion that, under the present state of the law, a veteran of the Spanish-American war who was a resident of Wisconsin but who enlisted and served with troops from some other state is not eligible for admission to the G. A. R. Home.

JEF

Criminal Law—Fish and Game—One who paddles boat and holds light for another illegally fishing may be convicted as principal.

May 25, 1933.

PAUL KELLETER, *Conservation Director,*
Conservation Commission.

The following question is taken from your request of May 18.

"In the event that A and B go fishing in the nighttime from a boat on one of the inland lakes of the state, where the use of gill nets is prohibited, would B, rowing the boat for A and also holding the light to enable him to set the net properly, be considered a principal in the violation of the game laws that is being committed by A?"

It is our opinion that B could be convicted as a principal for violating the state fish and game laws.

Sec. 29.30, subsec. (1), Stats., provides as follows:

"Nets and set lines may be used for the purpose of taking, catching, or killing rough fish and game fish, subject to the conditions, limitations and restrictions prescribed in this chapter; but no person shall set, place or use in any waters of this state any net, trap, snare, set hook, or set line, which is intended to or might take, catch or kill fish of any variety, other than a landing net, dip net, minnow seine or minnow dip net, unless a license therefor has been duly issued to such person."

Sec. 29.63 provides penalties for violations of the fish and game laws found in ch. 29. Sec. 29.63 (1) (a) provides:

"For the unlawful use of any gill net or trammel in taking, catching or killing fish of any variety in any waters, or for the use of any net in taking, catching or killing trout of any variety in inland waters, by a fine of not less than two hundred nor more than five hundred dollars, or by imprisonment in the county jail not less than nine months nor more than one year, or by both such fine and imprisonment."

Sec. 353.31 provides:

The term 'felony,' when used in any statute, shall be construed to mean an offense for which the offender, on con-

viction, shall be liable by law to be punished by imprisonment in a state prison."

Only those crimes are felonies which were considered such at the common law, or which had been specifically declared by statute to be felonies. Sec. 353.31, quoted above, simply provides a definition for the word "felony" when it is used in the Wisconsin statutes. *Wilson v. State,* 1 Wis. 184. See also *Hall v. State,* 48 Wis. 688, and *Pooler v. State,* 97 Wis. 627.

The illegal use of the gill net was not considered a felony at the common law. Under the statutes a person offending against this law is not subject to imprisonment in the state prison, but only in the county jail. The offense is not specifically declared to be a felony and is therefore considered as a misdemeanor.

Sec. 353.05 provides in part:

"Every person who shall be aiding in the commission of any offense which shall be a felony * * * shall be punished in the same manner as is, or shall be, prescribed for the punishment of the principal felony."

It was the purpose of this section to remove the common law distinction which existed between principals in the first and second degree with respect to the commission of a felony. The statute makes no reference whatsoever to misdemeanors and cannot, by implication, be construed as changing the common law concerning misdemeanors.

Art. XIV, sec. 13, Wis. Const., provides:

"Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

At common law there were no accessories in misdemeanors. *United States v. Williams,* Fed. Cas. No. 16708; *United States v. White,* Fed. Cas. No. 16,676; *United States v. Hartwell,* Fed. Cas. No. 15318; *Commonwealth v. Macomber,* 3 Mass. 254; *Commonwealth v. Ahearn,* 160 Mass. 300; *People v. Lyon,* 99 N. Y. 210; *State v. Munson,* 25 Ohio St. 381. See also *Wilson v. State,* 1 Wis. 184.

All participants in a misdemeanor are principals. *United States v. Winslow,* 195 Fed. 578, judgment affirmed, 27 U. S.

202; *Richardson v. United States,* 181 Fed. 1; *Albright v. State,* 164 S. W. 1001.

All who assist or aid in a misdemeanor are principals. *Deal v. State,* 80 S. E. 537; *Moody v. State,* 81 S. E. 588; *Shorter v. State,* 101 N. E. 821; *State v. Rowland Lbr. Co.,* 69 S. E. 58.

In *Connaughty v. State,* 1 Wis. 159, 170, it was stated in respect to aiding and abetting the commission of a crime:

"* * * there must be something * * * shown in the conduct of the bystander, which unmistakably evinces a design to encourage, incite, approve of, or in some manner afford aid or consent to the act."

In the case of *Commonwealth v. Richardson,* 142 Mass. 71, which was a case very much in point, it was held that a person who paddled a boat in which another was fishing in violation of a statute could be convicted of illegal fishing under that statute.

In the case mentioned B would certainly be considered as aiding and assisting in the commission of the crime by paddling a boat and holding the light for the man who set the net in violation of the law. It is our opinion that B could be convicted as a principal in the commission of the offense. JEF

Banks and Banking—State Banks—Milwaukee bank need not increase capital stock to $200,000 when changing location in city.

May 25, 1933.

A. C. KINGSTON,
Commissioner of Banking.

In 1928 a bank with a capital of $50,000 was organized in territory which at that time was just outside of the city of Milwaukee. Since the organization of the bank the territory in which it was situated has become a part of the city of Milwaukee. The bank now desires to change its location to another part of the city and has submitted to your

department, for approval, an amendment to its articles of incorporation changing its location to another part of the city. The question has arisen as to whether or not this bank in changing its location does not have to comply with the statutory requirement of having a capital of at least $200,000 for a city the size of Milwaukee.

It is our opinion that the bank may change its location without increasing its capitalization from $50,000 to $200,000.

Sec. 221.01 (12), Stats., as amended by sec. 13, ch. 10, Laws of the Special Session 1931, provides in part:

"The aggregate amount of the capital stock of any bank *hereafter organized* shall not be less than * * * two hundred thousand dollars in any city having a population of more than two hundred thousand inhabitants according to the last official census."

At the time of its organization in 1928 the capitalization of $50,000 satisfied all statutory requirements and the bank may now move its location and retain its capitalization of $50,000, unless prevented from so doing by the section above quoted. The language of that statute specifically refers to banks *hereafter organized.*

The meaning of the word "organized" as used in this statute has never been passed upon by our supreme court. In the case of *Dodge et al. v. Williams,* 46 Wis. 70, the question arose as to the meaning of the word "organized" as applied to a college. The court stated, p. 101:

"* * * So organization generally implies legal organization; in an instance like this, corporate organization. A voluntary association may be formed at will; but it can be legally organized by authority of statute only. * * *"

The Wisconsin statutes, of course, make provisions for the legal organization of banking corporations. Other states have passed upon the meaning of the word "organize" or "organization." It has been held that these two words as used in reference to corporations have a well understood meaning, which is the election of officers, providing for the subscription and payment of the capital stock, the adoption of by-laws, and such other steps as are necessary to endow

the legal entity with the capacity to transact the legitimate business for which it was created. *Waltson v. Oliver,* 30 Pac. 172, 173, 49 Kan. 107, 33 Am. St. Rep. 355; *Topeka Bridge Co. v. Cummings,* 3 Kan. 55, 77; *Hunt v. Kansas & M. Bridge Co.,* 11 Kan. 412, 439; *Aspen Water & Light Co. v. City of Aspen,* 37 Pac. 728, 730, 5 Colo. App. 12; *Nemaha Coal & Mining Co. v. Settle,* 38 Pac. 483, 484, 54 Kan. 424.

In *Commonwealth v. William Mann Co.,* 24 Atl. 601, 150 Pa. 64, it was held that the term "organized" when used in reference to the organization of a corporation applies to the act of officers in being appointed and taking upon themselves the burden of their offices. It is then furnished with organs endowed with the capacity for the functions of life and qualified for the exercise of its appropriate functions. This is the sense in which the word "organized" is used in statutes providing for the incorporation of companies for various purposes. There is no reason for believing that a similar interpretation would not be given by our supreme court to the word "organized" as used in sec. 221.01 (12). The word thus refers to the legal creation of the bank, which in the present case took place in 1928, and does not refer to the site which the bank may choose to occupy.

JEF

Municipal Corporations — School Districts — Municipal Borrowing—Towns and school districts are not authorized to issue orders to be used by county for borrowing money.

May 25, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

You state that your county is in dire financial circumstances and that a loan which you attempted to secure from the state by means of using your delinquent taxes for security was refused. Several towns and school districts in the county are not indebted in any way, except the amount

they owe the county for taxes. These towns and school districts still have borrowing power.

You desire an opinion from this office concerning the legality of a plan by which the school districts and towns would issue their notes for a specified amount up to their borrowing limit and have a trustee appointed to take these notes and use them to secure loans for the county.

It is our opinion that such a plan would be illegal. A town is a quasi corporation. A town possesses only such powers and functions as are provided for by statute. *Mulvaney v. Town of Armstrong,* 168 Wis. 476. See *Town of Swiss v. United States National Bank,* 196 Wis. 171. The school district is a quasi-municipal corporation with limited powers. *Schaut v. Joint School District No. 6, Towns of Lena and Little River,* 191 Wis. 104. Being a quasi-public corporation it has only the powers given to it by statute and such implied powers as are necessary to execute the powers expressly given to it. *State ex rel. Van Straten v. Milquet,* 180 Wis. 109. See also *Iverson v. Union Free High School District of the Towns of Springfie'd and Curran,* 186 Wis. 342. The last case also holds that the powers conferred upon school districts, however exercised, are germane to and appropriate for the promotion of education and must be used and exercised for that purpose alone.

An examination of ch. 60, Stats., relating to towns, discloses no power delegated by the statutes either to the town meeting or to the town board which could be construed as an authority to loan money to the county or to issue orders which might be used by the county for the purpose of borrowing money. Ch. 40, Stats., relating to schools, likewise reveals no statute delegating to the school district meeting or the school board authority to lend its credit to a county in any manner whatsoever.

Sec. 67.04 concerns the borrowing of money by municipalities and the issuance of bonds secured by irrepealable tax for the repayment of that money. Sec. 67.12 relates to temporary borrowing by municipalities for current and ordinary expenses. An examination of these statutes as amended by several laws passed by the legislature in 1933 did not show any authority to pursue the plan which has

been proposed. These sections of the statutes specifically indicate the purposes for which money may be borrowed. By implication this enumeration would exclude any purposes not mentioned therein.

For the reasons given above, this office is of the opinion that the towns and school districts of your county are not authorized to issue orders which may be used by the county for the purpose of borrowing money.

Your request for an opinion did not state the reason why your county was financially embarrassed at this time. It is possible that sec. 220.22 of the statutes enacted by ch. 30, Laws 1933, relating to the issuance of scrip, might be of some assistance to your county. That section provides:

"220.22 COUNTY AND MUNICIPAL SCRIP. In emergencies, when money on deposit in public depositories by counties and other municipalities are unavailable because of the stabilization of such depositories, such counties and municipalities may issue scrip for the payment of salaries and other obligations in amounts not exceeding the aggregate of such unavailable balances. The banking review board and the commissioner of banking shall adopt rules and regulations prescribing the amounts and conditions on which such scrip may be issued and distributed."

JEF

Counties—County Board—County Board Resolutions—Taxation—Tax Sales—Resolution of county board purporting to authorize county clerk to sell county owned land at price which equals or exceeds assessed valuation is invalid.

May 25, 1933.

B. O. REYNOLDS,
District Attorney,
Elkhorn, Wisconsin.

You have submitted a copy of a resolution concerning the conveyance of county owned land and request an opinion as to the validity of the same.

The resolution purports to authorize the county clerk to sell and convey by quitclaim deed, "lands for which a deed

has been executed to such county upon the following terms, which are hereby prescribed and set forth by this board for the guidance of the county clerk:"

"1. Unimproved property in the Pell Lake, Lake Ivanhoe, North Lake, Wandawega and Lake Como Beach subdivisions at an amount equal to all taxes, penalties and interest due Walworth county.

"2. Any other lands in the county improved or unimproved at a price which shall equal or exceed the assessed valuation of such property as shown by the last tax roll on file in the office of the county treasurer."

It is our opinion that the resolution is invalid for the reason that part of paragraph "2" purports to vest in the county clerk some discretion as to the terms upon which the property shall be sold. The said part "2" authorizes the county clerk to issue a quitclaim deed when the price offered "shall equal *or exceed* the assessed valuation."

If the county board intended that the county clerk should sell the land for an amount which just equaled the assessed valuation, there was no point in inserting the provision concerning an excess over the assessed valuation. If the county board intended that the county clerk should determine which lands should be sold for an amount which just equaled the assessed valuation and which land should be sold for an amount which exceeded the assessed valuation, it exceeded its authority by attempting to delegate discretionary powers of this nature to the county clerk. See XXII Op. Atty. Gen. 79.

In connection with part "1" of the resolution, it is advised that in case the same is redrafted, there be inserted in the resolution itself a definition of what is meant by "unimproved property" in order to obviate any administrative difficulties which might arise in the future.

JEF

Trade Regulation—Trading Stamps—Where coupons attached to original package are redeemable by manufacturer and retail merchant acts merely as his agent in receiving coupons for forwarding to manufacturer there is no violation of ch. 134, Stats.

May 25, 1933.

FRANK F. WHEELER,
District Attorney,
Appleton, Wisconsin.

You set forth the following two sets of facts and inquire whether they constitute a violation of ch. 134, Stats., the trading stamp law.

"* * * A certain Wisconsin corporation manufacturing ice cream and other dairy products, by the use of radio advertising, is building up clubs of boys and girls throughout the state and * * * is offering coupons which are redeemable under certain conditions. These coupons I believe, are within, attached to, or a part of the package or container containing the merchandise and are taken to the retail merchant handling the product, who sends them direct to the manufacturer for redemption. It is my understanding that the retail merchant plays no part in the redemption of the coupons except to receive them from the boys and girls and send them direct to the manufacturer.
"* * *

"The second circumstances are somewhat similar except that the plan under consideration is for the manufacturer to enclose within, attach to, or make a part of the package of ice cream a coupon to be redeemed at some open air picnic * * *, which picnic will be entirely arranged by the manufacturer and at which picnic the coupons within, attached to, or a part of the package will be redeemed for possibly an ice cream cone."

You are advised that neither case constitutes a violation of ch. 134. Sec. 134.01, subsec. (1), provides substantially that no person, firm, corporation or association in this state shall use, give, offer, etc., in connection with the sale of goods, wares or merchandise, any trading stamp, token or similar device which shall entitle the purchaser to merchandise or a thing of value in exchange for the said token or device, except that a manufacturer, packer, or dealer may

issue a slip or ticket bearing upon its face a stated cash value and redeemable in cash only on presentation, in amounts aggregating twenty-five cents or over. At the end of the section appears the following proviso:

"* * * this section shall not apply to any coupon, certificate, or similar device which is within, attached to or a part of any package or container as packed by the original manufacturer and is directly redeemed by such manufacturer."

It is our opinion that both of the circumstances set forth in your statement of facts come within the exemption contained in the proviso above quoted. In the first case it appears that the manufacturer redeems the coupons which were attached by him to the original package. The only question which could arise hinges upon a interpretation of the word "directly."

In the case of *Sperry & Hutchinson v. Weigle*, 169 Wis. 562, the court discussed a situation similar to the one presented by you in your first statement of facts. At page 566 it was held:

"* * * The language of the act limiting redemption to the issuer must be given the meaning usually accorded such language when applied to a legitimate business and cannot be held to limit redemption to a personal or manual one by the issuer or by his servants or employees only. It must be held to include an agent for whose acts the principal is responsible, because in law the redemption by an agent is the redemption of the principal and not that of the agent. We are convinced the legislature did not intend to annul the law of agency, even if it had the power, in respect to a business affirmatively sanctioned by it. If there is no lure when the principal redeems *in propria persona*, there is no lure when his agent redeems for him. * * *"

The second case stated by you is clearly within the last proviso of sec. 134.01 (1). The coupons are attached to the package as packed by the original manufacturer and are directly redeemed by the said manufacturer.

JEF

Taxation—Tax Sales—County board is not authorized to purchase excess delinquent tax roll of town.

May 25, 1933.

ROBERT L. WILEY,
District Attorney,
Chippewa Falls, Wisconsin.

You request an opinion from this office as to whether Chippewa county can legally purchase delinquent tax accounts, with the circumstances as follows:

"The town treasurer of the town of Ruby, in a settlement with the county treasurer for the county taxes for the years 1929, 1930 and 1931, has turned over an excess of delinquent real estate taxes, over the amount due the county for county taxes as provided under subsection (3), section 74.19 of the Wisconsin statutes, in the amount of $5,000.00.

"These delinquent taxes making up the excess in question were sold at the tax sales for the years 1930, 1931 and 1932, and the county of Chippewa became the purchaser of the tax certificates. These tax certificates representing this excess are unredeemed.

"The town of Ruby is now in dire need of funds and has offered to sell to Chippewa county this excess delinquent tax account for 80% of the face value of the tax certificates."

It is our opinion that Chippewa county does not have the legal authority to purchase this delinquent account as suggested by the town of Ruby.

Sec. 59.07, Stats., enumerates the general powers of the county board.

Sec. 59.08 enumerates special powers of the county board.

The county board has only such powers as are specifically enumerated in the statutes together with such additional powers as are necessarily implied from the powers specifically enumerated.

It was held in the case of *Frederick v. Douglas County, et al.*, 96 Wis. 411, pp. 416–417:

"* * * 'Counties are, at most, but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, with-

out the particular solicitation, consent, or concurrent action of the people who inhabit them. . . . They are purely auxiliaries of the state; and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers they possess, * * *. * * *' "

Secs. 59.07 and 59.08 and certain other laws found in other parts of the statutes relating to the powers of the county board do not specifically or by implication indicate that a county would have the right to purchase the delinquent tax account of a town.

Certain of the statutes relating to taxation matters do by implication strongly indicate that there is no authority in a county to deal with delinquent tax accounts, as the town of Ruby has suggested.

Under the provisions of sec. 75.36, the county is not required to make any settlement concerning the land to which title has been taken on tax deed until the land is sold by the county or, in the case of registered lands, as forest crop lands, until the forest crop is taken off.

Under this section of the statutes the county is relieved of all liability in case the amount realized from the sale is not sufficient to pay the taxes assessed against the property. No alternative provision is found in the statutes for a settlement concerning the lands to which the county has taken tax deed.

Sec. 75.34 vests in the county board the right to dispose of tax certificates at less than the face value, if it sees fit to do so.

Sec. 75.35 vests in the county board the right to authorize the county clerk to give a quitclaim deed to lands to which the county has taken a tax deed.

The statutes do not empower the town board to make any compromise in respect to the levying of taxes except as authorized by sec. 75.61 (2), which section is not at all applicable to the present case.

In addition to the inferences to be derived from the sections cited above, it would seem that the proposed plan is in direct contravention to the entire set-up of the Wisconsin taxation statutes.

JEF

Appropriations and Expenditures—County Orders—Bridges and Highways—Road Machinery—Public Officers —County clerk may not issue county orders in payment for road machinery in absence of resolution or recorded vote by county board authorizing same.

May 26, 1933.

ALOYSIUS W. GALVIN,
District Attorney,
Menomonie, Wisconsin.

For a number of years the Dunn county highway committee has purchased trucks, tractors, and other needed road machinery and equipment without authorization or appropriation for the same by the county board as is provided under sec. 82.06, subsec. (1), Stats. The policy of said highway committee was to purchase the road machinery and pay for the same out of the earnings of the county highway department. The question has now arisen whether the county clerk can legally draw an order for the payment of said machinery purchased by the highway committee when there was no authorization or appropriation made for such purchase by the county board. The machinery in question was purchased by said committee after the county board had met and no appropriation or resolution was made or passed by the board for such purchase.

It is our opinion that the county clerk has no authority to draw an order to pay for this machinery.

Sec. 82.06 provides:

"The powers and duties of the county highway committee shall be:

"(1) To purchase and sell county road machinery as authorized by the county board."

Under this section of the statutes authorization by the county board is a prerequisite to the purchase of road machinery by the county highway committee. Sec. 59.17 (3), provides that the county clerk shall

"Sign all orders for the payment of money directed by the board to be issued, * * *; but he shall in no case

sign or issue any county order except upon a recorded vote or resolution of the board authorizing the same; * * *."

It was held in *Reichert v. Milwaukee County*, 159 Wis. 25, at pp. 35–36:

"* * * The county acts through its officers as agents, but agents not of its own choice or creation. These officers are agents who represent the county in the transaction, but have their authority conferred and limited by act of the state through its legislature. Each has his appointed field of action, not created, limited, or expanded by act of the county or by usage or by contract obligations. Within the scope of the authority conferred by the legislature the county, through its board of supervisors, may by its acts arouse official action and official duties upon the part of other county officers, but the powers of the latter derived from the state legislature may not be taken away or narrowed by action of the county board nor enlarged except in cases in which the legislature has authorized such limitation or enlargement. For illustration: Although the county board is given power to contract and to authorize and require the making and delivery of county orders, and the duty of the county clerk in signing and delivering such orders is ministerial (*State ex rel. Treat v. Richter*, 37 Wis. 275), the clerk may refuse to sign and deliver an order not legally authorized (*State ex rel. Mulholland v. County Clerk*, 48 Wis. 112, 4 N. W. 121), * * *.

"Every ministerial officer in the performance of purely ministerial acts is required, at his peril, to interpret the statute, or the order made in pursuance thereof, imposing a duty upon him and calling for action on his part. His decision if erroneous does not exempt him from liability in an action, but his decision if correct is sufficient to defeat an action against him. * * *"

In *State ex rel. Mulholland v. The County Clerk of Manitowoc Co.*, 48 Wis. 112, the court uses the following language at pp. 114–115:

"* * * When the clerk refused to issue the orders demanded, the law was that 'such clerk shall not sign or issue any county order except upon a recorded vote of the board of supervisors authorizing the same.' R. S. 1858, ch. 13, sec. 59 (Tay. Stats., 308, sec. 85). Such is still the law. R. S., 249, sec. 709, subd. 3. See, also, Tay. Stats., 297, sec. 35, subd. 2; id., 301, sec. 49; R. S., 244, sec. 686. In the present case, not only was there no vote of the board of supervisors authorizing the clerk to issue the orders de-

manded by the relator, but he was expressly directed by the board not to do so. It is manifest that, had he issued the orders, he would have violated a positive provision of law.

"The signing and issuing of county orders by the clerk, when authorized by the board of supervisors, is purely a ministerial duty. *State ex rel. Treat v. Richter,* 37 Wis. 275. Unless he has such authority, he cannot lawfully sign and issue them, and a *mandamus* to compel him to do so will not be granted."

The authorities above cited are conclusive against the right of the county clerk to issue orders under the circumstances which you have set forth.

This opinion is not to be construed as holding that the persons who have sold the road machinery are not entitled to be paid for the same, but only as holding that payment cannot be made at the present time and under the circumstances which you have given. It is suggested that the county board at its next meeting ratify the purchases by the county highway committee and by appropriate action make provision for the issuance of orders in payment for the said machinery.

JEF

Bonds—Bridges and Highways—Contracts—Liens—Sec. 289.16, Stats., is construed in light of stated facts.

May 26, 1933.

HIGHWAY COMMISSION.

Attention K. G. Kurtenacker, *Secretary.*

You request the opinion of this department upon the following statement of facts:

You state that a contract, Project No. 352-C,

"in the amount of $53,331.92 was started in the fall of 1932 and when closed down for the winter, there was approximately $27,000.00 of work remaining to be done. We were informed that the surety on the contract is in bankruptcy and we therefore asked the contractor to furnish a new bond in the amount of $27,000.00 to cover the un-

completed work. The contractor now informs us that he has endeavored to secure a bond from several surety companies, but none of those companies will sign such a bond for the uncompleted contract.

"* * *

"Section 289.16 of the statutes provides that no contract involving $100.00 or more shall be let unless the contractor shall give a good and sufficient bond —.

"In this case, a bond was furnished and approved by the governor as provided in the statutes, but the surety has subsequently gone into bankruptcy, so that no protection is afforded by the bond.

"There have been no claims filed with this commission against the contract. * * *."

Upon the foregoing you ask:

"1. Under the circumstances cited is it necessary that the contractor furnish a new bond for the unfinished work?"

It is the opinion of this department that the requirements of sec. 289.16, Stats., are mandatory and that under the circumstances indicated herein it is necessary that the contractor furnish a new bond for the unfinished work. See *Cowin & Company, Inc. v. Merrill,* 202 Wis. 614.

"2. If the contractor cannot furnish a new bond, is it the duty of this commission to prevent him from resuming work, cancel his contract, and receive bids for the uncompleted work?"

It is our opinion that if the contractor cannot furnish a new bond, it is the duty of the commission to prevent him from resuming work to complete his contract, and to receive bids for the uncompleted work.

"3. If the contractor cannot furnish a new bond and his contract is cancelled, the job readvertised, and new bids received, and in the event the cost of completing the job under the new bid is greater than it would have been under the present contract, is the state entitled to recover the increased cost, and from whom?"

It is the opinion of this department that if the contractor cannot furnish a new bond this would result in a cancellation of his contract and in effect a breach thereof, inasmuch as the requirements of the statutes in this regard are

mandatory. It would seem, therefore, that the state could recover the increased cost from the contractor who breached the contract by failure to furnish the new bond, if the cost of completing the job is greater than it would have been under the existing contract.

"4. If the contractor is prevented from resuming work because of his failure to furnish a new bond, would he have a valid claim against the state for damages?"

It is our opinion that if the contractor is prevented from resuming work because of his failure to furnish a new bond, he would have no valid claim against the state for damages, inasmuch as he is required, under the statutes, to furnish a bond and to see that the bond so furnished is kept good.

JEF

Public Health—Plumbing—Rule made by state board of health under authority of sec. 145.02, subsec. (4), Stats., amending Rule 8 by extending period of journeymanship from three to five years before applicant is eligible to file application for master plumber's license is valid and applies to all examinations to be taken for master plumber's license after rule was adopted.

May 27, 1933.

BOARD OF HEALTH.

In your letter of May 26 you state that on January 29, 1932, the state board of health, pursuant to authority given by sec. 145.02, subsec. (4), Stats., amended Rule 8 governing the examination and licensing of plumbers by extending the period of journeymanship from three to five years before an applicant is eligible to file application for a master plumber's license. You state that a number of journeymen plumbers who have from three to four years of experience are now desirous of taking the examination for a master plumber's license and have recently written

the board, asking whether this rule is retroactive and applies to those journeymen engaged in the plumbing business as such before this requirement of from three to five years' experience was adopted by the board.

The rule is not retroactive in the sense that it applies to persons who have been licensed as master plumbers in the past, with three or four years' experience. It is prospective in its effect as applying to all examinations that must be taken by journeymen plumbers after the rule was adopted. They will all be required, in compliance with the rule, to have five years' experience.

JEF

Appropriations and Expenditures—State Aid—School Districts—Sec. 40.535, Stats., is construed under stated facts.

May 27, 1933.

JOHN CALLAHAN, *State Superintendent, Department of Public Instruction.*

In your recent communication you refer to sec. 40.535, Stats., with a request for a construction thereon. You ask the following questions which will be answered seriatim:

"1. In case a city superintendent also acts as principal of a high school may his salary be prorated for high school instruction, supervision and administration if he so uses part of his time, and charged towards (for) tuition fees?"

Your question must be answered in the affirmative. Sec. 40.535, subsec. (2), provides in part:

"Such tuition shall be determined by dividing the total salaries paid the teachers and principals and the high school cost of textbooks, supplies used in high school instruction, manual training and domestic science by the total enrollment for the year, but not to exceed the sum of three dollars per pupil per week, nor to be less than two dollars per pupil per week."

It is manifest, from a reading of the above quoted subsection of sec. 40.535 that the salary of a city superintendent of schools who also acts as principal of a high school may be prorated and charged in determining the tuition fees under sec. 40.535.

"2. May any part of a city superintendent's salary be figured in the cost of high school supervision and administration (cost of instruction) if he so uses part of his time, though a high school principal is employed?"

It is the opinion of this department that no part of a city superintendent's salary may be figured in the cost of administration if the city superintendent devotes a part of his time to instruction or administration where a high school principal is regularly employed.

"3. Is the amount of state aid for special vocational courses, disbursed until 1931, deductible when tuition is calculated?"

It is the opinion of this department that the amount of state aid under former sec. 20.29, now sec. 20.27, Stats., is not deductible when determining the tuition charge. Subsec. (2), sec. 40.535, Stats., provides that such tuition shall be determined by dividing *the total salaries paid the teachers and principals,* and this would not allow a deduction for state aid.

"4. Where the federal government pays a part of a teacher's salary (20.337, Stats. 1929 [20.33 (8), Stats.]) is all of the teacher's salary chargeable to tuition or only that part paid by the municipality?"

It is the opinion of this department that where the federal government pays a part of a teacher's salary under sec. 20.337, Stats. 1929 (sec. 20.33 (8), Stats.), all of such teacher's salary is chargeable to tuition under the provisions of sec. 40.535.

"5. The said law includes the terms 'manual training and domestic science.' Are these terms to be interpreted as specific or generic, i.e., are other 'special subjects' such as, agriculture and commercial work included or excluded by this terminology as regards 'supplies used in * * *'?

It is the opinion of this department that if a regular, set course in agriculture or in commercial work is given in high school, such courses are excluded under the language used in sec. 40.535, (2) Stats. If, however, classes are given in agriculture or if classes are given in commercial work, which classes are regularly included in the regular high school instruction, supplies used in such classes would be included within the meaning of sec. 40.535, (2).

"6. What is the effect of the interpretation of (5) on the salary of teachers of agriculture, commercial work, etc., as regards charging said salary to tuition costs? Shall they be included or excluded?"

It is manifest that under the express language of sec. 40.535, the salary of teachers of agriculture and commercial work are to be included in determining the tuition costs under said section.

"7. Is the cost of library books, books of reference, encyclopedias and dictionaries not used specifically as textbooks, chargeable to tuition costs or as equipment?"

It is the opinion of this department that library books, books of reference, encyclopedias and dictionaries which are not used specifically as textbooks, are not chargeable to tuition costs and may not be included in determining the amount of tuition under sec. 40.535.

"8. Is the term 'total enrollment' to be interpreted as listing all pupils enrolled in a school, irrespective of the time element or is it to be interpreted as taking into account the actual attendance and as interpreted by this department according to the attached circular, or in some other way?"

It is the opinion of this department that the term "total enrollment" as used in subsec. (2), sec. 40.535, must be construed as including all pupils regularly enrolled in a school, irrespective of whether their attendance is regular or is irregular. However, pupils who enroll in a school and then drop out after attending for a week or so are not to be included in determining the total enrollment. It is manifest that the term "total enrollment" as used in the statute is not the same as the attendance as computed

by dividing the total days of attendance and absence of all pupils by the total number of school days. The interpretation of "total enrollment" as used in this section of the statutes is indefinite and extremely difficult of interpretation. It would seem that the interpretation of this question should be left to the superintendent of public instruction according to precedent and custom.

"9. There is also raised a definite question as to what constitutes 'supplies' vs. equipment or permanent acquisitions. For instance, is any kind of laboratory equipment, such as mortars, scales, beakers or ordinary glass ware, subject to breakage and periodic destruction and therefore to be replaced from time to time, to be considered 'supplies' or 'equipment'?"

It is the opinion of this department that mortars, scales, beakers or ordinary glass ware, which are subject to breakage and periodic destruction, are to be considered "supplies" within the purview of sec. 40.535, while typewriters are not to be classed as supplies but must be classified as permanent equipment and not chargeable to tuition within the meaning of this section.
JEF

Courts—Garnishment—Quasi-garnishment—Where money is obtained by state from Reconstruction Finance Corporation and allotted to municipalities, which pay out part of same to property owners as shelter allowance under relief program, funds so paid out to property owners as such allowance constitute money subject to quasi-garnishment under sec. 304.21, Stats.

May 27, 1933.

INDUSTRIAL COMMISSION.
Attention Florence Peterson, *Supervisor of Unemployment Relief.*

You request the opinion of this department upon the following statement of facts:

"In order to effect a more uniform policy on shelter for persons on relief, the industrial commission, with the tacit

approval of the Reconstruction Finance Corporation, has adopted the policy as described on the attached memoranda. Although this shelter allowance is the amount which a relief agency may enter on their monthly statements for reimbursement from federal funds, it does not preclude a city or county from paying additional amounts from local funds if they should decide to do so. The purpose of the 'shelter allowance' was to enable landlords to defray current maintenance costs and eliminates investments on interest or profit on investments.

"This question is now brought to us:

" 'Now that a shelter allowance has been substituted for the payment of rent, are such funds liable under the quasi-garnishment statute in a judgment against the property owner for the use of whose property the allowance is made?' "

It is the opinion of this department that funds paid by the unemployment relief authorities to owners of property rented or leased to indigents or persons receiving poor relief, are subject to quasi-garnishment under the provisions of sec. 304.21, Stats.

Sec. 304.21 applies to any person, firm or corporation instead of merely to officers or employees and to any money due at the time of the rendition of the judgment or any time thereafter during the life of the judgment from the state or any of the main governmental subdivisions thereof. See also XXI Op. Atty. Gen. 1063.

JEF

Indigent, Insane, etc.—Medical Aid—In absence of contract, express or implied, county has no obligation to pay for medical and hospital services furnished indigent person, notwithstanding guarantee of payment by city officials.

June 1, 1933.

HAROLD M. DAKIN,
District Attorney,
Watertown, Wisconsin.

You say that a man who had been receiving county aid through the outdoor relief plan was severely injured in Beaver Dam; that medical and hospital services were furnished to him and that payment for these services was guaranteed by the city of Beaver Dam. The city claims reimbursement from Jefferson county, and you ask whether the county is liable for the doctors', hospital and nursing bills incurred in connection with the care of the injured man.

It is apparent from your statement that Jefferson county is on the county system of poor relief. Under the provisions of sec. 49.15, Stats., when a county adopts the county system of poor relief, it has the duty to relieve and support the poor in said county, and the cities, towns and villages have no duties in regard to the care and relief of the poor.

This office has held, however, that there is no obligation on the part of a city or county to pay for medical attention furnished to an indigent person unless the furnishing of such aid has been authorized by the proper authorities. XXI Op. Atty. Gen. 149. Obviously the city officials in a county which is on the county system of poor relief have no authority to enter into any contracts on behalf of the county for the furnishing of poor relief. Since the county would not have been liable for payment of medical and hospital services in the absence of a contract, express or implied, made by the proper county officials, the mere fact that the city had guaranteed the payment cannot have the effect of imposing any liability upon the county.

JEF

Counties—County Board—Torts—County board has control over courthouse and courthouse grounds.

When county rents courthouse as commercial enterprise it is liable for torts occurring through negligence of its officers or agents.

County board has right to permit use of courthouse for nongovernmental functions provided such use is in interests of public welfare, and does not interfere with use of court rooms by judiciary.

June 1, 1933.

HAROLD M. DAKIN,
District Attorney,
Watertown, Wisconsin.

You ask who has control over the courthouse and grounds especially with reference to the granting of permission to various organizations to use the courthouse as a meeting place.

The county board has control over the courthouse and courthouse grounds. See subsecs. (1), (2), (4), and (6), sec. 59.07, Stats.

You ask further: In the event that somebody should be injured at one of these meetings would any liability attach to the county; for instance, if a person should fall down an unlighted stairway or something of that kind, would the county be liable?

The county would be liable for injuries happening through the negligence of its officers or agents. The rule is well established that there is no liability for torts arising out of the prosecution of governmental functions *(Apfelbacher v. State,* 160 Wis. 565; *Bernstein v. Milwaukee,* 158 Wis. 576; *Erickson v. West Salem,* 205 Wis. 107); the rule is equally well established that a municipality is liable for torts while engaged in carrying on proprietary enterprises for gain *(State Journal Printing Co. v. Madison,* 148 Wis. 396; *Young v. Juneau County,* 192 Wis. 646). While the control and management of the courthouse ordinarily is obviously a governmental function, when the county rents the courthouse as a commercial enterprise, it does so in its proprietary capacity and is subject to liability accordingly. In

Worden v. New Bedford, 131 Mass. 23, it was held that while a city was not liable for injury caused by any defect or want of repair in a public building erected solely for municipal purposes or the negligence of its agents in the management of such building, yet where it let the building or part of it for its own advantages and received rents therefor, it was liable while it was so let in the same manner as a private owner would be. This rule was followed in *Little v. Holyoke,* 177 Mass. 114, 52 L. R. A. 417, 58 N. E. 170. See L. R. A. 1917E 695, 25 L. R. A. (N. S.) 88.

You ask whether the county board has the right to permit the use of the courthouse for the use of nongovernmental functions. The county board has the right to permit the use of the courthouse for nongovernmental functions provided such use is in the interest of the public welfare and does not interfere with the use of the court rooms by the judiciary. In *Bell v. The City of Platteville,* 71 Wis. 139, it was held that the city of Platteville had the right to rent out a room in the city hall for entertainment purposes. See also: *Stone v. The City of Oconomowoc,* 71 Wis. 155. In XII Op. Atty. Gen. 1, it was held that county property may be leased only for such purposes as are in the "interest of the public welfare." "Public welfare" is a somewhat general term. It has been defined as follows: The public welfare embraces the primary social interests of safety, order, morals, economic interest, and nonmaterial and political interests. *State v. Hutchinson Ice Cream Co.,* 147 N. W. 195, 199, 168 Iowa 1, L. R. A. 1917B 198. In the development of our civic life, the definition of "public welfare" has also developed until it has been held to bring within its purview regulations for the promotion of economic welfare and public convenience. *Pettis v. Alpha Alpha Chapter of Phi Beta Pi,* 213 N. W. 835, 838, 115 Neb. 525. In *Miller v. Board of Public Works,* 195 Cal. 477, 485, 234 P. 381, the court said:

"* * * As our civic life has developed so has the definition of 'public welfare' until it has been held to embrace regulations 'to promote the economic welfare, public convenience and general prosperity of the community.' "

It must be understood, of course, that in renting the courthouse there can be no interference with the use of the court

rooms by the judiciary. See *In re Court Room,* 148 Wis. 109 and *In re Janitor of Supreme Court,* 35 Wis. 410, for discussions concerning the right of courts to perform their functions without interference.
JEF

Taxation—Extension of Time for Payment of Taxes—Finance committee of county board has no authority to grant additional period of thirty days in which 1932 property taxes may be paid without penalty.

June 1, 1933.

JOHN P. MCEVOY,
Assistant District Attorney,
Kenosha, Wisconsin.

You request the opinion of this department upon the following statement of facts:

* * * "The finance committee of the county board desires to grant an additional period of thirty days in which taxes may be paid without penalty.
"* * *
"My question is: May the finance committee of the county board take such a step?"

It is the opinion of this department that the finance committee of the county board has no authority to grant an additional period of thirty days in which the 1932 property taxes may be paid without a penalty.

We have given this question very careful consideration but are unable to find any authority for such action either on the part of the finance committee of the county board or of the county board itself.

It is well settled that the county, being a creature of the legislature, has only such powers as are expressly granted by statute or as may be implied from the express powers granted. The county board has no power to remit taxes on any portion thereof nor to extend the time of payment thereof except if legislative authority is given. Nowhere in the statutes is there any grant of authority which would author-

ize either the county board or any of its committees to remit the penalties or interest provided by statute or to extend the time for the payment of taxes without penalty. See XXI Op. Atty. Gen. 745.
JEF

Corporations—Municipal Corporations—Public Utilities
—Charges accruing during preceding year for water service furnished by municipal utility constitute lien on premises regardless of change in ownership.

Delinquent bills may be placed in tax rolls only if accrued during preceding calendar year.

June 2, 1933.

WM. M. DINNEEN, *Secretary,*
Public Service Commission.

You state that a certain piece of property was purchased in June, 1932; that against said premises was a tax lien for unpaid water service bills rendered for service furnished from September, 1931, to May, 1932, to the previous owner, and that "the delinquent bill was entered in the tax roll in November, 1932, and apparently became a lien upon the premises."

You ask the following question:

"Is the unpaid water bill of the previous occupant and owner for service furnished in 1931 as well as 1932 a proper lien upon the premises now owned and occupied by another?"

Yes, under the authority of XXI Op. Atty. Gen. 695, 697, wherein it was said:

"* * * In the case of municipally owned utilities, however, the section here under consideration specifically creates a lien against the property which accrues when the list of delinquent charges for the preceding calendar year is filed with the clerk by the treasurer on November 1. Changes of ownership of the property do not affect the validity of such a lien, since the existence of the statute creating the lien puts a purchaser on notice with respect thereto."

We call your attention, however, to an error in entering the delinquent bills on the tax roll which is apparent from your statement of facts. You say the delinquent bills from September, 1931, to May, 1932, were entered in the tax roll in November, 1932. Sec. 66.06, subsec. (11), par. (b), Stats., provides only for the entry on the "first day of November" of "all sums that have accrued during the preceding year." This means the preceding calendar year, which on November, 1932, was the year 1931. XXI Op. Atty. Gen. 424; sec. 370.01, subsec. (10), Stats. Therefore, in the case under consideration, in November, 1932, all that could have been entered in the tax roll were the unpaid bills from September, 1931, up to January, 1932. The delinquent tax bills for January, 1932, through May, 1932, cannot be entered in the tax roll until November, 1933.

You ask:

"What limitation, as to period of delinquency, is placed upon the inclusion of past delinquent bills on the tax roll?"

Sec. 66.06, subsec. (11), par. (b), Stats., gives the clerk authority to enter on the tax roll "all sums that have accrued during the preceding year." This is the limit of his authority, and he cannot place in the tax roll sums accruing prior to the commencement of the preceding year.

JEF

Indigent, Insane, etc.—Public Health—Wisconsin General Hospital—Claims against county arising under sec. 142.04 or 142.08, Stats., are payable by county treasurer upon certificate of county judge.

June 2, 1933.

EDWARD S. EICK,
District Attorney,
Chilton, Wisconsin.

You call our attention to the following statutes which appear to conflict:

Sec. 142.08, subsec. (5), Stats., provides:

"The expense of treatment of patients in other hospitals under this chapter shall be paid by the county treasurer upon certificate of the county judge, who shall be satisfied as to the correctness and reasonableness thereof."

Sec. 59.77, subsec. (1), Stats., provides:

"Every person, except jurors, witnesses, interpreters, and except physicians or other persons entitled to receive from the county fees for reporting to the register of deeds births or deaths, which have occurred under their care, having any such claim against any county shall:

"(a) Make a statement thereof in writing, setting forth the nature of his claim and the facts upon which it is founded, and if the claim is an account the items thereof separately, the nature of each and the time expended in the performance of any service charged for, when no specific fees are allowed therefor by law, and, if the claim is for mileage, the statement shall specify dates and places so as to show between what points and when and the purpose for which the travel charged for was had.

"(b) Such statement shall be verified by the affidavit of the claimant, his agent or attorney, and filed with the county clerk; and no such claim against any county shall be acted upon or considered by any county board unless such statement is so made and filed."

You ask whether bills incurred for treatment of patients at home under sec. 142.04, Stats., or treatment in a hospital other than the Wisconsin general hospital, must be filed pursuant to sec. 59.77, Stats.

You are advised that as regards expenses of the county incurred under ch. 142, Stats., the provisions of that chapter govern and the county treasurer has authority to pay such expenses on certificate of the county judge.

It is a familiar principle of statutory construction that a special provision will prevail over a general provision. *Wisconsin Gas & E. Co. v. Fort Atkinson,* 193 Wis. 232. Sec. 59.77, Stats., is merely a general provision regarding the payment of claims against the county. Sec. 142.08 (5) is a specific provision relating to the payment of certain definite expenses and hence is controlling as to those expenses. Expenses incurred under the provisions of sec. 142.04 should logically be paid in the same manner as those incurred under sec. 142.08. This is in accordance with the

opinion of this office in XXI Op. Atty. Gen. 240, wherein the legislative intent in regard to this section was fully discussed.
JEF

Banks and Banking—State Banks—Provision in stock certificate of state bank making it "fully paid and nonassessable," contrary to secs. 221.42 and 220.07, Stats., is null and void and of no effect.

June 2, 1933.

A. C. KINGSTON,
Commissioner of Banking.

You state that the stock certificates of a state bank in liquidation were found to have the following words included in the printed form: "fully paid and nonassessable"; that you levied the statutory assessment on all the stock of this bank, but that one person on whose stock certificates the above mentioned words appear has denied liability on the grounds that this stock is nonassessable. You have submitted a number of questions regarding the validity of his contentions.

You are advised that the contentions are without merit, that the words "fully paid and nonassessable" are contrary to secs. 221.42 and 220.07, Stats., and are therefore null and void and of no effect. The liability of bank stockholders is statutory (*Thompson v. Gross,* 106 Wis. 34; *Schwenker v. Reedal,* 205 Wis. 376), and that liability is not dependent on the terms of the stock or by-laws of the bank. Any provisions contained in the stock certificate or by-laws and any agreement among the stockholders contrary to the statutory provisions are absolutely void. *Schwenker v. Reedal,* 205 Wis. 376; *Wells v. Black,* 117 Cal. 157, L. R. A. 619; *Barto v. Nix,* 15 Wash. 563, 46 Pac. 1033. In the case of *Barto v. Nix,* 15 Wash. 563, 46 Pac. 1033, 1034, where certain bank stock was issued to the defendants under an agreement that they should incur no liability thereon, the court said:

"* * * The contract was clearly an illegal one, and there might be reason for holding that the transaction must be treated as though this secret illegal agreement had never been entered into. But it is not necessary here to decide that question. This action is in the name of the receiver, who represents both the bank and its creditors; and, as between the creditors and these defendants, it is clear that this secret agreement, by which it was sought to change the liability of the holders of this stock, was without any force whatever. To hold that one could have stock issued to him, and allow the same to stand in his name upon the books of the bank, and yet, by a secret agreement with such bank, be released from all liability growing out of the issue of such stock, would be contrary to the provisions of our statute, and to public policy. This would be true even if the person to whom the stock was issued was a stranger to the corporation at the time of its issue; and where, as in the case at bar, the stock was issued to the directors of the bank, who must be presumed to know its condition and the purpose of the issue, the reason for holding them liable is much greater."

JEF

Legislature—In counting number of days for which either house may adjourn without consent of other, Sundays should be excluded, and legal holidays included, in absence of legislative construction. Court would probably be guided by any practical construction of legislature.

June 2, 1933.

JOHN J. SLOCUM, *Chief Clerk,*
Assembly.

Reference is made to art. IV, sec. 10, Wis. Const., which provides, in part:

"* * * Neither house shall, without the consent of the other, adjourn for more than three days."

You request the opinion of this department as to "whether or not Sundays and legal holidays may be exempted when determining the adjournment."

It is our opinion that Sundays may be excluded, but that legal holidays may not.

In the case of *Moog v. Randolph*, 77 Ala. 597, approved in the case of *Ex parte Cowert*, 92 Ala. 94, the court discussed the meaning of the word "days" as used in art. IV, sec. 5 of the Alabama constitution, which provided that the legislature should not remain in session longer than fifty days. The court stated, pp. 607–608:

"I fully concur with the Chief-Justice in the views expressed by him as to the proper construction of section 5, of Article IV of the present Constitution, fixing the time during which the General Assembly is permitted to remain in session. I am satisfied that 'fifty days' mean fifty legislative *working days*, exclusive of the Sundays. * * * This question has been repeatedly considered by the judiciary committees of the Senate and House of Representatives, at successive sessions of the General Assembly, since the adoption of the Constitution; and their reports, concurring in this view, have in each instance been adopted by those bodies. Even if we regarded the question a doubtful one, we would hesitate to depart from this settled legislative construction of the fundamental law, especially in view of the serious consequences which would necessarily flow from it."

In the case of *People ex rel. Akin v. Rose*, 167 Ill. 147, the constitutional provision under discussion provided:

"Any bill which shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him (the governor), shall become a law in like manner as if he had signed it; unless the General Assembly shall, by their adjournment, prevent its return, in which case it shall be filed over his objections in the office of the secretary of state, within ten days after such adjournment, or become a law."

In that case the court held that the words "ten days" as used in the latter part of the constitutional provision meant ten days exclusive of Sundays, even in the face of the fact that the legislature had specifically excluded Sundays in the *first* part of the provision, but not in the last.

In *State ex rel. State Pharmaceutical Assn. v. Michel*, 27 So. 565, the court said, p. 568:

"* * * There is a rule of general, though perhaps of not universal, acceptance, that, where a limitation of time is fixed within which a particular act or thing is required to be done, if done at all, after which performance or the

doing of the thing would be without effect if the time exceed a week, an intervening Sunday is to be included in the computation; if less than a week, Sunday is to be excluded. * * *"

Under this rule the court stated, p. 568:

"* * * Where the time stipulated was such that it did not necessarily include Sunday, Sunday is excluded from the computation, without express mention of the fact. Where the time stipulated must necessarily include Sunday, to exclude that day from the computation there must be an express declaration to that effect. * * *"

See also the case of *John v. Farwell Co. v. Matheis,* 48 Fed. 363.

In the light of the above holdings it is our opinion that Sundays should be excluded when considering the number of days for which either house may adjourn without the consent of the other.

In the case of *State ex rel. Putnam v. Holm,* 215 N. W. 200 (Minn.), a bill was presented to the governor on Wednesday, and the legislature adjourned on the following day until the next Monday. The intervening Friday was Good Friday, which had been declared a legal holiday in the state. The court was confronted with the problem of including or excluding this day in the time in which the governor was required to return the bill. Good Friday was included in the count, the court stating, p. 202:

"* * * There is an important distinction between Sunday, the Lord's Day, and a secular holiday, even though the Legislature, by laws, has established the policy of not transacting public business other than necessary on such days, * * *."

It is our opinion that our supreme court would probably be guided by the reasoning of the Minnesota court and would hold that legal holidays should be included when counting the number of days for which either house may adjourn without the consent of the other.

This opinion is based upon the assumption that the legislature has not seen fit to place a construction upon the constitutional provision in question, but that the same is open to construction by the court without any guidance in so far as practical construction by the legislature is concerned. It

is quite probable that if extensive research disclosed the fact that the legislature has placed a definite interpretation upon the meaning of this constitutional provision, that the court would be guided by the same.

As was stated in *In re Appointment of Revisor,* 141 Wis. 592, 602–603:

"* * * If it be doubtful, then the inquiry whether there has been any long-continued, practical construction of the constitutional provision by the branches of the government affected thereby is not only proper but essential * * * when the meaning of a doubtful clause is in question, the construction placed upon it by the fathers, and concurred in through long years without question, is strongly persuasive and frequently will be held to be controlling. *State ex rel. Bashford v. Frear,* 138 Wis. 536, 102 N. W. 216. * * *"

JEF

Taxation—Motor Vehicle Fuel Tax—Words and Phrases —Original Invoice—Words "original invoice," under sec. 78.09, Stats., do not mean invoice necessarily obtained at date of purchase.

June 2, 1933.

JOHN J. SLOCUM, *Chief Clerk,*
Assembly.

ROBERT K. HENRY,
State Treasurer.

Request is made for an opinion on the question as to whether, under sec. 78.09, Stats., the original invoice for gasoline purchased, on which a refund of the tax is claimed, must necessarily be secured on the date of purchase. Reference is made to an opinion rendered by this office, March 14, 1933 (XXII Op. Atty. Gen. 158), from which the following language is taken, pp. 159–160:

"It is the opinion of this department that the words 'original invoice,' as used in sec. 78.09, refer to the invoice obtained at the time of purchase of the motor vehicle fuel. * * *

"* * *

"* * * It is a simple matter to obtain an invoice at the time of the purchase of the gasoline. This must be done if a refund is claimed."

The opinion has been interpreted by the state treasurer to mean that claims for refunds should be refused unless the invoices were obtained at the time that the gasoline was purchased.

It is a fundamental rule that opinions and decisions must be interpreted on the basis of the specific state of facts passed upon. In the opinion referred to it was the intention of this office to pass upon the meaning of the words "original invoice" as distinguished from a second invoice or a copy, and the element of time was not the important consideration.

The question as to the time at which the original invoice must be obtained, however, is now squarely presented by the joint request.

The question has been just as squarely passed upon by the supreme court of the state of Oregon in the case of *Oregon–Washington R. & Nav. Co. v. Hoss, Secretary of State,* 128 Ore. 347, 274 Pac. 314. In that case purchases of gasoline were made on and between the 21st day of August, 1925, and the 24th day of February, 1926. Invoices were given at the time of purchases which did not include the amount of the tax because of a misinterpretation of the law. When the correct interpretation of the law was determined by the oil company and the individual claimant, corrected invoices were obtained on the 29th day of April, 1927, almost two years after the first purchase, and something over a year after the last purchase.

The gasoline tax law of the state of Oregon requires that the person making a claim for refund should submit an affidavit which must be accompanied by the original invoices. (The same requirement is made of sec. 78.09, Wisconsin Stats.) In making its decision, the court used the following language, p. 316:

"Some stress is laid by defendant upon the fact that the statute * * * requires that the affidavit for a refund must be accompanied by the 'original invoices.' Counsel for defendant construes this to refer to the first invoice

* * * furnished when the gasoline was sold plaintiff, but it is clear the word 'original' as there employed is used in contradistinction to a copy and *not in reference to time.*" (Last italics ours.)

The Wisconsin supreme court would probably adopt the interpretation given by the state of Oregon to a statute almost identical to our own.

It is our opinion that the words "original invoice" as used in sec. 78.09 do not mean an invoice necessarily obtained on the date of the purchase.

JEF

Bridges and Highways—Relocations—Land formerly used for highway purposes abutting on relocated highway does not revert to private ownership. Right to plant vegetation on such lands does not necessarily exist in all cases, but may be acquired by appropriate proceedings.

June 2, 1933.

M. W. TORKELSON, *Director of Regional Planning, Highway Commission.*

You state that the right of way on U. S. Highway No. 12 and 16 was relocated in the city of Tomah, that the old highway abuts on the new right of way, and that the city authorities wish to plant trees and shrubbery on the space occupied by the old highway in accordance with a general highway beautification plan. The difficulty, however, is that the owner of a filling station is maintaining a driveway across a portion of the old highway instead of using another entrance which the local authorities desire him to use. You ask our opinion on the right of the highway authorities to require the owner to use the entrance which will not interfere with the highway beautification plan.

Sec. 80.01, subsec. (3), Stats., to which you call our attention, provides:

"No lands abutting on any public highway, heretofore or hereafter acquired or held for highway purposes, shall be deemed discontinued for such purpose so long as such lands

continue to abut on any public highway. All lands hereafter acquired for highway purposes may be used for any purpose that the public authorities in control of such highway shall deem to conduce to the benefit of the public use and enjoyment thereof. Such authorities may improve such highways by suitable planting to prevent the erosion of the soil or to beautify the highway. The right to protect existing vegetation and to plant vegetation in any highway heretofore laid out may be acquired by the highway authorities in control of such highway in any manner that lands may be acquired for highway purposes. It shall be unlawful for any person to injure any tree or shrub, or cut or trim any vegetation, or make any excavation in any highway hereafter laid out or where the right to protect vegetation has been acquired, without the consent of the highway authorities having control of the highway and under their direction."

This statute prevents the land in question from reverting to private ownership as was formerly the case when old roads were rendered unnecessary by the relocation. See XVIII Op. Atty. Gen. 624, and cases therein cited.

The manner of acquiring the old right of way is not stated in the request. Probably, however, the right of way was acquired so as to be held in trust for stated purposes, such as for public travel only. If that is true, the city would have no right to plant trees and shrubs on the old right of way. That such is the case in some instances is expressly recognized in the statute above quoted by the following provision:

"* * * The right to protect existing vegetation and to plant vegetation in any highway *heretofore* laid out may be acquired by the highway authorities in control of such highway in any manner that lands may be acquired for highway purposes."

In the case you present, if the land is held only for use as a public street, the local authorities at the present time could not compel the filling station owner to build his driveway elsewhere in order to permit the use of the land for highway beautification. They may, however, follow the directions in sec. 80.01, subsec. (3) and acquire "the right * * * in any manner that lands may be acquired for highway purposes."

JEF

Minors—Adoption—Court order of adoption by court having jurisdiction is valid until vacated or modified by court proceedings.

June 5, 1933.

BOARD OF CONTROL.

You state "that in 1927 a man and woman, giving the name of Mr. and Mrs. Peterson, were allowed to adopt a child in one of the county courts of Wisconsin;" that it has since been discovered by a child welfare agency of Minnesota that "Mr. and Mrs. Peterson were not married until after the adoption had been granted." You now inquire whether, because of this fact, the adoption is illegal.

It does not appear from your statement of facts that the court authorizing the adoption did not have jurisdiction over the matter. It is, therefore, assumed that it had jurisdiction. The order of adoption is, therefore, valid and the adoption legal until such time as the order of adoption is vacated or modified by a court of competent jurisdiction. As was held in XXII Op. Atty. Gen. 28, the "sentence of court of competent jurisdiction * * * controls unless and until modified by appropriate proceedings."

Your attention is also directed to sec. 322.09, Stats., which would probably operate as a bar to any proceedings attacking the validity of the adoption proceedings, since they were had more than two years prior to this date.

JEF

Public Officers—Board of Medical Examiners—Public Records—Under sec. 327.18, Stats., board of medical examiners need not furnish original or certified copies of examination papers.

Board cannot refuse applicant right to write examination if he meets requirements of sec. 147.15.

June 6, 1933.

BOARD OF MEDICAL EXAMINERS,
LaCrosse, Wisconsin.
Attention Robert E. Flynn, M. D., *Secretary.*

Your board desires the opinion of this office upon the following two questions, viz.:

(1) Whether or not the board is required to furnish the original, or certified copies, of an applicant's examination papers, under sec. 327.18, Stats.

(2) Whether the board has jurisdiction to determine how often an applicant who has failed repeatedly can write.

It is our opinion that the board is not required to furnish either the original or certified copies of an applicant's examination papers.

Sec. 327.18, relates to official records, and reads as follows:

"(1) Every official record, report or certificate made by any public officer, pursuant to law, is prima facie evidence of the facts which are therein stated and which are required or permitted to be by such officer recorded, reported or certified.

"(2) A certified copy of any written or printed matter preserved pursuant to law in any public office or with any public officer in this state, or of the United States, is admissible in evidence whenever and wherever the original is admissible, and with like effect.

"(3) Any such officer of this state who, when tendered the legal fee therefor and requested to furnish such certified copy, shall unreasonably refuse to comply with such request, shall forfeit not less than twenty nor more than one hundred dollars, one-half to the person prosecuting therefor."

Subsec. (1) of the above statute refers to official records, reports or certificates made *pursuant to law;* subsec. (2)

thereof, relates to a certified copy of printed matter preserved *pursuant to law;* subsec. (3) thereof provides a penalty upon an officer who *unreasonably* refuses to furnish "such certified copy," which can only refer to a certified copy of a paper preserved pursuant to law.

An examination of ch. 147, Stats., relating to duties and powers of the Wisconsin state board of medical examiners, does not reveal any provision to the effect that the examination papers of applicants shall be preserved. Their preservation, therefore, is a matter in the discretion and for the convenience of the board itself. These examination papers are not preserved *pursuant to law* and are not covered by the provisions of sec. 327.18, above quoted.

In XI Op. Atty. Gen. 549, sec. 4148, Stats. 1921 (now sec. 327.18, Stats.), was discussed and the following language used, p. 550:

"As our supreme court pointed out in *Musback v. Schaefer,* 115 Wis. 357, this statute, by imposing a penalty for failure to furnish a certified copy, impliedly creates a duty to furnish such copy. That duty, however, is limited by the word 'unreasonably' in the statutes. The presence of that word means that in those cases where it is reasonable for a public official to refuse to certify a copy of a document, his failure to furnish the copy does not subject him to a penalty, and it therefore follows that in such cases he is under no duty to furnish it."

Discussion was then made of the common law rule holding that a public officer might refuse inspection of a document on the ground (1) that the applicant had no interest in the document, or (2) that the disclosure of the matter contained in the document would be against public policy or would embarrass the official in the performance of his duties.

Reference was then made to the notes of the revisers of 1878, which states: "Provision is added to compel the furnishing of copies in proper cases."

It was then said, pp. 551–552:

"To my mind, the use of the words 'in proper cases' by the revisers of 1878 is of great significance in determining what the effect of the new sec. 4148 was intended to be. The revisers expressly recognized that there were cases where

it would not be proper to furnish certified copies, and that is the reason why they inserted the word 'unreasonably' in the statute. * * *."

In XI Op. Atty. Gen. 7, sec. 18.01, Stats. 1921, referring to the custody and delivery of official property and records, was discussed. The language of that section is similar to that used in sec. 327.18 (3), Stats., in that it refers to property and things "required by law to be filed, deposited or kept in his office." It was said in reference to this section, p. 9:

"* * * If it is not such a record, it is then your power and authority to deny such inspection, for as I read the statute first herein quoted, sec. 18.01, it refers only to such property and things as the officer is under a legal duty or obligation to preserve, and it does not embrace every document or memorandum that may be found in a public office at any time. In other words, any document or memorandum or report that a public officer has a right to destroy is not embraced within the terms of the statute, notwithstanding that it could be said to be in his lawful possession if he did in fact preserve it. I distinguish such from those required to be kept, on the ground that the phrase 'lawful possession or control of himself or his deputies' means a possession or control resulting from a legal duty rather than from a mere lawful desire to retain such possession or control for future reference of himself or his assistants."

It would seem that this argument would be equally applicable to sec. 327.18 (3), Stats., and would cover examination papers which the board does keep without being obliged to do so.

In reference to your second question, I do not find any authority given to the board to refuse an applicant the right to write an examination if he can comply with the requirements set forth in sec. 147.15, Wis. Stats.

In the absence of specific statutory authority giving the board the right to refuse the applicant an opportunity to write, it must be held that the board does not have the power so to do.

JEF

Education—Teachers' Certificates—County Superintendent of Schools—Under facts stated unlimited state certificate should be issued to person elected as county superintendent.

June 6, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

You request the opinion of this department upon the following statement of facts:

"A young man who was elected this spring as county superintendent in Columbia county has had seven years of teaching experience, the success of which has never been questioned. Sec. 39.01 (2) gives the eligibility requirements for county superintendent. He was under contract to act as principal of a two-room school in the summer of 1931. He lacked ten weeks of having completed enough work for his diploma from the Whitewater teachers college. He secured someone to substitute for him until November, when he received his diploma and also his first license which was dated November 20. He completed that year and taught the next year, which ended this June on this first license and the second.

"Sec. 39.29 (5) seems to be the section that governs the granting to him of an unlimited state certificate, which under 39.01 (2) he needs to qualify him to serve as county superintendent.

"I am asking your opinion as to whether or not the law justifies me in giving him his unlimited certificate at this time."

It is the opinion of this department that under the facts stated above you are authorized to give the young man in question an unlimited state certificate.

Subsec. (2), sec. 39.01, Stats., provides:

"To be eligible to the office of county superintendent of schools a person must be a resident of the county, have taught eight months in a public school in this state and after July 1, 1929, must hold an unlimited state certificate entitling him to teach in any public school; provided that this last requirement shall not disqualify any person who held the office of county superintendent on June 30, 1929."

Subsec. (5), sec. 39.29, provides:

"The state superintendent, upon application therefor, and the presentation to him by the graduate of the University of Wisconsin, of a state normal school or the Stout institute, of such certified statement and satisfactory evidence of good moral character, and of two years' successful teaching in the public schools of this state, shall issue to the applicant, an unlimited state certificate, but such certificate shall qualify the holder to teach only the subjects or pupils included in the license authorized by this section."

It appears that the young man in question has had seven years of teaching experience to date and the question raised in this connection is whether this satisfies the requirements of subsec. (5), sec. 39.29.

Under the provisions of subsec. (5), sec. 39.29, a successful applicant for a unlimited state certificate must be a graduate of the university of Wisconsin or of a normal school or of Stout institute, show satisfactory evidence of good moral character, and have had two years' successful teaching in the public schools of this state.

It is manifest from a consideration of the facts recited by you and from an examination of the statutes that you are authorized under the law to give the young man in question his unlimited state certificate. Sec. 39.29 (5) is very broad and simply requires, among other things, at least "two years' successful teaching in the public schools of this state." In the instant case the application in question satisfies the statutes and the unlimited state certificate should be issued to him.

JEF

Indigent, Insane, etc.—Under sec. 49.03, subsec. (9), Stats., county may remove indigent to county of legal settlement.

County furnishing relief may collect from place of legal settlement after notice provided for in sec. 49.03 (4) has been given.

June 6, 1933.

HAROLD M. DAKIN,
District Attorney,
Watertown, Wisconsin.

We quote your request for an opinion as follows:

"X was brought to Fort Atkinson, Jefferson county, Wisconsin, by his parents five or six years ago. He was crippled and unable to work when he came; he was married and had four children. He has been supported by Fort Atkinson and Jefferson county for five or six years and on account of his crippled condition Jefferson county has expended the sum of $4,000 or more on account of this relief. I am writing to you to ascertain whether or not we would have the right to move this man back to Forest county and whether or not Jefferson county would be entitled to collect from Forest county for the relief furnished in view of the present financial condition of Forest county."

Your letter does not state whether X had established a legal settlement in Forest county before moving to Jefferson county. If, at the time X was brought to Jefferson county, he had previously established a legal settlement in Forest county under sec. 49.02, Stats., his settlement would continue there up to the present time, under your statement of facts.

Since X has been supported by Jefferson county ever since his arrival there, he has never gained a legal settlement in that county. Sec. 49.02, subsec. (4).

Under sec. 49.02 (7), Stats., his absence from Forest county for a period of five years or more has not caused him to lose his legal settlement there, because he has been supported as a pauper there during all of that time. XXII Op. Atty. Gen. 222.

If, therefore, it is established that X's legal settlement is

still in Forest county, the procedure set forth in sec. 49.03 (9) could be employed by Jefferson county for the purpose of compelling his removal to Forest county. If X had no legal settlement in Forest county, it is now the duty of Jefferson county to support him as a transient.

Referring to the other part of your question, if X's legal settlement is in Forest county, Jefferson county is legally entitled to collect from Forest county the sums furnished him as relief, after the notice prescribed in sec. 49.03 (4) was given. Amounts furnished before such notice was given are not collectible. *Plymouth v. Sheboygan County,* 101 Wis. 200; VI Op. Atty. Gen. 823.

This opinion must not be taken as passing upon the financial condition of Forest county, or as representing that that county is in a position to pay its legal obligations.

JEF

School Districts—Textbooks—Uniform textbooks selected by county board of education pursuant to secs. 40.24 and 40.25, Stats., may not be changed by that board within five years from date of adoption.

June 8, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

You request the opinion of this department on the following statement of facts:

"Sec. 40.24 provides a way for bringing about a county uniformity of school textbooks. After action has been taken in accordance with this section, would it be legal for some later annual county school board convention to rescind the action taken by the former school board convention?"

Sec. 40.24, Stats., relates to uniform textbooks for counties and sec. 40.25 relates to uniform textbooks, their selection and use. Subsec. (1), sec. 40.25, provides in part:

"Every county board of education shall, as soon as may be, and every fifth year after the first adoption of textbooks,

meet at the county seat and select and adopt a series of textbooks, covering all branches of study required to be taught below the ninth grade."

Subsec. (3), sec. 40.25 provides:

"The books so selected shall be introduced in the schools the following September, and shall remain in use until displayed or replaced by said county board of education; but no books so adopted and introduced into said schools shall be changed within five years from the date of adoption."

It is manifest from a careful reading of the above quoted sections of the statutes that after the textbooks have first been selected by the county board of education pursuant to law, such textbooks cannot be changed within five years from the date of adoption. You are therefore advised that after action has been taken by the county board of education for the selection of uniform textbooks for the county, no change in such textbooks may be made within five years from the date of adoption.

JEF

Education — Teachers' Certificates — County Superintendent of Schools—Person holding unlimited state certificate and meeting other requirements of sec. 39.01, subsec. (2), Stats., is eligible for office of county superintendent of schools even though he has not taught for past thirteen years.

June 8, 1933.

DEPARTMENT OF PUBLIC INSTRUCTION.

You request an opinion on the first four questions contained in the letter to your department from the county superintendent of schools of Outagamie county which you have submitted.

The questions follow with the answers:

Q. (1) First, there is the statement that after July 1, 1929, the county superintendent must be qualified to teach in any public school. It is assumed up here that by "any

public school" is meant any position from high school principalship down. Is this correct? Assuming that it is, there is a further statement that nothing in this law shall disqualify the person who was county superintendent June 30, 1929. In just what way does this limitation indicate that qualifications of the county superintendent have been raised?

A. (1) This question obviously refers to sec. 39.01, subsec. (2), Stats., which reads as follows:

"To be eligible to the office of county superintendent of schools a person must be a resident of the county, have taught eight months in a public school in this state and after July 1, 1929, must hold an unlimited state certificate entitling him to teach in any public school; provided that this last requirement shall not disqualify any person who held the office of county superintendent June 30, 1929."

The assumption that the unlimited state certificate entitles the holder to teach or to act as principal in any school is correct. Sec. 39.28 (3) is to that effect, reading as follows:

"A limited state certificate qualifies the holder to teach in any school for five years from its date, but does not qualify the holder to be principal of a high school. An unlimited state certificate qualifies the holder to teach or to act as principal in any school."

Referring to the second part of the question, the proviso contained in sec. 39.01 (2) exempts all persons holding the office of county superintendent on June 30, 1929, from the provision requiring an unlimited state certificate. The standards, however, are raised as to all persons not holding office at that time.

Q. (2) Second, if the person holds a certificate issued about fifteen years before this law was in effect, who was then qualified to teach under the lower prevailing standards, but who had not been connected with educational work for at least thirteen years, could he submit that lower qualification as the full equivalent to the higher standard set by the new law and be considered qualified to teach in "any public school"?

A. (2) The requirement contained in sec. 39.01 (2) is that "a person * * * must hold an unlimited state

certificate." There is no limitation as to the time when the certificate must have been issued. The time of issuance and the time the holder has been away from teaching service are immaterial under the law. The holder of an unlimited state certificate regardless of the time issued may teach in "any public school."

Q. (3) Third, assuming that the protective clause in the law covering the qualification of the county superintendent who was in office June 30, 1929, was put there with a purpose, how could one who had not been teaching for at least thirteen years claim the protection of this automatic increase of qualification?

A. (3) Under sec. 39.01 (2) the fact that a person has "not been teaching for at least thirteen years" is immaterial.

Q. (4) Fourth, is there agreement in the certification department that the old, long, unused certificate based on lower standards can be revived at will? If so, why should the department letter to Mr. F. P. Young, stating his educational qualifications be limited to the statement that he had graduated from the Oshkosh State Teachers College, and that he held a diploma countersigned by L. D. Harvey, and the essential information that this constituted an unlimited state certificate, be removed from the body of the letter and entered as a postscript?

A. (4) An unlimited state certificate is good for life. See sec. 39.28 (3), quoted in answer (1). In view of this there is no necessity for "reviving" it even though unused for a period of time.

JEF

Contracts—Public Health—Sewage Disposal—Contract between city of Madison and Madison metropolitan sewerage district is not authorized by law.

June 9, 1933.

BOARD OF CONTROL.

You have submitted a communication directed to your board by the Madison metropolitan sewerage district to-

gether with a copy of an agreement entered into by the district with the city of Madison, and also a copy of a proposed agreement submitted to your board between the board and the Madison metropolitan sewerage district. You state that before considering the acceptance of this agreement you ask to be advised whether in our judgment the Madison metropolitan sewerage district has the legal right to make a contract with the city of Madison as above referred to.

In said contract between the city of Madison and the Madison metropolitan sewerage district it is mutually agreed that the sewerage from surrounding towns, villages and institutions from any portion of the Madison metropolitan sewerage district lying outside of the city of Madison may be transmitted through the city mains to the city sewerage system; and that the city will treat and dispose of the same, as that of the city of Madison. There is a compensation provided for this service. The city agrees to dispose of said sewerage in a suitable, proper manner and agrees to save the district harmless from any and all claims for damages and judgments that may arise out of the treatment or disposal by the city, etc. It is stated that this contract is a temporary expedient. The contract is to continue for one year and from year to year thereafter, but may be terminated at the end of any such year by any party giving 90 days' notice in writing.

After careful examination of this contract, which has other provisions besides those enumerated here, I come to the conclusion that there is no authority in the statute for the Madison metropolitan sewerage system to enter into a contract of this kind. While I do not question that the district may enter into contracts for temporary disposition of sewerage, they should be connected with other obligations gone into that would make it evident that the agreement is really for a temporary expedient. I do not find any authority in the statute, express or implied, which in my opinion justifies a contract of this kind.

JEF

Taxation—Tax Sales—County board may authorize county treasurer to sell separately earliest tax certificate held by county on particular parcel of land without at same time and as part of same sale selling also subsequent tax certificates held by county on same parcel.

June 13, 1933.

A. C. BARRETT,
District Attorney,
Spooner, Wisconsin.

You state that, acting under authority of sec. 75.35, Stats., which provides to the effect that the county board may, by an order prescribing the terms of sale, authorize the county clerk or the county treasurer to sell and assign the tax certificates held or owned by the county, the county board of Washburn county has adopted a resolution or order directing the county treasurer to sell tax certificates held by the county and prescribing the terms of sale, but that such resolution also contains the following direction: "* * * with the express provision that the certificate owned by the county, representing the oldest tax on that tract or parcel, be sold first."

The purpose of the direction contained in the resolution is to authorize the county treasurer to sell separately the earliest tax certificate held by the county on a particular parcel of land, without at the same time and as a part of the same sale also selling the subsequent tax certificates held by the county on the same parcel.

You ask whether such direction is valid, in view of the following italicized clause of sec. 75.34, subsec. (1):

"The several county treasurers, when no order to the contrary shall have been made by the county board, shall sell and transfer, by assignment, any tax certificates held by the county to any person offering to purchase the same for the amount for which the land described therein was sold, with interest thereon at the rate of fifteen per cent per annum; *but every such sale shall include all certificates in the hands of such treasurer on the same lands.*"

It will be noted that sec. 75.32 requires that the county shall be the exclusive purchaser at the tax sale of lands

upon which it already holds tax certificates. The purpose of such requirement is to protect the county on its prior certificates, as a tax deed on later certificates, if issued to a third party, would cut off the lien of the prior certificates held by the county. *Foster v. Sawyer County,* 197 Wis. 218, 222–223. A like purpose pervades the above quoted clause of sec. 75.34 (1), to the effect that a sale of tax certificates held by the county shall include all certificates in the hands of the treasurer on the same lands. A separate sale of a later tax certificate held by the county would have the effect of cutting off the lien of the prior certificates held by the county on the same lands. The purpose of the clause in question is to protect the county by preventing the lien of the prior certificates held by it from being cut off by the separate sale of a later certificate held by the county. The clause in question is found only in sec. 75.34 (1), which authorizes sales of county held tax certificates by the county treasurer on certain terms in the absence of an order by the county board to the contrary. Such clause there provides to the effect that every "such" sale shall include all certificates in the hands of such treasurer on the same lands. It does not seem entirely clear, therefore, whether every "such" sale referred to in the clause in question was intended to mean also every sale of county held tax certificates by the county treasurer under authority of an order of the county board made pursuant to sec. 75.35. Certain it is, however, that the *purpose* of the clause in question applies equally to sales of the latter character. It should be considered, therefore, that the county board has no authority to enter an order authorizing the county treasurer to separately sell a later tax certificate held by the county where the county holds prior certificates on the same lands. To give effect to such an order would cut off the lien of the prior certificates held by the county, and would defeat the very purpose of the clause in question. It should be considered further, however, that the county board does have authority to enter an order authorizing the county treasurer to separately sell the *earliest* tax certificate held by the county. A sale of the earliest certificate will not adversely affect or cut off the lien of the later certificates held by the county on the same lands. Such a construction will fully carry

out the protective purpose of the clause in question, and at the same time will probably place the county in a position where it can more readily realize on the sale of its tax certificates.

JEF

Loans from Trust Funds—School Districts—Loan made in school district for building of schoolhouse under secs. 40.50 to 40.60, Stats., is valid when made under supreme court decision interpreting law. Later decision of supreme court in another case interpreting law differently cannot invalidate loan made while under former decision.

Territory outside city limits which was separated from school district after loan was made is liable for its share and cannot collect its share from district until it ceased to send its pupils to city school on tuition basis.

June 13, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

You have submitted to this department a letter from a man who lives in the outlying territory of a school district consisting of the city of Medford and some outlying territory. It appears from the said letter that a loan was made of $40,000 for building an addition to the school. The city attorney of Medford informs me that this loan was a state loan obtained under ch. 25, Stats., and that no bonds were issued. The primary question is whether this loan is a valid loan and whether the outlying territory is obligated to pay its share of it.

It appears that after the loan was made a petition was made for separation by that portion of the residents of the school district residing outside of the city of Medford and they were separated. They continued to send their children to the city school on a tuition basis. When the loan was made, the decision of our supreme court in *State ex rel. Grelle v. Carroll,* 203 Wis. 602, had already been handed down. The court held that the city school plan under secs.

40.50 to 40.60 applies to a city of the fourth class whose territory comprised a single school district although territory outside the city was joined to such district.

On December 6, 1932, after the loan had been made as above stated, our supreme court in the case of *State v. Mitchell,* 245 N. W. 640, handed down a decision in which it reversed its former ruling in the *Grelle* case and ruled that a city school plan does not apply to a fourth class city constituting only a portion of the school district under secs. 40.50 to 40.60. This later decision was made after the state loan had been made to this district. The question now before us is whether this loan, which could not have been made in the manner in which it was made had the ruling in the *Mitchell* case been made in the *Grelle* case, was legally made. The loan could legally have been made in the manner in which it was made under the ruling in the *Grelle* case.

We are presented directly with the question whether the ruling in the *Mitchell* case will invalidate the loan. It is a well established rule of law that existing law and decisions are a part of contracts. Where the liability of a municipal corporation on negotiable securities depends upon a local statute, the rights of the parties are to be determined according to the law as declared by the state courts at the time such securities were issued. *Douglass v. Pike County,* 101 U. S. 677. The supreme court will not adopt and apply a decision of a state court upon county bonds in a suit announced after the controversy arose and between other parties. *Carroll County v. Smith,* 111 U. S. 556. Where, at the time or a loan and issue of bonds, the decisions of the supreme court of the state upheld the validity of a law authorizing them, a later decision to the contrary cannot be followed. *Gelpcke v. Dubuque,* 68 U. S. (1 Wall.) 175. Prior decisions of a state court, backed by acts of the legislature under which bonds were taken by holders, will be followed rather than later decisions. *Lee County v. Rogers,* 74 U. S. (7 Wall.) 181.

In view of this principle of law announced in the above cited authorities, the loan made at the time is binding on the whole district, for the law as interpreted by our supreme court prior to the time the loan was made is part of

the contract making the loan and the subsequent ruling of our court cannot invalidate said loan. It may be said that these decisions were not in any way connected with the loan here under consideration. It appears that the pupils from the outlying territory have been sent to the school in the city of Medford after the district had been separated and are paid for under the tuition system. In view of that fact, sec. 40.85 (1) (e) is applicable. It provides:

"No distribution, transfer or assignment of the assets of the district from which territory is detached, shall be made, so long as said district continues to receive and adequately provide school facilities for both grade and high school pupils from the detached territory on the legal tuition basis. In the event of failure or refusal of the said district to so provide for and receive such pupils, or if the provisions of this paragraph be declared unconstitutional, then the assets shall be adjusted, assigned and transferred as provided by paragraph (d), as of the date of detachment."

Par. (d) provides:

"The assets and liabilities of the former district shall be determined, adjusted, transferred and assigned in the manner provided in section 66.03, except as provided in paragraph (e)."

You are therefore advised that the territory lying outside of the city of Medford is liable for its share of the loan of $40,000. It cannot collect its share from the district in the city of Medford until it ceases to send its pupils to the city schools on the tuition basis. I believe this answers your questions.

JEF

Indigent, Insane, etc.—Order entered under sec. 49.03, Stats., binds only municipalities immediately interested.

Indigent refusing to abide by order cannot be forcibly removed.

June 13, 1933.

FULTON COLLIPP,
District Attorney,
Friendship, Wisconsin.

You state that a family having a legal settlement in the town of Rushford, Winnebago county, moved into your county in 1932. Adams county is under the county system of poor relief, while Winnebago county is under the local system.

After the family had moved into your (Adams) county, aid was furnished them at their request, and proper notices were sent to Winnebago county, informing that county that reimbursement was expected. Word was received from the town of Rushford that the family had previously gone to the city of Milwaukee, but that an order has been issued, under sec. 49.03 (9), Stats., requiring the family to remove from Milwaukee back to the town of Rushford. This removal was made shortly prior to the time that the family left the town of Rushford for Adams county.

It is now contended that the order entered as between Milwaukee county and the town of Rushford is binding upon Adams county, and that the town of Rushford is not legally liable to reimburse Adams county for the amounts which the said county has expended for the support of the family in question.

On the basis of this factual statement the following questions arise:

(1) Is the order entered under sec. 49.03 (9) as between Milwaukee county and the town of Rushford binding as between Adams county and the town of Rushford, or must another order be made as between the latter two municipalities?

(2) Is there any interpretation that can be given sec. 49.03 (9) whereby a family that refuses to abide by an

order entered thereunder can be bodily removed from one municipality to another?

(3) Is the town of Rushford responsible for the amounts paid by Adams county for the support of this family prior or subsequent to actual notice of the order entered between the town of Rushford and Milwaukee county?

(4) In case the family persists in refusing to leave Adams county after a proper order has been entered under sec. 49.03 (9), who is responsible for furnishing aid to the family?

It is our opinion that the order entered as between Milwaukee county and the town of Rushford is not binding upon Adams county.

Sec. 49.03 (9) provides:

"When a poor person is given relief in some other county or municipality than the one in which he has a legal settlement, either county or municipality involved may apply to the county judge or municipal judge of its county or municipality for an order directing such poor person to return to the county or municipality of his legal settlement, all expenses of removal to be paid by the county or municipality in which such poor person has a legal residence or settlement. Upon the filing of such petition the county or municipal judge shall issue an order directing the poor person to return to such municipality, unless it shall clearly appear that such removal would be against his best interests. Upon issuance of any such order no further public relief shall be given to the person to whom it is directed until he shall comply therewith."

The statute above quoted provides that when relief is given by some county or municipality other than the one in which the indigent has a legal settlement, *either* municipality involved may apply to the county judge or municipal judge for an order directing the indigent's return. Upon the filing of this petition it is the duty of the judge to exercise his discretion to determine whether it would be for the best interests of the individual to order his removal. It is quite obvious that a great many circumstances would actuate the judge in arriving at his decision, and the final determination would be based upon a consideration of all of the relative advantages and disadvantages resulting from

an order directing removal. Quite obviously, too, circumstances might exist which would make it inadvisable to direct removal of a family located in one municipality back to the place of its legal settlement, although it would be advisable to direct the removal of the same family back to its legal settlement when located in some other municipality where the circumstances were entirely different.

It is believed that the statute contemplates that some judge shall pass upon the question of removal from one municipality to the other in every case where two different municipalities are involved.

The statute also provides that upon the issuance of the order no further public relief shall be given until the indigent shall comply. In the present case, the indigent has complied for some period of time at least. If, therefore, it is desired to again secure the removal of the indigent family in question from Adams county back to the town of Rushford, it will be necessary for one of the municipalities to secure a new order.

In connection with your second question, I wish to call your attention to the following language taken from an official opinion of this department written last year (XXI Op. Atty. Gen. 893, 894):

"It is apparently left to the discretion of the county or municipal authorities whether such a petition will be filed with the court, and it follows that it is within the discretion of such officials to determine whether, in a particular case, relief should be provided and the same collected from the municipality in which the person has a legal settlement, or whether the statutory action looking toward the removal of such person shall be taken."

The language of sec. 49.03 (9) provides that the order shall be directed to the "poor person to return to the county or municipality of his legal settlement." Subsequent language of the same section again indicates that the order shall be directed to the poor person himself. No provision is made for an order either directed to the poor authorities or to any officer. The last sentence of the section apparently indicates that the sole result of the failure of the individual to return in accordance with the order shall be to deprive him of the right to be supported at public expense.

Authority for the removal of indigent persons must be found entirely in the statutes. In most cases where statutory provisions for removal are enacted specific provision is made for service of the order upon all municipalities affected, who shall serve the order, the person or persons whose duty it is to effect the removal, the place to which the removal is to be made, etc. Wisconsin statutes omit these administrative details, thus indicating an alternative to removal, namely, the right to remain without receiving public assistance. It is one thing to say that an individual can remain in a place if he wishes to forfeit his right to public assistance, and it is another matter to absolutely deprive him of the right to say where he shall reside.

In the absence of more specific statutory authority, it is our opinion that an indigent who refuses to abide by an order under sec. 49.03 (9) cannot forcibly be removed to the place of his legal settlement.

If the ten days' notice under sec. 49.03 (3) was sent to the county clerk of Winnebago county, then Adams county is entitled to reimbursement for the amounts expended both before and after actual notice of the order between Milwaukee county and the town of Rushford.

At the common law there was no legal obligation on the part of a municipal corporation to maintain or relieve the poor. *Patrick v. Baldwin,* 109 Wis. 342.

The present obligation of municipalities, therefore, is entirely dependent upon the statutory law. Those statutes in derogation of the common law, must be strictly construed. *Pearson v. School Dist. No. 8, Town of Greenfield,* 144 Wis. 620; *Sullivan v. School District No. 1, City of Tomah,* 179 Wis. 502.

The code of statutes relating to one subject is governed by the same spirit and is intended to be consistent and harmonious and they must be construed together as if parts of the same statute. *State ex rel. Sweet v. Cunningham,* 88 Wis. 81; *Lamont v. Hibbard, Spencer, Bartlett & Co.,* 88 Wis. 107.

It has been held that the duty imposed by sec. 49.01, upon municipalities relieving and supporting the poor is a mandatory one. *Meyer v. Prairie du Chien,* 9 Wis. 233.

It is our opinion that sec. 49.03 (9) modifies the provisions of sec. 49.01 to the extent that the duty of furnishing relief and support exists subject to the conditions prescribed by sec. 49.03 (9) that the indigent shall return to the municipality liable for his support after a proper order has been entered.

If the proper order has been entered and the indigent does not comply therewith, he is not entitled to be supported or relieved at public expense.

If, in the present case, however, the town of Rushford does not see fit to secure an order directing removal of the indigent family, Adams county may furnish the necessary relief and support and charge the same back under the provisions of sec. 49.03.

JEF

Public Officers—Notary Public—Ch. 167, Laws 1933, is interpreted.

June 13, 1933.

THEODORE DAMMANN,
Secretary of State.

You request this office to interpret the provisions of ch. 167, Laws 1933, in regard to the competency of bank or corporation notaries, presenting the following specific questions:

1. May an employee of a bank or other corporation, who is a notary public, notarize an instrument to which his firm is a party, providing he himself is not named in the instrument?

2. What effect has the proviso upon the first part of the act?

Ch. 167, Laws 1933, provides as follows:

"SECTION 1. A new section is added to the statutes to read: 220.23 BANK OR CORPORATION NOTARIES; PERMITTED AND PROHIBITED ACTS. It shall be lawful for any notary public who is a stockholder, director, officer or employe of a bank or other corporation to take the acknowledgment of

any party to any written instrument executed to or by such corporation, or to administer an oath to any other stockholder, director, officer, employe or agent of such corporation, or to protest for non-acceptance or non-payment bills of exchange, drafts, checks, notes and other negotiable instruments which may be owned or held for collection by such corporation; provided, it shall be unlawful for any notary public to take the acknowledgment of an instrument executed by or to a bank or other corporation of which he is a stockholder, director, officer, or employe, where such notary is a party to such instrument, either individually or as a representative of such corporation, or to protest any negotiable instrument owned or held for collection by such corporation, where such notary is individually a party to such instrument.

"SECTION 2. This act shall take effect upon passage and publication."

It is our opinion that the words "party to * * * instrument," as used in the above quoted section 1, mean an individual whose name is signed to the instrument by way of establishing rights, whether the name is attached in an individual capacity or as a representative of the corporation. The first portion of the section reading to the semicolon, constitutes a specific grant of authority. The second part of the section constitutes a limitation upon the authority previously granted. The second portion is a proviso rather than an exception.

An exception exempts something absolutely from the operation of a statute by express words in the enacting clause; a proviso defeats its operation conditionally. An exception takes out of the statute something that would otherwise be a part of the subject matter of it; a proviso avoids it by way of defeasance or way of excuse. *Pabst Brewing Company v. Milwaukee,* 148 Wis. 582.

The second portion of the section in question defeats the exercise of the authority granted in the first part when certain conditions obtain, namely, in some cases, when the notary is a party to the instrument.

It is our opinion that under ch. 167, Laws 1933:

1. A notary public who is a stockholder, director, officer or employee of a bank or other corporation may, subject to the limitations stated in 2 and 3 hereinafter set forth, (a) take the acknowledgment of any party to any written in-

strument to or by such corporation, (b) administer an oath to any other stockholder, director, officer, employee or agent of such corporation, (c) protest for nonacceptance or nonpayment bills of exchange, drafts, checks, notes and other negotiable instruments which may be owned or held for collection by such corporation.

2. No notary public is authorized to take the acknowledgment of an instrument executed by or to a bank or other corporation of which he is a stockholder, director, officer or employee where such notary's name is signed to the instrument either as an individual or as a representative of the corporation for the purpose of creating a right or rights.

3. No notary public is authorized to protest any negotiable instruments owned or held for collection by a corporation where the name of the notary is signed to the instrument in his individual capacity for the purpose of establishing a legal right or rights.

4. A notary public who is a stockholder, director, officer or employee of a bank or other corporation may administer an oath to any other stockholder, director, officer, employee or agent of such corporation, even though the notary public is a party to the instrument as that term is above described, either individually or as a representative of the corporation.

5. A notary public who is a stockholder, director, officer or employee of a bank or other corporation may protest any negotiable instrument owned or held for collection by such corporation where such notary public is a party to the instrument only as a representative of the corporation.

JEF

Elections—Ballot Boxes—Use of Schriver ballot box by election officials is legal.

June 13, 1933.

THEODORE DAMMANN,
Secretary of State.

You request an opinion from this office as to the legality of the use of the Schriver ballot box by election officials. A

sample box was submitted for inspection and demonstration and a circular describing its features was also submitted.

The box itself is made of 24-gauge leaded steel, is cylindrical and can be telescoped. Extended it is 36 inches high, and closed it is 19 inches high. The diameter is 14 inches. It is provided with two large convenient handles and a Yale lock with two keys. The weight is 19 pounds, and the cubic content is three and one-fourth feet.

The advantages of this box are listed as being its inability to jam, absolute protection for ballots against the elements, inaccessibility except by opening the lock, and effective method for sealing and closing of the slot in the lid, which is approximately the same size as that used on the present ballot box. Its telescoping feature makes the ballot box adjustable for heavy elections, and enables the election officials to compress the ballots into a mass.

The only statutory provision relating to the construction of ballot boxes is found in sec. 6.46, Stats., which reads:

"There shall be provided and kept by the clerk of each town, city or village, at the expense thereof, suitable ballot boxes for each poll therein, with a suitable lock and key to each, and there shall be one opening through the lid of each such box of no larger size than shall be sufficient to admit a single closed ballot."

The box described is provided with a suitable lock and key, and appears to have all the advantages of the boxes generally used and many more additional ones. It may possibly be argued that the opening in the lid is slightly larger than is provided for by the statute. This would depend entirely upon the manner in which the ballot is folded. It is not believed that the statute contemplates the smallest possible opening through which a single ballot can conceivably be inserted. Compliance with such a construction would result in tremendous inconvenience and would quite probably delay handling of the ballots to an altogether unreasonable extent.

As stated above, the opening is approximately the same size as the opening in ballot boxes which have been generally used since the advent of the Australian ballot system.

It is our opinion that the construction of the Schriver ballot box complies with the statute and may legally be used by election officials.
JEF

Public Health—Cemeteries—Taxation—Under sec. 157.11, subsec. (6), par. (b), Stats., town board can levy and collect tax to make up cemetery association deficiency for coming year only.

June 13, 1933.

HERBERT J. GERGEN,
District Attorney,
Beaver Dam, Wisconsin.

Inquiry is made as to whether the town board under the provisions of sec. 157.11, subsec. (6), par. (b), Stats., can levy a tax to cover past deficiencies of a cemetery association, or only to make up a deficiency that may arise in the future.

Sec. 157.11 (6) (b), provides as follows:

"When a cemetery association having control of a cemetery in a town, has insufficient maintenance funds it may certify in writing to the town clerk the amount deemed necessary during the next ensuing year, the amount the association has therefor, and the deficiency, and the town board may levy and collect a tax therefor and pay the same to the association."

This section authorizes the town board to levy and collect a tax to make up a deficiency which will accrue "during the next ensuing year," and does not authorize or contemplate a tax to cover past deficiencies.

It is our opinion that the town board is limited under this section to levying a tax which, together with the sums available to the cemetery association, will constitute a fund sufficient to maintain the cemetery during the next coming year only.

The powers of a town board are derived from statutory enactments. A town has only such powers as are specifically

delegated to it or such as are necessarily implied from those specifically delegated. *Mulvaney v. Town of Armstrong,* 168 Wis. 476.

Your attention is also directed to the fact that statutes making appropriations must be strictly construed.

JEF

Appropriations and Expenditures—Counties—County board resolution purporting to appropriate money to barter and exchange organization is invalid.

June 13, 1933.

ROSCOE GRIMM,
District Attorney,
Janesville, Wisconsin.

On May 16, 1933, the Rock county board passed the following resolution by an almost unanimous vote:

"Resolved that of the poor relief fund the sum of $1,000 may be used by the Barter and Exchange Board for the better relief of the county poor who are willing to co-operate with said board in the discharge of their duties respecting the poor relief administration in Rock county."

The Barter and Exchange Board is an organization for the purpose of providing unemployed or prospective unemployed persons with a medium of exchange for their services. The intent of the organization is to relieve the acute poor relief problem. The Barter and Exchange Board has no official connection with Rock county, or any of Rock county's activities. It is a purely private organization which has commenced incorporation proceedings as the Rock County Organized Unemployed, Inc. The plan has worked successfully in numerous other places where it was privately financed, however. Being sympathetic with its purposes, the Rock county board sought to make the appropriation indicated by the resolution.

You wish to be advised whether the appropriation is legal.

It is our opinion that the appropriation is in violation of the law.

As was said in *Frederick v. Douglas County, et al.*, 96 Wis. 411, 416:

"'Counties are, at most, but local organizations, which, for the purposes of civil administration, are vested with a few functions characteristic of a corporate existence. They are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. . . . They are purely auxiliaries of the state; and to the general statutes of the state they owe their creation, and the statutes confer upon them all the powers they possess, * * *.'"

The Wisconsin statutes do not vest with the county board any authority to appropriate money to a private organization even when the same is created for the purpose of charity and the said charity will indirectly benefit the county. This, in itself, would negative the right of the county board to make the appropriation in question.

In *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, the court held that the legislature *may authorize* a municipality to levy taxes therein for public purposes not strictly of a municipal character, but from which the public have received or will receive some direct advantage; or where the tax is to be expended to discharge the obligations of charity and humanity.

In the case of *Curtis's Adm'r v. Whipple, et al.*, 24 Wis. 350, the question of taxation for the benefit of a private educational organization was discussed in the following language (pp. 354–355):

"* * * If we turn to the cases where taxation has been sustained as in pursuance of the power, we shall find in every one of them that there was some direct advantage accruing to the public from the outlay, either by its being the owner or part owner of the property or thing to be created or obtained with the money, or the party immediately interested in and benefited by the work to be performed, the same being matters of public concern; * * * Any direct public benefit or interest of this nature, no matter how slight, as distinguished from those public benefits or interests incidentally arising from the employment or

business of private individuals or corporations, will undoubtedly sustain a tax. * * * Taxes may be levied and collected for charitable purposes, but these constitute a peculiar ground for the exercise of the power, * * *."

It is thus indicated that where the power to tax for charitable purposes is given, care should be exercised to see that conditions necessary to the exercise of that power are present. In the case quoted from it was held that there was no power in the town to make the donation to the private educational institution.

In the case of *Kircher v. Pederson,* 117 Wis. 68, a county board appropriated a sum of money as a charity to a claimant whose claim had been disallowed. The court held the appropriation invalid, stating (pp. 74–75):

"* * * It was made distinctly as a donation to the appellant. * * * They declared that the appropriation was made as a mere gift, having no basis to rest upon but that of charity for the unfortunate claimant. * * * When they laid aside considerations of doubt as to whether the county was or was not liable to appellant, they had no more right to appropriate its money to her than to appropriate it to any one else or convert the same to their personal use. Their action was wholly without legal authority. * * *."

Even if the legislature purported to authorize taxation for such a purpose as is contemplated by the resolution in question, it may be doubted whether the purpose could be shown to be such a public one as to support the constitutionality of the statute.

It may be added that the legislature has seen fit to abrogate by statute a common law rule and place upon municipalities the duty of supporting unfortunate persons. Statutes in derogation of the common law trust must be strictly construed. *Pearson v. School Dist. No. 8, Town of Greenfield,* 144 Wis. 620; *Koepp v. National Enameling & S. Co.,* 151 Wis. 302.

The statutory method of support contemplates support directly by the municipality itself, such support being within the jurisdiction, and to some extent, at least, within the

discretion of the municipal officials themselves. By implication any other method would be excluded.
JEF

Automobiles—Registration—Used car dealer may not display sticker containing words "Displayed for Sale and Demonstration" on used car.

Automobile dealer may not use dealers' plates on used cars.

June 13, 1933.

KENNETH C. HEALY,
District Attorney,
Manitowoc, Wisconsin.

You inquire:

(1) Under sec. 85.02 (3), Stats., is it necessary for a used car dealer to display a sticker containing the words "Displayed for Sale and Demonstration" on each used car that is being sold?

(2) May automobile dealers use their license plates interchangeably on used cars?

(3) May a garage dealer who has a used car for sale legally permit a prospective purchaser alone to operate said used car for demonstration purposes while the car bears the dealer's plates?

Sec. 85.02, Stats., provides, as follows:

"(3) Beginning July 1, 1931, as to motor trucks, tractor trucks, trailers and semitrailers, and January 1, 1932, as to other vehicles, every vehicle owned by any dealer, distributor or manufacturer of vehicles required to be registered by this chapter shall be registered in the same manner as other similar vehicles, except new vehicles displayed for retail sale or used for demonstration purposes by a dealer, distributor or manufacturer. When any such vehicle is displayed for retail sale or used for demonstration purposes, there shall be affixed to the inner side of the windshield of such vehicle, or in other conspicuous positions if there is no windshield, a 'Displayed for Sale and Demonstration' sticker, bearing the words 'Displayed for Sale and

Demonstration,' the name and registration number of the dealer, the make and style of the vehicle, the date received from the distributor or manufacturer and the license fee for the vehicle, plainly stamped or stenciled thereon.

"(4) 'Displayed for Sale and Demonstration' stickers shall be supplied by the secretary of state on application by the dealer, accompanied by the fee which shall be ten per cent of the full registration fee. Application for such sticker shall be made in the same manner as application for registration, and the stickers issued in the same manner as license plates. No new vehicle shall be displayed for sale or demonstrated on the highways unless a sticker is attached as provided in this section. No such vehicle shall be operated on the highways except by an authorized representative of the dealer, distributor or manufacturer, and for demonstration purposes exclusively. When the vehicle is sold, the sticker shall remain on the vehicle until the number plates are attached and then be destroyed. Provided, that any buyer of such vehicle having made application for the registration thereof and having paid the fee therefor may operate such car on the highways.

"(6) Number plates shall be furnished by the secretary of state at one dollar per set of two plates to manufacturers, distributors and dealers whose vehicles are registered in accordance with the provisions of this section. Such plates shall have upon them the registration number assigned to the registered manufacturer, distributor or dealer but with a different symbol upon each set of number plates as a special distinguishing mark and such plates shall be used only on those vehicles displaying 'Displayed for Sale and Demonstration' stickers specified in subsection (4) of this section, or on vehicles while being tested by the manufacturer or in transit from the factory to a distributor or dealer and being driven by an authorized representative of the manufacturer, distributor or dealer."

A-1. It is our opinion that question (1) should be answered in the negative.

The words "such vehicle" found in the second sentence of (3), sec. 85.02, undoubtedly refer to the words "new vehicles" displayed for retail sale or used for demonstration purposes by dealers, distributors or manufacturers, found in the preceding sentence of that section.

Qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent unless the context or the evident meaning of the enactment requires

a different construction. *Jorgenson v. City of Superior,* 111 Wis. 561; *Dagan v. State,* 162 Wis. 353.

The context of the section in question does not indicate that a different rule should be applied, and the fact that the subsection later provides that the sticker shall bear the name and registration number of the dealer and the date received from the *distributor or manufacturer* would indicate that new vehicles rather than used cars were intended by the statute.

The question was indirectly passed upon by this office in XXI Op. Atty. Gen. 367, where it was said, pp. 368–369:

"You also inquire whether a used car dealer is required to register at the full registration rate all cars owned by him, even though the same are not operated upon the highways.

"Sec. 85.01 (1), Stats., forbids the operation of motor vehicles on the public highways unless the same have been registered in the office of the secretary of state and the registration fee paid.

"Sec. 85.02 (3), Stats., provides that all motor vehicles owned by any dealer, distributor or manufacturer *required to be registered by this chapter* shall be registered in the same manner as other similar vehicles, except new cars displayed for retail sale or used for demonstration purposes. As to used cars, therefore, those in the hands of dealers are in exactly the same status as used cars in the hands of individuals. The only requirement is, that such cars may not be used on the public highways without registration. In this respect the dealer is subject to the same requirements as every other owner of a used car, and to no other or different requirements. So long as the cars owned by such a dealer are not operated upon the public highways their registration is not required."

A-2. Your second question must also be answered in the negative.

Subsec. (6), sec. 85.02, provides that "such plates shall be used only on those vehicles displaying 'Displayed for Sale and Demonstration' stickers specified in subsec. (4) of this section, or on vehicles while being tested by the manufacturer or in transit from the factory * * *."

The vehicles displaying stickers specified in subsection (4) are, of course, new vehicles.

Your attention is directed to XXI Op. Atty. Gen. 426,

where it was held that the word "new" as used in sec. 85.02 (3) and (4), not only refers to the latest or current model automobiles but applies as well to automobiles of a model older than the last or current model but which has never been sold or used on highways except for demonstration purposes by the dealer.

A-3. Inasmuch as question No. (3) is based upon an affirmative answer to question No. (2), it becomes unnecessary to discuss that question.

JEF

Corporations—Public Utilities—Taxation—Taxation of Utilities—Under sec. 76.38, Stats., "gross receipts" means total amount of billings for services rendered by telephone company during preceding calendar year and includes accounts which may prove to be uncollectible. (Supplementing XXII Op. Atty. Gen. 90.)

June 13, 1933.

ROBERT K. HENRY,
State Treasurer.

On February 20, 1933, the attorney general addressed an opinion to you (XXII Op. Atty. Gen. 90), the caption of which reads:

"Under sec. 76.38, Stats., which imposes upon telephone companies annual license fee computed upon 'gross receipts from the operation of the business during the preceding calendar year,' term 'gross receipts' is not confined to cash but means total amount of billings for services rendered during preceding calendar year, even though not actually paid for by end of year."

You now ask for a supplemental opinion on the question of whether particular accounts billed during the preceding calendar year, but which have been determined uncollectible and which have been written off as uncollectible, should be included in such "gross receipts."

The question is answered, Yes.

Under the opinion of February 20, "gross receipts" means, and the annual license fee is measured by, the total amount of billings for services rendered during the preceding calendar year, whether actually paid for or not. This does not allow for deduction of accounts which may prove to be uncollectible. In short, "gross receipts" means the total amount of billings and not the amount of billings determined to be collectible.

JEF

Public Officers—Highway Commission—Officers appointed by highway commission in 1931 and 1932 under authority of sec. 82.025, Stats., now have powers of sheriffs in discharge of duties.

June 13, 1933.

HIGHWAY COMMISSION.

Sec. 82.025, Stats., provides as follows:

"The state highway commission may appoint not more than ten of their regular employes as officers to assist in enforcing the provisions of chapters 85 and 194. Such officers shall co-operate with local officers and may be equipped with devices for weighing motor vehicles, and may stop and weigh any motor vehicle which appears to weigh in excess of the amounts permitted by law. Such officers may require the operator of any motor vehicle whose load is in excess of that allowed by law to reduce such load to conform to the law before permitting such motor vehicle to proceed."

The state highway commission, acting pursuant to authority vested in it by the above-quoted section, appointed five of its employees as officers to assist in enforcing the provisions of chs. 85 and 194, Stats.

By ch. 130, Laws 1933, the legislature amended the section quoted above by inserting the following words after the first sentence: "Such officers, in the discharge of their duties, shall have the powers of sheriffs."

The commission desires to be advised "if the amendment to which reference is made automatically confers upon the

officers appointed in 1931 and 1932 in the discharge of their duties the powers of sheriffs."

It is our opinion that the officers appointed by the highway commission during 1931 and 1932 were automatically vested with the powers of sheriffs in the discharge of their duties by ch. 130, Laws 1933.

It is presumed that the question was prompted by virtue of the well-known rule of statutory construction that laws, generally speaking, will not be given a retroactive effect unless specific provision to the contrary is made in the law itself. It is true that the five officers in question received their appointment from the highway commission prior to the time at which the legislature vested officers of their class with the powers of sheriffs.

A statute, however, is not retrospective in operation because a part of the requisites for its action is drawn from another statute existing before the passage of the act in question. *McDougald v. N. Y. Life Ins. Co.*, 146 Fed. 674.

Nor is a law retrospective in a sense forbidding it because a part of the requisites for its action and application is drawn from a time antedating its passage. *Clearwater Tp. v. Board of Supervisors of Kalkaska County*, 153 N. W. 824. See also *In re Scott*, 126 Fed. 981.

The rule against retroactive operation of statutes was designed to prevent inequities resulting by changing the legal status of parties in respect to transactions already past. It was not intended to necessitate the reappointment of officers in order to vest them with powers delegated by the legislature during their incumbency. As a general rule the duties imposed by law on public officers are functions and attributes of the office and not of the officer. *State v. Johnson*, 126 N. W. 479.

An office created by the legislature is wholly within that body's power, and it may prescribe the powers and duties of the incumbent and from time to time change or impose additional duties upon officers elected or appointed. *Perkins v. Board of Commissioners of Cook County*, 271 Ill. 449, 111 N. E. 580.

The office provided for by sec. 82.025, Stats., is not a constitutional one, and is, therefore, entirely within the con-

trol of the legislature. *State ex rel. DeGuenther v. Douglas,* 26 Wis. 428.

It is our opinion that when the legislature, in its amendment to sec. 82.025 made by ch. 130, Laws 1933, used the words "such officers" it referred to officers previously appointed, as well as to those to be appointed thereafter and that the delegation of power was intended to be an investment of the office rather than of individuals who might hold the office.

JEF

Indigent, Insane, etc.—Old-age Pensions—Applicant for old-age assistance who has lived in county total of less than eight years is not entitled to pension.

June 13, 1933.

L. A. KOENIG,
District Attorney,
Phillips, Wisconsin.

A person in your county is making application for an old-age pension in accordance with the provisions of sec. 49.20, Stats. This applicant, who is past seventy-seven years of age, was born in the state of Wisconsin and has always resided in this state, but has not resided in your county for fifteen years immediately preceding the date of the application. The applicant has, however, been a resident of the county for a period of over seven years. You inquire whether this person will be entitled to old-age assistance after July 1, 1933. There is no question of her ability to fulfill all of the other conditions.

Sec. 49.22 imposes a number of conditions which must be met by the applicant before he or she is entitled to a pension. Among those conditions subsec. (3) provides that the applicant must have resided in the state *and* county in which he makes application either (1) continuously for at least fifteen years immediately preceding the date of application, or (2) forty years, at least five of which have im-

mediately preceded the date of the application. The statutes also make modifications which are not here material.

The residence requirement, in so far as time is concerned, can thus be fulfilled in either of two different ways. The ability to fulfill both is not necessary.

The applicant in question, having lived in your county a total of less than eight years, quite obviously cannot fulfill the first option of continuous residence in the county for at least fifteen years immediately preceding the date of application. Nor can she fulfill the requirement of having lived in your county a total of forty years, at least five of which have immediately preceded the application. Subsec. (3), sec. 49.22 not only provides that the applicant must have resided in the *state* for either of those periods mentioned, but must also have resided in the *county* for either of the periods mentioned.

The person in question, therefore, will not be entitled to old-age assistance.

JEF

Peddlers—Transient Merchants—Man who owns store, pays taxes on same and sells merchandise from said store for short period every year is not transient merchant under sec. 129.05, subsec. (1), Stats.

June 13, 1933.

B. O. REYNOLDS,
District Attorney,
Elkhorn, Wisconsin.

The following statement of facts is taken from your recent request:

"F. is a merchant operating a chain of two confectionary stores, one at Lake Geneva, Wisconsin, and one at Williams Bay, Wisconsin. He pays a chain store tax for an additional store under sec. 5, ch. 29, Laws Special Session, 1931. He votes at Lake Geneva and lives at both places. His store at Williams Bay is on leased land but he owns the building and pays taxes on it as well as on his stock to the village of Williams Bay. There is also a small stand and some bath-

ing houses on the Williams Bay property. At the stand and the store in Williams Bay he sells ice cream, candy, cigars, souvenirs, bathing supplies and lunches. The Williams Bay store and stand have been operated by F. every summer for the past five years and he intends to continue operating in the future. However he closes the Williams Bay store in the wintertime on account of lack of business in that summer resort locality.

"Question: Is F. a transient merchant at Williams Bay so as to make him liable for the $75 state license fee?"

It is our opinion that F. is not a transient merchant liable for the seventy-five dollar state license fee.

Sec. 129.05, subsec. (1), Stats., provides in part, as follows:

"A transient merchant within the meaning of sections 129.01 to 129.24, is defined as one who engages in the vending or sale of merchandise at any place in this state temporarily, and who does not intend to become and does not become a permanent merchant of such place. * * *."

It is true that in XIV Op. Atty. Gen. 572, it was held that one who opens up a store and sells merchandise only during the holiday season is a transient merchant under sec. 129.05 (1).

In that case, however, it was not shown that the individuals involved were persons who owned and maintained any property of any kind at their places of business during the whole year round or paid any taxes to any municipality whatsoever. It also did not appear but what the individuals concerned were different persons each and every year.

The statute by its own terms is directed against a person who "does not become a permanent merchant." It is not necessarily directed against a person who does not permanently and continuously sell merchandise at a given place.

The fact that F. does not reside continuously at Williams Bay is not material, because the term "transient merchant" does not have reference to the residence of the individual, but to the character of the business carried on by him. *Ottumwa v. Zekind,* 95 Iowa 622; *Scranton v. Henson,* 151 Iowa. 221.

In the majority of cases a transient merchant is one who

moves his merchandise from place to place, selling from a definite place of business for a short period of time.

F. in the present case does nothing of that sort, but has an established place of business at Williams Bay.

The transient merchant statute was directed against those individuals who temporarily locate in a municipality, carry on their business, make a profit and then remove from that municipality without paying any taxes or without contributing in any manner to the upkeep of governmental agencies.

The fundamental rule in the construction of statutes is to ascertain and give effect to the intent of the legislature. *State ex rel. Pine Ins. Co. v. Superior Court, Douglas County,* 176 Wis. 269.

In construing a statute the evil which it was designed to cure may be considered as well as the mischief it was intended to prevent. *Minneapolis, T. M. Co. v. Haug,* 136 Wis. 350; *Pettingill v. Goulet,* 137 Wis. 285; *State v. Hall,* 141 Wis. 30; *Koepp v. Nat'l Enameling & Stamping Co.,* 151 Wis. 302.

F. in the present case does not perpetuate any of the evils or mischiefs at which the statute was directed. He has operated the Williams Bay store every year for five years at the same location and expects to do so in the future. He contributes taxes to Williams Bay and has a definitely established place of business.

It is our opinion that his failure to sell merchandise for the full twelve months does not render him a transient merchant of Williams Bay, under sec. 129.05 (1), and make him liable for state license thereunder.

JEF

Insurance—Fire Insurance—Valued Policy Law—Legislature—Substitute Amendment No. 2, A., to Bill No. 918, A., accomplishes legislative purpose expressed in Resolution No. 58, A.

June 13, 1933.

JOHN J. SLOCUM, *Chief Clerk, Assembly.*

The following quotation is taken from Resolution No. 58, A., requesting an opinion of this office on the effect of Substitute Amendment No. 2, A., to Bill No. 918, A.:

"WHEREAS, The purpose of Substitute Amendment No. 2, A., to Bill No. 918, A., is to provide that where the assured without the written consent of the insurance company already on the risk has taken out additional insurance and his property is totally destroyed, then his recovery shall be limited to the actual value of such property, each insurance company on the risk at the time of the fire to pay its proportionate part of such actual loss; then, be it

"RESOLVED by the assembly, That the attorney-general be and is hereby requested to give this house an opinion in writing whether Substitute Amendment No. 2, A., to Bill No. 918, A., will accomplish the purpose of this bill as expressed in this resolution."

It is the opinion of this office that Substitute Amendment No. 2, A., to Bill No. 918, A., will accomplish the purpose of the bill as expressed in Resolution No. 58, A.

Sec. 203.21, known as the valued policy law and sec. 203.215, Stats., provide as follows:

"203.21. Whenever any policy of insurance is written to insure real property and the property insured is wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property when insured and the true amount of loss and measure of damages when destroyed."

"203.215. Whenever a condition is included in any fire insurance policy issued in this state that unless provided by agreement in writing added thereto the insuring company shall not be liable for loss or damage occurring while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by such

policy, such other or additional insurance, whether with or without knowledge of the insuring company, shall nevertheless not operate to relieve the insuring company from liability for loss or damage occurring while the insured shall have such other contract of insurance, whether valid or not. Subject to all other terms and conditions of its policy, each insuring company shall be liable for its proportionate share of any such loss or damage, but in no event shall the insured be entitled to recover from any or all of such insuring companies a sum greater than his actual loss or damage."

In an opinion rendered in XXI Op. Atty. Gen. 634, this office construed the two statutory provisions above quoted. It was there held that the valued policy law was applicable where a building was totally destroyed by fire, and there were two or more fire insurance policies covering the property regardless of whether the several insurers had knowledge of the existence of other policies on the property. It was there said, p. 638:

"We think that the clear meaning of secs. 203.21 and 203.215 is that where the loss is partial, the amount shall be ascertained and paid in proportion to the amount of each policy, but where the loss of the insured property is total, the proportion of each is the full amount named in each policy. There is nothing in sec. 203.21 or 203.215 to indicate that the legislature intended that the valued policy law should be abrogated, when more than one policy had been issued. If such had been the intention, it is natural to assume that the legislature would have added to sec. 203.21 a simple provision that the valued policy law should not apply where there is more than one policy on the property. * * *."

The legislative purpose as expressed in Resolution No. 58, A., will be accomplished if sec. 203.215 can be made to apply where the loss of the insured property is total and additional policies were taken out by the insured without the consent of the insurer, as well as to cases where the loss is partial.

Substitute Amendment No. 2, A., to Bill No. 918, A., very definitely follows the suggestion made by this office in the opinion in XXI Op. Atty. Gen. 634 by providing that in the case of total loss, where additional insurance has been taken out by the insured without the written consent of the in-

surer, the provisions of the valued policy law shall be superseded by sec. 203.215, Stats., which latter section shall be applicable in its stead.

It is our opinion that the construction which the court would place upon this bill would have the legal effect of accomplishing the legislative purpose expressed in Resolution No. 58, A.

JEF

Taxation—Tax Collection—Where town treasurer died before expiration of his term and before time specified by law for making delinquent tax return and no person was appointed for residue of unexpired term, new town treasurer regularly elected at spring election of April 4, 1933, should make return and verify same by affidavit as required by sec. 74.19, Stats.

June 13, 1933.

ROBERT L. WILEY,
District Attorney,
Chippewa Falls, Wisconsin.

You state that the treasurer of town X died before he made his return of delinquent taxes for 1932 as required by secs. 74.18 and 74.19, Stats. He died shortly before the spring election of April 4, 1933, and no successor was appointed for the unexpired term normally ending on that date. The return has been made to the county treasurer, but no signature has been attached and the required affidavit is unsigned because of the town treasurer's death. You do not state who made the unsigned and unverified return but it will be assumed that the same was made by the new treasurer, who was elected at the spring election of April 4, 1933.

The question asked is: Who can sign the return and affidavit as required by sec. 74.19?

As you suggest, the question is important in that sales of land based upon an unverified delinquent return and the tax certificates and tax deeds founded on such sales may be

of doubtful validity. See *Cotzhausen v. Kaehler,* (1877) 42 Wis. 332, 333; *Cole v. Van Ostrand,* (1907) 131 Wis. 454, 458–459; *Foster v. Sawyer County,* (1928) 197 Wis. 218, 222–223.

By sec. 74.17 it is provided that if the local treasurer is unable to collect any taxes within the time prescribed by law he shall make out a statement of the taxes so remaining unpaid, setting down separately real estate and personal property, with a description of such real estate from his tax roll, and the name of the person taxed, and submit the same to the county treasurer. Such statement is known as the delinquent tax return. The county treasurer is required carefully to compare the same, when submitted, with the tax roll and ascertain that it is correct.

It is not expressly provided in the statutes that the local treasurer shall sign the delinquent return itself, but it is provided by sec. 74.19 that he shall make an affidavit to be annexed to such delinquent return, as follows:

"(1) The town, city or village treasurer shall then make an affidavit to be annexed to such statement, before the county treasurer or before any officer authorized to administer oaths, that the facts set forth in said statement are correct, that the sums therein returned as unpaid taxes have not been paid, and that he has not, upon diligent inquiry, been able to discover any goods or chattels belonging to the persons charged with such unpaid taxes whereon he could levy the same, which statement and affidavit shall be filed with the county treasurer; and he shall thereupon be credited by the county treasurer with the amount of taxes so returned as unpaid and doubly assessed, except the penalty provided by section 74.23, and he shall be allowed by the county treasurer, in settlement four dollars, and six cents for each mile traveled both ways to deliver the same.

"(2) If any actions have been commenced by him for the recovery of any personal property tax he shall also state that fact and what proceedings have been had therein. And any town, city or village treasurer who shall render his return without duly making, annexing, subscribing and making oath to the affidavit as above required shall forfeit one hundred dollars; and every county treasurer who shall receive such return, and credit the amount of unpaid and doubly assessed taxes to the town, city or village treasurer, without first requiring such return to be duly verified by affidavit as above required shall forfeit two hundred dol-

lars; and neither said town, city or village nor county treasurer shall be permitted to offer such unverified statement in evidence in any settlement made by them with their respective boards of supervisors or auditing officers, nor in any action brought against them on their respective official bonds, nor in any prosecution against them for embezzlement.

"(3) All taxes so returned as delinquent shall belong to the county and be collected, with the interest and charges thereon, for its use; and all actions and proceedings commenced and pending for the collection of any personal property tax shall be thereafter prosecuted and judgments rendered therein be collected by the county treasurer for the use of the county; but if such delinquent taxes, exclusive of the penalty provided by section 74.23, exceed the sum then due the county for unpaid county taxes such excess, when collected, with the interest and charges thereon, shall be returned to the town, city or village treasurer for the use of the town, city or village."

The taxes involved in the instant case are those for the year 1932, collectible by the town treasurer up to and including April 10, 1933 (the time having been extended to that date by ch. 42, Laws 1933).

By sec. 70.68 (1), sec. 74.15 (1) and 74.17 such local treasurer is normally required to settle and make delinquent tax return to the county treasurer by March 22. However, ch. 42, Laws 1933, extended the time to April 10, 1933. And ch. 66, Laws 1933, provided that if no such settlement or return was made by the local treasurer with the county treasurer prior to the expiration of the term of the local treasurer, then the local treasurer should continue to hold office to and including April 10, 1933 and, further, that his successor (who would be elected at the spring election of April 4, 1933) should not qualify until April 11, 1933.

It was the duty of the town treasurer (the one who died shortly before the April 4, 1933 election) to collect the 1932 taxes; it was his duty to enforce the collection of such taxes, as provided by secs. 74.10, 74.11 and 74.12; it was his duty to settle with the county treasurer and to make the delinquent tax return as provided by sec. 74.17, and it was his duty to verify the same by affidavit as required by sec. 74.19. Those were his duties while he lived. However, he died before the time specified by law for the collection of 1932 taxes

by the local treasurer ended and before the time specified by law for the local treasurer's settling and making the delinquent tax return and affidavit arrived. Accordingly, had a town treasurer been appointed to fill the vacancy (sec. 60.28 provides that if the office of town treasurer becomes vacant the town board shall forthwith appoint a treasurer for the unexpired term) it would have become the appointee town treasurer's duty to continue with the collections and enforcement thereof, and to make the settlement, return and affidavit. However, no one was appointed to fill the vacancy.

As the law specified that the settlement, return and affidavit should be made by April 10, 1933, had there been a town treasurer on April 10, 1933, it would probably have been his duty to make such settlement, return and affidavit even after the expiration of his term on April 10, 1933, if he had not performed said duty by that date. However, that is not the situation here. The situation here is that, on April 10, 1933, when the settlement, return and affidavit should have been made, there was no town treasurer. (The town treasurer elected at the April 4, 1933 election was enjoined by ch. 66, Laws 1933, from qualifying until April 11, 1933, and, anyway, said newly elected treasurer, by sec. 60.20, was not required to qualify until ten days after his election.) On April 10, 1933, therefore, there was no one qualified to make the settlement, return and affidavit.

However, it seems plain that such settlement, return and affidavit must be made, even if made late. Under the instant circumstances, there being no predecessor town treasurer who could be charged with making the settlement, return and affidavit, it would seem that the same should be made by the newly elected town treasurer. He appears to be the only possible person who could officially perform that duty. It should, therefore, be considered that the newly elected town treasurer had authority to make the settlement and return and to verify the return by affidavit.

As regards the content of the affidavit, it will be noted that sec. 74.19 (1) provides not only that the affidavit shall contain a verification of the return but also that the affidavit shall contain a statement that the local treasurer "has not,

upon diligent inquiry, been able to discover any goods or chattels belonging to the persons charged with such unpaid taxes whereon he could levy the same." That statement the newly elected treasurer could not include in his affidavit, as it would be untrue as to him, for the reason that, when he qualified for the office of treasurer, the time for collection of taxes by levy of goods or chattels had already expired. Under the circumstances it is believed that the omission of such statement from the affidavit would not make the affidavit defective. The affidavit should, however, explain the omission.

JEF

Indigent, Insane, etc.—Wisconsin General Hospital—Under ch. 142, Stats., county judge may make commitment to local hospital where expense is same or less than expense at Wisconsin general or orthopedic hospital. In case of emergency county judge may commit to local hospital in or out of state where expense would be more than cost of treatment at Wisconsin general or orthopedic hospital.

June 14, 1933.

R. A. FORSYTHE,
District Attorney,
Hudson, Wisconsin.

You state that you are frequently called upon to construe sec. 142.01, Stats., concerning the authority of the county judge to order a patient to be treated at some other institution than the Wisconsin general hospital in cases where the expense would be the same or less.

Your refer particularly to cases requiring an operation for the removal of the appendix, where the local doctors estimate a period of ten days for hospitalization.

Sec. 142.01 provides:

"A person having a legal settlement in any county in this state who is * * * ailing and whose condition can probably be remedied or advantageously treated, * * * may be treated at the Wisconsin general hospital or the Wis-

consin orthopedic hospital for children at Madison or in some other hospital as the county judge shall direct * * *."

Under this section and sec. 142.03, providing for an investigation, authority and discretion are vested in the county judge to determine the advisability of treatment if certain specific conditions can be met, as well as the place of treatment.

In XXI Op. Atty. Gen. 240, this office ruled that when the county judge, under ch. 142, Stats., orders treatment either at home or in a local hospital, the expense of the treatment is to be paid by the county.

On June 2, 1933, this office rendered an official opinion* holding that claims against a county arising under sec. 142.04 or sec. 142.08 are payable by the county treasurer upon certificate of the county judge, and need not be filed pursuant to sec. 59.77, the latter being merely a general provision over which the specific provision found in sec. 142.08 controls.

It is our opinion, therefore, that in the case of the appendectomy such as you describe, the county judge has authority to order treatment at a local hospital where the expense would be the same or less than treatment at the Wisconsin general hospital.

You also inquire whether the county judge has any authority to bind the county by ordering a patient sent to a nearby hospital either within or without the state at a cost to exceed an amount necessary to send the person to Madison in an emergency situation, where transportation to Madison would endanger the life of the patient.

It is our opinion that the county judge would have authority to bind the county in such a situation. The provisions of ch. 142 are intended to be beneficent in their nature and should be liberally construed to effectuate the evident intent back of their enactment.

Sec. 142.01 makes the general statement that indigent persons who are ailing and whose condition can probably be remedied may be given treatment. It is not only a charitable statute but one that is humane as well. It is not be-

* Page 408 of this volume.

lieved that the legislature intended to endanger the life of an indigent by insisting upon his removal to Madison, where the treatment would be slightly less costly if the patient were able to survive the trip.

Sec. 142.04 provides, in part:

"* * * If he [the county judge] find the required facts and that the person can receive adequate treatment at home or in a hospital, at the same or less expense to the county, * * * he shall enter an order directing such treatment, the place thereof, and the physician or physicians * * *."

This section provides for treatment at home or in a local hospital where the treatment will be adequate and the expense to the county the same or less than that of treatment at the Wisconsin general or the Wisconsin orthopedic hospital.

Where the trip to Madison would necessarily endanger the life of the patient and probably very materially impair his chances of surviving the treatment even if the trip itself was endured, it is not believed that the treatment at Madison would be considered adequate or that the county judge would be bound to prescribe treatment, if any, at Madison.

Sec. 142.01 contemplates commitment to state or local hospitals where the patient's ailing condition can probably be remedied or advantageously treated. In the case of emergencies such as you suggest, the condition can probably be remedied or advantageously treated only in a local hospital.

It is our opinion, therefore, that the county judge, in an emergency, may make a commitment to a nearby hospital even where the expense would be somewhat more than the cost of treatment at Madison.

Ch. 142 does not make any specific mention as to the location of hospitals other than the Wisconsin general or the orthopedic.

In the absence of any legislation, therefore, the county judge could legally commit to an institution near by, even though outside of the state.

JEF

Loans from Trust Funds—School Districts—School district officers calling special meeting to vote on question of time extension for repayment of trust funds loan need not comply with notice provisions of sec. 40.06, Stats.

June 14, 1933.

LAND DEPARTMENT,
Attention A. D. Campbell, *Chief Clerk.*

You present the following question for an official opinion:

Should school district officers when calling a special meeting under sec. 40.06, Stats., for the purpose of voting on the question of an extension of the time for the repayment of a trust funds loan, comply with the notice requirements of said section?

It is our opinion that the question must be answered in the negative.

Ch. 25, Stats., relates to loans from the state trust funds.

Sec. 25.05, subsec. (5), Stats., provides that when a municipality, including a school district, makes an application for a loan, a direct, annual irrepealable tax shall be levied upon all the taxable property of the municipality, for the purpose of paying, and sufficient to pay, interest on the proposed loan as it falls due and also to pay and discharge the principal within twenty years from the making of such loan. This subsection concludes as follows:

"* * * Such a levy shall become void and of no effect if the commissioners decline to make the loan; otherwise it shall remain valid and irrepealable until the loan and all interest thereon shall be fully paid."

Sec. 25.11, provides:

"All loans made or which may be made from any such funds to any municipality may be extended for such time and upon such terms as may be agreed upon by and between the commissioners and such borrower; provided, however, that no loan shall be extended upon which there is any default in the payment of interest at the time of making application therefor, nor to any period beyond twenty years from its inception, nor at any rate of interest less than the minimum established by law."

In XX Op. Atty. Gen. 171, this office held that under this provision of the statutes a loan made from the the state trust funds to a school district might be extended to any period not exceeding twenty years from the inception of the loan, but when so extended the balance due must be payable in approximately equal annual instalments.

An extension of the time for repayment of the loan is usually made quite some time prior to the date on which the loan and interest were to be completely repaid.

When an extension of time is granted, the commissioners of the public lands spread the balance to be repaid over the remaining years, including those years for which the extension was granted. As the payments must be in approximately equal annual instalments, this automatically reduces the yearly payment and decreases the amount which the municipality is obliged to raise in order to make payments upon its loan.

Sec. 40.06, provides:

"Special district meetings shall have the powers of the annual meeting, excepting the election of officers, but not more than two special meetings shall be held in any year to consider or act upon the same subject. No tax shall be voted at a special meeting unless three-fourths of the electors shall have been notified in writing either personally or by written notice left at their places of residence, or by publication of the notice in a newspaper published in the district, stating the time, place and object of the meeting, and specifying the amount proposed to be voted, at least seven days before the time appointed therefor. The electors at a special meeting may vote a less amount than that stated in said notice but not a greater amount."

The only action which is necessary by the electors of a school district who desire an extension of time on their loans from the state trust funds is to pass a resolution requesting that extension from the commissioners of the public lands.

No tax for the repayment of the loan need be voted at that time, it being unnecessary by virtue of the provisions of sec. 25.05 (5), which automatically continues a tax levy sufficient to repay the loan and interest.

It is our opinion, therefore, that school district officers when calling a special meeting for the purpose of voting

on the question of an extension of time for the repayment of a loan from the state trust funds need not comply with the provisions of sec. 40.06, relating to notice.
JEF

Contracts—Education—County Normal Schools—Faculty members of county normal school can enforce contract with board if school is subsequently closed.

June 15, 1933.

A. J. CONNORS,
District Attorney,
Barron, Wisconsin.

At a meeting of the normal school board of your county this spring the members signed a contract with certain persons on the faculty of the normal school for the coming school year. No clause was inserted in the contract for voiding the same in the event that the school was discontinued. A committee has been appointed from the county board to determine the advisability of discontinuing the school. The opinion of this office is requested as to whether or not these contracts with the teachers would be enforcible by them in the event that the school is discontinued.

Sec. 41.36, Stats., authorizes any county within which no state normal school is located to appropriate money for the organization, equipment and maintenance of a normal school, to be known as a "County Normal School."

Sec. 41.37, provides, in part:

"A 'County Normal School Board' is created, which shall have charge and control of all matters pertaining to the organization, equipment and maintenance of such schools. * * *"

As was said in *State ex rel. Mattek v. Nimtz,* 204 Wis. 311, 315, 236 N. W. 125,

"* * * It is not perceived how language could be broader in granting full power to the board. Certainly the language, 'shall have charge and control of all matters pertaining to the organization, equipment and maintenance of

such schools,' when construed in connection with the board upon which such authority is conferred, is amply broad, in the absence of a provision specifically limiting its authority to hire a principal, to grant such power and authority. This authority was limited only by the provisions of sec. 41.41, which provided the minimum qualifications for both teachers and principals employed in such schools."

It was further held in the same case that sec. 41.39, giving the state superintendent general supervision of county normal schools, did not make it necessary for the state superintendent to approve contracts with teachers in order to make the same valid.

The authority and duty to contract with qualified teachers is, therefore, vested in the county normal school board. The contracts already made are apparently valid.

In the case of *Clune v. School District No. 3 of the Town of Buchanan,* 166 Wis. 452, the school board entered into a contract with the teacher for the ensuing school year. Subsequent to the making of the contract the schoolhouse burned. At a special meeting it was voted to suspend the school, that right apparently being given to the school district meeting. The person with whom the contract to teach had been made brought action for his salary and was permitted to recover. It was said, pp. 457–458:

"It is insisted that appellant was discharged from performing its contract with respondent even if a valid contract were made, on account of the destruction of the schoolhouse by fire. There was no stipulation in the contract to that effect, and no provision for deduction on account of destruction of the school house by fire or otherwise. Under such circumstances no deduction could be made without the consent of the respondent. * * *

"It is also contended that the appellant was discharged from performing its contract with respondent on account of the action of the special school meeting in voting to suspend the school. The respondent was an employee of the appellant and the relations between appellant and respondent were contractual. The appellant, therefore, could not abrogate the contract or modify it without the consent of the respondent. *Board of Ed. v. State ex rel. Reed,* 100 Wis. 455, 76 N. W. 351; *Jones v. U. S.,* 96 U. S. 24, 29; *McKay v. Barnett,* 21 Utah, 239, 60 Pac. 1100, 50 L. R. A. 371."

The case of *Emma Bolle v. Pioneer School Dist. No. 1, Town of Antigo,* recently decided by the municipal court of Langlade county, was similar to the *Clune* case. The following language is taken from the opinion there handed down:

"* * * The School District cannot be relieved from complying with its valid contract entered into with a teacher by its own acts or because the school building has been destroyed by fire, or because there is an epidemic of contagious diseases making it necessary to close the school. 24 RCL 619, 56 C. J. 420. * * *

"The school in question here was closed by the action of the district itself. The district having properly entered into the contract with the plaintiff, the district surely would not have the right to turn around and by some other resolution or act taken by the district or its officers, relieve itself from its contract."

The facts in the present case are less complicated than those in the *Clune* case, due to the fact that the school is still in existence, and the authority to close the school is not vested in a school district meeting. The relationship between the school board and the persons on the faculty of the normal school is a contractual one which can be modified or abrogated only with the consent of those faculty members.

JEF

Banks and Banking—Farm loan bonds issued by federal land banks under authority of emergency farm mortgage act of 1933 are not eligible for investment of trust funds under authority of sec. 231.32, Stats.

June 15, 1933.

A. C. KINGSTON, *Commissioner of Banking, Banking Department.*

In your letter to the attorney general you ask:

"If a state bank sells a mortgage which it holds to the federal land bank and receives bonds under the provisions of the emergency farm mortgage act of 1933, can these bonds

be used as a trust fund investment under the provisions of Section 231.32 (1) of the statutes?"

"May I have your official opinion on this question at your earliest convenience?"

Par. (d), subsec. (1) of sec. 231.32, Stats., provides that an "executor, guardian or trustee * * * may invest trust funds" * * *.

"In the bonds of the federal or joint stock land banks authorized by the federal farm loan act approved July 17, 1916."

The farm loan bonds authorized to be issued by the federal land banks under the provisions of the "emergency farm mortgage act of 1933" are of course not the bonds of the federal land banks of 1916 in which trust funds may be invested under sec. 231.32. You are therefore advised that the federal farm loan bonds authorized by the 1933 emergency farm mortgage act are not eligible for the investment of trust funds under the provisions of sec. 231.32.
JEF

Corporations—Co-operative Associations—Name of proposed co-operative, "Wisconsin Co-operative Brewery, Inc.," sufficiently distinguishes it from existing corporation having name "Wisconsin Brewing Company"; secretary of state may, in his discretion, file articles of incorporation under name "Wisconsin Co-operative Brewery, Inc."

June 16, 1933.

THEODORE DAMMANN,
Secretary of State.

You state that articles of incorporation of a co-operative association, under ch. 185, Stats., for the manufacture and sale of beer and located at Milwaukee, have been submitted to your office under the name, "Wisconsin Co-operative Brewery, Inc." The co-operative is a nonstock, nonprofit-sharing organization.

You state further that there is an existing corporation, organized under ch. 180, Stats., located at Kenosha, which was incorporated April 7, 1933, with authorized capital

stock of $20,000.00, under the name, "Wisconsin Brewing Company."

You ask to be advised whether in my opinion the name of the proposed co-operative, namely, "Wisconsin Co-operative Brewery, Inc.," is such as to distinguish it from the already existing corporate name, "Wisconsin Brewing Company," and whether in my opinion you are authorized to file these articles under the name, "Wisconsin Co-operative Brewery, Inc."

Under sec. 180.02, subsec. (1), par. (b), Stats., the articles of incorporation of a corporation organized under ch. 180, Stats., must contain the name of the corporation, and the name "shall be such as to distinguish it from any other domestic corporation and from any corporation licensed in this state."

The same requirement applies to a co-operative association organized under ch. 185, Stats. Sec. 185.02 (2).

The test to be applied is whether the name of the proposed co-operative is so similar to the name of the existing corporation as to mislead the public. Op. Atty. Gen. for 1910, 184; XI Op. Atty. Gen. 402. If so, the name of the proposed co-operative is not such as to distinguish it from the existing corporation. While the two names here in question indicate that both corporations are engaged in the same type of business, yet the names are quite different. The only word common to both names is the word "Wisconsin." The name of the proposed co-operative contains the distinctive word "Co-operative," which serves to distinguish such co-operative as a strictly co-operative association. Under sec. 185.22, every association organized under ch. 185 must use the word "co-operative" as a part of its corporate name and the same section forbids a corporation organized under ch. 180 from using that word as a part of its corporate name. In my opinion the proposed name, "Wisconsin Co-operative Brewery, Inc." is not so similar to the name "Wisconsin Brewery Company" as to mislead the public and, therefore, the name of the proposed co-operative is such as to distinguish it from the existing corporation.

While it is my opinion that it is within your authority

to file the articles of incorporation under the name "Wisconsin Co-operative Brewery, Inc.," yet the matter is one that is ultimately for you to determine, as it is your duty under the law to file articles of incorporation only when such articles comply with the statutes. Whether or not there is a prohibitive similarity between the two names in question is largely within your discretion to determine, and your decision, if not arbitrary or capricious, will be given great weight by the courts.. 66 A. L. R. 984. See also Op. Atty. Gen. for 1910, 184.
JEF

Education—Vocational Education—Public Officers—Board of Vocational Education—Local vocational board is required to have two representatives of employers and two of employees.

Member of board who is appointed as employee will remain representative of employees although during term of office he became employer.

June 19, 1933.

GEORGE P. HAMBRECHT, *Director,*
Board of Vocational Education.

In your letter of June 6 you submit a question which grows out of the appointment of a local vocational board in the city of Eau Claire, and you state that you would like an opinion from this department concerning the validity of appointing two new members on the local board of vocational education representing the interests of employers, when two of the hold-over members were appointed as labor representatives and who later became employers by virtue of being promoted to the position of superintendent with hiring and discharging powers.

Sec. 41.15 subsec. (2), Stats., contains the following provisions after making the city superintendent or principal of the high school ex officio member of the local board, that it shall consist of "four other members, two employers, and

two representative employes who have no employing or discharging power and who are not foremen or superintendents, who shall serve without pay, and who shall be appointed by the local school board, or if there be more than one local board, by such boards jointly."

There is no provision in the statute which provides that if the status of those appointed as employees changes to that of employers during their term of office it shall vacate their office. Neither is any board or officer empowered to remove them from office by reason of the fact that their status has changed. Our statute specifically provides what shall constitute a vacancy in an office. This is not one of the grounds which causes a vacancy under our statute.

We believe the persons appointed to the local vocational board as employees will represent employees during their term of office irrespective of the fact that their status may have changed and they have become employers under the definition given in the statute. It has been held in *Stafford v. Cook,* 159 Ark 438, 444:

" 'Vacancy in office' means the absence of an incumbent of the office who has been legally inducted therein * * * when the induction into office is legal and the person so inducted is eligible at the time, his continuance in office prevents a vacancy until he abandons the office or is removed therefrom in the manner provided by law. Mere existence of grounds for removal do not constitute a vacation of an office so as to confer * * * the right to elect a successor."

While we believe that the person whose status is changed and who has become an employer after he was placed upon the board as a representative of the employees cannot be reappointed as a representative of the employees when his term expires, still he will represent the employees during his term of office. The two members in question as given in the statement of facts are still representing the employees, and the other two members under the terms of the statute may legally be appointed as representative employers.

JEF

Oil Inspection—Deputy oil inspector should collect fee as for barrel when quantity is any fraction of barrel.

June 19, 1933.

ADAM PORT,
Oil Inspector.

Some question has arisen as to the right of the deputy oil inspector to assess a fee as for the inspection of a "barrel" when the container being inspected has less than fifty gallons. The contention is made on the one hand that your office is entitled to charge as for a barrel when the gallonage is twenty-five or over, and on the other hand that the charge cannot be made unless the gallonage is twenty-six or over.

It is our opinion that your office is entitled to charge the fee as for a barrel if the container contains any fraction of a barrel. Ch. 168, Stats., relates to illuminating oils. Sec. 168.10 provides in part:

"When the amount contained in any such tank or tank car shall exceed fifty gallons, each fifty gallons shall constitute a barrel within the meaning of this chapter, and the fees for inspecting the same and marking, stamping, sealing, or branding the barrels shall for each fifty gallons be the same as prescribed for each barrel, cask or package.

"The term cask, barrel, package, or sample as used in sections 168.03 to 168.14, inclusive, means a quantity not exceeding that contained in an ordinary commercial barrel estimated as fifty gallons."

Sec. 168.16 provides in part:

"Every deputy inspector of illuminating oils shall demand and receive from the owner or other person for whom or at whose request he shall examine or test any oil, gasoline, benzine, naphtha or such other like products of petroleum or sample thereof, as provided by law, an inspection fee of four cents for every single cask, barrel, package or sample so inspected."

The second sentence of the quotation taken from sec. 168.10 contains the *definition* of the word "barrel." By the language of the definition, it extends to the word "barrel" as used in secs. 168.03 to 168.14. It is our opinion,

however, that this definition must also be extended to the word as it is used in sec. 168.16, which section now relates to the fee to be collected for inspection. By sec. 169, ch. 67, Laws 1931, the legislature created sec. 168.16, providing fees for oil inspection. The failure to extend the definition to include sec. 168.16 was probably an oversight. There is no good reason to believe that the word "barrel" as used in the statutes relating to illuminating oils should have a different meaning in different sections. The definition provides that the term "barrel" means a quantity *not exceeding* that contained in an ordinary commercial barrel estimated as fifty gallons. This is a limitation upon the amount which may be considered as a barrel, and is not a declaratory statement that only fifty gallons shall constitute a barrel. Nowhere in the definition is any statement made with reference to a fraction of a barrel, whether more or less than one-half. The statutes therefore afford no justification for the distinction attempted to be drawn between twenty-five and twenty-six gallons or any other gallonage less than fifty.

The first sentence of the quotation taken from sec. 168.10 is not a definition of the word "barrel" but relates to the application of the definition found in the second part of that quotation in the case of tank or tank car inspection. Substituting the definition given in sec. 168.10 and applying it to sec. 168.16, the latter section would read:

"Every deputy inspector of illuminating oils shall demand and receive * * * an inspection fee of four cents for every single * * * quantity not exceeding that contained in an ordinary commercial barrel estimated as fifty gallons."

Every quantity not exceeding that contained in an ordinary commercial barrel estimated at fifty gallons would, of course, include twenty-five gallons, twenty-six gallons or even one gallon.

JEF

School Districts—Transportation of School Children— In case of suspended school, voters of district rather than school board may provide transportation for children residing over one mile limit.

June 20, 1933.

DEPARTMENT OF PUBLIC INSTRUCTION.

In a certain school district having a suspended school the school board provided transportation for all children living one mile from the school which they attended. The question has been raised whether this right to provide transportation for those children living over one mile from the school rested with the school board, or whether it must be authorized by the voters of the school district.

It is our opinion that the voters of the school district rather than the school board have the right to provide transportation for those children living over one mile from the school, when the local school is closed.

Sec. 40.34, subsec. (2), Stats., provides, in part:

"The board of any district which has suspended school shall * * * provide transportation to and from school for all children residing more than two miles from the nearest school which they may attend * * *; and in the event such district shall provide for transportation for all such children residing more than one mile from the nearest school which they may attend one hundred fifty dollars additional state aid."

The section quoted above previously was found in sec. 40.16 (1) (c), Stats. 1923, and at that time provided that the school board of any district in which the electors had voted to suspend the school should provide transportation to and from school for all children residing more than *one* mile from the nearest school which such children were permitted by the statutes to attend.

The legislature has since seen fit to alter the duty imposed upon the school board by now making it compulsory to provide transportation in the case of a suspended school for only those children residing more than two miles from the school which they attend. The change thus made deprived the school board of a duty formerly imposed.

In the first part of sec. 40.34 (2) the "board" of the district is required to provide transportation over the two mile limit. The latter part of the section uses the word "district" in reference to providing transportation for children residing over the one mile limit. It must be presumed that the legislature used the two different words for a purpose and meant some distinction. By sec. 40.01 the word "district" means school district. The school district acts directly at the school meetings, and only indirectly through the board. Had the legislature intended that the school board should have the right to provide transportation in case of a suspended school for those residing over the one mile limit, it would have used the word "board" in the latter part of sec. 40.34 (2), just the same as it did in the first part of that section.

This conclusion is strengthened by the fact that sec. 40.34 (1) provides, in part:

"The school district meeting may authorize the board to provide transportation for all the children of school age residing in the district. * * *."

This is a discretionary power vested with the voters of the school district. This section was formerly sec. 40.16 (1) (b) Stats. 1923, and at that time read as follows:

"The electors of any school district are empowered to authorize the district board to provide transportation to and from school for any or all of the children of school age residing in the district for whom transportation is not required by law. * * *"

The wording of this section as found in the statutes of 1923 indicates the meaning which the legislature intended that it should have. The school statutes, and particularly those relating to transportation, must be read and construed together, being *in pari materia.*

It is our opinion that inasmuch as transportation is not required for children residing over the one mile limit, in cases of suspended schools, the voters at a school meeting, rather than the school board, have the right to provide for such transportation.

JEF

Architects—Board of examiners of architects and civil engineers has no power to revoke certificate of registration of any registrant for offense which does not pertain to practice of architecture or of civil engineering or to practice of any fraud and deceit in obtaining certificate of registration.

June 20, 1933.

ARTHUR PEABODY, *Secretary,*
Board of Examiners of Architects and Civil Engineers.

You state that a registered architect, A, of Milwaukee, was convicted of a criminal offense and sentenced to a term in the house of correction; that he was registered as an architect in November, 1917, and said registration was renewed by the present board on August 1, 1932. You also state that the statute, sec. 101.31, subsec. (5), par. (c), provides:

"No person shall be eligible for registration as an architect or civil engineer who is not of good character and repute. * * *"

Under sec. 101.31 (10) (a) and (b) it is provided that the board has the power to revoke the certificate of registration of any registrant who is guilty of

"(a) The practice of any fraud or deceit in obtaining a certificate of registration;
"(b) Any gross negligence, incompetency or misconduct in the practice of architecture or of civil engineering as a registered architect or as a registered civil engineer."

It appears that A was convicted on a charge of making unauthorized bank loans and said offense for which he was convicted did not pertain to the practice of architecture. You are therefore advised that under the statute your board had no power to revoke his registration, as the offense does not come within the purview of the statute authorizing the board to revoke his certificate of registration.
JEF

Municipal Corporations—Home Rule—Public Officers—Board of Public Works—City Council—Member of city council of third or fourth class city may not be appointed to board of public works under sec. 62.14, Stats.

City may not elect, under home rule amendment, that sec. 66.11 (2), statute on eligibility for other offices or positions, be not applicable to such city. This eligibility section is enactment of legislature of state-wide concern that affects with uniformity every city.

June 20, 1933.

PUBLIC SERVICE COMMISSION.
Attention Wm. M. Dinneen, *Secretary.*

In your letter to the attorney general you state as follows:

"If a city of the third or fourth class elects, pursuant to sec. 66.06, subsec. (10), par. (g), Stats., to have its municipal utilities managed by a board of public works as provided for in sec. 62.14, Stats., may members of the city council be appointed to the board discharging the duties of the board of public works where the city has dispensed with such board of public works?

"If your answer to the first question is in the negative, may such city under the home rule amendment, elect that subsection (2) of section 66.11, Stats., be not applicable to it, and thereby avoid the prohibition against members of the council serving on the board managing its municipal utilities?"

Your first question is answered in the negative. Members of a city council may not be appointed to the board discharging the duties of the board of public works.

Subsec. (10), sec. 66.06, Stats., provides in part as follows:

"* * *

"(g) In cities of the third or fourth class the council may provide for the operation of a public utility or utilities by the board of public works, in lieu of the commission above provided for."

The board of public works referred to in par. (g) is provided for by sec. 62.14, subsec. (1) of which reads as follows:

"There shall be a department known as the 'Board of Public Works' to consist of three commissioners. In cities of the second class the commissioners shall be appointed by the mayor and confirmed by the council at their first regular meeting or as soon thereafter as may be. The members of the first board shall hold their offices one, two and three years, respectively, and thereafter for three years or until their successors are qualified. In all other cities the board shall consist of the city attorney, city comptroller and city engineer; provided, that the council, by a two-thirds vote, may determine that the board of public works shall consist of other public officers or persons and provide for the election or appointment of the members thereof, or it may, by a like vote, dispense with such board, in which case its duties and powers shall be exercised by the council or a committee thereof, or by such officers or boards as the council shall designate. The words 'board of public works' wherever used in this chapter shall include such officers or boards as shall be designated to discharge its duties."

An examination of this subsection discloses that, in cities of the third and fourth classes, the board of public works shall consist of the city attorney, city comptroller and city engineer; but that the council may by a two-thirds vote determine that the board of public works shall consist of other public officers or persons, in which case the council shall also provide for the election or appointment of such officers or persons.

The above subsection also provides that by a two-thirds vote the council may dispense with the board of public works. If this has been done, the council itself or a committee of the council, or certain designated officers or boards, shall exercise the powers and duties prescribed for the board of public works. By the wording of this subsection of the statutes, when the council or a committee thereof exercises the duties and powers of the board of public works, it is still acting as the council or a committee of the council, and not as the board of public works. But the last sentence of this subsection provides that the words, "board of public works" shall include the "officers or boards" that have been designated by the council to exercise the duties and powers of the board of public works. There is nothing, therefore, in sec. 62.14 which authorizes

the council to appoint itself or any member thereof to the board of public works. The council or a committee of the council may exercise the duties and powers of the board of public works under certain circumstances, but when it does so act, it is not acting as the board of public works.

Subsec. (2), sec. 66.11 reads as follows:

"No member of a town, village, or county board, or city council shall, during the term for which he is elected, be eligible for any office or position which during such term has been created by, or the selection to which is vested in, such board or council."

This statute makes a member of the council ineligible for appointment to the board of public works, and in the absence of any contrary intention being manifested in sec. 62.14 or in any other statute, must be controlling. As pointed out, a member of the council may, under certain circumstances, perform the duties of the board of public works, but by the prohibition contained in subsec. (2), sec. 66.11 he may not be appointed to the board known as the "board of public works" in sec. 62.14. I might add that, on May 4, 1923, when ch. 95, Laws 1923, created par. (g), subsec. (10), sec. 66.06, the statute on the board of public works read no differently than it does now. No change has been made. The meaning of the words "board of public works" as above indicated, must have been the meaning given them when the legislature added par. (g) to sec. 66.06.

Your second question must also be answered in the negative.

A city may not elect, under the home rule amendment, that subsec. (2), sec. 66.11 be not applicable to such city. The grant of power, given to cities under the home rule amendment, is

"* * * to determine their local affairs and government, * * * and this power is restricted only by the * * * enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village. * * *"

Our supreme court has construed this grant as follows:

"* * * This plainly contemplates that there will continue to be in the future as there always have been in the past enactments of the legislature affecting only classes of cities. This is a plain recognition of the continuing right of the legislature to classify cities for the purposes of legislation, in accordance with settled practice. But enactments of the legislature which do not affect all cities uniformly are to be subordinate to legislation of cities within their constitutional field. When cities under their constitutional power enact legislation, that legislation supplants in that city all enactments of the legislature with which it comes in conflict unless such enactments of the legislature affect all cities with uniformity. If the state legislation affects only classes of cities, it is subordinate to the city legislation in the city which has so legislated, but it is still in force and effect for the government of cities which have not acted under their home-rule powers." *State ex rel. Sleeman v. Baxter,* 195 Wis. 437, 447–448 (1928).

By the test or definition given by our court in the *Sleeman* case it seems clear that subsec. (2), sec. 66.11, is an enactment "of the legislature of state-wide concern" that "with uniformity" affects every city. That being true, a city may not elect that subsec. (2), sec. 66.11 be not applicable to it. Since the adoption of the home rule amendment on November 4, 1924, our supreme court has several times had it under consideration. In *State ex rel. Coyle v. Richter,* 203 Wis. 595, 601 (1931), the court suggested, without passing on the question:

* * * "election laws affect with uniformity all cities of the state and are not subject to being set aside under an exercise of home-rule powers. * * *"

In *State ex rel. Ekern v. Milwaukee,* 190 Wis. 633, 641 (1926), the court after announcing its decision, changed it, and held:

"* * * the height of buildings in a particular community is a problem and affair which much more intimately and directly concerns the inhabitants of that community than the casual visitor or the other parts of the state, and it is therefore a 'local affair' of such community within the amendment."

In that case, page 639, the court pointed out that education was a matter of "state-wide concern;" that health regu-

lations might be and that "exclusive control over methods and means of transportation and crime * * *" might also be. I refer to these cases to point out what little construction has been given to the amendment in this state. However, the opinion in *State ex rel. Sleeman v. Baxter, supra,* rendered after the court invited briefs amici curiae, page 144, warrants the conclusion reached.

See also *Browne v. New York,* 241 N. Y. 96, 149 N. E. 211; *Adler v. Dugan,* 251 N. Y. 467; *Robia Holding Corp. v. Walker,* 257 N. Y. 431.

JEF

Counties—County Board—Taxation—Tax Sales—County board may not contract with tax specialist to sell county-owned lands.

Neither county board nor county clerk can make executory contract to sell county-owned lands.

June 20, 1933.

B. O. REYNOLDS,
District Attorney,
Elkhorn, Wisconsin.

Your county is desirous of employing a certain tax specialist as a salesman for the county to help move numerous subdivision lots now owned by the county in order to get them back on the tax roll. The question arises as to whether the county can legally compensate this agent. You wish to know whether any of the following suggested methods of compensation would be valid:

"1. Can the county board enter into a contract with this tax specialist to sell county owned lands on terms of sale prescribed by the board, paying said specialist a commission of all above a net price fixed by the board and consisting of back taxes, penalties and interest?

"2. Can the county board give an exclusive option to this person to purchase county owned properties himself

at a price and on terms prescribed by the board wherein the properties shall be deeded from time to time as paid for?

"3. The county clerk being now authorized to sell these lots by resolution of the board on terms and at a price prescribed by the board, can the county clerk sell specified lots to this agent and allow him to pay for each individual tract when and as deeds are required?"

It is our opinion that not any of the suggested methods would be valid.

A county, of course, has only such powers as are specifically given it by statute and such as are necessarily implied in order to exercise those specifically given. *Frederick v. Douglas County,* 96 Wis. 411.

Neither the general nor the special powers of the county board found in secs. 59.07 and 59.08, Stats., delegate specific authority to employ an agent of this kind. The legislature has, however, gone to the trouble of making specific enumeration of certain cases in which the county board is authorized to employ agents and personnel. The county board cannot, however, appropriate money to compensate persons whom it is not authorized to employ. The legislature, moreover, has seen fit to enact specific statutes relating to the disposition of lands to which the county has taken tax deeds, and has defined the nature and extent of the power vested in the county board in respect to this matter.

Sec. 75.35 provides:

"The county board may, by an order to be entered in its records prescribing the terms of sale, authorize * * * the county clerk to sell and convey by quitclaim deed, duly executed and delivered by such clerk under his hand and the county seal of such county, and such lands for which a deed has been executed to such county as provided in the next section."

Under this section the board may authorize only the county clerk to sell and convey lands therein mentioned. When so authorized, it is the duty of the clerk to sell the lands.

"* * * it is clearly the duty of one holding an office to discharge its duties in person, unless the law has provided him with an assistant or assistants. * * *"

Montgomery et al. v. Board of Supervisors of Jackson County, 22 Wis. 69, 71.

The law has not provided for a tax specialist as a salesman to assist the county clerk.

It was said in *Beal v. Supervisors of St. Croix County,* 13 Wis. 500, 503:

"* * * And it was not competent for the board of supervisors, by any contract, to divest the treasurer of this authority, or to set aside the provisions of the statute. Their contract would be good as to matters subject to their control. But they cannot, by making contracts, divest the authority of other officers, or assume to themselves the control of matters which the law has not subjected to their supervision. If this were not so, they might, under the guise of contracting, assume the entire management of county affairs, and where the law said a thing should be done, by one officer, and upon certain terms, they could contract that it should be done by another, upon different terms."

It is our opinion that the above statement of the law would render proposed method No. 1 invalid.

Proposed methods Nos. 2 and 3 contemplate an executory contract of sale, the second between the county board and the salesman, and the third between the county clerk and the salesman.

In both of these cases, the deed would be given, as to most of the lands, at a date subsequent to the making of the agreement. This practice was condemned in the case of *Smith v. Board of Supervisors, Barron County,* 44 Wis. 686, wherein it was said in respect to the sale of tax certificates, which is also covered by sec. 75.35, the language relating thereto being similar to that used in reference to the sale of lands, pp. 691–693:

"The contract set out, it is quite clear, is not a 'bargain and sale,' or an *executed* contract of sale, but an *executory* contract *to sell,* and for the payment of the consideration when the amount is determined, dependent upon the condition precedent of the ascertainment, assignment and delivery of the certificates *in futuro,* and with a payment, in advance, of a small part of the consideration to bind the bargain. It is a contract of sale, incomplete, uncertain and executory. The number and amount of the certificates,

and the total amount of the consideration, were undetermined, and the certificates were *yet to be* assigned and delivered, which, under the statute and the decisions of this court, is the only evidence and muniment of title to tax certificates purchased from the county treasurer. A sale *executed* is where nothing remains to be done by either party to effect a complete transfer of the subject matter of the sale. Story on the Law of Sales, secs. 231, 332; *Benedict v. Field,* 16 N. Y., 597; *Straus v. Ross,* 25 Ind., 300; *Martin v. Hurlbut,* 9 Minn., 142; *Welsch v. Bell,* 32 Pa. St., 12; *Whitmore v. Alley,* 46 Me., 428; *Ganson v. Madigan,* 9 Wis. 146; S. C. 15 id., 144; *Congar v. The Galena & Chi. U. R. R. Co.,* 17 id., 477. 'It is a mere contract *to sell,* and executory and incomplete, * * * when some after act is to be done to complete the sale, such as a formal delivery or a bill of sale.' Benj. on Sales, secs. 310, 319; *Macomber v. Parker,* 13 Pick., 175. * * * "* * *

"A construction of this language which would allow the board of supervisors to prescribe by such order, as the terms of sale, that payment might be made in anything besides money, or on credit, or that the county treasurer might enter into an *executory* contract of sale, or make a conditional sale, would be most dangerous and pernicious, and work incalculable mischief by uncertainty, insecurity, litigation and loss: consequences which certainly were never anticipated by the legislature.

"We must hold that the statute confers no power upon a county treasurer to make, and no authority upon the board of supervisors to order him to make, any other than an absolute and fully executed sale of tax certificates, and for cash in hand. The very language of the power itself, 'to sell and transfer by assignment,' must mean such a sale with present payment, and by assignment and delivery, and no other."

By sec. 75.35 the county board may direct the county clerk "to sell and convey" lands therein mentioned.

It is our opinion that the same construction would be given to this language as was given to the words "to sell and assign" and contemplates a present completed sale by receiving cash and delivering a deed which would constitute a muniment of title. That being the case, neither the county board nor the county clerk could enter into an agreement such as that set forth in either proposed method 2 or 3.

It may be added that the statutes do not provide for options of any kind, much less an exclusive option.

It would seem to be definitely against public policy for the county to deprive any one of the right to purchase county-owned lands according to the terms of sale fixed by the county board, or to assist one individual to profit in this manner by trafficking in county property.

JEF

Banks and Banking—Public Deposits—Commerce—Reconstruction Finance Corporation moneys deposited by governor or unemployment relief trustees in public depository which has failed to repay on demand constitute valid claim against state public deposit fund.

Sums due state public deposit fund under sec. 34.06, subsec. (2), Stats., on such funds and similar funds should be paid by public depositors.

June 21, 1933.

BOARD OF DEPOSITS.

Attention Gerald C. Maloney, *Assistant Secretary.*

You refer us to the opinion of this department rendered May 3, 1933, to the industrial commission,* holding that the Reconstruction Finance Corporation moneys deposited by the governor or unemployment relief trustees are public deposits under ch. 34 as created by ch. 1, Laws Special Session 1931. You then state:

"Certain relief funds received from the Reconstruction Finance Corporation were deposited by trustees appointed by the governor in the Commercial National Bank of Madison during the year 1932. The first report received by this department relative to such deposits was received during the month of January and was as of January 9, 1933, the date upon which this bank became a state bank and adopted a stabilization plan. This report indicates that the sum of $317,637.56 was then on deposit to the credit of said trustees. No payments have been made into the state deposit fund on account of deposit of such poor re-

* Page 319 of this volume.

lief funds. This department has received no proof that the Commercial National Bank was designated as a public depository for such funds."

Upon the foregoing statement of facts the following questions have arisen which will be answered *seriatim:*

"1. Have the trustees referred to a claim against the state deposit fund for the amount of poor relief funds which were on deposit in the Commercial National Bank on January 9, 1933?"

Answer. In view of the holding of the opinion above referred to the answer to this question must necessarily be affirmative.

Sec. 34.06 captioned "state deposit fund," provides in subsection (1):

"* * * Such fund shall be used solely for the reimbursement of losses resulting from the failure of any public depository to repay to any public depositor on demand the full amount of its deposits * * *."

In subsec. (4), sec. 34.06 it is provided:

"Every loss required to be paid out of the state deposit fund shall be paid within three months after the loss has been definitely ascertained, * * *."

The Reconstruction Finance Corporation relief funds, being public deposits on deposit with the Commercial National Bank, a public depository, which has failed to repay on demand the governor or his authorized agents, a public depositor, the full amount of the deposits, meet the requirements of the statute. The trustees, therefore, have "a claim against the state deposit fund for the amount of poor relief funds which were on deposit in the Commercial National Bank on January 9, 1933."

No exception is made in the statute for funds not previously reported. We therefore regard that fact as immaterial.

You state that you have received no proof of designation of the Commercial National Bank as a public depository.

In XX Op. Atty. Gen. 1233, in regard to designation of a public depository by a county, which language is also applicable in this case, it was stated, pp. 1234–1235:

"* * * I am of the opinion that a formal resolution is not necessary to the designation of a county depository. Both new ch. 34 and the retained provisions of sec. 59.74, as to the designation of county depositories, use merely the word 'designated,' without prescribing any particular formality. Any action, therefore, which is legal action by the county board or the proper committee complies with the statute. * * *"

In the opinion dated May 3, 1933, to the industrial commission it was shown that the governor legally received the money on behalf of the state to be administered by him "or under his direction and upon his responsibility." Sec. 605a (c) of ch. 14, Title 15, U. S. C. A. The power given him to administer the fund would certainly carry with it authority to deposit the fund. And a mere deposit by him or his agents with the Commercial National Bank, a qualified public depository, is a sufficient designation.

I quote from XX Op. Atty. Gen. 1224, 1225, referring to the law under consideration:

"* * * Substantial compliance, that which supplies the substance, even though not the full letter of the act, should suffice."

Since the funds in this instance are received by the governor and placed in his custody, we do not regard provisions in the law relating to the state treasurer and a designation by the state board of public deposits as applicable. In view, however, of the authority with which the governor was vested in regard to these funds, he does come within the following quoted portion of ch. 1, Laws Special Session 1931. Sec. 34.01 (4), as enacted by ch. 1, provides:

" 'Governing board' shall mean the * * * body of any other governmental subdivision of the state or commission or committee, board or officer which under the statutes has authority to designate the public depositories in which the moneys of such governmental subdivision shall be deposited."

"2. If the state deposit fund is held liable then are the trustees required to pay into the state deposit fund the amount specified under the statutes as being due on such public deposit, or will this amount be deducted before payment of such claim?"

Answer. Since the funds in question are public deposits the amount required by sec. 34.06 (2) should have been paid into the public deposit fund, and if they have not yet been paid they are now past due and owing. The public depositor or official is liable for the amounts due under sec. 34.06 (2). It would seem to be more a matter of policy than of law as to how the amount due should be paid. However, as a matter of protection to the state deposit fund, the best policy for the board of deposits would be to deduct the amounts due the fund before payment of the claim.

"3. Many other deposits of relief moneys received from the Reconstruction Finance Corporation have been made by various unemployment relief trustees which have never been reported to this department. In the event the state deposit fund is liable for losses which have occurred, then the question arises as to whether or not all such past deposits must now be reported and the required amount paid into the state deposit fund."

Answer. This question is similar to question 2, and a like answer is given. The public depositor is liable for all sums now past due and owing under sec. 34.06 (2) and the required amounts should be paid into the state deposit fund.

"4. If such past deposits of relief funds are required to be reported then is the amount due the state deposit fund a proper charge against such poor relief funds or must it be paid from other funds of the municipality?"

As was stated in the answer to question 2, the manner of payment here is again a matter of policy for the public depositor to determine. The depositor is liable for the amounts past due. Out of what fund it should be paid is a matter for it to determine. Nowhere in the statute are the amounts due made a proper charge against any particular funds.

The bank having the funds on deposit and constituting the collector for the state deposit fund under sec. 34.06 (2) has authority to pay into the fund on the days specified only the amounts due for the preceding three months, which sums it may collect from the public depositor. No authority is given to it to pay sums past due and delinquent

for which the liability was incurred by the depositor at a period previous to the preceding three months.
JEF

Contracts—Labor—It is compliance with secs. 103.50 and 348.50, Stats., for highway commission, in advertisement, to state prevailing rate of wage found by industrial commission that will be rate of wage scale required on project for public works, and that employees may be paid more but not less than such wage.

June 21, 1933.

HIGHWAY COMMISSION.
Attention M. W. Torkelson, *Director of Regional Planning.*

You state that the application of road oils to certain state trunk highways for the purpose of laying dust will soon be commenced. A portion of this work will be done by contract. The commission desires to advertise the work as soon as possible in order that the application of the road oil may be made at the right time. In connection with the advertisement the following question arises:

"If the commission should, in its advertisement, state the prevailing hours of labor and the prevailing rate of wage for common labor, as required by sec. 103.50, and further advertise that this would be the rate of wage scale required under chapter 95, Laws 1933, and that no employee on the work might be paid less than this rate of wage scale but that any portion or all of the employees might be paid a higher wage scale, would this be a compliance with sec. 103.50 and with ch. 95, Laws 1933?"

Sec. 103.50, subsec. (1), Stats., provides:

"Every contract to which the state is a party for the construction or improvement of any highway shall contain a stipulation that no laborer in the employ of the contractor or of any subcontractor, agent or other person doing or contracting to do all or a part of the work shall be permitted to work a longer number of hours per day or be paid a lesser rate of wages than the prevailing hours of labor

and rate of wages in the county or counties where the work is to be done, as set forth specifically in the contract."

Sec. 103.50 (2) makes it the duty of the industrial commission to determine the prevailing hours of labor and the prevailing wage rate when advised by the state highway commission that a necessity therefor exists. Said sec. 103.50 (3) further defines what is meant by "prevailing hours of labor" and "prevailing wage rate" and states the method to be used in determining the same.

Sec. 348.50 as enacted in ch. 95, Laws 1933, provides:

"(1) It shall be the duty of every city, village, township, county, school board, school district, sewer district, drainage district, commission, public or quasi public corporation or any other governmental unit, which proposes the making of a contract for any project of public works, to determine the rate of wage scale which shall be paid by the contractor to the employes upon such project. Such rate scale shall be published in the notice issued for the purpose of securing bids for such project. Whenever any contract for a project of public works is entered into, the rate of wage scale shall be incorporated in and made a part of such contract. All employes working upon the project shall be paid by the contractor in accordance with the rate of wage scale incorporated in the contract. Such rate of wage scale shall not be altered during the time that such contract is in force.

"(2) Whenever any city, village, township, county, school board, school district, sewer district, drainage district, commission, public or quasi public corporation or any governmental unit, shall by ordinance, resolution, rule or by-law, establish a rate of wage scale to be paid to employes upon any project of public works by a contractor, be he individual, copartnership, or corporation, and it shall be found upon due proof that such contractor is not paying or has failed to pay the wage scale thus established, or is directly or indirectly, by a system of rebates or otherwise, violating the provisions of such ordinance, rule, resolution or by-law of such city, village, township, county, school board, school district, sewer district, drainage district, commission, public or quasi public corporation or any governmental unit, such contractor shall be deemed guilty of a misdemeanor and shall be punished therefor by imprisonment in the county jail for a period of not more than one year nor less than thirty days or by a fine of not to exceed five hundred dollars for each offense or both.

"(3) The failure to pay the required wage to an employe for any one week or part thereof shall be deemed a separate offense."

Sec. 348.50, above quoted, makes it the duty of the highway commission to determine the rate of wage scale which shall prevail under any contract which it makes for a project of public works. The contract for the application of road oils would be considered a contract for a project of public works.

Sec. 348.50 does not contain a definition of what is meant by "rate of wage scale." It is our opinion that it has substantially the same meaning as the term "prevailing wage rate," which is defined by sec. 103.50 (3) to mean "the rate of pay per hour or per day paid to a larger number of workmen engaged in the same grade of labor at outdoor work within such county or counties" (whichever the case may be) in which the work is to be performed. Such being the case, the determination made by the industrial commission under the provisions of sec. 103.50, at the request of the highway commission is a determination by the highway commission within the meaning of sec. 348.50.

One of the purposes in enacting both secs. 103.50 and 348.50 was to set a minimum wage which might be paid laborers, which wage would be at least a subsistence wage. These sections were not intended to fix the maximum amount which laborers might receive. Sec. 103.50 (1), in fact, states that the contract therein referred to shall contain a stipulation to the effect that the contractor shall not pay a *lesser* rate of wages than the prevailing rate. No mention is made of a maximum wage.

Sec. 348.50 provides that employees upon the project of public works shall be paid by the contractor *in accordance with* the rate of wage scale incorporated in the contract.

It is our opinion that a payment of exactly the wage scale set in the contract, or a greater amount, would be a payment in accordance with the rate of wage scale fixed by the contract.

The penalty imposed by sec. 348.50 is upon a contractor who "has failed to pay the wage scale thus established, or is directly or indirectly, by a system of rebates or other-

wise, violating the provisions of such ordinance, rule, resolution or by-law * * *."

The language of subsec. (2), as well as the language of subsec. (3), sec. 348.50, which relates "to the failure to pay the required wage," evidently contemplates a failure to pay *at least* the rate of wage scale set by the contract, and does not impose a penalty upon a contractor who pays in excess of that wage scale. This construction is placed upon the section by virtue of the rule which permits consideration of the evil which a statute is designed to cure and of the mischiefs intended to be remedied at the time the construction is made. *State v. Hall,* 131 Wis. 30; *Koepp v. National Enameling & Stamping Co.* 151 Wis. 302. *Minneapolis Threshing Machine Co. v. Haug,* 136 Wis. 350; *Pettingill v. Goulet,* 137 Wis. 285.

JEF

Bridges and Highways—Arterials—Town officials do not have authority to place stop signs on United States or state trunk highways without consent of state highway commission.

June 21, 1933.

HIGHWAY COMMISSION.

Attention E. J. O'Meara, *Traffic Engineer.*

You desire an opinion as to whether town officials have authority to place stop signs on a United States or state highway in an unincorporated village in their town. Some towns have erected these signs on state trunk highways and maintain that the state highway has no jurisdiction in the matter.

It is our opinion that the town officials do not have the authority which they claim.

Sec. 85.68, Stats., provides:

"(1) The state highway commission may, when it deems it necessary for the public safety, by order declare any United States or state highway or any portion thereof or any highway within a city or village not a portion of

the United States or state highway system but selected and marked as a connecting street through such city or village between portions of said system, to be an artery for through traffic.

"(2) Every county highway committee may, when it deems it necessary for the public safety, by order declare any county trunk highway or any portion thereof to be an artery for through traffic except where state highways are involved in which case such order shall be subject to the approval of the state highway commission.

"(3) Every local authority may, when it deems it necessary for the public safety, by ordinance or resolution declare any highway or any portion thereof under its exclusive jurisdiction, to be an artery for through traffic."

Sec. 85.68, subsec. (1), gives the state highway commission authority to declare any United States or state highway, *or any portion thereof,* to be an arterial.

Subsec. (3), sec. 85.68 gives every local authority the right to make arterials only of those highways, or portions thereof, *under its exclusive jurisdiction.*

By sec. 85.10 (20) a town board is a local authority. The very fact that the state highway commission may declare any portion of a United States or state highway to be arterial would prevent any portion of a United States or state highway from being under the exclusive jurisdiction of a town board. Other sections of the statute, however, furnish additional authority for the statement that a town board does not have exclusive jurisdiction over any portion of a United States or state trunk highway.

By sec. 83.08 the state highway commission is given the right to change or relocate a state trunk highway system.

By sec. 83.06 if the state highway commission deems state highways in any county not properly maintained, it may terminate state aid until those highways are placed in an acceptable state of repair.

By sec. 84.03 all moneys allotted by the federal government to Wisconsin as federal aid for highways is to be expended under the provisions of ch. 83. Under the provisions of ch. 83 the construction work is subject to the approval of the state highway commission.

By sec. 84.07 the state trunk highway system is to be

maintained by the state under regulations and specifications prescribed by the state highway commission.

It is unnecessary to cite further authority for the statement that neither the United States highways nor the state trunk highways in Wisconsin, or any portions thereof, are under the exclusive jurisdiction of town officials. Town officials, therefore, do not have authority to place stop signs on United States or state trunk highways in an unincorporated village in their town without the consent of the state highway commission.

JEF

Labor—Minors—Child labor permits issued by industrial commission under sec. 103.05, subsec. (4), par. (b), Stats., 1931, are invalidated by ch. 143, Laws 1933.

June 21, 1933.

INDUSTRIAL COMMISSION.

Attention A. J. Altmeyer, *Secretary.*

Par. (b), subsec. (4), sec. 103.05, Stats., as enacted by ch. 143, Laws 1933, materially increases the educational qualifications for a labor permit for a child under sixteen years of age. These labor permits authorize the employment of children, sometimes during school hours while the public schools are in session, where such employment otherwise would be illegal. Under this same section, as found in the statutes of 1931, approximately two hundred regular permits authorizing the employment of children under sixteen years of age were issued, most, if not all of them, being on a lower standard of educational qualifications than those fixed by the same section as enacted by ch. 143, Laws 1933.

Opinion is requested as to whether the above named chapter invalidates those permits which were issued under the old law.

It is our opinion that these permits are invalidated by ch. 143, Laws of 1933.

"The term 'license' is not involved in uncertainty or doubt; in its general and popular sense, as used with reference to occupations and privileges, it means a right or permission granted by some competent authority to carry on a business or do an act which, without such license, would be illegal. It is a formal or official permit or permission to carry on some business or do some act which, without the license, would be unlawful, the words 'license' and 'permit' often being used synonymously. It has also been defined as the granting of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not by a class to which the licensee belongs." 37 C. J. pp. 166–167.

A permit is not a contract between the authority granting it and the person to whom it is granted. *Chicago v. Gall,* 195 Ill. A. 41; *Burgess v. Brockton,* 235 Mass. 95; *Metropolitan Excise Bd. v. Barrie,* 34 N. Y. 657; *Public Service Commn. v. Booth,* 156 N. Y. S. 140 (aff. 155 N. Y. S. 568).

It is not a property right. *Voight v. Newark,* 59 N. J. L. 358; *Message Photo-Play Co. v. Bell,* 166 N. Y. S. 338; *Baldacchi v. Goodlet,* 145 S. W. 325.

Nor does it create a vested right. *Laing v. Americus,* 86 Ga. 756; *State v. Cote,* 122 Me. 450; See also *Public Serv. Commn. v. Booth, supra*; and *Burgess v. Brockton, supra.*

"It is generally held or provided under the various license acts * * * that a license may be revoked for due cause at any time by the licensing authorities; and, since a license is a mere privilege, and neither a contract nor a property or vested right, a statute * * * providing for its revocation does not violate constitutional provisions, as depriving the licensee of property, immunity, or a privilege. * * *" 37 C. J. 246.

"The power of revoking a license generally is vested in the authorities which granted it, unless such power is expressly given to other officials." 37 C. J. 247.

The power to revoke the permits issued to children by the industrial commission is vested in the commission under sec. 103.05 (6) (b). This authority, however, is not exclusive in the sense that it deprives the legislature of the authority to revoke. The permits in the first in-

stance are issued by virtue of legislative action and, in the absence of specific statutory authority, would be illegal.

Ch. 143, Laws 1933, repealed that section of the statutes under which the two hundred permits in question were issued.

Sec. 103.05 (4) (a), as enacted by ch. 143, Laws 1933, now provides as follows:

"Except as otherwise provided in subsection (4a) and in paragraph (d) of subsection (6) of this section and in sections 103.12 and in sections 103.21 to 103.33, no child under seventeen years of age, unless indentured as an apprentice in accordance with section 106.01, shall be employed or permitted to work at any time in any gainful occupation or employment, unless there is first obtained from the industrial commission, or from some person designated by the commission, a written permit authorizing the employment of such child within such period of time as may be stated therein, which shall not exceed the maximum hours prescribed by law."

This section definitely provides that except as therein stated, "no child * * * under seventeen years of age * * * shall be employed or permitted to work." This makes no reference whatsoever to any children who have already received permits under the old law. Nor does the exception specifically mentioned make any reference whatsoever to the old permits. The language of the section covers employment of *all* children under seventeen years of age, subsequent to the effective date of the act, which, according to sec. 4 thereof is upon passage and publication.

It is our opinion, therefore, that the repeal of the law under which the permits were previously issued, and the enactment of a law under which those permits could not now be issued, automatically invalidates the permits in question.

JEF

Public Health—Narcotic Law—It is duty of pharmacy board to enforce all provisions of sec. 146.02, Stats., and it is not limited to enforcement of pharmacy law only.

June 21, 1933.

G. V. KRADWELL,
Board of Pharmacy,
Racine, Wisconsin.

In your communication of June 16 you state that there is a difference of opinion as to the duties of the inspectors of your department concerning enforcement of sec. 146.02, Stats., as given in subsec. (29), which provides:

"It shall be the duty of the police and sheriffs throughout the state and members of the state board of pharmacy to enforce the provisions of section 146.02; and it shall be the duty of the district attorney in each county to prosecute violations thereof on complaint or on knowledge of such violations."

You state that it has been suggested that the activities of the inspectors of the state board of pharmacy be confined to the enforcement of the pharmacy law only, while police officers and sheriffs contend that their knowledge of narcotics and narcotic drugs is limited and they are required to call upon your department to aid them in this type of case.

In answer to your inquiry I will say that the statute seems to be explicit and definite. It does not limit the activities of your board to the enforcement of the pharmacy law only but it applies to every violation of sec. 146.02. You are, therefore, advised that it is the duty of your department to aid in enforcing any violations of sec. 146.02.
JEF

Public Officers—Alderman—Supervisor—Offices of alderman and county supervisor may be held by same person without preliminary compliance with sec. 62.09, subsec. (1), par. (b), Stats.

June 21, 1933.

R. C. LAUS,
District Attorney,
Oshkosh, Wisconsin.

You request the opinion of this department upon the following statement of facts:

"At the spring 1933 election for members to serve on the county board of Winnebago county, and also for aldermen of the various wards of the city of Oshkosh, under the new aldermanic form of government, two persons were elected to the offices of both aldermen on the city council and supervisors on the county board, from their respective wards. At the same election, two questions were submitted to the voters, as follows:-

" 'Shall the offices of aldermen and members of the county board of the city of Oshkosh be consolidated?'

" 'Shall the city of Oshkosh elect one alderman from each ward instead of two aldermen?'

"The votes by the electors indicated that they did not want the aldermen from their ward to be supervisors and they further indicated that they wanted two aldermen from each ward. Now the question arises whether the two persons who were elected to both alderman and supervisor are eligible to hold both offices.

"I have given some consideration to section 59.03 (3) of the statutes for 1931 and the opinion of the attorney general in Vol. VIII, page 72, based on section 925.249, of the statutes for 1919. This section was subsequently changed in number and is now section 62.09 (2). I note, further, that under the general charter law under which Oshkosh is operating, section 62.09 (1) provides how the council and the electors may make it mandatory for one person to be both alderman and supervisor from the same ward.

"It would seem to me that the question now to be answered is whether the people have the right, under section 59.03 (3) to elect the same man from any ward, to both positions, or whether it must be done by the vote of the electors and two-thirds vote of the common council, under section 62.09."

You are referred to two former rulings of this department, to which we adhere, VIII Op. Atty. Gen. 72 and XVII Op. Atty. Gen. 442, which answer your question in the affirmative. We do not regard sec. 62.09 (1) (b), quoted below and to which you call our attention, as sufficient grounds for changing these former rulings. Sec. 62.09 (1) (b) merely provides for a method of making the holding of the two offices mandatory, but does not at all prohibit the holding of the two offices by the same person. The statute follows:

"The council by a two-thirds vote, may dispense with the offices of street commissioner, engineer, comptroller, constable, and board of public works, and provide that the duties thereof be performed by other officers or board, by the council or a committee thereof. The council may, by ordinance, adopted by a two-thirds vote of all its members, and approved by the electors at the general or special election, provide that there shall be one alderman from each ward, and may also, in like manner, provide that, whatever the number of aldermen, the supervisor of each ward shall be the alderman or one of the aldermen. Any office dispensed with under this paragraph may be recreated in like manner, and any office created under this section may be dispensed with in like manner."

Subsec. (3), sec. 59.03, provides:

"No county officer of any county or deputy of any such officer, or undersheriff, is eligible to the office of supervisor, but a county supervisor may also be a member of the common council of the city or of the board of trustees of the village in which he was elected or appointed."

In view of the foregoing, it is our opinion that the offices of alderman and county supervisor may be held by the same person without a preliminary compliance with sec. 62.09 (1) (b).

JEF

Municipal Corporations—Beer Licenses—Under ch. 207, Laws 1933, wholesale and Class "B" retail licenses may not be issued to same person.

June 23, 1933.

T. W. ANDRESEN,
District Attorney,
Medford, Wisconsin.

You desire an opinion from this office upon the question of whether, under ch. 207, Laws 1933, a wholesaler's license and a Class "B" retailer's license may be issued to the same person.

It is our opinion that your question must be answered negatively.

Sec. 66.05, subsec. (10), par. (c), subd. 1, as enacted by ch. 207, Laws 1933, provides in part:

"* * * No brewer, bottler, or wholesaler shall advance, pay or furnish money for any license fees or taxes which may be required to be paid by any retailer or be otherwise financially interested in, directly, or indirectly, (in) any Class 'B' license, except as provided in subdivision 2 of this paragraph. * * *"

Said subd. 2, provides in part:

"A brewer may maintain and operate in and upon the brewery premises a place for the service or sale of fermented malt beverages or light wines, for which a Class 'B' license shall be required. * * *"

By virtue of sec. 66.05 (10) (a), the words "brewer" "bottler," and "wholesaler," as used in ch. 207, Laws 1933, all have distinct and different meanings.

The prohibition found in sec. 66.05 (10) (c) 1, above quoted, is applicable to brewers, bottlers and wholesalers, with the single exception found in subd. 2 of the same section, which refers only to a brewer. No exception is made in the case of the bottler or the wholesaler, and no exception in their favor can be read into the statute in view of the very definite definitions found in the act. It is noted, moreover, that even the exception relating to the brewer is confined to the operation of a place upon the brewery premises.

A wholesaler, who would make application for a Class "B" license, would doubtless be financially interested directly, or indirectly, in such class "B" license.

Under the statute, therefore, a wholesaler may not obtain a Class "B" retail license.

Other portions of sec. 66.05 (10) (c) 1 relating to leasing or taking of chattel mortgages by wholesalers where such leases or chattel mortgages involve property used in conducting the business where a Class "B" license is required, indicate an intent upon the part of the legislature to divorce wholesale and Class "B" retail operations.

The exceptions which the legislature wish made have been enumerated in the act itself. That enumeration must be taken to exclude by implication those situations which are not mentioned.

JEF

Public Officers—Trustees of County Institutions—Under proper resolution of county board, compensation for trustee of county home may be limited to seven dollars for each calendar month, in addition to traveling expenses.

Counties—Prisons—Jails—City is not liable for board of prisoners confined in county jail for violation of municipal ordinances.

June 23, 1933.

A. B. CURRAN,
District Attorney,
Prairie du Chien, Wisconsin.

Crawford county is acting under the county system of poor relief, and has a county home established under sec. 49.14, Stats. Under the provisions of sec. 46.18 (1) three trustees were elected by the county board to manage the county home. At the November, 1932, session of the county board, a resolution was passed which provided in part:

"The board of trustees shall receive for their services the sum of seven ($7.00) dollars, per day for committee

work while in session and are limited to one day per month for each calendar month."

One of the trustees has now filed a claim for two days' services rendered during one calendar month. You request our opinion as to whether this claim should be paid, or whether the trustee is limited to receiving seven dollars per month aside from his traveling expenses necessarily incurred in the discharge of his functions.

It is our opinion that the claim should not be paid, and that the trustee is limited to seven dollars per month as compensation for his services, in addition to his expenses.

Sec. 46.18, subsec. (4), relating to the compensation of a trustee of a county home, provides in part:

"* * * He shall be reimbursed his traveling expenses necessarily incurred in the discharge of his functions, and shall receive such compensation as shall be fixed by the county board, unless otherwise provided by law."

It is, of course, a well established rule that a public officer assumes office *cum onere*, and is entitled only to such compensation as is provided for by statute.

If the officer believes that the duties of his office are, or will become, too burdensome, or disproportionate to the compensation attached thereto, it is his privilege to resign.

Sec. 46.18 (4) vests with the county board the right of determining the compensation which a trustee of a county home shall receive, unless and until the legislature sees fit to fix that compensation itself.

The resolution of the county board was an exercise of the authority granted to it under sec. 46.18 (4) and, in effect, limited the compensation to be paid a trustee to eighty-four dollars per year, or seven dollars for any one calendar month, in addition to traveling expenses.

The resolution of the county board was not an attempt to limit the number of days during the month which a trustee might work, but did limit the number of days in each month for which he might be paid. The word "compensation" as used in sec. 46.18 does not refer to *per diem* only, but to the total salary to be paid to the trustees.

You also state that pursuant to par. (a), subsec. (1), sec. 59.15, the county board entered into a contract with

the sheriff for keeping and maintaining prisoners in the county jail. The consideration did not include maintenance of prisoners committed by a city.

You now inquire whether the county of Crawford or the city of Prairie du Chien is liable for the board of the prisoners committed for violations of ordinances of the city of Prairie du Chien.

It is our opinion that Crawford county is liable for this additional board.

Sec. 55.03 provides:

"All charges for maintaining, while in county institutions, convicts who have been sentenced to confinement in the state penal institutions, prisoners charged with offenses and duly committed for trial, prisoners committed for the nonpayment of fines and expenses, and prisoners sentenced to imprisonment therein, shall be paid out of the county treasury; but no claim shall be allowed to any sheriff or jailer for keeping or boarding any person in the county jail unless such person shall have been committed thereto pursuant to law."

The question of the liability of a county for maintenance of prisoners in the county jail was discussed in the case of *Deissner v. Waukesha County,* 95 Wis. 588, where it was said, pp. 591–592:

"The principle of this decision is that, under the statutes of this state, the sheriff is entitled to pay for his actual expenses in maintaining prisoners confined in county jails under his charge (following *Bell v. Fond du Lac Co.*, 53 Wis. 433; *Nickell v. Waukesha Co.*, 62 Wis. 469; *Parsons v. Waukesha Co.* 83 Wis. 288, and *Doty v. Sauk Co., supra*); that the law contemplates that he shall keep accurate accounts of all such expenses, and present the same to the county board, and have the same audited, before receiving payment; that, if he neglects so to do, he can recover of the county, in an action therefor, only such expenses as he is able to show he incurred, by clear and satisfactory testimony, and only such as are reasonable."

In *Doty v. Sauk County,* 93 Wis. 102, 103, it was said:

"* * * the county is liable to the sheriff for whatever the proper board of the persons confined in the county jail may actually cost, * * *"

See also *Bell v. Fond du Lac County,* 53 Wis. 433.

It will thus be seen that the primary liability rests upon the county. Reimbursement by villages and cities could only be by virtue of the statutes.

Sec. 61.63 (2) provides in respect to villages:

"* * * Every person so committed shall be received and committed to prison by the keeper of the county jail, and kept at the expense of such village * * *."

There is no similar provision, however, in respect to cities. It was definitely ruled in XXI Op. Atty. Gen. 1133, and in XV Op. Atty. Gen. 17, that in the absence of statutory liability therefor, a city is not liable for board furnished to prisoners confined in the county jail for offenses against city ordinances.

In the case in question, therefore, Prairie du Chien is not liable to Crawford county for board furnished to those prisoners committed for violation of city ordinances.

JEF

School Districts—Taxation—Under sec. 74.15, subsec. (2), Stats., where deficiency exists local treasurer should pay school district in proportion to amount levied in those districts for school purposes, excepting from computation amounts levied as equalization tax.

June 23, 1933.

EDMUND H. DRAGER,
District Attorney,
Eagle River, Wisconsin.

One of the towns in your county has collected about $900, in addition to the state tax, and is now confronted with the problem of what to do with said money, that is, whether it should be paid to the common school district, the high school, or be retained for town use.

It does not appear from your letter how much money was levied by the common school district, or how much was levied by the high school district.

Sec. 74.15, subsec. (2), Stats., provides, in part:

"Out of the taxes collected the treasurer shall first pay the state tax to the county treasurer, then the equalization tax levied by the county for school purposes, and shall then set aside all sums of money levied for school taxes, then moneys levied for the payment of judgments, then all sums raised as special taxes in the order in which they are levied, then taxes for the payment of principal and interest on the public debt, then taxes for bridge purposes, then for fire purposes, then for streets and other public improvements, and lastly county taxes. * * *."

This section controls the disposition of taxes collected by the local treasurer. See XX Op. Atty. Gen. 613.

Under this section it is the duty of the local treasurer, to first pay, in cash, to the county treasurer the state tax (when one is levied), then the amount due from the school districts on their loans from the state trust funds, then the state special charges levied by sec. 46.10. These payments are to be made in the order mentioned. XXII Op. Atty. Gen. 239.

Next in order the local treasurer must pay, in cash, the equalization tax levied by the county for school purposes. XXI Op. Atty. Gen. 145.

It does not appear from your letter whether all of these payments have been made or not. It is assumed, however, that these payments have been made and that the $900 still remains.

Next, under the statute, it is the duty of the local treasurer to "set aside all sums of money levied for school taxes." Payment of the school taxes, therefore, takes priority over payment into the town treasury of the amounts levied for various town purposes.

The $900 on hand, therefore, must first be used to pay the school districts, whether common school or high school, the amounts levied by the respective districts.

It will be seen that the statute quoted above, relating to preferences in payment, did not make provision for any preference between the various types of school districts. This preference statute was prompted by the desire to secure, in so far as possible, the operation of certain public functions, perhaps at the expense of some others. This was undoubtedly due to the fact that those functions to

be insured were considered as being more valuable than those others which might be injured by the preference.

The method of payment destroys all identification of the source from which the money was obtained. For example, the repayment of the loans from the state trust funds does not depend upon the collection from the debtor district of the amount which it owes. If sufficient money is collected from *all* of the districts, it must be used for that purpose, after the state tax (when one is levied) is paid. The payment of the equalization tax and the other school taxes also do not depend upon the collection of those taxes from the individual district.

The money collected by the local treasurer is placed in one fund with no segregation made as to the amount received from each school district. As stated above, payment to a school district does not depend upon the amount collected from that district. The legislative intention evidently was to guarantee in so far as possible, and subject to the above limitations, the operation of the schools.

It is our opinion, therefore, that the $900 must be distributed to the school districts in proportion to the amount levied by that district for school purposes, excepting from those amounts such as were levied for equalization purposes. It is understood, of course, that the school districts are not entitled to receive for school purposes any more than the amount levied by each.

The above construction is also one which has been placed upon sec. 74.15 (2), by the municipal accounting division of the state tax commission. The construction given to a statute by the body of men or officers who are directed to act upon it is always entitled to weight, and should not be overridden unless contrary to the clearly expressed meaning of the law. *Wright v. Forrestal,* 65 Wis. 341; *State ex rel. Bashford v. Frear,* 138 Wis. 536; *In re Appointment of Revisor of Statutes,* 141 Wis. 592; *State ex rel. v. Donald,* 160 Wis. 21; *State v. Johnson,* 186 Wis. 59.

JEF

Municipal Corporations—Beer Licenses—Under ch. 207, Laws 1933, foreign corporation may not do business in Wisconsin as wholesaler through agent who secures license.

June 23, 1933.

ROBERT K. HENRY,
State Treasurer.

A foreign corporation, located near the Wisconsin border line, desires to serve retail customers in this state. The said corporation intends to appoint an agent in this state, have him apply for a wholesaler's license, and do business through such agent. You inquire whether the various cities, towns and villages in this state can keep this out-of-state corporation from doing business in Wisconsin as a wholesaler, under the provisions of ch. 207, Laws 1933.

It is our opinion that each town, city or village may prevent the foreign corporation in question from transacting business as a wholesaler in that town, city or village, which ever the case may be.

Sec. 66.05, subsec. (10), par. (d), subds. 1 and 2, as enacted by ch. 207, Laws 1933, provides:

"1. No person shall sell, barter, exchange, offer for sale, or have in possession with intent to sell, deal or traffic in fermented malt beverages or light wines, unless licensed as provided in this subsection by the governing board of the city, village, or town in which the place of business is located.

"2. The governing body of every city, village and town shall have the power, *but shall not be required*, to issue licenses to wholesalers * * * for the sale of fermented malt beverages or light wines within its respective limits, as herein provided. * * *"

The second paragraph of par. (d), quoted above, is a grant of power to every city, village and town in this state to issue wholesalers' as well as retailers' licenses. The municipalities, however, cannot be required to issue the licenses, but may do so if they see fit.

The first subdivision of par. (d), above quoted, provides that no person shall deal in fermented malt beverages or light wines unless licensed by the local municipality.

Sec. 66.05 (10) (m) provides a penalty for violation of the said subd. 1.

Sec. 66.05 (10) (e), provides in part:

"Wholesalers' licenses may be issued only to domestic corporations or to persons of good moral character who shall have been residents of this state continuously for not less than one year prior to the date of filing application for said license. * * *"

The local municipalities are thus limited in the matter of issuing wholesalers' licenses to *domestic* corporations and to certain individuals who are residents of this state. Under no consideration can a local municipality license a foreign corporation. A wholesaler's license authorizes the licensee to do a wholesale business. Without a license, wholesaling is illegal.

If a foreign corporation appointed an individual in this state to apply for a wholesaler's license as its agent, the foreign corporation, and not the agent, would be the one who would be doing the wholesale business.

Under the law of agency, the agent would, in effect, be bringing the foreign corporation into this state, where it would be doing a wholesale business. Under ch. 207, Laws 1933, this would be illegal, because a foreign corporation is not entitled to a wholesaler's license and no corporation or individual can operate a wholesale business without a license. It is immaterial that the agent who makes application for the license may himself be an individual who could qualify, under the statute if *he* desired a license to operate a wholesale business.

JEF

Courts—Minors—Guardianship—Application for guardianship should be made to county court in county in which minor has residence, irrespective of legal settlement.

June 23, 1933.

ROBERT L. WILEY,
District Attorney,
Chippewa Falls, Wisconsin.

You state one A and his family, consisting of five minor children, moved from X county in September, 1929, to Z county, and applied to the latter county for poor aid. This aid was granted by Z county, but was paid for by X county, after the filing of proper notice for the former county. The wife of A died, and A himself has moved to another county. The children still live in Z county. X county admits liability for poor relief, but A and his family have lived in Z county since September, 1929, and A has voted in Z county and considered it his residence. The question arises: To which county must application be made for guardianship of the minor children?

It is our opinion that application should be made to the county court of Z county.

Sec. 319.01, Stats., provides in part:

"All persons under the age of twenty-one years shall be deemed minors, and the county court in each county may appoint guardians for minors and others subject to guardianship, *being residents in the same county,* * * *."

A resident of a county, of course, is a person who has a residence in the county.

Our supreme court has stated that the word "residence" means the same as "domicile," that is, an actual location at a place, with the intention of making it a permanent home. *Kempster v. City of Milwaukee,* 97 Wis. 343.

In the case of *De Laval Separator Co. v. Hofberger,* 161 Wis. 344, the word "residence" was held to be synonymous with "abode".

"Residence" within the meaning of the divorce statute, means actual habitation in fact and intent. *Hall v. Hall,* 125 Wis. 600.

The word "residents," as contemplated by sec. 319.01, means the minor children for whom application for guardianship is being made, and does not include the parent or parents of such children.

Your statement of facts indicates that the children are residents of Z county, inasmuch as they are living there apparently with the intention of making it their home. Their abode certainly is in Z county. The fact that X county admits liability for poor relief furnished to the children is not material. This liability is based upon legal settlement and not upon residence.

It is also immaterial whether A considers his residence to be in Z county.

JEF

Taxation—Tax Sales—Ch. 244, Laws 1933, does not alter interest rate on 1931 or 1932 tax certificates or prevent issuance of tax deed on 1930 tax certificate.

June 24, 1933.

MARTIN GULBRANDSEN,
District Attorney,
Viroqua, Wisconsin.

A certain person holding a tax certificate bearing date June 10, 1930, has made application to the county clerk for a tax deed to the property covered by the certificate. The 1931 tax certificate, bearing twelve per cent interest, and the 1932 tax certificate, bearing ten per cent interest, are also held by this individual.

You inquire whether ch. 244, Laws 1933, extending the period of redemption from three to five years, and lowering the interest rate on tax certificates to eight per cent per annum, in any manner affects the issuance of the tax deed in question, or alters the interest which the 1931 and 1932 tax certificates will draw.

It is our opinion that ch. 244, Laws 1933, does not affect

the issuance of this tax deed or alter the rate of interest upon 1931 and 1932 certificates.

Ch. 244, Laws 1933, which took effect upon publication June 13, 1933, provides in sec. 1 that delinquent taxes and the redemption of land sold for taxes may be made in partial payments.

Sec. 2 of the act amends various sections of the Wisconsin statutes relating to tax certificates, including interest thereon, which was lowered.

Sec. 75.01, subsec. (1), Stats., was amended so that the owner or occupant of any land sold for taxes, or any other person, shall have five years instead of three years in which to redeem from tax sale.

Under the provisions of sec. 75.14, a tax deed is issued upon the strength of a tax certificate. Formerly this tax certificate had to be at least three years old.

Sec. 3, ch. 244, Laws 1933, provides:

"The provisions of section 2 of this act shall apply to taxes which hereafter become delinquent and to tax certificates hereafter issued. * * *"

The legislature has thus indicated that it intended only sec. 1 of the act, relating to partial payments, to operate in respect to transactions already past. Sec. 2 of the act, however, was intended to apply to taxes which become delinquent hereafter, and to tax certificates issued hereafter, and not to taxes which become delinquent before, or to tax certificates issued before. It is quite possible that sec. 2 of the act could not constitutionally have been made to apply retroactively, inasmuch as it would perhaps result in the destruction of contract or vested rights.

That question need not be considered, however, because no such intention upon the part of the legislature is apparent.

JEF

Taxation—Forest Crop Lands—Enforcement of penalty provided in sec. 77.09, Stats., is upon conservation commission.

Prosecution must be brought through office of district attorney of county where unauthorized cutting of timber was done instead of office of attorney general.

Penalty clause in sec. 77.09 does not apply to those who trespass in cutting timber, but only to owner.

June 24, 1933.

PAUL D. KELLETER,
Conservation Director.

In your letter of June 16 you say that under subsec. (1), sec. 77.06, Stats., no person shall cut any merchantable wood products on any forest crop lands until thirty days after the owner has filed with the conservation commission and also with the tax commission a notice of intention to cut. You also state that sec. 77.09 provides penalties for failure to make the reports required by sec. 77.06. You ask the following questions:

"1. Is the enforcement of this penalty section the duty of the conservation commission or the tax commission?"

Sec. 77.09, Stats., reads as follows:

"Any person who fails to report or shall intentionally make any false statement or report to the conservation commission required by section 77.06 shall be guilty of a misdemeanor, and punishable on conviction thereof by imprisonment in the county jail for not exceeding one year or by fine not exceeding one thousand dollars, or both."

This section refers to a report and not to a notice.

Sec. 77.06, subsec. (4), provides:

"On or before the fifteenth day of May and also of November succeeding any time in which any merchantable wood products were cut on any forest crop lands, the owner shall transmit to the conservation commission a written statement of the products so cut for the six months preceding the first day of that calendar month, specifying the variety of wood, kind of product, and quantity of each variety and kind as shown by the scale or measurement thereof made on the ground as cut, skidded or loaded as the case may be. If no such scale or measurement is made

on the ground, an estimate thereof shall be made and such estimate corrected by the first scale or measurement made in the due course of business and such correction at once transmitted to the conservation commission. The conservation commission may accept such reports as sufficient evidence of the facts, or may either with or without hearing and notice of time and place thereof to such owner, investigate and determine the fact of the quantity of each variety and kind of product so cut during said periods preceding such reports."

Your first question must be answered that it is the duty of the conservation commission to apprise the district attorney of the violation of the law. Whether the district attorney will begin prosecution upon being apprised of the facts and evidence is a matter for him to decide and he had a certain discretion in the matter. Of course he must not abuse this discretion. It is the conservation commission that is informed of the fact whether the report has been made or not.

"2. Shall action be brought through the office of the attorney general or through the district attorney of the county where such unauthorized cutting was done?"

It is the duty of the district attorney to prosecute. The statute does not make it the part of the duty of the attorney general to prosecute in such cases.

"3. Does the penalty clause apply to persons who cut in trespass without the owners' knowledge and consent?"

This question must be answered "No." You will notice that the report must be made by the owner. The person who trespasses may be prosecuted under other sections of the statute but not under sec. 77.07.

JEF

Municipal Corporations—Beer Licenses—Confectionary store operated in connection with restaurant is "mercantile establishment" within meaning of sec. 66.05, subsec. (10), par. (g), as created by ch. 207, Laws 1933.

June 26, 1933.

L. W. BRUEMMER,
District Attorney,
Kewaunee, Wisconsin.

You call attention to ch. 207, Laws 1933, which creates sec. 66.05, subsec. (10), Stats. Par. (g) of this subsection provides:

"* * * No such license shall be granted for any premises where any other business shall be conducted, in connection with a licensed premises except that such restriction shall not apply to a hotel, or to a restaurant not a part of or located in any mercantile establishment, * * *."

You ask:

"Is a confectionary store operated in connection with a restaurant, a 'mercantile establishment' within the definition of this act?"

It is the opinion of this department that a confectionary store operated in connection with a restaurant, is a "mercantile establishment" within the meaning of par. (g), subsec. (10), sec. 66.05, created by ch. 207, Laws 1933.

In construing a statute, the common, ordinary or approved meaning of words is to be regarded as the one intended by the legislature. Sec. 370.01 (1), Stats. 1931; *Wadhams Oil Co. v. State,* (1932)—Wis.—, 245 N. W. 646.

The words "mercantile establishment" when used to designate a place of business have been given broad meaning by the courts. Thus, in *Hotchkiss v. District of Columbia,* (1915) 44 App. Div. 73, 79, a "mercantile establishment" is defined as a place where the buying and selling of articles of merchandise is conducted.

In *Graham v. Hendricks,* (1870) 22 La. Ann. 523, it was held that a mercantile establishment is a place where the buying and selling of articles of merchandise as an employment is conducted.

In *Carr v. Riley,* (1908) 84 N. E. 426, 428, 198 Mass. 70, the court defined the term "mercantile" thus:

"* * * of or pertaining to merchants, having to do with trade or commerce; trade, commercial."

It is manifest that confectionary is an article of merchandise and, hence, that a confectionary store is a place where articles of merchandise are sold. We are therefore constrained to hold that a confectionary store is a mercantile establishment within the ordinary and approved meaning of the word and within the meaning of par. (g), subsec. (10) sec. 66.05, created by ch. 207, Laws 1933.
JEF

Elections—School Elections—Under sec. 6.23, Stats., ballots for school elections must be printed upon white print paper of quality specified therein; use of ballots of various qualities of paper and of various colors at school elections is not permitted.

June 26, 1933.

F. W. HORNE,
District Attorney,
Crandon, Wisconsin.

You request the opinion of this department upon the following statement of facts:

"Is it legal to use ballots at a school election of various sizes, of various qualities of paper, and of various colors?"

It is the opinion of this department that under the provisions of sec. 6.23, Stats., the ballots for school elections must be printed upon white print paper of the quality specified therein.

Subsec. (16), sec. 6.23, provides in part:

"Ballots for judicial, school and city elections shall be printed upon the quality of white print paper hereinbefore specified, and shall be of sufficient size to afford space for the names of the several candidates for any office in the column under the proper office designation. * * *."

Pars. (b) and (c), subsec. (17), sec. 6.23, provide:

"All ballots shall be of sufficient width and length to afford space for all matter required to be printed thereon and shall be printed on paper weighing thirty-five pounds per ream of sheets twenty-four by thirty-six inches; if a different size sheet is used the weight per ream shall be proportioned as above."

"No sample ballot shall be printed upon the paper of the color provided for any official ballot."

It is obvious that the use of ballots at a school election of various qualities of paper and of various colors is not permitted under the existing law. Under the statutes in force the ballots for school elections must be printed upon white print paper of the quality specified in sec. 6.23.
JEF

Public Officers—Governor—Highway Commissioner—Removals—Person appointed to office of highway commissioner during recess of legislature may be removed by governor at pleasure at any time under sec. 17.07, subsec. (4), Stats.; act of governor in nominating another person to fill such office amounts to such removal.

June 27, 1933.

THOMAS J. O'MALLEY,
Lieutenant Governor.

In reference to your question as to the status of the present incumbent, John C. Schmidtmann, as a member of the state highway commission I understand the facts to be that Mr. Schmidtmann was appointed by a former governor to fill a vacancy in the office which he holds, and that said appointment was made during the recess of the legislature; that a few days ago the governor sent to the senate a message nominating Fred C. Russell to fill the vacancy and asked the advice and consent of the senate to make such appointment.

The status of Mr. Schmidtmann as commissioner is fixed by sec. 17.07, subsec. (4), Stats. Under that statute Mr. Schmidtmann has held office as such commissioner with the

condition attached that he may be removed by the governor at pleasure at any time.

The act of the governor in submitting another name and asking for the advice and consent of the senate for the confirmation of the appointment of Russell amounted to a removal from office of said Schmidtmann, and it requires no further action by any other officer or body of the state government to make such removal effective.

JEF

School Districts—Transportation of School Children— School district meeting may authorize transportation of all pupils in district and is entitled to state aid on account of such transportation at rate of ten cents per day for each child transported.

June 30, 1933.

JOHN CALLAHAN, *State Superintendent, Department of Public Instruction.*

Under date of June 22 you request an opinion in the following case:

"A certain school district is adjacent to an incorporated city. At the annual school district meeting on July 11, 1932 the electors of this district instructed the school board to close the school and to transport all pupils to the city schools. The school board members have done so during the present school year. The pupils have been transported distances ranging from two miles to one-fourth of a mile. All pupils have attended more than one hundred twenty days and have been transported daily."

You inquire whether you have a legal right to apportion to this district state aid for the total number of days' attendance on the part of all pupils.

Sec. 40.34 subsec. (1), Stats., to which you refer contains the following provision:

"The school district meeting may authorize the board to provide transportation for all the children of school age residing in the district. * * *"

And then it contains other provisions compulsory on the school board, and the section ends as follows:

"* * * The district shall be entitled to state aid on account of such transportation at the rate of ten cents per day for each child transported."

It appears by the above statute that the board has the authority authorized by the district meeting to provide transportation, and the statute expressly says that the district shall be entitled to state aid on account of such transportation at the rate of ten cents per day for each child transported. I can see no escape from giving an affirmative answer to the question submitted.
JEF

Taxation—Tax Collection—Provision of sec. 3, ch. 288, Laws 1933, that in no event shall any person be required to pay interest on "such" (1931 and 1932) delinquent taxes paid before July 1, 1934, at rate in excess of eight per cent per annum, applies only to cases where county or city of first class holds tax certificates, and does not apply to cases where private purchasers hold tax certificates. However, by sec. 2, ch. 244, Laws 1933, all delinquent taxes of 1932 are subject to delinquent rate of eight per cent, and all tax certificates issued upon sale in August, 1933, for unpaid taxes of 1932 will bear interest at rate of eight per cent, whether issued to county or to private purchaser. Land sold at sale of 1933 for unpaid taxes of 1932 should be sold for amount of unpaid taxes, plus interest thereon at rate of eight per cent per annum from January 1, 1933, to date of sale, plus two per cent penalty and other legal charges allowed by law, and tax certificate issued thereon should state that rate of interest in case of redemption shall be eight per cent per annum.

June 30, 1933.

FULTON COLLIPP,
District Attorney,
Friendship, Wisconsin.
CARL CHRISTIANSON,
Assistant District Attorney,
Madison, Wisconsin.

As your separate requests for a construction of certain provisions of sec. 3, ch. 288, Laws 1933, involve substantially similar questions, a single opinion will be given.

Sec. 3, ch. 288, Laws 1933 (published and effective June 21, 1933), provides:

"The governing body of any county or city of the first class, may, but is not required to, waive the payment of all or any part of the interest and penalties on delinquent taxes on real estate for the years 1931 and 1932 *for which such county or city holds the tax certificates,* provided such taxes are paid before July 1, 1934. In no event shall any person be required to pay interest on *such* taxes paid before July 1, 1934 at a rate in excess of *eight* per cent per annum."

1. You state that at the sale of 1932, being the sale of real estate for delinquent taxes for the year 1931, the county sold the real estate for the amount of delinquent taxes, plus the two per cent penalty as prescribed by sec. 74.03 (1), Stats. 1931, plus interest at the rate of *twelve* per cent per annum upon the amount of such taxes from the preceding January 1 to the date of sale as prescribed by sec. 74.39, Stats. 1931, plus other legal charges; that some of the real estate was sold to private purchasers and some was sold to the county, so that some tax certificates issued upon the sale of 1932 (taxes of 1931) are held by private purchasers while some are held by the county; that all of the tax certificates so issued state that the rate of interest in case of redemption from the sale shall be *fifteen* per cent per annum. Such rate was fixed by the county board under authority of sec. 75.01 (2), Stats. 1931, which provides to the effect that the rate of interest to be paid in any county on certificates of sale of land sold for taxes may be changed at any annual meeting of the county board of such county to a rate not to exceed *fifteen* per cent per annum. Otherwise, sec. 75.01 (1), Stats. 1931, fixes the rate at *ten* per cent per annum from the date of such certificate.

The first question asked is: Does the second sentence of the above quoted sec. 3, ch. 288, Laws 1933, which provides to the effect that in no event shall any person be required to pay interest on "such" taxes paid before July 1, 1934 at a rate in excess of *eight* per cent per annum, apply to cases where *private purchasers* hold the tax certificates?

The first question is answered, No.

The second sentence must be construed in connection with the first sentence of sec. 3 of the act in question. The first sentence authorizes the county (or a city of the first class) to waive the payment of all or any part of the interest and penalties on delinquent taxes "for which the county or city holds the tax certificates." The second sentence, in providing that in no event shall any person be required to pay interest on "such" taxes, etc., at a rate in excess of eight per cent per annum plainly indicates that it has reference to the delinquent taxes "for which the county or city holds the tax certificates" as described in the first sentence. When both sentences are considered together and sec. 3, which they comprise, is considered as a whole, it seems apparent that the only taxes there intended to be dealt with are those delinquent taxes for which the county or the city holds the tax certificates. Taxes on real estate for which the county or the city holds the tax certificates have not been paid to and have not been realized by the county or city, and the plan of sec. 3 is to stimulate payment and realization of such taxes by offering as an inducement to payment either the waiving of all or some part of the interest or charging interest at not to exceed eight per cent per annum.

2. The second question submitted is: At the sale of 1933 (taxes of 1932) are the tax certificates issued upon said sales to bear interest at the rate of eight per cent per annum?

The second question is answered, Yes, and includes *all* tax certificates issued upon the sale of 1933, whether issued to private purchasers or to the county or the city.

This answer is not obtained by recourse only to the provisions of sec. 3, ch. 288, Laws 1933, but by recourse also to the provisions of ch. 81 and ch. 244, Laws 1933.

Ch. 81, Laws 1933, postpones the sale of 1933 (taxes of 1932) so as not to take place until the first Tuesday in August, 1933.

As regards the items of interest, it has already been pointed out what rates the statutes of 1931 provide. However, ch. 244, Laws 1933 (published and effective June 13, 1933), has made the following changes, among others:

Sec. 2 of said act amends sec. 74.39, Stats. 1931, so as to provide that the lands shall be sold for the amount of delinquent taxes, with interest at the rate of *eight* per cent per annum from the preceding January 1 to the date of sale; amends sec. 74.46 (1), Stats. 1931, so as to provide that the tax certificate shall contain a statement that the rate of interest in case of redemption from the sale shall be *eight* per cent per annum; and amends sec. 75.01 (1), Stats. 1931, so as to provide for interest at the rate of *eight* per cent per annum from the date of such certificate. The rate of interest is thus reduced to eight per cent.

As ch. 244, Laws 1933, provides in sec. 4 thereof that it "shall take effect upon passage and publication," and as it was published on June 13, 1933, and as the sale of 1933 (taxes of 1932) will not take place until the first Monday in August, 1933, it would seem that the *eight* per cent interest rate should apply to the sale of 1933. The only doubt as to this is occasioned by that provision of sec. 3 of said act to the effect that, "The provisions of section 2 of this act shall apply to *taxes which hereafter become delinquent and* to tax certificates hereafter issued." It is seen that the provision just quoted provides, in part, that sec. 2 of said act shall apply to "taxes which hereafter become delinquent." On June 13, 1933, when said act took effect, the unpaid taxes of 1932 had already become delinquent and, therefore, they did not "hereafter become delinquent." However, the provision in question also expressly provides that sec. 2 of said act shall apply to "tax certificates hereafter issued." The phrase "tax certificates hereafter issued" plainly applies to tax certificates issued on the sale of 1933 for the unpaid taxes of 1932. On the effective date of said act the sale of 1933 for the unpaid taxes of 1932 had not taken place and will not take place until August, 1933, and no tax certificates on the sale of 1933 will be issued until August, 1933. Another consideration is that the Bill, No. 47, A., was introduced as early as January 25, 1933, when the unpaid taxes of 1932 had not become delinquent. Had the bill been promptly passed it would have been enacted into law before the unpaid taxes of 1932 did become delinquent and, in such case, the phrase

"taxes which hereafter become delinquent" would plainly have included the unpaid taxes of 1932. In view of all the foregoing, it is considered that it was the legislative intent that the provisions of sec. 2 of said act, fixing the interest rate at *eight* per cent per annum, should apply to the sale of 1933 for the unpaid taxes of 1932 and to the tax certificates issued thereon.

Accordingly, land sold at the sale of 1933 for unpaid taxes of 1932 should be sold for the amount of unpaid taxes, plus interest thereon at the rate of *eight* per cent per annum from January 1, 1933 to the date of sale, plus the two per cent penalty and other legal charges hereinbefore referred to, such as the advertising fee and the certificate fee. The sum of these items will represent the face amount of the tax certificate issued, and the certificate should state that the rate of interest in case of redemption from the sale shall be *eight* per cent per annum.

JEF

Trade Regulation — Trade-Marks — Trade-mark "Old Gold Lager" for beer may be registered by secretary of state even though trade-mark "Old Gold" has been previously registered for food products.

June 30, 1933.

THEODORE DAMMANN,
Secretary of State.

In your request for an opinion you state that "a certain brewing firm of this state has made application for registration of the trade mark "OLD GOLD LAGER," as applied to beer.

You further state:

"Our records show, however, that on November 5, 1928, we registered * * * the trade-mark 'OLD GOLD' as applied to food products including 'malt syrup and/or malt extracts (not beverages) packed either in cans, containers, kegs or barrels.'"

You say that you are informed that the firm for whom you registered the trade-mark "Old Gold" now "contemplates adopting the same trade-mark for beverages," and you ask whether you are free to register the trade-mark "Old Gold Lager" on the application before you. The applicant for the registration of "Old Gold Lager" is not the owner of the trade-mark "Old Gold".

It is not a question of whether the purchasing public will confuse "Old Gold Lager" with "Old Gold" when in search of a certain product, because one product is a beverage and the other product belongs to the class known as food products. The question, therefore, does not arise whether the proposed registered trade-mark may be reasonably mistaken for any other theretofore filed in your office, under the provisions of sec. 132.09, Stats. The trademarks will be attached to different classes of goods; under such circumstances you have many times registered trademarks that were alike, or very nearly alike, and you have on previous occasions been advised by the attorney general that such registrations were in accordance with the law. No reason occurs at this time for changing such advice.

You are advised, accordingly, that you are free to register the trade-mark, "Old Gold Lager" if the application otherwise meets with statutory requirements. The reasons for this conclusion have been many times stated, and discussions of the legal principles involved will be found in the following opinions of the attorney general: XXII 341, XXI 387, XI 173, IX 108, V 588, 1910 852.

JEF

Physicians and Surgeons—Public Health—Basic Science Law—Board of medical examiners must consist of members appointed according to their schools of practice as enumerated in sec. 147.13, Stats.

June 30, 1933.

DR. ROBERT E. FLYNN, *Secretary,*
Board of Medical Examiners,
LaCrosse, Wisconsin.

You request an opinion from this department as to the requirements for an appointment on the state board of medical examiners.

The Wisconsin state board of medical examiners is created by sec. 147.13 of the Wisconsin statutes, and provides, in part:

"1. The governor shall appoint the 'Wisconsin State Board of Medical Examiners,' consisting of eight members. * * * Three members shall be allopathic, two homeopathic, two eclectic and one osteopathic, and all shall be licentiates of the board."

The wording of the section above quoted seems clear enough. The statute evidently requires that the members of this board must be appointed according to their schools of practice as enumerated.

Moreover, in considering other provisions of ch. 147, relating to treatment of the sick, and in considering the nature and purpose of the board in question, it is evident that the membership thereof must correspond with the schools of medical theory as listed in sec. 147.13 (1), Stats.

Sec. 147.06, relating to the examination in the basic sciences, declares:

"No applicant shall be required to disclose * * * or what system of treating the sick he intends to pursue."

It is to be remembered that although the legislature by virtue of its police power may constitutionally enact laws regulating and licensing the practice of medicine, nevertheless, such laws must prescribe to the test of reasonable regulation required under the Fourteenth Amendment of the United States constitution.

That is to say, the legislature cannot

"* * * under the constitution, restrict all healing to any one school of thought or practice. * * * The courts have also held that of the many schools of 'medicine and surgery' the legislature could not prescribe that any one was orthodox and others heterodox, but that those professing the different systems, — 'allopathic,' 'homeopathic,' 'Thompsonian' and the like, — should be examined upon a course, such as is taught in the best colleges of the school of practice, * * *" *State v. Biggs*, 133 N. C. 729, 732, 46 S. E. 401, 98 Am. St. Rep. 731, 834, 64 L. R. A. 139 (1903).

As it is the purpose of the board to determine the qualifications of applicants for license to practice medicine, and as the applicant is entitled to such license irrespective of what theory of medical practice he intends to pursue, provided he conforms to the standard required in other respects, it is evident that the statutory provision in question is intended to protect the said right of the applicant to pursue whatever system of treating the sick he may desire, by placing on the board of medical examiners members who are followers of the various schools of practice.

As the Wisconsin state board of medical examiners depends for its existence upon an enactment of the legislature in order to continue to exist as a legal body, it must in every respect comply with the requirements of the act which give it life. Therefore, in order to be a legal body, such board must consist of members three of whom are allopathic, two of whom are homeopathic, two of whom are eclectic and one of whom is osteopathic.

JEF

School Districts—Taxation—Taxation of Utilities—Where town receives portion of utility taxes from state but town board fails to apportion school districts' shares as provided by sec. 76.28, subsec. (3), Stats., school districts may bring action in mandamus to compel town board to make apportionment.

June 30, 1933.

G. ARTHUR JOHNSON,
District Attorney,
Ashland, Wisconsin.

You submit the following:

Under the provisions of secs. 76.01 to 76.29, Stats., the property of light, heat and power companies and of certain other public utilities is annually assessed for taxation by the tax commission, and such taxes are paid directly into the state treasury.

By subsec. (1), sec. 76.28 it is provided that a certain percentage of the taxes so paid into the state treasury shall be distributed to the towns, cities and villages within which or through which the business of the company is carried on.

By subsec. (3), sec. 76.28 it is provided that in counties having a population of fifty thousand or less fifty per cent of the amount of such taxes received by any town or village from the state treasurer shall be retained by the local treasurer for general town or village purposes,

"and the *remaining fifty per cent shall be equitably apportioned by the town board or village trustees to the various school districts* or parts of school districts in which th property of such company is located, in proportion to the amount which the property of such company within each such school district bears to the total valuation of the property of such company in the town or village or part thereof; provided, that no such school district shall in any event receive more than the actual cost of operating and maintaining its school."

Subsec. (3), sec. 76.28 was added to the statutes by ch. 423, Laws 1925. Since that time the town of Buttternut, in Ashland county (having a population of less than fifty thousand), has annually received from the state treas-

urer a due share of such taxes, but the town board of such town has never made any apportionment to the various school districts as thus provided for.

You ask to be advised as to what action these school districts may take in order to obtain relief in the matter.

Under the provisions of subsec. (3), sec. 76.28 the various school districts are collectively entitled to receive from the town fifty per cent of the amount received by the town for the state, subject to the limitation that no such school district is entitled to receive more than the actual cost of operating and maintaining its school. *State ex rel. Carlson v. Kingston,* (Wis.) 246 N. W. 426. However, in order to know the amount that each district is separately entitled to it is necessary that the apportionment be made as provided by the statute. Until such apportionment is made it would seem that no district is in a position to claim any specified amount as its share. The statute makes it the duty of the town board to make the apportionment and no other body or person is given authority to make the same. The duty thus imposed is a mandatory one and in our opinion it is a duty which continues until performed. You are therefore advised that the various school districts should bring an action in mandamus to compel the town board to make the apportionment. See *State ex rel. Joint School District v. Becker,* 194 Wis. 464, where several school districts were joined as parties plaintiff in a similar action.

When the apportionment is made and the amounts to which each school district is entitled are thus determined, I think that each school district will have a valid claim against the town for such amounts. See *Town of Conover v. Eagle River Joint Union Free High School Dist.,* (Wis.) 248 N. W. (adv. sheets) 420; *Town of Milwaukee v. City of Milwaukee,* 114 Wis. 374.

JEF

Banks and Banking—Mortgages, Deeds, etc.—Federal reserve bank is quasi-federal department, agency or institution within purview of sec. 278.107, Stats., as created by ch. 240, Laws 1933.

June 30, 1933.

A. C. KINGSTON,
Commissioner of Banking.

You request the opinion of this department relative to a construction of sec. 278.107, Stats., as created by ch. 240, Laws 1933. You state that a question has arisen as to whether or not a federal reserve bank is a "quasi-federal department, agency or institution" within the purview of that section of the statutes.

It is the opinion of this department that the federal reserve bank is a "quasi-federal department, agency or institution" within the provisions of sec. 278.107 of the statutes as created by ch. 240, Laws 1933. The section in question reads as follows:

"Sections 278.101 to 278.106 and also section 269.58 shall not apply to loans heretofore or which may hereafter be made, discounted, or rediscounted by the United States, the Reconstruction Finance Corporation, the Federal Credit Administration, federal land banks, joint stock land banks, federal home loan banks, federal intermediate credit banks, regional agricultural credit corporations, or any other federal or quasi-federal department, agency or institution, nor to the security given for such loans."

Manifestly, since the federal reserve bank is not specifically mentioned in the above quoted section of the statutes, it is by necessary implication excluded unless the federal reserve bank is a "quasi-federal department, agency or institution" within the meaning of the act.

The words "quasi-federal department, agency or institution," as used in that act are words of broad import and liberally construed would obviously include federal reserve banks. Looking at the history of the statute in question and to all the circumstances intended to be dealt with, and to the evils intended to be remedied, it would seem that since sec. 278.107 of the statutes as created by ch. 240,

Laws 1933, should be liberally construed to carry out the intention of the legislature. We are therefore constrained to hold that the federal reserve bank is a quasi-federal department, agency or institution within the purview of sec. 278.107 of the statutes as created by ch. 240, Laws 1933.
JEF

Courts—Statute of Limitations—Indigent, Insane, etc.—Statute of limitations does not run against state or county in recovering expenses for maintaining person at public hospital for insane, in view of sec. 49.10, Stats.

June 30, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

In your inquiry of June 23 you refer to the expense of insane persons in the institutions and the reimbursement of the state or county out of the estate of such insane person. The question which you submit is: What time does the statute of limitations begin to run?

In this connection I direct your attention to sec. 49.10, Stats., as amended by ch. 345, Laws 1919, which expressly says that the statutes of limitations shall not be pleaded in defense in cases for the recovery of property of indigent charges. Your answer is, therefore, to the effect that this statute is controlling in this matter. It was enacted in 1919 and prior to that time the debt is outlawed within six years. See XII Op. Atty. Gen. 76, 307; IX Op. Atty. Gen. 310.
JEF

Courts—Fines—Public Officers—Investigators—Justice of peace has no power to deduct from fines collected in cases expenses of town in hiring investigators in such cases and to remit such sums to town.

June 30, 1933.

FRED RISSER,
District Attorney,
Madison, Wisconsin.

You inquire as to the power of a justice of the peace "to hold out and remit to the town from the fine a portion of the money paid to cover the expenses of investigators."

There being no specific statutory authority to deduct from fines collected expenses of the town in hiring investigators in such cases and to remit such sums to the town, a justice has no power to do so. A town like a county is a municipality and has only such rights as are granted it by statute. *Frederick v. Douglas County,* 96 Wis. 411; *Marvin v. Town of Jacobs,* 77 Wis. 31. No statute exists granting the power to a justice to pay town investigation expenses out of fines collected. The power, therefore, does not exist.

Furthermore, sec. 360.34, subsec. (1), Stats., specifically directs:

"All fines imposed by any such court shall * * * be by him paid over to the county treasurer,"

who in turn pays it to the state treasurer under sec. 59.20 (8).

It may well be that under art X, sec. 2 of the constitution, to which you refer us, directing that "the *clear* proceeds of all fines collected in the several counties" be paid into the school fund, a statute could be enacted granting such power to the towns. However, the legislature is the only proper body which could grant such power.

As was said in *State ex rel. Guenther, State Treasurer, v. Miles,* 52 Wis. 488, 490:

"* * * It is for the legislature to determine what deductions are to be made, and not the county treasurers or the county boards of supervisors. * * *."

The facts in that case were very similar to those under consideration. The county treasurer attempted to deduct the expenses of prosecutions. It was held he could not do so in the absence of legislative authority. The rule is applicable here.

See also *State v. De Lano,* 80 Wis. 259. You are also referred to sec. 353.24, Stats., authorizing the court to award a share to the informer out of the fine in special cases which, however, we understand from your facts not to be applicable here.

JEF

Municipal Corporations—Beer Licenses—Wholesaler operating under license granted by municipality where his warehouse or depot is located is not required to obtain separate license from other municipalities wherein he may solicit sales or make deliveries consummated in licensing municipality.

July 5, 1933.

LEO W. BRUEMMER,
District Attorney,
Kewaunee, Wisconsin.

You request an opinion from this office as to whether, under the provisions of ch. 207, Laws 1933, a wholesaler operating under a license granted by the municipality where his warehouse is located is required to procure a license in any other municipality where he may make deliveries.

Ch. 207, Laws 1933, is an act regulating the issuance of licenses relating to the sale of and traffic in fermented malt beverages or light wines.

A license is defined by sec. 66.05, subsec. (10), par. (a), subd. 7, Stats., as enacted by ch. 207, Laws 1933, to mean "an authorization or permit issued by the city council or village or town board, relating to the sale, barter, exchange, or traffic in fermented malt beverages or light wines."

The act then establishes certain general requirements relating to such licenses. Subds. 1 and 4, sec. 66.05 (10) (d), provide:

"1. No person shall sell, barter, exchange, offer for sale, or have in possession with intent to sell, deal, or traffic in fermented malt beverages or light wines, unless licensed as provided in this subsection by the governing board of the city, village, or town in which the place of business is located."

"4. All licenses shall be granted only upon written application * * * A separate license shall be required for each place of business. Said licenses shall particularly describe the premises for which issued, shall not be transferable, and shall be subject to revocation for violation of any of the terms or provisions thereof or of any of the provisions of this subsection."

The provisions of this act seem to contemplate that a license shall be issued by the municipality wherein the place of business of the applicant is located, inasmuch as the requirements established for the granting of a license are that the application for a license must be filed by a resident of the licensing municipality as is set forth in subsec. (10) (a) 8, and as the license must contain a description of the premises for which issued, as appears by the provisions above quoted.

Although a license granted by a municipality is necessarily limited to the jurisdictional extent of such municipality, nevertheless the general rule seems to be that a wholesaler licensed in one town may make deliveries from said town into other municipalities and may solicit orders elsewhere to be filled at his place of business without requiring licenses from such other municipalities. *People v. Perenchio,* 181 Mich. 304, 148 N. W. 205, L. R. A. 1915A 901 (1914); 33 C. J. 534, sec. 95; 15 R. C. L. 295, sec. 49.

The reason for the rule is that the transaction of sale is deemed to have been consummated at the place where title passes and not where orders are solicited or deliveries are made, and hence the privilege of selling is protected by the license of the municipality where the transaction has been, in law, completed.

The legislature has declared in par. (n) 1 that the enactment in question is one "of state-wide concern for the purpose of providing a uniform regulation of the sale of fermented malt liquors or light wines." Although such a legislative declaration might not of itself be conclusive as to the nature of the act, nevertheless such legislative declaration must be given due weight, and it would seem that this act is what the legislature has declared it to be, namely, an enactment of state-wide concern, and hence binding upon all municipalities even under the home rule power.

The legislature has provided for the issuing of licenses in detail, and has enumerated the various types of licenses which may be issued. Applying the rule of statutory construction that *expressio unius est exclusio alterius* the result is that municipalities cannot require licenses other than those specified by ch. 207. *Nowack v. Auditor Gen.,* 243 Mich. 200, 219 N. W. 749, 60 A. L. R. 1351 (1928); *Chain*

Belt Co. v. Milwaukee, 151 Wis. 188, 138 N. W. 621, 42 L. R. A. (N. S.) 899 (1912).

It is the opinion of this department, therefore, that a wholesaler operating under a license granted by the municipality where his warehouse or depot is located is not required to obtain a separate license from other municipalities wherein he may solicit sales or make deliveries consummated in the licensing municipality.

JEF

Taxation—Tax Sales—Interest on tax certificate issued to private purchaser at delinquent tax sale of February 1, 1933, is governed by law in force at time of such sale and certificate and is not affected by subsequent legislation.

Under law in force at time of such sale and certificate, holder of certificate is entitled to six months' interest where land is redeemed within six months after sale.

July 5, 1933.

MARTIN GULBRANDSEN,
District Attorney,
Viroqua, Wisconsin.

In your request for an opinion, you submit the following:

"On February 1, 1933, one X purchased from Vernon county at the tax sale held on that date, a tax certificate on a certain parcel of land in Vernon county. On April 15 ch. 73, Laws 1933 was approved and published, which amended sec. 75.01 by striking out the words 'but whenever any land sold for taxes shall be redeemed within six months after the sale thereof interest as aforesaid shall be paid for six months.' On April 25 the owner of the said land offered to redeem, and the county treasurer charged him interest on the said certificate up to that date from February 1, 1933.

"The said X, holder of the tax certificate, claims that he is entitled to interest on the said certificate, according to the law in force February first, the date of the certificate, for six months instead of interest from February 1 until April 25.

"It is my opinion that Mr. X is entitled to interest on said certificate according to law in force February 1, the date of the certificate, for six months instead of interest February 1 until April 25. * * *."

I am in accord with your opinion.

The general rule is that the amount required to redeem land sold for delinquent taxes is governed by the law in force at the time of the sale and not by the law in force at the time of the offer to redeem. 61 C. J. 1275. The relative rights of the parties, having become fixed and vested at the time of the tax sale, cannot be affected by subsequent legislation, except where no contract obligation will be affected thereby, as, for example, where the state itself or the county is the purchaser. 61 C. J. 1243–1244. See also *International Life Insurance Co. v. Scales,* 27 Wis. 640, 642–643.

JEF

Appropriations and Expenditures — Bridges and Highways—Street Improvements — Snow Removal—Under sec. 20.49, subsec. (8), Stats., allotment of gasoline tax money to town or village for "improvement" of certain public highways and streets may be used for removal of snow from streets.

Entire amount received by town or village is not required to be expended each year, and part may be accumulated, to be expended on some particular street improvement project subject to supervision and approval of county highway committee.

July 5, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

1. You ask whether the gas tax money allotted and paid over to towns, cities and villages under sec. 20.49, subsec. (8), Stats., may be used for the removal of snow on the streets of the town, city or village.

This money is allotted and paid by the state to the towns, cities and villages for the "improvement of public roads and streets within their respective limits which are open and used for travel, and which are not portions of the state or county trunk highway systems, and which are not direct connections * * * between state t r u n k highways." Sec. 20.49 (8), Stats.

The money may be used only for the "improvement" of certain public roads and streets which are open and used for travel, and the question is whether the removal of snow therefrom constitutes an "improvement" of such road or street.

In 31 C. J. 262 it is stated that the word "improvement" is a relative term, and its meaning must be ascertained from the context and the subject matter of the instrument in which it is used. The word is defined in Webster's New International Dictionary as, "A valuable addition, or betterment," and in Funk & Wagnalls New Standard Dictionary as, "A valuable or useful addition to or modification of something." It has been held that the word "local improvement" includes street sprinkling. *Rosswell v. Batemen,* (N. M.) 146 Pac. 950, 954. On the other hand it has been held that the word "local improvement" does not include street sprinkling. *Owensboro v. Sweeney,* (Ky.) 111 S. W. 364, 366–367. It has been held that authority to "improve" existing streets means to better the same and does not include such improvements as are necessary merely to keep the streets in condition for travel. *Birmingham v. Starr,* (Ala.) 20 So. 424, 427; that "improvement" of an existing boulevard means bettering it as by grading, curbing, macadamizing etc. *Wolff Chemical Co. v. Philadelphia,* (Pa.) 66 Atl. 344, 347; that "improving" a highway has reference to bettering the same *State v. Babcock,* (Minn.) 242 N. W. 474, 476. The general tenor of the decisions is that "improvement" means a betterment amounting to an addition to the street or highway.

This department has previously ruled that "maintenance" includes snow removal. XIX Op. Atty. Gen. 530. However, "maintenance" and "improvement" are not strictly synonymous, the former word relating to keeping up, pre-

serving and rebuilding in case of destruction. *State ex rel. Boddenhagen v. C. M. & St. P. R. Co.*, 164 Wis. 304, 308.

The foregoing review is presented in order to show that there may be some doubt as to whether the word "improvement," as used in the statute here in question, was intended to include the removal of snow. However, this department has previously ruled that "improvement" as there used should have a broad interpretation and should include "maintenance," the opinion being based, in part, upon an administrative construction by the state highway commission. XXI Op. Atty. Gen. 66. In view of those considerations the previous opinion is adhered to and, therefore, the conclusion is that "improvement" as used in said statute includes the removal of snow from the streets.

2. You also ask whether the money received by a town or village under the statute in question must be spent in the same year or whether the municipality may set the money aside and let it accumulate, to be used for some particular street improvement project.

The allotment under the statute is an annual one, as of January 1 of each year. The amount is annually paid into the local treasury. The amounts allotted to towns and villages may be expended by the town and village officers subject, however, to the supervision and approval of the county highway committee. The statute does not specify that the entire amount must be expended each year, but it does imply that some expenditure should be made in each year, as it provides:

"* * * A report of the work done shall be made each year,"

copies to be filed with the clerk of the town or village, the county clerk and the highway commission.

It is considered, therefore, that the town or village is not required to expend the entire amount each year and that it may permit an accumulation of part thereof to be expended on some special street improvement project, subject to the supervision and approval of the county highway committee.

JEF

Labor—Under facts stated, employer is not liable to county for expenses of burial of person employed by him.

July 5, 1933.

CLIVE J. STRANG,
District Attorney,
Grantsburg, Wisconsin.

You state that one A is engaged in cutting pulp wood in Burnett county. He advertises for help to cut and peel the wood and employs help for that purpose. Some of these employees have died and the county has stood the expense of burial of two of them. You ask whether A is liable for the burial expenses.

Under the facts stated you are advised that no circumstances are presented which would make the employer liable for the burial expenses.

Your attention is directed, however, to the workmen's compensation act, sec. 102.50, Stats., which provides to the effect that in all cases where death of an employee proximately results from the injury the employer, if subject to the act, or insurer, shall pay the reasonable expense for burial, not exceeding two hundred dollars. Whether the above mentioned employer was subject to the compensation act and whether the employees died as the result of injuries sustained in their employment are matters not shown by the facts which you submit.

JEF

School Districts—District Board—Wisconsin Statutes—Ch. 245, Laws 1933, took effect June 14, 1933.

Petition to change number of members of district board signed by more than thirty electors is valid and constitutes compliance with ch. 245, Laws 1933, providing that such petition must be signed by thirty electors in school district.

July 6, 1933.

HERBERT J. GERGEN,
District Attorney,
Beaver Dam, Wisconsin.

In your recent letter you state that the annual school meeting of the Horicon district is scheduled to be held the evening of July 10, 1933, at which time a number of electors of the district wish to vote on the matter of increasing the school board from three to five members in conformity with the provisions of ch. 245, Laws 1933, which was published under date of June 13, 1933. It has been suggested that this act does not take effect until one year from date and legal opinion to that effect has been obtained. You state that you are of the opinion that this chapter takes effect upon passage and publication, and you wish to be advised.

Another question raised in this connection is whether a petition which contains more than thirty electors filed pursuant to ch. 245, Laws 1933, is valid. It has been contended that the law provides that only thirty electors and no more shall be on the petition.

1. It is the opinion of this department that ch. 245, Laws 1933, became effective the date after publication. Ch. 245, Laws 1933, provides that it shall take effect upon passage and publication. A law takes effect the day after publication if it says, "upon passage and publication." Ch. 245, Laws 1933, was published on June 13, 1933. Inasmuch as this act was published on June 13, 1933, it became effective June 14, 1933. See X Op. Atty. Gen. 1099; XVIII Op. Atty. Gen. 615, 616.

2. Ch. 245, Laws 1933, provides that "such change in the number of the members of the school board shall only be authorized to be made at the annual school meeting when a

petition signed by thirty electors in such school district * * * shall be filed. * * *."

It is the opinion of this department that a petition signed by at least thirty electors, to wit, thirty or more, is a compliance with the provisions of ch. 245, Laws 1933. It is not necessary for the petition to contain *only* thirty electors thereon and a petition which is signed by at least thirty electors is a full compliance with the law.

JEF

Constitutional Law—Taxation—Tax Collection — Under sec. 2, ch. 288, Laws 1933, tax moneys collected by county treasurer up to and including June 26, 1933, on delinquent real estate taxes of 1932 are to be paid over to town, city or village wherein such taxes are assessed and local treasurer will be entitled to retain therefrom amount of local school taxes and other local taxes not theretofore retained by him out of previous collections, and balance, if any, will go to county to apply on county tax.

Sec. 2, ch. 288, Laws 1933, is held constitutional.

July 6, 1933.

JOHN P. MCEVOY,
Assistant District Attorney,
Kenosha, Wisconsin.

You ask for an interpretation of sec. 2, ch. 288, Laws 1933, which was published June 21 and became effective on June 22, 1933. Sec. 1 of the act provides to the effect that taxpayers who pay their delinquent taxes on real estate for the year 1932 on or before June 26, 1933, shall be entitled to pay such taxes without penalty, interest or other charges, "regardless of whether or not they filed an affidavit for the extension of the time of payment pursuant to chapter 16, laws of 1933," and provides for a refund of penalty, interest and charges to those taxpayers who paid such taxes prior to the effective date of the act, namely, June 22, 1933. The referred to ch. 16, Laws 1933, extended the time of payment,

without penalty etc., to June 1, 1933, in those cases where the taxpayers had filed an affidavit as required by that chapter. The effect of sec. 1 of ch. 288, Laws 1933 was, therefore, to extend the time for payment of delinquent taxes for the year 1932 without penalty etc. to June 26, 1933, in favor of all taxpayers, whether or not they had filed an affidavit.

As the delinquent tax rolls were returned by the local treasurers to the county treasurer on March 22, 1933, payments under sec. 1, ch. 288, Laws 1933, would be made to the county treasurer. Sec. 2 of the act provides for the disposition of the amounts so paid to the county treasurer, as follows:

"Any taxes of the year 1932 that are paid under the provisions of section 1 of this act to any county treasurer up to and including the fourth Monday in June, 1933, less the amount due for advertising the same at tax sale, shall be paid over to the town, city or village wherein such taxes were assessed. The town, city or village treasurer shall on July 15, 1933, make a supplemental settlement with the county treasurer for the part of such taxes due the county as county taxes. Such settlement shall be made as provided in subsection (2) of section 74.15 of the statutes."

1. You ask: Upon the making of the supplemental settlement of July 15, 1933, is the county treasurer entitled to retain, or to receive, out of the tax money so paid to him from June 2 to June 26, 1933, inclusive, so much as represents the county tax included therein?

This question is answered, No, with the following explanation:

While sec. 2, ch. 288, Laws 1933, provides that the town, city or village treasurer shall on July 15, 1933, make a supplementary settlement with the county treasurer for the part of "such" taxes due the county as county taxes, it also provides:

"* * * Such settlement shall be made as provided in subsection (2) of section 74.15 of the statutes."

Subsec. (2), sec. 74.15 sets up a system of preferences, normally applicable where the local treasurer makes the collections, whereby the local treasurer is entitled to retain out of the tax moneys collected the entire amount of local school

taxes and the entire amount of other local taxes, "and lastly county taxes." The purpose of sec. 2, ch. 288, Laws 1933, is to continue this same system of preferences with regard to the tax moneys paid to the county treasurer up to June 26, 1933. In other words, out of the tax moneys so paid to the county treasurer to June 26, 1933, the local treasurer will be entitled to retain the amount of local school taxes and other local taxes not theretofore retained by him out of previous collections, and only the balance, if any, will be retained by the county treasurer to apply on county taxes.

2. You also ask whether the said provisions of sec. 2, ch. 288, Laws 1933, are constitutional, in that, although said act was not enacted until June 21, 1933, yet the said provisions of sec. 2 thereof give to the town, city or village the tax moneys collected by the county treasurer prior to June 22, when normally, under subsec. (3), sec. 74.19, Stats., the tax moneys collected by the county treasurer after the delinquent tax rolls have been returned to him are to be retained by the *county* in payment of the county tax and only the excess collected (over and above the amount of the county tax) is to be returned to the town, city or village.

It is considered that the second question should be answered, Yes.

It is well settled that the legislature has power to regulate and direct the disposition of taxes collected and to set up a system of preferences in the disposition of the same. See the article on "Disposition of taxes collected" in 61 C. J. 1520 *et seq.* Our own supreme court has recently held that the legislature has broad powers with respect to the disposition of moneys raised by taxation even after it is collected. *Town of Bell v. Bayfield County,* 206 Wis. 297, 302. The court there said:

"* * * The disposition of moneys raised by taxation to which one governmental unit is entitled under existing law is subject to legislative control. * * *"

It would seem, therefore, that the legislature acted well within its powers when, by sec. 2, ch. 288, Laws 1933, it directed that the tax moneys collected by the county treasurer up to June 26, 1933, should be paid over to the town, city or village and a supplemental settlement made between

the local treasurer and the county treasurer on the same basis as would have been made had the collections been made by the local treasurer.
JEF

Elections — School Districts — District Board — Where candidates for office of district board under sec. 40.07, Stats., have duly filed their declination under sec. 5.28, their names are not to be printed on ballots. If, however, such candidates have not filed their declination under sec. 5.28 their names are to be printed on ballots.

July 7, 1933.

JOHN CALLAHAN, *State Superintendent, Department of Public Instruction.*

You request the opinion of this department upon the following statement of facts:

"Under sec. 40.07, subsec. (2), Stats., providing for election of common school officers by ballot from three until eight o'clock in the afternoon, four candidates duly filed nomination papers to have their names printed on the ballots. Subsequently two of the candidates voluntarily request that their nominations be withdrawn. The ballots have not yet been printed. Are only two names to be printed on the ballot? Are all four names to be printed? Are four names printed and two crossed out? Or what should be done?"

It is the opinion of this department that a candidate who has been regularly nominated by the due filing of nomination papers for the office of district board of the common school district under sec. 40.07, Stats., may decline to be a candidate at the regular election by duly filing his declination as provided in sec. 5.28.

Sec. 5.28, provides in part:

"Any person nominated to office may decline and annul the same by delivering to the officer with whom his certificate of nomination or nomination paper is filed, not less than twelve days before election in case of town, village or city officers, and *twenty days in other cases,* a declination in

writing signed by him and acknowledged before some officer authorized to take acknowledgments. * * *"

Unless the candidates mentioned in your letter who were regularly nominated duly filed their declination as provided in sec. 5.28, their names must be printed on the ballots. If, however, such candidates regularly filed their declinations under sec. 5.28, then only two names are to be printed on the ballots.

JEF

Taxation—Tax Sales—Sec. 2, ch. 244, Laws 1933, amending subsec. (1), sec. 75.01, Stats., so as to extend time for redemption of tax certificates to five years from date of certificate, does not apply to tax certificates issued prior to passage of act.

July 7, 1933.

HELMAR A. LEWIS,
District Attorney,
Lancaster, Wisconsin.

You direct attention to that portion of subsec. (1), sec. 75.01, Stats., 1931, which provides to the effect that the owner or occupant of any land sold for taxes may at any time within *three* years from the date of the tax certificate redeem the same, and to sec. 2, ch. 244, Laws 1933, enacted June 13, 1933, which amends subsec. (1), sec. 75.01 so as to fix the period of redemption at *five* years from the date of the tax certificate.

You ask whether the five-year redemption period applies to tax certificates issued prior to the passage of ch. 244, Laws 1933.

The question is answered, No.

Sec. 3, ch. 244, Laws 1933, expressly provides:

"The provisions of section 2 of this act shall apply to taxes which hereafter become delinquent and to tax certificates hereafter issued. * * *"

The quoted language clearly indicates that the five-year redemption period is not to apply to tax certificates issued prior to the passage of said act.
JEF

Taxation—Tax Collection—Delinquent Taxes—County treasurer has no authority to advance any part of delinquent taxes to town, village or city treasurer, no payment over to such local treasurer being authorized until collection has been made.

County is given preference over town, village or city in apportionment of collections made by county treasurer after June 26, 1933, of delinquent taxes of 1932 until county's claim for unpaid county taxes of that year is satisfied. Apportionment of such collections is governed by provisions of subsec. (3), sec. 74.19, Stats.

July 7, 1933.

B. O. REYNOLDS,
District Attorney,
Elkhorn, Wisconsin.

You submit the following questions:

"1. Has the county treasurer, either with or without action of the county board, authority to pay taxing districts in cash for their 'excess delinquent real estate taxes' before same are collected by the county?

"2. Has the county treasurer, either with or without action of the county board, authority to pay taxing districts in cash for their 'extended real estate taxes taken in trust under the provisions of chapter 16, Laws 1933,' before the same are collected by the county?

"3. Should the local taxing districts ever be paid by the county treasurer until collection is made?"

Each of questions 1 to 3 is answered, No.

When the amount of delinquent taxes returned by the local treasurer to the county treasurer is so large as to include not only the amount due the county for unpaid county taxes but also some amount due the local taxing district

(town, village or city) for unpaid local taxes, the local taxing district of course has an interest therein. After the delinquent taxes have been returned to the county treasurer, collections thereon are made by him. However, neither ch. 16 or ch. 288, Laws 1933 (extending the time for payment of delinquent taxes on real estate for 1932 to the county treasurer to June 26, 1933 without penalty), nor subsec. (3), sec. 74.19, Stats. (relating generally to collection of delinquent taxes by the county treasurer), authorizes either the county treasurer or the county to make any payments over to the local taxing district until collection has been made. This department has repeatedly ruled that the county treasurer has no authority to advance any part of the delinquent taxes to the town, village or city treasurer, as the case may be. Op. Atty. Gen. for 1912, 988; III Op. Atty. Gen. 862. See also, XXII Op. Atty. Gen. 199 and statements in *Bear Bluff v. Knutson,* 189 Wis. 353; *Town of Bell v. Bayfield County,* 206 Wis. 297, 304–305.

You also ask:

"4. Does the county have the first rights to all moneys paid in for taxes of 1932 after June 26, 1933, to satisfy county claims?"

Question 4 is answered, Yes.

By ch. 16 and ch. 288, Laws 1933, the various towns, villages and cities are preferred in the allotment of delinquent 1932 real estate taxes paid to the county treasurer up to and including June 26, 1933. After June 26, 1933, however, the county is preferred, by subsec. (3) of sec. 74.19, Stats., which provides as follows:

"All taxes so returned as delinquent shall belong to the county and be collected, with the interest and charges thereon, for its use; and all actions and proceedings commenced and pending for the collection of any personal property tax shall be thereafter prosecuted and judgments therein be collected by the county treasurer for the use of the county; but if such delinquent taxes, exclusive of the penalty provided by section 74.23, exceed the sum then due the county for unpaid county taxes *such excess, when collected,* with the interest and charges thereon, shall be returned to the town, city or village treasurer for the use of the town, city or village."

In referring to subsec. (3), sec. 74.19, the supreme court has said:

"* * * after proper return of the delinquent list by the town treasurer the county is preferred in the allotment of delinquent taxes paid to the county treasurer. * * *." *Town of Bell v. Bayfield County,* 206 Wis. 297, 305.

And in another case:

"While there may be no injustice in saying so, we find no authority whatever in the law to support the proposition that as between the town and the county, after the delinquent return has been made by the town treasurer, that any sum will thereafter become due to the town treasurer until a sufficient amount has been collected thereon to satisfy the claims of the county, for by the language of sub. (3) of sec. 74.19 it is only 'such excess, when collected, with the interest and charges thereon, shall be returned to the town, city or village treasurer for the use of the town, city or village.'" *Bear Bluff v. Knutson,* 189 Wis. 353, 358–359.

You also ask:

"5. If the county treasurer is not authorized to pay the taxing districts in cash in the aforementioned cases, are tax certificates issued against such delinquent and extended taxes and held in trust for the taxing districts until collection is made by the county treasurer?"

Question 5 is answered as follows: Land on which the delinquent taxes of 1932 have not been paid will be sold at the tax sale to be held in August, 1933, and tax certificates will be issued thereon to the county in those cases where the county is the purchaser and to private parties where they are the purchasers. Sales to private purchasers (they actually pay the tax) will represent collections. Sales to the county (the county does not pay the tax) will not represent collections at the time when tax certificates are issued to the county, and will not be equivalent to collections until the county realizes thereon either by sale of the tax certificates held by the county or by sale of the lands after the county has taken deeds thereon. Sec. 75.36, Stats.; *Town of Bell v. Bayfield County,* 206 Wis. 297. Collections made will be apportioned in the manner prescribed by the above quoted subsec. (3) of sec. 74.19, Stats.

JEF

Intoxicating Liquors—Municipal Corporations—Beer Licenses—Words and Phrases—Calendar Year—Phrase "calendar year" as used in sec. 1, ch. 207, Laws 1933, creating sec. 66.05, subsec. (10), par. (g), subd. 2, Stats., means period from January first to December thirty-first, inclusive.

Town and village can, by ordinance, prohibit sale, manufacture and transportation of intoxicating liquors.

July 7, 1933.

ROBERT L. WILEY,
District Attorney,
Chippewa Falls, Wisconsin.

You request of this office an interpretation of the phrase "calendar year" as used in sec. 1, ch. 207, Laws 1933, which enacts sec. 66.05, subsec. (10), par. (g), subd. 2, Stats., providing in part:

"The amount of the license fee shall be determined by the city, village or town in which said licensed premises are located, but said license fee shall not exceed one hundred dollars per year, but licenses may be issued at any time for a period of six months in any calendar year for which one-half of the license fee shall be paid. Such six months' licenses shall not be renewable during the calendar year in which issued. * * *."

The calendar year is composed of twelve months varying in length, according to the common or Gregorian calendar. *Shaffner v. Lipinsky,* 194 N. C. 1, 138 S. E. 418 (1927); *People v. Milan,* 89 Colo. 556, 5 P. (2d) 249 (1931); *Byrne v. Bearden,* 27 Ga. A. 149, 107 S. E. 782 (1921); *In re Parker's Estate,* 14 Wkly. Notes Cas. 566 (Pa. 1884).

In the case of *Carroll v. Wright,* 131 Ga. 728, 63 S. E. 260 (1908), the Georgia court, in construing a liquor license law which required that the licensee pay a designated sum for each calendar year, or part thereof, held that the term "calendar year" means the period from January first to December thirty-first, inclusive, and not a period of twelve months commencing at any fixed or desig-

nated month, and terminating with the day of the corresponding month in the next succeeding year.

In Webster's New International Dictionary, the word "year" is defined as:

"A period of 365 days or, in case of leap year 366 days. The *calendar, civil,* or *legal* year has the same number of days, is divided into twelve calendar months, and is now reckoned as beginning with January 1 and ending with December 31. * * *"

Giving to the words in question their ordinary and usual meaning, this department is of the opinion that, the term "calendar year," as used in the above quoted section of ch. 207, Laws 1933, means the period of time between January 1 and December 31, inclusive.

You further inquire whether a town or village can, by ordinance, prohibit the sale, manufacture and transportation of intoxicating liquors.

At the outset, we wish to make clear that this opinion refers only to *intoxicating* liquors.

The position of beverages containing not more than 3.2 per centum of alcohol by weight is somewhat ambiguous. By the recent modification of the national prohibition or Volstead act such beverages were released from the penalties imposed by that act. The Kentucky court of appeals in the case of *Louisville & N. R. R. Co. v. Falls City Ice and Beverage Co. Inc.,* decided June 16, 1933, held that beer containing 3.2 per centum of alcohol by weight is not intoxicating and does not come within the constitutional and statutory prohibition of that state against intoxicating liquors. For further discussion of this problem, we refer you to an earlier opinion of this department rendered March 28, 1933, XXII Op. Atty. Gen. 215.

The powers of villages, like that of cities, may come from two sources, legislative enactment, and the provisions of the Wisconsin constitution, namely, art. XI, sec. 3, known as the home rule amendment.

By sec. 3, ch. 187, Laws 1933, the legislature has enlarged the powers of village boards, and makes a general grant of power, providing:

"61.34 (1) Except as otherwise provided by law, the village board shall have the management and control of

the village property, finances, highways, streets, navigable waters, and the public service, and shall have power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language.

"* * *

"(5) For the purpose of giving to villages the largest measure of self-government in accordance with the spirit of the home rule amendment to the constitution it is hereby declared that chapter 61 shall be liberally construed in favor of the rights, powers and privileges of villages to promote the general welfare, peace, good order and prosperity of such villages and the inhabitants thereof."

The above quoted provisions are undoubtedly sufficient to give to villages the power in question, as was held by the Wisconsin supreme court in the case of *Hack v. Mineral Point*, 203 Wis. 215 (1931), when construing a similar provision conferring powers upon cities.

The effect of the home rule amendment upon this problem is not here determined. In the *Hack* case, *supra*, the court refused to determine whether the suppression of traffic in intoxicating liquors is a matter of national, state, or local concern. The court said further, at p. 220:

"* * * The fact that the suppression of the liquor traffic may be a matter of state-wide concern and subject to regulation or suppression by the state does not deprive the city of the power to act under its powers within its territorial limits."

Moreover, the fact that it may be a matter of state-wide concern does not prevent its being at the same time a local affair within the meaning of the home rule amendment. *State ex. rel. Ekern v. Milwaukee*, 190 Wis. 633, 609 N. W. 860 (1926).

We therefore feel that your question as to the power of a village to prohibit liquor traffic is substantially answered by the decision of the Wisconsin supreme court in the *Hack* case, *supra*, and that villages are, accordingly, empowered so to do.

The power of towns has its source in the legislature alone. A town is but a *quasi*-municipal corporation. *Mulvaney v. Armstrong,* 168 Wis. 476, 170 N. W. 652 (1919); *First Wis. Nat. Bank v. Catawba,* 183 Wis. 220, 197 N. W. 1013 (1924); *Dekorra v. Wis. Power Co.* 188 Wis. 501, 205 N. W. 403 (1926).

Sec. 60.18 (3), Stats. 1931, provides that the town meeting shall have power "to make orders and by-laws for the management of all the affairs of the town conducive to the peace, welfare and good order thereof." This section could hardly be deemed sufficient to confer upon towns the power to prohibit liquor traffic.

Towns have, however, been granted further authority by sec. 60.29 (13), which provides that town boards shall be empowered: "To exercise powers relating to villages and conferred on village boards when lawfully authorized so to do by resolution of the town meeting adopted pursuant to subsection (12) of section 60.18."

By fulfilling the requirements of sec. 60.18 (12), it would seem that a town, as well as a village, could lawfully exercise the power to prohibit liquor traffic.

JEF

Public Officers—Sheriff—Salary fixed by county board for sheriff does not include maintenance of prisoners in county jail.

County board may fix and change amount of compensation for sheriff to receive for maintenance of prisoners in county jail at any time during his term, provided such compensation is not less than actual cost of maintenance.

July 10, 1933.

RALPH WESCOTT,
District Attorney,
Shawano, Wisconsin.

In your letter of June 28 you enclose a resolution of the county board passed at a meeting on March 26, 1932,

fixing the salary of the sheriff beginning on the first Monday of January, 1933. In addition to the details of said resolution, the board said this:

"* * * Board for keeping and maintaining prisoners in the county jail shall be at the rate heretofore fixed by the board therefore; * * *"

You say that on November 17, 1932, a resolution was passed changing the compensation for maintenance of the prisoner from 25 cents per meal to 50 cents per day. The reason given for the change was that the price of commodities had dropped considerably.

You inquire whether the compensation for maintenance of prisoners is included in the salary fixed by the county board or whether the county board may change the same as it has done in said last resolution.

Sec. 59.15, Stats., provides:

"(1) The county board at its annual meeting shall fix the annual salary for each county officer, including county judge, to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer's term, and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions:

"(a) Compensation to the sheriff for keeping and maintaining prisoners in the county jail."

Under this statute it is our opinion that the resolution fixing the salary does not include compensation for maintenance of the prisoners. The statute expressly exempts that and the county board is permitted to make such changes in this throughout the term of the sheriff as it sees fit. See XX Op. Atty. Gen. 386; XI Op. Atty. Gen. 99.

JEF

Banks and Banking—Counties—County Orders—County board may not legally reimburse persons for loss sustained in failing to present county orders within reasonable time after their issuance, as county's liability has been discharged. Clerk and treasurer may be held liable after such payment is made even on order of county board.

July 11, 1933.

A. B. CURRAN,
District Attorney,
Prairie du Chien, Wisconsin.

In your recent letter you state that the Bank of Prairie du Chien and the Crawford County Bank closed on November 19, 1932, and that on October 28, 1932, and previous to that date a number of county orders had been issued to various persons, but had not been presented to the banks before closing. They are now demanding payment of Crawford county. You state that you, as district attorney, advised the county clerk and county treasurer that in view of the opinion of the attorney general as appears in XIX Op. Atty. Gen. 259, together with the case of *Kinyon v. Stanton,* 44 Wis. 479, the county was discharged from liability to the extent of the loss because of the delay in presenting the county orders within a reasonable time.

You also state that in the case of the two banks there was a forty-five per cent waiver and the banks are now reorganized, but due to the fact that there has been no settlement from the state under its surety law as a guarantee to municipalities who had deposits in banks, the county has not accepted the deferred payment certificates, or trust certificates.

You also state that at a special session held recently in your county the county board passed a resolution for the reason that the county board felt that the parties holding these county orders should be paid. Said resolution reads as follows:

" 'Be it by the county board of Crawford county, Wisconsin, now in session, resolved:

" 'Whereas, previous to the closing of the Bank of Prairie du Chien and the Crawford County Bank, on November 19,

1932, a number of county orders were issued to a number of workmen and employees of the county, and who failed to present their orders to the bank for payment before closing; and,

" 'Whereas, a number of these people who are holding county orders are now receiving aid and relief from the county of Crawford, and that it is the opinion of the members of the county board that these orders should be paid.

" 'Be it resolved: That the county treasurer and the county clerk are hereby authorized and directed to pay these orders that are now outstanding to the holders thereof, and the county clerk and county treasurer are hereby authorized and directed to issue to these holders of county orders a new order upon the surrender of the old order.' "

You request our opinion as to whether the county clerk and county treasurer would be authorized to pay these orders, and if there would be any liability that they might incur in doing so.

As was held in the opinion of the attorney general cited by you and the case of *Kinyon v. Stanton,* 44 Wis. 479, and also by a later opinion of the attorney general found in XX Op. Atty. Gen. 501, there can be no question that the county is discharged from any liability to the parties who accepted the county orders. It was through their negligence that they did not receive a cash payment. The county board is in a different position than private parties. It is not passing upon its own property but upon the property of the taxpayer and it cannot pay out any money of the taxpayer where there is no liability nor authority in law to do so. We are of the opinion that the answer to your question is to the effect that the county clerk and the county treasurer would not be authorized to pay these orders and that they might be held if a taxpayer should bring an action against them.

JEF

Fish and Game—Nonresident over sixteen years of age is required to have nonresident fishing license before he may fish in private fish hatchery.

July 11, 1933.

PAUL D. KELLETER, *Conservation Director, Conservation Commission.*

You direct our attention to sec. 29.52, Stats., which provides for the registration of private trout ponds. You ask our opinion as to whether it is necessary for a nonresident to purchase a nonresident fishing license before he may fish in an area covered by registration as a private fish hatchery.

Sec. 29.14, Stats., as amended by ch. 243, Laws 1933, provides:

"(1) Any nonresident under the age of sixteen years, may, without a license take, catch or kill with hook and line, or rod and reel fish of any variety, subject to all other conditions, limitations and restrictions prescribed in this chapter.

"(2) Any nonresident over the age of sixteen years shall have the rights of a resident to take, catch or kill fish of any variety with hook and line or with rod and reel in outlying waters. Such nonresident may take, catch or kill fish with hook and line or with rod and reel in inland waters only if a license has been duly issued to him, subject to the provisions of section 29.09, by the state conservation commission. The fee for each such license entitling the holder to take, catch or kill fish with hook and line of any variety, subject to the provisions of section 29.09, shall be three dollars, and all such licenses shall be effective only from the first day of May until the next succeeding first day of December. Upon the payment of an additional fee of two dollars the original purchaser of such license shall be entitled to receive three coupons entitling him to make three separate shipments of game fish of twenty pounds or one fish of any weight as provided in section 29.47, but no more. One coupon shall be attached to each shipment so made. The agent of any common carrier who shall accept any such shipment without a coupon attached shall be guilty of a violation of this chapter, and shall be punished by a fine of not less than twenty-five dollars nor more than fifty dollars. The commission may cause such licenses or coupons to be issued through agents for a compensation of ten

per cent of the license fees collected therefor; but no such compensation shall be paid to any of its regular deputies or other employes."

It has been the custom, as I am informed, that nonresident fishermen over sixteen years of age are required to take out a nonresident fishing license for the purpose of catching fish in inland waters, irrespective of whether they are privately owned ponds or hatcheries or not. A careful reading of this statute seems to justify this construction. It is expressly stated that no nonresident over the age of sixteen shall have the right to fish in inland waters unless a license has been duly issued to him.

You are therefore advised that it is our opinion that your question is answered to the effect that a nonresident over sixteen years of age is required to have a nonresident fishing license before he may fish in an area covered by registration as a private fish hatchery.

JEF

Municipal Corporations—Municipal Borrowing—Taxation—Under ch. 124, Laws 1933 (sec. 67.155, Stats.), county should borrow only to extent of its equity in tax certificates owned by it; should set aside tax certificates in which county has equity equal to amount borrowed; and should set aside for retirement of loan proceeds realized on said certificates to extent of county's equity therein.

July 15, 1933.

A. J. CONNORS,
District Attorney,
Barron, Wisconsin.

You direct attention to ch. 124, Laws of 1933, which creates sec. 67.155, Stats., authorizing any county for the purpose of paying its "current and ordinary expenses," to borrow money and issue bonds "in a sum not to exceed the face value of all tax certificates owned by it and not otherwise pledged as collateral security for any loan" by the county.

In addition to requiring that the county levy a direct annual tax sufficient to pay interest and principal of the bonds as the same fall due, the act provides (subsec. (4), sec. 67.155, Stats.):

"Whenever bonds are issued under this section tax certificates having a face value equal to at least one hundred per cent of the amount of such bonds shall be set aside by the county treasurer and all moneys received for the redemption of said certificates shall be set aside and applied toward the retirement of bonds issued hereunder."

You also direct attention to subsec. (3), sec. 74.19, Stats., which provides to the effect that all taxes returned each year as delinquent shall belong to the county and be collected, with the interest and charges thereon, for its use, but that after collections thereof have been made by the county sufficient in amount to satisfy the county's claim for unpaid county taxes for the year involved,

"such excess, when collected, with the interest and charges thereon, shall be returned to the town, city or village treasurers for the use of the town, city or village."

You state that, acting under said ch. 124, Laws 1933, the county board of Barron county has voted a bond issue of $100,000; that the county owns tax certificates, covering certificates of several different years, having an aggregate face value of $100,000; that the county has an equity in the tax certificates of each year, by reason of unpaid county taxes of each such year; that the various towns, cities and villages also have an equity in the tax certificates of each year, by reason of unpaid local taxes and consequent excess delinquent returns of taxes of each such year; that the equity of the county in the aggregate is $75,000; that the equity of the various towns, cities and villages, in the aggregate, is $25,000. So that, while the county owns all of said tax certificates, it is entitled to retain for its corporate purposes only $75,000 of the proceeds thereof.

Upon the foregoing, you ask whether the county, under ch. 124, Laws 1933, should borrow money only to the extent of the county's equity in the tax certificates so owned

by it, or whether the county may borrow to the extent of the face value of the certificates so owned by it, and if the latter, how the equity of the various towns, cities and villages in said tax certificates should be taken care of.

Ch. 124, Laws 1933, expressly provides that the county may borrow money "in a sum not to exceed the face value of all tax certificates owned by it." Given its literal meaning, that language authorizes the county to borrow money to an amount equal to the face value of all tax certificates owned by it. If the county should borrow to the extent of the face value of the tax certificates owned by it, namely, $100,000, it would be required by the act to set aside for the retirement thereof all of the proceeds of said certificates, namely, the proceeds of certificates having a face value of $100,000. Having done this, then, under the circumstances above outlined, the various towns, cities and villages having an equity of $25,000 in said certificates, the county should settle with them for their equity.

However, it seems to me that ch. 124, Laws 1933, contemplates rather that the county shall borrow only to the extent of its equity in the tax certificates owned by it, which in the instant case would be $75,000; that it should set aside tax certificates in which the county has an equity equal to the amount borrowed, which in the instant case would mean setting aside tax certificates having a face value of $100,000; and that it should set aside for the retirement of the loan the proceeds realized on said certificates to the extent of the county's said equity therein, leaving the excess, when collected, to be returned to the various, towns, villages and cities as their interests may appear.

JEF

Banks and Banking—State Banks—Pursuant to sec. 221.255, Stats., banking department of Wisconsin may authorize "receiving and paying stations" to engage in following transactions: receiving and paying deposits, making loans, discounting paper, selling exchange, issuing drafts, and the like, as agent for and on behalf of parent bank.

July 18, 1933.

LEO T. CROWLEY, *Chairman,*
Banking Review Board.

You have called my attention to sec. 221.255, Wis. Stats., as created by ch. 8, Laws 1933, and amended by chs. 362 and 396, Laws 1933, and you especially direct my attention to the following provisions of such sec. 221.255 as being pertinent to the inquiry you are making to wit:

"(1) Until July 1, 1935, with the approval of the banking review board, any bank may establish a receiving and paying station to replace an existing bank or a bank that has closed or ceased to do business since July 1, 1929, and in place of which no new bank or receiving and paying station has been opened * * *.

"(2) Whenever a receiving station shall be permitted under this section, the banking department shall in each case prescribe the rules and regulations under which it may conduct its operations.

"* * *

"(4) * * * Nothing in this act shall be construed as committing the state in any manner to a policy of allowing branch banking within its borders."

You note that prior to the adoption of ch. 362, Laws 1933, sec. 221.255 in subsec. (1) used only the words "receiving station," the words "and paying" having been brought in by said ch. 362, laws 1933; and you also note that ch. 362, Laws 1933, became effective July 9, 1933.

You further advise that prior to the effective date of ch. 362, Laws 1933 and pursuant to authority contained in sec. 221.255 of the statutes as originally enacted, which authority is set out in subsec. (2) as above quoted, the banking department of the state of Wisconsin, having authorized the establishment of a number of such receiving

stations has, pursuant to its power to prescribe the rules and regulations under which each such receiving station might conduct its operations, authorized the conduct of the following transactions: receiving and paying deposits, making loans, discounting paper, selling exchange, issuing drafts, etc., and that such receiving stations, pursuant to such authority and with the full knowledge and approval of the banking department and the banking board of review, have carried on and are now carrying on such banking functions.

You ask my opinion as to legality of such operations above described under the rules and regulations of the banking department adopted as indicated above.

The statutory provisions as they existed prior to the enactment of ch. 362, Laws 1933, constitute a definite and express authority for the establishment of receiving stations. They further constitute a definite and express authority to the banking department to prescribe the rules and regulations under which such receiving stations are to operate.

The legality of the operations of such receiving stations under the rules and regulations prescribed by the department, pursuant to such express statutory authority for the establishment of receiving stations and the prescribing of rules and regulations by the department, could hardly be questioned, and I assume would not be questioned except for the statement in subsec. (4), sec. 221.255 as above quoted, which provides:

"* * * Nothing in this act shall be construed as committing the state in any manner to a policy of allowing branch banking within its borders."

A branch bank may be defined as a division, department or separate part of a parent bank. In other words, the theory of branch banking contemplates the lodgment of discretionary power in the branch bank to carry on the same functions of banking as are carried on by the parent bank. In its broadest sense the term "bank" implies a place for the deposit of money, a place where bills and notes may be discounted and where money may be borrowed on mortgages, pawn or other securities. Some banks today

are also authorized to issue notes of their own which circulate in the community as currency and as a medium of exchange in place of gold and silver.

In its strictest sense the term "receiving station" implies an office or institution whose sole function is limited to that of receiving deposits. A "paying station" may be defined as an office or institution which pays out money and cashes checks.

We are of the opinion that under the existing law receiving and paying stations established pursuant to sec. 221.255 may be authorized to engage in the conduct of the following banking transactions as agents for the parent bank: receiving and paying deposits, making loans, discounting paper, selling exchange, issuing drafts, and the like. Your attention is also invited to the fact that such receiving and paying stations may not be authorized to engage in business as a bank of issue, that is, they may not issue notes of their own to circulate in the community as a medium of currency in place of gold and silver. In other words, a receiving and paying station under the Wisconsin statutes is vested with no discretionary power such as the parent bank is. It may make loans which are subject to approval by the parent bank and it may discount notes as agent for the parent bank.

If the rules and regulations adopted by the banking department of the state of Wisconsin are limited as above described such rules and regulations would be valid and neither the letter nor the spirit of the statement of the act that it should not be construed as "committing the state * * * to a policy of allowing branch banking" would be violated.

Taking the whole situation and the facts as evidenced by the department's action, I reach the conclusion that the declaration of policy must mean that the state has not adopted a policy of permitting branch banking unrestrictedly, that is, of permitting every banking institution in every location and under all circumstances to have branches, but that nevertheless the act does permit of the transactions necessarily incident to a receiving station as determined by the banking department in its rules and regula-

tions and that such transactions are none the less valid, although the word "branch" properly might be applied to the station conducting those operations.

Permit me to say, further, that the addition through ch. 362, Laws 1933, to the provisions of sec. 221.255 as created by ch. 8, Laws 1933, whereby the words "receiving station" were amended to read "receiving and paying station" adds, by express language in the statute, materially to the strength of the position indicated in the foregoing and strengthens the legality of the operations which are being conducted by the receiving stations established prior to the enactment of ch. 362, Laws 1933.

It is significant in this case that the legislature, by this second enactment, added the words "paying station," expressly extending the powers previously given, although at the time of enactment the rules and regulations of the banking department were permitting receiving stations to conduct the series of operations which you have noted. The fact that a law is re-enacted in identical phraseology, and *a fortiori* when this phraseology is strengthened, gives legislative sanction to the department rules and regulations which have construed that act. *Brewster v. Gage*, 280 U. S. 327, 337; *National Lead Co. v. United States*, 252 U. S. 140, 146; *United States v. Cerecedo etc. Compania*, 209 U. S. 337, 339; *United States v. G. Falk & Brother*, 204 U. S. 143, 152; *Bent v. Comm'r of Internal Revenue*, 56 Fed. (2d) 99, 102.

JGH

Municipal Corporations—Beer Licenses—Under ch. 207, Laws 1933, town has no authority to pass ordinance providing for different amounts under Class "B" retailers' licenses issued by such town.

Applicant for Class "B" retailer's license is entitled thereto where such applicant conducts tavern and has on premises gasoline pump where sale of such gasoline is merely incidental to tavern business and accommodation for customers.

Under ch. 207, Laws 1933, Class "B" retailer's license may not be granted to grocery store in which is located branch of United States post office.

Beer may not be sold within limits of town where governing body of town fails to take any action toward granting permits under ch. 207, Laws 1933.

July 18, 1933.

R. A. FORSYTHE,
District Attorney,
Hudson, Wisconsin.

You request the opinion of this department on the following questions raised in connection with ch. 207, Laws 1933.

Question 1. You state that a number of towns in St. Croix county have passed ordinances in which provision has been made for payment of different amounts under the Class "B" retailers' licenses which are to be issued under ch. 207, Laws 1933. You inquire whether this can be done or whether the license fee must not be uniform to cover all premises included within the Class "B" retailers' licenses.

Answer 1. It is the opinion of this department that the Class "B" retailer's license fee under ch. 207, Laws 1933, must be uniform. A town has no authority to pass an ordinance providing for different amounts under the Class "B" retailers' licenses to cover the various premises upon which beer is to be sold.

Question 2. You ask whether a Class "B" license may be granted to a tavern which has in connection with its business or on its premises one or more gasoline pumps. You state that these particular places are not filling sta-

tions in the true sense of the word but that gasoline and oil is sold as a matter of accommodation and as incidental to the tavern business.

Answer 2. Ch. 207, Laws 1933, (sec. 66.05 (10) (g) 1, Stats.), provides in part:

"* * * No such license shall be granted for any premises where any other business shall be conducted, in connection with said licensed premises except that such restriction shall not apply to a hotel, or to a restaurant not a part of or located in any mercantile establishment, or to a combination grocery store and tavern, or to a bowling alley or recreation premises or to a bona fide club, society or lodge that shall have been in existence for not less than six months prior to the date of filing application for such license."

It is manifest that under the express terms of the statute, with some exceptions not material here, no Class "B" retailer's license may be granted for any premises where *any other business* shall be conducted. However, this does not mean that gasoline or candies may not be incidentally sold on such premises as a part of the tavern business.

The word "business" is one of broad import. In its largest sense it would include any and every act or transaction or affair undertaken by an individual. *Troewert v. Decker,* (1881) 51 Wis. 46, 8 N. W. 26; *De Forth v. Wisconsin & M. R. Co.,* (1882) 52 Wis. 320, 9 N. W. 17.

However, in its restricted sense, the word "business" refers merely to the employment or trade or profession in which one is engaged. It is in its narrow or restricted sense that the word "business" is used in ch. 207, Laws 1933.

It is well known that in the past decade the various stores and business have materially broadened the scope of their activities. Thus, the modern drug store handles a variety of articles not found in the old-time drug store. Cameras, jewelry, books, chinaware, glassware, automobile accessories, are sold in drug stores today, as an accommodation and in connection with the sale of drugs and patented medicines. No one would seriously contend that the proprietor of the drug store is engaged in five or six businesses merely because he sells, as an incident to but not a

substantial part of his drug business, articles other than drugs and patented medicines. Likewise, the modern grocery store usually carries a line of pots and pans and other articles ordinarily found in a hardware store, motor oils, pastries, breads, and baked goods, and many other articles and merchandise not groceries. Many restaurants sell cigars, cigarettes, newspapers and candies as an incident of the restaurant trade. Other examples might be pointed out but it is sufficient to note here that what the legislature intended to prohibit was the carrying on of a real, substantial business enterprise on the same premises where a tavern is located.

The question whether the sale of a particular commodity, article, or merchandise constitutes a "business" within the meaning of ch. 207, Laws 1933, is one of fact for the governing board of the city, town, or village to pass upon. If the actual business of the applicant is that of conducting a tavern, and the sale of gasoline is merely incidental thereto, as an accommodation to his customers, then such person is entitled to a license. However, if the real business of the applicant is that of operator of a gasoline filling station, and the sale of beer is merely incidental thereto, the governing body of the city, town, or village must deny the applicant a Class "B" license.

Question 3. You also inquire whether or not a Class "B" license may be granted to a grocery store in which is located a branch of the United States post office.

Answer 3. Under ch. 207, Laws 1933, a Class "B" retailer's license may not be granted to a grocery store in which is located a branch of the United States post office.

Question 4. You inquire whether beer may be sold if a town fails to take any action toward granting of permits under ch. 207, Laws 1933.

Answer 4. Ch. 207, Laws 1933, (sec. 66.05 (10) (d) 1, Stats.), provides in part:

"No person shall sell, barter, exchange, offer for sale, or have in possession with intent to sell, deal, or traffic in fermented malt beverages or light wines, unless licensed as provided in this subsection by the governing board of the city, village, or town in which the place of business is located."

This act further provides (sec. 66.05 (10) (d) 2, Stats.):

"The governing body of every city, village and town shall have the power, but shall not be required, to issue licenses to wholesalers and retailers for the sale of fermented malt beverages or light wines within its respective limits, as herein provided, Said retailers' licenses shall be of two classes, to be designated as classes 'A' and 'B'."

Manifestly, under the express language above quoted, *no person may lawfully sell, barter, exchange or offer for sale any beer or light wines unless such person is licensed* by the governing board of the city or the town in which the place of business is located. Moreover, the governing body of every city, village or town, is empowered to *"but shall not be required to issue licenses"* to wholesalers and retailers for the sale of light wines and beer. Therefore, if the governing body of the city, village or town refuses or fails or neglects to take any action authorizing the issuance of licenses to wholesalers and retailers for the sale of beer and light wines, no person may lawfully sell beer or light wines in such city, village or town. The statute is plain on this point and the legislature obviously intended that the local community should have some degree of discretion in determining whether it will permit the sale of light wines and beer within its limits.

JEF

Municipal Corporations—Beer Licenses—Under ch. 207, Laws 1933, governing body of city, village and town may, in its discretion, refuse to grant licenses to sell beer and light wines, and without licenses beer and light wines may not lawfully be sold.

July 18, 1933.

JOHN P. MCEVOY,
Assistant District Attorney,
Kenosha, Wisconsin.

You request the opinion of this department upon the following statement of facts:

"One of the town boards of our county does not desire to pass a licensing ordinance at this time, feeling that they

prefer to put it to a vote of the electors at the spring election as provided by the new license law. In the meantime they have no ordinance prohibiting the sale of beer, light wines, or any intoxicating beverages.

"A search of the records of the town discloses that the only local option ever exercised was in 1894, when the electors voted against granting saloon licenses, but it does not appear that any prohibitory ordinance has ever been passed.

"My question is: Have they, under the police power, or any other existent statute, the authority to pass an ordinance prohibiting the sale of legal beer and wines?"

It is the opinion of this department that, under the express language of ch. 207, Laws 1933, the governing body in any town may refuse to grant licenses for the sale of light wines and beer within its limits and that no person may lawfully sell light wines and beer unless such person has been granted a license by the governing body of the city, town or village.

Ch. 207, Laws 1933, (sec. 66.05 subsec. (10) par. (d), subd. 1, Stats.), provides in part:

"No person shall sell, barter, exchange, offer for sale, or have in possession with intent to sell, deal, or traffic in fermented malt beverages or light wines, unless licensed as provided in this subsection by the governing board of the city, village, or town in which the place of business is located."

This act further provides (sec. 66.05 (10) (d) 2, Stats.):

"The governing body of every city, village and town shall have the power, but shall not be required, to issue licenses to wholesalers and retailers for the sale of fermented malt beverages or light wines within its respective limits, as herein provided. Said retailers' licenses shall be of two classes, to be designated as classes 'A' and 'B'."

Manifestly, under the express language above quoted, no person may lawfully sell, barter, exchange or offer for sale any beer or light wines unless such person is licensed by the governing board of the city or village or the town in which the place of business is located. Moreover, the governing body of every city, village or town, is empowered to *"but shall not be required, to issue licenses"* to wholesalers and retailers for the sale of light wines and beer.

Therefore, if the governing body of the city, village or town refuses or fails or neglects to take any action authorizing the issuance of licenses to wholesalers and retailers for the sale of beer and light wines, no person may lawfully sell beer or light wines in such city, village or town. The statute is plain on this point, and the legislature obviously intended that the local community should have some degree of discretion in determining whether it will permit the sale of light wines and beer within its limits. Hence, until and unless the governing body in the city, village or town within its discretion grants licenses to sell beer in such community, beer may not lawfully be sold.
JEF

Constitutional Law—Taxation—Tax Sales—Ch. 288, Laws 1933, is constitutional and not violative of art. VIII, sec. 1, uniformity clause of Wisconsin constitution.

Sec. 3, ch. 288, Laws 1933, permits counties to waive penalty and interest only on those tax certificates which it holds for its own account and not those which represent special assessment taxes and are held by county in separate accounts as collecting agent for improvement bond and contractor's certificate holders.

Sec. 1, ch. 288, Laws 1933, includes special assessment taxes and is not violative of art. VIII, sec. 1, Wis. Const.

County may waive penalty and interest only on 1931 taxes. County may waive penalty and interest provided such taxes are paid before date set by county, though not later than July 1, 1934.

Ch. 244, Laws 1933, applies to all redemptions to be made after passage of act and is not unconstitutional impairment of contracts.

July 18, 1933.

OLIVER L. O'BOYLE, *Corporation Counsel,*
Milwaukee County,
Milwaukee, Wisconsin.

You submit for the consideration of this department with a request for an opinion thereon several questions, in re-

gard to ch. 288, Laws 1933, which will be answered seriatim.

Ch. 288, Laws 1933, reads as follows:

"SECTION 1. Taxpayers who pay their delinquent taxes on real estate for the year 1932 on or before the fourth Monday in June, 1933, shall be entitled to pay such taxes without penalty, interest or other charges except the fee for advertising the same at tax sale, regardless of whether or not they filed an affidavit for the extension of the time of payment pursuant to chapter 16, laws of 1933. Taxpayers who prior to the effective date of this act paid their delinquent taxes on real estate for the year 1932 shall be entitled to a refund of all amounts paid as penalty, interest, or other charges on such delinquent taxes except the fee for advertising the same at the tax sale.

"SECTION 2. Any taxes of the year 1932 that are paid under the provisions of section 1 of this act to any county treasurer up to and including the fourth Monday in June, 1933, less the amount due for advertising the same at tax sale, shall be paid over to the town, city or village wherein such taxes were assessed. The town, city or village treasurer shall on July 15, 1933, make a supplemental settlement with the county treasurer for the part of such taxes due the county as county taxes. Such settlement shall be made as provided in subsection (2) of section 74.15 of the statutes.

"SECTION 3. The governing body of any county or city of the first class, may, but is not required to, waive the payment of all or any part of the interest and penalties on delinquent taxes on real estate for the years 1931 and 1932 for which such county or city holds the tax certificates, provided such taxes are paid before July 1, 1934. In no event shall any person be required to pay interest on such taxes paid before July 1, 1934 at a rate in excess of eight per cent per annum."

1. You state that "question has been raised as to the constitutionality of sec. 3, that is to say, whether it is a violation of art. VIII, sec. 1 of the Wisconsin constitution relating to the uniformity of taxation" since it will relieve only those whose tax certificates are owned by the county.

It is the opinion of this department that sec. 3, ch. 288, Laws 1933, is constitutional legislation.

The Wisconsin constitution prescribes that;

"The rule of taxation shall be uniform, * * *" Art. VIII, sec. 1, Wis. Const.

At the outset, it may be noted that there is a presumption in favor of the constitutionality of the law. Acts of the legislature are not declared unconstitutional unless they are plainly so beyond a reasonable doubt. *State ex rel. Blockwitz v. Diehl,* 198 Wis. 326, 223 N. W. 852.

Ch. 288, Laws 1933, falls within the rule that the legislature has power to make reasonable classifications in its taxation provisions. As was said in *Nash Sales, Inc. et al. v. City of Milwaukee, et al.,* 198 Wis. 281, 288, citing from *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 642–643, 655, 108 N. W. 557:

" 'Under our constitution, it must be remembered, there is the amplest power on the part of the legislature to exempt an entire class of property from taxation, and to make such class very narrow, even excluding from the benefits accorded to the members thereof those owning property of the same general class, so long as the character of that owned by those of the sub-class is so far different from that owned by others, as, within the boundaries of reason at least, to suggest necessity or propriety, having regard to the public good and the constitutional object to be attained, and limitations in respect thereto, of substantially different legislative treatment. . . . The discretion of the legislature in this field is so broad that it is not competent for the court to mark the constitutional limitations of it other than at the farthest one might go without transcending all reason.' "

It is well known that the reason the legislature by ch. 288, Laws 1933, empowered the counties to waive interest on only those tax certificates held by the county was that it would have been an unconstitutional abrogation of contracts to have done so in regard to those tax certificates held by individuals. That certainly is a valid reason for the classification that was made.

2. Your second question is stated in the following language:

"Secondly, what is meant by the language 'for which such county * * * *holds* the tax certificates'? The county bids in all taxes for which there are no other bids. This includes special assessment taxes for the payment of improvement bonds, contractors' certificates, etc. As we construe the law, this language is intended to cover only

certificates bought in by the county for its own account and would not apply to special taxes."

We believe that your construction of the law is correct. Under sec. 62.21, Stats., special assessment taxes may be levied to pay improvement bonds or contractors' certificates. These taxes when collected by the city or county are to be paid directly to the bond or certificate holder. See XX Op. Atty. Gen. 133, XVII Op. Atty. Gen. 201, XVI Op. Atty. Gen. 775, XIV Op. Atty. Gen. 382. Any law which would allow the county to waive penalty and interest on such special assessment taxes would be an unconstitutional impairment of contract rights. Wis. Const., art. I, sec. 12. However, sec. 3 of ch. 288, Laws 1933, is capable of another construction which can save it from the charge of unconstitutionality and which construction therefore must be adopted. *City of LaCrosse v. Elbertson,* 205 Wis. 207, 237 N. W. 99. That is, the language above quoted can be held to cover only certificates bought in by the county for its own account. It is our opinion, therefore, that sec. 3, ch. 288, Laws 1933, permits counties to waive penalty and interest only on those tax certificates which it holds for its own account and not those which it holds merely as a collecting agent for the bond and certificate holders.

3. Your third question is quoted as follows:

"Referring to section I of this act, waiving interest and penalty on delinquent 1932 taxes if paid on or before the fourth Monday of June, 1933, how does this affect special taxes levied for the payment of contractors' certificates or special improvement bonds that have been sold on the market? Would a waiver of interest and penalty on such special taxes violate the obligations of contract as far as the purchasers of these securities are concerned?"

Sec. 1, ch. 288, Laws 1933, applies to all taxes. Special assessment taxes are not excepted and must be included within the purview of the law. We do not believe there is any violation "of the obligation of contract" by this law. Sec. 1, ch. 288, Laws 1933, merely changes the method and procedure of collecting the taxes, by postponing the date when penalty and interest shall become due. No tax certificates have yet been issued as to such taxes perfect-

ing the rights of the contractor certificate and improvement bond holders to the penalty and interest. A change in the manner of collection of the taxes which leaves a substantial remedy is properly allowable. *Von Baumbach v. Bade,* 9 Wis. 559, *Curtis v. Morrow,* 24 Wis. 664. Furthermore the contractor certificate holder and improvement bond holder has only the right to have the special assessment taxes collected by "the same proceedings * * * as in case of other taxes" under sec. 62.20, Stats.

4. Your next question follows:

"Would a county board have authority to waive delinquent 1931 taxes but not 1932? The answer to this would appear to be in the affirmative."

We agree that the answer to this question should be in the affirmative. The county, by sec. 3, ch. 288, Laws 1933, is authorized to waive "all or *any part* of the interest and penalties on delinquent taxes on real estate for the years 1931 and 1932." The language "any part" is a sufficient authorization to a county to waive penalty and interest on 1931 taxes only.

5. Your fifth question reads:

"Would the county board, under the provisions of section 3, have the right to ordain that interest and penalty on delinquent 1931 and 1932 taxes might be waived, assuming such taxes were paid *on or* before November 1, 1933; that if not so paid, interest and penalty would run from that date?"

We are of the opinion that this question must also be answered in the affirmative. We believe the legislature by the following quoted words of sec. 3, ch. 288, Laws 1933, intended to grant the counties a wide exercise of discretion within the limits set by the act. "* * * may, but is not required to, * * * all or any part * * * paid before July 1, 1934."

6. Your final question follows:

"Turning now to ch. 244, creating subsec. (2) of sec. 75.01 of the statutes and providing for the redemption of land sold for taxes in instalments of not less than ten dollars or in any multiple of five dollars, do you consider this act retroactive so as to apply to redemption of 1931 and private taxes?"

Ch. 244, Laws 1933, was made to take effect upon passage and publication. It was published on June 13, 1933. Since a law takes effect the day after publication if it says it shall take effect "upon passage and publication" (X Op. Atty. Gen. 1099; XVIII Op. Atty. Gen. 615, 616), ch. 244, Laws 1933, became effective on June 14, 1933. Although that act does not in express terms make it retroactive, it obviously applies to all redemptions of land after the effective date of the law. No exceptions are contained in sec. 75.01 (2) created by the act. We find no difficulty in holding that it applies to all redemptions taking place after the effective date of the act. As to the argument that making it apply to present holders of tax certificates, requiring them to accept payments in instalments, is an impairment of contracts, it may be said that this again is merely a change in the procedure and method of collecting the sums due and is valid and constitutional.

JEF

Municipal Corporations—Beer Licenses—Wholesaler's license must be secured from governing body of city, village or town wherein such wholesaler maintains place of business.

No wholesaler's license is required from municipalities wherein deliveries are made.

If residence of wholesaler is in fact place of business of wholesaler, then license is required from municipality wherein such residence is located; otherwise no wholesaler's license is required for such residence, even though occasional orders are taken from residence.

July 18, 1933.

THEODORE A. WALLER,
District Attorney,
Ellsworth, Wisconsin.

You request the opinion of this department upon the following statement of facts:

"* * * The distributing point or warehouse may be in the village of Ellsworth and the deliveries are made in

various towns as well as villages and cities in the county. Is only one license required of the wholesaler, being the license in the municipality where the warehouse is kept?

"* * * Supposing the distributor or wholesaler resides in one municipality and takes telephone orders at the residence in that municipality but the distributing point or warehouse is in a different municipality. What would the distributing point be, or would there be more than one license required? Could the town require a license where the wholesaler resides and, if so, would the town have to show that orders were taken at the residence? Or is only one license required by the municipality to be paid to the municipality where the distributing point or warehouse is?

"If some of the beer is distributed from the residence in one municipality and some is distributed from another point in another municipality, would there then be two licenses required, one by each municipality?"

A wholesaler is defined in ch. 207, Laws 1933, (sec. 66.05, subsec. (10), par. (a), subd. 3, Stats.), as follows:

" 'Wholesaler' shall mean any person, firm or corporation, other than a brewer or bottler, who shall sell, barter, exchange, offer for sale, have in possession with intent to sell, deal or traffic in fermented malt beverages or light wines as herein defined, in quantities of not less than four and one-half gallons at one time, not to be consumed in or about the premises where sold."

The provision of the act relating to wholesalers' licenses reads as follows (sec. 66.05 (10) (e), Stats.):

"Wholesalers' licenses may be issued only to domestic corporations or to persons of good moral character who shall have been residents of this state continuously for not less than one year prior to the date of filing application for said license. Said licenses shall authorize sales of fermented malt beverages or light wines only in original packages or containers and in quantities of not less than four and one-half gallons at any one time, not to be consumed in or about the premises where sold. The fee for a wholesaler's license shall not exceed twenty-five dollars per year or fractional part thereof."

The general requirements relating to licenses reads as follows:

"* * * A separate license shall be required for each place of business. Said licenses shall particularly describe

the premises for which issued, shall not be transferable, and shall be subject to revocation for violation of any of the terms or provisions thereof or of any of the provisions of this subsection." (Sec. 66.05 (10) (d) 4, Stats.)

It is the opinion of this department that a wholesaler's license must be secured for each place of business conducted by such wholesaler within this state. The law specifically provides:

"* * * A * * * license shall be required for each place of business."

Thus, the wholesaler who has a place of business, such as an office or warehouse in the village of Ellsworth, must secure a wholesaler's permit from the governing board of that village. No wholesaler's license is required from the various cities, villages and towns wherein deliveries are made. However, if such wholesaler, in addition to his warehouse, maintains a place of business in his residence, and orders are taken and a general business is conducted from such residence, then a wholesaler's license is also required from the municipality in which such residence is located. The occasional taking of an order from the residence of the wholesaler, not as a regular matter but only incidentally, would probably not be sufficient to label the residence a place of business for which a wholesaler's license would be required. Nor would the occasional distribution of beer from the residence constitute such residence as a place of business. However, this is a question of fact for the governing board of the city, village or town to determine. If the facts warrant, a wholesaler's license may be required for the residence where orders are taken or beer is distributed.

JEF

Automobiles—Law of Road—Wisconsin Statutes—Sec. 85.01, subsec. (4), par. (cm), Stats., is impliedly repealed by sec. 85.01 (4) (c) as amended by ch. 414, Laws 1933.

As to trucks owned and operated by farmer for farm uses, no distinction exists between trucks always such and converted trucks.

July 20, 1933.

THEODORE DAMMANN,
Secretary of State.

You call our attention to chs. 364 and 414, Laws 1933, and inquire whether the weight limit of one and one-half tons, referred to in sec. 85.01, subsec. (4), par. (cm), Stats., relating to farm trucks, applies to trucks which were formerly passenger automobiles, or whether the weight of these converted trucks is unlimited.

By ch. 364, Laws 1933, the legislature amended sec. 85.01 (4) (c) of the Wisconsin statutes relating to registration fees for trucks used exclusively for farm purposes.

By sec. 2 of said ch. 364, sec. 85.01 (4) (cm) of the statutes was created, which provided for a new classification of trucks known as "farm trucks." The said sec. 85.01 (4) (cm) provides, according to sec. 2, ch. 364, Laws 1933:

"A new paragraph is added to subsection (4) of section 85.01 to read: 85.01 (4) (cm) FARM TRUCKS. For the registration of 'farm trucks', which are defined as trucks having a gross weight of not more than one and one-half tons, or trucks which are passenger automobiles that have been converted into trucks, which are owned and operated by a farmer exclusively for farm use and not for commercial purposes, a fee of five dollars. * * *."

By ch. 414, Laws 1933, the legislature again amended sec. 85.01 (4) (c) of the statutes, making no reference whatsoever to ch. 364, Laws 1933. The said sec. 85.01 (4) (c) as found in ch. 414, contains the following language:

"* * * The registration fee for any motor truck or motor delivery wagon, having a gross weight of two tons or less, owned and operated by a farmer for farm use and not for commercial purposes, shall be five dollars. * * *"

Sec. 85.01 (4) (c) as found in ch. 414, quite obviously deals with the same subject matter as the same section found in ch. 364. This section as found in ch. 414 also covers the subject matter dealt with in sec. 85.01 (4) (cm), enacted by ch. 364.

Ch. 364 created the class known as "farm trucks" and provided that those trucks owned and operated by a farmer for farm use and not for commercial purposes might be of two classes, namely, (1) those having a gross weight of not more than one and one-half tons, and (2) those which were converted from passenger automobiles into trucks without regard to the weight.

Sec. 85.01 (4) (c) as found in ch. 414, nowhere uses the term "farm trucks" or requires a definition of such a class. Sec. 85.01 (4) (c) as found in ch. 414 also quite obviously covers the subject of trucks owned and operated by a farmer for farm use and not for commercial purposes. The weight limit is increased from one and one-half to two tons and no distinction is made between trucks which always existed as such, and those which formerly were passenger automobiles.

The provisions of sec. 85.01 (4) (c) as found in ch. 414 and sec. 85.01 (4) (cm) in ch. 364, are distinctly conflicting.

Under sec. 85.01 (4) (cm) a farm truck which always existed as a truck, but had a weight not in excess of one and one-half tons, required the same registration fee as a converted truck, irrespective of the weight of the latter or its hauling capacity.

It is possible that the legislature sought to remedy this inequality by increasing the weight limit of the trucks to two tons and by removing the distinction between trucks which always existed as such and converted trucks.

It is our opinion, therefore, that sec. 85.01 (4) (c) by implication repeals sec. 85.04 (4) (cm), and that no distinction whatsoever now exists between a converted truck and any other kind.

It is true that repeals by implication are not favored and that statutes whenever possible should be construed so as to harmonize. In the present case, however, no rea-

sonable construction will permit us to bring these statutes into harmony. The later law, therefore, prevails over the earlier. *State ex rel. Hayden v. Arnold,* 151 Wis. 19; *State ex rel. Trustees LaCrosse Pub. Library v. Bentley,* 163 Wis. 632; *State ex rel. Boddenhagen v. C. M. St. P. R. Co.,* 164 Wis. 304; *Jones v. Broadway Roller Rink Co.,* 136 Wis. 595; *State ex rel. M. A. Hanna Dock Co. v. Willscuts,* 143 Wis. 449.

See also *City of Madison v. So. Wis. R. Co.,* 156 Wis. 352; *State ex rel. Carter v. Rosenthal,* 179 Wis. 243.

JEF

Bonds—Taxation—Motor Vehicle Fuel Tax—Under ch. 312, Laws 1933, state treasurer may accept personal bond of county highway committee members or other security furnished by county not in form of bond.

July 20, 1933.

ROBERT K. HENRY,
State Treasurer.

You present the question whether it is necessary to require a bond from the county or the county highway commissioner to protect the state in the collection of the gasoline tax, where the county is required to take out a license before it can do business as a wholesaler in gasoline.

The furnishing of a bond would involve additional expense to the county, while the state is almost certain of being able to collect the tax in one way or another.

Sec. 78.01, subsec. (12), Stats., as found in ch. 312, Laws 1933, relating to motor vehicle fuel tax, provides:

" 'Wholesaler' means and includes any person (including the state of Wisconsin and *any political subdivision thereof* * * *)."

Sec. 78.03 (6), Stats., provides:

"No license to act as a wholesaler of motor fuel shall issue upon any application until the person applying therefor has filed a surety bond with the state treasurer, payable to the state of Wisconsin, in such amount as shall be fixed by the state treasurer except that the amount shall

never be less than the average amount of tax paid by such wholesaler during one month. * * * In lieu of such bond, the applicant may file with the state treasurer good and sufficient security or a personal bond in such form and amount as the state treasurer may require. Provided that the bond *or any other form of security* or surety required by the state treasurer shall not exceed twice the average amount of tax paid by such wholesaler in one month. * * *"

A county is a political subdivision of the state and by specific enumeration is included in the word "wholesaler" as used in the motor fuel tax law.

Sec. 78.03 (6), Stats., however, provides that the state treasurer may permit the applicant to furnish a personal bond or other security in place of the surety bond ordinarily required. The acceptance of the personal bond or other security in place of the surety bond is discretionary with the state treasurer, and, according to the terms of the statute, is to be "in such form and amount as the state treasurer may require."

It will thus be seen that if the county is able to furnish to the state treasurer such security as the state treasurer deems sufficient it is unnecessary to furnish either a personal or a surety bond. If the state treasurer, moreover, deems a personal bond furnished by the members of the county highway committee as sufficient, neither a surety bond nor other security of any form need be required.
JEF

Taxation—Beer Tax—Where Wisconsin wholesaler, upon receiving order for beer from Illinois customer, transmits such order to Wisconsin brewer with directions to send order for beer through to Illinois customer, such beer is exempt from tax imposed by ch. 361, Laws 1933.

July 20, 1933.

ROBERT K. HENRY,
State Treasurer.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts:

Sears & Diehl, located at Lake Geneva, Wisconsin, are engaged in the business of selling beer at wholesale in a territory which includes part of the state of Illinois. Upon receipt of an order for beer from one of its Illinois customers it places the order with the Wisconsin brewer marketing the brand of beer covered by the order and the brewer then makes shipment direct to the Illinois customer under a bill of lading designating such customer as consignee. All beer sold to such Illinois customers is for consumption in Illinois.

If Sears & Diehl have to pay the Wisconsin tax on sales effected as above set forth to Illinois customers, they will lose the Illinois market, because they will not be in position to compete with brewers and wholesalers located in Illinois and other states who need pay only the Illinois tax whereas Sears & Diehl will have to pay both the Wisconsin tax and the Illinois tax.

The tax in question is authorized by ch. 361, Laws 1933, providing in part (in sec. 2), as follows:

"**139.01. An emergency** occcupational tax is assessed, imposed and levied until July 1, 1935, upon the sale, exchange, offering or exposing for sale, having in possession with intent to sell, or removal for consumption or sale of fermented malt beverages or light wines, other than for shipment in interstate or foreign commerce or for shipment or sale by a brewer to a bottler or sales company. Such tax is levied and shall be collected at the rate of one dollar per barrel of thirty-one gallons, and at a proportionate rate for any other quantity or for fractional parts thereof."

Whether the transaction is subject to the tax would seem to be governed by the interpretation placed upon that part of sec. 139.01, Stats., as created by ch. 361, excepting beer from the tax when sold "for shipment in interstate * * * commerce" beyond the borders of this state.

The language of this section is broad and particular notice should be taken of the fact that it is not limited to cases in which the brewer *sells* in interstate commerce but includes also those in which the brewer sells for shipment in interstate commerce.

It seems plain that this language was selected with dis-

crimination and was intended to cover the precise case under consideration, where shipment by the brewer in interstate commerce was made upon a sale by a dealer other than the brewer. Undoubtedly the legislature intended to avoid burdening wholesalers located in Wisconsin, as well as brewers, with the tax in those cases where the beer was sold for consumption in some state other than Wisconsin.

This construction is still more persuasive when consideration is given to the validity of the statute under the commerce clause of the federal constitution.

If a different construction were adopted and an occupational tax were assessed against the sale, the law providing for the tax would be invalid as an unlawful imposition upon interstate commerce. *Superior Oil Co. v. Mississippi,* 280 U. S. 390; *Sonnehorn Brothers v. Cureton, Attorney General of the State of Texas,* 262 U. S. 506; *Carson Petroleum Company v. Vial, Sheriff and Tax Collector,* 279 U. S. 95; *Interstate Transit, Incorporated, v. Lindsey, County Court Clerk,* 283 U. S. 183; *East Ohio Gas Co. v. Tax Commission of Ohio,* 283 U. S. 465.

Up to this point we have viewed the tax only in its effect upon the wholesaler or brewer. Viewing the transaction from the standpoint of the purchaser, the purchaser may complain that he is compelled to pay the Wisconsin and Illinois taxes on the sale and that having made the purchase in interstate commerce he is entitled to the protection of the federal constitution on the ground that he has a right to buy a product for shipment and to have it shipped in interstate commerce without being required to pay a tax upon the purchase. *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282; *Lemke, Attorney General v. Farmers Grain Co.,* 258 U. S. 50; *Schaefer, Attorney General v. Farmers Grain Co.,* 268 U. S. 189.

The act should not be given a construction which will render it unconstitutional and any doubt on this score should be resolved in favor of an interpretation which will avoid the question of constitutionality. *Filipkowski v. Springfield Fire & Marine Insurance Company,* 206 Wis. 39.

The transaction in question, therefore, not only should be exempt from the tax because of the obvious intention

of the act to except shipments "in interstate * * * commerce" but should be exempted for the further reason that any tax measured by the sale would be invalid as an unlawful burden upon interstate commerce.
JEF

Taxation—Beer Tax—Under provisions of ch. 361, Laws 1933, state treasurer has power to designate denominations of stamps to suit containers most commonly used for beers and wines and is under no obligation to furnish denominations for all odd sizes of containers used in industry.

July 20, 1933.

ROBERT K. HENRY,
State Treasurer.

You request the opinion of this department on the following statement of facts:

"In accordance with the provisions of ch. 361, Laws of 1933, we have provided stamps of the following denominations, to suit the containers most commonly used:

"Full barrel
"Half barrel
" ¼ barrel
" ⅛ barrel
"Case of 24/12 oz. bottles
" " " 6/12 oz. "
" " " 12/12 oz. "
" " " 24/14 oz. "
" " " 12/14 oz. "
" " " 12/10 oz. "
" " " 36/12 oz. "

"We now find that various wine companies and foreign brewers are putting out packages containing four 11½ oz. bottles, twelve 11 oz. bottles, twelve 16 oz. bottles, twelve 25 oz. bottles, twelve, twenty-five and fifty 13 oz. bottles, etc. We have not provided stamps for these size cases."

You ask the following question: Is it necessary for the state treasurer to provide additional stamps for the odd

sizes above mentioned and other odd sizes which may be used, or may the state treasurer, under the power contained in ch. 361, Laws 1933, adopt reasonable rules and regulations fixing the denominations of the stamps and requiring the brewers, bottlers, wholesalers, or retailers to use the size bottles which will conform to the denominations of stamps issued by the state treasurer?

Subsec. (2), sec. 139.03, Stats. (ch. 361, Laws 1933), provides in part:

"The emergency occupational tax imposed in section 139.01 shall be paid by the purchase of stamps from the state treasurer, *of such design and denominations as shall be designated by him.* Each brewer, bottler, wholesaler or retailer shall affix at the time of sale (unless previously affixed thereto) to each barrel, keg, case, or other container in which fermented malt beverages or light wines shall be packed for sale within the state except sales by brewers to bottlers a stamp so purchased, which stamp shall be of proper denomination. * * *"

Subsec. (11), sec. 139.03 (ch. 361, Laws 1933) provides in part:

"The state treasurer shall enforce and administer the provisions of this chapter * * *. He shall collect and keep a record of all taxes collected and stamps sold, and shall issue such rules and regulations as may be necessary to carry out the provisions of this chapter."

Under the provisions above quoted we are of the opinion that the state treasurer may designate the denominations of stamps to be issued under ch. 139, Stats. Thus the state treasurer may provide for stamps in denominations to suit the containers most commonly used and the various brewers, bottlers, and wine merchants would either be required to eliminate the various odd sizes of containers now used by some of them and in lieu thereof use the containers for which the proper denominations of stamps have been issued by the state treasurer, or if the odd size containers are used, use a stamp of sufficient denomination to pay the tax thereon. It is manifest that the state treasurer may issue reasonable rules and regulations to carry out the provisions of ch. 139, Stats. (ch. 361, Laws 1933), and that the state treasurer may reasonably limit the denomina-

tions of stamps to be issued thereunder. In other words, the state treasurer is under no obligation to issue a denomination of stamp for every odd-sized container used by brewers, bottlers, or wholesalers.

In view of the foregoing it is our opinion that it is not necessary for you, as state treasurer, to provide additional denominations of stamps for the odd-sized containers used by the brewers, bottlers, and wholesalers today and that the issuance of reasonable denominations of stamps by the state treasurer is a compliance with the provisions of the law.

JGH

Tuberculosis Sanatoriums—Where appropriation is not sufficient to pay rate of seven dollars per week under sec. 50.07, Stats., for maintenance of each patient, pro rata reduction must be made to patients in state.

July 22, 1933.

BOARD OF CONTROL.

"What is the proper rate or rates the state will pay toward the care of tuberculous in the several county sanatoria for the period of July 1, 1932 to June 30, 1933, in the bills submitted in accordance with section 46.10?"

Sec. 20.18, subsec. (3), Stats., as contained in ch. 140, Laws 1933, reads thus:

"On July 1, 1933, and annually thereafter, five hundred fifty thousand dollars for state aid of tuberculosis sanatoria to be expended as provided in section 50.07 and subsection (2) of section 58.06 of the statutes."

There have been no changes in the rates in the statute and they are similar to those heretofore made. Under sec. 50.07, the rate of compensation is seven dollars per week. The only change made in the law that while under the previous statute the appropriation was an unlimited appropriation, there is now an appropriation for five hundred fifty thousand dollars and the only affect that this has is

that should the appropriation be insufficient to pay the seven dollars in each case a pro rata reduction must be made to the different patients in the state.
JEF

Automobiles—Law of Road—Local authorities have power, under secs. 85.40 and 85.43, Stats., to increase maximum speed limit of automobiles on highways but not to decrease it.

July 22, 1933.

CHARLES A. COPP,
District Attorney,
Sheboygan, Wisconsin.

In your communication of July 7 you state that you have been appealed to by the chairman of one of the towns in your county with reference to speed on highways through said town, the question being whether the town board has power to set a speed limit. You state that you have examined sections 85.40 and 85.43 and have come to the conclusion that the board has power only to increase speed limits on arteries for through traffic.

In sec. 85.43, Stats., we find the following:

"Local authorities may by ordinance increase the speeds specified in subsections (6), (7) and (8) of section 85.40."

Subsec. (6), (7) and (8) of sec. 85.40 contain a provision for the maximum speed limit on highways in business districts at fifteen miles per hour, in residence districts at twenty miles per hour and on highways not in a business or residence district within the incorporated limits of a city or village at twenty-five miles per hour, and also has a specific provision in each subsection that local authorities may increase the speed as provided in sec. 85.43.

Your conclusion, therefore, is correct and the local authorities, as specified in said statute, have only the power to increase the maximum speed limit and have no authority to make it less than the maximum fixed by statute.
JEF

Copyrights—Legislature—Resolutions—Statutes of state and Resolution No. 72, A., passed by 1933 legislature, do not give superintendent of buildings and grounds and state chief engineer authority to purchase copyright and supply of guide books to capitol on hand and sell them to visitors at capitol.

July 22, 1933.

CHARLES A. HALBERT, *State Chief Engineer, Bureau of Engineering.*

You have directed our attention to Resol. No. 72, A., and you inquire whether the bureau of engineering can legally purchase the copyright and supply of guide books on hand and sell the same to visitors in accordance with the resolution above referred to. Said resolution, passed by the assembly of 1933, says in part:

"RESOLVED by the assembly, That the superintendent of buildings and grounds and the state chief engineer be and hereby are requested to make a study of the feasibility of publishing an official booklet descriptive of the state capitol to be sold to visitors at cost and at a price not to exceed fifteen cents."

You direct our attention to an official opinion in XVII Op. Atty. Gen. 105 which holds that the superintendent of public property has not the power to purchase the copyright and sell guide books of the capitol. In that opinion it was stated that an examination had been made of all the statutes prescribing the duties of the superintendent of public property and that in all cases where he had been selling statutes, laws, pamphlets, maps, etc., a statute was found having express provision authorizing it. There were no statutes found authorizing publication of a guide book.

You will note that this is not even a joint resolution of both houses of the legislature, but only a resolution of the assembly. That this has not the force of law has been repeatedly held by courts having constitutions similar to ours and also by this department. See XVII Op. Atty. Gen. 166.

A good discussion of the proposition is also found in IV Op. Atty. Gen. 1076, VIII Op. Atty. Gen. 663, XXI Op. Atty. Gen. 52, 311, 372, VI Op. Atty. Gen. 329.

34 Cyc. 1667–1668, quoted in VIII Op. Atty. Gen. 663, 664, reads thus:

A resolution is

"Merely the form in which the legislative body expresses an opinion; not a law. * * * Merely a suggestion or direction in writing, * * * ordinarily passed without the forms and delays which are generally required by constitutions * * *."

A Texas case expresses the thought still more clearly. It is there stated:

"The chief distinction between a resolution and a law seems to be that the former is used whenever the legislative body passing it wishes to merely express an opinion as to some given matter or thing, * * * while by the latter it is intended to permanently direct and control matters applying to persons or things in general." *Conley v. Texas Div. U. D. of Confederacy,* (Tex.) 164 S. W. 24, 26.

This resolution simply makes a request to the superintendent and the state chief engineer to make a study of the feasibility of publishing an official booklet descriptive of the state capitol, to be sold to visitors at cost and at a price not to exceed fifteen cents. It does not pretend to give any authority to these officials to publish or to purchase a copyright. This resolution cannot add anything to the duties of these officials that have not been given to them by statute either expressly or impliedly.

I am of the opinion that these officials may inquire as to the feasibility of purchasing these copyrights and publishing the same, but cannot act upon it, but can report the matter to the next legislature. There is no authority in the statute at the present time authorizing the officials named to publish a capitol guide at cost, neither does this resolution have the effect of giving them that power.

You are therefore advised that the said officials cannot purchase the copyright or the supply of guide books on hand and sell the same to visitors of the capitol.

JEF

Courts—Public Officers—Industrial Commission—Expense of bringing action upon wage claim assigned to industrial commission, which action is prosecuted by district attorney, is payable out of general fund of state.

July 22, 1933.

INDUSTRIAL COMMISSION.
Attention A. J. Altmeyer, *Secretary.*

You request an opinion from this department upon the subject of the cost and expenses of an action brought by the district attorney upon the request of the industrial commission.

From the facts as stated in your letter, it appears that the industrial commission took an assignment of a wage claim under the provisions of sec. 101.10, subsec. (14), Stats., and that the district attorney of the proper county, upon the request of the commission, as provided in sec. 101.24 (2), brought action upon such claim. Judgment was rendered in favor of the industrial commission and execution was issued thereon. There could be found, however, no property subject to seizure on execution. The question, therefore, arises as to who or what funds shall bear the cost and expense of such action.

There appear to be no provisions in the Wisconsin statutes dealing at any length with the expenditure of moneys by the industrial commission for the purpose of prosecuting actions to enforce laws which come within the province of that commission as provided by sec. 101.24.

There is a specific provision covering legal expenses incurred by the attorney general in the prosecution or defense of any action or proceeding in which the state may be interested. The said provision, namely, sec. 20.08 (2), would in no event apply to the case in question, since the action was brought by the district attorney and not the attorney general.

As the action in question, however, was a part of the functions of the industrial commission, the expense therefor would seem to fall within the provisions of sec. 20.57, Stats., which provides in part:

"There is appropriated from the general fund to the industrial commission:

"(1) Annually, beginning July 1, 1931, three hundred thirty-eight thousand dollars, for the execution of its functions. * * *."

It is the opinion of this department, therefore, that the expense of bringing an action upon a wage claim assigned to the industrial commission, which action is prosecuted by the district attorney, is payable out of the general fund of the state.

JEF

Minors—Legal Settlement—Although divorced wife is given custody of children, still legal settlement of those children follows that of father if he has one in state.

July 22, 1933.

EARL F. KILEEN,
District Attorney,
Wautoma, Wisconsin.

In your letter of July 14 you gave the following statement of facts:

"Mrs. A was married to Mr. A twenty-three years ago. They had five children by that marriage. In 1928 Mrs. A was divorced from Mr. A and awarded the custody of the children. In 1930 she was remarried. Her second husband did not adopt the children. For the past two years Mrs. A has resided and obtained a settlement in the village of Lohrville. The village of Lohrville is now supporting Mrs. A and her two minor children as paupers. The village of Lohrville claims the settlement of the children follows and has the settlement of the father. The father, Mr. A, has a legal settlement in the town of Saxeville, Waushara county."

You submit the following question:

"Do the children have the legal settlement of the father or the mother?"

A recent opinion by this department is decisive of the question involved. The facts are practically the same. It

was there held that the legal settlement of two minor children living with their mother, who has a legal settlement different from that of the father, follows that of the father instead of the mother under sec. 49.02, subsec. (2), Stats. XXI Op. Atty. Gen. 1095.

Under the provisions of that statute and the decision of our court in the case of *Monroe County v. Jackson County*, 72 Wis. 449, we are constrained to answer your question to the effect that the legal settlement of the children follows that of the father.

JEF

Mothers' Pensions—Legal Settlement—Woman residing in LaCrosse county for period of one year while receiving mother's pension acquires legal settlement in said county.

July 22, 1933.

FRED G. SILBERSCHMIDT,
District Attorney,
La Crosse, Wisconsin.

In your communication of July 7 you submit the following:

"The county of Monroe had been paying a mother's pension to Mrs. X, and subsequently Mrs. X moved to LaCrosse county. While living in La Crosse county, Mrs. X received her mother's pension from Monroe county for a period of one year, and then Monroe county discontinued paying the mother's pension, claiming Mrs. X was a resident of La Crosse county. During the year Mrs. X lived in La Crosse county, she received no relief from the county of La Crosse."

You inquire whether Mrs. X is a resident of Monroe county or La Crosse county.

She is, of course, a resident of La Crosse county, but I presume you intend to ask whether she has a legal settlement in La Crosse county and I will answer it on that basis.

You state that in some instances persons who are receiving mothers' pensions are sent by adjoining counties

to La Crosse with the information that such persons can obtain work in factories in La Crosse and cheaper living quarters; that the home counties discontinue the pensions after a year has elapsed under the assumption that the pensioner in each case has become a resident of La Crosse county.

Sec. 48.33, Stats., provides for mother's pension in certain cases. Sec. 48.33, subsec. (5) par. (b), provides:

"Such child must have a legal settlement in the county in which application is made for aid; but such child may, with the approval of the court, reside and be cared for outside of the county while receiving aid. For the purposes of this section, the receipt of public aid during the year next preceding by the family of any child shall not bar such child from having a legal settlement in the county."

Sec. 48.33, (5) (c) provides:

"In cases in which all other conditions for granting aid shall be satisfied but in which the child does not have a legal settlement in the county in which application for aid is made, such aid may be granted in the discretion of the court, but only with the approval of the state board of control; provided, however, that the person having the care of said child has lived in this state for a period of one year next preceding the application for such aid. The entire amount paid from county funds as aid in such cases shall be recoverable from the state out of the appropriation made by subsection (13) of section 20.17. Such aid shall not operate to prevent the gaining of a legal settlement within the county, and shall be chargeable to the state only until the child shall have acquired such legal settlement and in no event longer than one year from the date of the first payment."

I am of the opinion that the mother may gain a legal settlement in La Crosse county although she received a mother's pension from Monroe county for a period of one year, during which time she resided in La Crosse county. In an official opinion in XV Op. Atty. Gen. 186 it was distinctly held that a woman may acquire a legal settlement in a county although she is receiving a mother's pension. You are therefore advised that Mrs. X has acquired a legal settlement in La Crosse county and is entitled to a mother's pension in said county.

JEF

Appropriations and Expenditures—Education—Teachers' Institutes—County superintendent may not use unexpended balance in county institute funds for holding future county institutes.

Unexpended balance in such funds has become portion of general fund of county.

July 24, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

For a number of years the legislature has appropriated sums of money for the purpose of conducting county institutes. As a result of these repeated appropriations, some counties had yearly balances in the institute fund, which balances were carried over from year to year. The legislature has now omitted the appropriation for the conduct of county institutes. Question arises whether the unexpended balances in the various county treasuries can be used by the county superintendents to defray the necessary expenses of institutes which may hereafter be held.

It is our opinion that this question must be answered in the negative. The appropriation made by the legislature for the conduct of county institutes was found in the 1931 statutes in sec. 20.31, subsec. (1), which provided for an appropriation of nine thousand dollars which was to be distributed as provided in sec. 39.20. The latter section read as follows:

"The state superintendent shall apportion the appropriation made in subsection (1) of section 20.31 for state aid for teachers' institutes conducted pursuant to section 39.19 among the several counties in the amount of one hundred dollars to each county or superintendent district maintaining such teacher's institute and the balance in proportion to the number of duly qualified teachers actually engaged in teaching. All amounts paid as aid under this section shall be kept by the respective county treasurers in a separate fund and shall be distributed on vouchers certified by the county or district superintendents, as other county moneys are distributed."

By ch. 140, Laws 1933, the legislature repealed subsec. (1), sec. 20.31, and also repealed all of sec. 39.20 above quoted. Said section clearly provided that the money ap-

propriated for the county institute should be kept in a separate fund analogous to a trust fund, if not actually such. It also provided that money should be paid out of the fund when certification was made by either the county or district superintendent of schools.

It will thus be seen that the legislature not only failed to appropriate a sum of money for the conduct of county institutes but also repealed that portion of the statutes which required the county treasurer to keep the appropriation in a separate fund. It also repealed that portion of the statutes which gave the county or district superintendents the authority to certify vouchers for the payment of money out of the fund. The trust nature of the county institute fund was thus removed by ch. 140, Laws 1933, and any unexpended balances became a part of the general fund of the county.

It was stated in the case of *Montague v. Horton,* 12 Wis. 599, 603.

"* * * By law all money belonging to the county as such, and not coming into its hands in the capacity of trustee, is treated as one fund, out of which all its liabilities are to be discharged. * * *"

The appropriations by the legislature for county institutes were appropriations to the county, although the state superintendent assisted in making the apportionment of some of that money. Even though it be said that this money originally came into the hands of the county in the capacity of trustee, the trust nature of the funds has now been removed and the unexpended balance may now be used by the county for general county purposes.

The conclusion that the unexpended balance may not be used by the county superintendent to conduct institutes hereafter is further strengthened by adverting to ch. 212, Laws 1933. In that chapter the legislature amended sec. 39.19, subsec. (1), Stats., making the holding of county institutes by the county superintendent discretionary rather than mandatory, and more especially provided:

"* * * There shall be no extra compensation and no expenses entailed for such institutes."

JEF

Counties—Municipal Borrowing—Certificates of Indebtedness—County is empowered by ch. 65, Laws 1933, to pass resolution authorizing issuance of certificates of indebtedness and sale of such certificates to public by county treasurer to meet current bills as they arise.

Certificates of indebtedness issued by county under provisions of ch. 65, Laws 1933, ought to be numbered and issued seriatim.

July 24, 1933.

WALTER B. MURAT,
District Attorney,
Stevens Point, Wisconsin.

You request an opinion as to the validity of a county resolution authorizing the issuance of certificates of indebtedness by Portage county and authorizing the sale thereof by the county treasurer.

The resolution in question was passed under the apparent authority of ch. 65, Laws 1933. This chapter amended subsec. (1), sec. 59.81, Stats., and reads, in part:

"* * * The county board may authorize the issuance of orders, scrip or certificates of indebtedness at a rate of interest specified thereon, but not to exceed six per cent per annum; except that such orders, scrip and certificates of indebtedness shall bear no interest if paid and payable within one month from date of issuance, and shall bear no interest after date of publication of redemption notice as hereafter provided. The county treasurer may give notice that the county will redeem certain outstanding orders, scrip or certificates by publication in any newspaper published in the county. Such publication shall specify the particular orders, scrip or certificates, or series thereof then redeemable."

There is, unfortunately, some confusion arising out of the terms used in the above quoted section, and there is some difficulty in trying to determine the meaning of the said amendment and to ascertain what connection there may be between this provision and other provisions of the law regulating county finances.

Some attempt to define the terms "order," "scrip," and

"certificate of indebtedness" may prove of use in making an interpretation of the enactment in question.

An "order" is a command to the county treasurer that he pay money out of the county funds. It is not a new debt, nor is it evidence of a new debt, but it is rather a means for drawing money out of the treasury to pay an existing debt. See: II Dillon, Municipal Corporations (5th ed. 1911) 1283, sec. 850, *et seq.* VI McQuillin, Municipal Corporations (2d ed. 1928) 74, sec. 2400.

The Wisconsin supreme court in the case of *Pelton v. Supervisors of Crawford County,* 10 Wis. 69 (1859), discussed the nature of a county order, and said (p. 72):

"* * * The order is unquestionably an evidence of a county liability, drawn by certain county officers, authorized by law to draw the same, upon another county officer directing him to pay the amount of money therein specified, out of any money in the treasury not otherwise appropriated. That an action upon it is founded upon the evidence of a county liability, or county indebtedness, is very clear. *Tyell v. The Supervisors of La Pier County,* 6 McLean, 446.

"* * *

"* * * County orders constitute a form of indebtedness well known to the laws of the state and it is very convenient for the board of supervisors, upon settling and allowing charges against the county, to evidence the indebtedness this way. No advantage is gained by likening them to a judgment, specialty, or promissory note, although they may possess some of the characters, and perform some of the functions of each. We think they are a peculiar form of county indebtedness, and that the statute of limitations runs upon them, as upon a simple contract. * * *."

Elsewhere county orders have been spoken of as constituting a written contract to pay, being in legal effect a promissory note. *Brownlee v. Board of Commissioners,* 81 Ind. 186 (1881); *Noble School Furniture Co. v. Washington School Tp.,* 4 Ind. App. 270, 29 N. E. 935 (1892).

Webster's New International Dictionary defines the word "scrip" as follows: "Any of various documents used as evidence that the holder or bearer is entitled to receive something either absolutely or conditionally." Specifically it may mean, among other things: "A certificate of indebt-

edness in the form of a promise to pay or a certification that a person is entitled to receive a sum of money * * *" And it may include "a warrant on a city treasury, etc."

Thus the term "scrip" has been applied by courts to notes or other evidences of debt. *Burgin v. Smith,* 115 N. C. 561, 66 S. E. 607 (1909). And has been defined as including municipal warrants or orders. *City of Alma v. Guaranty Sav. Bank,* 60 Fed. 203 (C. C. A. 8th, 1894).

So, too, the term "certificate of indebtedness" seems to be generic rather than specific, and has been held to include bonds. *Christie v. Duluth,* 82 Minn. 202, 84 N. W. 754 (1901).

The meaning to be given to these various terms used in ch. 65, Laws 1933, seems, therefore, to be dependent upon the purpose of the statute in which they are used; and whether such words should be given a broader or a more confined meaning must be determined by the intent of the legislature.

Turning now to the laws of Wisconsin relating to county finances, we find several provisions regulating the borrowing of money by such a municipality.

Ch. 30, Laws 1933, empowers counties to issue scrip under certain conditions and regulations. The county is authorized to issue scrip in emergencies when moneys deposited in public depositories are unavailable by reason of the stabilization of such depositories. The scrip so issued, however, may not exceed the aggregate amount of such unavailable deposits and the issuance and distribution of such scrip are to be regulated by the banking review board and the commissioner of banking. A penalty is prescribed for the issuance of any scrip under the provisions of said chapter which has not been authorized as provided therein.

A county is empowered temporarily to borrow money by the provisions of sec. 67.12 of the statutes, as amended by ch. 9, Laws Special Session 1931. This statute was enacted to enable municipalities to meet current expenses by means of borrowing money. However, in order to borrow money, the governing body of the municipality

must adopt a resolution, supported by at least three-fourths of all the members elect of such governing body, specifying the purpose and the amount of the loan. Such resolution is further to include the levying of an irrepealable tax to be carried into the next tax roll of the municipality. The proceeds of such tax must be kept in a distinct fund to be used solely for the purpose of paying the temporary indebtedness. This indebtedness is to be evidenced by the issuance of promissory notes or orders.

This section of the statutes has been interpreted by the attorney general in XVI Op. Atty. Gen. 338 (1927). That opinion held that the purpose of the loan is to supply any shortage of moneys which a municipality may feel, either because the tax which has been levied is insufficient to provide the money required or by reason of the delinquency in the tax roll.

Ch. 113, Laws 1933, makes further provision for temporary borrowing by governing boards of municipalities. This chapter, however, is evidently intended to enable the municipality to obtain money where funds which that municipality has already collected are unavailable by reason of the readjustment of banks. The sum which may be borrowed under this provision may not exceed the aggregate amount of moneys deposited in such banks. Further, provision is made for the repaying of such loan by means of an irrepealable tax to be carried into the next tax roll of the municipality.

The question then is: Does ch. 65, Laws 1933, empowering the county board to authorize the issuance of orders, scrip or certificates of indebtedness, confer a further and additional power upon the county board or is it merely intended to confirm the powers to issue such instruments granted by the other statutory provisions discussed above?

The amendment in question is made a part of a former statutory provision relating to orders drawn upon the county treasurer in favor of a claimant against the county. County orders, plus scrip and certificates of indebtedness may not exceed the amount of taxes levied for the year in which such orders and the like have been issued. This section, it would seem, is intended to confer powers in ad-

dition to those already discussed relating to the borrowing of money and the issuance of scrip under the provision of the banking review board and the commissioner of banking. Nothing is herein said as to the levy of a tax to be carried into the next tax roll which shall afford a means of repaying any loans. The chapter apparently contemplates taxes which have been already levied but not yet collected and seems to give the county the right to carry on its business on a cash basis by selling certificates of indebtedness which are to be repaid out of the tax already levied.

The above interpretation is further strengthened by the fact that the said chapter is in terms independent of other provisions relating to municipal borrowing, and its meaning must be interpreted without considering unrelated provisions found elsewhere in the law.

It is our opinion, therefore, that the resolution in question is valid under the provisions of ch. 65, Laws 1933.

In respect to the form of the certificate of indebtedness which you have submitted to us, we would suggest that you number the certificates issued and likewise that you provide such certificates with a serial number, since the chapter provides that the county may redeem particular scrip or certificates or series thereof.

JEF

Banks and Banking—Public Depositories—Public depositors having funds on deposit in national banks are given authority to join reorganization plans of such national banks after such reorganization plan has been approved by board of deposits under provisions of sec. 34.075, Stats.

July 26, 1933.

BOARD OF DEPOSITS.

Attention Gerald C. Maloney.

You request the opinion of this department upon the following statement of facts:

Several national banks, now in the hands of conserva-

tors, are contemplating reorganization. In most cases it is necessary that public depositors join the reorganization agreement in order to obtain the percentage required under federal statutes.

Sec. 34.075, Stats., provides that public depositors having funds on deposit in national banks may join in such reorganization agreements if the reorganization plan has been approved by the board of deposits.

The comptroller of the currency requires positive and definite showing that the officers of municipalities having funds on deposit in national banks have authority to enter such reorganization plans.

You then ask:

"Are public depositors having funds on deposit in national banks given authority to join reorganization plans of such national banks after such reorganization plan has been approved by the board of deposits under the provisions of section 34.075 of the statutes?"

It is the opinion of this department that public depositors having funds on deposit in national banks are given authority to join reorganization plans of such national banks after such reorganization plan has been approved by the board of deposits under the provisions of sec. 34.075.

Sec. 34.075, Stats., (as created by ch. 435, Laws 1933) reads as follows:

"Whenever the commissioner of banking or the comptroller of the currency, with a view of restoring the solvency of any bank of which he has taken charge, pursuant to law, or with a view to stabilizing and readjusting the banking structure of any national or state banking institution located in this state, shall approve a reorganization plan or a stabilization and readjustment agreement entered into between such bank and depositors and unsecured creditors, or when a bank, with the approval of the commissioner of banking or comptroller of currency proposes to sell its assets to another bank which agrees to assume a part or all of the deposit liability of such selling bank and to pay the same on a deferred payment basis, the governing board of such public depositor may, on the approval of the state board of deposits, join in the execution of any reorganization plan, or any stabilization and readjustment agreement, or any depositor's agreement relative to a proposed sale of assets if, in its judgment and that of the state board

of deposits, such reorganization plan or stabilization and readjustment agreement or proposed sale of assets is in the best interests of all persons concerned. The joining in any such reorganization plan, or any stabilization and readjustment agreement, or any proposed sale of assets which meets the approval of the state board of deposits shall not operate as a waiver of any rights arising under this chapter or under any bond or other security which was given for the repayment of any of such public funds on deposit in such bank."

It is manifest from a reading of the above quoted section of the statutes that public depositors having funds on deposit in national banks are given authority to join reorganization plans of national banks after approval has been given by the board of deposits of such reorganization plan. Sec. 34.075 grants positive and definite authority to the governing board of such depositors on the approval of the state board of deposits to join in the execution of any reorganization plan or any stabilization or readjustment plan and you are therefore advised that any such action taken by the public depositor with the approval of the state board of deposits is legal.
JEF

Counties — Education — Superintendent of Schools — Change in salary of county superintendent at special meeting in July prior to his election is not in compliance with statute; such change of salary is void.

July 31, 1933.

HERBERT J. GERGEN,
District Attorney,
Beaver Dam, Wisconsin.

You state that on July 12, 1932, the county board of Dodge county met in a special session and reduced the salaries of practically all of the county officers including the superintendent of schools; that the annual meeting of the county board is held regularly in November each year, and that at the annual meeting last fall no resolution was in-

troduced specifically reducing the salary of the superintendent of schools for the various counties. You state that your superintendent's term of office expired on July 1 and that he had been re-elected. He now has notified the county clerk that he will not accept a reduction in salary and expects to receive his old salary. You seem to agree with him, but you have asked for our opinion as to whether the superintendent can require Dodge county to pay him his former salary.

Sec. 39.01, subsec. (3), Stats., provides:

"The county board, at its annual meeting next preceding the election of such school superintendent, shall fix his annual salary and when so fixed, it shall continue to be the salary of said officer until changed by the board or by operation of law. * * *"

Then the minimum salary is fixed for the various counties depending on the number of teachers in the county.

Sec. 59.15, subsec. (1) provides:

"The county board at its annual meeting shall fix the annual salary for each county officer, including county judge, to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer's term, and shall be in lieu of all fees, per diem and compensation for services rendered, except the following additions:
"* * *"

Our supreme court, in the case of *Sheboygan County v. Gaffron*, 143 Wis. 124, held:

"A county superintendent of schools, even though his jurisdiction be confined to a district less than the whole county, is a county officer whose term of office continues for two years and *until his successor is qualified*, and under sec. 694, Stats. (1898) [now sec. 59.15], his salary cannot be increased or diminished during such term." (Syllabus 1.)

The language used in sec. 59.15 has not been changed. I am of the opinion that the changing of the superintendent's salary at the special meeting is not in compliance with the statute, as it was necessary to increase or decrease the salary at a regular meeting prior to his election.

The provision in sec. 39.01, subsec. (3), as above quoted, that "it shall continue to be the salary of said officer until changed by the board or by operation of law" was not intended to authorize the county board to act at any meeting, special or regular, to change the salary, but intended that such change could only be made by the county board at a regular meeting, at which the county board was authorized to change such salary. I am confirmed in this judgment by the provisions of sec. 59.08, subsec. (8), which reads as follows:

"The county board, at any annual meeting, may abolish, create or re-establish any office or position (other than the county officers designated by section 59.12 of the statutes, judicial officers and the county superintendent of schools), created by any special or general provision of the statutes and the salary or compensation for which is paid in whole or in part, by the county, and the jurisdiction and duties of which lie wholly within the county or any portion thereof, notwithstanding the provisions of any special or general law to the contrary."

It will be noted that the county superintendent of schools is expressly exempt from the provisions here enacted.

You are therefore advised that Dodge county is required to pay the superintendent of schools the salary which he has heretofore had.

JEF

Taxation—Tax Collection—Words and Phrases— Interest—Word "interest" used in last sentence of sec. 5, ch. 288, Laws 1933, does not include two per cent penalty and/or other lawful fees and charges.

Under ch. 288, Laws 1933, maximum interest rate of eight per cent relates to interest before sale as well as after sale.

Maximum interest rate of eight per cent should be figured on 1931 taxes from January 1, 1932, to date when tax certificate is redeemed.

July 31, 1933.

TAX COMMISSION.

Sec. 3, ch. 288, Laws 1933, provides as follows:

"The governing body of any county or city of the first class, may, but is not required to, waive the payment of all or any part of the interest and penalties on delinquent taxes on real estate for the years 1931 and 1932 for which such county or city holds the tax certificates, provided such taxes are paid before July 1, 1934. In no event shall any person be required to pay interest on such taxes paid before July 1, 1934 at a rate in excess of eight per cent per annum."

You request the opinion of this office on the following points with respect to 1931 taxes for which the county or city of the first class holds tax certificates:

"1. Does the word 'interest' as used in the last sentence in section 3 include the two per cent penalty and other lawful fees and charges?

"2. If your answer to the first question is 'no,' does the maximum interest rate of eight per cent per annum, which may be charged if such taxes are paid before July 1, 1934, relate to interest before sale as well as redemption interest after sale, or does it relate exclusively to the redemption interest which is figured on the face of the certificates issued at the 1932 sales?

"3. If in your opinion the maximum rate of eight per cent relates to interest before sale as well as interest after sale, should straight interest be figured on the tax from January 1, 1932, to the date of payment, or should interest be figured on the tax from January 1, 1932, to the time of sale, and the interest after sale be figured on the total of

the tax, interest to date of sale, penalties, and other lawful fees and charges customarily included in the face of the certificate?"

It is our opinion that the word "interest" used in the last sentence of sec. 3 does not include the two per cent penalty or other lawful fees and charges. If the words of a statute express clearly its sense and intent there is no room for the application of rules of judicial construction. They come in only where the intent is ambiguously expressed. *Gilbert v. Dutruit,* 91 Wis. 661; *Burgess v. Dane County,* 148 Wis. 427; *In re Reeseville Drainage District,* 156 Wis. 238.

Real uncertainty of meaning must be found in the legislative enactment before resorting to rules for judicial construction. *State ex rel. Husting v. Board of State Canvassers,* 159 Wis. 216.

A statute is ambiguous only where if given effect in its letter the result is absurd or unreasonable. *In re Reeseville Drainage District, supra.*

A law which is plain in its literal sense and leads to no inconsistent or absurd consequence is presumed to have been intended to have such meaning. *Miller v. Chicago & Northwestern Railway Company,* 133 Wis. 183.

In the said sec. 3 the legislature uses the words "taxes," "interest," "penalties," "tax certificates." Each of these words has a more or less definite and well settled meaning. It must be presumed that the legislature was aware of the meaning which is attached to each, either by virtue of its common usage or by judicial or other construction, and intended to use the words in accordance with the meaning which has been so attached to them. These words are in no sense interchangeable nor does the meaning of any one include any other.

In sec. 1, ch. 288, Laws 1933, the legislature uses the expression "penalty, interest, or other charges on such delinquent taxes, except the fee for advertising the same at the tax sale." In this language, also, the legislature indicates that it intended a distinction between interest, the two per cent penalty, and the other charges which attach after taxes become delinquent. The first sentence of sec.

3, ch. 288, refers to "delinquent taxes on real estate for the years 1931 and 1932 for which such county or city holds the tax certificates" and subsequently refers to "such taxes" in two different places. The words "such taxes" can only refer to the delinquent taxes on real estate for the years 1931 and 1932. See opinion rendered June 30, 1933.* The legislature quite obviously intended the provisions of the act to apply to the 1932 taxes.

At the time that ch. 288 was passed the legislature by ch. 81, Laws 1933, had already postponed the tax sale for the taxes of 1932, so that it would not take place until the first Tuesday in August, 1933. This fact also indicates that the legislature intended the provisions of sec. 3 to apply, as the language itself indicates, to the delinquent taxes assessed for the year 1932 and not to the face of the tax certificate issued at the tax sale of 1933 for the taxes of 1932.

No absurd consequence follows from attributing to the language used the literal meaning which such language has. It is therefore the opinion of this office that the maximum interest rate of eight per cent per annum, which may be charged on the 1931 taxes if the taxes are paid before July 1, 1934, refers to the interest before the sale, as well as after the sale, but should be figured only upon the taxes themselves from January 1, 1932, to the day of redemption of the tax certificate.

It is realized that the system of bookkeeping used by many counties is such that the present holding will necessitate considerable effort upon the part of such counties to distinguish the original tax from the interest, penalties, and other lawful charges. That fact, however, cannot be taken by this office as a reason for distorting the plain, literal meaning of the statute when such meaning will not lead to an absurd or unreasonable result.

JEF

* Page 521 of this volume.

Municipal Corporations—Beer Licenses—Public Officers —District Attorney.—It is duty of district attorney to prosecute violation of provisions of ch. 207, Laws 1933, as well as violations of municipal ordinances adopted pursuant thereto.

August 2, 1933.

CURT W. AUGUSTINE,
District Attorney,
Eau Claire, Wisconsin.

You wish to be advised in what respect the district attorney's duties apply to the enforcement of the so-called beer law, ch. 207, Laws 1933.

It is our opinion that it is the duty of the district attorney to prosecute violations of the provisions of said ch. 207, as well as violations of city, town, and village ordinances adopted pursuant to the provisions of said law. Sec. 59.47, Stats., relates to the duties of the district attorney. Subsec. (1) provides that the district attorney shall

"prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county in which the state or county is interested or a party * * *."

Sec. 66.05, Subsec. (10), subd. (m), par. 1, as found in said ch. 207, provides:

"Any person who shall violate any of the provisions of this subsection, or of any municipal ordinance adopted pursuant thereto shall be deemed guilty of a misdemeanor * * *."

As was stated in the case of *In re Bergin,* 31 Wis. 383, 386–387:

"A 'crime' is defined by Blackstone to be 'an act committed in violation of a public law either forbidding or commanding it' * * *. By this is meant, of course, those wrongs of which the law takes cognizance as injurious to the public, and punishes in what is called a criminal proceeding, prosecuted by the state in its own name, or in the name of the people of the sovereign. * * *

"These definitions are correct beyond all question; and they show that a misdemeanor is a crime, in the sense in which the word 'crime' is used in the law * * *."

Inasmuch as violations of ch. 207 or municipal ordinances adopted pursuant thereto are misdemeanors they are therefore crimes and are offenses against the state and the state would have an *interest* in their punishment.

Sec. 66.05 (10) (j) and (k) indicate that the "municipal ordinance" referred to in subd. (m) contemplates an ordinance passed by the city, village, or town.

JEF

Physicians and Surgeons—Public Health—Basic Science Law.—Under sec. 147.18, Stats., board of medical examiners must issue license for itinerant practice to licentiate of board who submits proper application and fee.

Board may not accept for reciprocity diplomate of National Examining Board.

August 2, 1933.

BOARD OF MEDICAL EXAMINERS,
La Crosse, Wisconsin.

You request the opinion of this office on the following matters:

"Under sec. 147.18, Stats., is our state board of medical examiners required to license an applicant for itinerant practice, provided he is already a regular licentiate of the board and submits a proper application and fee to become an Itinerant?

"Under sec. 147.17 is it within the discretion of our board to accept for reciprocity a diplomate of the National Examining Board? The National Examining Board is an independent board made up of reputable licensed physicians who conduct periodical examinations in the various states. They call their licentiates diplomates and they ask our state board to accept their grades so as to effect reciprocity."

Sec. 147.18, Stats., provides in part:

"Itinerant practitioners of medicine, surgery or osteopathy or of any form or system of treating the afflicted shall obtain an annual license in addition to the regular license or certificate of registration, and shall pay therefor two hundred fifty dollars per annum. * * *"

A license for itinerant practice can be issued only to a person who already holds a regular license or a certificate of registration. The only requirement made by this section in addition to the holding of a regular license or certificate of registration is the payment of two hundred fifty dollars per annum. This is the only section of the statutes relating to itinerant practice. It vests with the state board of medical examiners no discretion in the matter of determining the fitness or qualifications of the individual who requests the license. The legislature apparently felt that a person who held a regular license from the state board of medical examiners for a general practice would be absolutely entitled to a license for itinerant practice upon payment of the fee specified in sec. 147.18.

It is our opinion that the state board of medical examiners is required to license an applicant for itinerant practice if he is already a regular licentiate of the board and submits the proper application and fee to become an itinerant.

In respect to the second question presented, sec. 147.17, subsec. (1), provides in part:

"* * * The board may license without examination a person holding a license to practice medicine and surgery, or osteopathy and surgery, in another state, if in such state the requirements imposed are equivalent to those of this state, upon presentation of the license and a diploma from a reputable professional college, * * *"

It is our understanding that the National Examining Board conducts their examinations in the hope and with the expectation that their diplomates will be licensed by the various states simply upon the strength of the fact that they have passed the examination given by the board. A great number of states, as a matter of fact, do issue licenses to practice to these diplomates. Our information is to the effect that the National Examining Board is composed of physicians of very high repute and that ability to satisfactorily pass the examination is quite conclusive as to the capacity of the diplomate to practice. It is also understood that these diplomates are accepted by the United States army and the United States navy.

Sec. 147.17 (1), however, quite apparently makes provision for and contemplates a licensing reciprocity between *states*. It does not make provisions for reciprocity between this state and any privately organized examining board, no matter how wide its scope nor how comprehensive its examinations. Under that portion of sec. 147.17 (1) quoted above your board may license without examination only a person holding a license to practice in another state. The discretion which that section vests in your board is that of determining whether the requirements imposed by the other state are equivalent to those of this state. The statutes, therefore, do not authorize you to accept for reciprocity a diplomate of the National Examining Board.
JEF

Indigent, Insane, etc.—Mothers' Pensions—Local poor relief officials may take into consideration mother's pension received by members of family in determining amount of aid to be granted such family.

August 2, 1933.

CHAS. K. BONG,
Assistant District Attorney,
Green Bay, Wisconsin.

You request our opinion on the following statement of facts:

One, X, resides in the city of D with her widowed mother. Neither X nor her mother owns any property. X receives a mother's pension of ten dollars a month for her child, four years old. X's mother also receives aid from the city of D in the form of rent, groceries and fuel. You ask whether the city can demand that five dollars a month of the aid given the child be turned over to help defray the rent furnished to the widowed mother and X.

You are advised that the city of D— is acting within its rights. The statutes, ch. 49, do not prescribe any certain amount which shall be granted as poor relief. It is left to the discretion of the local officials to determine what

amount is to be granted. In such determination it is quite proper for them to consider other sources of income a family may have and reduce the aid granted accordingly. See also XIV Op. Atty. Gen. 24, wherein it was held that poor relief officials could take into consideration the aid received by an Indian from the federal government in determining whether or not he stood in need of aid.
JEF

School Districts—Tuition—Pupil who resides more than four miles from school of his high school district may attend high school in some other district and obligate union free high school district in which he resides to pay for his tuition.

August 2, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

You state that at the annual meeting of a certain union free high school district on June 26, 1933, the electors passed a resolution requesting an official opinion on our part as to whether a union free high school district has a legal right to pay the tuition of pupils, residents of such a district, when they attend the Wisconsin high school, the Edgewood high school, or any other Madison high school.

The very question submitted by you is answered in an official opinion in XX Op. Atty. Gen. 294. It was there held that the clause of subsec. (1), sec. 40.34, Stats., to the effect that any child residing more than four miles from the school of his district may attend a school of another district, in which case the home district shall pay tuition of such child, applies to union free high school districts.

In view of the language used in that section, we believe that the ruling in that opinion is correct and that it must stand as the law until it is changed by the legislature. The said opinion was given to the chief clerk of the assembly on May 19, 1931, but no change was made in the law. You

are therefore advised that a union free high school district has a legal right to pay the tuition of pupils, residents of such district, when they reside four miles from the union free high school and attend another high school. JEF

Appropriations and Expenditures — Counties — County Board — Education — Supervising Teachers — Sec. 59.08, subsec. (8), Stats., does not empower county to abolish office of supervising teacher and rescind its appropriation for his salary.

August 2, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

You have submitted a resolution passed by the county board of Green Lake county and you inquire whether said resolution is valid. You direct our attention to sec. 39.14 and sec. 59.08 (8), Stats. The part of the resolution which is here pertinent reads as follows:

"RESOLVED: That RESOLUTION NUMBER 27 relating to the supervising teacher passed at the November 1932 meeting of the county board of Green Lake county be wholly rescinded.

"FURTHER RESOLVED: That, pursuant to the authority vested in the county board of Green Lake county by section 59.08—8, the county board of Green Lake county does hereby abolish the office of supervising teacher and hereby rescinds all appropriations heretofore made for said office."

The resolution was dated, passed and adopted on May 12, 1933.

Sec. 50.08, subsec. (8), Stats., reads:

"The county board, at any annual meeting, may abolish, create or re-establish any office or position (other than the county officers designated by section 59.12 of the statutes, judicial officers and the county superintendent of schools), created by any special or general provision of the statutes and the salary or compensation for which is paid in whole or in part, by the county, and the jurisdiction and duties of which lie wholly within the county or any portion there-

of, notwithstanding the provisions of any special or general law to the contrary."

Sec. 39.14 Stats., provides in part as follows:

"(1) The county superintendent shall employ a supervising teacher, and, if there are more than one hundred twenty-five schools under his supervision, he shall employ two supervising teachers.

"(2) The county board shall fix the salary of such teacher which shall be not less than one thousand dollars for ten months in each year. The supervising teacher shall be reimbursed for actual and necessary expenses incurred in the performance of her duties. The county board shall make provision for the monthly payment of her salary and expenses.

"* * *

"(5) Any supervising teacher may be discharged for cause by the county superintendent after opportunity shall have been given her to be heard.

"(6) The county superintendent shall in July of each year make a report to the state superintendent of the name and qualifications of each supervising teacher employed in the county, the number of months employed, the total amount of her salary and actual and necessary expenses paid during the year ending the preceding June 30th and such other facts as may be required by the state superintendent.

"(7) On receipt of such report, and it appearing from an actual inspection by direction of the state superintendent that the work of such supervising teacher has been efficient, and that she has devoted her time exclusively to the duties of the position, the state superintendent shall certify in favor of the county which employed her, the amount of the salary *paid but not to exceed an amount to which such teacher shall be entitled under a salary schedule for supervising teachers to be adopted and promulgated by the state superintendent of public instruction which shall provide for a salary range of from eleven hundred to fifteen hundred dollars per year, varying with length of service and professional training. The county shall also be entitled to reimbursement for the* * * actual and necessary expenses paid to her in the year preceding, and file it with the secretary of state, whereupon he shall draw his warrant for the amount of the certificate and in favor of the proper county treasurer."

That part of subsection (7) which is underlined was inserted by an amendment in ch. 140, Laws 1933.

You will note that under sec. 39.14, Stats., it is mandatory for the county superintendent to appoint the supervising teachers. It is true that the county board fixes the salary, but it cannot fix it less than one thousand dollars for ten months in each year, so the salary is really fixed to that amount by the statute. You will note that the expenses and the salary are reported by the county superintendent to the state superintendent as contained in subsec. (6), and the county is reimbursed in the total amount that it has paid to the supervising teacher, the designated salary and actual and necessary expenses. This reimbursement is made by the state out of the general fund and the people of the state are taxed for all the salaries and the expenses of the supervising teachers in the various counties of the state.

It follows that if this resolution of the county board were a valid resolution, Green Lake county nevertheless would have to pay its proportionate share of the salaries of supervising teachers and their actual and necessary expenses in this state. The supervising teacher merely carries out a state function, paid practically by the people of the whole state, who are taxed for it. You will note that by that part of subsec. (7), sec. 39.14 as amended, it is now made possible for the county to pay more to the teacher than they will be reimbursed for, if they so desire. It is also germane here to note that in *State ex rel. Harbock v. Mayor,* 189 Wis. 84, our court has held that the home rule amendment to sec. 3, art XI of the Wisconsin constitution imposes no limits upon the power of the legislature to deal with education, and this entire subject of education remains with the legislature. I do not believe, however, that this will make any change in the interpretation that should be given to the question submitted. While sec. 59.08, (8), is rather broad and inclusive, still I do not believe that in view of the fact that the county does not or need not pay any part of this salary but that the whole salary and expenses are ultimately paid out of the general fund and the county only advances the money that it receives from the state, it is not broad enough to empower the county board to pass such resolution.

It is our opinion that the resolution of the county board abolishing the office of supervising teachers is void and of no effect.
JEF

Public Lands—Taxation—Tax Collection—Words and Phrases—Just and Legal Taxes—To determine whether taxes presented for payment under sec. 74.57, subsec. (1), Stats., are just and legal, commissioners of public lands must obtain such information, in addition to certification presented by county treasurer, as will satisfy them and enable them to make determination.

Phrase "just and legal" taxes as used in sec. 74.57 (1) means legally valid taxes, that is, taxes based upon legal levy and legal assessment.

Commissioners of public lands shall order paid according to provisions of sec. 74.57 (1) taxes which have become lien upon public lands sold under contract where such lands have been taken back by state after lien has been impressed.

August 2, 1933.

COMMISSIONERS OF PUBLIC LANDS.

You request an interpretation of sec. 74.57, subsec. (1), Stats., which reads as follows:

"It shall not be lawful for any county, city or village treasurer to sell any lands which shall have been acquired by the state after the taxes become a lien thereon. When such lands shall have been returned delinquent to the county treasurer he shall certify to the commissioners of public lands a description thereon together with the amount of taxes charged against each separate description. The commissioners of public lands within ten days after the receipt of such certificate from the county treasurer shall consider the question of whether such taxes are just and legal, and if they so find shall order the same paid. They shall transmit a certified copy of their order to the secretary of state, and upon his audit and warrant drawn upon the state treasurer the amount of said taxes shall be paid out of the appropriation provided for carrying out the purposes of this section."

First you inquire how the commissioners should proceed to determine whether or not taxes presented for payment under the above quoted section are *"just and legal."* No categorical answer can be given to this question. The duty imposed upon the commissioners is one which demands the exercise of judgment on their part and hence can be bound by no inflexible rule.

In order to clarify the problem, it would be well to consider first what is involved in the problem which confronts the commissioners, that is, what is the meaning of the phrase "just and legal" taxes.

The word *"legal"* is defined as "that which is according to law." Bouvier, Law Dictionary. So defined in *Vaughn v. National Council, Junior Order U. A. M.,* 136 Mo. App. 362, 117 S. W. 115 (1909); see also Black, Law Dictionary.

The word *"just,"* in this instance, we consider, is to be given its technical legal meaning. In this sense it is defined in Webster's New International Dictionary as that which is "conforming to, or consonant with, what is legal or lawful; legally right; lawful."

The New York court of appeals has traced the meaning of the word in the following language:

"The word 'just' is derived from the Latin 'justus,' which is from the Latin 'jus' which means a right, and, more technically a legal right, a law." *Bregman v. Kress,* 83 App. Div. 7, 81 N. Y. S. 1072 at 1073 (1903).

The meaning of the word was discussed at some length in the case of *State v. Several Parcels of Land,* 81 Neb. 770, 116 N. W. 682 (1908), wherein the court was called upon to interpret a statute providing for the sale of land to satisfy taxes, by the terms of which the court was to confirm such sale unless, *inter alia,* "the taxes and assessments, or a part thereof, were based upon proceedings wherein there had been fraud, gross injustice or mistake" (p. 683). The court said in that case (p. 684):

"It is contended that a void tax is not necessarily an unjust tax. In other words, we are asked to give to the word 'just' its popular meaning of upright, honest, impartial, fair and equitable, rather than its legal interpreta-

tion of true, exact and conformable to law. If we were permitted to give this word the popular interpretation, we might go behind the acts of the Legislature in authorizing the tax, and the acts of administrative officers imposing it; for in the popular sense of the word laws are sometimes unjust and taxes imposed in pursuance thereof often oppressive. In that sense of the word it may be broadly stated that any unnecessary tax is an unjust tax. If we were to adopt that definition, we might inquire into the need for the tax, and into the motives of officers imposing the same. Such a construction would lead us into a world of uncertainty and conjecture. In determining what is just, the judicial branch of the government should not be permitted to question that mass of principles, which, classified and reduced to order by the legislative power and the interpretation of the courts, we call 'the law.' It is the very essence of the social compact that we should be governed by those principles of justice which are crystallized into law; and in its administration nothing can be said to be just which is unlawful, and nothing unjust that is lawful. * * *"

"Just and legal" taxes, as that term is used in sec. 74.57, (1), must mean taxes which are valid in law.

To determine what constitutes a valid tax as provided in sec. 74.57 (1), we recommend to you the criterion stated by Mr. Cooley in regard to tax sales:

"There can be no valid tax sale unless there was a lawful tax, a lawful levy, and a legal assessment. A valid assessment is a condition precedent to a tax sale, including a sufficient description of the real property assessed." III Cooley, Taxation (4th ed. 1924) 2743, sec. 1394.

The Wisconsin supreme court has also, in several cases, pronounced the various elements necessary to a valid tax:

1. Taxes must be based upon legislative action, i. e., there must be a levy. *Wisconsin Elec. Power Co. v. Town of Lake,* 186 Wis. 199, 202 N. W. 195 (1925); *Paul v. Town of Greenfield,* 202 Wis. 257, 232 N. W. 770 (1930).

2. There must be a valid assessment made in substantial compliance with the statutes, i. e., a proper listing and valuation of the property by the assessor. *Schettler v. Fort Howard,* 43 Wis. 48 (1877).

The statutory section here under consideration implies that the commissioners shall obtain some information in

addition to the bill presented. A certification by the county treasurer of the county wherein the property is located by which he certifies to the description of the property and the amount of the taxes due, and that the same are correct, is not sufficient evidence upon which the commissioners should base the required judgment. The presentation of such a certificate calls for the exercise of such judgment, but it would seem that the statute requires further information upon which to base such judgment.

We therefore recommend that you make some examination of the county records to determine that the taxes have been legally assessed and levied, and to satisfy yourselves that the tax presented is a legally valid one.

In connection with the same statute, viz., 74.57 (1), you inquire whether the commissioners of public lands shall order paid taxes which have become a lien upon public lands sold by the state on contract and reacquired by the state after the tax lien was impressed thereon, as was held by this department in 1929, XVIII Op. Atty. Gen. 319.

The particular statutory section upon which the former ruling was based, sec. 70.07, has been repealed by the present session of the legislature, ch. 349, Laws 1933. Nevertheless, we feel that the opinion rendered in 1929 is still applicable to lands sold by the state on contract.

Various provisions in the statutes indicate that public lands sold on contract shall be assessed and taxed. Thus sec. 24.11, subsec. (3), provides that every contract or certificate of sale of public lands shall require the purchaser to pay taxes assessed against such lands.

Sec. 70.01, as created in ch. 349, Laws 1933, provides:

"Taxes shall be levied, under the provisions of this chapter, upon all general property in this state except such as is exempted therefrom."

The exemption provision, sec. 70.11 (1) excepts from its purview lands contracted to be sold by the state.

The legislative intent that public lands sold on contract are subject to taxation is clearly expressed in sec. 70.24, which provides in part:

"* * * Every assessor shall enter on the assessment roll, in a separate column, under distinct headings, a list

of all such public [i. e. 'public lands sold and not patented by the state'] and mortgaged lands, and the same shall be assessed and taxed in the same manner as other lands, without regard to any balance of purchase money or loans remaining unpaid on the same."

By the provisions of sec. 74.52 the treasurer of any county, city or village may not sell any public lands held on contract for delinquent taxes.

Where public lands sold on contract have been taken back by the state after taxes have become a lien thereon, then the provisions of sec. 74.57, subsec. (1), apply, and the commissioners are then to determine whether such taxes are just and legal, and if so, order them paid as held in XVIII Op. Atty. Gen. 319.

JEF

Counties—Agricultural Associations—Municipal Corporations—Beer Licenses—Under ch. 207, Laws 1933, city, town or village has jurisdiction over county-owned property within corporate limits as to issuance of licenses.

City, village or town which has voted to issue licenses may not arbitrarily discriminate between individual applicants. Where individuals operate taverns on rented county property for private benefit regular Class "B" license must be obtained.

Agricultural and fair association may be granted license for not to exceed ten dollars, authorizing sales during fair, when sales are for benefit of said association.

August 2, 1933.

CLARENCE J. DORSCHEL,
District Attorney,
Green Bay, Wisconsin.

The Brown County Agricultural and Fair Association conducts a fair on county-owned property. The authorities in charge of this property have rented out a dance hall on the grounds to a private individual who intends to conduct a dance hall and a tavern located in the build-

ing on the rented grounds. The premises in question are located in the city of De Pere. The application made by the individual for a tavern license was refused by the common council. The question arises:

"Has the city of De Pere any jurisdiction over such premises, so as to refuse a license, or is it possible to conduct a tavern on said premises without a license in view of the fact that the county owns the real estate?"

It also appears that during fair week the Brown County Agricultural and Fair Association rents out space on the grounds for use as taverns.

"Has the city of De Pere a right to charge a license fee for taverns on the fair grounds (owned by the county) and is it necessary for each tavern operator to take out a picnic license, or will one license taken out in the name of the fair association cover all taverns located on the fair grounds during the fair?"

Sec. 66.05, subsec. (10), subd. (d), pars. 1, 2, 4, provide (ch. 207, Laws 1933):

"1. No person shall sell, barter, exchange, offer for sale, or have in possession with intent to sell, deal, or traffic in fermented malt beverages or light wines, unless licensed as provided in this subsection by the governing board of the city, village, or town in which the place of business is located."

"2. The governing body of every city, village and town shall have the power, but shall not be required, to issue licenses to wholesalers and retailers for the sale of fermented malt beverages or light wines within its respective limits, as herein provided. * * *"

"4. * * * A separate license shall be required for each place of business. Said licenses shall particularly describe the premises for which issued, shall not be transferable, and shall be subject to revocation for violation of any of the terms or provisions thereof or of any of the provisions of this subsection."

Sec. 66.05 (10) (g) 2 provides:

"* * * Licenses may also be issued to * * * county or local fair associations or agricultural societies * * * that have been in existence for not less than six months prior to the date of application * * * author-

izing them to sell fermented malt beverages or light wines at a particular picnic or similar gathering * * * or during a fair conducted by such fair associations or agricultural societies, for which a fee of not to exceed ten dollars may be charged as fixed by the governing board. All Class 'B' licenses shall be posted in a conspicuous place in the room or place where fermented malt beverages or light wines are drawn or removed for service or sale."

From the above-quoted section it will appear that it is illegal for any person to sell fermented malt beverages or light wines unless licensed by the governing board of the city, village, or town in which the person conducts his business. The governing board of every city, village, and town *may*, but is not required to, issue licenses for the sale of fermented malt beverages or light wines within the limits of the said city, village, and town. I assume that the governing body of the city of De Pere has already voted to grant licenses to the proper persons. The governing board of a city, village, or town does not have the right to arbitrarily grant a license to one person and deny a license to another. Its discretion in this matter is confined only to a determination as to whether a person is of good moral character and whether a prohibited "business" is conducted upon the premises for which the license is sought. In addition to having a good moral character, of course, it is necessary that the person be a citizen of the United States and of the state of Wisconsin and have resided in this state continuously for not less than one year prior to the date of the filing of the application. (See sec. 66.05 (10) (g) 1.)

The statute provides for licensing by the governing board of the city, village, or town "in which the place of business is located." The power to license refers to the issuance of licenses by the governing body of every city, village, and town for the sale of fermented malt beverages or light wines "within its respective limits." No exception is made or implied as to property the title of which is held by the county. The jurisdiction of the governing board of a city, village, or town in respect to the issuance of licenses under ch. 207, Laws 1933, is the same over county-owned property within the limits of the city, village, or town as it

is over privately owned property within the corporate limits. Any individual, therefore, who rents county-owned property and conducts a tavern thereon must obtain a license from the governing body in order to comply with the law.

In respect to your second question, every individual who has rented property from the county and will conduct a tavern thereon during the fair must obtain a license for the place of business which is being operated as a private enterprise. It may be noted in this connection that sec. 66.05 (10) (g) 1 also provides:

"* * * Not more than two class 'B' licenses shall be issued in the state to any one person, * * *."

If the Brown County Agricultural and Fair Association decides to sell fermented malt beverages and light wines on the county property during the fair it may be granted a license by the city of De Pere for a fee of not to exceed ten dollars, which will authorize sales of fermented malt beverages and light wines as an enterprise conducted for the benefit of the Brown County Agricultural and Fair Association. This license, if taken out by the Brown County Agricultural and Fair Association, would not be sufficient to cover a number of taverns operated on the fair grounds on behalf of individuals nor would the individuals be entitled to obtain a license for the fee of not to exceed ten dollars simply because they were operating taverns upon the fair grounds.

JEF

Civil Service—State Inspection Bureau—Inspectors appointed under provisions of ch. 461, Laws 1933, are subject to provisions of ch. 16, Stats.

August 2, 1933.

ROBERT K. HENRY,
State Treasurer.

In your recent letter you asked to be advised as to whether or not the inspectors appointed under ch. 461, Laws 1933

(Bill No. 701, A.) must qualify under the civil service law (ch. 16, Stats.).

It is the opinion of this department that the inspectors appointed under the provisions of ch. 461, Laws 1933 are subject to the provisions of the state civil service law (ch. 16, Stats.).

Ch. 461, Laws 1933 is an act

"To repeal subsection (7n) of section 20.49 and sections 20.58, 168.01 and 168.02; to renumber sections 82.025 and 85.04 to be sections 109.06 and 109.07; to create sections 20.055, 109.01 to 109.05, and 168.01; and to amend sections 109.06 and 109.07, and subsection (1) of section 168.03 of the statutes, relating to the consolidation of the oil inspection department, the traffic division of the highway commission, and the work of the automobile license inspectors of the office of the secretary of state in a state inspection bureau in the treasury department, and making an appropriation."

Sec. 16.08, Stats., divides the state civil service into two classes, to wit: the classified service and the unclassified service.

Sec. 16.09 relates to the classified service and provides for two divisions, namely the exempt and the competitive divisions.

Subsec. (3), sec. 16.09 relates to the competitive division and provides:

"The competitive division shall include all positions for which it is practicable to determine the merit and fitness of applicants by competitive examinations, and shall include all positions and employments of whatever functions, designations or compensation, in each and every branch of the classified service, except such positions as are in the exempt division."

A careful examination of the statutes discloses that the inspectors provided for in ch. 461, Laws 1933, do not come within any of the positions in the exempt division of the classified service nor do they come under any of the positions enumerated in the unclassified service.

Subsec. (3) par. (b), sec. 20.055, Stats. (as created by ch. 461, Laws 1933), reads as follows:

"To the inspectors of the state inspection bureau, such salaries as may be fixed by the state supervisor of in-

spectors, with the approval of the state treasurer, within the salary ranges fixed pursuant to the state civil service law."

Sec. 8, ch. 461, Laws 1933 reads as follows:

"All employees now employed in the departments and bureaus affected by this act shall be eligible to appointment in the bureau created hereunder and shall be given preference in such employment and appointment."

The above quoted provisions of ch. 461, Laws 1933, read in connection with the pertinent provisions of ch. 16, Stats., clearly indicate that the inspectors appointed under ch. 461, Laws 1933, are subject to the provisions of the civil service law.

It might be argued that Amendment No. 6, S., to Bill No. 701, A., militates against the view that the employees of the state inspection bureau are subject to the provisions of ch. 16. Amendment No. 6, S., was introduced by Senator Reis, and reads as follows:

"All employes of the state inspection bureau shall be subject to the provisions of chapter 16, notwithstanding the effect of any other bill which may be enacted by the 1933 legislature."

This amendment was rejected on July 12 by a vote of 19 to 14.

However, it is manifest from a reading of this amendment that all that it was intended to do was to make the employees subject to the provisions of ch. 16 "notwithstanding the effect of any other bill which may be enacted by the 1933 legislature." The Carroll civil service bill was still under consideration and it was intended that even if such civil service bill passed the employees of the state inspection bureau should be subject to the provisions of ch. 16, the state civil service law. The fact that this amendment was rejected does not manifest an intention of the legislature that the employees under consideration should not be subject to the civil service law. In the present state of the law it is manifest that inspectors appointed under ch. 461, Laws 1933, come within the provisions of subsec. (3), sec. 16.09, Stats., and that they are subject to ch. 16.

JEF

Fish and Game—Hunting on Horicon marsh is illegal.

August 3, 1933.

HERBERT J. GERGEN,
District Attorney,
Beaver Dam, Wisconsin.

You request the opinion of this department as to what bearing the recent decision in the Delta Fur Farm case will have on the legality of hunting on Horicon Marsh. The case you refer to is *State v. Lipinske,* decided June 29, 1933, and reported in 249 N. W. 289.

The supreme court did not decide the constitutionality of ch. 484, Laws 1931, which created a wild life, fish and spawning refuge on certain lands belonging to the Delta Fish & Fur Farms, Inc. Had the court found it necessary for the determination of the case, it is the opinion of this department that the law would have been upheld. *State ex rel. Hammann v. Levitan,* 200 Wis. 271; *Monka v. State Conservation Comm.,* 202 Wis. 39.

In answer to a question submitted by Paul D. Kelleter, conservation director, as to whether the proper legal steps were taken by the conservation department in the establishment of the Horicon marsh wild life refuge to the extent that it is within the authority of the enforcement officers to make arrests of persons hunting within the Horicon marsh, our department decided affirmatively. XXI Op. Atty. Gen. 992.

It is the opinion of this department that the supreme court in the case of *State v. Lipinske,* above cited, did in no way void that opinion or destroy the effectiveness of sec. 29.571, which established the Horicon marsh game refuge.

The court simply held that Lipinske had not violated subsec. (4), sec. 29.57. Certain stipulated facts were presented to the supreme court, among them the important facts shown were: that the Delta Farms, Inc., of which defendant was president, had maintained a breeding place for fish which had no connection with any navigable waters and located wholly within the lands owned by it in fee

simple; that the Delta Farms, Inc., had in fact purchased three carloads of different varieties of fish and put them in the nonnavigable waters, the state having taken no steps at all to replenish the supply.

On these facts the court merely said that the fish had always been owned by the Farms, Inc.; that they were not to be considered as wild life, or in the court's own words,

"* * * Whether a land owner propagates fish in a glass bowl, a water tank, or a pond, such fish are not wild so long as they have no connection with navigable waters and so long as they are subject to the dominion and control of the owner * * *" (p. 291).

It is to be further noted that since 1929 the conservation commission has been supplying the eggs of the pheasant to the farmers of Horicon marsh. These birds after hatching are not kept in a state of captivity as was done with the fish in the case of *State v. Lipinske.*

In view of this opinion, hunting on Horicon marsh is illegal.

JEF

School Districts—Municipal Borrowing—Under subsec. (8), sec. 67.12, Stats. 1933, school board of school district operating under district system is authorized to borrow temporarily money necessary to meet immediate expenses of maintaining schools, in amount not exceeding one-half estimated receipts for school year as certified by state superintendent and local school clerk, but such estimated receipts do not include district funds tied up in closed bank.

August 7, 1933.

ANNUITY AND INVESTMENT BOARD.

Attention Albert Trathen, *Director of Investments.*

You state that a certain school district made temporary loans of $9,300 during the last preceding school year of 1932–1933, which loans became due on March 15, 1933,

but which remain unpaid because the district has $9,983.59 tied up in a closed bank. The school district desires to make additional temporary loans under sec. 67.12, subsec. (8), Stats. The estimated receipts of the district for the present school year of 1933–1934 amount to $24,000.00, exclusive of the $9,983.59 tied up in a bank.

The question which you present is whether the $9,983.59 tied up in a bank may be included in the estimated receipts of the district for the present school year of 1933–1934 in computing the maximum amount that the district may temporarily borrow under sec. 67.12 (8), Stats.

The answer is, "No," and is in accord with your own conclusion in the matter.

Sec. 67.12 (8) Stats., as amended by ch. 127, Laws 1933, authorizes the school board of any school district operating under the district system to temporarily borrow money in such sums as are needed to meet the immediate expenses of maintaining the schools in such district, no such loan or loans to extend beyond the first day of May following nor to an amount exceeding one-half the "estimated receipts as certified by the state superintendent of schools and the local school clerk."

The term "estimated receipts," etc., plainly refers to the estimated annual income which it is anticipated the school district will receive during the school year in and for which the loans are made, including state aid and local school taxes, and the apparent purpose of authorizing such loans to be made is to enable the district to finance the maintenance of its schools in advance of the realization of such anticipated income. Obviously the term in question does not include school district funds tied up in a closed bank. Such funds do not represent anticipated income. Instead they represent past income, actually realized, but which is presently unavailable. Furthermore, as you suggest, school district funds tied up in a closed bank should not in any event be included in "estimated receipts" for the reason that it is extremely uncertain what proportion, if any, of such funds will be released to the district during the year.

It will be noted that temporary borrowing on the basis

of school district funds tied up in a closed bank is specifically authorized by another statute, namely, subsec. (10), sec. 67.12, as created by ch. 113, Laws 1933, but such borrowing involves a proceeding separate and distinct from that under subsec. (8), sec. 67.12.
JEF

Taxation—Tax Sales—Redemption—County board does not have power to refund redemption money.

August 7, 1933.

CLIVE J. STRANG,
District Attorney,
Grantsburg, Wisconsin.

You have inquired of this department whether the county board can refund redemption money paid within the period allowed for redemption from tax sales. The situation given us was one which arose through an error of county officials who, receiving this money in good time, later granted a tax deed on this land to the holder of the tax certificates. Such action was erroneous and the deed given would be void and of no effect. However, that is an error which can be corrected by court procedure alone. The power of the county board is limited to canceling deeds only when the deed is *in*valid due to some error in the groundwork, i. e., assessment of the tax. Sec. 75.22, Stats.; IV Op. Atty. Gen. 1007; XXII Op. Atty. Gen. 73. Obviously, this situation is not present here.

Likewise, the county board can refund money only when the deed is invalid. Sec. 75.22, Stats.

This section does not apply to redemption money, for throughout the section the refund and cancellation are considered together. Certainly the holder of the tax certificate or tax deed is the only one considered as being entitled to a refund. We have not found any other section which would permit of a refund to the taxpayer but, on the contrary, we notice that sec. 75.05, Stats., permits of but two dispositions of the redemption money: (1) to the holder of the certificate, or (2) to the general fund.

The proper way for this matter to be handled is to have the tax deed offered up to be canceled of record by the court and then pay over the money to the tax deed grantee as on his tax certificates which may then be redeemed. If this could not be done amicably by the parties, the only recourse would be for the taxpayer to start a suit to quiet title. If the tax title claimant seeks the redemption money that would, no doubt, be an election on his part to treat the deed as void and of no effect.

Our conclusion is that the redemption money must go through the regular channels, and further that the county cannot cancel the tax deed and cannot turn over the moneys as a refund to either the tax title claimant or the taxpayer. The statutes are clear and must be followed.

JEF

Mortgages, Deeds, etc.—Leases—Public Officers—Register of Deeds—Under sec. 59.51, Stats., register of deeds cannot be compelled to record lease covering period less than three years.

August 7, 1933.

ROBERT L. WILEY,
District Attorney,
Chippewa Falls, Wisconsin.

The question submitted is:

"Must the register of deeds record in his office leases that are made for less than three years?"

Sec. 59.51, subsec. (1), Stats., states that the register of deeds shall:

"Record or cause to be recorded in suitable books to be kept in his office, correctly and legibly all deeds, mortgages, maps, instruments and writings authorized by law to be recorded in his office and left with him for that purpose."

Concerning the recordability of conveyances, sec. 235.39, Stats., states:

"A certificate of the acknowledgment of any conveyance or of the proof of the execution thereof before a court

of record or justice of the peace, signed by the clerk of such court or by the justice before whom the same was taken, and in the cases when the same is necessary, the certificate required by section 235.24 [acknowledgment of foreign deeds] shall entitle such conveyance with the certificates aforesaid to be recorded in the office of the register of deeds of every county in which any of the lands lie."

Considering the above two sections it seems apparent that conveyances, as a general term, when in the proper form, and upon payment of the stipulated filing fee, are writings authorized by law to be recorded. Hence it becomes the duty of the register of deeds to record such conveyances.

Concerning just what is included in the term "conveyance," sec. 235.50 provides:

"The term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned or by which the title to any real estate may be affected in law or equity, except wills and leases for a term not exceeding three years; * * *."

Therefore, in view of these particular statutes, at least, it seems clear that a lease for a period shorter than three years is not a conveyance analogous to those which registers of deeds are required to record. Nor am I able to find any further statutory stipulation which authorizes the recording of leases not included in the requirements set out in sec. 235.50.

The situation here concerned seems analogous to that dealt with in XI Op. Atty. Gen. In that opinion it was asked whether any method existed by which the liquidation of a bank or loan association could be made a matter of record in the county wherein the said corporation was located.

In view of the result reached in this opinion, and from the fact that I fail to find any statute or decision construing a statute so as to authorize the recording here concerned, I conclude that a register of deeds cannot be forced to record a lease covering a period less than three years.
JEF

Taxation—Tax Collection—Delinquent Taxes—Sec. 1, ch. 288, Laws 1933, does not set time limit for refunds to taxpayers of penalties and delinquent taxes.

County should issue orders for refunds after individual presents proper claim, even though county has no money in treasury.

August 8, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin

Secs. 1 and 2, ch. 288 Laws 1933, relating to the payment of delinquent real estate taxes for the years 1931 and 1932 provide as follows:

"Taxpayers who pay their delinquent taxes on real estate for the year 1932 on or before the fourth Monday in June, 1933, shall be entitled to pay such taxes without penalty, interest or other charges except the fee for advertising the same at tax sale, regardless of whether or not they filed an affidavit for the extension of the time of payment pursuant to chapter 16, laws of 1933. Taxpayers who prior to the effective date of this act paid their delinquent taxes on real estate for the year 1932 shall be entitled to a refund of all amounts paid as penalty, interest, or other charges on such delinquent taxes except the fee for advertising the same at the tax sale.

"Any taxes of the year 1932 that are paid under the provisions of section 1 of this act to any county treasurer up to and including the fourth Monday in June, 1933, less the amount due for advertising the same at tax sale, shall be paid over to the town, city or village wherein such taxes were assessed. The town, city or village treasurer shall on July 15, 1933, make a supplemental settlement with the county treasurer for the part of such taxes due the county as county taxes. Such settlement shall be made as provided in subsection (2) of section 74.15 of the statutes."

You state that your county has been in dire financial circumstances and that the refunding of these penalties may work a great hardship upon it. You inquire whether there is any set time in which these penalties must be refunded or whether the county can admit the fact that they owe these taxpayers a refund and pay it when they get the money. The county is willing to make the refund when

the money is available. The penalties which were collected, however, have been used to pay county officers and current expenses.

You will note that sec. 1 of the act provides that taxpayers who prior to the effective date of the act paid their delinquent taxes on real estate for the year 1932 "shall be entitled to a refund" of the amounts paid as penalty and interest. The act does not specify any time for the making of such refunds, but it gives the taxpayer a right to a refund upon making claim therefore. Such claims should be handled in ordinary course, and county orders may be issued therefor. Actual payment cannot, of course, be made unless and until there are county funds available therefor.

You also state in your letter:

"There is another provision in the statutes which requires the county to make a settlement with the towns. Our county has made the settlement of June 15 and if they are required to make a supplemental settlement on July 15 it is going to create another hardship for the county."

Sec. 2 of the act expressly requires that any taxes of 1932 that are paid to the county treasurer on or before the fourth Monday in June, 1933, shall be paid over to the proper local treasurer and supplemental settlement made by July 15, 1933. While this may work a hardship upon the county, the mandate of the statute is plain and unequivocal.

JEF

Bridges and Highways—State Highways—Counties—Bids—County is not authorized to bid on contract for road job financed with federal funds.

August 8, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

Your county highway commission has asked you whether or not the county could bid in on the road jobs that are

being let throughout the state in which the state is going to receive money appropriated by the federal government to build the roads.

It is our opinion that the county may not bid in on these jobs.

Counties are but local organizations invested with a few functions characteristic of a corporate existence. They depend upon the legislature for their existence and the statutes confer upon them all the powers they possess. *Frederick v. Douglas County,* 96 Wis. 411; *Rock County v. Weirich,* 143 Wis. 500. Neither the general nor the special powers of the county board given by statute authorize the county to enter into such a contract as is contemplated by your county highway commission. Such an undertaking by the county would be in a proprietary capacity and authority to do so must be specifically found in the statute. The law does not contemplate that a county board may bind the taxpayers of a county to make up a loss which might occur if the bid made by the county should prove to be less than the actual cost of doing the work.

Secs. 83.04 and 84.06, Stats., relate to arrangements between the state and the county regarding highway construction. A reading of those statutes will clearly indicate that whenever the county forces or machinery are to be used the construction is to be handled as a non-contract proposition.

JEF

Taxation—Tax Sales—Under sec. 75.34, subsec. (2), and sec. 75.35, Stats., county board may sell tax certificates for less than face value.

County may not limit sale of its tax certificates to owners of real estate.

August 9, 1933.

L. A. KOENIG,
District Attorney,
Phillips, Wisconsin.

Your county proposes to sell tax certificates after the tax sale at seven per cent less than their face value pur-

suant to sec. 75.34, subsec. (2) Stats. For that purpose the county intends to authorize the county clerk, after due publication, to sell the certificates only to the owners of the real estate themselves "and thus cut out investors and speculators and give this opportunity and advantage to the owners of the property." It is also proposed to limit the sale for only thirty or sixty days at this seven per cent discount. You request our opinion concerning the legality of this procedure.

It is our opinion that such an action by the county board would be illegal. The deduction of seven per cent from the face of the tax certificate would, in many cases, bring the amount to be paid by the person redeeming, less than the original amount of the tax assessed against his property. Confining the sale to the owner of the real estate would, in effect, be a compromise of his tax without any showing of illegality or improper assessment.

Sec. 75.60, authorizes the county to compromise taxes which are believed to be illegal. Sec. 75.61 (2) authorizes a county to accept a proportional amount of the tax assessed against real estate and cancel a tax certificate when there has been a finding by the town board, village board, or city council that the original assessment was greater than the value that could ordinarily be obtained for the real estate at private sale. These are the only two sections of the statutes which provide that a county may accept in full satisfaction of the taxes assessed against real estate any amount less than the tax originally assessed.

Sec. 3, ch. 288, Laws 1933, authorizes the governing body of a county to waive the payment of all or any part of the interest and penalties of the delinquent taxes on real estate for the years 1931 and 1932 for which the county holds the tax certificates, provided such taxes are paid before July 1, 1934. This part of the act neither specifically nor by implication suggests that the county accept less than the original amount of the tax.

Under the present state of the law it is possible for a taxpayer to make partial payments, either upon his taxes or toward the redemption of tax certificates outstanding against his property. Any taxpayer having money with

which to redeem a tax certificate on his property when offered by the county board at seven per cent less than its face value would have money to apply on the said tax certificate when not offered at this reduction.

It would also seem to be distinctly against public policy for a county to enter into an arrangement with a taxpayer which apparently places a premium upon delinquency in the payment of governmental revenues. Not only would it be an injustice to those taxpayers who pay their taxes promptly, but it would be an incentive to all taxpayers to delay their tax payments in future years in the hope of securing a similar reduction. Under secs. 75.34 (2) and 75.35 the county board may, however, sell the tax certificates held by it for a percentage less than their face value and for a limited time only. It is only that portion of the proposal which makes the original taxpayer the only purchaser which is illegal.

JEF

Elections—Absent Voting—School Districts—School District Clerk—Provisions for absent voting, under sec. 11.54, Stats., do not apply to school district election.

August 11, 1933.

CHAS. K. BONG,
Assistant District Attorney,
Green Bay, Wisconsin.

Under date of July 28 you inquire whether in our opinion sec. 11.54 and the following statutes relating to absent voting, apply to elections held for the selection of a clerk for a school district, under sec. 40.07 and the subsections thereunder.

Sec. 11.54, subsec. (1) provides:

"Any qualified elector of this state registered, where registration is required or who swears in his vote as herein provided, who is absent or expects to be absent from the city, town or village in which he is a qualified elector, or from this state, or who because of sickness or physical disability cannot appear at the polling place in his precinct,

on the day of holding any general, special, primary, county, city, village or town election, may vote at any such election as provided in sections 11.54 to 11.68, inclusive. of the statutes."

You will note that this provides for absent voting on the day of holding any general, special, primary, county, city, village or town election. School district elections, as held under sec. 40.07, are not mentioned. I believe they were left out by the law makers by design. The statute applies only to those enumerated.

You are therefore advised that the provisions for absent voting under sec. 11.54 do not apply to school district election held under sec. 40.07.

JEF

School Districts—State Aid—County treasurer may not, on ground that county has claim against village, withhold from payment to village treasurer state school aid under sec. 40.87, Stats., which is due to school district located in such village.

August 11, 1933.

JOHN CALLAHAN, *State Superintendent, Department of Public Instruction.*

With your request of July 26 and file of correspondence attached thereto you submit the following set of facts: On March 27, 1933, the village treasurer of a certain village made a "temporary" settlement with the county treasurer for the taxes of 1932. The county treasurer "accepted" three checks from the village treasurer as follows: $1,059.23 for state tax, $1,0971.74 for county tax and $12.20 for dog tax, making a total of $2,163.17. These three checks were drawn on a moratorium bank. According to the county treasurer the checks

"were accepted with the understanding that we would only be obliged to hold them until the state school aid was received at this office, therefore, when the state money arrived I made a county check payable to the village treasurer of the village of Pound in the amount of $2,885.62,

which covered $2,135.62 for state aid plus $750.00 county aid. I offered to release this check to the village of Pound providing they would make good the moratorium checks I was withholding. * * *"

The county treasurer further states:

"* * * You will see from the above information that the village of Pound has not paid its obligation to the state through this office, that the village has not paid its state tax nor has it paid its county tax. In view of the fact that the village has not fulfilled its obligations to the county or the state I believe that it should not be entitled to receive anything in return, * * * and the village board refuses to make the checks good which I am holding because their funds are restricted by the bank."

The state school aid referred to is the common school equalization aid provided for in sec. 40.87, Stats., for the various school districts in the state according to the number of teachers employed, and the county aid referred to is the aid required by the same section and sec. 59.075 to be raised by the county for the same purpose.

The amount which is being withheld by the county treasurer represents the aid that is to be distributed to the school district which is located in the village in question.

The question presented is whether the county treasurer has a right to withhold the aid under the circumstances outlined.

The answer is, No.

The aid, both state and county, is raised and set aside for the benefit of the school district for school purposes and not for the village for village purposes, and the school district is entitled to receive the same. The school district is a legal entity separate and distinct from the village, and the aid is due to the school district and not to the village. The method of distribution is such that the state aid is first paid over by the state treasurer to the county treasurer and then by him, together with the county aid, paid over to the village treasurer, but the ultimate distributee and the only municipality beneficially entitled to the same is the school district. The village treasurer receives the aid merely as one of the distributing agencies

and for the sole purpose of distributing the same to the school district. The county treasurer, therefore, has no right to withhold such aid simply because the county has or may have a claim against the *village*. The school district may not thus be involved in the controversy over the tax settlement between the village treasurer and the county treasurer.

JEF

Fish and Game—Beaver Farms—Owner of beaver farm is proper person, for all practical purposes, to bring complaint for violation of sec. 29.63, subsec. (1), par. (f), Stats.

August 11, 1933.

PAUL D. KELLETER,
Conservation Director.

In your communication of August 3 you have referred us to ch. 329, Laws 1933, which adds a new par. (f) to sec. 29.63, subsec. (1), Stats. Said paragraph (f) reads as follows:

"For hunting or trapping upon a licensed beaver or muskrat farm without the consent of the owner of the same by a fine of not less than two hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than six months nor more than nine months, or by both such fine and imprisonment."

You inquire whether it is the duty of your department to enforce this law or whether it should be enforceable only by local, county, city, village or town officers.

The conservation commission and its deputies are authorized under sec. 29.05

"(1) * * * to arrest, with or without a warrant, any person detected in the actual violation, or whom such officer has reasonable cause to believe guilty of the violation of any of the provisions of this chapter, and to take such person before any court in the county where the offense was committed and make proper complaint.

"(2) Such officers shall, upon receiving notice or information that any provision of this chapter has been violated, as soon as possible make a thorough investigation thereof, and cause proceedings to be instituted if the proofs at hand warrant it."

You will note that the penalty in the new paragraph above quoted does not apply to anyone who has consent of the owner to hunt and trap upon the licensed beaver and muskrat farm. Anyone who does such trapping and hunting with the consent of the owner of the muskrat farm is not subject to this penalty. A conservation warden seeing anyone hunting and trapping on a beaver farm would not know whether the owner had authorized it and therefore could not be certain whether this section is violated. The proper person to make complaint is the owner of the place, for he is the only one who knows whether he has given consent to the person in question.

As a general rule the conservation warden would have to pay very little attention to enforcing this provision of the law, still it is part of ch. 29, and the conservation warden, when he finds out that there is a violation of the law, has the right and it is his duty to make complaint. There is nothing in the law concerning beaver farms or this new paragraph above quoted, which would limit the bringing of the prosecution to the owner of the beaver farm, although it naturally will work out that he will be the proper person to make the complaint.

JEF

Counties—County Board—Indigent, Insane, etc.—Hospital Aid—Price county, under resolution of county board, is still liable for hospital aid for poor treated therein.

August 11, 1933.

L. A. KOENIG,
District Attorney,
Phillips, Wisconsin.

You have enclosed with your communication a resolution passed by the Price county board on the 17th day of November, 1932, whereby pursuant to sec. 49.15, Stats., the system of poor relief that had theretofore been in existence in Price county was changed to the county system for such period of time as poor aid was and will be extended to Price county by or through the agency of the Federal Reconstruction Finance Corporation. You say that it is now a fact that expenses of taking care of the poor in hospitals and for any attention received in hospitals either for medical or hospital services has been cut by a recent order. You state that the question now is whether the county is still liable for hospital cases or whether the charge for such cases is to be taken care of by the town, village or city, as the case may be.

You state that you have advised the relief committee that under the resolution the county is still liable for the care and expense of all hospital cases even though that feature of the poor aid has been cut out by order of the Federal Government and industrial commission. The condition of the resolution which reads that the county system shall be in force so long as poor aid is extended to the county through the agency of the Federal Reconstruction Finance Corporation, in view of the fact that such aid is still extended to Price county although not as fully as before, is present. You are therefore advised that we agree with your conclusion and that the county is still liable for the care and expense of all hospital cases for the poor.
JEF

Public Officers—High School Board Members—Malfeasance—School Districts—Transportation of School Children —Whether high school board has violated sec. 348.28, Stats., providing for punishment of malfeasance in office, by paying for transportation to parents of children who were transported without compensation by one who had contract for transporting children of graded school district, under all facts and circumstances, is doubtful.

August 11, 1933.

R. C. TREMBATH,
District Attorney,
Hurley, Wisconsin.

You say that X, who in 1931-1932 had a contract for transporting school children of a state graded school district, transported not only children attending the state graded school but also children attending the union free high school; that no agreement was entered into by the parents with the school board or with the one transporting the children for the transportation of their children; that at the close of the school year the union free high school board sent a check to all parents of children attending the free high school, ostensibly to pay for the transportation of the high school pupils; that the parents kept the money, but had paid for no such transportation. You ask whether such action on the part of the free high school board was a violation of sec. 348.28, Stats.

The provisions of sec. 348.28, being the malfeasance in office statute, are applicable to officers of school districts and school boards, and prohibit the doing of an unlawful act in an official capacity. It therefore applies to the union free high school board. Any act by the school officers in their official capacity, unauthorized or required by law, is punishable. See *State v. Cleveland,* 161 Wis. 457. The only question that confronts us is whether the act was an unlawful act.

That part of sec. 40.34, subsec. (1), Stats., which is here relevant provides:

"* * * The board shall provide transportation to and from school for all school children residing in the dis-

trict and over two miles and one-half from the schoolhouse, in case of a common school and four miles in case of a union high school. And if it fails to provide such transportation the parents may provide suitable transportation for their children, and shall be paid therefor by the district, at the rate of twenty cents per day for the first child, twenty cents per day for the second child, and ten cents per day for each additional transported child; provided, the child shall have attended not less than one hundred and twenty days during the school year unless prevented by absence from the district; * * *."

Our court has held in the case of *Andrews v. School District,* 183 Wis. 255, that this

"* * * is a beneficient statute, in the interest of education, and must be liberally construed to accomplish the purpose intended. * * *"

In that case the parents furnished a horse and buggy which the five children used in driving to the school, neither the parent nor any one else accompanying the children. Our court held that nevertheless they were entitled to the compensation for transporting the children, under said sec. 40.34. You will note that the statute does not reimburse parents for expenses incurred. They are compensated for providing for the transportation. Under a liberal construction, as the statute requires, the parents may provide transportation for their children, and the law does not concern itself whether the parents are required to pay for such transportation or whether it is given to them gratis.

The union free high school board evidently held that the parents had provided transportation for their children. It is a fact, under your statement, that said high school children did have transportation and that it evidently was furnished to them without cost. If a neighbor takes such children along while transporting his own children, for a nominal sum, or even gratis, when all other conditions of the statute are otherwise complied with, it would seem that under the liberal construction required of sec. 40.34, and the strict construction against the state under sec. 348.28, no conviction could be obtained for a violation of sec. 348.28.

Under your facts stated, the person who transported the

children of the graded school district took these children with him from the union free high school and transported them. Some of them were undoubtedly the children of the same parents whose children he was transporting for the graded district. The reason he did this, or what consideration he had for it, does not appear.

In view of the fact that the union free high school board passed upon the question and decided that the parents were entitled to the compensation for the transportation, we believe it is very doubtful whether a conviction could be obtained under the circumstances.

JEF

Municipal Corporations—Beer Licenses—State Fair—Under ch. 207, Laws 1933, person who has been granted privilege of operating stand or concession on state fair grounds by commissioners of department of agriculture and markets must first secure license from governing board of town of Wauwatosa before he is authorized to sell 3.2 beer on state fair grounds.

August 14, 1933.

RALPH E. AMMON, *Manager,*
State Fair.

You state that the Wisconsin State Fair Park is located in the town of Wauwatosa, Milwaukee county, Wisconsin, and inquire whether or not said town has authority to issue a license for the sale of 3.2 beer in the State Fair Park.

Sec. 66.05, subsec. (10), subd. (d), par. 1, Stats. (as amended by ch. 207, Laws 1933) provides as follows:

"No person shall sell, barter, exchange, offer for sale, or have in his possession with intent to sell, deal or traffic in fermented malt beverages or light wines, unless licensed as provided in this subsection by the governing board of the city, village, or town in which the place of business is located."

Sec. 66.05 (10) (g) 2, Stats, (as amended by ch. 207, Laws 1933) reads as follows:

"* * * Licenses may also be issued to bona fide clubs, state, county or local fair associations or agricultural societies, lodges or societies that have been in existence for not less than six months prior to the date of application or to posts now or hereafter established, of ex-service men's organizations, authorizing them to sell fermented malt beverages or light wines at a particular picnic or similar gathering, or at a meeting of any such post, or during a fair conducted by such fair associations or agricultural societies, for which a fee of not to exceed ten dollars may be charged as fixed by the governing board. * * *."

Sec. 93.07, Stats., provides:

"It shall be the duty of the commissioner of agriculture [now commissioners of the department of agriculture and markets] and he shall have the power:

"* * *

"(4) To exclude from the state fairgrounds all exhibitions and all booths, stands and other temporary places for the sale of articles which he may deem objectionable."

Sec. 93.16 provides:

"The principal officers of the state board of agriculture, the northern Wisconsin state fair and of any county agricultural or industrial society shall have full jurisdiction and control of the grounds on which such board or society may exhibit, and all the streets and alleys and other grounds adjacent to the same during all such exhibitions, so far as may be necessary to exclude therefrom all other exhibitions, booths, stands or other temporary places for the retail or sale of any kind of spirituous or fermented liquors or other articles that they might deem objectionable. The president, or, in his absence, any vice president acting in his stead, may appoint at any time any necessary policemen to assist in preserving the peace and enforce the regulations upon the ground and adjacent streets, who, for such purpose, shall have all the powers of a constable and be entitled to similar fees."

It would seem from the above that there is a conflict between the provisions of subsec. (10) (d) 1, (10) (g) 2, sec. 66.05, and sec. 93.07.

In XX Op. Atty. Gen. 506 this office ruled that the Milwaukee county dance hall ordinance does not apply to a dance hall operated on the state fair grounds by contract with the state.

In that opinion see pages 508–509.

"The regulation and control of dances and dance halls is an exercise of the police power of the state. *Mehlos v. Milwaukee,* 156 Wis. 591, 601. The power may be delegated to political subdivisions of the state, but the power of the county board is only such as is specifically delegated to it. *Northern Trust Co. v. Snyder,* 113 Wis. 516, 531.

"While there can be no question but that the legislature could, if it saw fit, have delegated to a county authority to exercise police powers over state lands within the county, no such delegation can be implied *(Northern Trust Co. v. Snyder,* supra.); and the specific charging of the commissioner of agriculture with the care and custody of the fairgrounds, and giving him authority to appoint police 'to preserve the peace and enforce his regulations upon said fairgrounds' very definitely is a delegation by the state, to its own official, of the police power and control over such grounds.

"It should also be noted that the authority to counties to enact dance hall ordinances is found in sec. 59.08 (9) and that sec. 59.08 relates to 'special powers,' and that subsec. (5) thereof provides that the county's power is restricted where the legislature shall have exercised such power. The clear purpose of a dance hall ordinance is to preserve the peace, and where the legislature has specifically provided for policemen to preserve the peace on the fairgrounds, it seems to me this restricts the county's authority to further attempt to preserve the peace by its dance hall regulations."

It will be noted that this office pointed out in the above opinion that the legislature could, if it saw fit, have delegated to a municipality authority to exercise police power over state lands located within such municipality.

The only question before us is whether in the instant case such authority has been delegated to the town of Wauwatosa.

It is the opinion of this department that the town of Wauwatosa has jurisdiction over the sale of 3.2 beer on the state fair grounds under the provisions of ch. 207, Laws 1933. It should be further pointed out that if the state itself wishes to sell beer upon the state fair grounds the state, acting through the commissioners of the department of agriculture and markets, must secure a license. It would seem absurd to say that the state would have to have a

license to sell 3.2 beer on the state fair grounds but that an individual who is granted the privileges of operating a stand or concession on the state fair grounds and who wishes to sell beer thereon would not have to secure a license.

In view of the foregoing we are constrained to hold that no person may sell 3.2 beer on the state fair grounds without first having complied with the provisions of ch. 207, Laws 1933, and without first having secured a license from the governing board of the town of Wauwatosa. We wish to make it clear that this opinion is limited merely to holding that the town of Wauwatosa has jurisdiction over the sale of 3.2 beer on the state fair grounds under the provisions of ch. 207, Laws 1933, and that this opinion does not hold that the town of Wauwatosa has general jurisdiction or control of the state fair grounds.

JEF

Indigent, Insane, etc.—Sanity Hearings—Physicians' report shall contain statement of reasons for application and finding on merits of reasons.

All notices mentioned in sec. 51.02, subsecs. (1) to (4), Stats., should be given.

August 14, 1933.

BOARD OF CONTROL.

Attention A. W. Bayley, *Secretary.*

You have referred to us a communication from Judge Carl Lynn in reference to ch. 330, Laws 1933. You ask us to give the opinion of this department on the questions raised by Judge Lynn in addition to making up forms as suggested by him.

The questions raised seem to be: (1) What must be contained in the physicians' report? (2) Are a hearing under sec. 51.02, subsec. (4), Stats. (1933), and orders for hearings necessary?

In answer to the first question, it is our opinion that the physicians' report need be but an informal statement stat-

ing the symptoms and diseases afflicting the insane. Such report would contain the statement of facts alleged in the application as the reasons given for such application and would be for the guidance of the physicians and those using their conclusions or findings. This report is, of course, supplementary to the statutory questions.

As to the second question, it is the opinion of this department that the word "shall" as used in sec. 51.02 (4), is mandatory, more particularly so when used with the word "may" in the same statute. *Equitable Life Assurance Society v. Host,* 124 Wis. 657. It is our advice that the maximum requirements be followed, particularly in view of the fact that summary procedure, which is that followed under sec. 51.02 (5), is frowned upon in our jurisprudence especially when depriving a person of his liberty. Our conclusion is that notice be given as provided in sec. 51.02 (4) in all cases and that sec. 51.02 (5), be disregarded where it conflicts with sec. 51.02 (4).

JEF

School Districts—State aid given upon statement that county has levied school tax, when in fact it has not but has used public utility taxes exclusively, is improperly obtained.

State superintendent of public instruction can withhold future aid until error is corrected or amount paid is set off by aid subsequently due.

August 14, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

You inquire of this department whether you can retain the flat state aid and the equalization state aid from school districts which have failed to levy school taxes to support their schools, using instead public utility tax moneys.

That school districts cannot lighten the general county tax burden by using utility tax money seems clear. The utilities are taxed by the state an amount which roughly

corresponds to the local taxes, and the uniformity provision of our constitution would only seem to be satisfied when such was the case. *Chicago & N. W. R. Co. v. State,* 128 Wis. 553; *Gen. Am. Tank Car Co. v. Day,* 270 U. S. 367. If the local taxing authorities neglected to levy the local taxes the utilities would be bearing a greater burden than is permitted. That the county cannot use utility moneys in place of county funds was determined in XVIII Op. Atty. Gen. 291. Therefore the county has not, in legal contemplation, levied taxes for school purposes. That the county must levy a tax for school purposes before it can receive equalization aid seems obvious from a reading of sec. 40.87, subsec. (2), Stats., which reads:

"* * * the amounts so obtained" shall be "multiplied by the local school tax rate for such school district or city, * * *"

If this is not done, obviously your department has no way of determining the amount to be given, for that amount is determined by the school district tax rate.

Therefore, since the failure of the county to levy this tax has resulted in a maldistribution of the tax burden, and since your department has not and did not have a true guide by which to determine the equalization aid, that aid has been improperly obtained.

That you can withhold future flat and equalization aids seems to follow from sec. 40.87 (4) (a), Stats., wherein the county is required to raise for schools "by taxation upon the aggregate valuation of the whole county an amount at least equal to two hundred fifty dollars" per teacher. As stated in paragraph 2 of this opinion the county has not done this. Therefore you are entitled to withhold from the next succeeding apportionment the aids provided in sec. 40.87 (1) and (2). This seems to manifest the legislative intention that the state shall not aid those who will not aid themselves in the manner specified by the legislature. Therefore you may withhold the apportionments until the error is corrected or the amount paid out improperly has been set off.

JEF

Appropriations and Expenditures—School Districts—State Aid—Appropriation to emergency board made by sec. 3, ch. 346, Laws 1933, is now available for distribution as therein provided.

August 14, 1933.

DEPARTMENT OF PUBLIC INSTRUCTION.

The title to ch. 59, Laws 1933, reads as follows:

"To levy an emergency occupational tax on fermented malt beverages, and providing for the collection thereof."

All of sec. 1, ch. 59, which section constituted by far the greater portion of the act, was devoted to the purposes mentioned in the title. Appended to ch. 59 was an appropriation. That appropriation was found in subsec. (1), sec. 2 and read as follows:

"All moneys paid into the state treasury prior to July 1, 1933, from the emergency occupational tax on fermented malt beverages are appropriated to the emergency board to be allotted as the board may determine to school districts and cities operating under the city school plan which are in such financial distress that they cannot complete the present school year without assistance from the state."

Sec. 3, ch. 346, Laws 1933, provided:

"Subsection (1) of section 2 of Chapter 59, laws of 1933, is amended to read: (Chapter 59, laws of 1933) (Section 2) (1) All moneys paid into the state treasury from the emergency occupational tax on fermented malt beverages for the period prior to July 1, 1933, are appropriated as a non-lapsible appropriation to the emergency board. Any part of such appropriation not otherwise allotted by statute shall be allotted as the board may determine to school districts and to cities operating under the city school plan which are in financial distress."

The title of ch. 361, Laws 1933, reads as follows:

"To repeal chapter 59, laws of 1933; to create chapter 139 and subsection (5) of section 20.05 of the statutes, relating to an emergency occupational tax on fermented malt beverages and light wine, providing penalties, and making an appropriation."

The appropriation referred to in the title of ch. 361, however, was an appropriation made to the treasury for the purpose of administering the act and was not an appropriation to the emergency board for distribution to schools.

Section 1 of the said ch. 361 provides:

"Chapter 59, laws of 1933, is hereby repealed. Such repeal shall be effective August 1, 1933."

The question arises whether the appropriation mentioned in ch. 346 or any part of it is available for distribution to the public elementary schools as set forth in section 3.

It is our opinion that all of the money appropriated by sec. 3, ch. 346 is available for distribution in the manner therein provided. It is true that,

"Ordinarily a repeal of a statute which has been amended operates on, and carries with it, the amendment, at least where the amendment merely enlarged and extended the provisions, and did not affect the identity of the original statute; * * *" 59 C. J. 938.

In spite of this general rule,

"* * * The question of repeal is one of intent and must be solved by determining as near as may be the intent of the legislature * * *." 59 C. J. 900; *City of Madison v. So. Wis. Ry. Co.*, 156 Wis. 352.

That section of ch. 361 which repealed ch. 59 did not expressly repeal ch. 346 nor did it provide that ch. 59 "as amended" was repealed. Repeals by implication certainly are not favored in the law. Ch. 361 covered the subject matter found in sec. 1, ch. 59 by providing for an emergency occupational tax on fermented malt beverages. It did not cover or mention in any way the subject matter found in subsec. (1), sec. 2, ch. 59, namely the appropriation to the emergency board for the benefit of school districts and cities operating under the city school plan.

Sec. 3, ch. 346, relating to this appropriation is such that it might very well stand by itself and is not in any sense dependent upon the existence or continued operation of the other portions of ch. 59.

Ch. 346 was Bill 953, A.; ch. 361 was Bill 945, A. Ref-

erence to the bulletin of the proceedings of the Wisconsin legislature indicates the following: Bill 945, A., was introduced on June 15 and referred to the committee on finance. It was passed by the assembly on June 16 by a vote of 78–0. It was concurred in in the senate on June 28 by a vote of 32–1. Bill 953, A., was introduced on June 28 and was referred to the committee on finance. By suspension of the rules in both houses this bill was passed on the same day on which it was introduced, in the assembly by a vote of 89–0 and in the senate by a vote of 32–1. It is to be noted that these bills both were referred to the same committee and were passed in both houses by practically unanimous votes. The senate concurred in both bills on the same day. Bill 953, A. (ch. 346), was rushed through prior to July 1 undoubtedly for the reason that the legislature wished to prevent the lapse of the appropriation on July 1, that portion relating to its nonlapsibility being found in ch. 346 but not in ch. 59. It is most unlikely that the legislature, and particularly the senate, intended in one breath to guarantee the emergency board a nonlapsible appropriation for the benefit of certain schools and in the next breath to deprive the schools of that appropriation without using apt and specific language to that effect.

Ch. 346 was published on June 29, 1933, and so became effective on June 30. Ch. 361 was not published until July 8, 1933, and so did not become effective until the next day. By the terms of ch. 361 the repeal of ch. 59 was not to become effective until August 1. There can be no doubt but that the legislature granted to the emergency board the right to allot the appropriation made by ch. 346 to the schools up to July 9, 1933, and in all probability even up to August 1, 1933, despite any effect which ch. 361 might have had. It is our opinion that the legislature did not intend to repeal ch. 346, but intended that certain schools throughout the state should have the money appropriated by said ch. 346.

JEF

Bridges and Highways—Relocations—Words and Phrases —Change—Word "change," used in ch. 196, Laws 1933, does not include relocations which highway commission may make under provisions of sec. 83.08, Stats.

Highway commission need not secure approval of county board for relocation involving more than one mile of highway.

Highway commission must secure approval of county board for change in trunk system involving more than one mile of said system.

August 14, 1933.

HIGHWAY COMMISSION.

By ch. 196, Laws 1933, sec. 84.02, subsec. (3), par. (a), Stats., was amended to read:

"Any necessary changes may be made in the trunk system from time to time by the commission, if it deems that the public good is best served by making such changes. Due notice shall be given to the localities concerned of the intention to make such changes or discontinuances, and if the proposed change affects more than one mile of the system, a hearing at or near the proposed change shall be held prior to making the change effective. Whenever the commission shall decide to change more than one mile of the system, such change shall not be effective until the decision of the commission shall have been referred to and approved by the county board of each county in which any part of such proposed change is situated. A copy of such decision shall be filed in the office of the clerk of each county in which a change is made or proposed."

The question arises as to what is meant by the word "change" as used in this act. Specifically the question is asked whether it includes all *relocations* provided for by sec. 83.08, Stats. Sec. 84.02 (3) (a) as found in the statutes of 1931 was substantially the same as it is made by ch. 196, except that it was necessary to hold a hearing only when the change involved more than five miles of the system instead of one mile as at present.

A relocation has been interpreted and understood by the highway department as referring to an alteration of a highway for construction purposes—that is, to secure

improved gradient, alignment, to avoid construction difficulties, etc. The result of the relocation was considered as being an improved road but not a different road. The relocated road served essentially the same purposes as the original highway and to all intents and for all practical purposes was considered the original highway.

A change has been considered as referring to a removal of the state trunk highway system from one road to a distinctly different road by which the advantage with which any state trunk highway is vested, such as eligibility to be improved by state or federal aid maintenance as a portion of the state trunk highway system, etc., would be removed from the first road and transferred to a different road.

In the case of a change the original road would revert to its previous status as a township highway or a county road, as the case may be. If the word "change" as used in sec. 84.02 (3) (a) includes all relocations as above defined it will be necessary for the highway commission to hold hearings and to have county board approval for alterations in locations which are of the nature of relocations when more than one mile of the highway is involved. If such relocations and alterations require the approval of the county board it may mean either postponing the work until the regular session of the county board shall have taken place or a special session of the county board with the delays and expense incidental thereto. It might in fact seriously delay the execution of projects under the national recovery act.

It is our opinion that the word "change" used in ch. 196 does not include relocations and alterations as herein explained, but refers only to changes in the state trunk highway system as defined and understood by the highway commission.

Sec. 83.08 (1) provides: "Whenever the state highway commission shall deem it necessary for the proper construction, improvement or maintenance of any state trunk highway or prospective state highway or state highway * * *" it may take appropriate action to effect the same without providing for a hearing or the approval of the

county board. This section of the statutes contemplates alteration in a *highway* as contrasted with an alteration in a *route* or *system.*

Sec. 84.02 (3) (a) provides: "Any necessary changes may be made in the trunk *system* from time to time by the *commission*" if it deems that the public good is best served by making such changes. An examination of other portions of sec. 84.02 of which subsec. (3) (a) quoted above forms a part, particularly subsecs. (1), (6), and (7) indicates that the subject matter dealt with therein was the *system* or *routes* rather than any individual road.

The following excerpt taken from the opinion in the case of *Bosshard v. Hotchkiss,* 190 Wis. 29, 31, would indicate that the supreme court had placed the same interpretation upon these sections.

"There is nothing in the statutes to prevent the same proceeding, as here, from being both one for an alteration of a highway under sec. 83.08 and one for a change in the system of highways under section 84.02. * * *"

It may not be inappropriate at this time to quote also from the case of *Muscoda Bridge Company v. Worden-Allen Co.,* 196 Wis. 76, 83:

"* * * Under the present necessities of travel it was found necessary to have trunk highways so connected as to be able to reach any part of the state, and so improved as to be appropriate for present methods of travel. It became necessary to straighten these highways and to relocate some of them, or parts of them, for that purpose, and to obtain better grades; it became necessary to make easy turns instead of square corners in the highways; it became necessary to widen them in places and to put in stronger bridges and culverts; it was necessary to surface the roads, and on the main trunk highways to put in concrete or other lasting material. To do these things it was necessary to give the highway commission authority to move rapidly and continuously in the development of such highways. The legislation during this time clearly outlines the legislative intent to prevent any unnecessary obstruction to the program. For this reason the legislation must be liberally construed to carry out the legislative intent."

Throughout sec. 84.02, and particularly in subsec. (3) (a) under consideration, reference is made to those changes

which the commission may make "if it deems that the public good is best served" by making such changes. Such language would indicate that the legislature had in mind changes which would affect the great body of the traveling public and involve the designation of routes for travel to serve the public convenience rather than minor changes of relocation for the purpose of straightening a road or giving it a better grade.
JEF

Education — Military Service — Soldiers' Educational Bonus—Ch. 368, Laws 1933, goes into effect day after publication, July 11, but refers back to July 1, 1933.

Words "who enrolled prior to October 1, 1931," as given in amended subsec. (7), sec. 45.27, Stats., mean enrolment at approved school although no assignment was made by adjutant general.

"Completed at least two years of college work" in above amended subsection includes college work had prior to passage of initial law.

Informal request for benefits enumerated in sec. 37.25, Stats. 1931, is all that is required.

After July 1, 1933, no benefits are available under ch. 667, Laws 1919.

August 14, 1933.

RALPH M. IMMELL,
Adjutant General.

You have directed our attention to sec. 37.25, Stats., which provides in subsec. (2) as follows:

"Any person described in subsection (1) of section 37.25 who was, subsequent to September 8, 1919, and to his discharge from military service, and prior to a formal assignment to an educational institution in accordance with the law, in regular attendance at a school in accordance with the provisions of section 37.25, shall be entitled, upon application to the adjutant general, to the educational bonus during the period of regular attendance between his entrance into school subsequent to September 8, 1919, and

to his discharge from military service and the date of assignment by the adjutant general."

Subsec. (7) of the same section, Stats. 1931, read:

"The benefits provided in this section shall not be available to veterans after July 1, 1935, nor after July 1, 1945, to the child not under sixteen and not over twenty-four years of age of a veteran who was killed in action or died of wounds or disease, traceable to world war service, between the dates of April 6, 1917, and July 2, 1921."

Ch. 368, Laws 1933, amends subsec. (7), sec. 37.25 to read as follows:

"The benefits provided in this section shall not be available to veterans after July 1, 1933, except only to veterans who enrolled prior to October 1, 1931, and who by July 1, 1933, have completed at least two years of college work. Nor shall the benefits of this section be available after July 1, 1945, to the child not under sixteen and not over twenty-four years of age of a veteran who was killed in action or died of wounds or disease, traceable to world war service, between the dates of April 6, 1917, and July 2, 1921."

You have submitted a number of questions concerning these statutes, which we will consider seriatim.

"1. Do the benefits provided in section 37.25 and in ch. 667, Laws 1919, terminate on July 1, 1933, or upon passage and publication of the act?"

Ch. 368 was published on July 10 and it provides that it shall take effect upon passage and publication. While the law goes into effect on the day after publication, still it refers back to July 1, 1933. Any matter that was consummated by the first day of July and the 11th day of July under the old statute will be valid and binding, but after the passage of the act, the law refers back to the first day of July, 1933.

"2. Do the words, 'who enrolled prior to October 1, 1931' mean date of assignment by the adjutant general or merely enrolment at an approved school?"

The original educational bonus provided that the benefits were payable only from the date of assignment to a school by the adjutant general. The law was later amended to provide for the payment of back benefits provided the

student was eligible otherwise. It was therefore payable from the date of enrolment. While the statute as amended is not definite and clear on this subject, still I believe that the statute when it says "who enrolled prior to October 1, 1931" means merely enrolment at an approved school, although the assignment may not have been procured from the adjutant general.

"3. Do the words, "and who by July 1, 1933, have completed at least two years of college work" include college work had prior to assignment by the adjutant general, and if so, do they include college work had prior to the passage of the initial law?"

Having in mind the object of the statute and also that it should receive a liberal construction in order to carry out its purposes, I believe it includes college work had prior to the assignment by the adjutant general, and also includes college work had prior to the passage of the initial law.

"4. May an informal request for the benefits enumerated in sec. 37.25, received prior to July 1, 1933, be considered a valid claim, and if so, may informal claims received prior to July 1, 1933, and formal claims received subsequent to July 1, 1933, provided otherwise entitled, be accepted and paid?"

An informal request for the benefits enumerated in sec. 37.25, Stats., prior to July 1, 1933, may, in my opinion, be considered a valid claim if the requests were definite and to the point, such as a letter received making requests for the rights secured by said section. You are also advised that such informal claims received prior to July 1, 1933 and formal claims received subsequent to July 1, 1933, provided the parties otherwise are entitled thereto, may be accepted and paid.

"5. May applications for the benefits provided in ch. 667, Laws 1919, received prior to July 1, 1931, but pending adjudication on such date, be approved and paid subsequent to July 1, 1933, provided entitlement is otherwise shown?"

This question must be answered in the negative for the reason that it was expressly provided in subsec. (7), sec.

45.27, as amended by ch. 368, Laws 1933, that "the benefits provided by chapter 667, laws 1919, shall not be available after July 1, 1933."
JEF

Trade Regulation—Trade-marks—Word "Co-op" cannot be registered as trade-mark in face of sec. 185.22, Stats., which expressly regulates use of that word.

August 15, 1933.

THEODORE DAMMANN,
Secretary of State.

You state that you have been requested to register the trade-mark "CO-OP"; that in view of the fact that there are many co-operative associations and corporations in this state incorporated under sec. 185.22, Stats., you inquire whether any one of them, through registration, is entitled to the exclusive use of such a trade-mark.

Sec. 185.22, in part, reads:

"(1) No person, partnership, corporation, trust or unincorporated association doing business in this state shall be entitled to use the term 'co-operative,' or any abbreviation or derivation thereof or any word similar thereto, as part of its corporate or other business name or title; except that any foreign corporation, organized under and complying with the co-operative law of the state of such corporation's creation, shall be entitled to use the term 'co-operative' in this state, provided that said corporation has complied with the laws of this state applicable to other foreign corporations, insofar as those laws are applicable to said corporation, and provided further, that said corporation is doing business upon co-operative basis, as defined in section 185.01.

"(2) Every association shall use the term 'Co-operative' as part of its corporate name or affixed thereto."

Under the provisions of the statute, I believe that you should not register the trade-mark "CO-OP," as no one has an exclusive right to use it.
JEF

Counties—County Fairs—Court—Garnishment—Quasi-garnishment—Money appropriated by county board to fair association under sec. 59.86, Stats., is subject to quasi-garnishment.

Where controversy exists over right to payment under sec. 304.21 officer having money should hold same until controversy is settled.

August 15, 1933.

WILLIAM M. GLEISS,
District Attorney,
Sparta, Wisconsin.

The county board, pursuant to sec. 59.86, Stats., appropriated the sum of seven hundred dollars to aid the Monroe County Fair Association. The money so appropriated is in the hands of the county treasurer and has not as yet been forwarded to the treasurer of the fair association. In the meantime an action was brought against the association and judgment taken in the sum of $148.78 and a transcript of the judgment filed with the county clerk pursuant to sec. 304.21, relating to quasi-garnishment.

You request the opinion of this office as to whether the county clerk should pay the judgment creditor of the fair association the sum of one hundred forty-eight dollars and seventy-eight cents out of the moneys appropriated to aid the fair association under sec. 59.86.

It is our opinion that the county clerk should make provision for such payment.

Sec. 304.21 provides:

"(1) Whenever any person, firm or corporation shall recover a judgment against any person, firm or corporation, and said judgment debtor at the time of the rendition of said judgment, or at any time thereafter during the life of said judgment, shall have money due, or to become due, from the * * * county * * *, said judgment creditor may file a certified copy of such judgment with the * * * clerk of such county * * *.

"(2) It shall thereby become the duty of the proper officers of such * * * county * * * after the expiration of thirty days from the date of filing a certified copy of said judgment, to pay to the owner of such judg-

ment such sum as at the time of said filing is due, and thereafter and until said judgment is fully paid to pay to the owner of said judgment such sum or sums as may at any time or times be due from * * * such county * * * and to deduct the sum or sums so paid as aforesaid from the amount due; * * *"

"The reading of the statute under which the certified copy of the judgment was filed discloses the fact that the language is broad enough to include and apply to any person whomsoever and to any money whatsoever due or to become due * * *" XV. Op. Atty. Gen. 476.

"The statute, as originally enacted by ch. 360, Laws 1915 (creating sec. 3716*a*), was limited in its application to officers and employes of the state and governmental subdivisions and the filing of a certified copy of a judgment held only the amount due at the time of the filing or thereafter becoming due to the judgment debtor as salary or wages; but by ch. 332, Laws 1917 (published June 4, 1917), said sec. 3716*a* was repealed and a new section 3716*a* [now 304.21] was created, which very broadly extended its provisions so as to apply to *any person, firm or corporation,* instead of merely to officers and employes, and to *any* money due at the time of the rendition of the judgment or at any time thereafter during the life of the judgment from the state or any of the named governmental subdivisions, including counties, to such person, firm or corporation." XV Op. Atty. Gen. 473, 474.

In XVI Op. Atty. Gen. 158, it was held that fees for jury service are not subject to quasi-garnishment under sec. 304.21. It was so held upon the grounds of public policy, because the application of sec. 304.21 to jury fees might have the effect of discouraging persons from serving as jurors.

In XX Op. Atty. Gen. 529, it was held that members of the legislature were not liable to quasi-garnishment during regular or special sessions of the legislature and fifteen days next before commencement and after termination of each session. This holding was based upon a constitutional provision. Neither of the arguments used in these two opinions, for the purpose of holding sec. 304.21 inapplicable, applies to the present case.

Our attention has also been directed to sec. 59.86 of the statutes relating to the power of the county board to make an appropriation to fairs. That section provides:

"The county board of any county having a population of thirty thousand or more by the last federal census may vote an amount not exceeding twenty thousand dollars and in all other counties the county board may vote an amount not exceeding five thousand dollars in the aggregate for all societies in the county in any one year to aid in the purchase of, or make improvements upon the fair grounds for any organized agricultural society, or to aid any organized agricultural society * * * in any of its public exhibitions held or to be held; * * *"

It has been contended that if the judgment creditor is permitted to collect out of the seven hundred dollar appropriation "then the purpose of aiding fairs is nullified. It is true that the statute expressly provides the purpose for which money can be appropriated. This office has, however, held that the county board may appropriate money for an indebtedness incurred in the past and is not confined under the statute to aiding fairs for future exhibitions. XX Op. Atty. Gen. 34, 250; XVIII Op. Atty. Gen. 73, 695. It is our opinion that although the county board is limited by statute as to the purposes for which it may appropriate money, a creditor who has obtained a judgment and complied with sec. 304.21 is not estopped to claim the money or a portion of it simply because it was not appropriated for his benefit. If the argument which has been advanced were allowed to prevail it would in most cases nullify what was intended to be the beneficent provisions of sec. 304.21.

Apparently there is a controversy between the county clerk, the judgment creditor and the fair association as to proper disposition of at least some of the money appropriated to the fair association. In such a case the county clerk should hold the money until the controversy between the judgment creditor and the one claiming an exemption from the provisions of sec. 304.21 is settled in court. It is especially advisable for the county clerk to do this because he may be held personally liable if he pays the wrong party prior to the settlement of the controversy. See XIII Op. Atty. Gen. 449; VII Op. Atty. Gen. 82.

JEF

Banks and Banking—Public Depositories—Under stated facts county should file claim against closed bank.

August 15, 1933.

WILLIAM M. GLEISS,
District Attorney,
Sparta, Wisconsin.

You request the opinion of this department upon the following statement of facts: You are having considerable difficulty in your county with the closing of banks. Monroe county has on deposit approximately five thousand dollars in a bank that is now closed. In 1928 a bond was given by the bank to the county with four individual sureties who are financially responsible. You further state that the public deposit law enacted December 10, 1931, Special Session, provides that it "shall not apply to deposits of public funds which are secured by bonds or other security furnished under statutes heretofore in effect so long as such bonds or other security shall remain in force." It appears that the bond in question was executed the 25th day of February, 1928, for the year beginning January 1, 1928, and each year thereafter. The questions raised in this connection are whether a claim should be filed against the bank or whether the county should hold the bondsmen. You also inquire whether the public depository law would release the bondsmen and whether, if a claim against the closed bank were filed by the county, such claim would be a waiver so as to prevent the county from instituting proceedings against the bondsmen.

It is the opinion of this department that the county should file a claim against the bank. Under the old law it was necessary for bids to be submitted annually and for the bank to qualify by filing a bond for the ensuing calendar year. The contract was for one year and all bonds were terminated at the expiration of the year. Under the provisions of the public deposit law enacted December 10, 1931 (ch. 1, Laws Special Session 1931) this old law was repealed and all bonds were terminated. All public depositories, including counties, came under the provisions of the new law. It would seem, therefore, that the public de-

posit law passed by the special session of 1931 released the bondsmen. It is therefore suggested that the county should file a claim against the closed bank and at the same time should inform the sureties of this action in order that the sureties might make themselves parties thereto and in order that they might take whatever action they deem necessary to protect their interests. This would probably not operate as a waiver so as to prohibit the county from instituting proceedings against the personal sureties in the event that the county decided that it could successfully prosecute an action against such bondsmen.
JEF

Indigent, Insane, etc.—Legal Settlement—Wisconsin General Hospital—Husband who has resided in township for more than one year, although his wife has been treated during said year in Wisconsin general hospital at county expense, has acquired legal settlement in such town.

Woman with legal settlement in certain town on marrying man from another state does not lose her legal settlement; husband may obtain aid from such town.

August 16, 1933.

H. J. BEARDSLEY,
District Attorney,
Darlington, Wisconsin.

You set forth a situation in which it appears that one X has a legal settlement in M five years ago; that he moved, with his family, to Y township in Lafayette county; that his wife continued to live in Y township but X himself worked in various parts of the county and returned to his family only for short periods when without work; that shortly before the end of one year from the time X moved to Y township his wife was sent to the state hospital as a county charge, where she died, and the minor children continued to live in Y township for more than one year.

You say that your county has not the county system of poor relief.

You ask:

"Has X obtained a legal settlement in Y township under these circumstances? If not, does he continue to hold his legal settlement in M?"

Under the facts stated by you his home or residence was where he had his family. The fact that he was temporarily away from his family while earning support for them does not prevent him from having his residence at his home where his family resided. It requires a continuous residence for a year in the township to obtain a legal settlement.

Subsec. (4), sec. 49.02, Stats., provides:

"* * * but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein. * * *"

The fact that the woman was treated at the Wisconsin general hospital does not militate against her husband's establishing a legal settlement in township Y. This department has held that persons may acquire legal settlement in local municipalities, although they are being treated at the time in the Wisconsin general hospital at public expense. XVIII Op. Atty. Gen. 379.

You also submit the following statement:

"A" came from Dakota to Wisconsin and married a woman having a legal settlement in "X" township. He then moved to Z town with his wife, and asked for aid. Does the husband take the legal settlement of his wife in this case?

Sec. 49.02 (1) provides:

"A married woman shall always follow and have the settlement of her husband if he have any within the state; otherwise her own at the time of marriage, and if she then had any settlement it shall not be lost or suspended by the marriage; and in case the wife shall be removed to the place of her settlement and the husband shall want relief he shall receive it in the place where his wife shall have her settlement."

Under this statute the husband may get relief at the place where his wife had the legal settlement. This prac-

tically makes her legal settlement his when he has not acquired any anywhere else.
JEF

Criminal Law—Circulation of Obscene Books—Common carrier is not person who imports within meaning of sec. 351.38, subsec. (1), Stats.

August 16, 1933.

H. J. GERGEN,
District Attorney,
Beaver Dam, Wisconsin.

You inquire whether the Railway Express Company is criminally liable under the provisions of sec. 351.38 subsec. (1), Stats., for transporting certain magazines prohibited thereby into the state.

Sec. 351.38 (1), Wis. Stats., reads, in part:

"Any person who shall import, print, publish, exhibit, sell or distribute or give away any book or pamphlet, ballad, printed paper, moving picture or film, or other thing containing obscene language, prints, pictures, figures or descriptions manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school or place of education, or shall buy, procure, receive or have in his possession any such book, pamphlet, ballad, printed paper, moving picture or film, or other thing, either for the purpose of loan, sale, exhibition or circulation or giving away, or with intent to introduce the same into any family, school or place of education shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars; * * *"

This office is of the opinion that a common carrier is not a person who *imports* within the meaning of the above quoted statute.

The verb "import" is defined by Webster's New International Dictionary as meaning "to bring (wares or merchandise) into a place or country from a foreign country in transactions of commerce."

The word carries with it the idea of sale and like com-

mercial transactions. *Cook v. Marshall County,* 119 Iowa 384, 93 N. W. 372, 108 Am. St. Rep. 283 (1903).

A common carrier, on the other hand, is one engaged in the business of transporting goods for compensation. *Doty v. Strong,* 1 Pin. 313, 40 Am. Dec. 773 (1843); *Waldum v. Lake Superior T. & T. Co.,* 169 Wis. 137, 170 N. W. 729 (1919).

The provisions of the statute in question, moreover, are aimed at the act of circulating certain articles deemed objectionable, that is, at passing them around, making them public, and not at the mere act of carrying such articles.

Considering the nature of the business of a common carrier, therefore, from both an etymological and a functional standpoint, we feel that a common carrier is not one who imports within the meaning of the above statute and that the provisions in question are aimed at dealers rather than carriers.

JEF

Criminal Law—Prisons—Prison Labor—Prisoner in county jail in default of payment of fine may be hired out by sheriff under sec. 56.08, subsec. (1), Stats., without requiring order from court to that effect.

August 16, 1933.

WENDELL MCHENRY,
District Attorney,
Waupaca, Wisconsin.

You submit the following statement as a basis for an official opinion:

"A party was convicted in our local justice court and ordered to pay a fine, and upon his failure to pay the fine, he was committed to the county jail for a period of twenty days. He has a number of dependents and it was impossible for him to pay the fine and his employer informed the sheriff that he would not pay the fine for him and that if he kept him in jail for twenty days it would be necessary for him to hire another man in his place and release him from his position; the sheriff thereupon freed him of his own volition under subsec. (1), sec. 56.08, and employed

this man to work for his regular employer; the sheriff collects the wages and turns the same over to the family of the person convicted and the person convicted gets his meals at the jail, is locked up in the jail every evening and is kept there Sundays. There was no approval of the court obtained in any of these particulars."

You ask for an opinion whether the sheriff, under these circumstances, acted properly or whether it was necessary for him first to obtain authorization from the court that rendered the sentence.

You will note that sec. 56.08, subsec. (1), Stats., provides that every such prisoner for such period of time as he may have been sentenced to hard labor shall be required to do and perform any suitable labor provided by the sheriff anywhere within said county. It is made the duty of the sheriff to provide said labor and it does not require an order from the court.

In XI Op. Atty. Gen. 47, it was held that a prisoner in the county jail in default of payment of a fine must be hired out by the sheriff. In that case it was held that the statute applied to any person convicted of any offense and sentenced to imprisonment in the county jail.

JEF

Real Estate — Descriptions — Taxation — Assessments — Tax certificate issued upon joint assessment to one person of adjoining lots owned by two or more individuals is invalid.

Description of property as "lot 24, block 1, Edgewater plat," where such plat does not have any block designation, does not render tax certificate invalid if surplusage creates no confusion with reference to other property, property being otherwise adequately described.

August 16, 1933.

FRED RISSER,
District Attorney,
Madison, Wisconsin.

You propound to this office the following questions which I quote from your letter:

"If several pieces of adjoining property are owned by different individuals but all assessed together under one description to one party, will a tax certificate issued on such a description be illegal?"

You state that the property specifically concerned is a strip known as Outlots A, B, C, D and E, Riley plat. This entire parcel was written on the tax roll as Outlots A, B, C, D, and E, occupied one line, was assessed to the Madison Square Company, and was given a lump valuation. At the time of such assessment, upon which the certificates in question were based, the ownership of lot A was in three different persons other than the assessed company.

The Wisconsin statutes provide that separate lots shall be separately assessed to the owner, except in the cases therein provided where contiguous or improved lots are owned by the same person at the time of the assessment. The statutes read as follows:

Sec. 70.17, subsec. (1),

"Real property shall be entered in the name of the owner, if known to the assessor, otherwise to the occupant thereof if ascertainable, and otherwise without any name. * * *"

Sec. 70.23,

"(1) The assessor shall enter upon the assessment roll opposite to the name of the person to whom assessed, if any, as before provided in regular order as to lots and blocks, sections and parts of sections * * *, a correct and pertinent description of each parcel of real property in the assessment district not exempt from taxation and the number of acres in each tract containing more than one acre.

"(2) When two or more lots or tracts owned by the same person are deemed by the assessor so improved or occupied with buildings as to be practically incapable of separate valuation, they may be entered as one parcel. * * *"

Sec. 70.28,

"No assessment of real property which has been or shall be made shall be held invalid or irregular for the reason that several lots, tracts or parcels of land have been assessed and valued together as one parcel and not separately, where the same are contiguous and owned by the same person at the time of such assessment."

The provisions of sec. 70.23 Stats. are mandatory. *Neu v. Voege,* 96 Wis. 489, 71 N. W. 880 (1897).

The requirement that separate lots belonging to different persons must be separately assessed goes to the very groundwork of the tax.

"* * * Such a practice of jointly taxing separate lots belonging to different individuals strikes at the very foundation and reason of all assessment laws." *Crane v. Janesville,* 20 Wis. 305, at 306 (1866).

The rule stated in the *Crane* case has been frequently followed by the Wisconsin supreme court. *Knox v. Huidekoper,* 21 Wis. 534 (1867), (where part of a city lot belongs to one person and part to another, each part should be assessed to proper owner); *Hamilton v. Fond du Lac,* 25 Wis. 490 (1870); *Siegel v. Supervisors,* 26 Wis. 70 (1870); *Towne v. Salentine,* 92 Wis. 404, 66 N. W. 395 (1896).

The reasons supporting this rule are outlined by Mr. Cooley as follows:

"* * * If separate parcels of land belonging to different individuals, and presumably of different values, can be assessed together, neither of the owners has any means of determining the amount of tax which is properly chargeable to his property, and consequently no means of discharging his own land from the lien, and of protecting his title, except by paying the whole of a demand some undefined and undefinable portion of which is neither in equity nor in law a proper charge against him. * * *"

A tax certificate, therefore, which is based upon a joint assessment of separately owned lots of land is invalid.

Question 2:—"Where there is only one block to a plat, does the fact that the description reads 'Lot 24, Block 1' render a certificate illegal?"

You inform us that the property concerned is part of a tract known as Edgewater plat. Said plat consists of twenty-four lots but does not have a block designation. The description on the tax roll reads: "lot 24, block 1, Edgewater plat."

A sufficient description of the property taxed is a necessary element of a valid tax. III Cooley, Taxation 2363, sec. 1175; 61 C. J. 713, sec. 883; 21 R. C. L. 357, sec. 314.

So the Wisconsin supreme court has said:

"The counsel for the plaintiff are fully sustained by authority and correct in the position, that a false or mistaken description of the land, in proceedings to enforce the collection of taxes, avoids the sale, certificate or deed. The reasons are obvious. The officers are engaged in the exercise of mere, naked statutory powers, which must be strictly pursued, and the execution of which can only be shown by the *acts* of the officers themselves, evidenced in the manner prescribed by the statute. The certificate is the sole evidence of the land sold, and the deed, of that conveyed; and hence parol evidence cannot be received to aid or correct a description which is false or mistaken. For the same reason, also, no part of the description can be rejected as surplusage, nor words omitted be supplied as in similar transactions between private individuals. The officers can be presumed to have no intention different from that expressed by their acts. To receive evidence that they intended another description in the place of the one given, or that they sold or conveyed lands lying in one place for those which lie in another, or which have no existence at all, would be to show that they intended to do that which the law under which they proposed to act did not permit, and which was therefore illegal. Another reason why the description in the list, certificate or deed must be adhered to for the purpose of testing the legal validity of the proceedings, is that otherwise the owner of the lands would lose all benefit of the notices required by law to be given in such cases. It would be impossible for him to know, either from the published lists or the assessment roll, that his land had been assessed or sold, or was to be sold or conveyed; and hence he cannot be considered delinquent in not having paid the taxes, so that his title to the land should be lost or forfeited. * * *" *Curtis v. Board of Supervisors,* 22 Wis. 167, at 169–170 (1867) followed in *Orton v. Noonen,* 23 Wis. 102 (1868).

The sufficiency of the description required is set forth by the Wisconsin statutes. See sec. 70.23 (1), quoted above.

Sec. 70.25,

"In all assessments and tax rolls, and in all advertisements, certificates, papers, conveyances or proceedings for the assessment and collection of taxes, and proceedings founded thereon, as well heretofore as hereafter, any descriptions of land which shall indicate the land intended

with ordinary and reasonable certainty and which would be sufficient between grantor and grantee in an ordinary conveyance shall be sufficient; * * *"

The description in question would seem to fulfill the statutory requirements; it indicates the land "with ordinary and reasonable certainty." Since the surplusage creates no confusion as to the applicability of the certificate to a specific piece of property, and as the property is otherwise adequately described, the certificate is valid.
JEF

Peddlers—Closing out Sales—License must be obtained under ch. 219, Laws 1933, (sec. 129.25, Stats.), to conduct closing out sale where person has lost his lease and is compelled to move into new location across street and advertise to sell his goods, or part thereof.

August 17, 1933.

KENNETH C. HEALY,
District Attorney,
Manitowoc, Wisconsin.

You refer to ch. 219, Laws 1933, and inquire whether a well established local business which loses its lease and is forced to move to another location just across the street and advertises a "removal sale now on" and conducts such sale for the purpose of cleaning out as much as possible of stock it has on hand before moving to the new location in the same city must secure a license to hold such sale and file an inventory of the merchandise to be sold.

Sec. 129.25, as enacted by ch. 219, Laws 1933, contains the following:

"* * * Every person, partnership, firm, or corporation is hereby required to obtain such license before it shall, at retail, conduct a sale or advertise for sale any goods, wares, or merchandise represented in any manner to be the goods, wares or merchandise of a bankrupt, insolvent, assignee, liquidator, adjuster, administrator, trustee, executor, receiver, wholesaler, jobber, manufacturer, or of

any business that is in liquidation, that is closing out, closing or disposing of his stock or a particular part or department thereof, that has lost its lease or has been or is being forced out of business, that is disposing of stock on hand because of damage by fire, water, smoke or other cause, or that for any reason is forced by circumstances to dispose of stock on hand. Every person, partnership, firm or corporation is hereby required to obtain such license before it shall conduct a sale of, or advertise for sale, if such advertisement or representation, expressed or implied, tends to lead people of said city to believe that such sale is a selling out or closing out of the business conducting the sale."

I believe your question must be answered in the affirmative. The party in question has lost his lease and is compelled to move to a new location and conducts a closing out sale of as much of the stock as it is possible to sell. I believe it comes within the letter of the statute and a license is required. The subsequent part of the section clearly provides that in such cases an inventory must be filed. This law is intended to apply to all merchants, whether they are transient or not.
JEF

Fish and Game—Snag Lines—Conservation commission has authority under sec. 29.27, subsec. (2), Stats., to forbid possession but not sale of treble hooks that could possibly be used for snagging fish outside of those found attached to spoon hooks, plugs or similar legitimate baits.

August 21, 1933.

PAUL D. KELLETER, *Conservation Director.*
Conservation Department.

In your letter of recent date you cite the following statute, sec. 29.27, subsec. (2):

"No person shall set, place, use, have in possession, or under control any snag line or snag pole, snag hook, or parts thereof, or cluster of fishhooks that might be attached to same, designed to be placed in or drawn through the water for the purpose of catching or drawing such hooks

into the body of fish. Violations of this subsection shall be punished by a fine of not less than one hundred nor more than two hundred dollars, or by imprisonment in the county jail not less than six months nor more than nine months, or by both such fine and imprisonment."

You ask whether, under the provisions of the above statute, the conservation department would have authority "to forbid the sale or possession of any treble hooks that could possibly be used for snagging fish outside of those found attached to spoon hooks, plugs, or similar legitimate baits."

XIX Op. Atty. Gen. 584, 585:

"Under the Wisconsin constitution the legislature may delegate legislative functions of a local nature to municipalities (art. XI, sec. 3), including county boards (art. IV, sec. 22). It has, however no power to delegate any legislative function to administrative officers, boards, or commissions. The legislature may, however, confer upon boards and commissions the power to pass rules and regulations under general statutes in which standards are designated limiting such rules and regulations. This question has been before our supreme court a number of times and rules and regulations have often been declared void because the board or commission had not the broad powers under which they assume to act. * * *."

The authority for the making of the rule you wish to promulgate must be found either in the general statute conferring power upon you to make rules and regulations or in some specific statute referring to the matter upon which you wish to rule.

In sec. 23.09, Stats., we find the following:

"(7) The commission is hereby authorized to make such rules and regulations, inaugurate such studies, investigations and surveys, and establish such services as they may deem necessary to carry out the provisions and purposes of this act, and any violation of any provisions of this act, or of any rules or regulations promulgated by the commission, shall constitute a misdemeanor and be punished as hereinafter provided. * * *."

In sec. 2, ch. 152, Laws 1933, we read:

"A new section is added to the statutes to read: 29.174. Conservation of fish and game; Powers of commission. (1) There shall be established and maintained, as herein-

after provided, such open and close seasons for the several species of fish and game, and such bag limits, size limits, rest days and conditions governing the taking of fish and game as will conserve the fish and game supply and insure to the citizens of this state continued opportunities for good fishing, hunting and trapping."

Subsec. (2), sec. 29.174 confers power upon the commission to promulgate rules to carry out the purposes of subsec. (1).

Sec. 29.174 (6) provides:

"All orders of the conservation commission *in conformity with law* shall be valid and in force at the time specified therein and shall be prima facie reasonable and lawful until they are found otherwise in an action brought for that purpose, or until altered or revoked by the commission or by act of the legislature."

The statutes defining the general powers of the commission do not delegate to it any authority to regulate sales of fishing materials. The commission is given power merely to regulate the time and manner of taking of fish by the public.

Nowhere is the commission given power to change a specific statute or to add to it. The specific statute here involved is sec. 29.27 (2). I am of the opinion that under this statute the conservation department would have authority to forbid the *possession* of the treble hooks mentioned; since the treble hooks could, I believe, be included under the phrase in the statute "cluster of fish hooks" and the statute already forbids having them in possession. However, for the conservation department to forbid the sale of such treble hooks would be to add to the statute as passed by the legislature, to enlarge its scope and not merely to work out administrative details, and hence would be legislating, a function expressly reserved for the legislature.

It is therefore my opinion that the conservation department has authority under sec. 29.27 (2), to forbid the *possession,* but not the *sale* of any treble hooks that could possibly be used for snagging fish outside of those found attached to spoon hooks, plugs, or similar legitimate baits.
JEF

Public Officers—District Attorney—School District Director—Offices of district attorney and director of joint school district in same county are compatible.

August 22, 1933.

A. J. CONNORS,
District Attorney,
Barron, Wisconsin.

You request an opinion from this department as to the compatibility of the offices of district attorney and director of a joint school district in the county.

The duties of a district attorney are outlined by sec. 59.47, Stats.

The duties of a school district director are imposed by sec. 40.09, which reads:

It shall be the duty of the district director:
"(1) To countersign all orders legally drawn by the clerk upon the treasurer of the district.
"(2) To appear on behalf of the district in all actions brought by and against it, when no other direction shall have been given by a district meeting
"(3) To prosecute an action for the recovery of any forfeiture incurred under the provisions of this chapter, and in which his school district is interested, except when by him incurred, in which case such action shall be prosecuted by the treasurer. One-half of the net sum recovered shall be paid into the district treasury and the other half to the county treasury for the benefit of the school fund."

We are unable to find any statutory prohibition, express or implied, to the effect that the two positions shall not be held by the same person at the same time. The compatibility of such offices, therefore, must be determined by the common law.

The common law rule is that the holding of one office does not disqualify the incumbent from the holding of another unless the functions of the two are inconsistent. No standard test has been evolved to determine the question of compatibility, and the result must depend upon an analysis of the nature and functions of the particular offices in question. *Howard v. Harrington,* 114 Me. 443, 96 Atl. 769, L. R. A. 1917A, 211 (1916); 46 C. J. 991, sec. 46; 22 R. C. L. 413, sec. 55, note; L. R. A. 1917A, 216.

The offices of district attorney and director of a joint school district present no conflict as to duties nor as to functions, nor is the one officer subordinate to or in any way subject to the supervision of the other.

It is the opinion of this department, therefore, that the offices of district attorney and director of a joint school district within the same county are compatible.

JEF

Counties—Ordinances—Cattle on Highways—Ordinance of county board prohibiting cattle on highway is unreasonable and not authorized by statute.

August 22, 1933.

R. C. TREMBATH,
District Attorney,
Hurley, Wisconsin.

You have inquired whether the county board has the power to prohibit by ordinance the allowing of cattle and other animals on highways.

The county board has only such powers as are given by statute, either expressly or impliedly. The only provision touching upon this matter is found in sec. 59.07, subsec. (11), Stats., which empowers the county board at any legal meeting, to:

"Enact ordinances or by-laws regulating traffic of all kinds on any highway, except street or interurban railways, in the county which is maintained at the expense of the county and state, or either thereof; declare and impose forfeitures, and enforce the same against any person for any violation of such ordinances or by-laws; provide fully the manner in which forfeitures shall be collected; and provide for the policing of such highways and to provide for what purposes all forfeitures collected shall be used."

While this statute is broad, we are satisfied that it is not broad enough to prohibit cattle on the highways. Highways are for the purpose of transportation, and cattle may be driven along the highway under proper regulation. The title to the fee over which the highway runs is in the owner of the land over which the easement has been secured.

While there might be reasonable regulation, probably, for pasturing animals on the highway, we do not believe that an outright prohibition such as your ordinance contains would be valid.
JEF

Bridges and Highways—Tunnels—Cattle Passes—Duty to maintain cattle pass located on town road, where such pass was constructed by and for benefit of one owning lands on both sides of highway, under provisions of sec. 86.13, Stats., rests upon landowner as between such owner and township.

August 23, 1933.

CURT W. AUGUSTINE,
District Attorney,
Eau Claire, Wisconsin.

You ask whether the township must pay for repairs on a cattle pass located on a town road when the pass was constructed by the one who owns the farm on both sides of the road and has been used exclusively by him.

Your question is, I think, specifically answered by the provisions of sec. 86.13, Wis. Stats., which reads:

"Any person owning land lying on both sides of any highway is hereby authorized to construct a tunnel under such highway, also the necessary fences for the passage of stock, and other purposes, to and through the same, in such manner as will not interfere with or endanger travel on such highway. All such tunnels shall not be less than twenty-five feet in length and shall be maintained by the person constructing the same, and the owner of such property shall be liable for all damages which may be occasioned by reason of the failure to keep the same in repair; provided, that the electors of any town at an annual town meeting may by vote authorize the construction of any designated tunnel therein of the length of not less than sixteen feet. The chairman of every town shall see that all tunnels in his town are made in accordance with the provisions of this section and that they are kept in good repair."

The duty of maintaining a cattle pass is thus cast upon the person who constructed the same. The above provision

has been in effect in this state since the laws of 1869, and has suffered only minor changes, immaterial to the question at hand, during the course of its existence.

As between the township and the landowner, therefore, liability for the repair of a cattle pass rests upon the latter. JEF

Mothers' Pensions—Legal Settlement—Where custody of children is granted to mother by divorce decree their legal settlement is still that of father if he has one within state for purposes of mothers' pension act.

August 24, 1933.

BOARD OF CONTROL.

Attention A. W. Bayley, *Secretary.*

The situation herein concerned presents these facts:

Prior to January 3, 1924, the mother was married to Mr. B. By that marriage the mother had three children. On that date a decree of divorce was entered at Madison, Wisconsin, which awarded the custody of the children to the mother. Subsequent to January 3, 1924, the mother and the children moved to Walworth county and Mr. B, the father, moved to Beloit, in Rock county. The mother was unable to collect the alimony stipulated by the divorce decree from Mr. B, so, without a court order, the mother sent the two oldest children to Mr. B., in Beloit, where they have resided for the past several years. During the interval between 1924 and the present, the mother was remarried to a Mr. A. and later divorced. There were no children by this second marriage. Mr. A. was not ordered to pay any support money to the mother here concerned.

The mother at this time is in a position to take the children back with her but requests certain financial aid from Walworth county. The three children are under the age of sixteen years and the mother is unable to collect any alimony from Mr. B. in Beloit. The question asked is: On what county should these children be a charge?

Because at present the mother is remarried and because

she receives no financial aid from her second husband Mr. A. now divorced, the facts of the mother's second marriage and divorce are omitted from the discussion as not being pertinent to the question at hand, it being assumed that said second divorce was granted more than a year ago.

Concerning the requirements for obtaining aid under the mothers' pension act, sec. 48.33, Stats., provides in part:

"(1) If any person shall have knowledge that any child living with his mother or stepmother is dependent upon the public for proper support or that the interest of the public requires that such child be granted aid, such person may bring any such fact to the notice of a judge of a juvenile court or of a county court *of the county in which such child has a legal settlement.*

"* * *

"(5) Such aid shall be granted only upon the following conditions:

"* * *

"(b) Such child must have *a legal settlement in the county in which application is made for aid;* * * *.

"* * *

"(d) The mother or stepmother must be without a husband; * * * or such mother must be divorced from her husband for a period of at least one year and unable through use of the provisions of law to compel her former husband to support the child for whom aid is sought; provided, however, that the divorce was granted in Wisconsin."

From the above quotation it is apparent that the legal settlement of the child must be in the county from which aid is sought. Concerning the legal settlement of minors, sec. 49.02 provides in part:

"(2) Legitimate children shall follow and have the settlement of their father if he have any within the state until they gain a settlement of their own; but if the father have no settlement they shall in like manner follow and have the settlement of their mother if she have any.

"* * *

"(5) Every minor whose parent and every married woman whose husband has no settlement in this state who shall have resided one whole year in any town, village, or city in this state shall thereby gain a settlement therein."

Subsec. (5) has no application here because both the mother and the father, Mr. B., have legal settlements in

this state. From the words of subsec. (2), the legal settlement of the children here is that of their father, Rock county, there being no provision or exception made in the case of a divorce. This same question was considered in XXI Op. Atty. Gen. 1095, 1096, which stated:

"After careful consideration of the question submitted by you we are of the opinion that the legal settlement of these children is the same as that of their father. It comes within the letter of the law as contained in subsec. (2), sec. 49.02, Stats., above quoted. There is no provision making the legal settlement of the mother the legal settlement of children in her custody, which custody was granted to her by a divorce proceeding. We are constrained to hold that the legal settlement of the father is also the legal settlement of the children, and that the township in which he lives is liable for the support and the proper proceedings to collect it as prescribed by statute are applicable."

On a somewhat analogous point, attention is called to *Monroe County v. Jackson County,* 72 Wis. 449, which construes this same statute in a similar manner. Therefore, I conclude that the legal settlement of the children here concerned is that of their father, Mr. B. in Rock county.

The question which next presents itself is whether these children may receive aid from the mother's county, Walworth, under par. (c), subsec. (5), sec. 48.33, which provides in part:

"In cases in which all other conditions for granting aid shall be satisfied but in which the child does not have a legal settlement in the county in which application for aid is made, such aid may be granted in the discretion of the court, but only with the approval of the state board of control; provided, however, that the person having the care of said child has lived in this state for a period of one year next preceding the application for such aid. * * * Such aid shall not operate to prevent the gaining of a legal settlement within the county, and shall be chargeable to the state only until the child shall have acquired such legal settlement and in no event longer than one year from the date of the first payment."

I am of the opinion that the children here concerned may not receive aid in Walworth county under this quoted paragraph. It states that the aid therein specified shall

be extended to the needy child only till that child acquires a legal settlement in the county in which application for aid is made, which acquisition must be within one year of the time when aid is first granted. The only provision in sec. 49.02 pertaining to the actual acquisition of a legal settlement by a minor is subsec. (5), stated heretofore, which does not apply here because both the parents of these children have legal settlements in this state. Hence, I do not believe that the children here could acquire a legal settlement within the one year period as intended by par. (c), subsec. (5), sec. 48.33. A point similar to this was raised and so decided in XXI Op. Atty. Gen. 547. Therefore, I conclude that these children are not within the intended scope of par. (c), subsec. (5), sec. 48.33, so as to enable them to receive aid from Walworth, their mother's county. The proper procedure in the case is to apply for aid in Rock county, which may be given even though the children are living with their mother in Walworth county, under the provisions of par. (b), subsec. (5), sec. 48.33, Stats., which provides in part,

"* * * such child may, with the approval of the court, reside and be cared for outside of the county while receiving aid. * * *."

JEF

School Districts — Transportation of School Children — Apportionment of transportation money to school districts should be based on sec. 40.34, subsec. (1), Stats. 1931, rather than on either ch. 494 or 495, Laws 1933.

August 24, 1933.

JOHN CALLAHAN, *State Superintendent, Department of Public Instruction.*

Sec. 40.34, subsec. (1), Stats. 1931, provided as follows:

"The school district meeting may authorize the board to provide transportation for all the children of school age residing in the district. The board of every consolidated school district shall provide transportation to and from school for all school children residing in the district and

over one mile from the schoolhouse. The board shall provide transportation to and from school for all school children residing in the district and over two miles from the schoolhouse, in case of a common school and three miles in case of a union high school. And if it fails to provide such transportation the parents may provide suitable transportation for their children, and shall be paid therefor by the district, at the rate of thirty cents per day for the first child, twenty cents per day for the second child, and ten cents per day for each child in excess of two in the family; provided, the child shall have attended not less than one hundred and twenty days during the school year unless prevented by absence from the district; provided further, that any child residing more than four miles from the school of his district may attend the school of another district, in which case the home district shall pay the tuition of such child. The district shall be entitled to state aid on account of such transportation at the rate of ten cents per day for each child transported."

By chs. 494 and 495, Laws 1933, the legislature purported to amend sec. 40.34 (1) quoted above. It is assumed for the purposes of this opinion, but not decided, that ch. 495 rather than ch. 494, states the law obtaining at the present time. By that chapter the first three mileages mentioned in sec. 40.34 (1) are increased from one mile to two miles, from two miles to two and one-half miles, and from three miles to four miles, respectively.

By sec. 3, ch. 140, Laws 1933, the sum of two hundred thousand dollars was appropriated on July 1, 1933, for the purpose of aiding school districts who have furnished transportation under the provisions of sec. 40.34. Inasmuch as a sum considerably in excess of two hundred thousand dollars was necessary in previous years for the reimbursement of the district in accordance with sec. 40.34, it will undoubtedly become necessary this year to prorate the two hundred thousand dollar apportionment.

The apportionment to the various districts is based upon reports submitted by those districts, usually prior to July 10, succeeding the school year. The statutes do not definitely provide that the report must be in by that date; and the only machinery for apportionment is found in sec. 40.34.

Due to the fact that many of the reports from the school

districts are not received promptly by the superintendent of public instruction, the apportionment cannot be made promptly, and as a matter of fact is usually made quite late in the fall.

The question arises as to whether the apportionment of the two hundred thousand dollars for transportation furnished during the school year of 1932-1933 should be made in accordance with sec. 40.34 (1) as found in the 1931 statutes or as altered by the recent enactment of the legislature. If the apportionment is based upon the new law, districts will not be entitled to be reimbursed for the transportation of certain pupils for whose transportation they expected to receive reimbursement in accordance with the old law.

It is our opinion that the apportionment should be based upon sec. 40.34 (1) as found in the 1931 statutes. Ch. 495, Laws 1933, was published on August 3, 1933, and became effective the next day. Ch. 494, Laws 1933, was published on August 4th and so became effective on August 5th. Between July 1, 1933 and August 4, 1933, therefore, it would have been possible for the superintendent of public instruction to make a valid apportionment of the two hundred thousand dollars under sec. 40.34 (1) Stats., if the reports from the school districts had been promptly submitted. This fact would indicate that the legislature was not particularly desirous of having the apportionment made upon the basis of the new law.

The transportation for which sec. 40.34 (1), Stats. 1931, provides that the district shall be reimbursed was furnished in anticipation of reimbursement in accordance with that statute. The school districts acted in good faith, believing that they would receive from the state that money which the statute provided for during all of the period that the transportation was furnished. This opinion must not be construed as holding that this statute constituted a contract between the state and the school district, but equity will force the conclusion that the districts are entitled to payment in accordance with the 1931 statutes.

If the apportionment is now to be based upon sec. 40.34 (1) as amended by the 1933 legislature it will permit chs.

494 and 495 to operate upon past transactions. While this fact does not require the conclusion that such an operation would be giving the new law a legally retroactive effect, it would have that practical result. Generally speaking, statutes are not construed as being retroactive in the absence of a specific legislative declaration that they are so intended. An exception to this rule is, of course, the case of remedial statutes, in which class chs. 494 and 495 do not belong.

Ch. 495 moreover provides that it shall take effect upon passage and publication. The contention might be made that the legislature intended that the provision for apportionment should take effect upon passage and publication. It seems, however, more logical to believe that the legislature intended the apportionment to be based upon transportation furnished in accordance with preceding provisions of the act which could only take place in the future.

It is our opinion, therefore, that the legislature intended apportionments to be made under chs. 494 and 495 only in accordance with transportation furnished thereunder and that apportionments under this chapter should not be made until 1934.

JEF

Peddlers—Transient Merchants—Person moving about from place to place fashioning keys according to order at work bench is not transient merchant within contemplation of sec. 129.05, Stats.

August 24, 1933.

DEPARTMENT OF AGRICULTURE AND MARKETS.

You ask whether or not a person whose business is described below, is a transient merchant under sec. 129.05, Stats.

Quoting from your letter:

"The party's place of business is on a small work bench or table that is set up on a vacant lot or in a vacant building or possibly in the entrance to a building * * *

under arrangement with the owner of the property to operate usually for a short period of time. The business consists quite largely of making keys for locks from * * * key blanks. Ordinarily a customer brings a lock to this mechanic and he will make a key for the lock from * * * key blanks, these blanks consisting of corrugated, fluted, flat pieces of metal that have the handle part of the key shaped, but not the part that goes into the lock and it is this part of the key that the mechanic fashions or fits so that it will operate the lock. Occasionally a customer instead of bringing the lock will bring a key and the mechanic uses this key for a pattern and makes another key from the key blank * * *. The only sales * * * this party makes is the sale of the completed keys. * * * the charge for the labor is about nine times that of the material. * * *"

Sec. 129.05, subsec. (1), Stats., to which you refer, reads as follows:

"A transient merchant within the meaning of sections 129.01 to 192.24, is defined as one who *engages in the vending or sale of merchandise* at any place in this state temporarily, and who does not intend to become and does not become a permanent *merchant* of such place. No person shall engage in or follow the business or occupation of a transient merchant, as hereinbefore defined, at any place in this state, without first obtaining a license authorizing him to do so."

In order to determine whether or not the person you describe is a transient merchant under the above statute, it will be necessary to consider a few definitions.

The word "merchant" has been variously described by the courts:

"A merchant is a dealer in goods, wares, and merchandise who has the same on hand for sale and present delivery." *White v. Commonwealth,* 78 Va. 484, 485.

"The term 'merchant' embraces all who buy and sell any species of movable goods for gain or profit." *Rosenbaum v. City of Newbern,* 24 S. E. 1, 2, 118 N. C. 83, 32 L. R. A. 123.

Distinguishing a "merchant" from a "manufacturer"—

"Merchant is one engaged in purchase and sale of goods, a trafficker or trader, while 'manufacturer is one engaged in making materials, raw or partly finished into wares suit-

able for use, the marked distinction between them being that merchant or dealer sells to earn profit, while manufacturer sells to take profit already earned." *City of Ozark v. Hammond,* (Mo.) 49 S. W. (2d) 129, 131.

From the above, it will be seen that a merchant is one who buys goods and then sells them for a profit. He does not change the condition of the goods.

The man you describe buys raw material and refashions it before he sells it. He does not have his wares on hand "for sale and present delivery." He takes an order and then *makes* the product desired by the customer. He might more properly be termed a manufacturer than a merchant. Then, too, he is engaged in selling his services rather than in "the vending or sale of merchandise."

III Op. Atty. Gen. 613 determines that an oculist or optician who fits and sells glasses temporarily in a city is not a transient merchant as defined by sec. 1574 Stats. 1913 (now sec. 129.05, Stats.):

"* * * The sale of the glasses and cases to contain them is rather an incident of the service of fitting them and I think that a person so engaged is neither in legal acceptation or in common parlance a merchant. It therefore follows that such a person is not required to obtain a license as a transient merchant" (p. 614).

In this instance, I believe the sale of the key (the physical material) is an incident to the service of fashioning the key from the raw material and, by analogy to the above case, the person you describe is not a transient merchant under sec. 129.05, Stats.

JEF

Courts—Justice of Peace—Criminal Law—Assault and Abusive Language—Village justice of peace has exclusive jurisdiction of all cases arising under ordinances and by-laws of village; in village having no justice in office, village ordinances and by-laws cannot be enforced unless people of such village elect or appoint justice who qualifies and acts.

August 24, 1933.

HERBERT J. GERGEN,
District Attorney,
Beaver Dam, Wisconsin.

You have referred us to sec. 340.72, Stats., which provides the penalty for assault and also for using abusive language. The last part of the section reads as follows:

"* * * The provisions of this section shall not be applicable to any city or village which has enacted an ordinance under its charter for the punishment of the same or similar offense."

You also refer to sec. 61.30, which provides for the jurisdiction of the justice of the peace in villages, and at the end of the section we find the following:

"* * * He shall hold the police court and shall have exclusive jurisdiction of all cases arising under the ordinances and by-laws of such village. * * *"

You state that the village of Iron Ridge has an ordinance covering abusive language and at the present time the justices elected have not qualified; that the last justice to qualify did so a number of years ago, and about four years ago moved to Milwaukee and has lived there ever since; that according to the provisions of sec. 61.30 it appears that the justice of the village has jurisdiction, which would mean that no other justice would have jurisdiction. You state that there is no justice in the village and as he has exclusive jurisdiction there is no justice before whom violations of a village by-law or a village ordinance can be brought. You ask for our advice.

Your conclusions are correct, and the only suggestion we can make is that such village appoint a person or elect a

justice and have him qualify. Unless the people of such village place a justice in office either by election or appointment, who will qualify, they will have no means of enforcing their village ordinances.
JEF

Indigent, Insane, etc.—Military Service—Wisconsin Veterans' Home—Inmate of Wisconsin Veterans' Home at Waupaca has legal settlement in town of Farmington and by continuous residence of one year acquires legal settlement in such town.

This is true although person was indigent when he went to said home but received no support from town nor from county while in said home.

August 24, 1933.

WENDELL MCHENRY,
District Attorney,
Waupaca, Wisconsin.

You state that due to the fact that a great many pensions have been cut off after the veterans' act was passed by congress at its pending session, numerous members of the Wisconsin Veteran's Home, which is situated in the town of Farmington, Waupaca county, were materially affected; that these members of the home have received no aid either from the county of Waupaca or the township of Farmington or any other municipality and the only aid they have received is their pension and the low rate of living that they paid out of their pension at the home. You inquire whether a member who has resided at the Wisconsin Veterans' Home under the foregoing circumstances for over a year has acquired a legal residence in the township of Farmington, so as to render the township liable. This question must be answered in the affirmative.

The inmates of the Wisconsin Veterans' Home are not sentenced to that institution, but voluntarily decide to make it their home, and they have also been authorized to take their families with them. They therefore have voluntarily

decided to make that their legal residence and after having lived there continuously for one year they have acquired a legal settlement in said town.

You also submit the following:

A party who is entitled to membership in the home and who was an indigent at the time he came to the home, but who received no aid other than the aid that he receives from the home, remains there for over a period of one year and then is discharged as a member of the home because he has failed to comply with the rules and regulations in the home. Does he thereby acquire a settlement in the township of Farmington so as to create liability against the township for his support?

It has been held by this department that support and maintenance of a person by other agencies than that of town, village, city or county in which he has resided for one year and upwards does not prevent him from gaining a legal settlement therein. XII Op. Atty. Gen. 319.

It has also been held by this department that a person who receives a blind pension may, nevertheless, acquire a legal settlement in a town. XIV Op. Atty. Gen. 188.

Were it not for a late decision of our supreme court, April 11, 1933, *Town of Rolling et al. v. City of Antigo*, 248 N. W. 119, the question would not be very difficult to answer. But in that case, Justice Rosenberry uses some very general language as to the word "pauper" in sec. 49.02, subsec. (4), Stats. Heretofore it has generally been understood that a pauper, in the legal sense, was one who necessarily received support from the town, village or city, but under the above definition it practically takes in almost anyone who is below the level of subsistence. The fact in that case, however, in which the decision was rendered was such that the person would be a pauper, for he was receiving aid in the city of Antigo. Mr. Vanderhei applied to the city of Antigo for aid as a poor and indigent person, but he was refused aid and was directed to go to see Mrs. H. B. Mills, who held the office of superintendent of poor of the city of Antigo, and also president of the Community Welfare Association. She gave him aid on behalf of the community welfare association, and this welfare associa-

tion receives part of its appropriation from Langlade county, and in addition private contributions. I believe that there can be no question, but that this person was a pauper.

While it appears that the person here in question was an indigent prior to his coming to the Wisconsin Veterans' Home, it does not appear that he received aid from the town, village or city. At the Veterans' Home he received aid and support. I believe that this person, who was poor and indigent when he entered the home, cannot be considered a pauper unless he already was a pauper in the sense that he received aid from the local authorities.

I do not believe that a person who is supported by a relative who is morally or legally bound to support him is a pauper; neither do I believe that an exsoldier who is entitled to enter the Wisconsin Veterans' Home and receives aid and support there is, by reason of that fact, a pauper. In fact, I believe that one of the purposes for establishing this home was to prevent the soldiers from becoming ordinary paupers. The support that he receives there, he has earned, in contemplation of our statute, by his services as a soldier. Likewise, if a son supports his father, who is poor and helpless, he does it because of what his father has done for him. The father has really earned the support, and cannot be considered a pauper by reason of the fact that he is supported by his son.

I believe the person in question is not a pauper within the contemplation of sec. 49.02 (4). The question, however, is not free of doubt, in view of the decision above referred to.

JEF

Counties—Courts—County judge in Chippewa county may retain fees allowed justice of peace under sec. 307.01, obtained in justice court branch of his court.

County board may not change salary of county judge during his term of office.

August 24, 1933.

ROBERT L. WILEY,
District Attorney,
Chippewa Falls, Wisconsin.

In your letter of July 6 you ask whether the county judge, under ch. 32, Laws 1921, may retain fees obtained in justice court branch of his court. You also ask whether the county board may change the salary of the county judge during his tenure of office.

In answer to your first question, sec. 6, ch. 32, Laws 1921, provides in part:

"* * *

"All fines and all costs collected by the judge in every civil action and in all criminal prosecutions and proceedings under the general statutes of this state tried or determined by the county court, which, if tried or determined by a justice of the peace would be paid over to the county treasurer, shall be accounted for and paid over quarterly by the judge of said county court unto the county treasurer of the county of Chippewa and in like manner all fines and costs collected by the judge in every civil action and in all criminal prosecutions and proceedings under the ordinances of the city of Chippewa Falls tried or determined by the county court shall be accounted for and paid over quarterly by the judge of said county court unto the city treasurer of the city of Chippewa Falls.

"Costs and fees shall be taxed and allowed in the same amount as would be allowed in justice court."

Under these provisions a clear distinction was made between fines and costs the judge must pay to the county treasurer and fees and costs which he might keep when acting as a justice. Sec. 360.34, Stats., provides that all fines and costs collected by the justice of the peace must be paid to the county treasurer. Any other fees enumerated in sec. 307.01 may be retained by the justice.

As this distinction was made in ch. 32, Laws 1921, it seems clear that the legislative intent was to allow county judges in Chippewa county to retain such fees allowed justices of the peace. As this special law was passed while sec. 59.15, which provides that the fixed salary of a county judge shall be in lieu of fees and that he shall pay any fees collected to the county treasurer, was in effect, it is our opinion that the legislature meant to exclude the county judge in Chippewa county from its provisions when acting as a justice of the peace; therefore, the county judge may retain the enumerated fees obtained in justice court branch of his court.

In answer to your second question, sec. 59.15, subsec. (1), provides:

"The county board at its annual meeting shall fix the annual salary for each county officer, including county judge, to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. The salary so fixed shall not be increased or diminished during the officer's term, * * *."

This provision clearly states that the county board may not change the salary of a county judge during his tenure in office; therefore, we must answer your second question in the negative.
JEF

Education—Supervising Teachers—County board rather than state superintendent of public instruction has right to fix salary of supervising teacher.

August 25, 1933.

DEPARTMENT OF PUBLIC INSTRUCTION.

You inquire whether the county boards in the various counties still have the power to set the salary of the supervising teacher.

Sec. 39.14, Stats., provides for the employment of supervising teachers by the county superintendent. Subsec. (2), sec. 39.14 provides as follows:

"The county board shall fix the salary of such teacher which shall be not less than one thousand dollars for ten months in each year. The supervising teacher shall be reimbursed for actual and necessary expenses incurred in the performance of her duties. The county board shall make provision for the monthly payment of her salary and expenses."

Subsec. (6), sec. 39.14 provides that the county superintendent shall make a report to the state superintendent of the name and qualifications of each supervising teacher employed in the county, the total amount of her salary and actual and necessary expenses paid during the year ending the preceding June 30.

Subsec. (7), sec. 39.14 is entitled — "State reimburse county." It was amended by ch. 140, Laws 1933, to read as follows:

"On receipt of such report, and it appearing from an actual inspection by direction of the state superintendent that the work of such supervising teacher has been efficient, and that she has devoted her time exclusively to the duties of the position, *the state superintendent shall certify in favor of the county* which employed her, *the amount of the salary paid but not to exceed an amount to which such teacher shall be entitled under a salary schedule* for supervising teachers to be adopted and promulgated by the state superintendent of public instruction which shall provide for a salary range of from eleven hundred to fifteen hundred dollars per year, varying with length of service and professional training. The county shall also be entitled to reimbursement for the actual and necessary expenses paid to her in the year preceding, and file it with the secretary of state, whereupon he shall draw his warrant for the amount of the certificate and in favor of the proper county treasurer."

Subsec. (7) does not purport to set a standard for the payment of salaries to the supervising teacher, but only goes to the reimbursement of the counties by the state. That reimbursement is based upon the salary schedule promulgated by the state superintendent.

The language of sec. 39.14 (7) does not constitute a command to the state superintendent to fix a salary schedule which shall be binding upon the county boards, but relates to a salary schedule which shall bind the state in its re-

imbursement of the county. Incidentally it may be mentioned that it is binding upon the state only as a maximum. It provides that the reimbursement shall be "not to exceed" an amount to which the teacher shall be entitled under the schedule. In the event that the county board set the salary at an amount less than that fixed in the schedule, the reimbursement should be that amount paid in accordance with the salary set by the county board rather than the amount fixed by the schedule as being the proper salary.

In connection with the amendment of subsec. (7) of sec. 39.14, the legislature did not alter or repeal sec. 39.14 (2) quoted above. That subsection still authorizes the county board to fix the salary of the supervising teachers with the limitation that it shall be not less than one thousand dollars for ten months in each year.

In the construction of statutes it is the duty of courts, and of this office as well, to give some meaning to every statute and to make such construction as will render them harmonious, especially where they should be read *in pari materia.*

Sec. 59.08 (8) also provides:

"The county board, at any annual meeting, may abolish, create or re-establish any office or position (other than the county officers designated by section 59.12 of the statutes, judicial officers and the county superintendent of schools), created by any special or general provision of the statutes and the salary or compensation for which is paid in whole or in part, by the county, and the jurisdiction and duties of which lie wholly within the county or any portion thereof, notwithstanding the provisions of any special or general law to the contrary."

This statute is an additional reason for holding that the county board still has the right to fix the salary of a supervising teacher. The construction given above does not make the statutes in any sense conflicting and gives effect to the legislative intent.

It is our opinion that where the county boards at their meeting last November set a salary for the supervising teachers, such determination by the county boards is not

altered by the salary schedule fixed by the state superintendent where there is a variation between the two.
JEF

Municipal Corporations—Public Health—Public Nuisances—Public Officers—Park Board—City maintaining sewage system which pollutes bathing beach in park of city so as to endanger health of people maintains public nuisance and is liable for damages.

Park board which is operating bathing beach and park also may be liable.

Notice placed at beach to effect that bathers use it at their own risk will not, in our opinion, prevent city or park board from being liable.

August 31, 1933.

DR. C. A. HARPER, *State Health Officer, Board of Health.*

You state that a city has a park and in conjunction with that park a bathing beach; that they have showers, lockers and a life guard; that they rent bathing suits and lockers; that the waters adjacent to the park are considerably polluted by the sewage from the city, the pollution being more intense at some times than at others and that such pollution occurs is known to the city officials. The city has a park board who are appointees of the city council.

You submit the following question:

"What is the liability of the city should bathers contract certain types of infection by bathing in the waters of the beach connected with the park and amusement hall?"

The city in operating a park and bathing beach for the benefit of the public is performing a governmental function. See *Gensch v. Milwaukee,* 179 Wis. 95. And in the operation of a city sewage disposal system the city is also performing a governmental function. This is generally conceded. It is well established in this state that, in the performance of a governmental function, a city is not liable for the damages caused by the negligence of its ser-

vants engaged in that performance. *Gensch v. Milwaukee,* 179 Wis. 95, and other cases cited on page 97. The only exception to this rule is that a municipality may not maintain a public nuisance even where it is performing a governmental duty. *Bernstein v. Milwaukee,* 158 Wis. 576, and cases cited on page 578.

Maintaining a sewage system in such a way that it pollutes the water connected with the bathing beach and park in the city is without question the maintaining of a nuisance if the pollution of the water actually endangers the health of the people. We believe that the city is liable, and probably the park board also.

You also say:

"Supposing that the park board placards the shore of this bathing beach to the effect that 'if you bathe at this beach you do so at your own risk,' knowing that the conditions are such that the water is not considered of suitable sanitary quality for reasonably safe bathing, does that exempt the park board or municipality from liability or change the degree of liability?"

We do not believe that it changes the liability of either the park board or the city unless the board absolutely forbids people bathing at the beach, and informs them of the pollution.

Again you ask:

"If the bathing place is a municipally owned beach open to the public and if certain services are extended by those operating the bath house without any charge, after signs are posted warning people that they use the beach at their own risk, would this change the nature of the liability?"

We answer this also that we do not believe it does. As long as they are taking part in accommodating people to take the baths and as long as the water is polluted to the knowledge of the city, they should not encourage the public in any way, in bathing at the beach. These are the conclusions that we have arrived at in the short time that we have had to look into this matter.

JEF

Indigent, Insane, etc.—In cases where county system of maintaining poor obtains, relief furnished by county to transients may be recovered from municipality in some other county in which transient has legal settlement by county's giving notice directly to county in which legal settlement is had. No notice from local municipality to county is necessary in such cases.

August 31, 1933.

JAMES L. MCGINNIS,
District Attorney,
Amery, Wisconsin.

You state that Polk county is under the county system of poor relief and that you have occasionally the matter of the relief of transient paupers, under sec. 49.03, Stats., and that there has been some confusion relative to the manner in which transient paupers are to be handled in counties having the county system.

You ask the following questions:

1. "Must the initial relief be given by the town, village or city, or may it be given directly by the county?
2. "If it is given directly by the county, out of the poor relief funds, must the county wait until November until after the auditing of the accounts by the county board before filing a claim against the place of legal settlement?
3. "May the county clerk of the county furnishing relief serve a notice upon the county clerk of the county in which the legal settlement is, without first receiving a notice and statement from the clerk of the town, village or city in which the transient pauper is located at the time of the relief?"

You state that it appears that sec. 49.03 must be strictly followed and that it further appears that when the legislature passed sec. 49.15, regarding the adoption of the county system, no method was provided or outlined for the county to follow in the matter of charging other municipalities for relief of transient paupers belong to them.

Your first question should be answered, "By the county."

In answer to your second question, we would say that that would be a good way of proceeding in the matter.

Your third question must be answered to the effect that

the county clerk may serve the notice without receiving notice from the clerk of the town, village or city.

I see no purpose in having any notice from the local municipality to the county when there is no relief furnished by such local municipality. That part of sec. 49.03 which pertains to the town furnishing relief and giving notice to the county is superfluous in cases where the county is taking the place of furnishing relief for the poor. See *Mappes v. The Board of Supervisors of Iowa County,* 47 Wis. 31.
JEF

Municipal Corporations—City Ordinances—Zoning Ordinances—Ordinance prohibiting "business" within certain zone prohibits undertaking therein.

September 1, 1933.

CURT W. AUGUSTINE,
District Attorney,
Eau Claire, Wisconsin.

The city of Eau Claire has passed an ordinance which prohibits the establishment of a *business* in a particular zone, but does not prohibit a profession therein. Some question has arisen concerning the establishment of an undertaking parlor within this area, and you desire an opinion of this office as to whether "undertaking" is a business or a profession.

It is our opinion that "undertaking" must be classed as a business rather than a profession. Broad, general definitions of both "business" and "profession" might be found in legal and standard dictionaries, as well as in decisions of the courts which would permit undertaking to be placed in either class. "Business" has been defined: "That which occupies the time, attention and labor of men for the purpose of livelihood or profit." Bouvier's Law Dictionary (1914), p. 406. See also *Conhaim Holding Co. v. Willcuts,* 21 Fed. (2d) 91, 92; Black's Law Dictionary, page 158, citing *People ex rel. Hoyt v. Tax Commissioners,* 23 N. Y. 242.

The word "profession" has been held to mean the occupation to which one devotes one's self with the possible exception of mechanical or agricultural pursuits. As was stated in *Geise v. Pennsylvania Fire Insurance Co.,* 107 S. W. 555:

"* * * In a restricted sense it (profession) only applies to the learned professions. * * *. (Syllabus.)

See also *United States v. Laws,* 163 U. S. 258.

It is unnecessary here to speculate upon the relative merits or demerits of the various general definitions because the courts have definitely passed upon the question which you have raised.

"The business of embalming and undertaking is not a profession within the meaning of the statute, nor does the fact that an embalmer must be licensed make him a professional man. * * * The term 'professional' can only relate to some of those occupations universally classed as professions, the general duties and character of which the courts must be expected to understand judicially. * * *" *O'Reilly v. Erlanger,* 95 N. Y. S. 760, 761.

Again in *Building Commissioner of Town of Brookline v. McMannus,* 160 N. E. 887, it was said:

"Undertaking, as commonly carried on, is not a profession; it is a business or occupation."

The last quotation was made in connection with the enforcement of a zoning ordinance which forbade, among other things, the use of buildings in a certain zone for "commercial purposes."

In the case of *In re Dawson et al.,* 277 Pac. 226, the question of whether "undertaking" was a business or profession again arose in relation to a zoning ordinance. It was there held, p. 228:

"It is contended a funeral home should be classified in the same catagory with churches, community houses, and hospitals, and, since these are permitted within this particular zone, the funeral homes should also be permitted to operate therein. In other words, it is contended a funeral home is not a 'business' as contemplated by the ordinance, but partakes of the nature of a profession. It is true that in some particulars it does partake of the nature of a profession, but we think it is properly classified as a 'business.'"

While the supreme court of this state has not definitely passed upon this question it consistently spoke of "undertaking" as a business in the case of *State ex rel. Kempinger v. Whyte,* 177 Wis. 541.

JEF

Indigent, Insane, etc.—Maintenance rates to be used by state in compensating Milwaukee county for persons maintained in Milwaukee county hospital for mental diseases during period from January 1, 1933 to June 30, 1933 are rates prescribed in subsec. (2), sec. 51.24, Stats. 1931.

September 1, 1933.

BOARD OF CONTROL.
Attention Blaine M. Linke, *Collection and Deportation Agent.*

You present the question as to what maintenance rates are to be used by the state in compensating Milwaukee county for persons maintained in the Milwaukee county hospital for mental diseases during the period January 1, 1933 to June 30, 1933.

It is considered that the rates to be used are those prescribed in subsec. (2), sec. 51.24, Stats. 1931.

The Milwaukee county hospital for mental diseases was established and is maintained by Milwaukee county under the provisions of sec. 51.24, subsec. (1) of which provides to the effect that any county having a population of two hundred and fifty thousand may establish and maintain a hospital for mental diseases, and subsec. (2) of which prescribes the maintenance rates by which the state shall compensate such county for all insane persons maintained at public cost in such a hospital. Subsec. (2) of sec. 51.24 was amended by sec. 3, ch. 140, Laws 1933, so as to reduce the maintenance rates prescribed.

Subsec. (1), sec. 51.08 prescribes the maintenance rates with respect to state and county hospitals for the insane generally. Subsec. (1) of sec. 51.08 was also amended by sec. 3, ch. 140, Laws 1933, so as to reduce the maintenance rates there prescribed.

Sec. 3, ch. 140, Laws 1933, made amendments to various statutes other than those above mentioned, and the act provides that sec. 3 thereof should take effect on passage and publication. The act was published on May 22, 1933.

Later ch. 385, Laws 1933, was enacted containing the following provision:

"Settlements for all charges for the maintenance, care and treatment of inmates in any state or county hospital or asylum for the insane for the fiscal year ending on June 30, 1933, shall be made at the rate provided in subsection (1) of section 51.08 of the statutes as it existed prior to the enactment of chapter 140, laws of 1933. The change in rate made in said subsection (1) of section 51.08 by chapter 140, laws of 1933, shall take effect on July 1, 1933, notwithstanding the provisions of section 3 of said chapter."

While the above quoted provisions contain the broad language "any * * * county hospital or asylum for the insane," it manifestly only has reference to those county hospitals governed by the maintenance rate prescribed by subsec. (1), sec. 51.08. The obvious intent of such provision was simply to make it clear that the old rate prescribed in subsec. (1), sec. 51.08 was to govern for the period ending June 30, 1933 and that the new rate as prescribed in ch. 140, Laws 1933, was not to govern until the period commencing July 1, 1933. The provision in question does not evidence any intent that the rate prescribed in subsec. (1), sec. 51.08, as it existed prior to the enactment of ch. 140, Laws 1933, should be the rate governing county hospitals for mental diseases under sec. 51.24, for the period ending June 30, 1933.

There was no need for any clarification provision with respect to the time of application of the new rate prescribed in the amendment to subsec. (2), sec. 51.24, governing county hospitals for mental diseases. Under that section the amendment to subsec. (2), sec. 51.24 expressly provides that the state shall compensate every such county (maintaining a hospital for mental diseases under sec. 51.24) "for all insane persons maintained at public cost for mental diseases, *commencing July 1, 1933*," etc. That language clearly indicates that the new rate for county hospitals for mental diseases under sec. 51.24 should govern only for the period beginning July 1, 1933 and, conversely, that the old rate should govern for the period ending June 30, 1933.

JEF

Indigent, Insane, etc.—Maintenance Rates—Ch. 470, Laws 1933, in so far as it amends sec. 51.08, subsec. (2), Stats., is not retroactive and has no application in determining amount which may be charged counties for preceding fiscal year, 1932–1933, under secs. 51.08 (2) and 46.10 (2).

September 1, 1933.

BOARD OF CONTROL.

You state that under secs. 51.08, subsec. (2), and 46.10 (2), Stats., the state board of control annually bills the counties for the amounts due for clothing furnished the county patients while inmates of the state institutions. You state that the legislature by ch. 470, Laws 1933, published July 28, 1933, and effective on the following date, changed the amount limiting the sum which the county can be charged from fifty-five dollars to thirty-five dollars for each patient. You inquire as to the effect of ch. 470, Laws 1933, on the sums due from the counties to the state for the preceding fiscal year from July 1, 1932 to July 1, 1933.

You are advised that ch. 470, Laws 1933, has no effect in regard to sums due the state from the counties for clothing furnished the county patients from July 1st, 1932 to July 1, 1933. Under sec. 51.08 (2) the sums due the state are adjusted under sec. 46.10 (2), which reads as follows:

"On the first day of July in each year the state board of control shall prepare a statement of the amounts due from the several counties to the state, pursuant to law, for the maintenance, care, and treatment of inmates at public charge in state or county charitable, curative, reformatory, and penal institutions. Such statement shall cover the preceding fiscal year and shall specify the name of every inmate in each state institution whose support is partly chargeable to some county, and the name of every inmate in each county institution whose support is wholly chargeable in the first instance to the state and partly chargeable over to some county; and shall further specify, with respect to each inmate, his residence, the number of weeks for which support is charged, the grounds of the liability, and the amount due to the state from such county, itemized as to board and clothing. The president and

secretary of the board shall certify said statement, file it with the secretary of state, and mail a duplicate to the clerk of each county charged; and thereupon the secretary of state shall charge to the several counties the amounts so due, which shall be certified, levied, collected, and paid into the state treasury with the state tax as a special charge."

Under sec. 46.10 (2) the sums due from the counties are to be determined as of July 1. On July 1, 1933, ch. 470, Laws 1933, had not yet been passed, and on that time the sums due from the counties had already become fixed and due under sec. 51.08 (2) as it read on that date. When ch. 470, Laws 1933, was passed and published (July 28, 1933), it was not made retroactive; as regards 51.08 (2), it merely changed the words fifty-five dollars to thirty-five dollars, and the entire law was to go into effect upon passage and publication.

Ch. 470, Laws 1933, cannot be presumed to be retroactive, thereby changing these sums already due for amounts already expended by the state and chargeable back to the counties. There are no specific words making ch. 470, Laws 1933, retroactive, and without such specific language indicating such intent a statute will not be construed to be as retroactive. *In re Dancy Drainage District,* 199 Wis. 85, 92.

In determining the amounts due from the county for clothing furnished for the preceding fiscal year 1932–1933, the state board of control may charge up to fifty-five dollars for each patient according to sec. 51.08 (2) as of July 1, 1933.

JEF

Public Officers—Deputy County Clerk—Deputy County Treasurer—Offices of deputy county clerk and deputy county treasurer are incompatible.

September 1, 1933.

L. A. BUCKLEY,
District Attorney,
Hartford, Wisconsin.

The question herein presented is: May a deputy county clerk legally act as a deputy county treasurer?

Sec. 59.18, Stats., provides:

"No person holding the office of sheriff, undersheriff, county judge, district attorney, clerk of the circuit court, county clerk or member of the county board shall be eligible to the office of county treasurer or deputy county treasurer."

From this statute it follows that a county clerk may not be a deputy county treasurer. The next step is to consider whether the office of deputy county clerk is also to be included within the scope of the above statute. It is true that literally the office of deputy county clerk is not among those enumerated within the statute. Nevertheless, I am of the opinion that the statute should be construed as including the office here concerned.

As regards the appointment of deputy county clerk, subsec. (1), sec. 59.16, Stats., provides:

"Every county clerk shall appoint in writing one or more deputies and file such appointment in his office. Such deputy or deputies shall aid in the performance of the duties of such clerk under his direction, and in case of his absence or disability or of a vacancy in his office, unless another is appointed therefor as provided in subsection (3), shall perform all the duties of such clerk during such absence or until such vacancy is filled. The county board may in its discretion, at any meeting, provide a salary for such deputy or deputies."

Commenting on the duties of a deputy county clerk during the absence of the county clerk, Chief Justice Cole in the case of *Gilkey v. Cook,* 60 Wis. 133, 136, makes this statement:

"The statute requires the county clerk to appoint a deputy in writing under his hand, and, in case of the absence or disability of the clerk, or of a vacancy in the office, such deputy is authorized to perform all the duties of the clerk during such absence or until the vacancy is filled. Sec. 706, R. S. [now section 59.16 Stats.] * * * As the deputy, in the absence or disability of the clerk, is clothed with all the statutory powers of that officer and required to perform his duties, there can be no doubt but he may execute the tax deed. * * *."

Hence, from the above statute and decision, it is apparent that, in certain situations, the deputy county clerk may be required to fill the office of county clerk. It is because of this possibility that a deputy county clerk, like the county clerk, is ineligible to hold the office of deputy county treasurer.

In the case of *State v. Jones,* 130 Wis. 572, the question of whether a county judge could hold the office of justice of the peace was raised. It was shown that in certain instances of *habeas corpus* this particular county judge might possibly be called upon to review the validity of a commitment by a justice of the peace. Concerning whether this degree of possibility or probability was sufficiently great to make the two offices incompatible, the court cited the case of *Milward v. Thatcher,* 2 Term Rep. 81, 7 Eng. Rul. Cas. 320, and made the following quotation therefrom, p. 574:

" 'There may be cases in which it would be absolutely necessary for him to sit in that character, as in case of the sickness of the other members; and if there be one possible case in which he might be called upon to act, that is an answer to the argument.' "

The court concluded that, because a conflict of official duties might possibly arise, the offices of county judge and justice of the peace are incompatible.

An analogous situation was considered in XII Op. Atty. Gen. 20, wherein the question of whether the offices of undersheriff and alderman were compatible was discussed. Art. VI, sec. 4, Wis. Const., provides that a sheriff shall hold no other office. Because, stated the opinion, "The undersheriff, after the occurrence of a vacancy in the office

of sheriff, has all the responsibilities of sheriff, and performs all the duties" the following conclusion was reached:

"I am of the opinion that the offices of undersheriff and alderman are incompatible and cannot be held by the same person at the same time. That being true, the principle announced in the case of *State v. Jones*, 130 Wis. 572 [discussed above], is applicable, and the undersheriff by accepting the office of undersheriff has thereby vacated his office of alderman."

Therefore, on the authority of the preceding statutes and citations, I am of the opinion that the offices of deputy county clerk and deputy county treasurer are incompatible.
JEF

Appropriations and Expenditures—Unexpended Balance—Fish and Game—Damage—Deer—Any of appropriation under sec. 20.20, subsec. (19), Stats., which has not been expended during fiscal year 1932–1933 may be used for same purpose during years 1933–1934.

September 1, 1933.

PAUL D. KELLETER, *Conservation Director,*
Conservation Department.

In your recent letter you refer to sec. 29.596, Stats., pertaining to the paying of damage done by deer, and also to sec. 20.20 (19), Stats., which pertains to an appropriation of twelve thousand dollars each year in which there is an open season for deer, for the purpose of carrying out the provisions of sec. 29.596, and provides further that any unexpended balance in the course of any fiscal year shall revert to the conservation fund and may be used by the commission for any of the purposes specified in sec. 20.20.

You further state that the law provides that there shall be an open season for the hunting of deer during even numbered years. Therefore, during the fiscal year 1932-1933, twelve thousand dollars was appropriated for this purpose and the unexpended balance reverted to the conservation fund, as you understand it, on June 30, 1933, leaving no money available at the present time for the

paying of damages caused by deer at this time, but such damages will be payable after July 1, 1934, for the reason that during the fiscal year there will be an open season for the hunting of deer.

You inquire whether your department has any authority at this time to pay for damages suffered since July 1, 1933, and if you do have such authority, out of what fund it should be paid.

You do not state in your letter how much of the twelve thousand dollars reverted to the conservation fund, but whatever such amount was, it may be used by the commission for any of the purposes specified in sec. 20.20. Subsec. (19) is a part of said section 20.20, and the conservation commission may, therefore, use such money for the paying of damage done by deer, if there is any left. After that fund is exhausted, the conservation commission, of course, cannot authorize the payment of any money out of any fund. The commission may, however, determine, as provided in sec. 29.596, the amount that is due to those who have suffered damages from deer, and if no funds are available, the interested parties will have to submit their claim to the legislature, and if the legislature refuses to appropriate the money, then suit may be brought as provided in secs. 285.01, *et seq.*

JEF

Counties—County Board Committee—Education—Blind —County board committee has not power to administer sec. 47.08, Stats., in its entirety.

September 1, 1933.

HELMAR A. LEWIS,
District Attorney,
Boscobel, Wisconsin.

You state that the "blind aid in the county of Grant is being administered by a committee of three who are appointed by the chairman of the county board and who are members of the county board." You inquire as to the

authority of this committee to "administer the law in its entirety."

You are advised that the committee has not the power to administer the blind pension law, sec. 47.08, Stats., in its entirety. The county board committee can make preliminary investigations and recommendations to the county board. In XXI Op. Atty. Gen. 498, in referring to sec. 47.08 final action on the granting of blind pensions must can make "preliminary investigations prior to action by the county board." The same would be true in regard to a committee of the county board. However, under sec. 47.08 final action on the granting of blind pensions must come from the county board. Sec. 47.08 in subsecs. (5), (6), (7) and (8) specifically places the duty of administering the law on the county board, and this department has often ruled that a county board cannot delegate powers made specifically its duty by statute. See XXII Op. Atty. Gen. 79: XVIII Op. Atty. Gen. 287.

JEF

Public Officers—School Districts—School District Treasurer—Vacancies—Failure of school district treasurer to file required bond within stipulated period vacates that office. If no appointment is made by school district board to fill such vacancy as required by statute, it becomes duty of town clerk, who may select as appointee person originally elected and disqualified.

September 1, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

The facts presented in your request for an opinion are these: The treasurer of a school district was elected and through neglect failed to file his bond within the fifteen day period. Since the expiration of that period the person so elected has made application for his bond but the clerk has refused to sign same, claiming that the failure

to file the bond within the fifteen day period has disqualified the treasurer from holding that office. The school board is deadlocked in its effort to appoint another person to fill said office.

1. The first inquiry concerns whether the person so elected to the office of treasurer of the school district became disqualified by his failure to file the bond required by subsec. (1), sec. 40.10, Stats., which provides in part:

"The treasurer shall, within fifteen days after his election or appointment, execute and file an official bond at least equal to the amount of all the moneys to come to his hands, with sufficient sureties approved by the director and the clerk. * * *."

The effect of such failure to comply with the above section is set out in sec. 17.03, which provides in part:

"Any public office, including offices of cities, villages and school districts, however organized, shall become vacant upon the happening of either of the following events:
"* * *

"(7) The neglect or refusal of any person elected or appointed or re-elected or reappointed to any office to take and file his official oath or to execute or renew his official bond, if required, or to file the same or either thereof in the manner and within the time prescribed by law."

The application of this latter statute to the facts at hand results in my holding that the treasurer-elect here is disqualified from holding the office to which he was elected and, hence, that said office is vacant. It is to be noted that the failure to file here is through the negligence of the person elected to the office. This same result was reached under similar facts in XV Op. Atty. Gen. 80.

2. The next inquiry submitted is whether, the school board being deadlocked on the matter of a suitable appointee, it is the duty of the town clerk to make an appointment to the office of treasurer of the school district.

Sec. 17.26 provides in part:

"Vacancies in school district boards and boards of education operating under the general law or under special charters shall be filled as follows:

"(1) In boards the members of which are elected at the annual school district meeting, by appointment by the

remaining members of the boards within ten days after the vacancy occurs. If the vacancy is not so filled, the town, village or city clerk, and in case of joint districts, the clerk of the town, village or city in which the schoolhouse is situated, shall fill such vacancy by appointment. Any person upon being notified of his appointment shall be deemed to have accepted the same unless within five days thereafter he files with the clerk or director a written refusal to serve; and any person so appointed shall hold office until the next annual meeting at which meeting the electors shall fill such vacancy for the residue of the unexpired term."

Under the facts submitted it is assumed that the deadlock on the matter of appointment in the district board has prevailed beyond the above stipulated ten day period. The application of the quoted statute to facts similar to those at hand was considered in XV Op. Atty. Gen. 80, 81, wherein it was stated:

"Under the facts the vacancy caused through failure of K to furnish a sufficient bond was not filled by the director and clerk. Consequently it then became the duty of the town clerk in which the school house is located to appoint a treasurer."

Therefore, in view of the above statute and opinion, I conclude that it is the duty of the town clerk to fill the vacancy in the office of treasurer of the school district by appointment.

3. It is asked whether the town clerk, in making his appointment to fill said vacancy, can select as appointee the person originally elected to the office but disqualified through his failure to file the required bond within the stipulated period.

Under the authority of *State ex rel. Ackerman v. Dahl*, 65 Wis. 510, wherein such a procedure was countenanced, I am of the opinion that the town clerk may, by appointment, fill the existing vacancy by selecting the person originally elected and later disqualified from taking office under that election.

JEF

Peddlers — Transient Merchants — Person selling merchandise from stationary truck at same place and time each day is transient merchant.

September 1, 1933.

JOHN P. MCEVOY,
Assistant District Attorney,
Kenosha, Wisconsin.

You ask whether a man who sells confectioneries from a truck at a particular time and place each working day is a peddler or transient merchant under ch. 129, Stats.

A peddler has been defined as follows:

"A peddler is simply one who peddles, and anyone peddles who sells at retail from place to place, going from house to house, carrying the goods to be offered for sale with him." *Dewitt v. State,* 155 Wis. 249, 251.

"* * * The essential thing is that he [a peddler] must do business by going about from place to place selling and delivering merchandise in a retail way to such individuals as he may be able to deal with." III Op. Atty. Gen. 609, 610.

From these definitions, it is obvious that the business you describe is not that of a peddler because the men do not move from place to place or make a house to house canvass.

Sec. 129.05, subsec. (1), defines a transient merchant:

"* * * one who engages in the vending or sale of merchandise at any place in this state temporarily, and who does not intend to become and does not become a permanent merchant of such place. * * *"

Under this provision the essential characteristics of a transient merchant are the temporary nature of his business and the intention not to become a permanent merchant. The business you describe is temporary, even though carried on every day, because it is in operation only at short intervals during the regular business hours of the day; and the fact that such business has been carried on for over two years indicates that there is no intention to become a permanent merchant.

The sale of confectioneries and fruit from a temporary stand has been held to make the seller a transient merchant. Op. Atty. Gen. for 1912, 719. A truck, even if parked in a particular place at fixed times every day, would be such a temporary place of business, constituting the proprietor a transient merchant whose business should be licensed by the state.

In a former opinion, III Op. Atty. Gen. 614, it was held that the incidental sale of goods purchased for resale from a stand at some particular fair or circus would not make the proprietor a transient merchant unless he went from place to place and set up such stands. In this opinion it was implied that anyone setting up a temporary place of business as a regular practice might be a transient merchant. As the business you describe is set up temporarily each day, thus making it a regular practice, it is held that one conducting such business is a transient merchant.
JEF

Courts—Circuit Judge—Milwaukee county may at any time cease paying amount heretofore contributed to salary of circuit judge.

September 5, 1933.

OLIVER O'BOYLE, *Corporation Counsel,*
Office of District Attorney,
Milwaukee, Wisconsin.

Sec. 252.07 (5), Stats., provides:

"In every county having a population of five hundred thousand or more, and containing an entire judicial circuit, for which more than one judge is provided by law, the county may pay to each such judge, during terms of office commencing after the first day of January, 1924, a sum of one thousand dollars per annum, payable monthly, out of the treasury of said county, as compensation in addition to the salary paid to such judges out of the state treasury and the salary paid to them out of the treasury of said county, pursuant to subsection (4) of section 252.07."

Subsequent to the passage of this statute, which was enacted by ch. 248, Laws 1923, the Milwaukee county board of supervisors passed an ordinance granting such additional annual salary of one thousand dollars to circuit judges whose terms commenced after January 1, 1924. The ordinance used the language of the statute which attempts to authorize the increase. The ordinance has been effective in Milwaukee county and applicable to all the circuit judges therein since its enactment and the salaries contemplated by the ordinance have been paid out of the county treasury in accordance with the language of said ordinance. The Milwaukee county board of supervisors now desires to rescind the ordinance and to make such rescission applicable to all circuit judges in Milwaukee county as to terms *in praesenti* as well as *in futuro*.

It is our opinion that Milwaukee county may immediately cease its payments of one thousand dollars per annum to all circuit judges of Milwaukee county which heretofore have been made under the presumptive authority of sec. 252.07 (5).

Memorandum briefs have been submitted by parties interested in this opinion citing constitutional and statutory provisions by way of urging a contrary conclusion. Art. IV, sec. 26, Wis. Const., which provides as follows: "* * * nor shall the compensation of any public officer be increased or diminished during his term of office," as well as the language of sec. 252.07 (5) relating to *terms* of office were called to our attention, and numerous cases bearing upon an interpretation of the constitutional provision above mentioned. It was particularly and emphatically stated that the definition of the word "compensation" given by the court in the case of *Board of Supervisors of Milwaukee County v. Hackett*, 21 Wis. 613, should be adopted. That case held, p. 625:

"* * * The word 'compensation,' as used in sec. 26, art. IV of the constitution, signifies the return for the services of such officers as receive a fixed salary payable out of the public treasury of the state; * * *"

It is insisted that this language means exactly what it says and that it is the fact of payment out of the state

treasury rather than the salary itself that is the important consideration.

Because of the conclusion which has been reached it becomes unnecessary to pass upon the relative merits or demerits of the arguments which have been advanced for consideration.

Art. VII, sec. 7, Const., provides in part:

"* * * Every circuit judge shall * * * receive such compensation as the legislature shall *prescribe.*"

Art. VII, sec. 10, Const., provides:

"Each of the judges of the * * * circuit courts shall receive a salary, payable at such time as the legislature shall fix, of not less than one thousand five hundred dollars annually; they shall receive no fees of office, *or other compensation than their salary;* * * *."

In the case of *Milwaukee County v. Halsey,* 149 Wis. 82, it was stated, p. 87:

"* * * in the constitution the words 'salary' and 'compensation' are employed synonymously."

Under art. VII, sec. 10, Const., therefore, the circuit judges could receive no "other compensation [salary] than their salary." The salary which they were to receive is "such compensation [salary] as the *legislature* shall *prescribe.*" Adopting the definition of "compensation" laid down by the court in the *Hackett* case above and the interpretation argued for by the judges themselves, art. VII, sec. 10 prevents the circuit judges from receiving any other "return" for their "services" than their salary because they receive a fixed salary payable out of the public treasury of the state.

Art. VII. sec. 7, and art. VII, sec. 10, read together prevent the circuit judges from receiving any other return for their services than the salary which the legislature shall *prescribe.* The word "prescribe" is defined by Webster to mean: "To lay down authoritatively as a guide, direction, or rule of action; to impose as a peremptory order; to dictate; appoint; direct; ordain."

Prescribe is "a strong word, having a very definite and a very limited meaning. Etymologically, it means to write

before. Otherwise it means to appoint; to command positively; to define authoritatively; to determine definitely; to dictate; to direct; to establish; to fix; to fix definitely; to give as a guide, direction, or rule of action; to give, as a law or direction; to impose, as a peremptory order; to lay down authoritatively, as a guide, direction, or rule of action; to lay down authoritatively for direction; to lay down beforehand as a rule of action; to ordain; to order; to set down authoritatively; to set or lay down authoritatively for direction or control. It has been distinguished from 'furnish' and 'regulate,' but its distinction from 'determine' has been said to be far from clear." 49 C. J. 1333.

None of the meanings attributed to the word "prescribe" savor in any sense of permission or option. It is peremptory and mandatory as opposed to discretionary. Sec. 252.07 (5) is a statute which attempts to authorize a county board to prescribe at least a portion of the salary of a circuit judge. It is our opinion that such an attempted delegation of power is unconstitutional and that as to the one thousand dollars per annum salary paid by virtue of this action it was not a salary prescribed by the legislature.

The case of *Milwaukee County v. Halsey*, 149 Wis. 82, has been cited as sustaining the constitutionality of the provision in question at the present time. The attack there made upon the constitutionality concerned whatever conflict might exist between it and art. IV, sec. 23, art. IV, sec. 31, subdivision 6, art. VIII, sec. 1 and art. IV, sec. 18. The question of its repugnancy to article VII, secs. 7 and 10 was not raised. The law there in question, however, namely, ch. 377, Laws 1897, was one by which the legislature definitely prescribed the salary of the circuit judges, but provided that the excess over a certain amount should be paid by Milwaukee county. It was, therefore, not subject to the objection now raised. It is one thing for the legislature to definitely fix the salary of the circuit judge by providing for payment of a portion of that salary by a county and it is another thing for the legislature to attempt to authorize a county board to fix a portion of the salary. It is our opinion that sec. 252.07 (5), Stats.

was passed in violation of the Wisconsin constitution and that Milwaukee county may cease its payments of one thousand dollars per year thereunder at any time.
JEF

Banks and Banking—State Banks—Preferred stock issued under provisions of sec. 221.045, Stats., is not subject to payment of double liability.

September 7, 1933.

BANKING COMMISSION.

You ask whether under the provisions of sec. 221.045, Stats., enacted by ch. 484, Laws 1933, the preferred stock issued by state banks would be subject to the double liability as provided by sec. 221.42, Stats.

The preferred stock issued under the provisions of sec. 221.045 would not be subject to the payment of double liability. Sec. 221.045 provides as follows:

"To enable banks to secure capital during the present economic emergency, any bank with the approval of the banking commission may, in its original articles or by amendment thereto adopted by a two-thirds vote of the stockholders, provide for preferred stock to be issued only to the federal government or any agency thereof; for the payment of dividends thereon at a specified rate before dividends are paid upon the other stock; for the accumulation of such dividends; for a preference of such preferred stock not exceeding the par value thereof over the other stock in the distribution of the bank assets other than profits; and for the redemption of such preferred stock. Such preferred stock shall be issued under such conditions and in such amount as may be approved by the banking commission and shall not have voting power."

This section permits the issue of preferred stock only to the federal government or an agency thereof. The stock may be issued only for a specified purpose and is entirely different from the shares of common stock issued by banks. Consequently there is no reason or authority for holding the preferred stock subject to the provisions of sec. 221.42, Stats. which plainly have reference only to common stock.

Besides, sec. 221.045 expressly provides that preferred stock may be issued under such conditions as may be approved by the banking commission. The banking commission, therefore, would unquestionably have the authority to direct that this stock be issued with the express provision that it be not subject to double liability.
JEF

Appropriations and Expenditures — Tuberculosis Sanatoriums—Compensation to counties for patients maintained as county charges in privately owned sanatoriums is to be from sum certain appropriation set out by subsec. (3), sec. 20.18, Stats.

September 7, 1933.

STATE BOARD OF CONTROL.
Attention Blaine M. Linke, *Collection and Deportation Agent.*

The question presented is whether those counties maintaining patients as county charges in institutions included under sec. 58.06, Stats., are to be compensated by the state under either or both subsec. (2), par. (a), or subsec. (3), sec. 20.18, Stats. 1933.

Prior to ch. 140, Laws 1933, subsec. (2) (a), sec. 20.18, Stats., provided as follows:

"(2) For state aid and maintenance of inmates in county institutions:
"(a) From time to time such sums as may be necessary to be credited and charged on taxes, as provided in sections 46.10, *50.07*, 51.08, 51.12, 51.26, 51.27, 51.28 and *58.06* of the statutes."

Particular attention is called to secs. 50.07 and 58.06. Sec. 50.07 (3) (a) provides that each county be compensated in the sum of seven dollars per week per patient maintained in county tuberculosis sanatoriums. Sec. 58.06 indirectly provides that each county be compensated in the sum of seven dollars per week per patient maintained in private, philanthropic tuberculosis sanatoriums as county

charges. Hence, prior to ch. 140, Laws 1933, said compensation for both types of institutions was paid out of a sum sufficient appropriation.

Sec. 3, ch. 140, Laws 1933, amended subsec. (2) (a) of sec. 20.18, so as to read:

"From time to time such sums as may be necessary, to be credited and charged on taxes, as provided in sections 46.10, 51.08, 51.12, 51.26, 51.27, 51.28 and *58.06* of the statutes."

It will be noted that such amendment struck out section 50.07 but permitted to remain therein sec. 58.06.

Sec. 5, ch. 140, Laws 1933, also created a new subsec. (3), sec. 20.18, reading as follows:

"On July 1, 1933, and annually thereafter, five hundred fifty thousand dollars for state aid of state tuberculosis sanatoria to be expended as provided in section 50.07 and subsection (2) of section 58.06 of the statutes."

The result of the foregoing amendment and creation is clear as to sec. 50.07. The various counties are to be compensated by the state for patients maintained in county tuberculosis sanatoriums out of a limited appropriation instead of a sum sufficient fund as formerly. But no such clarity exists in the legislative treatment of sec. 58.06. Under the literal import of the above changes the various counties are to be compensated by the state for patients maintained in privately owned sanatoriums out of a limited appropriation as provided by the new subsec. (3), sec. 20.18 and also out of the sum sufficient appropriation set up by subsec. (2) (a), sec. 20.18 as formerly. This peculiar result is caused, as will be noted, by the inclusion of sec. 58.06 in the new subsection (3), sec. 20.18 and the failure to strike sec. 58.06 out of subsec. (2) (a), sec. 20.18 as was done with sec. 50.07.

I am of the opinion that the situation herein presented is not that of a dual appropriation to counties for patients in private sanatoriums which is clear and unambiguous. Rather, I believe that an ambiguity exists in construing these two subsections together and hence that inquiry may be made into the legislative intent to resolve that ambiguity which is, I concede, latent in nature.

In the case of *Pfingsten v. Pfingsten,* 164 Wis. 308, the court was called upon to construe a statute concerning the division of property in a divorce proceeding wherein the wife was charged with adultery. At page 313 is to be found this language:

"A statute may be plain and unambiguous in its letter, and yet, giving it the meaning thus suggested, it may be so unreasonable or absurd as to involve the legislative purpose in obscurity. * * *."

The court held that, were the statute read literally, it would result in either the adulterous wife being cast upon the world an object of charity or allowing her to profit materially by her wrong. Therefore the court concluded that a literal application of this statute would result in an absurdity and hence an ambiguity existed which it was the duty of the court to resolve by seeking out the true legislative intent.

A like absurdity results in the case at hand were the pertinent subsections of sec. 20.18 to be construed literally. Subsec. (2) (a) provides that compensation to counties for patients maintained in private sanatoriums be out of a sum sufficient appropriation while the following subsec. (3) provides that said compensation be paid out of a limited fund. This, on its face, raises a doubt as to the true legislative intent. The result of the literal application of said subsection would be that counties maintaining patients in county sanatoriums would be compensated from a limited fund only, which, when exhausted, would permit no additional compensation to said counties even though they had received less than the stipulated sum of seven dollars per week per patient. On the other hand, counties maintaining patients in privately owned sanatoriums would be assured of the entire seven dollars per week per patient compensation whether the limited appropriation was sufficient to pay this or not, they having also recourse to the sum sufficient appropriation. To say that the legislature intended to hold out such an inducement to counties to send their tuberculosis patients to privately owned sanatoriums is as absurd as the result reached under the literal construction of the statute in the *Pfingsten* case. Therefore,

an ambiguity exists here which must be resolved by ascertaining the true legislative intent.

It is obvious that the legislature, in creating subsec. (3), sec. 20.18 and including therein sec. 58.06, had some motive in so doing. The only possible motive attributable to that act is the legislative intent to change the source of compensation for counties maintaining patients as county charges in private sanatoriums, said change being the payment of those sums out of a sum certain appropriation instead of the sum sufficient appropriation as formerly. This conclusion is materially strengthened by the fact that were any other conclusion of legislative intent adopted the result would be that an incentive would be held out to counties to send their patients to private sanatoriums, which latter is highly improbable.

It has not been overlooked that subsec. (4), sec. 20.77 provides a rule of construction, "In case more than one appropriation is made by law * * *." It would seem, however, that the rule of construction therein set out is applicable only where more than one clear and unambiguous appropriation is made for the same purpose. As before stated such is not the case here because, after resolving the latent ambiguity, there is in fact only one appropriation intended by the legislature.

Therefore, I conclude that compensation to counties maintaining patients as county charges in privately owned sanatoriums is to be made exclusively out of the sum certain appropriation as provided in subsec. (3), sec. 20.18.
JEF

Automobiles—Taxation—Motor Vehicle Fuel Tax—Receivers of D-R-Oil Company, who are engaged in business as wholesalers under ch. 78, Stats. (ch. 312, Laws 1933), must file bond required by that act.

September 7, 1933.

ROBERT K. HENRY,
State Treasurer.

You request the opinion of this department on the following statement of facts. You state that H. N. G. and

B. L. M. were, on March 7, 1933, appointed ancillary receivers of the D-R-Oil Corporation by the circuit court of Milwaukee county, Wisconsin. The ancillary receivers are under $25,000 bond to the court. These receivers are carrying on the operations of the D-R-Oil Corporation in the state of Wisconsin and they inquire whether it will be necessary for them to furnish the bond required by ch. 78, Stats. 1933, or whether the bond filed with the circuit court of Milwaukee county, under whose directions they are operating the business in Wisconsin, will relieve them of the necessity of filing an additional bond under the motor fuel tax law.

It is the opinion of this department that the receivers of the D-R-Oil Company are required, under ch. 78, Stats. (ch. 312, Laws 1933), to file a surety bond with the state treasurer, payable to the state of Wisconsin, in the amount fixed by the state treasurer.

Among the provisions of ch. 78 which it will be necessary to consider are the following:

Subsec. (1), sec. 78.03, which provides:

"No wholesaler shall produce, refine, compound, blend or manufacture motor fuel in this state for sale, distribution or use in this state, or import motor fuel into this state or receive motor fuel imported to him from without this state for sale, distribution or use in this state, or engage in the business of wholesaler within this state unless such wholesaler is the holder of an uncancelled license issued to him by the state treasurer."

Subsec. (6), sec. 78.03:

"No license to act as a wholesaler of motor fuel shall issue upon any application until the person applying therefor has filed a surety bond with the state treasurer, payable to the state of Wisconsin, in such amount as shall be fixed by the state treasurer except that the amount shall never be less than the average amount of tax paid by such wholesaler during one month. * * *"

A wholesaler is defined as follows. Subsec. (12), sec. 78.01:

" 'Wholesaler' means and includes any person (including the state of Wisconsin and any political subdivision thereof, but not including the United States of America

or any of its agencies except to the extent now or hereafter permitted by the constitution and laws thereof):

"(a) Making the first sale or other disposition in this state of any motor fuel, * * *."

Subsec. (6), sec. 78.04, reads:

"Every wholesaler who sells or distributes any motor fuel for any purpose shall collect from the purchaser, at the time of such sale, four cents per gallon or fraction of a gallon on all motor fuel sold, and any and all sums of money so paid by the purchaser to the wholesaler as taxes upon motor fuel, upon which the tax imposed by this chapter has not theretofore been paid to the state treasurer, *shall be and remain public money, the property of the state of Wisconsin, and shall be held in trust in a separate account and fund by such wholesaler for the sole use and benefit of the state of Wisconsin until paid over to the state treasurer as hereinafter provided.*"

Manifestly under the express language of the statutes above quoted, the receivers of a corporation are engaged in business as wholesalers under the provisions of ch. 78 of the 1933 statutes and hence are required to furnish a bond. We are not referred to nor are we able to find any provisions of the statutes exempting receivers from this requirement. The fact that the receivers are already *bonded to the circuit court for Milwaukee county, Wisconsin,* is immaterial. Under ch. 78 the bond required of wholesalers to insure payment of motor fuel taxes must be made *payable to the state of Wisconsin.*

Moreover it will be noted that the 1933 "Motor Fuel Tax Law" provides that the motor fuel taxes collected under this chapter *"shall be and remain public money," the property of the state of Wisconsin, and shall be held in trust in a separate account and fund by such wholesaler for the sole use and benefit of the state of Wisconsin* until paid over to the state treasurer * * *." These moneys may not be mingled with other receipts of the business.

It is clear that the above quoted section of the statutes together with other sections of that act, and particularly sec. 78.20 (1), which provides that "said motor fuel tax shall constitute a first and prior lien against the property of said wholesaler, including all property of whatsoever

nature, belonging to him, whether used in his business or otherwise, and which lien shall be paramount and superior to any other lien, of whatever nature, against said property, whether attaching prior or subsequent to the time when said tax became due," takes precedence over any general provisions relating to receivers, as for example, sec. 268.17 of the statutes, fixing the order of payment by receivers of claims against the business.

The new "Motor Fuel Tax Law" was carefully drawn to protect the state's revenue from motor fuel taxes against the possibility of loss. It provides that such moneys shall be public moneys and shall be held in a separate trust fund and makes it embezzlement to fail to pay to the state the moneys collected as motor fuel taxes and permits the state to attach the property of a delinquent dealer and requires a bond. No exemptions in favor of receivers are permitted.

We are therefore constrained to hold that the receivers of the D-R-Oil Corporation must file a bond under the provisions of ch. 78 of the 1933 statutes.

JEF

Bonds—Sinking Funds—Municipal Corporations—Municipal Borrowing—Sinking fund to pay bonds created under sec. 67.11, Stats., is entitled to only its proportional share of taxes actually collected.

September 7, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

You request the opinion of this department on the question whether the full appropriation, or only a proportional share thereof, for a sinking fund created under Wisconsin statutes, sec. 67.11, is payable out of the actual cash collected by the county.

Sec. 67.05 (1) provides that the direct tax levied to pay any bond issue shall be carried into the tax roll and collected as other taxes are collected. The receipts from

this tax are made a part of the sinking fund created under sec. 67.11. When taxes are paid, it cannot be said that any particular tax included in the general tax roll was collected before a tax that was levied for another purpose on the same tax roll. Each tax gets its proportionate share of the total amount actually collected. As the direct tax levied for the payment of bonds issued was made a part of the tax roll by statute, it is the opinion of this office that only its proportionate share of all moneys collected need be paid into a sinking fund created under sec. 67.11.
JEF

Dairy and Food—Public Health—Radio programs advertising foods in package form are not regulated by sec. 352.087, Stats. (ch. 193, Laws 1933).

September 7, 1933.

WILLIAM A. ZABEL,
District Attorney,
Milwaukee, Wisconsin.

You ask whether radio advertising comes under the provisions of ch. 193, Laws 1933.

Ch. 193, Laws 1933, creating sec. 352.087, Stats., provides in part:

"No person shall, himself, or by his servant or agent, or as the servant or agent of any other person, advertise for sale any article of food in package form when the retail price is mentioned in such advertisement unless the actual weight or volume of the contents of such package as stated on the label shall be plainly and conspicuously set forth in such advertisement in not less than ten point type. * * *"

It seems clear that this law applies only to written or printed advertising and does not contemplate the regulation of advertising by radio. It is therefore our opinion that ch. 193, Laws 1933, does not regulate radio programs advertising the sale of foods in package form.
JEF

Taxation — Tax Collection — Delinquent Taxes — Sec. 74.19, subsec. (3), Stats. 1931, determines ownership and application of delinquent taxes collected by county treasurer. Ch. 288, Laws 1933, however, applies as to disposal of those taxes paid to county treasurer under said chapter.

September 8, 1933.

MARTIN GULBRANDSEN,
District Attorney,
Viroqua, Wisconsin.

You submit the following statement of facts with your opinion thereon:

The tax roll of the city of W for 1932 shows a levy of $44,176.93, of which the city treasurer has collected $22,-487.58; $21,689.35 was returned delinquent real estate taxes to the county treasurer. The county treasurer has collected, out of the $21,689.35, $11,744.25. The county's share for county purposes assessed against the city of W is $11,335.45. The city's portion of the state tax of $800.00 was paid over to the county treasurer as required by law.

The question before you is: Who is entitled to the money collected by the county treasurer?

The county treasurer contends that the county is entitled first to its share of the delinquent taxes collected to the extent of the sum it has coming from the city of W, under sec. 74.19, subsec. (3), Stats. The city treasurer, on the other hand, contends that the city is entitled to the city's share of this money first and that the county is last in receiving its share of the delinquent taxes, except the equalization tax levied by the county for school purposes, under sec. 74.15 (2).

You express the opinion that sec. 74.15 has to do with the disbursement of the money collected by the town, village and city treasurer and does not apply to money in the hands of the county treasurer; that sec. 74.19 provides that delinquent taxes turned over to the county treasurer for collection are for the use of the county and are not to be turned over to the town, village and city treasurers until the county taxes are paid.

You are advised that in so far as it applies to delinquent taxes generally, your opinion is correct and in accordance with the ruling of this department in XX Op. Atty. Gen. 613, wherein it was stated, citing *Spooner v. Washburn Co.*, 124 Wis. 24:

"* * * Taxes returned to the county treasurer delinquent are the property of the county and that the county does not become accountable to the municipality for any of such delinquent taxes collected by the county until enough shall first have been collected to pay 'the sum then due the county for unpaid county taxes.' * * *

"* * * Sec. 74.15 (2) deals only with the ownership and application of taxes collected by the local treasurer. Sec. 74.19 (3) deals with the ownership and application of delinquent taxes collected by the county treasurer."

See also XXI Op. Atty. Gen. 548.

We call your attention, however, to ch. 288, Laws 1933, which reads in part as follows:

"Taxpayers who pay their delinquent taxes on real estate for the year 1932 on or before the fourth Monday in June, 1933, shall be entitled to pay such taxes without penalty, interest or other charges except the fee for advertising the same at tax sale, regardless of whether or not they filed an affidavit for the extension of the time of payment pursuant to chapter 16, laws of 1933. Taxpayers who prior to the effective date of this act paid their delinquent taxes on real estate for the year 1932 shall be entitled to a refund of all amounts paid as penalty, interest, or other charges on such delinquent taxes except the fee for advertising the same at the tax sale.

"Any taxes of the year 1932 that are paid under the provisions of section 1 of this act to any county treasurer up to and including the fourth Monday in June, 1933, less the amount due for advertising the same at tax sale, shall be paid over to the town, city or village wherein such taxes were assessed. The town, city or village treasurer shall on July 15, 1933, make a supplemental settlement with the county treasurer for the part of such taxes due the county as county taxes. Such settlement shall be made as provided in subsection (2) of section 74.15 of the statutes."

It is not apparent from your statement of facts whether any of the taxes collected by the county treasurer were paid to him under ch. 288 on or before the fourth Monday

in June, 1933. If, however, some of the taxes collected by the county treasurer were thus paid, the amount thus collected should have been paid over to the city treasurer of W and he should have made a supplemental settlement July 15, 1933 with the county treasurer in accordance with ch. 288, Laws 1933.
JEF

Indigent, Insane, etc.—Indigent person who has no legal settlement must be cared for at expense of county in which he resides in accordance with sec. 49.04, subsec. (1), Stats.

September 8, 1933.

RALPH R. WESCOTT,
District Attorney,
Shawano, Wisconsin.

In a recent letter to this department you ask for an opinion as to the responsibility for the care of a poor person under the following facts:

"A poor person left the city of Clintonville April, 1932, and moved to the town of Maine, Outagamie county, Wisconsin, and stayed there until November, 1932, and then moved to the town of Matheson, Waupaca county, Wisconsin, and lived there until May, 1933. He then moved into Shawano county and *became a poor charge* on his reaching here."

The general statute on gaining a legal settlement is sec. 49.02, subsec. (4), which was amended by chs. 378 and 408, Laws 1933, so that it now reads (see sec. 8, ch. 491, Laws 1933):

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein. The time spent by any person, while residing or while employed on any Indian reservation over which the state has no jurisdiction, shall not be included as part of the year necessary to acquire a legal settlement in the town, city, or village in which said reservation is located, nor

shall such time so spent be included within the year necessary to lose his legal settlement in any other town, city, or village of this state." (Ch. 378.)

"* * * The time spent by any person as an inmate of any home, asylum or institution for the care of the aged, neglected or indigent persons, maintained by any lodge, society or corporation, or of any state or United States institution for the care of veterans of the military and naval service shall not be included as part of the year necessary to acquire a legal settlement in the town, city or village in which said home, asylum or institution is located, nor shall such time so spent be included as part of the year necessary to have a legal settlement in any other town, city or village of this state." (Ch. 408.)

Thus a residence of one year is required for the gaining of a legal settlement. From an analysis of the facts you state, this person about whose care you inquire did not live a year in the town of Maine, Outagamie county, the town of Matheson, Waupaca county, or in Shawano county, so he has acquired a legal settlement in none of those places.

If he had a legal settlement in the city of Clintonville, Waupaca county, he had lost it by the time he became a poor charge in Shawano county, for by May, 1933, when he arrived in the latter county, he had been absent from Clintonville over a year. Sec. 49.02 (7), Stats.:

"Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town, village, or city in which such legal settlement shall have been gained for one whole year or upward; and upon acquiring a new settlement or upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost."

Thus it appears that this person has no legal settlement and, under sec. 49.04 (1) Shawano county is responsible for his care.

Sec. 49.04 (1) provides:

"The county board of each county shall have the care of all poor persons in said county who have no legal settlement in the town, city or village where they may be, except as provided in section 49.03, and shall see that they are properly relieved and taken care of at the expense of the county."

VIII Op. Atty. Gen. 213 holds that under the statute last quoted an indigent person having no legal settlement must be relieved at the expense of the county in which he lives. JEF

Taxation—Assessments—Buildings on lands under lease are assessable as real estate.

September 13, 1933.

CURT W. AUGUSTINE,
District Attorney,
Eau Claire, Wisconsin.

You inquire whether, where buildings are located on leased property, an assessment of said buildings as real estate is a valid assessment so as to enable your county to perfect certain tax certificates on said property into tax deeds.

The question is answered by specific statutory provision.

Sec. 70.08, Stats. 1931, provides in part:

"The terms 'real property,' 'real estate' and 'land,' when used in this title, shall include not only the land itself but also all buildings and improvements thereon, *including buildings on leased land,* * * *."

Sec. 70.17, Stats. 1931, provides in part:

"Real property shall be entered in the name of the owner, if known to the assessor, otherwise to the occupant thereof if ascertainable, and otherwise without any name. * * * *All buildings on lands under lease or permit,* * * * *shall be assessed as real estate to the owners of such buildings,* if known, otherwise as above provided. The tax thereon may be enforced in the same manner as other real estate taxes or by action of debt as prescribed by section 74.12 for the collection of taxes on personal property."

The above italicized portions relating to buildings on leased land were added by ch. 244, Laws 1919. Since 1919, therefore, buildings on leased land have been assessable as real estate.

In commenting on amendment of 1919 to sec. 70.08, the

court in *Town of Langlade v. Crocker Chair Co.*, 190 Wis. 226, said, p. 228:

"It would seem to require no argument to show that by omitting 'buildings and improvements upon leased land' from the section defining personal property and by including them under the section defining real property, real estate, and land, the legislature intended thereafter that buildings and improvements on leased lands should be included as a part of the real estate for the purposes of taxation. * * *."

The case of *State ex rel. Hansen S. Co. v. Bodden,* 166 Wis. 219, to which you refer, and which held that a building erected upon leased premises should be assessed as *personal* property was decided before the enactment of the 1919 amendments above referred to.

JEF

Counties—County Officers—Public Officers—Board of Education—District Attorney—Member of city board of education is not county officer and hence is not entitled to legal advice from district attorney while acting in his official capacity.

September 13, 1933.

C. W. AUGUSTINE,
District Attorney,
Eau Claire, Wisconsin.

You ask whether the district attorney is required to give legal advice to members of a city board of education.

There are no specific provisions in the statutes requiring the district attorney to give legal advice to such board of education.

Sec. 59.47, subsec. (3), Stats., provides:

"Give advice to the county board and other officers of his county, when requested, in all matters in which the county or state is interested or relating to the discharge of the official duties of such board or officers; * * *"

The members of a city board of education are not "officers of his county" within the meaning of this provision, which has been construed to apply only to county officers. Members of such board are specifically designated as city officials by sec. 62.09 (1).

As the members of a city board of education are not county officers under sec. 59.47 (3), and no statute provides that advice must be given them by the district attorney, it is our opinion that such advice need not be given to the board members while acting in their official capacities.

JEF

Banks and Banking—State Banks—Commerce—Reconstruction Finance Corporation—State banking review board, under sec. 220.085, Stats., ch. 26, Laws 1931, Special Session, has power to generally approve substitution of collateral with Reconstruction Finance Corporation according to terms and conditions of corporation by borrowing from state bank, leaving relevant facts to be determined by officer of banking department.

State bank can legally substitute assets in stabilization trust fund or active assets for those assets pledged with Reconstruction Finance Corporation.

Reconstruction Finance Corporation would have valid and legal lien upon such substituted assets.

September 13, 1933.

BANKING DEPARTMENT.

You submit an inquiry from a loan agency of the Reconstruction Finance Corporation inquiring about your authority to approve applications by state banks which have issued no scrip and which are "in the process of stabilization," to withdraw "collateral pledged with the corporation and substitution therefor of assets of the bank which are either in the trust fund or part of the active assets of the bank."

Inquiry is also made as to the "legal effect of the pledging of such paper upon substitution." You request our opinion thereon.

The following statutes are applicable:

Sec. 220.085, ch. 26, Laws Special Session 1931, provides:

"On approval of the banking review board, any state bank or trust company, or the receiver of any insolvent or delinquent state bank or trust company, may take advantage of any act that may be enacted by the Congress of the United States for the relief of any state banks or trust companies."

Sec. 605, ch. 14, title 15, U. S. C. A., 47 Stats. at Large 6, amended by act of June 14, 1933, 48 Stats. at Large ——, relating to the Reconstruction Finance Corporation act, provides in part:

"To aid in financing agriculture, commerce, and industry, including facilitating the exportation of agricultural and other products the Corporation is authorized and empowered to make loans, upon such terms and conditions not inconsistent with this act as it may determine, to any bank, savings bank, trust company, building and loan association, insurance company, mortgage-loan company, credit union, Federal land bank, joint-stock land bank, Federal intermediate credit bank, agricultural credit corporation, livestock credit corporation, organized under the laws of any State or of the United States, including loans secured by the assets of any bank or savings bank or building and loan association that is closed or in process of liquidation to aid in the reorganization or liquidation of such bank or building and loan association upon application of the receiver or liquidating agent of such bank or building and loan association and any receiver of any national bank is hereby authorized to contract for such loans and to pledge any assets of the bank for securing the same."

Under the above statutes it was held in XXI Op. Atty. Gen. 381 (an opinion to your department under date of April 15, 1932), that a general approval passed by the state banking review board approving the taking advantage of the Reconstruction Finance Corporation act by any bank as to which the commissioner of banking shall determine certain relevant facts, is compliance with sec. 220.085,

Stats. That opinion also held, p. 383, such "approval of the act of congress necessarily includes approval of such terms and conditions as the Reconstruction Finance Corporation shall determine."

The last quotation is applicable to the facts under consideration. If the Reconstruction Finance Corporation according to its "terms and conditions" approves and permits the substitution of collateral pledges to the Reconstruction Finance Corporation by a state bank now in the process of stabilization, the state banking review board, by its approval already given of the borrowing by the state bank, has necessarily approved of such substitution of collateral if done according to the terms and conditions as set forth by the Reconstruction Finance Corporation.

We do not believe any specific approval by the state banking review board is necessary in view of the general approval to borrow already given. However, if it is thought a specific approval is necessary the same procedure as was outlined in XXI Op. Atty. Gen. 381 could be followed, that is, a general approval given by the state banking review board, leaving the determination of relevant facts to some officer of the banking department.

In connection with the foregoing it may be pointed out that a stabilized bank could legally transfer assets from the stabilization trust fund to the bank under the ordinary trust fund agreement which provides for such transfer. The bank could then substitute such assets or active assets of the bank for those pledged with the Reconstruction Finance Corporation. The corporation would then have the same valid and legal lien upon such substituted assets as it had on the assets originally pledged.

JEF

Banks and Banking — State Banks — With approval of banking review board state banks and trust companies may issue capital notes and debentures for purchase by Reconstruction Finance Corporation.

September 13, 1933.

BANKING COMMISSION.

You ask whether state banks and trust companies may issue capital notes and debentures for purchase by the Reconstruction Finance Corporation.

Sec. 220.085 (sec. 2, ch. 26, laws of special session 1931) provides as follows:

"On approval of the banking review board, any state bank or trust company, or the receiver of any insolvent or delinquent state bank or trust company, may take advantage of any act that may be enacted by the Congress of the United States for the relief of any state banks or trust companies."

This section unquestionably gives banks and trust companies, with the approval of the banking review board, the authority to issue capital notes and debentures within the meaning of sec. 304 of Title III of the bank conservation act.

JEF

Courts — Erroneous Sentences — Prisons — Prisoners — Parole—Sentence of court of competent jurisdiction, even though erroneous, controls until modified by appropriate proceedings.

Board of control, in exercise of its discretion in matter of granting parole, may take into consideration fact that prisoner was erroneously sentenced to indeterminate term.

Person properly sentenced to determinate term under secs. 340.56 and 359.05, Stats., is not eligible for parole until he has served one-half term for which he was sentenced.

September 13, 1933.

BOARD OF CONTROL.

You state that K, #21121, first offender, was committed to the Wisconsin state prison by the municipal court for

Brown county on June 21, 1933, to serve a term of one to fifteen years for kidnaping, and a term of three to fifteen years for the crime of assault and robbery, armed, said sentences to run concurrently.

You call our attention to sec. 359.05, Stats., which provides as follows:

"In every case in which the punishment of imprisonment in the state prison is awarded against any convict, except persons convicted of treason, murder in the first degree as defined by law, rape, kidnaping, or of any crime for which a minimum penalty is fixed by statute at twenty years or more, the court may fix a term less than the maximum prescribed by law for the offense, and the form of the sentence shall be substantially as follows:

" 'You are hereby sentenced to the state prison at Waupun at hard labor for a general indeterminate term of not less than ____ (the minimum as fixed by the law for the offense) years, and not more than ____ (the maximum as fixed by the court) years, and shall have the force and effect of a sentence of the maximum term, subject to the power of actual release from confinement by the board of control or actual discharge of the governor upon recommendation of the board of control or by pardon as provided by law. If, through mistake or otherwise, any person shall be sentenced for a definite period of time for any offense for which he may be sentenced under the provisions of this section, such sentence shall not be void, but the person shall be deemed to be sentenced nevertheless as defined and required by the terms of this section. Persons convicted of treason, murder in the first degree as defined by law, rape, kidnaping, or in the case of any other crime for which a minimum penalty is fixed by statute at twenty years or more, shall be sentenced for a certain term of time. Nothing herein shall be construed to extend or modify the term of imprisonment of any person sentenced prior to the enactment of this statute."

You submit the following questions which are answered seriatim.

1. "Are crimes committed in violation of section 340.54 to be construed as being 'determinate' under the meaning and language of section 359.05?"

It is apparent that the indeterminate sentence awarded to K for the crime of kidnaping under sec. 340.54, Stats.,

is erroneous in view of sec. 359.05 quoted above. The sentence should have been determinate.

However, as was pointed out to you in XXII Op. Atty. Gen. 28, the sentence of a court of competent jurisdiction controls even though erroneous. It can be modified only by appropriate proceedings before the court, if the term of court in which the sentence was given has not yet expired, by taking the prisoner back for resentence according to law. See XIX Op. Atty. Gen. 604. Sec. 359.05 prescribes no procedure to be followed where the court erroneously sentences for an indeterminate term.

The sentence must, therefore, be construed as given by the court for from "one to fifteen years."

2. "Was the definition of 'determinate' sentences (359.05) enacted when kidnaping carried but one penalty, that of life? If so, did the revisions of the law, permitting sentences ranging from one to fifteen years, and fifteen to thirty years, remove conviction under these sections, where the penalty is less than life, from the category of 'determinate' sentences as contemplated by section 359.05?"

The penalty for kidnaping was changed first, sec. 340.54 being by chs. 4 and 228, Laws 1925, sec. 359.05, being enacted by ch. 359, Laws 1925.

3. "When is prisoner K, in the instance above cited, eligible for parole under present sentence?"

Sec. 57.06 (1) as amended by ch. 384, Laws 1933, is applicable and reads as follows:

"The board of control, with the approval of the governor, may, upon ten days' written notice to the district attorney and judge who participated in the trial of the prisoner, parole any prisoner convicted of a felony and imprisoned in the state prison or in the house of correction of Milwaukee county who, if sentenced for less than life, shall have served at least one-half of the term for which he was sentenced, not deducting any allowance of time for good behavior, or who, if sentenced for life, shall have served thirty years less the diminution which would have been allowed for good conduct, pursuant to law, had his sentence been for thirty years, or who if he is a first offender and is sentenced for * * * *an* indeterminate term, shall have served the minimum for which he was sentenced not deducting any allowance for time for good be-

havior *or who, if he is a first offender and is sentenced under a statute imposing a minimum in excess of two years, shall have served two years, not deducting any allowance of time for good behavior.*"

Therefore, under the first sentence of one to fifteen years for kidnaping, K would be eligible for parole at the expiration of one year if he were not also, however, serving a concurrent sentence for assault and robbery of three to fifteen years. Therefore, in view of the fact that the statute, sec. 340.39, under which he was sentenced for this latter offense, prescribes "a minimum in excess of two years" he is eligible for parole at the expiration of two years from the beginning of his sentence.

We however point out that the matter of granting paroles is discretionary with the board of control and that where the sentence awarded to the prisoner is erroneously indeterminate, the board may well take this fact into consideration in the exercise of its discretion and "grant no parole until the prisoner has served one-half of the maximum sentence as was recommended in an opinion to you in XIX Op. Atty. Gen. 604, 607, involving similar facts.

Your fourth question relating to a matter outside the above case follows:

4. "Is one committed under section 340.56, where the penalty is less than life, eligible for parole consideration at the end of two years under the meaning and interpretation of sec 57.06, as revised by ch. 384, Laws 1933?"

Each case must be considered upon its own facts. However, we point out that under sec. 359.05 any person properly sentenced for the crime of kidnaping under sec. 340.56 would not be serving an indeterminate sentence. Therefore, the underlined portion of sec. 57.06, (1) as amended by ch. 384, Laws 1933, previously quoted in this opinion, would not be applicable. That is, the part of sec. 57.06 relating to parole at the expiration of a minimum term relates only to first offenders serving an *indeterminate* sentence. One serving a certain and determinate sentence is eligible for parole at the expiration "one-half of the term" for which he was sentenced.

JEF

Municipal Corporations—Taxation—Special Assessments —Where county treasurer advertises and sells delinquent general taxes and special assessments together and issues single certificate on such sale, he cannot later readvertise and sell such special assessments separately and issue separate certificate thereon.

September 13, 1933.

JOHN P. MCEVOY,
Assistant District Attorney,
Kenosha, Wisconsin.

You direct attention to subd. 1, par. (h), subsec. (1), sec. 62.21, Stats., which was created by ch. 472, Laws 1929, which provides:

"All special assessments and instalments of special assessments which are returned to the county treasurer as delinquent by any city, town or village treasurer and accepted by the county treasurer in lieu of cash, under paragraph (d) of subsection (1) of this section, shall be set forth in a separate column of the delinquent return and shall likewise be plainly distinguished in such return from special assessments or instalments of special assessments issued under laws prior to the passage and publication of chapter 406 of the laws of 1927. *Such assessments and instalments may be separately advertised and sold by the county treasurer,* but if more than one special assessment certificate shall be issued on the same tract only the fees legally chargeable to one certificate for advertising and certificate fee shall be included in the amounts for which the certificates are sold, and such fees shall be equally distributed between such certificates. If certificates issued under the provisions of this section are necessarily bid in at the tax sale by the county and are not sold, redeemed or otherwise disposed of within three years of the date of the sale thereof, the amount of the redemption value thereof at the time may be charged back as a tax to the proper city, town or village; but the county shall retain such certificates and if at any time thereafter the same shall be sold, redeemed or otherwise disposed of, the county treasurer shall pay the city, town or village which returned the same the full amount received therefor including interest and fees, or if the county shall take tax deeds upon such certificates the amount of the redemption value of said certificates shall be credited to the respective town, city or village which returned the same."

You state that the county treasurer of Kenosha county did not separately advertise and sell such delinquent special assessments, as he might have done under the above italicized provision of the statute in question, but instead he advertised and sold the delinquent special assessments and the delinquent general taxes on the same land together at the 1930 sale, and the same are now included in a single certificate held by the county.

The question which you submit is:

"May the county treasurer now separate the special assessments from the tax certificates bid in and now held by the county and readvertise the same separately as special assessment taxes, separating the same from the certificates where they are now represented, and resell the same and issue certificates therefor?"

The question is answered, No.

The county treasurer might have advertised and sold the special assessments and the general taxes separately at the 1930 sale, and he might have issued separate certificates on said separate sales. It appears to be unquestioned, however, that it was proper for him to advertise and sell together and to issue a single certificate on such sale. Having done this the transaction was complete, and there is no authority for his later readvertising and selling separately.

JEF

Insurance—Town Mutuals—Town mutual insurance company which is member of reinsurance company may levy assessments upon its policy holders to pay assessments made upon it by reinsurance company. Town mutual has no power to borrow for such purpose.

September 13, 1933.

H. J. MORTENSEN,
Commissioner of Insurance.

You ask whether a town mutual insurance company organized under ch. 202, Stats., and a member of a town mutual reinsurance company incorporated under secs.

202.15 to 202.18 can "levy assessments on their policy holders under the provisions of sec. 202.11 of the statutes to raise funds with which to pay their assessments to the reinsurance company."

You also ask whether a member company can "borrow money with which to pay their assessments to the reinsurance company."

In regard to your first question, you are advised that a town mutual insurance company which, pursuant to sec. 202.07, has voted to become a member of a mutual reinsurance company can levy assessments on its policy holders under the provisions of sec. 202.11 to raise funds with which to pay the assessments to the reinsurance company. Sec. 202.11 authorizes a town mutual insurance company to levy assessments in cases "when the amount of any loss shall exceed the funds on hand" and "for the purpose of carrying on the business of the company."

We believe the last quoted clause of this section is broad enough to include the levying of assessments for the purpose of meeting assessments made on it by the reinsurance company of which it is a member.

The case of *Sergeant v. Goldsmith Dry Goods Company,* 110 Tex. 482, 221 S. W. 259, 10 A. L. R. 742, involved facts similar to those under consideration. In that case a mutual insurance company was involved to which its "subscribers" or members paid a cash deposit and such additional cash deposits as were later required. The court held the members liable for the "reinsurance premium" for which the company had the authority to contract an indebtedness.

In answer to your second question regarding the power of a town mutual insurance company to borrow to pay their assessments to the reinsurance company, you are advised that a town mutual insurance company has no power to borrow for such purpose. Sec. 202.11 (4) authorizes borrowing "to pay losses." In view of the strict construction placed by our court on the word "losses" in the case of *Gilman v. Druse,* 111 Wis. 400, we do not believe that it could be construed to include borrowing to meet assessments made by a reinsurance company.

In the case cited it was held that "losses" did not include "general expenses of the conduct of the business." Therefore, we do not believe that it could be held to include assessments made by a reinsurance company which are an expense of the business rather than a loss.
JEF

Counties — County Board — Public Officers — Divorce Counsel—County board may not abolish office of divorce counsel or alter compensation paid thereto.

Jurisdiction and compensation of divorce counsel in collecting alimony and support money is discussed.

September 13, 1933.

FRED RISSER,
District Attorney,
Madison, Wisconsin.

You present the question of whether the county board may abolish the office of divorce counsel and whether the county board may regulate the compensation of divorce counsel.

Both of these questions are answered, No.

Subsec. (8), sec. 59.08, Stats., confers upon the county board the broad power to abolish any office or position, the salary or compensation for which is paid in whole or in part by the county and the jurisdiction and duties of which lie wholly within the county, except certain officers, including "judicial officers." Par. (e), subsec. (1), sec. 59.15 confers upon the county board power to fix the salary or compensation (using language similar to that found in subsec. (8), of sec. 59.08), but likewise excepts "judicial officers."

The above two provisions seem broad enough to include the position of divorce counsel unless divorce counsel is to be considered as a "judicial officer" within the meaning of the exception contained therein.

The position of divorce counsel is provided for by sec. 247.13. That section requires that in each county the cir-

cuit judge for the county shall appoint some reputable attorney as divorce counsel for such county. The same section also requires that divorce counsel before entering upon the discharge of his duties shall take and file the official oath, the form of which is prescribed by subsec. (1), sec. 19.01.

The duties and powers of divorce counsel are prescribed in secs. 247.14 and 247.15. Copies of all complaints and other papers in divorce actions must be served upon divorce counsel of the county in which the action is begun. Divorce counsel is required to appear in the action when the defendant fails to answer; also when the defendant interposes a counterclaim and the plaintiff thereupon neither supports his complaint nor opposes the counterclaim by proof; also when the court is satisfied that the issues are not contested in good faith by either party. Sec. 247.14. In any action in which divorce counsel is required by sec. 247.14 to appear, no decree may be granted until divorce counsel has appeared in open court and in behalf of the public made a fair and impartial presentation of the case to the court and fully advised the court as to the merits of the case and the rights and interests of the parties and of the public, nor until the proposed findings and judgment shall have been submitted to divorce counsel. Divorce counsel is empowered to cause witnesses to be subpoenaed on behalf of the state when in his judgment their testimony is necessary to fully advise the court as to the merits of the case and as to the rights and interests of the parties and of the public. Sec. 247.15.

As to compensation, sec. 247.17 provides to the effect that for each case in which divorce counsel appears he shall receive the sum of ten dollars, to be paid by the county wherein the action was tried, upon the order of the presiding judge and the certificate of the clerk of the circuit court.

Speaking of judicial officers, it is stated in 46 C. J. 926-927:

"Judicial offices are those which relate to the administration of justice. Judicial officers are those whose duties relate mainly to the administration of justice, the adjudication of controversies, and the interpretation of the laws."

It appears, however, that a judicial officer is not necessarily a judge or magistrate nor one who adjudicates controversies, nor one who resolves questions of law. Thus it has been said that a notary public, when engaged in taking depositions to be used as evidence before some judicial tribunal, is a judicial officer, "his duty being to assist the court under whose commission he acts in administering justice." *Stirneman v. Smith,* (C. C. A. 1900) 100 F. 600, 603. In the same case at page 603 it is said:

"* * * While so engaged a notary public is performing public duties devolved upon him by law, which are intimately connected with the administration of justice."

In *State v. Henning,* 33 Ind. 189, it was held that a prosecuting attorney is a judicial officer, being an officer entrusted with the administration of justice.

The duties of divorce counsel appear to be directly and intimately connected with the administration of justice. Divorce counsel is an appointee of the court and counsel's duties plainly involve assisting in the administration of justice in divorce cases. It is apparent that he is not an advocate but is rather an assistant or advisor to the court. In certain cases divorce counsel is required to appear and make a fair and impartial presentation of the case to the court and to fully advise the court in the premises, and in such cases the proposed judgment and findings must be submitted to divorce counsel before a decree may be granted by the court. It might well be said, therefore, that divorce counsel is to be considered a judicial officer. This view is strengthened by par. (c), subsec. (4), sec. 19.01 relating to the place of filing of the official oath of certain officers, and which provides to the effect that there should be filed in the office of the clerk of the circuit court of the county the official oath of the county judge, of all court commissioners, *"of all divorce counsel,"* of all justices of the peace, and of *"all other judges or judicial officers"* elected or appointed in and for such county or whose jurisdiction is limited thereto. That provision indicates that divorce counsel is considered a judicial officer.

There is, however, a contrary indication in subsec. (2), sec. 256.02. The first sentence of that subsection provides

to the effect that the judge of any court of record shall be ineligible to hold any office of public trust "except a judicial office" during a term for which he was elected or appointed. In 1929 the legislature added the following proviso to par. (c) of said subsection:

"Provided, however, that the judges of county courts not otherwise disqualified may hold the office of divorce counsel."

That amendment, on its face, rather indicates that divorce counsel is not considered a judicial officer. It will be noted, however, that such amendment was prompted by an opinion in XVII Op. Atty. Gen. 480, ruling to the effect that a county judge is ineligible to hold the position of divorce counsel, on the ground that such judge, being a judge of a court of record, is ineligible to hold any office of "public trust." The opinion in question did not give any consideration to the question of whether the position of divorce counsel is a "judicial office" within the meaning of the exception provided for in the first sentence of subsec. (2), sec. 256.02.

While, as seen from the foregoing, there may be some ambiguity about the matter, it is considered, in view of the manner of his appointment and nature of his duties, that divorce counsel should be classed as a judicial officer within the meaning of that term as used in the exception found in subsec. (8), sec. 59.08 and par. (e), subsec. (1), sec. 59.15. In excepting "judicial officers" from the power given to county boards to abolish or regulate the compensation of offices or positions, the legislature apparently intended to include therein more than judges or magistrates. If the legislature had intended to confine the exception to judges or magistrates, it could easily have so worded the exception. In excepting "judicial officers," it may well be that the legislature intended to preserve from abolition or regulation such offices or positions as form an integral part of the judicial system. The position of divorce counsel in each county clearly forms an integral part of the judicial system provided for the uniform administration of divorce cases throughout the state, and the abolition of that position by any county would manifestly result in disarrang-

ing such system. It would not seem that the legislature intended any such result.

The conclusion, therefore, is that the statutory provisions in question do not confer upon the county board the power either to abolish the position of divorce counsel or to regulate his compensation.

3. Concerning the question of the jurisdiction and compensation of divorce counsel in reference to the collection of alimony and support money, these matters are quite fully set out in sec. 247.29, which provides in part:

"* * * If the alimony or support money adjudged or ordered to be paid shall not be paid to the clerk at the time provided in said judgment or order, the clerk and the divorce counsel of said county shall take such proceedings as shall be directed by the court or presiding judge to secure the payment of such sum. Copies of any order issued to compel such payment shall be sent to counsel who represented the party who was awarded alimony or support money. In case any fees of officers in any proceedings taken by the divorce counsel, including the compensation of the divorce counsel at the rate of fifteen dollars per day, be not collected from the person proceeded against, the same shall be paid out of the county treasury upon the order of the presiding judge and the certificate of the clerk of the court."

The compensation provisions of this section are construed in XX Op. Atty. Gen. 1142, see pages 1143–1144.

Under the above cited statute, attention is called to the fact that the county is liable for the compensation therein stipulated only in case the person proceeded against does not pay same.

JEF

Taxation—Exemption—Nonstock hospital corporation whose articles of organization provide for no dividends or pecuniary profits to members and which excludes no one because of poverty is "benevolent association" under sec. 70.11, subsec. (4), Stats., and exempt from taxation.

September 13, 1933.

ROBERT L. WILEY,
District Attorney,
Chippewa Falls, Wisconsin.

You submit the articles of incorporation of the Chippewa Emergency Hospital, of Chippewa Falls, Wisconsin, and ask the opinion of this department as to whether the institution comes within the statute providing for tax exemption.

The third of the articles of organization provides that the corporation shall be nonstock and no dividends or pecuniary profits shall be declared to the members thereof. You state that it can be established that no one is turned down for entrance in the institution because of the lack of finances.

"In the absence of express or implied provision of law for their exemption, hospitals are subject to taxation. Hospitals may be granted exemption under laws exempting such institutions by name, or under laws in terms exempting almshouses or charitable or benevolent institutions, or property used for religious and charitable purposes * * *.

"Theory underlying exemption of hospitals is that they relieve the state of a burden which would otherwise rest upon it." 61 C. J. pages 500–501, sec. 597.

There is no express provision for the exemption from taxation of hospitals. However, 70.11, Stats., in listing property exempt from taxation, reads in part:

The property in this section described is exempt from taxation, to wit:

"(4) Personal property owned by any * * * *benevolent association* * * * which is used exclusively for the purposes of such association, and the real property necessary for the location and convenience of the buildings

of such * * * association and embracing the same, not exceeding ten acres; provided, such real or personal property is not leased or otherwise used for pecuniary profit; * * *."

The question narrows itself down to whether or not the hospital corporation in question can be deemed a benevolent association.

In *St. Joseph's Hospital Association v. Ashland County and others,* 96 Wis. 636, 639–640, the court said:

"The word 'benevolent' means, literally, 'well-wishing.' It is a word of larger meaning than 'charitable'. It has been well said that, 'though many charitable institutions are very properly called benevolent, it is impossible to say that every object of man's benevolence is also an object of his charity.' [citing *James v. Allen,* 3 Mer. 17; *Thomson's Ex'rs v. Norris,* 20 N. J. Eq. 489] * * * The care of the sick and wounded of all races and religious indiscriminately, with or without pay, according to the ability of the patient, must ever be one of the most genuine forms of benevolence."

In the case quoted from in the above paragraph, certain sisters of a religious order organized a corporation without capital stock for the purpose of conducting and maintaining a hospital for the care of the sick of all classes. The articles of organization provided that no dividends or pecuniary profits should ever be declared to individual members. When patients were able to pay a small charge per week was made, but when they were destitute they were received and treated without pay, if there was room in the hospital. It was held that the corporation was a "benevolent association" within the meaning of subd. 3, sec. 1038, Rev. Stats. 1878 (now 70.11) and its property used for hospital purposes was exempt from taxation.

This department is of the opinion that the Chippewa Emergency Hospital is sufficiently similar to the hospital in the case just cited in its organization and policies to come within the decision of that case. Because the Chippewa Falls Emergency Hospital is nonstock and its articles provide that no dividends or pecuniary profits shall be declared to members of the corporation and because no one

is turned down for entrance through lack of finances, it is our opinion that it is a benevolent association and hence is entitled to tax exemption under sec. 70.11 (4).
JEF

Corporations — Insurance — Dissolution — Secretary of state should file certified copy of dissolution resolution of insurance corporation.

September 16, 1933.

THEODORE DAMMANN,
Secretary of State.
Corporation Division.

You state that you are in receipt of a certified copy of the dissolution resolution of a Wisconsin insurance corporation. You desire our advice as to whether your department is authorized to file this resolution under sec. 181.03, Stats. It appears that a copy has already been filed with the commissioner of insurance.

It is our opinion that the statute cited requires you to file this paper.

Sec. 181.03 provides:

"Any corporation may dissolve by the adoption of a written resolution to that effect, * * *. Duplicate copies of such resolution, * * * shall be forwarded to the secretary of state, one copy to be filed by the secretary of state and the other copy to be returned with certificate of the secretary of state attached, showing the date when such copy was filed by the secretary of state, which said copy shall be recorded by the register of deeds of the county in which such corporation is located within thirty days after filing with the secretary of state, and thereupon such corporation shall cease to exist except for the winding up of its affairs. * * *"

The language of this statute does not make any exception in the case of insurance corporations. The statute definitely provides that a certified copy of the dissolution resolution shall be filed with the secretary of state. No statute provides that a certified copy of such paper shall

be filed with any other department of the state government. That section of the statutes (201.02) providing that articles of organization of insurance corporations shall be filed with the insurance commissioner instead of the secretary of state refers only to "articles and amendments." It does not mention a certified copy of the dissolution resolution, although it would seem to be most desirable that this paper should be filed with the insurance commissioner also. The statutes impose a definite duty upon the secretary of state to file such resolution. Persons reading sec. 181.03 would expect to find a copy of dissolution papers filed with your office and would undoubtedly write your department when desiring information concerning the same. Under sec. 181.03 the legal cessation of the corporation is also dependent upon a lapse of time after filing the resolution with the secretary of state. This fact furnishes an additional reason why the certified copy should be filed in your office.

JEF

Automobiles—Law of Road—Garage may permit prospective purchaser of new car to drive same upon highway without official garage representative present.

September 16, 1933.

KENNETH C. HEALY,
District Attorney,
Manitowoc, Wisconsin.

You inquire whether a garage may permit a prospective purchaser of a new car to drive that new car upon a highway without an official garage representative present. Reference is made to sec. 85.02, subsec. (4), Stats. 1931, the pertinent portion of which reads:

"* * * No new vehicle shall be displayed for sale or demonstrated on the highways unless a sticker is attached as provided in this section. No such vehicle shall be operated on the highways except by the authorized representative of the dealer, distributor, or manufacturer, and for demonstration purposes exclusively. * * *".

Sec. 85.02, subsec. (4), Stats. 1931, quoted above, was repealed by sec. 1, of ch. 418, Laws 1933. Subsec. (6), sec. 85.02 was amended by sec. 3, ch. 418, Laws 1933, to read:

"Number plates shall be furnished by the secretary of state at * * * ten dollars * * * for the first set of two plates and one dollar for each additional set to manufacturers, distributors and dealers whose vehicles are registered in accordance with the provisions of this section. Such plates shall have upon them the registration number assigned to the registered manufacturer, distributor or dealer but with a different symbol upon each set of number plates as a special distinguishing mark and such plates shall be used only on those vehicles used for trial test or adjustment or for demonstration or exhibition or for some purpose necessarily incidental to the sale of such vehicle, or on vehicles while in transit from the factory to a distributor or dealer and being driven by an authorized representative of the manufacturer, distributor or dealer."

Part of subsec. (6), sec. 85.02, Stats. 1931, formerly read:

"* * * Such plates shall have upon them the registration number assigned to the registered manufacturer, distributor or dealer but with a different symbol upon each set of number plates as a special distinguishing mark and such plates shall be used only on those vehicles displaying 'Displayed for Sale and Demonstration' stickers specified in subsection (4) of this section, or on vehicles while being tested by the manufacturer or in transit from the factory to a distributor or dealer and being driven by an authorized representative of the manufacturer, distributor or dealer."

It will be seen that in amending the above mentioned subsec. (6) the legislature deleted "displaying 'Displayed for Sale and Demonstration' stickers specified in subsection (4) [now repealed] of this section, or on vehicles while being tested by the manufacturer, * * *." It then inserted "used for trial test or adjustment or for demonstration or exhibition or for some purpose necessarily incidental to the sale of such vehicle." The phrase, "while being tested by the manufacturer" was omitted, but the concluding phrase, that is, "in transit from the factory to a distributor or dealer and being driven by an authorized

representative of the manufacturer, distributor or dealer," remains.

The legislature thus repealed the express prohibitions against the driving of a new car having on it the license plates issued to a manufacturer, dealer or distributor, except by an authorized representative of the dealer, distributor or manufacturer, and for demonstration purposes exclusively. From this fact, and the additional fact that it added to subsec. (6) so that plates issued to manufacturers, dealers and distributors can now be used on vehicles employed for trial test, adjustment, demonstration, exhibition or purposes necessarily incidental to the sale of such vehicle, it is our opinion that a garage may permit a prospective purchaser of a new car to drive the same upon the highways without a garage representative being present. Such driving will be classified as a trial test or demonstration, or a purpose incidental to the sale of such vehicle.

This opinion is an interpretation of the law as changed by ch. 418, Laws 1933. Sec. 4 of the said ch. 418 provides, however, that the act shall take effect on July 1, 1933, as to motor trucks, tractor trucks, trailers, and semitrailers, and on January 1, 1934, as to other vehicles.
JEF

Criminal Law—Extradition—Public Officers—District attorney may exercise discretion in approving of application for requisition papers.

September 16, 1933.

R. C. LAUS,
District Attorney,
Oshkosh, Wisconsin.

You ask the opinion of this department in regard to the following problem:

A warrant has been issued out of the municipal court of Winnebago county and is in the hands of the sheriff, charging a man, now residing in California, with nonsupport of his wife, who lives in Oshkosh. The wife is desti-

tute and being supported by the city of Oshkosh. A divorce action by the husband is pending in which there has been a temporary order for alimony. The man is in arrears in payment. You say that you do not believe the man has any money other than what he earns or borrows and that the expense of returning him to Oshkosh and Winnebago county would be approximately seven hundred fifty dollars.

You do not feel that the type of crime involved warrants the expenditure of so much money, and you ask whether you have any discretion in the matter or whether you must approve of the extradition if it is insisted upon by the complaining witness.

Sec. 2, art. VI, U. S. Const., and secs. 5278 and 5279, U. S. Rev. Stats., brought forward from a congressional act of 1793, form the basis of the interstate extradition of fugitive criminals in all the states.

Subjects collateral to the main right to extradition have been legislated upon independently by the various states and the result was that the laws governing extradition, especially those setting up intrastate machinery, were quite diversified throughout the country.

Up to 1933 intrastate procedure in extradition cases in Wisconsin was governed by ch. 364 "Fugitives from Justice" and a set of *Rules and Regulations,* issued by the executive department in 1921.

Rules 1 and 2 of the executive department's rules and regulations vest a certain amount of discretion in the district attorney in the matter of applications for requisitions:

Rule 1. "Every application to the governor for a requisition must be made in writing by the district attorney or other prosecuting officer of the county in which the crime was committed; provided, that if in any case such district attorney shall refuse to make the application, it may be made by any other person, but must be accompanied by the affidavit of at least two credible persons, stating, so far as can be ascertained, the reason of such refusal, and all the circumstances connected therewith."

Rule 2. "The district attorney or other prosecuting officer must, in addition to the requirements of the statute, *certify that he is content that said fugitive shall be brought back to the state for trial at the public expense, that such*

expense shall be a county charge and that he believes he has within his reach and will be able to produce at the trial the evidence necessary to secure a conviction."

Section 2, ch. 40, Laws 1933, provides for a new chapter, numbered 364, which is an adoption of the uniform extradition act as recommended by the National Conference of Commissioners on Uniform State Laws and Proceedings in their 1932 report. The object of the uniform act was to codify the practice and promote uniformity in the extradition statutes in the various states. Ch. 364, Wis. Stats. 1931, has been repealed. The repealing act does not make any mention of the rules and regulations nor does the act cover the same subject matter found in the rules. It may well be argued that as they deal entirely with intrastate procedure and cover details not determined by the act, they will not be considered as abrogated by the new enactment except if and where inconsistent therewith.

Sec. 364.23, Wis. Stats. 1933, covers the manner of applying for requisition and reads in part:

"When the return to this state of a person charged with crime in this state is required, the prosecuting attorney of the county in which the offense is committed shall present to the governor his written application for a requisition for the return of the person charged, * * * certifying that *in the opinion of the said prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial,* and that the proceeding is not instituted to enforce a private claim."

It is our opinion that the word "shall" in the phrase "shall present to the governor" means merely that *if* the return is required and the district attorney is to make application, he shall make application to the governor. You will note also that he is to certify that *in his opinion* the accused's return is required. If his opinion is to be considered, certainly he must be presumed to have discretion in reaching a conclusion as to whether or not the person shall be returned. The district attorney is to certify that in his opinion the *ends of justice* require the return of the accused. "Ends of justice" is a broader phrase than "enforcement of the law."

"Justice is the dictate of right, according to the consent of mankind generally, or of that portion of mankind who may be associated in one government, or who may be governed by the same principles and morals." *Duncan v. Magette,* 25 Tex. 245, 252–253.

" 'Justice' means that end which ought to be reached in a case by the regular administration of the principles of law involved as applied to the facts." *Meeks v. Carter,* 63 S. E. 517, 518, 5 Ga. App. 421, syllabus.

It is for the district attorney to decide whether the "ends of justice" require the return of the person charged with crime. Therefore, it is our opinion that discretion is given you in determining whether you will approve of extradition and make application for requisition papers in this and other cases coming before you.
JEF

Elections—Municipal Corporations—Beer Licenses—Determination by electors, under ch. 207, Laws 1933, that no licenses shall be issued can be had only at spring election.

By action at spring election electors may prevent, but cannot compel, issuance of licenses.

September 16, 1933.

JOHN P. MCEVOY,
Assistant District Attorney,
Kenosha, Wisconsin.

Certain electors of the township of Bristol, in Kenosha county, have signed and presented to the town clerk a request for a special town meeting for the purpose of voting upon the question as to whether or not the town board shall issue licenses for the sale of beer. You inquire whether the town clerk should honor the request of the electors for a special town meeting at this time.

It is our opinion that the town clerk should not honor the request for a special town meeting at the present time. Sec. 66.05, subsec. (10), subd. (d), par. 3, Wis. Stats., as enacted by ch. 207, Laws 1933, provides:

"The electors of any city, village or town may, by ballot, at the spring election, determine that no license shall be issued. * * *"

The result of such election shall determine the policy of the municipality until changed by ballot. The statute above quoted authorizes the electors to take action at the *spring election.* It is our opinion that when the legislature particularly mentioned the spring election, it excluded all other elections under the rule that the enumeration of one is to the exclusion of all others. *Conroe v. Bull,* 7 Wis. 408; *State ex rel. Owen v. Reisen,* 164 Wis. 123; *State ex rel. Owen v. McIntosh,* 165 Wis. 596.

The language of your letter would indicate a belief upon your part that the electors have the right to determine "whether or not licenses for the sale of beer shall be issued." Your attention is called to the fact that the above quoted statute merely delegates to the electors the right to determine "that *no* license shall be issued." Thus, if the governing board has issued the licenses, the electors at the spring election may stop the issuing of licenses. If a majority of the electors at the spring election favor the issuance of licenses, the governing board is still not obliged to issue licenses if it does not wish to do so.

JEF

Military Service — Municipal Corporations — Beer Licenses—Ordinance of town board regulating sale of malt beverages is not applicable to Camp Williams.

September 16, 1933.

EDWARD T. VINOPAL, JR.
District Attorney,
Mauston, Wisconsin.

A part of Camp Williams, a United States government reservation, is in the town of Orange, Juneau county, Wisconsin. The said town of Orange has an ordinance regulating the sale of malt beverages. A certain individual

has a concession on this government property in the town of Orange for the dispensing of malt beverages. The contention is made that this individual must adhere to the regulations laid down by the town board. You desire an opinion on this question.

It is our opinion that the individual does not have to abide by the regulations passed by the town board of the town of Orange.

In XVI Op. Atty. Gen. 671 this office rendered an opinion holding that under the provisions of the United States constitution and the Wisconsin statutes this state consented to the acquisition by the United States government of Camp McCoy and relinquished all jurisdiction in said tract, except for the purpose of serving process and for that reason the state criminal laws have no force in such tract. The following quotation is taken from that opinion, p. 672:

"* * * I have had my attention called to the provisions of secs. 1.01, 1.02 and 1.03, Stats., in which the state has expressly granted, conceded and confirmed to the United States exclusive jurisdiction over this particular tract near Sparta for all purposes except the right of the state to serve legal process anywhere within such tract. Court decisions under similar provisions in other states have held that practically takes the tract out of the state for all purposes except for the things expressly reserved. So, under that express provision, the legislature has placed that tract outside of your jurisdiction and outside of the prohibitions of the Wisconsin statutes by consenting to the United States' acquiring such lands for the purposes named as provided in subsec. (17), sec. 8, art. I, United States Const. (See *Lane v. Lane,* 133 Atl. 729, and cases.).

No reason is apparent why the United States government reservation known as Camp Williams is in any other or different position than the Camp McCoy reservation near Sparta. It is our opinion, therefore, that the town board of the town of Orange does not have jurisdiction over Camp Williams for the purpose of regulating the sale of malt beverages therein.

JEF

Indigent, Insane, etc.—Poor Relief—One who receives three hundred dollars fire insurance money, representing equity in his home under land contract, and proceeds to build new home with such funds is entitled to receive food and shelter from county outdoor relief for himself and family.

County poor relief unit is liable to provide beds and other household equipment to furnish new home.

September 18, 1933.

ROSCOE GRIMM,
District Attorney,
Janesville, Wisconsin.

You ask whether a man who receives poor relief and his family are entitled to receive food and shelter if he has three hundred or four hundred dollars fire insurance money representing the equity in his home under a land contract, with which he has begun the construction of a new home.

Sec. 49.025, Stats., created by ch. 299, Laws 1933, reads as follows:

"No person shall be denied relief as a poor person on the ground that he has an equity in the home in which he lives or a cash or loan value not in excess of three hundred dollars in a policy of insurance. No applicant for relief shall be required to assign such equity or insurance policy as a condition for receiving relief."

This statute was evidently enacted in recognition of the fact that it is wiser to let poor persons retain a certain reserve which they may have than to force them to sacrifice it by sale which may not bring its true value and, if it did, would not furnish a fund which would aid the person's condition for any appreciable length of time. From a social standpoint an equity in a home ought to be respected. From a common sense and economical viewpoint it is better to let a poor person retain his equity in his home than to force him to sell or assign and then have to rent other quarters for him. A reasonable interpretation of the statute would be that the legislature says this

equity in a home shall be a permanent reserve. Sec. 49.01, Stats., strengthens this conclusion because it says that even ownership of a home shall not bar relief.

If the equity which a poor person has in his home through circumstances not under his control is converted into cash, the proceeds would still be stamped with the exemption provided in sec. 49.025, that is, for the purposes of this statute the money is the equity. Therefore, the poor person could use the proceeds of his equity, in this case the insurance money, to rebuild his home and still be entitled to food and shelter from the county outdoor relief. Even aside from legal sanction, this might be the most economical procedure for the county relief unit, for if the converted equity were used in furnishing the immediate wants of the family, the unit would soon have to furnish shelter as well as other relief. 21 R. C. L. on poor and poor laws, at page 704 reads:

"* * * But a person may be a pauper though he has property of his own, if it is not available for his immediate relief [as in case of equity covered by statute] or is manifestly disproportionate to his needs" [as the three hundred dollars representing converted equity which would furnish his needs very temporarily].

Therefore, your first question is answered in the affirmative.

2. "Is the county outdoor poor relief liable under the law to provide beds and other household equipment to furnish a new home?"

The Rock county poor relief unit receives aid from the industrial commission. Ch. 363, sec. 6, subsec. (1), Laws 1933, providing for the administration of such moneys reads:

"Relief shall include such money, food, housing, clothing, fuel, light, water, medicines, medical and other treatment, nursing, and such other care, service, household equipment and commodities as shall be reasonable and necessary under the circumstances. * * * The housing provided shall be adequate for health and decency. * * *"

The above statute answers your question. You will see that this is really an administrative problem and that considerable discretion is vested in the local relief unit in determining what household equipment is reasonable and necessary under the circumstances and what housing is adequate for health and decency. According to the standard of life of even the poorest people in this country, beds would be included under reasonable and necessary household equipment. What other articles are included in this definition vests in a large measure in the discretion of the local unit.

In accordance with the above, your second question is also answered affirmatively.

JEF

Indigent, Insane, etc.—Public Health—Building Code—Words "forcibly confined" as used in state building code, Order No. 5718, apply to insane persons who are committed by court or transferred from state hospital to which they have been committed by court, words being broad enough to include one confined without his consent.

September 19, 1933.

JOHN J. HANNAN, *President,*
Board of Control.

In your communication of September 18 you direct our attention to Order No. 5718 of the Wisconsin state building code, issue of 1931, compiled by the industrial commission, which reads:

"Basement Rooms. Every basement, living or sleeping room shall be at least eight feet high from floor to ceiling. The ceiling shall be at least four feet above the outside grade. The walls and floor shall be damp proof and waterproof.

"No rooms wherein persons are forcibly confined shall be located in a basement."

You state that all patients of county asylums are either committed directly by the courts or are transferred from

the state hospitals to which they had been committed by the courts. You desire our interpretation of the phrase, "forcibly confined" as the same is used in the above quoted order.

You are advised that this order using the words "forcibly confined" includes an insane person who has been committed by the courts or transferred from the state hospital to which he has been committed by the courts. Such patient has no option in the matter and the words "forcibly confined" must be interpreted as broad enough to include one who is confined in a place without his consent.
JEF

Minors—Child Protection—Industrial School for Boys—It is advisable to secure consent of parent before minor operation is performed as health measure on child committed to industrial school.

If in opinion of examining physican operation is necessary to save life of child, such operation may be performed with consent of board of control, if consent of parent or guardian cannot be secured.

September 21, 1933.

A. W. BAYLEY, *Secretary,*
Board of Control.

The state board of control is given the power to govern and maintain the Wisconsin industrial school for boys and girls, and the state public schools and to supervise and to advise any private institutions created under sec. 58.01, Stats. The purpose of such institutions under the control of the board is stated as follows in sec. 48.07, subsec. (4):

"It is declared to be the intent of this chapter that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the state; and when such child is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents."

This would seem to give the above-mentioned board all powers necessary to carry out the purposes of ch. 48, which would include necessary medical attention. Tonsillectomy or other minor operations as health measures would not be considered necessary medical attention, as an operation on a minor without the consent of his parent or guardian, if fatal, is justified only if it is an emergency measure. Is the board of control the guardian of those placed in the industrial school for boys and therefore authorized to permit such operations?

There is no express provision to that effect while the board is made the guardian of children in the state public schools under sec. 48.22 (2). Those conducting private industrial schools for children, which the board may supervise, are given the "exclusive custody, care, and guardianship of such children" by sec. 58.01 (2). As the law authorizing private institutions was passed (ch. 325, Laws 1875), after the industrial school for boys was established in 1858 by Rev. Stats., ch. 189, and the state public school was created in 1885 by ch. 377, Laws 1885, it is my opinion that the legislature never intended to create the relationship of guardian and ward between the state board of control and those placed in the industrial school for boys, although the supreme court has held that the state, as *parens patriae* assumes parental authority over those placed in such institutions. *Wisconsin Industrial School v. Supervisors,* 40 Wis. 328; *State v. Scholl,* 167 Wis. 505.

It is not clear whether this would include such control exercised by the natural parent or guardian. Furthermore, when the act relating to the state school at Waukesha was amended by ch. 236, Laws 1861, it was provided in section 7 that the board of managers

"* * * shall have power to place the children committed to their care, during the minority of said children, at such employments, and cause them to be instructed in such branches of useful knowledge, as shall be suited to their years and capacities; and they shall have power in their discretion to bind out the said children, with their consent or the consent of their parents or guardians, * * *."

Sec. 48.17 (1) now provides:

"The state board of control shall cause the children committed to either of said industrial schools to be placed at such employments and to be instructed in such branches of useful knowledge as shall be suited to their years and capacities. * * *"

The law of 1861 seemed to imply that those in the industrial school were not the absolute wards of the state. As there is no greater power given under the present law in express language, it may be assumed that the legislature has not changed its original intention as expressed in sec. 7, ch. 236, Laws 1861.

The relation of physician and patient is contractual. 48 C. J. 1111. Therefore the consent of the patient, or his parent or guardian if he is a minor, is necessary before the physician or surgeon may treat or operate upon such patient. This would apply to prisoners in the absence of any definite statutory provision. As the children confined in the school at Waukesha are virtually prisoners and minors, it would seem that this rule would apply in so far as no definite statute changes said rule.

In the absence of any specific statute making the board the guardians of those children committed to the industrial school at Waukesha, it would be advisable to secure some form of consent from the parent before performing a minor operation as a health measure, to avoid all trouble. If such consent cannot be secured and the operation is necessary to save the life of the child, such operation could be performed with the consent of the board of control.

JEF

Appropriations and Expenditures—Workmen's Compensation—Claims—All awards of primary compensation and medical benefits of two hundred dollars or less made after publication of ch. 402, Laws 1933, must be paid from appropriation covering salary or maintenance of person injured.

Regardless of amount of award, primary compensation and medical benefits of two hundred dollars or less are payable from departmental appropriation.

September 21, 1933.

CONSERVATION COMMISSION.

You invite attention to ch. 402, Laws 1933, which amended sec. 20.07, subsec. (3), Stats., to read as follows:

"Annually, such sums as may be necessary, for compensation of persons injured while in the state service, as provided in sections 102.01 to 102.34, and for compensation to inmates of state institutions injured in the performance of work in such institutions, except persons injured in prison industries, as provided in *subsection (2) of* section 56.21, * * * *to cover primary compensation and medical benefits awarded by the industrial commission in excess of two hundred dollars in any individual case. Primary compensation and medical benefits of two hundred dollars or less, as well as all increased compensation payable under the provisions of sections 102.57 and 102.60, shall be paid from the appropriation covering the salary or maintenance of the person injured.*"

This law became effective on July 15, 1933. Before that time certain employees in your department suffered compensable injuries, but awards were not made by the industrial commission until after July 15. You ask whether in those cases the primary compensation and medical benefits of two hundred dollars or less are payable from the conservation department appropriation or from the appropriation in effect at the time the accidents occurred.

All awards of primary compensation and medical benefits of two hundred dollars or less made after the publication of ch. 402, Laws 1933, must be paid from the appropriation covering the salary or maintenance of the person

injured. Sec. 20.07, Stats. 1931, provided in part as follows:

"There is appropriated from the general fund, annually, to be paid as herein provided:

"* * *

"(3) Annually, such sums as may be necessary, for compensation of persons injured while in the state service, as provided in sections 102.01 to 102.34, and for compensation to inmates of state institutions injured in the performance of work in such institutions; except persons injured in prison industries, as provided in section 56.21, to be paid upon awards issued by the industrial commission."

Under this section compensation was paid to state employees only upon awards issued by the industrial commission. Until an award had been issued no appropriation was available for the payment of compensation. The appropriation in effect at the time of the issuance of the award, regardless of the time of the occurrence of the accident, controls the method of payment. After the enactment of ch. 402, Laws 1933, there was a general appropriation to cover only primary compensation and medical benefits *awarded* by the industrial commission in excess of two hundred dollars. It necessarily follows, therefore, that regardless of when the accident occurred in all awards made after the enactment of ch. 402, Laws 1933, the first two hundred dollars cannot be paid under the appropriation contained in subsec. (3), sec. 20.07, but must be paid from the appropriation covering the salary of the person injured.

You also ask whether when accidents have occurred since July 15 the departments are compelled to pay up to two hundred dollars when the award is for more than that amount, or if the full amount will be taken care of under the appropriation made in sec. 20.07, subsec. (3). The general appropriation in subsec. (3), sec. 20.07, covers only awards in excess of two hundred dollars, and consequently no matter what the amount of the award may be, primary compensation and medical benefits of two hundred dollars or less are payable from the departmental appropriation.

JEF

Counties—Board of Commissioners—County redistricted in pursuance of sec. 59.95, Stats, but not yet in control of county commissioners is held governed by ch. 472, Laws 1933.

September 21, 1933.

EDMUND H. DRAGER,
District Attorney,
Eagle River, Wisconsin.

You ask this department for an opinion on ch. 472, Laws 1933, as it relates to your county. You state that your county voted to operate under sec. 59.95, Stats., in April last. In June the county was redistricted into three districts in pursuance to the command of the law at that time. In July the legislature decreed that all counties operating under the county commission form of government should be redistricted. As applied to Vilas county this act required that one more district be created. You ask whether the county board must redistrict this county before December 31, 1933.

The answer is, Yes.

You may have been troubled by the wording of sec. 2 of the act wherein it reads:

"In each county * * * now operating * * * the county board of commissioners shall redistrict the county * * *."

The word "operating" would seem to exclude Vilas county from the operation of the act. Ordinary words should be given their usual meaning unless such a meaning would defeat the evident intent of the legislature and work a hardship. *Van Dyke v. City of Milwaukee,* 159 Wis. 460. The word "operating" then cannot defeat the legislative intent to have all counties which elect to do so come under sec. 59.95, Stats.

If this result were to be otherwise, then this statute would not apply to Vilas county nor would the amended sec. 59.95, Stats., apply since they set up the procedure for those counties contemplating coming under sec. 59.95. Since Vilas county has already organized pursuant to sec.

59.95, Stats. 1931, it would not be influenced by the amended statute of 1933 and would, therefore, present the anomaly of being the only county in the state operating contrary to the apparent legislative intent.

We hold, therefore, that Vilas county must be redistricted in accordance with ch. 472, Laws 1933.

JEF

Mothers' Pensions—Aid may be granted to woman for support of her children if she is divorced for period of at least one year; if divorce was granted in Wisconsin she must have availed herself of provisions of law and divorce judgment to compel husband to support her and must have failed.

September 21, 1933.

HANS HANSON,
District Attorney,
Black River Falls, Wisconsin.

You have submitted to this department at the request of your county judge the following provision in sec. 48.33, subsec. (5), par. (d), Stats.:

"The mother or stepmother must be without a husband; or the wife of a husband who is incapacitated for gainful work by mental or physical disability, likely to continue for at least one year in the opinion of a competent physician; or the wife of a husband who has been sentenced to a penal institution for a period of at least one year; or the wife of a husband who has continuously deserted her for one or more years, if the husband has been legally charged with abandonment for a period of one year; *or such mother must be divorced from her husband for a period of at least one year and unable through use of the provisions of law to compel her former husband to support the child for whom aid is sought; provided, however, that the divorce was granted in Wisconsin.*"

That part of said subsection which is italicized is the one in question. You say that it appears that the legislature of 1933 made no change affecting this section, but the

legislature of 1931 did make a change in this section by inserting after the word husband, "for a period of at least one year," and the last clause in said paragraph, "provided, however, that the divorce was granted in Wisconsin."

You are advised that we believe it is necessary under this provision that the mother has been divorced from her husband for a period of at least one year and that she is unable, through the use of the provisions of law, to compel her former husband to support the child for whom aid is sought. This latter provision, however, applied only to divorce granted in Wisconsin. We do not believe that it was the intention of the lawmakers to deprive all women who had received divorces from their husbands in other states from receiving a mothers' pension for their children. The provision in this law which makes it necessary to be divorced for one year is evidently to meet that phase of the divorce law which prohibits her from being married until the expiration of one year. After that period she has no husband and she could come under the first part of subsec. (5) (d), which says that she must be without a husband.

We believe that the provision that the divorce was granted in Wisconsin was inserted to make it necessary for the mother to make use of the provisions in the Wisconsin law which obligate their father to pay for the support of his children. When the judgment is rendered in a Wisconsin divorce suit requiring him to support her and her children, she must avail herself thereof before being eligible for a mother's pension.

JEF

Indigent, Insane, etc.—Transient Paupers—Failure to comply with order given to pauper to remove to county of his legal settlement relieves moving county of liability for relief to such pauper until such time as he gains legal settlement in moving county.

September 21, 1933.

JAMES L. MCGINNIS,
District Attorney,
Amery, Wisconsin.

You requested this department to interpret the last sentence of sec. 49.03, subsec. (9), Wis. Stats. Your question was whether or not John Doe, who has failed to comply with the order therein mentioned, is entitled to any relief.

Sec. 49.02 (7), stating how a settlement may be lost, and sec. 49.04 (1) stating that aid shall be given those having no settlement, are general provisions. Under sec. 49.02 (7) a person who failed to comply with an order made under sec. 49.03 (9), loses his settlement by voluntary absence. That would then put him under sec. 49.04 (1). Since sec. 49.04 (1) is general and sec. 49.03 (9) is more specific, it would follow that sec. 49.04 (1) would not apply in the face of the order given under sec. 49.03 (9). Further than this, it may be pointed out that sec. 49.03 (9) was first enacted into law as late as 1931. That provision is, therefore, later than sec. 49.04 (1) and these two factors — specificness and recentness — would indicate that sec. 49.03 (9) must take precedence over sec. 49.04 (1), *Jones v. Broadway Roller Rink Co.*, 136 Wis. 595, so that the county would be relieved from providing for the person who had failed to follow the directions of the order. The statute is plain but conflicts when applied to this situation. Such conflict is resolved to give full effect to the whole law. This interpretation does that.

But there is another phase of this question: Can the person to whom the order is directed gain a settlement if he lives in the county for a year? This is controlled by sec. 49.02 (4) and by the determination of whether or not the person was supported as a pauper. *Monroe Co. v.*

Jackson Co., 72 Wis. 449; *Saukville v. Grafton*, 68 Wis. 192; *Port Washington v. Saukville*, 62 Wis. 454; *Scott v. Clayton*, 51 Wis. 185.

But such support must be given by the town. *Sheboygan Co. v. Sheboygan Falls*, 130 Wis. 93. Whether the person is supported as a pauper is a question of fact. *Town of Holland v. Town of Belgium*, 66 Wis. 557, 560.

The granting of the order would negative the granting of any aid, so unless the facts are otherwise, John Doe could obtain a legal settlement after the year.

Sec. 49.03 (9) does not apply here since it deals with those persons only whose settlement is not in the county or municipality giving the aid. After John Doe has secured his legal residence sec. 49.03 (9) does not apply. This does not beg the question since that section merely denies giving of relief to persons not having a legal settlement in the county. It is, then, necessary to determine who have and who do not have legal settlements in the county in order to apply this section.

We hold, therefore, that until such time as John Doe acquires a legal settlement, the county is not liable for his support. If settlement is legally secured, then the county is liable. See XXII Op. Atty. Gen. 435.

JEF

Military Service — Mothers' Pensions — Tuberculosis Sanatoriums—Fact that veteran receives thirty dollars each month from federal government and is committed to sanatorium does not disqualify his wife from receiving mother's pension if she is otherwise qualified to receive it.

September 21, 1933.

GILES V. MEGAN,
District Attorney,
Oconto, Wisconsin.

In your communication of September 5 you state that one A, a World War veteran, totally disabled because of tuberculosis, is receiving thirty dollars a month compensation from the government. He is living with his wife and

five small children in a small home worth about one hundred fifty dollars. He has no personal property, money or income of any kind except the government compensation. He is to be immediately hospitalized by the government, and will undoubtedly remain there for a number of years. You say that a portion of his compensation will be needed to pay for certain clothing and extras not furnished by the government, so that the residue of his compensation will not be sufficient to support his wife and family. You also state that his wife has applied to the county judge for a mother's pension. You refer to sec. 48.33, Stats., which provides that a mother's pension shall be the only form of public assistance granted to the family. You inquire if the wife would be entitled to a mother's pension during the period that the husband is receiving thirty dollars a month aid from the government.

In an official opinion in VI Op. Atty. Gen. 160, it was held that a widow who receives a pension from the government is eligible to a mother's pension. In a well considered opinion in VI Op. Atty. Gen. 796, it was held that where a husband afflicted with tuberculosis is committed to a tuberculosis sanatorium at public expense, the charge therefor is not to affect the amount of aid to which the family may be entitled under sec. 573*f*, Stats. 1917. It was held that such expense is incurred somewhat perhaps for individual benefit but largely, if not mainly, for the benefit of the public at large, resulting from the segregation and confinement of those who may spread dangerous disease to others. The same reasoning was applied to a case where one is committed to an insane asylum. Such segregation in that case is made for the purpose of protecting the community from danger.

It was also held that the mothers' pension law should be liberally construed. The legislature had repeatedly met since the time these opinions were rendered and has not seen fit to make any changes in the law.

You are, therefore, advised that it is our opinion that the compensation that this veteran receives from the federal government will not prevent his wife from receiving a mother's pension if she is otherwise qualified.

JEF

School Districts—Transportation of School Children— Where common school district has no high school, school board has no authority to provide transportation to high school in another district.

Town board has no authority to provide transportation for pupils living in town in case where such pupils go to high school in another district and where town pays tuition for such pupils.

September 22, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

You have requested this department to render an opinion upon the following questions:

"(1) Can the school board of a school district not having a high school appropriate money to transport children eligible to enter high school from said district to a school district having a high school?

"(2) Can the town board appropriate money to transport children for whom they are obligated to pay high school tuition, if they attend high school, to some high school district?"

1. You set forth no special circumstances such as suspension or discontinuance of the schools, and the matter is dealt with on the assumption that this district has no more than eight grades of school.

The pertinent provisions of the statutes to be considered in this connection are as follows:

Sec. 40.34, subsec. (1), Stats. (as amended by ch. 494, Laws 1933) provides in part:

"The school district meeting may authorize the board to provide transportation for all children of school age residing in the district. The board of every consolidated school district or in a district which has voted to close its school and provide tuition and transportation shall provide transportation to and from school for all school children residing in the district and over two miles from the schoolhouse. The board shall provide transportation to and from school for all school children residing in the district and over two and one-half miles from the schoolhouse, in case of a common school and four miles in case of a union high school. * * *."

It is well settled that the school board has only such authority as is expressly granted by statute or authority as may be implied from the express grant of powers in order to carry out the specific authority granted. *State ex rel. Van Straten v. Milquet,* 180 Wis. 109.

We are unable to find any authority permitting the school board to provide for transportation of school children in a case where the school district has no high school therein and where it is necessary for the children of the district to enter a high school in another district.

The only provision in the statutes which would seem to authorize the school board to provide for transportation under the circumstances set forth above, is found in sec. 40.34 (1) which is quoted above. However, an examination of the history of this section of the statutes indicates clearly that the legislature had in mind only a situation where the school district had a school within the district, in which case the board could in its discretion provide for transportation of the pupils under certain circumstances. It is manifest from an examination of the statutes that the legislature never contemplated a situation where a common school district alone was involved in which no high school was located. Inasmuch as such a situation was not within the contemplation or intention of the legislature, it is clear that the present statute does not cover that type of case and, hence there is no authority or power in the school board to provide transportation for pupils eligible to enter high school from the common school district in which no high school is located and where such pupils are required to travel to another school district having a high school.

We are therefore constrained to hold that sec. 40.34 (1) does not authorize the school board of a common school district to provide transportation for high school pupils wishing to attend a high school outside of the district.

2. In answer to your second question, we are likewise constrained to hold that the town board has no power to provide transportation for high school pupils under the circumstances set forth in your second question.

As in the case of a school district, the authority of the town board is limited to the powers expressly granted by

the statute or such powers which may be impliedly necessary to carry out the specific authority granted. *Mulvaney v. Armstrong,* 168 Wis. 476.

We have made a careful examination of the statutes but we are unable to find any provision granting authority to the town board to provide transportation for pupils living in the town in a case where such pupils are required to attend a high school in another district and where the town board is required to pay the tuition for such pupils.

JEF

Automobiles—Law of Road—Registration—Vehicles of Italian consular officers in Wisconsin are exempt from state license fee.

September 22, 1933.

THEODORE DAMMANN,
Secretary of State.

You request an opinion from this department as to whether or not the vehicles of Italian consular officers are exempt from the license fee imposed by sec. 85.01, Wis. Stats.

Art. III of the Consular Convention of 1878 between Italy and the United States, 20 U. S. Stats. 726, provides in part:

"* * *.

"The aforesaid consular officers [i. e. those who are citizens of the state by which they were appointed] shall be exempt from all national, state, or municipal taxes, imposed upon persons either in the nature of capitation tax or in respect of their property unless such taxes become due on account of the possession of real estate or for interest on capital invested in the state in which they reside. If they are engaged in trade, manufactures or commerce, they shall not enjoy such exemption but shall be obliged to pay the same taxes as are paid by other foreigners under similar circumstances."

As such a convention is in fact a treaty, *Bartram v. Robertson,* 122 U. S. 116, 30 L. ed. 1110 (1886), and unques-

tionably within the treaty-making power of the United States, *United States v. 43 Gallons of Whiskey,* 93 U. S. 188, 23 L. ed. 846 (1876), *Santovincenzo v. Egan,* 284 U. S. 30, 56 L. ed. 453 (1931), it is a part of the supreme law of the land overruling any state law therewith conflicting, *Santovincenzo* case, *supra.*

It is therefore the opinion of this office, as was formerly held in an opinion relating to such an exemption in favor of Spanish consular officers under similar treaty provisions, XVIII Op. Atty. Gen. 169, that the vehicles of Italian consular officers in Wisconsin are exempt from taxation.
JEF

Mortgages, Deeds, etc. — Public Officers — Mediation Board—Local mediation board has jurisdiction to intervene after judgment of foreclosure has been entered.

September 22, 1933.

WALTER B. MURAT,
District Attorney,
Stevens Point, Wisconsin.

A mortgage foreclosure action was commenced in the circuit court of your county during the latter part of December, 1932. Judgment of foreclosure was entered in this action some time during the month of January, 1933. The mortgagor has applied to the local mediation board of Portage county to intervene for the purpose of making an adjustment between the debtor and the creditor. The question arises whether the local mediation board has authority to intervene after judgment of foreclosure and sale has been entered.

It is our opinion that your question must be answered in the affirmative.

The local mediation board is provided for in ch. 15, Laws 1933. Sec. 1 of the act declares that an emergency exists which necessitates the creation of the mediation board. The said sec. 1 concludes with the following language:

"* * * In view of the prevailing public emergency, it is deemed expedient to provide for a temporary curtailment of remedies for enforcing payment of certain debts, and to provide lines of encouragement and facilitating between debtors and creditors the adjustment, extension, and compromise thereof."

The act grants to the local mediation board general power to make recommendations for the compromise or extension of mortgage obligations analogous to the power granted to courts by ch. 11, Laws 1933, in relation to mortgage foreclosure actions. Sec. 281.23, subsec. (7), Stats., created by ch. 15, provides:

"The court, in exercising the discretion conferred upon it in chapter 278 of the statutes, shall take into consideration the refusal of either party to submit to mediation or his failure to accept the recommendations of the local mediation board for the voluntary adjustment of the obligation."

Ch. 15 does not by its terms specifically provide a limitation as to the time when the local mediation board may intervene. The quotation taken from sec. 1, ch. 15, states that it was deemed expedient to provide for temporary curtailment of remedies for enforcing payment of certain debts. It contemplates action by the mediation board during the time that the remedy is in the process of enforcement. In foreclosure actions, this remedy is in the process of enforcement both before and after judgment—that is to say, even after judgment and during the period of redemption, the debtor is not prevented from seeking some sort of a settlement with his creditor. The court, during that period of time, has full control of the litigation and has the power, under ch. 11, Laws 1933, to extend the time of payment of the debt by lengthening the redemption period.

Ch. 15 was enacted as emergency legislation to provide machinery by which debtors might secure some measure of relief. The legislature intended it as a beneficent enactment and, as such, it is entitled to receive a liberal construction. It was hoped that ch. 15 would enable debtors to make provision for the discharge of their obligations without the loss of their property through foreclosure ac-

tion. The purpose of the act will be accomplished if a satisfactory agreement can be reached between the debtor and the creditor through the intervention of the mediation board, even after judgment of foreclosure and sale has been entered.
JEF

Oil Inspection—Fees for inspecting illuminating oils must be computed upon basis of actual quantity inspected.

Fees for inspection of tank cars are to be computed upon basis of number of barrels as determined by actual number of gallons in car.

September 22, 1933.

ADAM PORT, *State Supervisor,*
Department of State Oil Inspector.

You have asked this department to give an opinion concerning the practice of the Texas Oil Co. in measuring the inspection fee on oils. It seems that the Texas Co. measures this fee on the net gallonage in a tank car while your department measures this fee upon the basis of the gross gallonage in each car. Since your question arises in relation to the measurement made in gallons, sec. 168.10 and sec. 168.16, Stats., apply to the problem.

Sec. 168.10 provides in part:

"* * *

"When the amount contained in any such tank or tank car shall exceed fifty gallons, each fifty gallons shall constitute a barrel within the meaning of this chapter, and the fees for inspecting the same and marking, stamping, sealing, or branding the barrels shall for each fifty gallons be the same as prescribed for each barrel, cask or package.

"The term cask, barrel, package, or sample as used in sections 168.03 to 168.14, inclusive, means a quantity not exceeding that contained in an ordinary commercial barrel estimated as fifty gallons.

"* * *"

Sec. 168.16 provides in part:

"Every deputy inspector of illuminating oils shall demand and receive from the owner or other person for whom

or at whose request he shall examine or test any oil, gasoline, benzine, naphtha, or such other like products of petroleum or sample thereof, as provided by law, an inspection fee of four cents for every single cask, barrel, package or sample so inspected. * * *"

This opinion must be ruled by what was said in XXII Op. Atty. Gen. 475. In that opinion we said:

"The second sentence of the quotation taken from sec. 168.10 contains the *definition* of the word 'barrel.' By the language of the definition, it extends to the word 'barrel' as used in secs. 168.03 to 168.14. It is our opinion, however, that this definition must also be extended to the word as it is used in sec. 168.16, which section now relates to the fee to be collected for inspection. By sec. 169, ch. 67, Laws 1931, the legislature created sec. 168.16, providing fees for oil inspection. The failure to extend the definition to include sec. 168.16 was probably an oversight. There is no good reason to believe that the word 'barrel' as used in the statutes relating to illuminating oils should have a different meaning in different sections. The definition provides that the term 'barrel' means a quantity *not exceeding* that contained in an ordinary commercial barrel estimated as fifty gallons. This is a limitation upon the amount which may be considered as a barrel, and is not a declaratory statement that only fifty gallons shall constitute a barrel. * * *"

You are therefore permitted to charge a fee based upon the number of barrels in a tank car, which in turn is based upon the actual number of gallons contained therein. An inspection fee is valid only when it brings in a revenue which is sufficient to defray the costs of inspection. Since the department incurs no expense in examining nonexistent quantities, it cannot charge a fee except for the actual quantity examined. *Wis. Tel. Co. v. Milwaukee,* 126 Wis. 1.

JEF

Public Officers—Special Deputy Sheriff—Sheriff may bind county to pay deputies appointed during emergency reasonable compensation.

September 22, 1933.

FRANK F. WHEELER,
District Attorney,
Appleton, Wisconsin.

You request the opinion of this office upon the following question:

"Has the sheriff of Outagamie county the power to bind the county to pay a definite wage to a deputy sheriff sworn in as such deputy sheriff in a grave public emergency, thereby taking away from the county board any authority to act in setting compensation for such deputy sheriff?"

Your question assumes the existence of the following facts:

"1. That the county board has never set any definite wage scale which should govern in the future, but on two separate occasions, at regular meetings of the board, has fixed the wage scale of deputies, deputized by the sheriff, prior to the meetings of the board at which the compensation was set;
"2. That the county board never limited the number of deputy sheriffs which the sheriff appointed;
"3. That a grave public emergency existed;
"4. That an express contract for an agreed wage scale was made by the sheriff and the respective deputy sheriffs who were deputized."

In XXII Op. Atty. Gen. 339 this office held that special deputies appointed by the sheriff in the absence of prior authorization by the county board, during an emergency, have a valid claim for compensation against the county. That opinion did not specify the amount of compensation that the county should pay, nor did it hold that the deputies were entitled to receive from the county whatever compensation had been agreed upon between themselves and the sheriff. As pointed out in your letter, the duties which the deputies were called upon to perform would, in a large measure, determine what sum would adequately compensate them for their services. Cases might arise requiring

the performance of such services as would entitle the deputies to five or ten times the amount that would compensate them for other kinds of services.

It is our opinion that the amount which the county must pay to duly appointed deputies is such an amount as would be held by the court to be reasonable. It follows, therefore, that a sheriff can legally bind the county to pay duly appointed deputies a reasonable sum for their services.

This opinion must not be construed as holding that every member of a *posse comitatus* is entitled to be paid for all services requested of him by the sheriff. Sec. 59.24, Stats., which requires the sheriffs to maintain and preserve peace, and which authorizes them to draft "such persons or power of their county as they may deem necessary" does not *ipso facto* mean that the assisting persons are entitled to compensation. Members of a *posse comitatus* are not deputies in the proper sense of the term. *Power v. Douglas County* (Nebr.), 106 N. W. 782.

It would be unfair to close this opinion without a word of commendation for the manner in which your question was presented and for the enlightening discussion that accompanied it. The fact that the citations therein called to our attention were not cited to greater extent in this opinion does not mean that your conclusions were not carefully considered or your discussion not greatly appreciated. It is gratifying to receive a letter showing such consideration and research in connection with a request.

JEF

School Districts—Transportation of School Children— One who closes up part of usually traveled short route from his home to district school and thereafter transports his children by different and longer route solely for purpose of coming within purview of school transportation law is not entitled to benefits of such law.

September 25, 1933.

JOHN G. TARAS,
District Attorney,
Portage, Wisconsin.

You submit the following statement of facts: X owns and resides on a farm situated in a certain common school district where his children attend school. X's farm abuts on two public highways (hereinafter referred to as highway A and highway B), both of which lead to the district school. Up to a year ago X maintained a private road leading from his home to highway A, and he also maintained and still maintains a private road leading from his home to highway B. The distance from X's home to the district school, over the private road leading to highway A and thence over highway A, was *less* than two miles. Up to a year ago X's children traveled that route to the district school. A year ago, however, X closed up the private road leading from his home to highway A and, during the last school year, X transported his children to school over the private road leading from his home to highway B and thence over highway B, which route is a distance of *more* than two miles.

The question submitted is: Under the above circumstances can X require the school district to pay him for the transportation of his children during the last school year?

By subsec. (1), sec. 40.34, Stats. 1931, it is provided to the effect that the school board of every common school district shall provide transportation to and from school for all children residing in the district and *over* two miles from the schoolhouse, and if the board fails to provide such transportation the parents may provide suitable transpor-

tation for their children, and shall be paid therefor by the district at specified rates per child.

By sec. 40.01, Stats. 1931, it is provided to the effect that the distance between a pupil's home and school "shall be measured from building to building, *along the usually traveled route.*"

The distance is thus to be measured from the children's home to the schoolhouse along the "usually traveled route," and if such distance is over two miles, the benefits of the school transportation law apply. However, the "usually traveled route" that is to be used in measuring the distance cannot be mechanically determined, but depends upon the facts and circumstances of each particular case. So, where a person changed and lengthened his private road which formed a part of the usually traveled route to school, it was said in XXI Op. Atty. Gen. 588 that the new and longer route thus resulting should not be used in measuring the distance from home to school if the lengthening of the private road was "palpably fraudulent and taken solely for the purpose of coming within the purview of the school transportation law." So, in the instant case, where X's children had previously traveled a shorter route and X then closed up the private road which formed a part of that route, and thereafter he transported his children to school by traveling a different and longer route, such new route should not be used in measuring the distance from his home to the schoolhouse, if X's action was taken solely for the purpose of coming within the purview of the school transportation law. If that was X's purpose when, in effect, he lengthened the distance from his home to the schoolhouse, then it must be considered that he is not entitled to the benefits of the law. To hold otherwise would be to permit a manipulation of the law that clearly was not contemplated.

It will be noted that ch. 494, Laws 1933, amended subsec. (1), sec. 40.34 by changing the distance from over two miles to over two and one-half miles. That change does not, of course, affect the conclusions herein reached.

JEF

Counties—County Board—Elections—Courthouse—Referendum—Determination of whether county shall build new courthouse rests with county board and is not subject of statutory referendum.

September 25, 1933.

FRANK F. WHEELER,
District Attorney,
Appleton, Wisconsin.

You state that various organizations and citizens of Outagamie county are in favor of the building of a new courthouse and expect to circulate petitions for a referendum vote on the question as to whether a new courthouse shall be built. The county board at a special session had previously voted against a resolution for the construction of a courthouse. Questions have arisen over construction of several statutes involved in this matter, particularly sec. 59.04, subsec. (2), Stats., which provides for the method of calling a special meeting of the county board, and sec. 59.02 (2), which makes the referendum statute for cities (sec. 10.43) applicable to counties.

You ask whether "it is the duty of the county clerk, upon the filing with him of the referendum petition and a determination by him of the sufficiency of the petition, to present the matter to the county board at a meeting called by him for that purpose, or whether such special meeting must be called pursuant to sec. 59.04 (2)."

The determination by a referendum vote to build a new courthouse would constitute direct legislation. This department in a previous opinion on a question whether the employment of a county agricultural representative could be determined by a referendum vote of the electors of the county, or whether it must be determined by the county court, held that such referendum vote would be unconstitutional. XI Op. Atty. Gen. 106. That opinion held that sec. 59.02 was unconstitutional in so far as it authorized referendum on legislative and administrative matters in counties.

The power "to build and keep in repair the county buildings" is in the county board (sec. 59.07, (4)), and any at-

tempt by the electors to determine this question by initiative or referendum would be interfering with the legislative and administrative powers possessed by the county board.

Since the question of building a new courthouse rests with the county board, its clerk has no authority to call a special meeting of the county board or file presentation of a referendum petition. A special meeting, if desired, can be called only under the provisions of subsec. (2), sec. 59.04, Stats.

JEF

Indigent, Insane, etc. — Legal Settlement — Prisons — Prisoners—One who had legal settlement in county in Wisconsin but went into Iowa, where he committed offense and was imprisoned for two years and then returned to place of legal settlement has not lost his legal settlement while absent from state, as he was not voluntarily absent one whole year.

September 27, 1933.

H. J. BEARDSLEY,
District Attorney,
Darlington, Wisconsin.

You state that one X had a legal settlement in Grant county, Wisconsin in 1930, at which time he went into Iowa and committed a crime, for which he was sentenced to the penitentiary of that state for two years. After his release he returned to his legal settlement and resided there for nine months, and then moved to Lafayette county. You inquire whether his incarceration in a penal institution of a foreign state for two years deprive him of his legal settlement in Grant county.

Sec. 49.02, subsec. (7), Stats., provides:

"Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town, village, or city in which such legal settle-

ment shall have been gained for one whole year or upward; and upon acquiring a new settlement or upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost."

You will note that it is necessary for him to be voluntarily and uninterruptedly absent for one whole year. It cannot be said that this person was voluntarily absent from Lafayette county when he was in prison, because he could not return to his former place of legal settlement if he had wished to do so. It was an involuntary absence. Had he been in Iowa for one whole year prior to the time when he committed the offense, the situation would be different, but under the facts stated by you, I take it that he committed the offense before he had been in Iowa very long. You are therefore advised that he still has his legal settlement in Grant county.
JEF

Appropriations and Expenditures—Counties—Board of Trustees of County Institutions—Board of asylum trustees may not rebuild building destroyed by fire with money received from insurance company without appropriation of such money for that purpose by county board.

September 27, 1933.

MARTIN GULBRANDSEN,
District Attorney,
Viroqua, Wisconsin.

In your communication of September 9 you state that the Vernon county asylum barn blew down in a tornado about the first of July. The cyclone insurance is in the name of Vernon county. You state that the question now arises whether the trustees of the asylum, together with the superintendent of the asylum, would have authority to adjust the loss with the insurance company, or whether this adjustment must be made by the county board. You say that the superintendent of the asylum believes that a

new barn could be built with the proceeds from the insurance without any additional appropriation by the county board. As the barn can be replaced by the insurance proceeds, you ask whether it would be necessary to have the county board rebuild this barn.

You direct our attention to XII Op. Atty. Gen. 26 and XX Op. Atty. Gen. 130. Subsec. (8), sec. 46.18, Stats., provides:

"The county board shall annually appropriate for operation and maintenance of each such institution, in addition to the amount appropriated for construction and improvement of grounds and buildings, a sum not less than the amount of state aid estimated by the trustees to accrue to said institution; or such lesser sum as may be estimated by the trustees to be necessary for operation and maintenance."

In XII Op. Atty. Gen. 26–27 it was said:

"* * * A reading of the section referred to will disclose that the trustees have the power of expending moneys which have been appropriated by the county board for (a) construction and improvement of grounds and buildings, and (b) operation and maintenance of the institution."

It was held that a board of asylum trustees may use for the construction of a building only money appropriated by the county board for that purpose. This opinion was reaffirmed in XX Op. Atty. Gen. 130. I will also refer you to the last sentence in subsec. (6), sec. 46.18 which reads:

"* * * All receipts on account of said institution shall be paid into the county treasury by the superintendent of the institution within one week after receipt."

The money received from the insurance company belongs to the county and must be appropriated by the county board for construction if it is intended to use the same for such purpose.

JEF

Corporations—Dissolution—To dissolve stock corporation two-thirds of all stock entitled to vote is required and to dissolve nonstock corporation one-half of all members entitled to vote.

September 28, 1933.

THEODORE DAMMANN,
Secretary of State.

With your letter of September 11 you enclose a letter from H. J. Mellum of the Nash Motors Company, Kenosha, acting for the Ra-Nash-A Club together with resolutions adopted by the members and officers of this nonstock, nonprofit-sharing organization. It appears from said letter that at the meeting for dissolution 530 members out of a total number of 983 were present and voting; that 354 voted in favor of the resolution and 176 against. You ask to be advised if in our opinion this vote of 354 members in favor of the dissolution is sufficient to comply with the provisions of sec. 181.03, Stats.

Said section so far as here pertinent, reads thus:

"Any corporation may dissolve by the adoption of a written resolution to that effect, at a meeting of its members called for that purpose, by a vote of two-thirds of the stock, entitled to vote, in the case of stock corporations, and of one-half the members in other corporations; * * *."

The statute providing for the amending of articles, sec. 180.07, subsec. (1), reads in part as follows:

"Any corporation organized for any of the purposes authorized by this chapter, may, by a vote of two-thirds of all the stock outstanding, and entitled to vote, or one-half of the members of a corporation without stock, unless a greater vote shall be required in its articles, amend its articles so as to modify or enlarge its business or purposes, * * *."

We interpret the words "by a vote of two-thirds of all the stock outstanding, and entitled to vote," to mean that you will have to have two-thirds of the number of votes entitled to vote in favor of it in case of a stock corporation and in case of a nonstock corporation by a majority of all the members entitled to vote. It does not mean a two-thirds

vote of those attending the meeting when you have a quorum present, nor does it mean in case of nonstock corporations a majority of those attending the meeting. In both cases it must be measured by the number of members who are entitled to vote. In case of stock corporations you will have to have two-thirds of such members voting for it and in case of nonstock corporations you will have to have one-half of all members voting in favor of it.
JEF

Banks and Banking—Public Deposits—Education—Vocational Education—Ch. 435, Laws 1933, amending public deposit law, does not grant any additional control to local boards of vocational education over vocational school moneys.

September 28, 1933.

GEO. P. HAMBRECHT, *Director,*
Board of Vocational Education.

You ask what further control the local board of vocational education is given over the disposition of vocational school funds under ch. 435 other than that specified in sec. 41.16, subsecs. (4), (5) and (6), Stats.

You quote sec. 41.16, Stats.:

"(4) Taxes for the purposes named in this section shall be in addition to all other taxes, and shall be for the use and support of the vocational schools.

"(5) The municipal treasurer shall keep such money separate from all other money. All moneys appropriated or otherwise provided for vocational education shall be expended by the local board of vocational education, and shall be paid by the town, village or city treasurer on orders issued by said local board and signed by its president and secretary.

"(6) All moneys received by said board shall be paid to the town, village or city treasurer and are appropriated to the vocational education fund."

The answer to the question is that no further control is granted. Said ch. 435 amends the public deposits law in

numerous respects, but does not amend the above quoted provisions of sec. 41.16. A careful examination of ch. 435 reveals that it does not grant any additional control to local boards of vocational education over vocational school moneys.

JEF

School Districts—Compulsory Education—Transportation of School Children—School district has not suspended school under sec. 40.34, subsec. (2), Stats., where some school is operating in home district to which pupils may go.

Mandamus will not lie to compel school board to furnish transportation to school of another district.

Where children live more than two miles from school and district does not provide transportation, father may not be criminally prosecuted for failure to send children to school.

September 28, 1933.

CHARLES F. MORRIS,
District Attorney,
Washburn, Wisconsin.

The boundaries of the town of Drummond and the Drummond school district are coterminous. The Drummond school district board has suspended several rural grade schools but maintains a school teaching all common school grades and a complete high school course in the unincorporated village of Drummond. A farmer residing in the school district of Drummond, about fifteen miles from the school at the village of Drummond, wishes to send his two children to the school in the town of Barnes, located about four miles from his home. He refuses to transport the children himself and demands that the Drummond school district furnish such transportation. The school district of Drummond is unable to procure a contract for the transportation of said children at what it regards as a reasonable sum.

Under this set of facts you inquire whether the school district of Drummond is a "district which has suspended school" within the meaning of sec. 40.34 (2), Stats.

1933, so as to require the school district of Drummond to furnish transportation from the home of the children in question to the school in the town of Barnes, four miles away.

The Drummond school district cannot be compelled to furnish this transportation. By a suspension of school, within the meaning of sec. 40.34 (2), the legislature contemplated that no school to which children might go should be operating in the district, but that it would be necessary for those children who wish to attend school to do so outside of the home district. In the Drummond school district there is a school operating to which the children in question could go. The district, therefore, has not suspended school but has merely closed certain parts of its school system and has created a situation similar to that of a consolidated school district. Sec. 40.34 (2), therefore, does not apply to the present situation.

Since the Drummond school district has not suspended school within the meaning of sec. 40.34 (2), the problem of where and how this particular farmer's children shall go to school, if they do go, must be solved in the light of sec. 40.34 (1), as amended by ch. 494, Laws 1933, the pertinent part of which reads:

"* * * The board shall provide transportation to and from school for all school children residing in the district and over two and one-half miles from the schoolhouse, in case of a common school and four miles in case of a union high school. And if it fails to provide such transportation the parents may provide suitable transportation for their children, and shall be paid therefor by the district, at the rate of twenty cents per day for the first child and ten cents per day for each additional child transported; provided, the child shall have attended not less than one hundred and twenty days during the school year unless prevented by absence from the district; provided, further, that any child residing more than four miles from the school of his district may attend the school of another district, in which case the home district shall pay the tuition of such child. * * *"

In XXI Op. Atty. Gen. 325 it was held that the provisions of sec. 40.34 (1) were applicable to transportation to a school in another district. You inquire whether the

school board of Drummond may be compelled by mandamus to furnish transportation for the children to the school in the town of Barnes. Your question was answered in the negative in *Hein v. Luther*, 197 Wis. 88, 92, in the following language:

"* * * It does not follow that the plaintiff may maintain *mandamus* in the event that the school board does not provide transportation. The statute provides what shall be done in that event. It shall be furnished by the parents at the expense of the district. It may well be that the school board elected that the parents should provide transportation and that the district should pay therefore at the statutory rate rather than attempt to provide transportation itself. Where a statute prescribes a procedure, the procedure so prescribed is exclusive of any other remedy. * * *"

You also ask:

"May the father of the children be prosecuted in a criminal action for failure to send his own children to school in the event of the failure of the town of Drummond to provide transportation from his home to the school in the town of Barnes four miles distant which is the nearest school to the home?"

Your question must be answered in the negative unless transportation is offered to the home district school. Sec. 40.70 (1) (b), Stats. 1933, provides, among other exceptions to the compulsory school attendance law, that it does not apply "to any child who lives in the country and more than two miles from the schoolhouse in his district *and for whom no transportation is furnished by the district.*"

The children in question live more than two miles from the schoolhouse in their district, and the district has failed to furnish transportation. The situation is thus covered by the exception above quoted, and the father may elect to keep the children at home without subjecting himself to criminal prosecution.

JEF

School Districts—Compulsory Attendance — Transportation of School Children — Provisions as to attendance at school and transportation as contained in sec. 40.21, subsec. (6), sec. 40.34, subsec. (1) as amended by ch. 495, Laws 1933, and sec. 40.70, Stats., are not subject to any inconsistency and may be literally followed.

October 2, 1933.

JOHN CALLAHAN, *State Superintendent, Department of Public Instruction.*

With your letter of September 14 you have enclosed an inquiry from G. T. Longbotham, county superintendent of schools of Rock county. You request us to give you an official opinion upon the questions submitted by him.

Mr. Longbotham cites provisions of sec. 40.34, Stats., as amended by ch. 495, Laws 1933 and the provisions of sec. 40.70. He calls attention to the compulsory attendance law and he states that there is a conflict in these provisions; that in one case it says two and one-half miles from the school and in another case only two miles. He asks for an interpretation of these provisions.

Sec. 40.34 as amended by ch. 495, Laws 1933, reads:

"In case children of school age reside more than two miles from the schoolhouse in the home district, and one-half mile nearer another public school, and transportation is not provided by the home district, such children may attend the nearer school if the facilities for seating and instruction will permit. * * *"

Then it is provided that his home district must pay the tuition.

Sec. 40.34 as amended by ch. 495, Laws 1933, reads:

"(1) The school district meeting may authorize the board to provide transportation for all the children of school age residing in the district. The board of every consolidated school district or district which has voted to close its school and provide tuition and transportation shall provide transportation to and from school for all school children residing in the district and over two miles from the schoolhouse. The board shall provide transportation to and from the school for all school children residing in the district

and over two and one-half miles from the schoolhouse, in case of a common school * * *."

Then it provides that if they do not do so the parents may provide such transportation and receive pay for it. See a further amendment of this section by ch. 494, Laws 1933.

Sec. 40.70, Stats., provides for compulsory attendance at school and then states that the provision shall not apply "to any child who lives in the country and more than two miles from the schoolhouse in his district, and for whom no transportation is furnished by the district." There seems to be no inconsistent provisions in these various laws. You will note that in sec. 40.34, the school board is authorized to provide transportation for all children residing in the district. This is optional where the word "may" is used. When it is a consolidated district or when the district has voted the school closed and transportation provided the children, then there is a mandatory provision that they must furnish transportation to and from school for all children residing in the district and over two miles from the school. There is a further mandatory provision that the district school board shall provide transportation to and from school for all school children residing in the district and over two and one-half miles from the schoolhouse, and if they do not so furnish it, the parents may provide for such transportation. They have another option: if they reside more than two miles from the district and one-half mile nearer another public school, they may attend such other school and the home district is required to pay tuition.

There is no inconsistency in these various provisions. They apply to different situations and may be complied with when literally followed.

JEF

Elections—Registration—Certificate "directing that such elector be permitted to cast his ballot," issued to nonregistered elector under sec. 6.44, Stats., as amended by ch. 433, Laws 1933, does not suspend right to challenge his vote under sec. 6.50.

Vote of nonregistered elector may not be received if he fails to deliver such certificate to election inspectors, even though, if challenged, he answers questions and subscribes to oath prescribed by sec. 6.53.

Under subsec. (2), sec. 6.44 and subsec. (8), sec. 6.17 as amended by ch. 433, Laws 1933, nonregistered elector must appear before his municipal clerk in connection with application to vote by affidavit and must fill out registration card before being entitled to certificate.

Certificate issued to absent nonregistered elector voting by mail may be delivered to election inspectors by freeholders whose names appear on corroborating affidavit, under subsec. (2), sec. 11.54.

October 2, 1933.

THEODORE DAMMANN,
Secretary of State.

You call attention to the provisions of sec. 6.44, Stats. 1931, and also as amended by ch. 433, Laws 1933, and you inquire as to the effect of the amendment in certain respects.

Sec. 6.44, Stats. 1931, provides to the effect that a *non*-registered elector, in order to be entitled to vote at an election, shall at the time he offers his ballot, deliver to the inspectors his affidavit containing certain statements, substantiated by the affidavit of two freeholders, electors in such precinct.

The amendment made by ch. 433, Laws 1933, changes sec. 6.44 so as to provide that a nonregistered elector may, at any time after the close of registration, deliver the required affidavits to the municipal clerk; that, upon the filing of the affidavits such election official shall issue a *certificate* addressed to the inspectors of the proper precinct, "directing that such elector be permitted to cast his ballot"; and that such nonregistered elector shall, at the time he requests his ballot, deliver such *certificate* to the inspectors.

1. The first question presented is whether the certificate "directing that such elector be permitted to cast his ballot" suspends the operation of sec. 6.50, Stats., which provides to the effect that each inspector shall, and any elector may, challenge every person offering to vote whom he shall know or suspect "not to be duly qualified as an elector."

Question 1 is answered, No.

The certificate "directing that such elector be permitted to cast his ballot" is intended merely as proof that such person has filed the required affidavits with the municipal clerk, and is not intended to settle such person's qualifications as an elector. Such a certificate, therefore, in no way affects the operation or effect of sec. 6.50.

2. The second question presented is: If a nonregistered elector comes to the polls without a certificate issued under sec. 6.44, may he nevertheless "swear in" his vote as provided in sec. 6.53?

Question 2 is answered, No.

Sec. 6.53 provides to the effect that if a challenge made under sec. 6.50 be not withdrawn after the person offering to vote shall have answered the questions prescribed by sec. 6.50, one of the inspectors shall then tender to him an oath therein prescribed, and if he shall then take such oath "his vote shall be received; *provided, that the requirements of law respecting registration, when applicable, have been complied with by such person.*"

The meaning of the above quoted proviso is plain and unequivocal. It prohibits receiving the vote of a person who has failed to comply with the requirements of law respecting registration, the words "when applicable," merely limiting such prohibition to cases arising in municipalities to which the registration law applies.

Under sec. 6.44, a nonregistered elector may vote at an election "upon compliance with" the provisions of that section "and not otherwise," and one of the provisions is that he shall at the time he requests his ballot deliver to the inspectors the certificate prescribed by such section.

The conclusion, therefore, must be that the vote of a nonregistered elector, in a municipality to which the registration law applies, may not be received if he fails to deliver

the required certificate, even though as a challenged voter he answers the questions and takes the oath under sec. 6.53.

The proviso contained in sec. 6.53 and the requirements contained in sec. 6.44 are, without any doubt, valid regulations. Similar provisions in earlier laws have been held to be mandatory, to be reasonable, and to be consistent with the present right to vote as secured by the constitution. *State ex rel. O'Neill v. Trask,* 135 Wis. 333, 337–339. See also *State ex rel. Symmonds v. Barnett,* 182 Wis. 114, 127.

It has been uniformly held that a vote tendered by a challenged voter who answers the statutory questions and takes the required oath must be received by the election inspectors, although such procedure is not conclusive on his right to vote. *Gillespie v. Palmer,* 20 Wis. 544; IV Op. Atty. Gen. 253; XVI Op. Atty. Gen. 745; XXI Op. Atty. Gen. 429; but in none of those cases was the failure to comply with the requirements of the registration law involved, and, therefore, those cases have no bearing here.

3. The third question presented is: Does sec. 6.44, as amended by ch. 433, Laws 1933, suspend the privilege granted to an *absent* nonregistered elector to swear in his vote under subsec. (2), sec. 11.54?

Question 3 is answered, No.

Secs. 11.54 to 11.68 provide for mail voting by absent electors, including sick and disabled electors. The absent elector's application is made to the municipal clerk and his ballot is mailed in a sealed envelope to the municipal clerk, who delivers the same to the election inspectors, who open the envelope and deposit the ballot in the ballot box. With respect to an absent *nonregistered* elector, subsec. (2), sec. 11.54 (which was not amended by the legislature of 1933) provides to the effect that he "* * * may swear in his vote by his affidavit, substantiated by the affidavit of two freeholders, as provided in section 6.44, except that the affidavit may be delivered to the election inspectors by either freeholder whose name appears thereon."

While subsec. (2), sec. 11.54 still speaks of delivery of the *affidavit* to the election inspectors, whereas sec. 6.44, as amended, requires that the affidavit be filed with the municipal clerk and that the *certificate* thereon be delivered to

the election inspectors, yet the obvious intent of subsec. (2), sec. 11.54 is that an absent nonregistered elector shall be permitted to swear in his mail vote by the same *proof* as is required by sec. 6.44. The required proof is now, in part, the *certificate*. Subsec. (2), sec. 11.54 should, therefore, be construed as permitting the certificate issued under sec. 6.44 to be delivered to the election inspectors by either freeholder whose name appears on the corroborating affidavit. Such a construction is in harmony with the obvious purpose of subsec. (2), sec. 11.54 and does no violence to its language, and such a construction does not offend against any of the provisions of sec. 6.44, as amended.

4. In connection with question 3, you also ask whether an absent nonregistered elector, for example, one who is working outside the state, must come back to his home municipality in order to execute his affidavit and obtain the certificate under sec. 6.44, as amended.

Question 4 is answered by reference to subsecs. (2) and (3), sec. 6.44, as amended, and subsec. (8), sec. 6.17, as amended. See ch. 433, Laws 1933.

It will be noted that subsec. (2), sec. 6.44, as amended, requires that "such affidavit shall be signed in the presence of" the municipal clerk. However, the words "such affidavit" and "such affidavits," considering their position in said subsection, appear strictly to refer only to the corroborating affidavits of the two freeholders and not to the affidavit of the nonregistered elector, and therefore, to require only that the corroborating affidavits of the two freeholders be signed in the presence of the municipal clerk. However, the requirement in subsec. (8), sec. 6.17, as amended, that a registration card shall be delivered to each elector making application to vote by affidavit, who shall fill out such card and submit the same to the municipal clerk before a certificate is supplied, plainly requires that such nonregistered elector personally appear before the clerk for that purpose. The practical result is, therefore, that a nonregistered elector is now required to personally appear before his municipal clerk in connection with his application to vote by affidavit and in order to obtain the certificate issued thereon.

The conclusions under 3 and 4 hereof seem to produce a rather incongruous result, in that, while a nonregistered elector who expects to be absent at election time and to vote by mail may swear in his mail vote by delivery of his certificate through a freeholder whose name appears on his affidavit, nevertheless, such nonregistered elector must, in order to obtain the certificate, personally appear before his municipal clerk. A nonregistered elector, who is working outside the state or in the state at some distance from his home municipality may find it difficult, if not impossible, to return to his home municipality for such purpose. However, if the result is incongruous, it is the fault of the statutes and the remedy, if any, lies with the legislature.

Furthermore, the result is not as harsh as it may seem, as subsec. (5), sec. 6.17 provides for regular registration by mail by an absent elector who is more than fifty miles from his legal residence, up to within ten days next preceding the election. One who registers in that manner may vote by mail without any affidavit.

JEF

Public Health—Dentistry—Under rules and regulations adopted by Wisconsin state board of dental examiners dentist is not permitted to use words "successor to" in connection with name of former dentist and his own name. Neither may he retain sign of former dentist on office building or about office longer than six months nor use it in advertising or listing in telephone directory.

October 2, 1933.

DR. S. F. DONOVAN, *Secretary,*
Board of Dental Examiners,
Tomah, Wisconsin.

You have submitted the following question:

"Can a dentist use the following words 'successor to'?"

You state that Drs. A and B were in partnership. Dr. A died and Dr. B continues to use the name of Dr. A. He also carries Dr. A's name in the telephone directory. The

board holds that using the name of Dr. A is misleading advertising.

Sec. 152.01 subsec. (7), Stats., as enacted by ch. 189, Laws 1933, gives the board the right to make rules, by-laws and regulations in the following language:

"The board shall make such reasonable rules, by-laws and regulations as it may deem necessary for the proper and better guidance, government, discipline and regulations of the board and of licensed dentists and dental hygienists or persons acting as such pertaining to immoral or unprofessional conduct and unprofessional advertising as hereinafter defined in subsections (5) and (6) of section 152.06; and such by-laws, regulations and rules shall be published for two successive weeks in the official state paper and shall not take effect until so published."

On August 3, 1932, the Wisconsin state board of dental examiners adopted rules and regulations under the above statute, and among them we find the following, which is here pertinent:

"It is the opinion of the Board that the following constitutes a violation of 152.06 (6) (a) which provides as unprofessional advertising, 'Any advertising statements of a character tending to deceive or mislead the public.'

"(c) The retention in or about the office or building for a period of longer than six (6) months of a sign or signs of a former dentist, owner or occupant or of the use of the name of said former dentist in any form of advertising or listing.

"(d) Signs of dentists used in any other place except on the premises of the building in which the office is located."

It appears by the above statute that the board is authorized to make the rules and regulations above copied, that the reputation and skill of a former dentist who is deceased or has ceased his professional work in a certain locality may be capitalized by the use of his name by another dentist with less skill and no reputation is certainly something that the board may regulate in the manner that it has been done here. It would seem that the regulation is reasonable and tending to prevent deception of the public. To use the words "successors to" in connection with a former dentist is a form of advertising which, it would seem, is prohibited by the regulation designated (c) and above quoted.

JEF

Indigent, Insane, etc. — Transient Paupers — One who moved into Wisconsin from Minnesota and has lived here for over a year but has been supported during all that time by municipality in which he lived has not acquired legal settlement and must be supported as transient pauper under sec. 49.03, Stats.

October 2, 1933.

JOHN W. KELLEY,
District Attorney,
Rhinelander, Wisconsin.

You enclose in your letter of September 15 an affidavit of one A. The question is: Who is liable for the support of this party? It appears in the affidavit that this man came from Minnesota on August 26, 1932. He has lived in various places in your county and has been supported by the public authorities so that he did not acquire a legal settlement in any place in your county. He had formerly lived in Wisconsin but moved away and had been absent for eleven years when he returned. You ask whether there is any way you can send this man to Minnesota.

There is no provision made in the law for returning this man to Minnesota, neither do I know of any reciprocity with the state officials of the two states. As he has formerly lived in Wisconsin, it probably could be shown that he was supported also in Minnesota, for the affidavit states that he came from Olmstead county, where he had been an inmate of the Olmstead county home for a little over a year. He comes under sec. 49.03, Stats., which requires your county to furnish him relief as a transient pauper.
JEF

Constitutional Law — Counties — County Board of Commissioners — Legislature may constitutionally amend sec. 59.95, Stats., by ch. 472, Laws 1933, so as to redistrict county without referendum and may change compensation and term of office of present county commissioners.

October 2, 1933.

CLIVE J. STRANG,
District Attorney,
Grantsburg, Wisconsin.

Burnett county was reorganized under the provisions of sec. 59.95, Wis. Stats., thereby establishing a county commission form of government. The recent legislature enacted ch. 472, Laws 1933, which materially changed several of the provisions of sec. 59.95, Stats. 1931. In counties having the population of Burnett county the number of commissioners was changed from three to four district commissioners and a commissioner at large was added. The new law also reduced the salary of the commissioners and shortened or terminated the term of office of the commissioners. Under this state of facts you inquire the opinion of this department as to the legality of the new law as a whole, but more particularly you ask:

"Can the legislature change this law [sec. 59.95, Stats.] and create four districts without submitting the question to the people for a referendum vote?"

This question must be answered in the affirmative.

"As counties are but subdivisions of the state, created by the legislature for political and civil purposes as agencies of the state government, they are entirely subject to legislative control, except so far as restricted by the constitution of the state. The legislature need not submit an act relating to county affairs to the voters of the county for approval, unless required by constitutional provision, * * *." 15 C. J. sec. 53, p. 420.

It is true that sec. 59.95, Stats., provided for a referendum to the people of a county to determine whether or not they wished to reorganize under its provisions. But this was not constitutionally necessary; it was a mere privilege extended by the legislature. The legislature could have pro-

vided in sec. 59.95 that all counties must reorganize under its provisions and the act would have been constitutional. Because the privilege of referendum was extended under sec. 59.95 is no reason why the legislature would be compelled to submit the amendment of sec. 59.95 by ch. 472, Laws 1933, to the voters of the county. When the people of Burnett county voted to reorganize their county government under sec. 59.95 they elected to set up a form of government, which, like every other county government, was subject to legislative change.

You also ask:

"Can the salary of those commissioners already in office be reduced and can their term be terminated as contemplated here [ch. 472, Laws 1933] before their original term is finished?"

Again, the answer is yes.

The State ex rel. Ewing v. Bell, 116 Ind. 1, 4, provides:

"The office of county commissioner is not provided for, nor is its term prescribed by, the Constitution. * * * It is, therefore, competent for the Legislature to enlarge, abridge, or otherwise change the term of that office, whether temporarily or permanently, as well as to abolish the office entirely, if it shall be deemed expedient to do so."

The same principle holds true in Wisconsin. Art. VI, sec. 4, Const., reads in part:

"Sheriffs, coroners, registers of deeds, district attorneys, and all other county officers, except judicial officers, shall be chosen by the electors of the respective counties once in every two years. * * *."

State ex rel. Williams v. Samuelson, 131 Wis. 499, holds that the term "all other county officers" in art. VI, sec. 4, quoted above, means the heads of the several major divisions of county government existing at the time the section was adopted (1882), and does not take away the legislative power mentioned in art. XIII, sec. 9:

"All county officers whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties, or appointed by the boards of supervisors, or other county authorities, *as the legislature shall direct.* * * *."

As to the change in salary of the commissioners, art. IV, sec. 26, Wis. Const., provides:

"The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office."

State ex rel. Sommer v. Erickson, 120 Wis. 435, 442, provides:

"* * * True, the constitution provides that the compensation of no public officer shall 'be increased or diminished during his term of office.' * * * But it was held many years ago that such provision 'only applies to officers who receive a fixed salary from the public treasury of the state.' "

See also, *Sieb v. City of Racine,* 176 Wis. 617.

15 C. J. sec. 164, p. 500, provides:

"* * * In the absence of constitutional prohibition, the legislature may, at its option, increase or decrease the compensation of a county officer, or it may attach additional duties to the office without increasing the compensation. * * *."

From the above it is clear that the legislature may change the compensation of commissioners already in office.

You point out that ch. 472 places the duty of redistricting the county by December 1, 1933, on the commissioners, but no arrangement is made therein as to procedure if they fail to act. In the original law if the commissioners did not district the county by a certain time, the duty of districting then fell upon the county clerk, treasurer, and district attorney. You ask whether the duty of redistricting is carried by implication to the above three officers in case the commissioners fail to redistrict. There can be no such implication. In the one instance the three officers are specifically designated, in the other the statute provides no alternative for action by the commissioners. If the commissioners fail to act under ch. 472, Laws 1933, mandamus will lie to compel them to redistrict the county.

JEF

Public Health—Basic Science Law—Chiropractor practicing in Winona, Minnesota, is not permitted to practice in Wisconsin without certificate from Wisconsin state board of examiners in chiropractic.

Attorney general's department has no information on reciprocity with Minnesota entered into under sec. 147.08, Stats.

October 2, 1933.

A. T. WEEK, *Secretary,*
Board of Examiners in Chiropractic,
Madison, Wisconsin.

You state you have a letter from a chiropractor practicing at Winona, Minnesota. He receives calls from Wisconsin territory and would like to know if he has legal rights to answer such calls without a Wisconsin license. He would also like to know if there is reciprocity between the Minnesota basic science board and the Wisconsin basic science board.

In order to treat the sick as a chiropractor it is necessary to have a certificate of registration in the basic sciences under ch. 147, Wis. Stats. Without such certificate no one can practice as a chiropractor in Wisconsin. The exceptions are given in sec. 147.19 as not applying to "commissioned surgeons of the army, navy, federal health service, or to medical or osteopathic physicians of other states or countries in actual consultation with resident licensed practitioners of this state, nor to the gratuitous prescribing and administering of family remedies or treatment rendered in an emergency." Neither does it apply to the practice of Christian Science or to persons who administer to or treat the sick or suffering by mental or spiritual means. The chiropractor at Winona does not come within any of these exceptions and therefore cannot practice in Wisconsin.

Under sec. 147.08, Stats., it is provided:

"The board may issue certificate to an applicant who presents sufficient and satisfactory evidence of having passed examinations in the basic sciences before a legal examining board or officer of another state, or of a foreign country, if the standards are as high as those of this state, and upon payment of a fee of fifteen dollars."

As to whether there is any reciprocity under this section with Minnesota, we are not informed, but refer you to Robert Bauer, secretary, 3414 West Wisconsin Avenue, Milwaukee, Wisconsin.
JEF

Charitable and Penal Institutions—Indigent, Insane, etc. —Northern Wisconsin Colony and Training School—Board of control may accept bequest to Northern Wisconsin colony and training school and use same for best interests of institution.

October 3, 1933.

A. W. BAYLEY, *Secretary,*
Board of Control.

Some time ago one A., died testate. By paragraph four of his will the sum of five hundred dollars was bequeathed "To the Northern Wisconsin colony and training school." You inquire what disposition should be made of this five hundred dollars.

From approximately July 2, 1924 to July 24, 1929 the testator had a granddaughter who was an inmate of the Northern Wisconsin colony and training school. She died at the latter institution some time in 1931. Testator's will was dated August 24, 1925. By various other provisions of the will a trust estate was created for the benefit of the granddaughter upon the condition that she should be mentally competent to administer her own affairs within the stated period of time. The trust *res* was quite substantial and in all probability sufficient to support the granddaughter if the conditions were such that she could avail herself of it. The terms of the will did not specify in any manner whatsoever what disposition was to be made of the five hundred dollars bequeathed to the Northern Wisconsin colony and training school. Although the will was made in 1925, testator presumably realized that its provisions would be operative after his death, in so far as circumstances would permit. The bequest to the Northern Wisconsin colony and

training school is clear and unambiguous. It is not qualified by any language which would constitute a bequest for the inmates of the institution rather than for the benefit of the institution itself. In the absence of some ambiguity there is no room for construction. 40 Cyc. pages 1441 to 1442. None of the heirs or relatives has been able to furnish any enlightenment concerning the intention of the testator in this matter. Although the executor was not appointed by the testator as an umpire for the purpose of construing the will, it is his opinion that the proper authorities may use this bequest "for the best interests of the institution, to which it was given."

The Northern Wisconsin colony and training school is a state institution, subject to the jurisdiction of the state board of control. By sec. 46.03, subsec. (3), Stats., it is provided that the said board shall

"Take and hold in trust, whenever the board may deem the acceptance thereof advantageous, all property, real or personal, transferred in any manner to the state to be applied to any specified purpose, use or benefit pertaining to any of said institutions or the inmates thereof, and apply the same in accordance with the trust."

Under this section of the statutes it is our opinion that the state board of control may accept the five hundred dollars bequeathed to the Northern Wisconsin colony and training school and should use the same for the best interests and general purposes of the institution instead of placing the money in the fund created for the inmates themselves.
JEF

Accountancy—Taxation—Income taxes—Public accountant who furnishes copies of income tax returns for compensation violates law.

Receipt of compensation is essential to violation.

October 3, 1933.

BOARD OF ACCOUNTANCY,
Madison, Wisconsin.
Attention A. W. Kimball, *Vice President.*

You ask whether a continuation of service furnished by a public accountant for compensation to a client out of the city consisting of various kinds of information from departments of the state government, including copies of income tax returns, constitutes a violation of ch. 449, Laws 1933; if it does constitute such violation, whether it would still be a violation to furnish copies of income tax returns as an accommodation only, with the specification that no charge is made.

Ch. 449, Laws 1933, creates sec. 71.20, Stats., reading as follows:

"No person shall divulge or circulate for revenue or offer to obtain, divulge, or circulate for compensation any information derived from an income tax return; provided, that this shall not be construed to prohibit publication by any newspaper of information derived from income tax returns for purposes of argument nor to prohibit any public speaker from referring to such information in any address. * * *"

A penalty provision follows the above quotation.

The above section is entitled: "Circulation for revenue of information from income tax returns." The practice engaged in by the public accountant referred to above is clearly a violation of sec. 71.20, as it consists of furnishing, for compensation, information obtained from an income tax return, that information being a copy of the income tax return taken from the original. When such information is furnished for compensation it is a violation of the law.

It will be seen from an examination of sec. 71.20 that the circulation of such information is a violation only when done for revenue or for compensation. If this information is

actually furnished clients without charge, there is no violation of this law. The furnishing of this information gratis must be bona fide, however, and not for the purpose of circumventing the statute.
JEF

Courts—Justice of Peace—Under sec. 307.01, Stats., 1931, justice of peace may not charge for testimony not taken by himself or his reporter.

October 3, 1933.

CHARLTON H. JAMES,
District Attorney,
Dodgeville, Wisconsin.

Sec. 307.01, Stats. 1931, provides:

"Justices of the peace may be allowed to receive the following fees and may tax the same in all cases when applicable, and all fees of said justices in the progress of a cause shall be taxed in the judgment in favor of the party who recovers judgment:
"* * *
"For taking an examination, testimony or for any writing done in a cause, twelve cents per folio."

This provision of the statutes was altered by ch. 460, Laws 1933, but inasmuch as certain claims have been presented to the county board under the old law, you are desirous of an interpretation of this section as found in the 1931 statutes.

In a number of criminal cases you have felt it advisable as a district attorney to have a reporter present to take down accurately all of the testimony taken at a preliminary examination. This reporter has been secured by yourself, and her fees have been paid by the county. The question arises whether the justice of the peace before whom a preliminary examination was held is also entitled to charge twelve cents per folio for the testimony taken by the above mentioned reporter.

Quite obviously, if the justice of the peace be permitted to charge twelve cents per folio for this testimony, the

result will be a double charge upon the county. It may be argued, on the other hand, that the twelve cents per folio which the justice may charge, was intended as compensation for time as well as for his actual work as scrivener and that he would not be compensated in the present case if he were not permitted to make the folio charge. It is our opinion, however, that the statute contemplates that the justice may receive twelve cents per folio only in those cases where the testimony or other writing is done by himself or under his direction. The statute probably contemplates that where the district attorney desires that the testimony be taken verbatim, it should be done by a reporter secured and paid by the justice of the peace where the justice cannot properly take it down himself. In such case the justice would be permitted to make the folio charge of twelve cents and reimburse the reporter himself. In the present instance, therefore, where the testimony was taken solely by a reporter, secured and compensated by the county, the justice of the peace may not make the folio charge of twelve cents.

JEF

Public Officers — Town Health Officer — Oath — Town health officer is not required to file oath.

October 3, 1933.

JOHN G. TARAS,
District Attorney,
Portage, Wisconsin.

You ask whether a health officer appointed in a certain town is required to file an official oath.

A health officer appointed in a town is not required to file an official oath.

Sec. 19.01, subsec. (4), par. (e), Stats., provides in part:

"In the office of any town clerk: Of all officers elected or appointed in and for such town * * *."

This statute has been mistaken to mean that all officers of the town, elected or appointed, must file an oath or bond. See XIII Op. Atty. Gen. 332, 333.

Subsec. (7), sec. 19.01 provides in part:

"This section shall not be construed as requiring any particular officer to furnish or file either an official oath or an official bond. It is applicable to such officers only as are elsewhere in these statutes or by the constitution [art. IV, sec. 28] required to furnish such an oath or bond. * * *."

It follows therefore that sec. 19.01, subsec. (4), par. (e), does not make it mandatory that a town officer file an oath. Unless some provision in the statutes or constitution requires the filing of an oath by a town officer, no such oath need be filed. Nowhere in ch. 141, Stats., relating to health officers is such a provision found, and there is no requirement in ch. 60, relating to towns, that a town health officer file an oath. The legislature may exempt a town officer from filing an oath. See *The State v. Hogue*, 71 Wis. 384, where it was held that a road commissioner, although an officer, was not required to file an oath, inasmuch as the act creating his office was silent as to the filing of an oath.

JEF

Automobiles—Taxation—Motor Vehicle Fuel Tax—Under ch. 78, Stats., gasoline, benzine, naphtha, etc., which at time of receipt and unloading in this state is capable of being used as motor fuel without any mixture or change is subject to motor fuel tax of four cents per gallon; but if such gasoline, benzine, etc., is not capable of being used as motor fuel at time of receipt and unloading within state, then it is not subject to motor fuel tax until blended.

October 5, 1933.

ROBERT K. HENRY,
State Treasurer.

You request an official opinion upon the following statement of facts:

The D— Refining Company imports into this state gasoline and naphtha usable as motor fuel in the condition in which it is received in the state.

The company claims that it then runs the gasoline and naphtha into mixing tanks, producing a compound or blend which is sold as motor fuel. The company then pays the motor fuel tax only on the product taken from the mixing tank, thus escaping taxation on large amounts of gasoline until the time it is compounded in the blending tanks.

You ask whether the company is required to pay the motor fuel tax at the time the gasoline and naphtha are imported into the state, in such a condition that they can be used as motor fuel, or whether it may be required to pay only after the gasoline and naphtha are blended or compounded into another motor fuel.

It is the opinion of this department that gasoline or naphtha received and unloaded in this state in such a condition that it may be used at once as motor fuel without any mixture or change, is subject to the motor fuel tax of four cents per gallon as provided by ch. 78, Stats. However, gasoline or naphtha received and unloaded in this state which at the time of receipt and unloading is not capable of being used as a motor fuel, is not subject to the motor fuel tax of four cents per gallon until it has been blended so as to be capable of use as a motor fuel.

JEF

Prisons—Prisoners—Neither board of control nor governor has power to transfer inmates from Waupun to Milwaukee house of correction.

October 5, 1933.

THEODORE G. LEWIS,
Executive Secretary.

You have submitted the following question:

"Can the board of control or the governor legally transfer inmates from Waupun to the Milwaukee house of correction, assuming such inmates were originally sentenced from Milwaukee county?"

The transfer of prisoners from one institution to another is regulated by statute, and unless there is a statute au-

thorizing it either expressly or by necessary implication, it cannot be done. While the transfer of a person from the Milwaukee house of correction to the state prison is authorized, there is no authorization in the statute for transferring a prisoner from the state prison to the Milwaukee house of correction. Your question is therefore answered in the negative. Sec. 56.18, subsec. (4), Stats.
JEF

Municipal Corporations — Beer Licenses — Under sec. 66.05, subsec. (10), Stats., brewer may not lend money to person holding Class B license if money is to be used for purchase of tavern fixtures or equipment; however, brewer may lend money to Class B licensee for general purposes but he does so at his peril and it is no defense for him to say he did not know money so lent was used for license fees, taxes or fixtures.

Where facts show no subterfuge or attempt to evade law, bona fide fixture corporation may furnish or lease fixtures or lend money to Class B licensee, even though stockholders of brewery also own stock in such fixture corporation, but such loan of money may not be accompanied by exclusive beer purchase agreement.

Brewer may not guarantee payment of bill for fixtures to manufacturer who furnishes same to Class B licensee.

Brewer may not sell either for cash or credit fixtures, furnishings or equipment to Class B licensee for use in place operated by such licensee.

October 5, 1933.

N. H. RODEN,
District Attorney,
Port Washington, Wisconsin.

You state that you are informed that certain brewery interests in the state of Wisconsin are engaged in practices which would seem to be in violation of ch. 207, Laws 1933. You therefore request my opinion on several questions on such practices.

1. (a). It is the opinion of this department that if a brewer lends money to a person holding a Class B retailers' license and knows that the money so lent is to be used for the purchase of fixtures or equipment to be used in the place of the licensee so holding a Class B license, such loan would be in violation of ch. 207, Laws 1933.

Sec. 66.05, subsec. (10), subd. (c), Wisconsin statutes, as created by ch. 207, Laws 1933, prohibits (1) brewers or corporations a majority of whose stock is owned by a brewer (a) from supplying, furnishing, leasing, giving or paying for any furniture, fixtures or equipment; and, (b) taking any chattel mortgage upon the same. (2) This section also prohibits brewers from (a) advancing, paying or furnishing money for any license fees or taxes, or (b) otherwise being financially interested, either directly or indirectly, in any Class B license.

It will be noted that the prohibition in this section of the statutes against furnishing money is limited to a brewer, bottler or wholesaler and does not contain the prohibition against a corporation a majority of whose stock is not owned by a brewer.

The term "brewer" is defined, in sec. 66.05 (10) (a) 1, as meaning a person, firm or corporation who shall manufacture fermented malt beverages or light wines for the purpose of sale, barter, exchange or transportation.

The right to engage in business is a right guaranteed by the constitution of this state and of the United States and cannot be restricted or barred except as the legislature may specifically so provide under the police power of the state on the grounds that the business so regulated, prohibited or barred may be inimical to the general public welfare. The prohibitions or limitations contained in a statute regulating a business must be limited to those specifically prohibited by the language of the statute and prohibitions not found in the statute cannot be engrafted thereon by construction. Neither should the prohibitions of the statute be evaded by a subterfuge.

It is manifest that what the Wisconsin legislature endeavored to correct by sec. 66.05 (10), Stats. 1933, was what, in the legislative mind, was one of the evils of the pre-prohibition days, namely, the brewery owned and con-

trolled saloon. To accomplish this purpose, that is, to eliminate the brewery owned and controlled saloon, the legislature adopted the prohibitions above referred to. These prohibitions are limited to the brewer, bottler and wholesaler and in the case of fixtures to a corporation a majority of whose stock is owned by a brewer, bottler or wholesaler. Sec. 66.05 (10) (c) does not by its terms bar a corporation the majority of whose stock is not held by the brewer, as defined in that statute. Neither does it bar a corporation whose stock may be held by the identical stockholders of the brewer. There is no prohibition against an individual doing any of the prohibited acts unless that individual be a brewer, bottler or wholesaler.

It may well be contended that the court would construe the term "brewer" as including the active officers of a corporation engaged in the brewery business. In a case where the brewer is a corporation, a stockholder of such corporation individually who is not an officer or who is not actively engaged in the brewery business might perform any of the prohibited acts and still be within the letter and spirit of the law. The statute does not contain a prohibition against a stockholder, director or officer of a corporation.

The second prohibition above referred to relates to the lending of money by a brewer, bottler or wholesaler and limits the prohibition as to such lending for the purpose of paying license fees or taxes. It then prohibits such brewer, bottler, or wholesaler from being otherwise financially interested, either directly or indirectly, in any Class B license. This language is very broad and the insertion of the words "directly or indirectly," clearly indicates the legislative intent, to separate the brewer, bottler or wholesaler from any possible financial interest in a place or business operated under a Class B license. It should be noted that this prohibition is more limited in scope and as to the classes barred than the first prohibition as to fixtures and that it does not embrace anyone other than the brewer, bottler or wholesaler. The statute contains no prohibition against a brewer lending money generally to those not owning a Class B license. We must, therefore, conclude that the statute intended to and does bar a brewer from lending money to an individual who happens to be a holder of a

Class B license if the money so lent is to be used for license fees or taxes on a place to be used in connection with the purchase of fixtures, supplies, equipment, or the like on the premises operated under a Class B license. On the other hand, if the brewer wishes to lend money to an individual who happens to hold a Class B license for the purpose of building a home, buying an automobile or a race horse, there is no prohibition in the statute against such a loan. It is our conclusion, therefore, that brewers may lend money to a person holding a Class B license if the money is not to be used for the payment of taxes or license fees or for fixtures, supplies or equipment to be used in or about the place requiring a Class B license.

You are, therefore, advised that your question 1 (a) must be answered "No" and your question 1 (b) must be answered "Yes" with, however, the qualification that the brewer so lending money to a holder of a Class B license does so at his peril and that such a brewer cannot shut his eyes to the facts that are objective, and it is no defense for a brewer to say that he did not know that the money he lent to the holder of a Class B license was to be used in or about the premises requiring a Class B license if, in fact, the money so lent was in fact used for license fees or taxes or was used in the setting up of a place requiring such a license. This will be particularly true in case the loan is accompanied by any agreement or understanding between the brewer and the licensee that beer sold by such a brewer will be exclusively sold upon the premises of the person to whom the loan is made.

2. With reference to your second question, on the right of stockholders of a brewery organized as a separate corporation to furnish or lease fixtures or equipment or to lend money to Class B licensees it will be noted that the prohibition contained in sec. 66.05 (10) (c) is applicable only to an individual corporation a majority of whose stock is owned by a brewer. Such individual corporation, a majority of whose stock is not owned by a brewer, can sell, lease or lend fixtures to a Class B licensee, but such sale, loan or lease cannot be accompanied by any agreement that a particular brand of beer must be sold as a partial consid-

eration for such sale or loan or lease. If such agreement is made it renders the whole transaction questionable and places the brewer, if he be directly or indirectly a party to the transaction, and particularly if the brewer has solicitated the licensee to allow the installation of fixtures in the business, in a position where such brewer will be deemed to be financially interested in the Class B premises. The court will look through the face of corporate entity, if necessary, to carry into effect the prohibition of the statute. Thus, where an owner manages his property through the medium of a corporate agency, the Wisconsin court has refused to recognize the fiction of separate corporate existence and has treated the act of the owner as the act of the corporation, and vice versa. *Bosanich v. Chicago R. Co.*, 173 Wis. 280, 283; *Milwaukee Toy Company v. Industrial Commission*, 203 Wis. 493, 495; *Wille v. State*, 207 Wis. 163, 167; *Minahan v. Timm*, 210 Wis. 689, 247 N. W. 321. If, however, a corporation is engaged legitimately in the furnishing of fixtures as a business, the mere fact that some stockholder of a brewery corporation is a stockholder in the fixture corporation would not render its business illegal. The corporation must, however, be a bona fide corporation and not a mere subterfuge employed by a brewer to evade the prohibition of the statute.

Brewers or their employees cannot solicit for such fixture corporation nor do any acts for or on behalf of such fixture corporation that they might not lawfully do for themselves. Thus, brewers, their officers or employees may not join in or become parties, either directly or indirectly, in any agreement restricting or limiting the sale of beer in the licensed premises to their own products in connection with the furnishing of fixtures or equipment or with the lending of money to such licensee.

It is our conclusion, therefore, that in answer to your second question, subject to the restrictions above referred to, the answer must in our opinion be to question 2 (a), "Yes"; to question 2 (b), "No," and to question 2 (c), "Yes."

3. From the foregoing discussion it is manifest that your question 3, both (a) and (b) must be answered in the

negative and you are, therefore, advised that a brewer cannot guarantee the payment of a bill for fixtures to a manufacturer who furnishes the same to a Class B licensee either in consideration for an exclusive sale of the brewer's beer or without any agreement as to sale.

4. Your fourth question presents the question of an ordinary sale of fixtures and equipment by a brewer to a holder of a Class B license. The statute uses the words "supply" and "furnish." It is our opinion that these words must be construed in the light of the evil which the legislature attempted to prohibit. It is manifest that what the legislature considered an evil of the pre-prohibition era was the brewery owned and brewery controlled saloon. The words "supply" and "furnish" are terms of broad import and include a sale as well as a gift of furnishings, fixtures or equipment.

It is our opinion, therefore, that a brewer may not make a sale of fixtures or equipment to a Class B licensee inasmuch as the statute above referred to, to wit, sec. 66.05 (10) (c), prohibits a brewer from supplying, furnishing, leasing, giving or paying for any furniture, fixtures or equipment to be used upon the premises of a place operated by the holder of a Class B license.

The Wisconsin supreme court has often said that in the construction of statutes the common, ordinary or approved meaning of words is to be regarded as the one intended unless inconsistent with the manifest legislative purpose. *Wadhams Oil Co. v. State,* 210 Wis. 448, 456; *Van Dyke v. Milwaukee,* 159 Wis. 460; *Northwestern Iron Co. v. Industrial Comm.,* 154 Wis. 97.

Moreover, the legislature itself has established rules for the construction of statutes, ch. 370, Stats. The first rule laid down is found in sec. 370.01 (1), Stats., and is as follows:

"All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning."

The word "supply" is defined to mean, "to furnish with what is required; provide; * * *." New Peerless Webster Dictionary.

The word "furnish" means "to supply with what is requisite; to fit out; to equip; * * *." New Peerless Webster Dictionary. See also: *Juneau v. Northland Elevator Co.*, 56 N. D. 223, 216 N. W. 562; *Foster Lumber Co. v. Sigma Chi*, 49 Ind. App. 528, 97 N. E. 801, 802.

It would seem that according to the common and approved usage of the words "supply" and "furnish," a sale, even though a bona fide sale and for an adequate consideration, whether cash or credit, would be within the purview of the act prohibiting brewers from supplying or furnishing fixtures or equipment to holders of a Class B license. The fact that such sales by brewers to Class B licensees are made independently of and do not involve in any way the purchase of malt beverages or light wines by the purchasers of such furnishings and equipment from the seller thereof, does not make such transaction any less a supplying and a furnishing of such articles by the brewer. This construction of the statutes is in accord with the ruling which, I understand, the attorney general of Iowa has made on this point.

While it might be argued that the act under consideration is a penal statute, which must be strictly construed, this rule of construction does not mean that the court is not to search for and ascertain, if possible, the true meaning of the language used in a statute, and when the intent of a statute is not plain and there is opportunity to choose between a restrictive and liberal construction, and it appears that a liberal construction accords with the intent of the legislature, such a construction should be accepted in order to carry out the legislative intent. *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N. W. 331.

In view of the foregoing, we are constrained to hold that a brewer may not sell either for cash or credit furnishings, fixtures or equipment to be used in a place operated by a holder of a Class B license.

JEF

Fish and Game—Hunting Licenses—Person who is convicted of felony is still citizen of United States, and hunting license may lawfully be issued to him.

October 6, 1933.

BOARD OF CONTROL.

You have submitted a question whether a hunting license may legally be issued to one who has been sentenced to the state reformatory and is out on parole.

The conviction of a person of a felony does not take away from him his citizenship of the United States. He cannot receive a hunting license unless he is a citizen of the United States. (Sec. 29.09, Wis. Stats.) It is true that a person may be disqualified for suffrage who is convicted of treason or felony unless he is restored to civil rights. (Wisconsin constitution, art. III, sec. 2) The civil rights to which you refer is the right to vote.

While a person may lose the right to vote by being convicted of a felony, still he does not lose his citizenship. The right to vote and citizenship are not identical. They may exist independent of each other. You do not state that the person was convicted of a felony, but even if he were he would still have the right to have a hunting license issued to him.

JEF

Automobiles—Law of Road—Reciprocal Agreements—In absence of written reciprocal agreement on file in office of secretary of state, under sec. 85.05, subsec. (2), par. (b), Stats., state bureau of inspection is at liberty to proceed as if no agreement were in effect.

Under sec. 85.05 (2) (a) and (b) secretary of state has no power to enter into reciprocal agreement with other states exempting from registration motor vehicles, trailers or semitrailers engaged in commercial transportation over regular routes or between fixed termini or those operating for direct or indirect hire.

Secretary of state has power to enter into reciprocal agreement with other states under sec. 85.05 (2) (b) only in case like privileges are accorded to Wisconsin vehicles operated in such other states, and in case like privileges are not accorded any such agreement is void.

October 10, 1933.

ADAM PORT, *State Supervisor of Inspectors, State Inspection Bureau.*

You ask three questions, the first of which is as follows:

"1. Must reciprocal agreements entered into under the provisions of par. (b), subsec. (2), sec. 85.05, Stats., be in writing and on file in the office of the secretary of state? In the absence of any such written agreement is it within the power of the state supervisor of inspectors, under sec. 109.01, Stats., to proceed as if no such agreement were in existence and to require all vehicles specified in par. (a), subsec. (2), sec. 85.05 to pay the full registration fee provided in sec. 85.01, Stats., and to display Wisconsin plates?"

The first part of your question is answered in the affirmative. Par. (b), subsec. (2), sec. 85.05 clearly does away with automatic or self-executing reciprocity as to the vehicles enumerated in that section, and requires an agreement to be entered into between the secretary of state of Wisconsin and the responsible officers of other states in order for reciprocity to be effectual. The supreme court in *Interstate Trucking Co. v. Dammann,* 208 Wis. 116, 121, 241 N. W. 625, 82 A. L. R. 1080, construed this section as follows:

"The provisions of sec. 85.05 (2) (a), (b) and (c), Stats., construed as an entirety, in effect remove from the self-executing reciprocal exemption provision of sec. 85.01 (1) * * * two classes of such vehicles, when engaged in commercial transportation. * * *"

It is the duty of the secretary of state, under sec. 14.29 (3), Stats., to:

"Have the custody of all books, records, deeds, bonds, parchments, maps, papers and other articles and effects belonging to the state, deposited or kept in his office, and, from time to time, make such provision for the arrangement and preservation thereof as is necessary, and keep the same, together with all accounts and transactions of his office open at all times to the inspections and examinations of the governor or any committee of either or both houses of the legislature."

A reciprocal agreement entered into by the secretary of state would be a public record or paper, and under the preceding section he would be bound to have the custody of it and keep it deposited in his office, and preserve it open to inspection. The following quotation from *Interstate Trucking Company v. Dammann, supra,* pp. 127–128, indicates that the court considers that sec. 85.05 (2) (b) requires some record to be kept of such reciprocal agreement:

"* * * the statute may rightly be held to contemplate the ascertainment by the respective responsible officers of the existence and scope of reciprocal legislation, * * * then * * * the responsible officers shall conclude an arrangement or agreement, *which will officially evidence or certify* to conformance with such legislative standard, and the resulting reciprocity for which the Legislature provided. * * * " (Italics ours.)

Under the foregoing statutory provision and judicial interpretation it seems clear that in order for the reciprocal agreement to be binding it must be in writing and on file in the office of the secretary of state.

The second part of your first question is also answered in the affirmative. Under sec. 109.07, Stats., as enacted by ch. 461, Laws 1933, it is the duty of the inspectors of the state inspection bureau:

"* * * To make such reasonable investigations as may be necessary to discover violations of the statutes as

to the registration of motor vehicles, and when any such inspector shall discover any violation or alleged violation thereof he shall report the same to the secretary of state. * * *"

In the absence of a written reciprocal agreement it is the duty of your department to require license plates and registration fee of all vehicles specified in par. (a), subsec. (2), sec. 85.05.

Your second question is as follows:

"2. If such a reciprocal agreement has been entered into and is on file, is it within the power of the state supervisor of inspectors, notwithstanding such reciprocal agreement, to require all motor vehicles, trailers or semitrailers engaged in commercial transportation over regular routes or between fixed termini or those operating for direct or indirect hire to register and pay the registration fees as provided in sec. 85.01, Stats., and to display Wisconsin number plates?"

The question is answered in the affirmative. The following language from *Interstate Trucking Co. v. Dammann, supra,* p. 121, seems to settle this question definitely:

"* * * The first class consists of those vehicles which are engaged regularly over regular routes, or between fixed termini, or make more than one trip during a year into Wisconsin for direct or indirect hire. As to all within that class, there is to be no exemption whatsoever. * * *"

The secretary of state has no power to enter into a reciprocal agreement as to the classes of vehicles mentioned in your second question, and they must be required to register and obtain licenses.

Your third question is as follows:

"In the event such reciprocal agreement has been entered into and is on file and it shall be found that the other state with which reciprocal agreements have been entered into is requiring Wisconsin trucks, trailers or semitrailers operated in that state to be registered therein and to pay their registration fees, is it then within the power of the state supervisor of inspectors to require motor vehicles, trailers, and semitrailers from such state to register in Wisconsin as provided in sec. 85.01 and display the proper plates evidencing such registration?"

This question is answered in the affirmative. The secretary of state is given authority to enter into reciprocal agreements with the responsible officers of other states only "provided like privileges are accorded to vehicles owned by Wisconsin citizens in such other states * * *." 85.05 (2) (b), Stats. That is the interpretation given this provision by the supreme court in *Interstate Trucking Co. v. Dammann.* If the other state with which a reciprocal agreement has been entered into does not in fact accord like privileges to vehicles owned by Wisconsin citizens in such other state, the agreement is beyond the power and authority of the secretary of state and is void and of no effect. In such case it would be the duty of your department to proceed as if there were no agreement in existence.

JEF

Courts—Practicing Law without License—Public Officers—Notary Public—Abstractor who is also notary public renders legal service not incidental to his business by drafting deeds and mortgages.

Isolated act of drafting legal instruments does not constitute practice of law within intent of sec. 256.30, Stats.

October 10, 1933.

RALPH R. WESCOTT,
District Attorney,
Shawano, Wisconsin.

You inquire whether an abstractor who is also a notary public is performing a "legal service" incidental to his business, within the meaning of sec. 256.30, Stats., by drawing a deed and mortgage.

The powers and duties of a notary public are outlined in ch. 137, Stats. In general, as defined by Black's Law Dictionary, a notary public is:

"A public officer whose function is to attest and certify, by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions; to take acknowledgments of deeds and other conveyances, and certify the same; and to perform certain

official acts, chiefly in commercial matters, such as the protesting of notes and bills, the noting of foreign drafts, and marine protests in cases of loss or damage."

The business of an abstractor is to make "an epitome, or brief statement of the evidences of ownership of real estate and its encumbrances." Bouvier's Law Dictionary (8th ed. by Rawle, 1914).

The drawing of a deed and mortgage is not an act incidental to the functions of either a notary public or of an abstractor.

It further remains to be considered whether the drafting of such instruments constitutes the practice of law as defined in sec. 256.30.

Said section imposes a forfeiture upon every person who shall practice law without having obtained a license as an attorney. The practice of law is further defined in subsec. (2), sec. 256.30, as follows:

"Every person who shall appear as agent, representative or attorney, for or on behalf of any other person, or any firm, copartnership, association or corporation in any action or proceeding in or before any court of record, court commissioner, or judicial tribunal of the United States, or of any state, or who shall otherwise, in or out of court for compensation or pecuniary reward give professional legal advice not incidental to his usual or ordinary business, or render any legal service for any other person, or any firm, copartnership, association or corporation, shall be deemed to be practicing law within the meaning of this section."

The "practice of law" is generally held by the courts to include not only the conduct of cases in courts of justice and the preparation therefor but also the giving of legal advice and the preparation of legal instruments of all kinds. *State Bar v. Superior Court*, 207 Cal. 323, 378 Pac. 432, 437 (1929); *Smallbey v. State Bar*, 212 Cal. 113, 297 Pac. 916 (1931); *Eley v. Miller*, 7 Ind. App. 529, 34 N. E. 836 (1893); 14 A. C. J. 296; 2 R. C. L. 938, sec. 4; Note (1911), 18 Am. & Eng. Ann. Cas. 658.

In one of the leading cases on the subject, *In re Duncan*, 83 S. C. 186, 65 S. E. 210, 24 L. R. A. (n. s.) 750, 18 Am. & Eng. Ann. Cas. 657 (1909), the court declared (24 L. R. A. (n. s.) 750, 753):

"* * * It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts, *conveyancing, the preparation,* and, in general, all advice to clients, and all action taken for them in matters connected with the law. * * *" (Italics ours.)

This broad definition of the phrase "practice of the law" is manifestly incorporated in the provisions of sec. 256.30.

Particularly in point on the present question is the case of *People v. Alfani,* 227 N. Y. 334, 125 N. E. 671 (1919), which sustained the conviction of a defendant for practicing law without a license. The defendant, a notary public, had an office where he carried on real estate and insurance business. Distinct from such work he also drew legal papers, contracts for real estate, deeds, mortgages, bills of sales and wills. The preparation of such documents was held to constitute the practice of law.

The reason for such an inclusive interpretation of the term is well portrayed by the Illinois court in the case of *People v. People's Stock Yards State Bank,* 344 Ill. 462, 176 N. E. 901, 908 (1931):

"* * * Where the rendering of such services involves the use of legal knowledge or skill, or where legal advice is required and is availed of or rendered in connection with such transactions, this is sufficient to characterize the services as practicing law. People v. Schreiber, 250 Ill. 345, 95 N. E. 189; People v. Alfani, supra; People v. Title Guarantee & Trust Co., 227 N. Y. 366, 125 N. E. 666; In re Eastern Loan & Trust Co., 49 Idaho, 280, 288 P. 157.

"Where a will, contract, or other instrument is to be shaped from facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to insure a specific result and guard against others, more than the knowledge of the layman is required, and a charge for such service brings it definitely within the term 'practice of the law.'"

Thus we conclude that the drafting of deeds and mortgages constitutes a "legal service" within the meaning of sec. 256.30.

The above conclusion must be modified to the extent, however, that an isolated act of the above nature, particularly if not accompanied by any attempt to give legal advice, would not fall within the intent of the above cited statute. *People v. Title Guaranty & Trust Co.*, 227 N. Y. 366, 125 N. E. 666 (1919).
JEF

Appropriations and Expenditures—Education—State aid for instruction of exceptional children cannot be paid for classes maintained during previous school year since appropriation for such aid has been abolished by 1933 session of legislature.

October 13, 1933.

JOHN CALLAHAN, *State Superintendent,*
Department of Public Instruction.

You request an opinion upon the question as to whether or not state aid for classes for the instruction of exceptional children should be paid for the past year.

Sec. 41.01, Stats. 1931, authorized the establishment of special classes for the instruction of exceptional children. By subsec. (3) of said section, the board of education maintaining such a class, was required to make an annual report relative to such class and to render an itemized statement of all receipts and disbursements therefor to the state superintendent of public instruction.

Sec. 41.03 made provision for state aid for such classes. Said section read, in part:

"(1) If upon the receipt of the report provided for in subsection (3) of section 41.01, the state superintendent shall be satisfied that the school or class has been maintained during the preceding year in accordance with the provisions of the statutes, he shall certify to the secretary of state in favor of each of the several school district boards or boards of education maintaining such day schools or classes a sum equal to the amount expended by each said board during the preceding year for salaries of qualified teachers employed in such day school and classes, board

and transportation of pupils residing within the state and attending such day school and classes, special books and special equipment prepared or designed for instruction in such schools and classes, and such other expenses as shall be approved by the state superintendent, in excess of seventy dollars per child; provided, the amount apportioned to any board shall not be in excess of the following:

"(a) For each pupil residing in the district and attending such day school or class for exceptional children one hundred dollars, * * *.

"* * *

"(2) On receipt of such certificates the secretary of state shall draw his several warrants accordingly, payable to the treasurers of the school boards or boards of education, respectively."

Sec. 20.32, Stats. 1931, made an appropriation for state aid as follows:

"There is appropriated from the general fund, annually, on July first, as state aid for schools and classes established and maintained pursuant to section 41.01, * * * fifty thousand dollars for special classes for the instruction of exceptional children, to be distributed as provided in section 41.03."

Pursuant to such statutory authority, the boards of education of various cities in Wisconsin maintained special classes during the school year of 1932–1933, for the instruction of exceptional children and expended money therefor.

By sec. 3, ch. 140, Laws 1933, secs. 20.32 and 41.03 (1) (a), Wis. Stats., were amended as of the date of passage and publication of such act, viz., May 22, 1933. Such amendment struck out the former above cited statutory provisions granting state aid for the instruction of exceptional children.

Various boards of education which expended moneys during the past year for the education of such children now claim that they are entitled to payment by the state for expenses thus previously incurred in reliance upon state aid.

Whatever may be the justice of these claims against the state, this department is of the opinion that no payments can now be made for the reason that there exist no funds from which moneys therefor can be drawn.

As the law previously stood, the legislature had appropriated, from the general fund, a certain amount to pay state aid for classes conducted for the instruction of exceptional children. This appropriation was made, annually, on July 1, and was manifestly intended to be applied to previously incurred expenses, since not until the classes had been established could the board of education render an itemized account, which formed the basis for the certificate to the secretary of state for the warrants of the latter, of all receipts and disbursements for such classes. Before such an appropriation took place for expenses incurred during the year 1932–33, the legislature repealed the statutory provisions authorizing payment of state aid, as above stated.

Section 2, art. VIII of the Wisconsin constitution, provides:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law. No appropriation shall be made for the payment of any claim against the state except claims of the United States and judgments, unless filed within six years after the claim accrued."

An appropriation by the legislature is a condition precedent to the payment of any money out of the state treasury. *State ex rel. Bell v. Harshaw,* 76 Wis. 230, 242, 45 N. W. 308 (1890); *State v. Zimmerman,* 183 Wis. 132, 197 N. W. 823 (1924); *B. F. Sturtevant Co. v. Industrial Comm.,* 186 Wis. 10, 15, 202 N. W. 324 (1925); 59 C. J. 236, sec. 381; 25 R. C. L. 396, sec. 29.

Upon the legislature alone rests the duty to determine in what amount and for what purposes money in the state treasury shall be spent. 59 C. J. 238, sec. 382.

Furthermore, it is a general and well recognized principle that one legislature cannot impair the legislative power of its successor. What one legislature may do, its successor may also do or undo. *Preveslin v. Derby & A. Developing Co.,* 112 Conn. 129, 15 Atl. 518, 70 A. L. R. 1426 (1930); *Town of Bell v. Bayfield County,* 206 Wis. 297, 239 N. W. 503 (1931); 59 C. J. 900, sec. 500; 25 R. C. L. 909, sec. 162.

The power of the legislature in respect to paying funds

is tersely stated by Justice Eschweiler in his dissenting opinion in the case of *State ex rel. Board of Regents v. Zimmerman,* 183 Wis. 132, 151:

"I assume that it is not necessary to cite authorities to the effect that it has been in this state and elsewhere firmly established.

"(1) That the legislature in one session cannot, as to matters such as are here concerned, tie the hands, control, or limit the power of a subsequent legislature except in the one particular found in sec. 6, art. VIII, Const., which absolutely prohibits the repeal of any appropriation or levy of taxes until principal and interest of any debt to which such shall have been applied shall have been wholly paid: (2) that a legislature cannot delegate its legislative function; and (3) that the raising of public funds and the appropriation thereof when raised is a purely legislative function."

As there no longer is in existence any fund from which payments can be made by the state as aid for classes conducted for the instruction of exceptional children, and as the Wisconsin constitution requires that there be an appropriation by the legislature as a condition precedent to any payment of money out of the state treasury, this office is of the opinion that state aid for classes for the instruction of exceptional children cannot be paid for the past school year.

JEF

School Districts—Transportation of School Children— Under sec. 40.34, subsec. (1), Stats., legal transportation of child to school, whether provided by school board or by parent, may begin at "reasonable" distance from child's home.

Where parent and child reside six and one-fourth miles from union free high school and parent provided transportation beginning one and one-fourth mile from home, making actual transportation distance five miles, parent provided legal transportation and walking distance of one and one-fourth mile from home to transportation conveyance was "reasonable."

October 13, 1933.

JOHN CALLAHAN, *State Superintendent, Department of Public Instruction.*

You submit the following statement of facts: Mr. and Mrs. A., having one child, reside in a certain union free high school district six and one-fourth miles from the union free high school. During the past year the school board did not provide transportation to and from school and, in lieu thereof, the parents provided transportation from a point one and one-fourth mile from the home, making a distance of five miles over which their child was transported. In consequence of such transportation the parents have filed a claim of thirty cents per day for one hundred seventy-eight days of transportation under subsec. (1), sec. 40.34, Stats. 1931, which provides to the effect that where the school board does not provide transportation for children residing more than three miles from the schoolhouse in case of a union free high school, the parents may provide suitable transportation for their children and shall be paid therefor by the district at the rate of thirty cents per day for the first child.

Because of the fact that the child in question apparently walked one and one-fourth mile before being provided with transportation you ask "as to what, if anything, constitutes reasonable walking distance in connection with a school transportation system or in cases of parent transportation," and you further ask whether the parents in

question provided legal transportation in accordance with the provisions of sec. 40.34 if they permitted the child to walk a mile or more before assuming actual transportation for the remaining five miles to the union free high school.

In the recent case of *Walters v. State,* —— Wis. ——, 248 N. W. 777, the supreme court passed upon analogous questions in connection with holding that the defendant there violated subsec. (1), sec. 40.70 by failing to send his children to a common school, and in holding that the defendant was not within the exception provided in that statute to the effect that it does not apply to any child who lives in the country and more than two miles from the schoolhouse in his district "and for whom *no transportation* is furnished by the district." The district there had provided transportation from a point one-half mile from the child's home, and this was held to constitute legal transportation.

The court stated, p. 778:

"Although section 40.01, Stats., prescribes that, in determining whether the distance between a pupil's home and the school is such that a child is to be transported at the expense of the district, the distance is to be 'measured from building to building' and, under section 40.34 (1), Stats., the provided transportation is to be 'to and from school,' neither of those provisions expressly prescribe that the transportation which is to be provided by the board shall be to and from 'building to building,' or to and from the home to the school. * * *."

The court also stated, p. 778:

"Within the limits of what is reasonable in compliance with these statutes, and not unreasonably discriminatory, it should be left to the board of the school district to determine the route and the time and places for gathering up the children who are to be transported. * * *."

Under the above cited decision it is apparent that the school board is not required to provide transportation from the very door of the home and that the board may provide legal transportation beginning at a point which is a "reasonable" distance from the home. No reason is perceived why the same rules should not apply where the parent provides the transportation in case the board fails to do so.

The rules applicable to the school board would, perhaps, not apply to the parent if the statute demanded that the parent himself transport his child where the board fails to provide transportation. However, the statute does not make any such demand, as it provides merely that the parent may "provide" suitable transportation where the board fails to do so. Accordingly, the parent may arrange for the transportation of his child by a conveyance operated by some third party and, where the parent does this, he should not be held to any stricter requirements than would the board be held to if it provided the transportation.

In the above cited decision a distance of one-half mile from the child's home, from which point the transportation was provided, was considered to be a "reasonable" distance. It is impossible, however, to establish a specific distance which will be "reasonable" for all cases. What is a "reasonable" distance is largely a question of fact, calling for the exercise of judgment in each particular case.

In the instant case parent and child resided six and one-fourth miles from the union free high school. Under the statute transportation was to be provided at the expense of the district for any child residing more than three miles from the schoolhouse. It appears that the parent arranged for the transportation of his child by a conveyance operated by a third party. Under this arrangement the transportation conveyance apparently was to follow a route the nearest point of which was one and one-fourth mile from the child's home. Probably the home was located on a side road and so, under the arrangement made, either the parent himself was obliged to transport the child one and one-fourth mile to meet the conveyance or the child was obliged to walk that distance. Apparently the latter course was followed. However, from the point where the child met the conveyance he was actually transported to school a distance of five miles, which was considerably greater than the minimum distance of anything more than three miles for which, under the statute, transportation was to be provided at the expense of the union free high school district. Under those circumstances, bearing in mind the actual transportation distance of five miles, it

would seem that the parent provided legal transportation for his child, and that the walking distance of one and one-fourth mile was not "unreasonable."
JEF

Elections—Indigent, Insane, etc.—Inspectors at polls do not exercise judicial powers.

Inspectors at polls in ministerial capacity have final right to reject vote of insane person.

October 13, 1933.

THEODORE DAMMANN,
Department of State.

You ask whether inspectors at the polls are given judicial powers to finally determine, without privilege of appeal or challenge, the eligibility of an insane person to vote.

Inspectors at the polls do not exercise judicial powers *(Gillespie v. Palmer,* 20 Wis. 544, 558), but acting in their ministerial capacity have the right to reject the vote of an insane person.

Sec. 6.54, Stats., says:

"The inspectors shall reject the vote of any person under guardianship, non compos mentis or insane."

Nothing is to be found in this statute or anywhere in the statutes which provides for challenge or privilege of appeal in the case of a person under guardianship, non compos mentis or insane. It therefore follows that the statute is conclusive and controlling. A person under guardianship, non compos mentis or insane is excluded from exercising the right of suffrage.
JEF

Trade Regulation—Loan Associations—Mortgage Loan Associations—Discount company may charge additional fees for delinquency, but such fees are limited to interest not in excess of ten per centum per annum after maturity.

Legislative regulation for loan associations created under sec. 115.09, Stats., are inapplicable to mortgage loan companies.

October 13, 1933.

MILO C. HAGAN, *Chairman,*
Banking Commission.

You ask whether a discount company, referred to as a loan association, licensed to do business under the provisions of sec. 115.09, Stats., is limited to a rate of ten per centum per annum taken in advance or whether it may charge additional fees for delinquency. You ask further, assuming such additional fees may be charged, if there is any limitation.

A discount company may charge additional fees for delinquency, but such fees are limited to interest not in excess of ten per centum per annum after maturity.

Loan associations or discount companies are authorized and regulated under sec. 115.09, Stats. Subsec. (1) provides for the discounting and the limitation of such discounting to ten per centum per annum. Subsec. (9) specifically provides the maximum rate which loan associations or discount companies may directly or indirectly charge, contract for or receive, for any loan, use or forebearance of money, goods or things in action, or for the use or sale of credit.

Contracts which provided for the payment of the legal rate of interest in advance were early held not to be usurious. *Telford v. Garrels,* 24 N. E. 573, 132 Ill. 550. Sec. 115.09, Stats., specifically authorizes such agreements. Such commercial agreements, however, become nonenforceable in this state when a charge or greater rate of interest than is allowed by sec. 115.09, subsec. (9) (ten per centum per annum) has been contracted for or received.

There is no violation of this statute if, after discounting a note at the lawful rate of ten dollars upon each one hun-

dred dollars for each year, additional interest not in excess of ten per centum per annum is charged on all delinquent balances.

You also ask whether provisions of sec. 115.09 relating to the supervision and regulation of loan associations apply to companies operating under the provisions of sec. 115.07, Stats.

The provisions of sec. 115.09, providing for the regulation and supervision of loan associations, are confined in their application to such associations and do not apply to mortgage loan companies referred to in sec. 115.07.

The limited supervisory and regulatory control over so-called chattel mortgage associations vested in the commissioner of banking is based upon sec. 115.07, subsec. (3a) and (4a). See X Op. Atty. Gen. 1022.

Sec. 115.09 specifically designates the manner in which the commissioner of banking shall regulate and supervise loan associations. Sec. 115.09, subsec. (2), provides in part:

"Before any person or association, copartnership or corporation heretofore or hereafter created shall do business under the provisions of subsection (1), * * *."

Chattel mortgage companies do not do business under the provisions of sec. 115.09, subsec. (1).
JEF

Taxation — Apportionment — Proportion of delinquent taxes chargeable to part of parcel of land assessed as whole and owned in severalty may be ascertained and discharged in accordance with method provided by sec. 74.32, Stats. XX Op. Atty. Gen. 342 is overruled.

October 13, 1933.

TAX COMMISSION.

Request is made for reconsideration of an opinion in XX Op. Atty. Gen. 342. That opinion was rendered upon the following statement of facts:

"One A is the owner of the S½ of the NE¼ of section 4–34–17, in Polk county. This land was assessed and taxed against A as a whole, namely, by the single description S½ of NE¼. The taxes thereon were returned delinquent. A certain bank has a mortgage covering part of this land, namely, the W½ of SW¼ of the NE¼. The bank desires to pay the taxes only on said W½ of SW¼ of NE¼, on which it has the mortgage, and to receive from the county treasurer a tax receipt covering said W½ of SW¼ of NE¼."

The conclusion, quoting from the caption of the opinion, was:

"Where person owns south one-half of northeast one-fourth of section of land same may be assessed to him and taxed as whole; tax receipt releasing any specified part of said land from taxes cannot be issued, as existing statutes provide no method for determining how much of aggregate tax is due from any specified part of such land which has been assessed and taxed as whole."

Upon reconsideration, it is now concluded that the earlier opinion was in error.

Sec. 74.32, Stats. 1931, provides as follows:

"Any person may discharge the taxes on any *parcel* of land returned to the county treasurer as delinquent *or on any part thereof or undivided share therein,* by paying the same, with interest at twelve per centum from the first day of January previous and all lawful charges thereon, to such county treasurer at any time before the same shall be sold as hereinafter provided; * * * provided, that when an application is made to the county treasurer for the payment of the taxes upon any part or portion of any lot or parcel of land assessed as a whole, but which is *owned in severalty,* such treasurer, before making a receipt for the taxes upon such part or portion thereof, may ascertain by affidavits or by actual view the true proportion of taxes chargeable to the part on which the tax is sought to be paid, and the amount so found shall be deemed to be the amount of taxes chargeable thereto."

By sec. 74.32, Stats., it is expressly provided that a person may discharge the taxes returned to the county treasurer as delinquent on any parcel of land *or on any part thereof* or undivided share therein, and, in case of taxes upon any part of a parcel of land assessed as a whole and

owned in severalty, the section prescribes a method for ascertaining the true proportion of taxes chargeable to the part on which the tax is sought to be paid.

Under the facts as stated in the earlier opinion, the land of A was "owned in severalty," and, therefore, within the above cited provision of sec. 74.32. "Estates in severalty" are defined in 21 C. J. 928, as follows:

"*Estates in Severalty.* A tenant in severalty or sole tenant is one who holds real property in his own right alone, without any other person being joined or connected with him in point of interest during his estate therein. This is the most common and usual way of holding an estate, and all estates are supposed to be of this sort unless they are expressly declared to be otherwise."

The earlier opinion erred in failing to give proper significance to the term "owned in severalty" as used in sec. 74.32.

JEF

Courts—Circuit Judges—Opinion rendered September 5, 1933, concerning optional payment of one thousand dollars to circuit judges in Milwaukee county under sec. 252.07, subsec. (5), Stats., is not intended in any manner to affect payment under sec. 252.07 (4).

October 18, 1933.

OLIVER L. O'BOYLE, *Corporation Counsel,*
Office of District Attorney,
Milwaukee, Wisconsin.

Under date of September 5 (XXII Op. Atty. Gen. 715), this office rendered an opinion to you to the effect that the Milwaukee county board had no authority to pay an annual salary of one thousand dollars to the circuit court judges under the provisions of sec. 252.07, subsec. (5), Stats. Some question has arisen as to whether this opinion should be construed as in any manner affecting the payment of an annual salary of one thousand dollars by Mil-

waukee county, under the provisions of sec. 252.07, subsec. (4).

For the purpose of clarifying this question, you are hereby advised that the opinion rendered you under date of September 5 should not be construed as in any manner affecting the one thousand dollar annual salary payable under the provisions of sec. 252.07, (4). The opinion is confined solely to the question of the authority of the payment which was sought to be justified by virtue of sec. 252.07, (5).

JEF

Courts—Justice of peace has power to sentence female to industrial home for women for misdemeanor of which justice has criminal jurisdiction.

October 20, 1933.

BOARD OF CONTROL.

You have forwarded a letter from Mrs. Anna M. Anderson, superintendent of the Wisconsin industrial home for women, together with commitment order, making commitment of a girl to that institution, the order being issued by a justice of the peace. You ask to be advised whether a justice of the peace has a legal right to make such a commitment and whether this commitment is a proper and legal one.

The crime for which this person is sentenced and committed is punished by imprisonment in the county jail not more than six months or by fine not exceeding one hundred dollars or both such fine and imprisonment. See sec. 351.05, Stats. A justice of the peace has the jurisdiction of this offense. See sec. 360.01, subsec. (5). Sentences and commitments to the industrial home for women are provided for in sec. 54.02. There are three classes in said section, subsec. (1), the third class reading:

"Class three. Female persons convicted of any other misdemeanor."

In sec. 54.03, subsec. (3), it is provided in part:

"In lieu of the penalty provided by statute, or city or village ordinance, under which said offender is tried, the court may commit any female person belonging to class two or three to the industrial home, for a general or indeterminate term, which term shall not exceed five years in any case, * * *."

Sec. 54.03 (4) provides:

"All courts of record having criminal jurisdiction in this state, regardless of their jurisdictions as otherwise defined by statute, shall have the power to commit as provided in subsection (3)."

Under these provisions it is clear that the person in question could be sentenced to the industrial home for women for the crime of which she was found guilty, and it is also apparent that a justice of the peace has jurisdiction of such an offense. It is true that in this case the commitment was for a definite term instead of for a general or indeterminate term as provided in subsec. (3), sec. 54.03, but under subsec. (1) of said section we find the following provision:

"* * * If, through mistake or otherwise, any person shall be sentenced for a definite period of time for any offense for which he may be sentenced under the provisions of this section, such sentence shall not be void, but the prisoner shall be deemed to be sentenced nevertheless as provided and required by the terms of this section. * * *."

I have not overlooked the provision of subsec. (4) of sec. 54.03, quoted above.

This does not militate against the conclusion that a justice of the peace has jurisdiction to sentence under subsec. (3), for this provision in subsec. (4) does not purport to give the courts of record exclusive jurisdiction of such offenses. It is a fact that under subsec. (3) the maximum in the general and indeterminate term may be as high as five years, including terms of which the justice has no jurisdiction. This, however, cannot take away from the justice, and is not intended to do so, the jurisdiction of those cases

where the maximum is six months in the county jail. You are therefore advised that it is our opinion that the sentence in this case is valid, legal and binding.
JEF

Courts—Indigent, Insane, etc.—Feeble-minded—Person in Southern Wisconsin colony and training school found, upon rehearing before county judge, to be mentally deficient but not proper subject for said institution may properly be discharged by said court.

October 20, 1933.

BOARD OF CONTROL.

You say that one A, an inmate of the southern Wisconsin colony and training school, was presented to the county court of Wood county on September 12, 1933, at Marshfield, Wisconsin, for the purpose of rehearing and reexamination. You state that the patient was discharged by the order of court on the basis of examination made by two physicians as shown in the copy of their report submitted with your request. The certificate of the medical examiners in this case has the following, "and as the result of such an examination hereby certify that he is mentally deficient but not a proper subject for an institution for care, custody and training of mentally deficient and epileptic persons under the provisions of the statute." The words "but not" were substituted after the words "mentally deficient" in place of the words "or epileptic and." You inquire whether this is the proper legal procedure and if not what steps can be taken to make a correction in this case.

You are advised that the proceeding is proper. While the physicians found that the man is mentally deficient, they also found for all practical purposes that such deficiency was of such a slight degree that he was not a proper subject for an institution such as you represent. The court acted upon this finding, and we believe it acted legally.
JEF

Mortgages, Deeds, etc.—Public Officers—Mediation Board —Real Estate—Ch. 15, Laws 1933, temporary emergency legislation, applies only to homes actually used by owner.

October 21, 1933.

H. J. BEARDSLEY,
District Attorney,
Darlington, Wisconsin.

You state that A, B, and C inherited the homestead farm of their parents; that none of them live on the place, which is leased to another. The insurance company which holds the mortgage on the place has commenced foreclosure, and the owners have brought the case before the local mediation board.

You state that, in view of the fact that the act creating the mediation board (ch. 15, Laws 1933) authorizes the board to act only where the real estate in question constitutes a home, you have advised the board that it has no jurisdiction to mediate if the mortgagee does not wish to submit the case.

Sec. 281.21, created by ch. 15, Laws 1933, provides:

"Sections 281.20 to 281.23 are enacted as temporary emergency legislation, the provisions of which shall apply only to obligations secured by mortgage, land contract, trust deed, or other security in the nature of a mortgage upon real estate which constitutes a home. Their provisions shall not be in effect longer than March 1, 1935, and may be sooner terminated by the legislature."

Sec. 281.22 (2) provides:

" 'Home' means a farm occupied by the owner, or any parcel of land other than a farm, where at least a one-tenth portion of the building or buildings thereon, used or useful for residence purposes, is actually used for such purpose by the owner."

Under the facts stated by you, the owners of the place are not using it for a home.

Your conclusion is therefore correct. The mediation board has no jurisdiction in the matter.

JEF

Insurance—State Insurance Fund—Milwaukee Auditorium is public building within meaning of sec. 210.04, Stats.

Said building may be insured in state insurance fund and interests of stockholders of Milwaukee Auditorium Company are protected by such policy.

October 21, 1933.

H. J. MORTENSEN,
Commissioner of Insurance.

In your communication of October 18 you submit the following three questions:

"1. Is the Milwaukee Auditorium a public building within the meaning of section 210.04?

"2. Are the interests of the stockholders of the Milwaukee Auditorium Company protected by a fire insurance policy issued by the state insurance fund?

"3. If the Milwaukee Auditorium is not a public building within the meaning of section 210.04, can the city of Milwaukee insure its equity in the building in the state insurance fund?"

You state that the Auditorium Building in Milwaukee is owned jointly by the city of Milwaukee and the Milwaukee Auditorium Company, the equity of the joint owners being equal, it being established under secs. 43.44 to 43.48, inclusive. Sec. 210.04, Stats., provides for the insuring of public buildings or property of any county, city or village, school district or library board in the state insurance fund upon the adoption of a resolution by the governing board of the political subdivision interested. In sec. 43.46 it is provided:

"* * * Title to all property acquired for the purposes of said institution shall be in the name of said city, and shall be held by said city perpetually for such purposes."

Sec. 43.47, subsec. (2), provides:

"Said institution shall be used primarily for public meetings, conventions, expositions, and other purposes of a public nature, which are hereby declared to be public purposes; but not for exhibits or trade shows if a charge is made for space occupied by any exhibitor or when an admission fee is exacted."

In subsec. (3), sec. 43.47 provision is made for renting the same or any part thereof for such purposes as in the discretion of the board may be deemed advisable and not inconsistent with said primary purposes.

Your first question must be answered in the affirmative. The title being in the state and it being used for public meetings as directed in the statute, there can be no question but that it comes within the term of "public buildings" as that term is used in the statutes.

You state that the policies were issued by the state insurance fund as requested, the insured being identified in the policies as the city of Milwaukee, Milwaukee Auditorium Company and/or Milwaukee Auditorium Board. The general rule is that lessees, lessors, mortgagees, mortgagors and tenants in common may join in the insurance of the building with the other parties interested and that they have an insurable interest in such building. 26 C. J. 34. We believe that your second question will also require an affirmative answer.

The answers to the first and second questions make it unnecessary to answer the third question.

JEF

Indigent, Insane, etc.—Legal Settlement—Pauper family with settlement in Milwaukee county who moved to Jefferson county and continued to remain paupers in that county is charge to Milwaukee county.

October 27, 1933.

HAROLD M. DAKIN,
District Attorney,
Watertown, Wisconsin.

You have submitted the following as a basis for an official opinion:

"In December, 1930 and January, 1931 the A family received relief from the Jefferson county department of outdoor relief and this was paid for by Milwaukee county, they, at that time, having legal residence in Milwaukee

county. For a period of thirteen months thereafter they did not receive any public relief but during that time they did receive aid from the local Red Cross and during that time lived in Jefferson county. From February, 1932 up to the present time this family has been receiving relief from the Jefferson county department of outdoor relief."

You ask whether the support of this family is a legal charge on Jefferson county, or whether it should be paid for by Milwaukee county.

It clearly appears from your statement of facts that this family were paupers when they lived in Milwaukee, and that on February, 1932, when they received aid from Jefferson county they were also paupers. The question is whether in the meantime, while they were receiving aid from the local Red Cross, they had passed out of the status of paupers. Under the decision of our supreme court in the recent case of *Town of Rolling et al v. City of Antigo,* 248 N. W. 119, the family had not, as in this case, received aid directly from the municipality, but were given aid by the community welfare association. The court held that they had not passed out of the status of a pauper while receiving such aid. I believe that said case rules the present situation.

Had this family not received any aid from a public relief association, such as the Red Cross, the situation would be different. We are therefore constrained to hold that the parties in question have never passed out of the pauper status since they left Milwaukee. In an official opinion in XIII Op. Atty. Gen. 212, it was held that where one has a legal settlement in a municipality and receives aid therein as a pauper and then, removing to another municipality, receives aid as a pauper, his legal settlement continues in the first municipality, and so long as this status continues the first municipality remains liable for his support. See said opinion and authorities cited.

You are therefore advised that Milwaukee county is liable for the support of the A family.

JEF

Automobiles—Law of Road—Revocation of Licenses— Under sec. 85.08, subsec. (11), Stats., period for maintaining proof of financial responsibility commences from date of entry of judgment.

Under sec. 85.08 (13) statutory fee of one dollar may be charged upon receipt of second application for reinstatement from one individual.

October 27, 1933.

THEODORE DAMMANN,
Secretary of State.

Sec. 85.08, subsec. (11), par. (a), Stats., provides:

"The driver's license and all of the registration certificates of any person who shall have been found negligent in respect to his operation of a motor vehicle in any civil action for damages and against whom a judgment shall have been rendered on account thereof, shall be forthwith suspended by the secretary of state upon receiving a certified copy or transcript of such judgment from the court in which the same was rendered showing such judgment or judgments to have been entered, and same shall remain so suspended and shall not be renewed, nor shall any motor vehicle be thereafter registered in his name for a period of three years after the entry of said judgment unless said person gives proof of his ability to respond in damages as required in subsection (10) of this section, for future accidents. No such judgment shall be stayed insofar as it operates to cause a suspension of license or registration certificates unless proof of ability to respond in damages for any future accidents is made as provided in subsection (10) of this section. It shall be the duty of the clerk of the court, or of the court where it has no clerk, in which any such judgment is rendered, to forward immediately to the secretary of state a certified copy of such judgment or a transcript thereof, as aforesaid. * * *"

Sec. 85.08, subsec. (1), provides that an automobile driver's license shall not be issued to:

"(f) Any person who shall have been found negligent in respect to his operation of a motor vehicle in any civil action for damages growing out of an accident and against whom a judgment shall have been rendered on account thereof, unless such person shall have furnished and filed proof of ability to respond in damages for any injury to

person or property thereafter occurring as hereinafter provided in subsections (10) and (11) of this section. Such disqualification shall continue for three years from the date of such judgment. * * *"

You desire to be informed as to when the period for maintaining proof of financial responsibility commences, particularly whether it is on the date of conviction, or the date upon which you receive proof of the same. It is our opinion that the period for maintaining proof of financial responsibility starts as soon as judgment is entered. Sec. 85.08 (1) (f) states:

"* * * Such disqualification shall continue for three years from the date of such judgment."

Sec. 85.08 (11) (a), quoted above, also states that the driver's license and all of the registration certificates shall remain suspended and shall not be renewed for a period of three years "after the entry of said judgment unless said person gives proof of his ability to respond in damages * * *."

It is true that sec. 85.08 (19) provides that the money or bonds which have been deposited shall be returned after three years have elapsed since the filing of such bond or money. In the light of the sections quoted above, however, it is our opinion that the period of three years, during which time proof of financial responsibility must be maintained, should begin from the date the judgment is entered rather than the date upon which you receive proof of the same.

Sec. 85.08 (13) provides for the revocation or suspension of the motor vehicle driver's license or registration certificate upon notice and hearing. Upon revocation or suspension of the license the holder of the same must immediately surrender his license to the secretary of state and must apply for a new license at the end of the period of suspension. The application for reinstatement must be accompanied by a fee of one dollar. Reinstatements are permitted upon the filing of proof of financial responsibility. Proof is usually made by the filing of an insurance policy. In certain cases, the individual applying for reinstatement has filed an insurance policy and paid the statu-

tory fee of one dollar. Shortly after the reinstatement has been effected you have received a letter from the insurance company canceling the policy. There being then no proof of financial responsibility on file, the suspension again becomes effective. You inquire whether you are entitled to charge the statutory fee of one dollar when the individual again applies for reinstatement.

Sec. 85.08 (13) reads:

"* * * Upon revocation or suspension of such license the holder thereof shall immediately surrender his license, through the court, to the secretary of state, and must apply for a new license, at the end of the period of suspension. Such application shall be accompanied by a fee of one dollar. * * *"

This language covers any and all suspensions under the provisions of that subsection, without exception. In the case of the revocation or suspension of the license of one who has once been reinstated, it is our opinion that, under this subsection, you are entitled to again charge the statutory fee of one dollar upon receiving the second application for reinstatement.

JEF

Public Officers—Truant Officers—School Districts—Truancy—Board of education in city of Oshkosh may appoint part-time truant officers and is not required to appoint full-time officer under sec. 40.73, Stats.

October 27, 1933.

GEORGE P. HAMBRECHT, *Director,*
Board of Vocational Education.

You say that the school board of the city of Oshkosh has abolished the full-time truancy officer's position at its meeting on May 26, 1933, by the following resolution:

"That the officer in charge of attendance and truancy of the pupils be not re-elected for the year 1933–1934 and that the work be delegated to the principals and such authority as may be deemed necessary."

The question has arisen whether, under the law, this resolution is valid or whether a full-time truant officer must be appointed for said city.

Sec. 40.73, subsec. (1), Stats., provides:

"In cities of the first class, the school board shall appoint ten or more truant officers; *in other cities such board shall appoint one or more truant officers.* In cities of the fourth class, the police officers may be appointed truant officers, and in all towns and villages the sheriff, his undersheriff and deputies shall be the truant officers."

It has been seriously argued that it is necessary to have a full-time truant officer in a city of the class of Oshkosh. We find no foundation for that proposition in the statute. The work of a truant officer is naturally intermittent. If the municipality is a small one and the children are attending school, then there may be very little or no work for such officer. We see no objection for anyone to be appointed to this office who is otherwise qualified. There is no incompatibility in the work to be performed by a teacher or principal and that of a truant officer. You will note that the school board is to appoint one or more truant officers. They are not limited in the number to be appointed. They may appoint as many as they believe necessary to enforce the law. As to the question of overlapping in their duties, this may be regulated by a regulation among the officers or the board and the officers. By appointing a number of principals or teachers to do the work of truant officers in connection with their general activities the statute is complied with. The school board is not required to appoint a full-time truant officer.

JEF

Loans from Trust Funds—School Districts—State Aid—Taxation—Tax Collection—Neither town nor county may retain collections on taxes levied in town until there have been satisfied therefrom claims of state for state special charges for loans from state trust funds and for state special charges for other purposes.

School district located in town is entitled to share in proceeds of county school tax actually raised and paid to county, even though town has not paid to county that portion of county school tax levied in such town.

October 27, 1933.

G. ARTHUR JOHNSON,
District Attorney,
Ashland, Wisconsin.

You submit the following statement of facts: The total 1932 county tax levy against the town of Agenda in Ashland county was $7,422.77. That amount included $841.70 of state special charitable and penal charges and also $961.40 of state charges for school loans and interest from the state trust funds. At the March, 1933, settlement the town treasurer returned to the county treasurer a delinquent roll of $7,216.63 and the town was given the further credit for delinquent personal property taxes of $895.29, thus producing an excess delinquent credit of $689.15. The total tax collections thereafter made by the county treasurer to June 26, 1933 (see ch. 288, Laws 1933) applicable to the town's tax account was $1,207.64, of which amount $841.70 was transmitted to the state treasurer in liquidation of the said state special charges. The balance of $365.94 the county treasurer has retained.

1. You present the question as to whether the county treasurer should remit to the state treasurer the said sum of $365.94 to apply as part payment on the state charge for school loans and interest.

This question is answered, Yes. Neither the town nor the county is entitled to retain any of said tax collections until there has been satisfied therefrom the claims of the state for state special charges for loans from the state

trust funds and for state special charges for other purposes. See XXII Op. Atty. Gen. 239, 290, and 507.

2. You also state that the total county levy of $7,422.77 against the town of Agenda included the sum of $1,107.84, representing the portion of the county school tax to be raised in said town. This $1,107.84 has not yet been paid to the county. The amount to which the school districts located in the town are entitled from the county school tax is $1,500.00. You present the question as to whether the town must first pay to the county the said sum of $1,107.84 before the school districts located in the town are entitled to receive the county school aid of $1,500.00.

Question 2 is answered as follows: The so-called county school tax (which is referred to in subsec. (2), sec. 74.15, Stats, as "the equalization tax levied by the county for school purposes") is a form of county school aid, supplemented by state aid, and is designed to equalize poorer school districts with wealthier school districts. It is annually levied by the county board under authority of sec. 59.075, Stats. The amount to be thus levied and raised is determined by multiplying the sum of $250.00 by the number of public elementary teachers employed by the county. The amount of county school tax thus determined is levied by the county board upon the aggregate assessed valuation of the county, so that each year the county clerk certifies to the various taxing districts (towns, villages and cities) a proportionate amount to be raised therein and to be paid over to the county for said purpose. The amount thus raised and paid over to the county is then distributed by the county to the various school districts, as county school aid, on the basis of the number of public elementary teachers employed in each school district. Under the method of distribution which is followed the amount due to any particular school district is paid by the county treasurer to the treasurer of the town, village or city in which the district is located, and by such local treasurer paid to the school district. The town, village or city, however, has no interest therein in its corporate capacity.

As was said in XXII Op. Atty. Gen. 638, 639–640:

"The aid, both state and county, is raised and set aside for the benefit of the school district for school purposes

and not for the village for village purposes, and the school district is entitled to receive the same. The school district is a legal entity separate and distinct from the village, and the aid is due to the school district and not to the village. The method of distribution is such that the state aid is first paid over by the state treasurer to the county treasurer and then by him, together with the county aid, paid over to the village treasurer, but the ultimate distributee and the only municipality beneficially entitled to the same is the school district. The village treasurer receives the aid merely as one of the distributing agencies and for the sole purpose of distributing the same to the school district. The county treasurer, therefore, has no right to withhold such aid simply because the county has or may have a claim against the *village*. The school district may not thus be involved in the controversy over the tax settlement between the village treasurer and the county treasurer."

In other words, applying the foregoing to the instant situation, a school district is entitled to receive its proportionate share of the county school tax actually raised and paid over to the county, without reference to what tax claims the county may have against the town in which the school district is located, including a claim for the portion of the county school tax levied in such town. The amount which is due from the county to the *school district* cannot be used by the county to offset a claim of the county against the *town*.

JEF

Insurance—Town mutual fire insurance company may legally levy and collect assessment upon policyholders whose policies are suspended because of nonpayment of one or more previous assessments.

October 27, 1933.

H. J. MORTENSEN,
Commissioner of Insurance.

You present the question: Can a town mutual fire insurance company legally levy and collect an assessment upon policy holders whose policies have lapsed because of nonpayment of one or more previous assessments?

Sec. 202.09, Stats., provides in part:

"Every policyholder is a member of the corporation and he shall give his undertaking, bearing even date with his policy, binding himself, his heirs and assigns to pay his pro rata share to the corporation of all losses which may be sustained by any member, and of its necessary business expenses, together with all legal costs and charges incurred in legal proceedings to collect any assessment made upon him; * * *."

Sec. 202.12 provides in part:

"The assessments of town mutuals shall constitute personal liabilities of the members and payment thereof may be enforced by appropriate action. * * *."

Under the provisions of secs. 202.09 and 202.12, every "policyholder" is a "member" of the corporation, and liability for assessments applies to all "members" of the corporation.

Subsec. (5), sec. 202.11, provides:

"Every member who shall fail to pay his assessment within the time specified in the notice sent to him, shall pay to such corporation a fine of two per cent of the amount of such assessment for each week or part thereof during which the same shall remain delinquent, and no payment shall be made by the company upon the policy of any member if at the time he shall suffer a loss he shall be in default and shall have failed to pay his assessment prior to the expiration of thirty days from the time limited in said notice."

Although under subsec. (5), sec. 202.11, the corporation is not liable upon the policy of any member if at the time he suffers a loss he is in default in the payment of a previous assessment, nevertheless the policy is merely suspended and not canceled, and such person continues to be a policyholder and a member of the corporation; and by the express language of the statute a method of reinstatement is still open and available. *Struebing v. American Ins. Co.*, 197 Wis. 487, 497. See also XVI Op. Atty. Gen. 100, 102.

The method by which a member may withdraw and have his policy canceled is provided by sec. 202.13, Stats., as follows:

"Any member may withdraw at any time by returning his policy with the request for its cancellation written thereon or by a notice in writing over his signature to the president or to the secretary and paying his share of all claims then existing against the corporation. * * *."

Under the foregoing provisions, it would seem that the question above submitted should be answered, Yes.

That a provision requiring that a member of a mutual fire insurance company shall be liable for liabilities of the corporation which may accrue during the time his policy is suspended and until his policy is legally canceled is valid, is well settled. *Johnson v. State Mut. Rodded Fire Ins. Co.*, (Mich.) 205 N. W. 163; *State Mut. Rodded Fire Ins. Co. v. Randall*, (Mich.) 205 N. W. 165. See also 14 R. C. L. 970–971; 19 R. C. L. 1259; Note in 1 Ann. Cas. 390.

There remains to be considered the effect of subsec. (1), sec. 202.11, which provides in part:

"When the amount of any loss shall exceed the funds on hand the president shall convene the board of directors who shall make an assessment upon all property insured at the time of the loss. * * *."

It will be noted that the last quoted statute literally provides that assessments shall be made upon "all property insured at the time of the loss." Nevertheless, in view of the other provisions of this chapter, it is concluded that this phrase is employed only to mark the time at which all those who are members of the corporation are liable for the loss and not to differentiate between members whose property is protected at the time of the loss and those whose property is not so protected because of their failure to pay a previous assessment.

Therefore, it is concluded that a town mutual fire insurance company may legally levy and collect an assessment upon policyholders whose policies are suspended because of nonpayment of one or more previous assessments.
JEF

Appropriations and Expenditures—Traveling and other expenses incurred while secretary of Wisconsin board of examiners of architects and civil engineers is attending meeting of National Council of Architectural Registration Boards at Chicago is not charge against state.

October 27, 1933.

ARTHUR PEABODY, *Secretary,*
Board of Examiners of Architects and Civil Engineers.

In your communication of October 20 you enclose a communication to Mr. J. B. Borden budget director, in which you state that the National Council of Architectural Registration Boards meets at Chicago on October 21, 22 and 23, and you are requested by the chairman of the architects' division of the Wisconsin board of examiners of architects and civil engineers to attend the meeting.

The question is whether your expenses at such meeting can be paid for by the state. Mr. Borden has ruled otherwise. You have submitted the question to us with the consent of Mr. Borden.

In the letter to Mr. Borden you quote sec. 101.31, Stats. Subsec. (8), provides:

"(a) * * * Agreements for reciprocity with other states, * * * may be entered into by the board at its discretion.

"(b) The board shall, * * * issue a certificate * * * to any person who holds * * * certificate * * * in conformity with the regulations of the national council of state boards of architectural or engineering examiners, and who complies with the regulations of this board, except as to qualifications and registration fee."

You argue that it will be for the best interests of the state for the Wisconsin board to participate in the meetings of these councils; that it will be unable to adequately protect the rights of Wisconsin and Wisconsin architects and civil engineers to the extent it should unless you attend; and that Wisconsin will hardly be justified in accepting the dictum of other states in this matter without representation and opportunity for redress, to say nothing about the opportunity to present measures for the common good.

Your argument is sound and rather persuasive but should be addressed to the legislature as there is no specific statute which authorizes the expenditure, and ch. 345, Laws 1933, expressly provides:

"* * *; nor shall he audit items of expenditure for expenses of any officer or employe of the state or of any department or institution thereof while attending any convention, association, society or meeting held outside the state unless otherwise provided by law."

In the absence of a statute authorizing your attendance at that convention and the expenditure therefor, we feel obliged to hold that your expenses cannot be charged to the state.

JEF

Automobiles—Common Carriers—Motor vehicle, when registered at certain number of pounds gross weight, may not be permitted to reduce said weight during period for which it was registered.

October 27, 1933.

PUBLIC SERVICE COMMISSION.

You have directed our attention to par. (e), subsec. (16), sec. 76.54, Stats., which provides that motor vehicles weighing not more than eight thousand pounds gross weight may be exempt from certain taxation specified in said section. You state that the term "gross weight" above referred to is defined by the statute as "the actual weight of such motor vehicle unloaded plus the licensed carrying capacity" thereof (sec. 76.54 (1) (b)). You inquire whether it is competent for the owner of a motor vehicle which is subject to the provisions of ch. 194 and of sec. 76.54, Stats., who on or about July 1, 1933, registered his motor vehicle with the secretary of state as having a gross weight in excess of eight thousand pounds, to apply to the secretary of state subsequent to September 1, 1933, to have the registration of his motor vehicle changed so as to reduce the licensed carrying capacity thereof in an amount sufficient

to reduce the gross weight of his vehicle under eight thousand pounds for the express purpose of avoiding the tax which would otherwise be imposed upon the operation of that vehicle pursuant to said sec. 76.54.

Your question must be answered in the negative. There is a provision in the statute which authorizes an increase in the weight of the motor vehicle, paying the additional fee to the secretary of state. There is no provision, however, for a decrease and, as the secretary of state has only such duties as are imposed by law, it is our opinion that no reduction can be made in the gross weight of the motor vehicle after registration.

JEF

Bridges and Highways — Intrastate Bridges — Reconstruction of two bridges over main stream and branch thereof, two bridges being separated by distance of one thousand two hundred feet traversed by county highway, bridge over main stream being necessarily more than four hundred seventy-five feet in length and bridge over branch being necessarily less than four hundred seventy-five feet in length, cannot be considered as one bridge project so as to make bridge over branch eligible for reconstruction with state aid under provisions of sec. 87.02, subsec. (1), par. (a), Stats.

October 27, 1933.

FRED G. SILBERSCHMIDT,
District Attorney,
La Crosse, Wisconsin.

You submit the following statement of facts and present the following question:

"The Black River, a navigable stream within the limits of La Crosse county, has a lift span bridge, and the length of said bridge is 545 feet not including approaches. This bridge is not located on a state trunk highway or on a road or street within the city of La Crosse connecting portions of the state highway. Along the same county highway about 1,200 feet there is a second portion of the river

crossing, which consists of a bridge, not lift or swing span, approximately 325 feet in length, not including approaches, which bridge at this point crosses a high water channel of this same river.

"Can these two spans be considered as one unit, whereby they can be eligible to the assistance of the state, under the provisions of Wisconsin statutes, section 87.02?"

Under sec. 87.02, Stats., as amended by ch. 14, Laws Special Session 1931, certain bridge projects are eligible for construction or reconstruction with state aid. As regards a bridge project *not* located on the state trunk highway system, it is provided by par. (a), subsec. (1), that such bridge project, in order to be thus eligible must be one "in which the bridge portion necessarily must be four hundred and seventy-five feet in length or more, not including approaches."

The bridge which you describe as being five hundred forty-five feet in length, not including approaches, is clearly eligible for reconstruction under the provisions of the statute in question. On the other hand, the bridge which you describe as only three hundred twenty-five feet in length, not including approaches, is clearly *not* thus eligible for reconstruction, if considered as a separate bridge project.

So the question is whether the two projects may be considered as a single bridge project for the purpose of eligibility for reconstruction with state aid under the provisions of the statute.

While the question as to whether the reconstruction of the two bridges constitutes one single or two separate bridge projects under the statute is primarily a question of fact for the Wisconsin highway commission to decide (see XIV Op. Atty. Gen. 362 and XVII Op. Atty. Gen. 540), it is considered that the question here submitted should be answered, No.

According to the statement of facts the two bridges are separated by a distance of almost a quarter of a mile, and this entire distance is traversed by a county highway on which both of the bridges are located: Under those facts it seems impossible, in any reasonable view, to find that the reconstruction of the two bridges involves but a single

bridge project. In our opinion there are two separate bridges within the meaning of the statute, and each bridge must answer the calls of the statute independently of the other in order to be eligible for reconstruction with state aid.
JEF

Peddlers—Transient Merchants—Nonresident temporarily doing business in this state under profit sharing agreement with citizen of state, nonresident furnishing goods and financing stand, is required to take out license when he aids in sale of goods here.

If nonresident sells vegetables to Wisconsin resident with proviso that resident can return to nonresident all vegetables not sold at end of each day, nonresident is not required to take out transient merchant's license.

Municipal Corporations—Beer Licenses—Nonresident wholesaler selling beer in this state is violating sec. 66.05, subsec. (10), as created by ch. 207, Laws 1933.

October 28, 1933.

MR. ALLEN C. WITTKOPF,
District Attorney,
Florence, Wisconsin.

You state that M, a nonresident, enters into a profit sharing agreement with a Wisconsin resident, whereby M is to supply vegetables and W is to sell them in Wisconsin. M finances the stand and helps in the sale of goods but has no intention of becoming a resident of this state. You ask:

"Is M obliged to take out the license required by sec. 129.05, Stats., of transient merchants?"

A nonresident temporarily doing business in this state under a profit sharing agreement with a resident of this state, the nonresident furnishing the goods and financing the stand, is required to take out a license when he aids in the sale of the goods here. The statute clearly pro-

hibits a person engaging "in the vending or sale of merchandise at any place in this state temporarily, and who does not intend to become and does not become a permanent merchant of such place." Sec. 129.05.

You ask:

"Would an agreement in which M was to sell to W on consignment, containing a provision to the effect that W could return to M all vegetables not sold at the end of each day, make it necessary for M to take out the license required of transient merchants?"

If M sells vegetables to W with a proviso that W can return to M all vegetables not sold at the end of each day, M would not be required to take out a transient merchant's license. The facts you submit fall squarely within the rule laid down in XIV Op. Atty. Gen. 315, where this department held that a nonresident of this state who sells fruit or other merchandise direct from his truck or other vehicle to dealers "does not come within the definition of a transient merchant as given by sec. 129.05, Stats."

You state that M, a beer wholesaler in an adjoining state, comes into Wisconsin, takes orders for beer and later delivers that beer to retailers in Wisconsin. You ask:

"(1) Is he engaged in interstate commerce so as to exempt him from taking out the license required of peddlers by section 129.09, Wisconsin statutes?

"(2) If M has an order from W in Wisconsin for two barrels of beer but carries enough with him so that if W wants three barrels instead when M arrives the extra can be supplied from the truck, does that alter the situation as to interstate commerce?"

A peddler ordinarily is considered as a person "who sells at retail from place to place, going from house to house, carrying the goods to be offered for sale with him." *Dewitt v. State,* 155 Wis. 249, 251. One who sells directly to retailers is not considered as a peddler. XIV Op. Atty. Gen. 315. Since M sells only to retailers he is liable for no state license as a peddler.

You ask:

"(3) How can the Wisconsin wholesaler of whom a license is required be protected from the Michigan whole-

saler who sells beer in Wisconsin without a license and who cannot obtain a license if he desires under our present laws?"

A nonresident wholesaler selling beer in this state is violating Wisconsin laws. Par. (d), subsec. (10) of sec. 66.05, Stats., (created by ch. 207, Laws 1933) provides in part:

"1. No person shall sell, barter, exchange, offer for sale, or have in possession with intent to sell, deal or traffic in fermented malt beverages or light wines, unless licensed as provided in this subsection by the governing board of the city, village, or town in which the place of business is located.

"2. The governing body of every city, village and town shall have the power, but shall not be required, to issue licenses to wholesalers * * * for the sale of fermented malt beverages or light wines within its respective limits as herein provided * * *."

Par. (e), subsec. (10), sec. 66.05 provides in part:

"Wholesalers' licenses may be issued only to domestic corporations or to persons of good moral character who shall have been residents of this state continuously for not less than one year prior to the date of filing application for said license. * * *"

In an opinion given on June 23, 1933 (XXII Op. Atty. Gen. 510, 511), this department ruled:

"The local municipalities are thus limited in the matter of issuing wholesalers' licenses to *domestic* corporations and to certain individuals who are residents of this state. Under no consideration can a local municipality license a foreign corporation. A wholesaler's license authorizes the licensee to do a wholesale business. Without a license, wholesaling is illegal."

JEF

Real Estate — Waste — Taxation — Tax Sales — County owning tax certificate on land may bring action to restrain commission of waste against tax deed holder and occupant who threatens to sell and remove buildings from land.

October 30, 1933.

T. W. ANDRESEN,
District Attorney,
Medford, Wisconsin.

You state that one B is in possession of certain city lots under a tax deed. The taxes on this property have not been paid for the last three years, and Taylor county is now the owner of the tax certificates thereon for the sales of 1931, 1932 and 1933, and the county will, within a few months, be in a position itself to take a tax deed. In the meantime, B is about to sell and remove the buildings situated on the property. The land, with the buildings removed, will be practically valueless.

You present the question as to what the rights of the county are under the situation set forth above.

The question submitted is answered by the provisions of the following statutes.

Sec. 279.08 provides as follows:

"*The purchaser or his assigns holding any certificate of sale of real estate duly issued upon any sale for taxes,* or upon execution, or by virtue of a power of sale in a mortgage *may have an action to restrain the commission of waste during the period of redemption,* and if no redemption shall be made and a deed shall be issued pursuant to such certificate the grantee or his assigns may, in such action or by a subsequent action, recover damages against any person for any waste committed by such person on the premises after such sale. But no person lawfully entitled to the possession of any premises so sold shall be liable to any such action for doing either of the acts authorized in section 279.09."

Sec. 279.09 provides to the effect that any person entitled to the possession of lands sold as mentioned in sec. 279.08 may, until the expiration of the time given by law for the redemption thereof, use and enjoy the same without being liable in an action of waste therefor, as follows:

"(1) He may use and enjoy the premises sold in like manner and for the like purposes in and for which they were used and applied prior to such sale, doing no permanent injury to the freehold.

"(2) If the premises sold were buildings, fences or any other erections he may make necessary repairs thereto, but he shall make no alterations in the form of structures thereof so as to impair or lessen their value."

Under the above statutory provisions it seems clear that the removal of buildings by one who is in possession of lands against which there are outstanding unpaid tax certificates involves the commission of waste, and that the county, as the holder of said certificates, is entitled to bring an action to restrain the removal thereof. See *Lackas v. Bahl,* 43 Wis. 53, where it was held that after sale of foreclosure and before issue of a sheriff's deed, the removal of fixtures by a mortgagor is waste.

JEF

Bridges and Highways — Relocations — Corporations — Public Utilities—Acquisition for highway purposes of land subject to public utility easement does not necessarily affect rights of utility.

October 30, 1933.

CLARENCE J. DORSCHEL,
District Attorney,
Green Bay, Wisconsin.

A relocation of a part of highway 141 in Brown county is contemplated. In order to acquire land for the new part of the highway the county intends to purchase outright a certain strip of land. It also intends to purchase another strip of land lying between the above mentioned strip and a railroad right of way. The Wisconsin Public Service Company has an easement in this second strip, maintaining a power line through it on towers, and the county's interest will, of course, be subject to that easement. You wish to know whether the purchase of these two strips of land will affect in any way the right of the

Wisconsin Public Service Company, particularly with reference to the height at which the high power electric wires would have to be strung on its towers.

It is the opinion of this department that the acquisition of these two strips of land by Brown county would not *ipso facto* or necessarily affect the rights of the Public Service Company. That part of the company's lines on the strip to be purchased subject to its easement would be brought within the scope of the following statutes:

Sec. 196.74:

"Every public utility and every railroad which owns, operates, manages or controls along or across any public or private way any wires over which electricity or messages are transmitted shall construct, operate and maintain such wires and the equipment used in connection therewith in a reasonably adequate and safe manner and so as not to unreasonably interfere with the service furnished by other public utilities or railroads. Upon a complaint to the commission by any interested party to the effect that public safety or adequate service requires changes in construction, location or methods of operation, the commission shall give notice to the parties in interest of the filing of such complaint, and shall proceed to investigate the same and shall order a hearing thereon. After such hearing the commission shall order any alteration in construction or location or change of methods of operation required for public safety or to avoid service interference, and by whom the same shall be made. The commission shall fix the proportion of the cost and expense of such changes, which shall be paid by the parties in interest, and fix reasonable terms and conditions in connection therewith."

Sec. 180.17, subsec. (2).

"But no such line or system or any appurtenance thereto shall at any time obstruct or incommode the public use of any highway, bridge, stream or body of water."

Unless the wires maintained by the service company are unreasonably low within the meaning of the above statutes, its rights will not be affected by the acquisition of the two strips of land by Brown county.

JEF

Counties—County Normal Schools—Mortgages, Deeds, etc.—Cessation of operation of county training school by county for temporary period as breach of condition in deed that site shall revert to grantor if discontinued for county school purposes is discussed.

Interruptions in use of property do not operate as breach of condition subsequent unless they amount to absolute and final abandonment of property for use specified in deed.

School board of grantor district has no power to waive condition subsequent without authority from electors of district.

October 30, 1933.

SIDNEY J. HANSON,
District Attorney,
Richland Center, Wisconsin.

You state that Richland county is operating a county training school on a site which was conveyed to the county by a certain joint school district by a deed which provides to the effect that the site is conveyed "to be used for a county training or agricultural school site," and which deed provides, further, to the effect that the site is conveyed subject to the condition "That any time said site be discontinued for county school purposes that it revert back to said joint school district."

1. You state, further, that there is some agitation on the county board for cessation of operation of the county training school for a time, and you present the question as to whether cessation of operation of the county training school by the county for a year or two would constitute a discontinuance to such an extent that the site would revert to the grantor school district.

A categorical answer cannot be given to this question.

Undoubtedly the language used in the deed created a condition subsequent which, if breached, by the discontinuance of the site for county school purposes, would cause the site to revert to the grantor school district, effective upon re-entry by it. 18 C. J. 354–356, 375; *Mills v. Evansville Seminary,* 58 Wis. 135; XIV Op. Atty. Gen. 230; XIII Op. Atty. Gen. 596.

As to whether cessation of operation of the county training school for a year or two would constitute a discontinuance of the site for the county school so as to amount to a breach of the condition, the following may be said: Conditions subsequent are construed strictly against the grantor. 18 C. J. 363; *Mills v. Evansville Seminary,* 58 Wis. 135, 140. And, although it is a general rule that the estate of the grantee continues for so long as he continues to use the property for the purpose specified, and the condition is violated when he ceases such use, yet "cessation of use is impliedly at least distinguished from mere nonuser." 18 C. J. 371.

In the *Mills* case it was held that a condition in a conveyance to a seminary corporation that the premises shall be used as a site for a seminary building and shall revert to the grantor when they shall cease to be used for that purpose was not so broken as to involve a forfeiture by the discontinuance of the school for some six years, originally caused by the want of patronage and funds, and where the school had been re-established after the commencement of the action and had been continued up to the time of the trial. In that case the court said, quoting from 58 Wis. 135, 140–141:

"* * * Now, according to the testimony of *Mr. Mills,* the condition was that the premises should be used as a site for a seminary building and grounds only, — the title to revert to the grantors when the property should cease to be used for seminary purposes. The condition imposed upon the defendant corporation the duty of keeping up and maintaining, or causing to be kept up and maintained, an educational institution on the land — a school or academy where young persons could be instructed in the several branches of knowledge and science. But the parties doubtless expected that there would be interruptions in the school for one reason or another, and for longer or shorter periods. *But such interruptions would not operate as a breach unless they amounted to an absolute and final abandonment of the property for seminary purposes.* It is admitted that the seminary building and grounds were used for seminary purposes until the spring of 1874. *From that time up to about the commencement of this suit there was no school kept in the building. It does not appear that this was due to any neglect or failure of the officers of the defendant to encourage a school, but was owing, doubt-*

less, to a want of funds and public patronage to support one. Consequently, the school ran down and was discontinued for some years. In the spring of 1880, however, the buildings were repaired at an expense of $2,700, and a school was opened in them in the fall of that year, which has been continued to the time of trial. * * *"

And at pp. 142–143:

"* * * Such being the case, we do not think the plaintiff can claim the property for condition broken, for *there has been no total abandonment of it for seminary purposes.* The failure to maintain a school in the building for a considerable period, it appears, resulted from causes which the trustees could not well overcome or control, and ought not to work a forfeiture. * * * We have referred to the rule of law that these conditions are strictly construed so as to avoid a breach. The authorities upon that point are most clear and emphatic. Counsel have referred to many of them in their briefs. We do not deem it necessary to notice them in detail."

From the *Mills* case it appears that *interruptions* in the use of the property will not operate as a breach unless they amount to an absolute and final abandonment of the property for the purpose specified. In that case the interruption was for a period of six years. The court took cognizance of the fact that such interruption, that is, the failure to keep a school for the period of six years, was due to no neglect or failure of the grantee to encourage a school but was owing to a lack of funds and patronage.

It would *seem,* therefore, that cessation of operation of the county training school for a temporary period of a year or two, if such cessation was caused purely by a lack of funds, would not operate as a breach of the condition subsequent in the instant deed. As we understand the situation, the county board does not intend to finally abandon the site for county school purposes, but proposes only to suspend the operation of the school for a temporary period, pending an improvement in county finances.

It will be noted that even where a breach of a condition occurs, such breach of itself does not cause the title to revert to the grantor. Following such breach a reentry or its equivalent is necessary in order to revest the title in the grantor. *Mash v. Bloom,* 130 Wis. 366; *Cob-*

ban v. Northern Wisconsin State Fair Assn., (Wis.) 248 N. W. 463. See also, *Donnelly v. Eastes*, 94 Wis. 390.

2. You also ask whether the school board of the grantor school district has power to waive the condition contained in the deed.

While, no doubt, the safe thing to do in the premises is to obtain a waiver of such condition, it is considered that the school board of the grantor school district has no power to waive the condition, in the absence of authority from the electors of the district. The statutes do not confer any such power upon the school board itself and it is, therefore, concluded that the board does not have the power.
JEF

Municipal Corporations—Wards—City Manager Plan—Public Officers—Supervisors—City by increasing number of wards creates vacancies for supervisors in some wards which may be filled by mayor or city manager with consent of council; such appointed officer serves until regular city election in April, 1934, if appointment is made more than thirty days before election. No special election can be held to fill such vacancies.

November 1, 1933.

ROSCOE GRIMM,
District Attorney,
Janesville, Wisconsin.

You say that the city of Beloit is operating under the city manager form of government and recently took steps to increase the number of wards in the city pursuant to sec. 62.08, Stats., by changing the boundaries of the present wards on a proper population basis and thereby creating nine new wards in the city without adding any newly attached territory to the city. You state that there are now eighteen wards in the city of Beloit, just doubling the number that formerly existed. There are, however, but nine supervisors.

You are assuming for the purpose of this opinion that the procedure of the city in increasing the number of wards was legally regular. The city of Beloit desires nine more supervisors to represent the city on the Rock county board. You submit the following questions:

"(1) Can the city of Beloit, through its council and city manager, appoint additional supervisors for the wards newly created to serve until the regular city election in April, 1934?

"(2) Can any body or executive in the state of Wisconsin appoint supervisors to represent the newly created wards until the regular city election in April, 1934?"

A supervisor is enumerated as one of the city officers in sec. 62.09 (1), Stats. Sec. 62.08 (3) speaks of a vacancy in the office whenever the boundaries of the wards are altered so as to create new wards. Under sec. 17.03 (10) a vacancy is declared to be

"On the happening of any other event which is declared by any special provision of law to create a vacancy."

Under these provisions it is apparent that there is a vacancy within contemplation of our statutes in the office of supervisors in those wards which have none. Sec. 17.23 (1) (b) provides for the filling of vacancies in the offices of cities by appointment by the mayor, subject to confirmation by the council, in the case of any other elective officer aside from mayor or aldermen. A person so appointed and confirmed holds office until his successor is elected and qualified. His successor shall be elected as provided in par. (a). In this paragraph it is provided:

"* * * His successor shall be elected for the residue of the unexpired term on the first Tuesday of April next after the vacancy happens, in case it happens thirty days or more before such day, but if such vacancy happens within thirty days before such first Tuesday of April, then such successor shall be elected on the first Tuesday of April of the next ensuing year; but no election to fill a vacancy in such office shall be held at the time of holding the regular election for such office."

This would include supervisors, for it is apparent that the office of supervisor must be considered a city office at least to the extent of electing supervisors or filling vacancies in the office. In sec. 64.11 (1), under the city manager form of government, the city manager has the same powers as a mayor under the aldermanic form of government. Under these provisions of the statute it is apparent, and we so hold, that the city manager is authorized to fill the vacancies with the consent of the council and that such appointment will hold until the regular city election in April, 1934. Both questions (1) and (2) are therefore answered in the affirmative.

"(3) Can a special election be called to fill the vacancies occasioned by the creation of these additional wards and if so, by whom is the election called?"

We find no provision for a special election to fill the vacancies. This question is therefore answered in the negative.

"(4) Can nothing be done toward filling these vacancies until the regular election of city officers in April, 1934?"

Nothing can be done except the appointment by the mayor or city manager and council.
JEF

Automobiles—Taxation—Motor Vehicle Tax—Under sec. 78.14, subsec. (2), Stats., individual who uses motor fuel in farm truck for power purposes on farm is not entitled to refund of motor fuel tax.

Individual who uses motor fuel in farm truck operated both on and off public highways is not entitled to refund of tax for that portion of motor fuel that is not used upon public highways of this state.

November 1, 1933.

ROBERT K. HENRY,
State Treasurer.

In your recent letter you inquire whether a truck that uses gasoline for power, and which truck is used both on and off the highways of this state, is entitled to a refund of that portion of the gasoline that is not used upon the highways. You state that ever since the gasoline tax law has been in existence no refund has been allowed for gasoline used in trucks whether operated on or off the roads.

It is the opinion of this department that a truck that uses gasoline for power and which truck is used both off and on the highway of the state is not entitled to a refund of that portion of the gasoline that is not used upon the highways of this state.

The pertinent provisions of the statutes to be considered are as follows:

Sec. 78.14, subsec. (2), Stats. 1933, reads as follows:

"Any person who uses motor fuel, upon which has been paid the tax required to be paid under this chapter, for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes, motor boats, airplanes, or who shall purchase or use any motor fuel for cleaning or dyeing or for any commercial use or purpose

other than operating a motor vehicle upon the public highways of this state, shall be reimbursed * * *"

It will be noted that the section above quoted, which relates to refunds, reads as follows: "for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes, motor boats, airplanes, * * *"

The word "truck" is not mentioned. It is manifest that if the legislature had intended to exempt trucks from the operation of the motor fuel tax law and to grant a refund for trucks used for agricultural purposes it would have used the word "trucks" along with the word "tractors" in the act. The only section of the statutes which might seem to indicate in any way that the legislature had intended to grant a refund for gasoline used in trucks being used off the highways of the state is that portion of the section which reads as follows: "or who shall purchase or use any motor fuel for cleaning or dyeing *or for any commercial use* other than operating a motor vehicle upon the public highways, * * *"

It is clear, after reading this section in connection with the preceding section of the statutes, that the term "commercial use" has been intended to refer to manufacturing and business uses of the gasoline and not to gasoline used in trucks for agricultural purposes off the highways of the state. Under the doctrines of "ejusdem generis" and "noscitur a sociis" the meaning of general words must be extended by reference to the preceding special words. Thus in *Bevitt v. Crandall,* 19 Wis. 581, 583, the court construed the following language of the exemption statute (ch. 134, Rev. Stats. 1858):

"The tools and implements, or stock in trade, of any mechanic, miner, or *other person,* used and kept for the purpose of carrying on his trade or business, * * *."

It was claimed that "farmer" would come under the designation of "other person" and hence was entitled to the exemption. The court held that the words "other person" were to be applied to mechanics and tradesmen and not to farmers according to the maxim "noscitur a sociis."

In *Jensen v. State,* 60 Wis. 577, the court, under the same maxim restricted "any tavern keeper or other person" to a

similar class of persons and including only those engaged in the business of selling liquor.

In *Chapman v. Piechowski*, 153 Wis. 353, 360, the court dealt with the provisions of a safety statute which regulated factories, work shops, and *other places of employment.* The court held that the term "other place" of employment did not include a threshing machine as a "place" within the meaning of this law. See also *Saxe Operating Corp. v. Ind. Comm.*, 197 Wis. 552; *Morris v. Buffalo F. & M. Ins. Co.*, 30 Wis. 534, 537; *State ex rel. Lederer v. International Invest. Co.*, 88 Wis. 512.

Statutes granting exemptions and refunds are to be strictly construed against the person claiming an exemption or a refund and in favor of the state.

It is clear that the legislature did not intend to grant a refund for gasoline used in farm trucks, regardless of whether such trucks are used for power purposes or whether such trucks are used both on and off the public highways.

In view of the foregoing you are advised that a person using gasoline in a farm truck for power purposes, where such truck is used both off and on the highways of the state, is not entitled to a refund to that portion of the gasoline that is not used upon the highways.

JEF

Criminal Law — Erasing Writing — Forgery — Erasing amount in order for supplies from city poor relief organization and inserting higher number is forgery as defined in sec. 343.56, Stats.

It is district attorney's duty to prosecute, as in all other criminal cases.

November 1, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

You state that a case has come to your attention in which a man received an order for supplies from the city poor

relief, and thinking that the order was not sufficient he raised the original in practically every item so that he received practically twice as much as he was allowed under the order, unknown to the administrator of relief. You inquire whether such act is a violation of some statute and whether it is your duty to prosecute; if it is your duty to prosecute, you would like to know what charge to make against him.

It of course is your duty to prosecute, as you are the prosecuting attorney of your county, and if the crime has been committed in your county, you are the one, under the statute, to prosecute. The statute which has been violated is sec. 343.64 Stats., in connection with sec. 343.56. It is forgery as defined in sec. 343.56.

JEF

Indigent, Insane, etc.—Public Health—Wisconsin General Hospital—All cases coming under provisions of ch. 142, Stats., are excepted from provisions of sec. 49.01.

County judge may order person treated at Wisconsin general hospital, Wisconsin orthopedic hospital, local hospital or at home, and county will be liable for such treatment.

There is no law which permits county to charge its portion back to local municipality.

November 1, 1933.

GILES V. MEGAN,
District Attorney,
Oconto, Wisconsin.

You state that Oconto county is on the township system for caring for poor and that sec. 49.01, Stats., provides that every town shall support and furnish medical relief to all poor persons lawfully settled therein. You inquire whether such general duty on the part of the town to furnish medical relief is nullified or changed by ch. 142, Stats., and if so in what manner.

You ask who, when a physician reports a case of an

indigent patient to the county judge under ch. 142 and wishes the patient treated in the home, which would be less costly than if he were hospitalized, is liable for the services and charges of the attending physician where the county is operating on the township system for care of poor.

Ch. 142 was intended to be beneficent in its nature and should be liberally construed. It applies under its terms to a person having a legal settlement who is crippled or ailing and whose condition can probably be remedied or advantageously treated. The procedural steps to be taken are given in the statute. Sec. 142.02 says:

"When the case of such person shall come to the notice of a sheriff, county supervisor, town clerk, health officer, health nurse, poor commissioner, policeman, physician or surgeon, or any public official, he shall and any teacher, priest or minister may, file with the county judge of the county wherein such afflicted person has a legal settlement an application for such treatment at such hospital."

Under sec. 142.04 the judge is permitted to give an order to have the patient treated at the Wisconsin general hospital or at the Wisconsin orthopedic hospital for children, or he may order him treated at a local hospital or even in the home of such person.

Sec. 142.08 (1) provides:

"The net cost of caring for a patient certified, within the quota fixed for any county by section 142.04, to the Wisconsin general hospital or Wisconsin orthopedic hospital for children shall be paid one-half by the state and one-half by the county of his legal settlement. The cost of caring for a patient certified to the Wisconsin general hospital from any county in excess of the quota fixed for said county by section 142.04 shall be paid entirely by the county of legal settlement. The county board may in its own name collect from such patient the total net cost of such care, and after deducting its share of the cost of such care pay the balance so collected to the state."

In subsec. (5) it is provided:

"The expense of treatment of patients in other hospitals under this chapter shall be paid by the county treasurer upon certificate of the county judge, who shall be satisfied as to the correctness and reasonableness thereof."

In an official opinion in XXI Op. Atty. Gen. 240, this department ruled that when the county judge, under ch. 142, orders treatment either at home or in a local hospital, the expense of the treatment is to be paid by the county. This department has also held that the claims are paid by the county treasurer upon certificate of the county judge and need not be filed pursuant to sec. 59.77, the latter being merely a general provision over which the specific provision found in sec. 142.08 controls. See XXII Op. Atty. Gen. 463.

In this latter cited opinion it was also held that this law provides for treatment at home or in a local hospital where the treatment will be adequate and the expense to the county the same or less than that of treatment at the Wisconsin general or the Wisconsin orthopedic hospital. Where the trip to Madison would necessarily endanger the life of the patient and probably very materially impair his chances of surviving the treatment even if the trip itself was endured, it is not believed that the treatment at Madison would be considered adequate or that the county judge would be bound to prescribe treatment, if any, at Madison. It was held that the county judge, in an emergency, may make a commitment to a near-by hospital even where the expense would be somewhat more than the cost of treatment at Madison.

You inquire whether the county judge can order hospitalization or medical treatment in an ordinary case of pregnancy or broken bones under ch. 142, or whether he is limited to exceptional cases which cannot be successfully treated locally.

The provisions of this statute are rather broad and the county judge is given great discretion. We doubt whether a court on appeal would interfere with this discretion of the judge in ordering hospitalization in most of such cases. The matter is generally given to the discretion of the judge. He may be guided by the physician but is not bound by the recommendations of the physician for he has all the facts and circumstances to consider.

You also inquire whether there is any law which permits

the county to charge its portion back to the town, city or village which is the legal settlement of the patient.

This question must be answered in the negative.

JEF

Fish and Game — Fishing and Hunting Licenses — All hunting and fishing licenses are issued by conservation commission or its agents except resident hunting licenses, which are issued by county clerk.

Deputy county clerks may issue licenses under direction of county clerks in any part of county.

County clerk is not entitled to ten per cent when license is issued by conservation commission or its agent.

County clerk is responsible for state share of moneys received for licenses issued by him or his deputies.

County clerk must keep, under sec. 29.03, subsec. (6), Stats., alphabetical index only for all persons to whom he or his deputies issued licenses.

November 1, 1933.

WILLIAM A. ZABEL,
District Attorney,
Milwaukee, Wisconsin.

An opinion from your department, prepared by C. S. Perry, assistant corporation counsel, was sent to this department with the request that we indicate whether we agree with the conclusions arrived at and the answers given to the questions submitted.

Your opinion holds:

1. The conservation commission may supply, for the purpose of issue, hunting and fishing licenses to others than the county clerks in their respective counties.

You cite sec. 29.10, Stats., providing for the issuance of all *resident hunting* licenses by the county clerk; 29.11, authorizing settlers' hunting licenses to be issued directly by the commission in its discretion; sec. 29.12, providing that *nonresident hunting* licenses be issued by the commission; sec. 29.14, Stats. 1931, which required no license

to be taken out for hook and line fishing in outlying waters by nonresidents, but in inland waters a license issued by the commission, which license may be issued by agents for a compensation of ten per cent of the license fee. You call attention to the change in this last section made by ch. 243, Laws 1933, providing that *nonresident rod and reel* fishing licenses be issued by the commission or its agents, and to sec. 29.145, created by ch. 243, relating to hook and line and rod and reel fishing by residents.

2. The county clerk may not give out hunting and fishing licenses to be issued outside his office in his county.

3. The county clerk is not entitled to the ten per cent fee under amended sec. 29.14 which the agent of the commission receives when the license is issued by an agent of the commission or the commission.

4. The county clerk is responsible for the state's share of the moneys received from licenses issued only by himself or his deputies.

5. The county clerk must, under sec. 29.09 (6), keep an alphabetical index of only those persons to whom he or his office has issued licenses.

We agree with all the conclusions except the answer to the second question. Under sec. 59.16 the county clerk is authorized to appoint one or more deputies and file such appointment in his office. Such deputy or deputies shall aid in the performance of the duties of such clerk under his direction. We see no objections to having these deputies issue licenses for the clerk in other places than his office, directed by him in the county.

JEF

Peddlers—Fact that employee of Ace Box Lunch Company sells to company employees and general public, both on and off premises where operating, does not in itself make him peddler.

In order to be classed as peddler individual must solicit or canvass for sales.

November 1, 1933.

WM. A. ZABEL,
District Attorney,
Milwaukee, Wisconsin.

On August 11, 1930, XIX Op. Atty. Gen. 405, an opinion was rendered by this office concerning certain sales made by the Ace Box Lunch Company. It was there held that, under the statement of facts concerning the sales method of the said corporation, there was no violation of ch. 129, relating to the peddlers' license law. Believing that all of the facts were not submitted before this opinion was rendered, you therefore submit the following statement and request a supplementary opinion as to whether the additional facts submitted by you would in any way alter the conclusion reached in the previous opinion:

"1: Occasionally the boy who is left at the premises of the employer will leave the premises and go into the street to deliver to one of the company employees who calls to him what he desires, to wit: lunches.

"2: Occasionally the boy will make delivery off the premises under the same circumstances to a member of the general public.

"3: Occasionally a member of the general public will come on to the property of the employer to purchase from the boy.

"4: Each boy covers more than one factory, being at a certain factory during certain hours and then being picked up with whatever goods he may have on hand, by the truck and taken to another factory, where he is supplied from the truck with whatever stock he contemplates requiring at that factory. Each boy may thus cover several plants during a day."

It is our opinion that not one of the above additional statements of fact, nor any combination of the four, would bring the business of the Ace Box Lunch Company within

the requirements of the peddlers' license law. The previous opinion of this office is, therefore, affirmed.

The following language is taken from XXI Op. Atty. Gen. 158:

"'* * * A peddler is simply one who peddles, and any one peddles who sells at retail from place to place, going from house to house, carrying the goods to be offered for sale with him.' *De Witt v. State,* 155 Wis. 249, 251.

"To constitute a person a peddler certain essentials must be present. There is a going from place to place. This is necessary to distinguish him from a merchant with a fixed place of business. There must be an actual canvass, a seeking of sales. It is the one that is actually making the canvass that is the peddler, not the corporation that employs him, though they may be the ones back of the project."

Your statement of facts presupposes that there is no sale from the truck. The statement of facts submitted by you does not show that there is an actual solicitation or canvass for sales such as is contemplated by the peddlers' license law. Under 1 and 2 of your letter, sales are made upon order issued by the individual customer and it is immaterial whether that customer is one of the general public or an employee of the company upon whose property the representative of the Ace Box Lunch Company is located. Neither does it make any difference whether the individual giving the order is on or off the property upon which the representative is located. There appears to be no distinction between a sale of the sort contemplated by 1, 2 and 3 and a sale which results when a member of the general public walks into the store of a permanent merchant and asks for certain merchandise. The initiative is taken by the prospective purchaser rather than by the seller. The statement made in No. 4 does not indicate the above conclusion for the reason that, although the boy covers more than one factory, his activities lack one of the essential elements to constitute him a peddler, namely, the solicitation or canvass for sales.

JEF

Minors—Adoption—Consent to adoption must be obtained either from legal guardian of child or from state board of control where mother of illegitimate infant is nonresident.

November 2, 1933.

BOARD OF CONTROL.

You state that illegitimate twins were brought from Illinois into this state for adoption, the mother, age nineteen, having given a written release to the Wisconsin foster parents. The state board of control was notified, since the mother was a nonresident. A guardian *ad litem,* appointed by the county court, gave his consent to the adoption, and thereupon the court made its order. You ask whether the consent of the state board of control was necessary to this adoption.

Consent to adoption must be obtained either from the legal guardian of the child or from the state board of control where the mother of illegitimate infants is a nonresident. Adoption proceedings being statutory, it is necessary that they be complied with. Consent is an essential factor in these proceedings and can only be obtained from those legally capable of giving it. It is necessary, where the parent is a nonresident, for the parent to give a written release of the custody of the child.

Sec. 322.04, subsec. (3), Stats., provides:

"If such child has no living parent or if such parent be a nonresident and shall have executed a written release of the custody of such child which shall have been valid at the time of its execution in the state in which made, adoption shall be permitted on consent of the legal guardian of the child or if there is no guardian, by the state board of control."

Since the mother by Illinois law is capable of making a contract at the age of eighteen, this release was valid. But the statute not only contemplates this as necessary but it further provides that "adoption shall be permitted on consent of the legal guardian." This is interpreted to mean that after the release is given by a nonresident mother

of the custody of her child, consent by the legal guardian must then be obtained in an adoption proceeding.

It is therefore essential to determine upon the guardians who are legally capable of giving consent, for not all guardians are capable of doing so. This power of a guardian to consent is statutory.

Sec. 322.04 (2) provides:

"* * * adoption shall be permitted only on consent of the state board of control, or of the child welfare agency, or the county home for dependent children, * * *."

According to the facts submitted, a guardian *ad litem* was appointed by the county court. It is assumed that he was an individual appointed for this purpose, and was not one of those mentioned in sec. 322.04 (2).

"A guardian *ad litem* or next friend is recognized only for certain specific purposes and has not the general powers of a trustee or guardian. His powers are strictly limited to matters connected with the suit in which he is appointed, and his acts with respect to the infant's rights concerning other matters are unauthorized; * * *" 22 Cyc. 661.

Therefore, unless the guardian *ad litem* was a child welfare agency or a county home for dependent children, his consent to adoption was unauthorized.

The consent to adoption not having been obtained from a licensed child welfare agency or a county home for dependent children, it is necessary in this case to obtain the consent of the state board of control. The case should be reopened so that the court order follows the filing of consent. Such procedure would prevent future difficulties that might arise.

JEF

Automobiles—Law of Road—Common Carrier—Secretary of state is not authorized to permit reduction in gross weight of motor vehicle during time for which it was registered. Licensed carrying capacity of motor vehicle is maximum weight for which it is licensed to operate.

November 2, 1933.

THEODORE DAMMANN,
Secretary of State.

You state that your department desires to be advised as to whether in correlating the provisions of sec. 85.01, subsec. (4), and ch. 194 and sec. 76.54, Stats., you are permitted to grant requests by the licensee to reduce the licensed "gross weight" for trucks when the effect of the same would be to place a truck in a different taxing and fee classification under the motor vehicle carrier act, even to the point of possibly avoiding all taxes thereunder, and secondly, whether, where a given weight is the stated "gross weight" of such vehicles the public service commission may disregard the same in determining "gross weight" under ch. 194 and sec. 76.54 so as to fix the same for such vehicle as the maximum "gross weight" allowed under the particular outstanding license plates for such vehicle or the license fees paid thereon.

Under sec. 85.01 (4) (c) relating to registration fees for trucks, the weight classifications for the different fee brackets in part are:

4,500 pounds to 5,999 pounds — $20
6,000 pounds to 7,999 pounds — $35
8,000 pounds to 9,999 pounds — $60

Sec. 194.04 (4) (d) and (e) provides that private motor vehicles weighing up to 7,999 pounds pay a fee of one dollar for a permit and that those weighing 8,000 pounds or more shall pay two dollars.

Under sec. 76.54 (3) and (4) the tax classifications are as follows:

Up to 4,500 pounds
4,501 pounds to 6,000 pounds
6,001 pounds to 8,000 pounds
8,001 pounds to 10,000 pounds, etc.

The flat tax provided for vehicles under the latter section ranges in general from $22.50 for vehicles of 4,500 pounds or less to $540 for vehicles weighing 34,001 pounds to 36,000 pounds. In addition motor vehicles in these weight classifications are required to pay a flat tax of double the amount given in the event that such vehicles have two or more solid tires. The above statutes, except sec. 85.01, have been amended as above stated in ch. 488, Laws 1933. Sec. 194.01, (16) and sec. 76.54 (1) (b), relating to taxation, "gross weight" is defined as follows: "the actual weight of such motor vehicles unloaded plus the licensed carrying capacity of such motor vehicle.

Sec. 194.04, subsec. (2), provides:

"* * * No permit shall be issued or renewed for any motor vehicle unless the registration required by section 85.01 shall be paid in this state."

After registration has been made, the secretary of state is expressly authorized to permit the owner of the truck to increase the weight of his truck by paying the additional registration fee. There is, however, no express provision in the statute authorizing a reduction in the weight of the truck after it has been registered. In view of the fact that the secretary of state has only such powers as are provided by law in this matter, we are of the opinion that no reduction in the weight of the truck can be permitted by the secretary of state during a year for which the registry is made. Your first question must therefore be answered in the negative.

Your second question must be answered in the affirmative, for as above quoted, the "gross weight" is "the actual weight of such motor vehicle unloaded plus the licensed carrying capacity of such motor vehicle." When a truck is registered for 8,000 pounds under the table as above quoted, $60 must be paid, but this authorizes the owner to use the truck to a maximum of 9,999 pounds. This maximum is the "licensed carrying capacity" of the truck as that term is used in the definition of gross weight as above quoted.

JEF

Agriculture — Agricultural Societies — Purses for colt races must be approved by commissioners of department of agriculture and markets as premiums are approved, before state aid can be given.

November 2, 1933.

CHARLES L. HILL,
Department of Agriculture and Markets.

You inquire whether or not the race purses for which state aid is provided in subsec. (10), sec. 96.68 Stats., are subject to the same regulations as the premiums mentioned in subsec. (1), sec. 96.68.

Subsec. (10), sec. 96.68 came into our statutes by the enactment by the legislature of ch. 339, Laws 1931, and was enacted to encourage the development and improvement of standard bred horses. It gives as state aid to each county and any such organized agricultural society, association or board in the state fifty per cent of each purse of four hundred dollars and fifty per cent of each purse of five hundred dollars paid by it to the owners of the successful contestants in a two-year-old trot, two-year-old pace, three-year-old trot and three-year old pace.

What is now sec. 96.68 (1) to (9) was formerly sec. 20.61 (11) (a) to (g) and (11a) and governed the giving of state aid to county fairs and agricultural societies for money actually paid by them as net premiums. Thus the matter of state aid to county fairs is included in one section, viz., sec. 96.68 (1) to (10).

Subsec. (1), sec. 96.68 is as follows:

"(1) To each county, and any such organized agricultural society, association, or board in the state, eighty per cent of the first five thousand dollars actually paid in net premiums and fifty per cent of all net premiums paid in excess of five thousand dollars at its annual fair upon live stock, articles of production, educational exhibits, agricultural implements and tools, domestic manufactures, mechanical implements and productions, for which premium lists have been submitted to the commissioner of agriculture not later than May 1 of each year; but no one premium so paid shall exceed the sum of thirty-five dollars to a single person, or seventy-five dollars for any township or other

group premium. No fair, association, or board shall receive state aid unless its premium list, entry fees, and charges shall have been submitted to the commissioner of agriculture on or before May 1, and approved by him in writing, both as to premiums offered, amounts to be paid, entry fees to be charged, and all other charges for exhibiting."

I would call your attention particularly to the last sentence of that subsection. Subsec. (4), sec. 96.68 requires the setting up by each county agricultural society, association, or board of a complete accounting system, and the commissioners may withhold state aid until a satisfactory accounting system has been approved by them. It is very clear that it was the intent of the legislature to give the commissioners close supervision over the giving of state aid for net premiums.

Subsec. (10), sec. 96.68 was made a part of this statute, and while it does not specifically give to the commissioners the same supervision over the purses offered for colt races, it is my opinion that this subsection must be interpreted in the light of the entire section, and that the commissioners have the same authority over the purses that they have over the net premiums. Stated in another way, it is my opinion that no fair, association, or board shall receive state aid unless its purses for colt races, premium lists, entry fees, and charges shall have been submitted to the commissioners of the department of agriculture and markets on or before May 1, and approved by them in writing.

To put any other interpretation upon this section would lead to very serious consequences, that is, some fairs could, by following the provisions of subsec. (10), deprive other county fairs of much of their premium money. I do not believe that it was the intent of the legislature to do this.

JEF

Agriculture—Drainage—Soil Saving Dams—Measure of damage done by water over Y's land is deterioration in land.

To safeguard against fictitious damages, X should perpetuate testimony by pictures and observation by several witnesses.

Nov. 2, 1933.

E. R. JONES, *Field Director,*
Wisconsin Flood Control Administration.

You state that in La Crosse county one of the soil saving dams that has been built this summer as emergency conservation work under a contract with the state is on the farm of X about 100 feet up stream from the line fence of one Y; that the contract is with X, but Y gave silent consent to the structure as it has been under construction for the past three months. Now bad feeling has developed and the latter has threatened to sue for damages if the structure ever does him even the most infinitesimal damage. You say the fact is that the water will have a somewhat greater velocity just below the outlet of the conduit through the dam than it formerly had, and may cause a little more erosion in the gully already existing on the Y land, but the quantity of water will be the same as it ever was.

You further state:

"I may add that the purpose of the dam is to trap the silt in the gully above the dam on X's land. In two or three years, the gully on X's land will be filled with silt, and then the silt will be carried by the water through the conduit into Y's gully as it is now. During these two or three years, however, it will be the de-silted water that enters Y's gully, unable to replenish by sedimentation the erosion that may occur temporarily in the bottom of Y's gully. The gully is now about 30 feet deep. It may deepen to 31 feet in the next two or three years, but after that will probably refill by sedimentation back to its present depth. There is a worthless point of bank jutting out into the gully on Y's land just below the line fence. This point may be worn off permanently by the increased velocity just below the dam, but it is hard to see how that could damage Y's farm any."

You inquire:

"(1) How would the damage, if any, to the Y land be measured?

"(2) What safeguards are there to X against liability for fictitious damages to Y?"

You state that you have constructed the conduit, and X is to make the earth dam over it. He is loath to start making the fill until he knows the extent of his liability.

From your description it would appear that there is no inconvenience to Mr. Y in the use of his land. Whether the gully is thirty feet deep or thirty-one feet does not, it would seem, make any material difference. The measure of damage, if there is any damage, would, in our opinion, be the difference between the land as it is now or as it will be when the damage is done. In other words the deterioration of the land is the measure of damages. That is the answer to your first question.

The only safeguard which we can suggest for Mr. X in answer to your second question is that he place himself in a position where he can produce evidence as to the condition of the gully and land at the present time by taking pictures of it and having intelligent witnesses observe it so that he may be able to prove the actual situation as it existed prior to any damages.

JEF

Fish and Game—Public Lands—United States has power to issue regulations for protection of national forests lying within boundaries of state, notwithstanding any state laws to contrary.

November 2, 1933.

PAUL D. KELLETER, *Conservation Director,*
Conservation Department.

You request an opinion from this department as to the authority of the United States government in relation to national forest areas, and particularly with reference to the authority of the department of agriculture to place poison in national forest areas even though such action

is in conflict with the Wisconsin law. The object is to decrease the number of rabbits within those areas.

Power is vested in the United States to control and protect federal owned land by art. IV, sec. 3, cl. 2 of the United States constitution, which provides:

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

By virtue of this authority, congress has established national forest reserves. *United States v. Shannon,* 151 Fed. 863 (D. Mont., 1907); affirmed, *Shannon v. United States,* 160 Fed. 870 (C. C. A. 9th, 1908); *Ex parte Hyde,* 194 Fed. 207 (N. D. Cal., 1904).

Likewise, under the above cited constitutional provision, the United States has power to make reasonable regulations for the protection of its property. The power of the federal government in this respect is carefully analysed by the court in the case of *Camfield v. United States,* 167 U. S. 518, 525–526, 42 L. ed. 260 (1896):

"* * * The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. * * * While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of state legislation."

Such power is paramount to any state laws. *Utah Power & L. Co. v. United States,* 243 U. S. 389, 61 L. ed. 791 (1916); *United States v. Alford,* 274 U. S. 264, 71 L. ed. 1040 (1927); *United States v. Gurley,* 279 Fed. 874 (N. D. Ga. 1922).

The very point here in question seems to have been conclusively settled by the decision in the case of *United States v. Hunt*, 19 F. (2d) 634 (D. Ariz., 1927), modified and affirmed in *Hunt v. United States*, 278 U. S. 96, 73 L. ed. 200 (1928).

The facts in the above case were that the department of agriculture, under authority of the act of February 1, 1905 (33 Stats. 628), authorized the killing of surplus deer in a national forest and game reserve located in the state of Arizona. The deer had increased to such extent that they were doing irreparable damage to trees, bushes and shrubs growing in the reserve. Such regulations issued by the department of agriculture contravened the state game laws. The court held that the United States, by virtue of its ownership of the land affected, has the power to kill deer for the purpose of protecting its forest reserve, any state law to the contrary notwithstanding.

This office, therefore, is of the opinion that the United States department of agriculture has power under 33 Stats. at Large 628, to authorize the placing of poison within national forest areas as a necessary protection to such lands against rabbits, irrespective of any state laws on the subject.

JEF

Education—Vocational Education—Vocational board has powers expressly granted to it under sec. 41.18, Stats.

Board of directors of vocational education of West Allis has power to refuse its consent to pupils resident of West Allis to attend vocational school of Milwaukee.

November 4, 1933.

GEORGE P. HAMBRECHT, *Director,*
Board of Vocational Education.

You state that an issue has arisen between the administrative agencies of the vocational school in Milwaukee and the vocational school in West Allis concerning the attendance of residents of West Allis in the Milwaukee vocational

school classes. It appears that the city of West Allis does not offer certain courses in vocational training that are offered in the city of Milwaukee. You quote Dr. Cooley in a letter addressed to you, in which he says:

"A careful reading of 41.18 under the clause beginning: 'The vocational schools shall be open to all persons fourteen years of age or over who reside in other municipalities having local boards of vocational education * * *' leads me to believe that the courts would construe the provision 'provided further, that such nonresidents shall present the written approval of the local board of vocational education of their home municipality' as being limited to the ascertaining of whether or not such courses are provided in their own school, and in order that they may have information enabling them to provide in the budget for the payment of such monies. I doubt very much that any court would construe that the local board of the home municipality had the power to flatly deny the man or woman his educational opportunity."

You also state that you received a letter from Charles H. Beeckler from West Allis, making inquiry concerning the subject matter of disagreement in construing the purposes and intent of secs. 41.18 and 41.19, Stats. He speaks of two young men who enrolled in a five-year technical course in the Milwaukee vocational school while they were residents of the city of Milwaukee. During the past year they have moved to West Allis. They have completed one year of this technical course, which is not offered at the West Allis vocational school, and it is their desire to continue and complete the work in the Milwaukee vocational school. In order to do so it appears that it would be necessary for them to pay a tuition fee of $36.00 a year, which amount is required of students who are not residents of the city of Milwaukee.

They state that it is their understanding that this tuition is to be paid either by the student or the city in which he resides. The board of directors of the West Allis vocational school refuses to permit the city of West Allis to pay such tuition fees. The directors claim the board's financial condition will not permit such payments to be made. The young men inquire what course, if any, they

may pursue to continue their enrolment in the five year technical course of the Milwaukee vocational school without changing their residence status as citizens of West Allis.

Sec. 41.18, Stats., reads thus:

"The vocational schools shall be open to all residents of the cities, towns and villages in which such schools are located, who are fourteen years of age and who are not by law required to attend other schools, and to all persons over fourteen years of age employed in said cities, towns or villages, but who are residents of other municipalities maintaining vocational schools; provided, such nonresidents shall present the written approval of the local board of vocational education of their home municipality. The vocational schools shall be open to all persons fourteen years of age or over who reside in other municipalities having local boards of vocational education but in which the specific courses desired by such persons are not given; provided, such courses are given in the municipality in which such persons elect to attend and the local board of such municipality agrees to admit them; provided further, that such nonresidents shall present the written approval of the local board of vocational education of their home municipality. Any person over the age of fourteen years who shall reside in any town, village or city not having a vocational school, and who is otherwise qualified to persue the course of study, may with the approval of the board of vocational education, be allowed to attend any school under its supervision. Nonresident pupils shall be subject to the same rules and regulations as resident pupils."

We have carefully examined this statute and we do not believe that the construction contended for by Dr. Cooley is the one that the wording of the statute calls for. I believe that the vocational board has the power to refuse to give its consent as the West Allis board has refused. Vocational education has, of course, not the constitutional guaranty that common school education has. It is a matter of statutory construction and the language is clear. I believe if the legislature had intended to express what Dr. Cooley is reading into this statute, it would have been an easy matter to do so.

You are therefore advised that the local board of vocational education of West Allis is within its rights in deciding as it has.

We cannot suggest any way out of this dilemma for these two young men, as the statute does not govern the case.
JEF

Public Health—Contagious Diseases—Wisconsin General Hospital—County judge has great powers under ch. 142, Stats., to order hospitalization of persons having ailments which may be treated in hospital even though it is not necessary to consider Wisconsin general hospital or orthopedic hospital.

Quarantine expenses of person afflicted with communicable disease, if he is quarantined in hospital on order of local board of health, are charge upon municipality; but if he is ordered to hospital by county judge under ch. 142, expense of hospitalization is paid by county on order of judge.

November 4, 1933.

FRED G. SILBERSCHMIDT,
District Attorney,
La Crosse, Wisconsin.

You state that La Crosse county has adopted the county plan for furnishing relief to indigents. It maintains a relief list of from nine hundred families in the summer to fifteen hundred families in the winter. It employs a commissioner of poor and a supervisor of case records. This latter supervisor is a position created because the state industrial commission, through the Federal Reconstruction Finance Corporation, pays fifty per cent of all relief work except hospitalization. The supervisor has the supervision of nine investigators for relief cases. You also state that the county likewise has a contract with the county medical society whereby the physicians render medical services for all indigents. Hospitalization is paid directly by the county upon the authorization of the medical director, who is the agent stipulated in the medical contract.

You state that assuming the above facts, a patient applies to the county medical director for surgical services

and hospitalization. The patient is not now receiving nor has he received county aid but states he is unable at present to pay the hospital obligation. The surgical case is not an emergency, but surgical treatment would be beneficial. The patient wants a local surgeon (who has offered his services gratis) and a local hospital. The nature of the case is such that it can be successfully treated in his home.

The medical director or agent refuses hospitalization at the county expense until such time as the commissioner of poor accepts the patient as a proper relief subject. The patient goes to the county probate judge and he authorizes hospitalization without consulting the poor commissioner or the medical director and without proper investigation of the patient's financial condition and his ability to pay.

You inquire whether the county probate judge has the legal authority to grant hospitalization under such conditions, and whether sec. 142.01, Stats., contemplate that the county probate judge may hospitalize in the local hospital indigent cases who apply to him where neither the patient nor the nature of the operation is such that the Wisconsin general hospital or the orthopedic hospital need be considered.

We rendered an official opinion on November 1 on a similar question to the district attorney of Oconto county.* Assuming that the procedural steps were taken which the statute prescribes, that the application to the county judge contained a full statement of the financial situation of the person and a general statement of his physical condition, verified, and if the judge is satisfied that the person is unable to pay for such hospitalization, that he has a legal settlement in the county and has an ailment which will be benefited by treatment in the hospital, he certainly has the right to order such hospitalization. You state, however, that the judge did not make proper investigation of the patient's financial condition and his ability to pay. If this is true the judge failed in his prescribed duty under this statute. I believe, however, the presumption is that he has made proper investigation if he has made the order after

* Page 875 of this volume.

being duly advised in the premises. This statute will be liberally construed and the county judge may order hospitalization in case where the Wisconsin general hospital or the orthopedic hospital need not be considered.

I believe that to set aside the order of the judge in a matter of this kind, it is necessary to prove that he acted arbitrarily and abused his discretion. The judge has the power to order hospitalization even against the advice of the medical director or agent. See secs. 142.01 and 142.04.

You also inquire whether, in the case of a person who resides within the city limits of La Crosse and who develops a case of diphtheria or any other communicable disease other than a venereal disease and requires quarantine in the local hospital, under ch. 143 Stats., the cost of hospitalization shall be assumed by the city or by the county.

Under sec. 143.05 the quarantine is under the order of the board of health. In subsec. (10), as to the expense, it is provided:

"Expenses for necessary nurses, medical attention, food and other articles needed for the comfort of the afflicted person, shall be a charge against him or whoever is liable for his support. Indigent cases shall be cared for at municipal expense. If he is a legal resident of another municipality of this state, the expense of care shall be paid by such municipality, or by the county where the county system for the care of the poor has been adopted, when a sworn statement of such expense is sent to the proper officers within thirty days after quarantine is removed. * * *"

Under subsec. (6) (a) of said section it is provided:

"When the health officer deems it necessary that such afflicted person be quarantined in a separate place, he shall remove him, if it can be done without danger to his health, to such place, and the expense of such removal shall be paid by the municipality."

Subsec. (7) provides:

"* * * The expense of maintaining quarantine, including examinations and tests for disease carriers and the enforcement of isolation on the premises, shall be paid by the city, incorporated village or town upon the order of the local board of health."

If, however, the order is made by the county judge under ch. 142 instead of the health officer, then the expense of such hospitalization must be paid by the county on the order of the judge.
JEF

Loans from Trust Funds—School Districts—Detachment of Territory—Upon division of territory and adjustment of assets and liabilities, under sec. 66.03, Stats., municipality which obtained loan from trust funds is still responsible for repayment of same.

Although annexing municipality assumes part of indebtedness, loan must be considered as liability of borrower and included in determining five per cent indebtedness limitation.

November 6, 1933.

A. D. CAMPBELL, *Chief Clerk,*
Commissioners of the Public Lands.

Some time ago a school district located in Milwaukee county applied for and received a loan from the state trust fund. Subsequently a portion of this school district was detached, and annexed to the city of West Allis. At the time of the detachment and annexation an apportionment or adjustment of assets and liabilities was made between the school district and the city of West Allis, under sec. 66.03, Stats. By this adjustment the city of West Allis assumed the indebtedness of this school district to the state trust funds. The question now arises as to whether this loan continues to be an obligation of the school district, after this adjustment, so that the district should include this indebtedness when determining its five per cent indebtedness limitation upon application for another loan from the state trust funds.

It is our opinion that your question must be answered in the affirmative. Sec. 25.02, subsec. (2), Stats., provides:

"Every loan to a school district may be made for such time, not exceeding fifteen years, and for such amount as together with all other indebtedness of such district, shall not exceed five per centum of the last preceding assessed valuation of the property in such district * * *."

Sec. 25.07 provides:

"All the taxable property in any municipality which has obtained or shall obtain any loan from the state or from any of its trust funds shall stand charged for the payment of the principal and interest thereof. * * *"

A school district is considered as a "municipality" within the meaning of this section. Sec. 25.01 (3).

Upon the strength of sec. 25.07, it was held, in XXI Op. Atty. Gen. 990, that the boundaries of a school district which has borrowed from state trust funds may be changed, but all of the territory included in the district at the time such loan was made remains charged with the irrepealable tax levy. In XX Op. Atty. Gen. 214, it was held that taxes levied to pay the principal and interest on loans from state trust funds to school districts constitute a lien upon each parcel of taxable property within such district, so that the property remains liable for such taxes, regardless of its detachment from the district. See p. 215.

Sec. 66.03 relates to the adjustment of assets and liabilities on a division of territory. Subsec. (7) provides:

"* * * If a proportionate share of any indebtedness existing by reason of municipal bonds or other obligations outstanding shall be assigned to any municipality it shall cause to be levied and collected upon all the taxable property in such municipality in one sum or in annual instalments the amount necessary to pay the principal and interest thereon when the same shall become due, and shall pay the amount so collected to the treasurer of the municipality which issued said bonds or incurred such other obligations, who shall apply the moneys so received strictly to the payment of such principal or interest."

It will be observed, under the statute just quoted, that the municipality which assumes part or all of the obligation of another municipality from whom some assets have been received, does not thereafter pay its proportionate share of the indebtedness directly to the creditor but col-

lects the money and pays it over to the original debtor, who in turn must pay it to the creditor. This method of payment is further indication that the loan remains and is considered as a liability or an indebtedness of the municipality which obtained the loan, and it must be considered as an indebtedness of such municipality when applying for a subsequent loan.
JEF

Taxation—Tax Collection—Apportionment—Under sec. 74.27, Stats., secretary of state must include in next apportionment principal and interest on school district loans, charges for charitable and penal institutional services due from counties and charges made by tax and conservation commissions for services rendered to counties. Secretary of state has no authority to waive interest on delinquent payments.

November 7, 1933.

THEODORE DAMMANN,
Secretary of State.

You request an opinion upon the following questions:

1. Has the secretary of state any discretion in the matter of including in the next apportionment principal and interest on school district loans, charges for charitable and penal institutional services due from counties, and charges made by the tax commission and conservation commission for services rendered to counties?

It is the opinion of this department that the secretary of state has no discretion in the matter of including or failing to include these payments, if delinquent, in the next apportionment. The secretary has only such powers as given to him by statute. *State ex rel. Crawford v. Hastings*, 10 Wis. 525 (1860).

There is no discretion vested by statute in the secretary of state on this matter. On the contrary, the statute specifically requires that the secretary shall include these charges in the tax roll. The statute (sec. 74.27), says:

"* * * The secretary of state *shall* annually, at the time he is by law directed to apportion the state tax, add to the amount charged to each county respectively all amounts which may be due the state and unpaid from such county on any former tax, * * *."

The word "shall" makes this provision mandatory on the secretary of state. *Equitable Life Insur. Soc. v. Host,* 124 Wis. 657, 102 N. W. 579 (1905).

Secs. 25.08, subsec. (2), relating to payment of school fund loans, 46.10 (2), relating to special charges for the support of penal and charitable institutions, and 73.03 (6) and (14), relating to special charges made by the tax commission, all clearly indicate that these special charges are to be collected in the same manner as state taxes. These, therefore, would clearly come within the purview of sec. 74.27. Sec. 26.14 (4), relating to special charges made by the conservation commission, is not as specific. However, this is included in the certification of state taxes and would, therefore, be subject to the same provisions as other state taxes are when delinquent. Sec. 70.60. We have carefully considered the effect of the recent decision in the case of *Petition of State,* 210 Wis. 9, 245 N. W. 844, (1932), and while there is considerable doubt whether or not under that decision it must be held that the county is also the agent of the state in collecting the taxes indicated above, we are of the opinion that that decision must be limited to the facts stated therein and that the same has no application to the facts indicated in your first question.

2. Has the secretary of state any authority to waive the interest on delinquent payments?

We have found no express authority in the statute granting to the secretary of state this power. The provisions of sec. 74.27 are clear and specific on this point. The answer to your second question must be No. See XXII Op. Atty. Gen. 406.

JEF

Appropriations and Expenditures—State Office Building —Improvement of Grounds and Streets—State office building commission has power to improve property located partly on lot area surrounding state office building and pay for same out of its appropriation.

November 8, 1933.

CHAS. A. HALBERT, *State Chief Engineer, Bureau of Engineering.*

You state:

"The first unit of state office building has been completed, and is so located that improvements along the adjoining street are highly desirable. It is proposed to grade the street area, construct walks, walls, and ornament the same, with fountains and other improvements. It is not intended to use the area for ordinary street purposes. The cost of such improvements estimated at $13,000 is to be borne by private trust funds, the city of Madison and, if legal, partly by the state. A sufficient balance is available in the appropriation made by ch. 486, Laws 1929, to defray the state's cost, estimated at $2,500."

You inquire whether the state may by proper action of the state office building commission pay for improvements such as grading, walks, etc., on property located partly on the lot area owned by the state and partly on the adjoining street area.

Ch. 486, sec. 1, Laws 1929, so far as necessary makes an appropriation of "four hundred thousand dollars, for the purchase of the site, the construction and equipment of the state office building, necessary tunnels to connect said building with the capitol lighting system and all other expenses necessarily incident to the erection of the said state office building."

In an official opinion in III Op. Atty. Gen. 901 it was held:

"Regents of university have power to co-operate with other property owners on streets adjoining university grounds to establish a system of street lights and pay the proportionate share of the expense."

It was stated in that opinion that the city did not have the power to levy a special tax on the university of any

kind and that if the city should install the system of ornamental lights contemplated without the co-operation of the board of regents the municipal authorities could not compel the university to pay its proportionate share.

Prior to that time on July 23, 1907, it was held that the regents of the normal schools have the power to build sidewalks in the public streets of a city where they have a normal school and pay for the same, although they could not be compelled to pay for such sidewalk by a special tax levied if built by the city. See Op. Atty. Gen. for 1908, 928.

In the former opinion it appears there was no provision in the statute expressly authorizing the regents of the university to make improvements on the city streets surrounding the university nor to install ornamental lights on the streets. In the opinion to the regents of the normal schools it appeared that there was no express provision in the statute authorizing the normal school to build sidewalks on the streets surrounding the normal school grounds. In both of those cases it was argued and maintained that the power to expend such money was implied from the power to build and erect the buildings.

In the latter opinion it was held, p. 929:

"* * * Under this power they certainly have the right to improve the surrounding lots, such as grading the same, planting trees, building sidewalks, etc., so as to make a proper approach to the buildings or produce an effect that will add to the beauty or usefulness of the building or its grounds; and, in doing this, it may be very necessary, and it is necessary as a general rule, if the city does not build a sidewalk, to build one in the street. * * *"

Your question by a parity of reasoning must be answered in the affirmative. The state office building commission has the implied power to make improvements surrounding the building to give it a proper setting, and this includes the power to improve that part of the street with the title belonging to the state.

JEF

Building and Loan Associations—Representatives of deceased members in building and loan association are not given prior rights over living members by sec. 215.12, Stats., when association is on withdrawal notice and receipts are not sufficient to pay demand for withdrawal.

Representatives of deceased members of association must wait their turn on withdrawal list.

November 10, 1933.

BANKING COMMISSION.

You ask whether sec. 215.12, Stats., gives representatives of deceased members in building and loan associations priority over living members when the association is on a withdrawal notice and the receipts of the association are not sufficient to pay the demand for withdrawal. You ask further if such representatives must wait their turn on the withdrawal list.

Representatives of deceased members in building and loan associations are not given prior rights over living members by sec. 215.12, when the associations are on a withdrawal notice and the receipts are not sufficient to pay the demand for withdrawal. Representatives of deceased members of a building and loan association must wait their turn on the withdrawal list.

Sec. 215.11 provides for the manner in which withdrawals may be made.

Sec. 215.12 reads:

"The stock of a deceased member may be held and controlled by the legal administrator, executor, or trustee of the estate of such member, or sixty days after the death of a member his legal representative *may* be paid the full amount of dues paid in and such proportion of the dividends or earnings apportioned or credited to his shares of stock as the by-laws may provide * * *"

The provision of sec. 215.12 providing for the payments to the legal representative of a deceased member is permissive, not mandatory. The general rule is that in the absence of statute or by-law regulating the order of payment stockholders withdrawing from a solvent building and loan association are to be paid in the order in which they per-

fect their withdrawals. *Hoyt v. Interocean Building and Loan Association,* 58 Minn. 345.

Since there is nothing in the statute (and assuming that there is no by-law on the matter) which would give the representative of a deceased member prior rights over a living member the general rule should be applied.
JEF

Automobiles—Criminal Law—Operating Motor Vehicle without Owner's Consent—Under sec. 343.18, Stats., forbidding one to take, use and operate car without owner's consent, person may be convicted in county where he so operated car although taking actually occurred in another county.

November 10, 1933.

EDWARD S. EICK,
District Attorney,
Chilton, Wisconsin.

You have requested an official opinion on the following:

"Mr. A. stole a car from a city in the county of M and drove it into the county of C and later drove through the county of C into another county. He was arrested by the sheriff from C county and charged with operating a motor vehicle upon a public highway without the owner's consent in violation of sec. 343.18 of the statutes."

Your question is whether C county acquires jurisdiction and can convict the party under sec. 343.18 in view of the wording of the statutes.

Sec. 343.18, Stats., reads in part:

"Any person who shall take, use and operate any automobile, motor cycle, or other similar motor vehicle upon any public highway of this state without the consent of the owner thereof shall, upon conviction thereof, be punished * * *."

This section was originally enacted by ch. 254, Laws 1909, and read in part as follows:

"Any person who shall operate any automobile, motor cycle, or other similar motor vehicle upon any public highway of this state without the consent of the owner of such motor vehicle, shall be deemed guilty of a misdemeanor, * * *"

Ch. 690, Laws 1913, amended this statute making it a felony, inserting before the word "operate" the words "take, use and," and substituting "thereof" for "of such motor vehicle," so that now the section reads "who shall take, use and operate," etc.

Under your statement of facts the car was actually taken in the county of M, and we are confronted with the problem whether the fact that the words "take, use and operate" are connected by "and" will place the venue of the crime in the county of M, where the actual taking took place. In 16 C. J. 185 the following rule is laid down:

"A continuing crime, although complete in the jurisdiction where first committed, may continue to be committed, and may also be punished, in another jurisdiction."

In an early case, *Powell v. The State*, 52 Wis. 217, it was held:

"Where one enters a moving car in one county, with intent to commit a larceny in such car, and with the same intent continues in the car until it passes into another county, and there commits the intended larceny, there is in law a fresh entry in the latter county, and the offense is indictable therein under the statute." (Syllabus.)

The court said, pages 218–219:

"Conceding that the plaintiffs in error entered the car in the county of Jefferson, if, with the same felonious intent, they continued therein until the car passed into the county of Columbia, the offense charged was committed in the latter as well as in the former county. The felonious intent not being abandoned, it is a fresh entry in each county into which the car was taken while they so remained in the car. This is held in analogy to the common-law rule that where a person steals goods in one county and carries them into another county, the felonious intent continuing, it is a fresh larceny in such other county. 1 Bish. Cr. Pr., sec. 59. There seems to be no distinction in principle between the two cases. * * *"

The ruling in this case has never been modified and we believe that the same principle applies in the present case. It was urged upon the court in that case that the statute did not make being in the car a fresh entry and it was alleged that the law must be strictly construed. But nevertheless the court did construe it as being a fresh entry, although the entry was not made in the second county. Your question must be answered in the affirmative. We believe a conviction may be legally had in C county.
JEF

Indians—No assistance to Indian to finish his education in high school can be given under present statutes by any official of Wisconsin. Application must be made to federal government.

November 10, 1933.

MARTIN GULBRANDSEN,
District Attorney,
Viroqua, Wisconsin.

You state that one A, an Indian, is now at Viroqua, Wisconsin, and has a boy B, a Winnebago Indian, Reg. No. 202, who desires to continue his education. You say you would appreciate it if we could advise you what assistance or help either from the state or from the federal government A could receive on behalf of his boy, who is fifteen years of age and a sophomore in high school but is not attending at the present time due to the fact that A has no means to send him.

There is no assistance that the state can render to Indians in high school. The provision that was made for aiding education was in universities and other higher institutions. Whether the federal government will assist in a case like this must be determined by the officers of said government and I would recommend that you keep in touch with the United States Indian commissioner at Washington, who can give you the required information.
JEF

Indigent, Insane, etc.—Poor Relief—Taxation—Relief agency need not pay federal tax on electrical energy for electricity furnished indigent persons at request of agency.

November 10, 1933.

INDUSTRIAL COMMISSION.
Attention Miss Peterson.

You inquire whether relief agencies which pay light bills for recipients of poor relief are obliged to pay the federal tax on electrical energy. It is our opinion that your question must be answered in the negative.

The following excerpt is taken from a letter written by Mr. David Burnet, commissioner of internal revenue in the treasury department at Washington, and dated January 5, 1933. The language was used in connection with a request as to whether relief agencies were obliged to pay the check tax on checks issued for relief purposes:

"* * * it is a well established rule in the administration of internal revenue laws that no tax may be imposed upon officials of a state engaged in the exercise of essential governmental functions.

"This raises the question whether the disbursement of funds by the officers of a state engaged in furnishing relief to its needy and distressed citizens and in relieving the hardship resulting from unemployment is an essential governmental function. States, counties and municipalities of the various states have long engaged in relief work. For many years they have provided hospitals, asylums and poor farms for the use and benefit of their indigent citizens. These activities have long been recognized as peculiarly the obligations of states and their political subdivisions. The disbursement of relief funds under the law cited is deemed to be an essential governmental function and checks drawn by officers of a state or its political subdivisions in making such disbursements are not subject to the tax in question."

As stated in the first part of this quotation, the exemption referred to in the ruling is based upon the legal principle that neither the state nor the federal government may impose a tax upon the operations of governmental agencies of each other. It has frequently been stated that the power to tax is the power to destroy, and were each government permitted to tax the governmental operations of the other, a

danger would exist of handicapping and impairing those operations to such an extent as to destroy the sovereign rights of the taxed government.

The administration of taxing laws, however, and the exemptions under them, are, to some extent at least, and particularly prior to a court decision, dependent upon rulings of administrative officers. The language taken from the letter of the commissioner of internal revenue indicates quite conclusively that the federal treasury department considers relief work one of the essential governmental functions and that the application of the federal check tax to those checks issued by the states and their political subdivisions as a part of relief operations, would be a violation of the mutual exemption rule referred to above.

Sec. 616 (a) and (c) of the federal revenue act of 1932 (47 Stats. at Large 266), provides:

"(a) There is hereby imposed a tax equivalent to 3 per centum of the amount paid on or after the fifteenth day after the date of the enactment of this Act, for electrical energy for domestic or commercial consumption furnished after such date and before July 1, 1934, to be paid by the person paying for such electrical energy and to be collected by the vendor.

* * *

"(c) No tax shall be imposed under this section upon any payment received for electrical energy furnished to the United States or to any State or Territory, or political subdivision thereof, or the District of Columbia. The right to exemption under this subsection shall be evidenced in such manner as the Commissioner with the approval of the Secretary may by regulation prescribe."

Relief agencies throughout this state, in administering their work, are obliged to pay the bills submitted by companies furnishing electrical energy where that electrical energy has been supplied to recipients of poor relief. Under legal principles which it is not necessary to discuss here at length the relief agencies have authority to pay for this service only through an agreement made with the company prior to the time when the electrical energy is supplied. Were it not for the agreement by the relief agency, the electrical energy would not be supplied because of the indigent person's inability to pay for the same. In effect,

therefore, the electrical energy is furnished to the relief agency for the use of the indigent person. Par. (a), sec. 616, quoted above, provides that the tax is to be paid by the person paying for the electrical energy. In the present case, the electrical energy is being paid for by the relief agencies as a part of its work and, incidentally, is considered as an essential governmental function by the commissioner of internal revenue. Par. (c), sec. 616 provides that no tax shall be imposed under that section upon any payment received for electrical energy furnished to any state or political subdivision thereof.

It is our opinion that under this paragraph and the general principle of law on which it is based, relief agencies in this state are not obliged to pay the federal tax on electrical energy when paying for electrical energy furnished to indigents at the request of the relief agency.

JEF

Indigent, Insane, etc.—Transient Paupers—County under county system for relieving poor must support indigent residents within its borders under sec. 49.04, subsec. (1), Stats.

November 10, 1933.

RALPH R. WESCOTT,
District Attorney,
Shawano, Wisconsin.

You submit the question whether one A when residing in Shawano county but who has no legal settlement anywhere as he has been moving from place to place and for the last forty-three years has lived on the Menominee Indian reservation, is entitled to public support from Shawano county. Authorities on the reservation have ordered this man off the reservation for the reason that he will not work and support his family nor will any of his children work as they should. They have given him support from the Indian tribal funds at various times. You inquire who is responsible for this family, and say that neither Shawano county nor Oconto county feels that it is liable

for him but feel rather that he is a state at large charge. You admit that this person has no legal settlement in Oconto county through having remained away from there voluntarily for a period of over one year, but that he has not gained a legal settlement in any other county. Under ch. 378, Laws 1933, he has not gained a legal settlement in Shawano county.

The question submitted by you has practically been passed upon by former decisions of this department. In XII Op. Atty. Gen. 343 it was held that an Indian is entitled to aid under the poor relief statute. In XIV Op. Atty. Gen. 24 the status of indigent Indians and white persons residing on a reservation was discussed, and it was held that an Indian who resides in a town in the state is entitled to poor relief if in fact poor and indigent. In XXII Op. Atty. Gen. 730 it was held that an indigent person who has no legal settlement must be cared for at the expense of the county in which he resides in accordance with sec. 49.04, subsec. (1), Stats.

Sec. 49.04, subsec. (1), provides:

"The county board of each county shall have the care of all poor persons in said county who have no legal settlement in the town, city or village where they may be, except as provided in section 49.03, and shall see that they are properly relieved and taken care of at the expense of the county."

There is no provision in the statute requiring the state to take care of and support an indigent person residing in any county of the state. The statute contemplates that the local municipalities must take care of and support the indigent within their borders whether they have acquired a legal settlement therein or not. In certain cases where they have a legal settlement in one county and move into another county, under sec. 49.03 the county in which they have a legal settlement must reimburse the county that supports them. Under the facts submitted by you, the persons in question have no legal settlement anywhere in this state. They must therefore be supported by the municipality in which they make their residence.

JEF

Counties—County Park Commission—Public Lands—Parks—County park commissioners have power to install filling stations at county park airport and to buy and sell gasoline in connection therewith, together with power to settle all bills for gasoline supplies. Such power is subject to general regulatory and supervisory power of county board over park commissioners.

November 13, 1933.

CLARENCE J. DORSCHEL,
District Attorney,
Green Bay, Wisconsin.

You state that the county park commission, acting under authority of sec. 27.05, subsec. (4), Stats., which permits that body to provide for an airport, with the approval and consent of the county board, has established such a port. It has also set up equipment for the sale of gasoline to the owners and operators of airplanes and has sold to such owners and operators gasoline for use in their planes. You have requested an opinion from this department upon the following two questions:

1. Is not the park board exceeding its authority in first undertaking to buy and sell gasoline to owners and operators, and,
2. Can the park commission adjust a bill for those services with one of the operators without in either case securing the approval of the county board?

1. It must be recognized that sec. 27.05 provides for general supervision by the county board over all parks and over the park commission's handling of such parks. That section provides:

"The said commission shall have charge and supervision of all county parks, and all lands heretofore or hereafter acquired by the county for park or reservation purposes; and shall have power *subject to the general supervision of the county board and to such regulations* as it may prescribe."

The italicized part was added by ch. 248, Laws 1927.

If the county board has set up regulations for the governance of the parks in general or for the airport in par-

ticular which are being violated by the commissioners, then the commissioners are obviously acting in excess of their authority. If the county board wishes to supervise the commissioners in their handling of the parks or airport then the commissioners must permit such supervision by the county board.

Therefore, if the county board wishes to provide for the regulation of the airport or to supervise it in any manner, it has the power to do so. If the county board desires to go further than this it may proceed under sec. 59.08 (11). Failing to do so, we must consider the power of the commissioners when acting free and clear of the supervisory and regulatory eye of the county board.

2. Sec. 27.05 (4) was enacted into law by ch. 613, Laws 1919. That section provides in part that the commission "shall have power * * *

"(4) To acquire * * * such tract or tracts of land as it may deem necessary for the purpose of providing a suitable and convenient place and station upon which aeroplane and aircraft generally may land, be cared for, and make flight from; and to improve and provide such place with the necessary hangars, and equipment for same; * * *"

Throughout this section it must be noted that the commissioners are empowered to provide for a complete landing field as distinguished from a mere emergency field. It has been recognized that gasoline supplies are necessary concomitants to a complete air field. *City of Wichita v. Clapp,* 125 Kan. 100, 263 Pac. 12, 63 A. L. R. 478 (1928). Without gasoline facilities it is doubtful if a landing field could be used for anything more than an emergency landing. Commercial planes do not make a practice of stopping at every town near their routes without some adequate reason therefor. And in the case of a medium sized town, traffic alone cannot be the only consideration. It is impossible to deny to the commissioners the power to provide facilities for the supplying of gasoline. This power must be a necessary part of an air field and is authorized as a part of the equipment for proper caring for air craft generally. The commissioners must, therefore, be held to have the power to provide for the procurement of gasoline at the field.

That they have power to do this themselves cannot be denied. The commission certainly has the control of the policing of the field and in pursuance to exercising such control they may deem it best to provide for the handling of the gasoline by themselves rather than by some independent company which might sell spurious and low grade gasoline to planes which require the highest type of petrol.

To admit that they can sell this gasoline forces the conclusion that they can arrange for the payment thereof. So long as the county board has not made any provision relative to the sale of the liquid, the commissioners must have that power.

These conclusions are obviously sound when we consider them in the light of sec. 59.08 (11), making provision for the taking over by the county of the control and operation of airports under the control of the park commissioners. That section recognizes the power of the commission as being independent of the county board until supervised by that body. The provision of sec. 59.08 (11) provides:

"The county board of any county in which a county airport or air field is operated by a county park commission pursuant to subsection (4) of section 27.05, may by resolution make determination to take over and operate such airport, and upon the delivery of a certified copy of said resolution the county park commission at a date to be designated in said resolution, shall turn over and surrender to said county board the charge, superintendence and control of said airport, including all lands, buildings, and structures and appurtenances of whatever kind, and thereupon the county board shall be vested with all the powers and authority conferred on the county park commission under said subsection (4) of said section 27.05, and of all other powers and authority now or hereafter conferred upon county boards with reference to the establishment, control, operation and maintenance of airports or landing fields. * * *"

This clearly recognizes that the county board has supervisory and regulatory power but lacks the full initiatory power as to the policies which the park commissioners will follow in handling the field. Only under this section can the county board gain full control of the airport. Operating under sec. 27.05 (4), the board must be content with interfering with the policy of the commissioners after it

has been initiated except in so far as they choose to exercise their initiatory power of regulation.

It will also be noted that the above quoted section provides for the turning over to the county board of building structures and appurtenances of whatever kind the commissioners may have put up on the field. Those appurtenances referred to might well have contemplated gasoline filling stations. At least at this time they must be held to include them.

JEF

Appropriations and Expenditures—Emergency Relief—Indigent, Insane, etc.—Poor Relief—Fact that money spent by county for relief purposes is all furnished by county does not, in itself, preclude reimbursement under ch. 363, Laws 1933.

November 14, 1933.

CLIFFORD M. LAMAR,
District Attorney,
Baraboo, Wisconsin.

You inquire whether Sauk county is entitled to be reimbursed from the state under the provisions of ch. 363, Laws 1933, to the extent of half the amount spent by Sauk county for poor relief, regardless of the fact that all the money used for such relief was furnished by the county, none of it being obtained from the federal government.

Sec. 5, ch. 363, Laws 1933, provides:

"There shall be allotted by the industrial commission to county and local relief agencies administering relief in accordance with the provisions of section 6, not less than fifty per cent of the total local relief expenditures out of public moneys from all sources. Additional amounts may be allotted by the industrial commission to such public relief agencies where the total funds available from all sources are not adequate to provide relief in accordance with the standards prescribed in such section."

The manner in which your question is presented indicates that you may have misinterpreted the intention of

ch. 363. In contrast to the provisions of the previous state relief act, ch. 363 does not provide for a reimbursement of the counties for expenditures made prior to the passage of the act. It authorizes reimbursement to the counties for relief expenditures to be made in the future, and made in accordance with the provisions of sec. 6 of the act. In order that counties may be entitled to be reimbursed under the provisions of ch. 363, their relief operations and activities must be carried on in accordance with the rules and regulations prescribed and set up by the state industrial commission. These rules and regulations must, in turn, conform to the requirements laid down by the federal government concerning the manner of expenditure of those funds which are received from the federal government. The money raised under ch. 363, Laws 1933, is pooled with the money received from the federal government and any reimbursements under said ch. 363 are made from this general fund.

Money expended by Sauk county, which was raised by taxation of Sauk county inhabitants rather than obtained from the state or federal government would be considered "public moneys" within the meaning of that term as used in sec. 5, ch. 363. The provisions of the said chapter authorize the industrial commission to reimburse Sauk county to the extent of not less than fifty per cent of such local relief expenditures provided they are made in accordance with the rules and regulations prescribed by the industrial commission and the federal government. The fact in itself that Sauk county expends only its own money does not preclude it from being reimbursed under ch. 363. This office, however, does not and cannot, in this opinion, pass upon the question of whether the local relief expenditures of Sauk county are made in accordance with sec. 6, ch. 363 so that Sauk county is entitled to be reimbursed.

JEF

Agriculture—Bonds—Farm Drainage Bonds—Counties —County Board Resolutions—County board has no authority to adopt plan outlined for payment by county of outstanding farm drainage bonds.

November 14, 1933.

WENDELL MCHENRY,
District Attorney,
Waupaca, Wisconsin.

It appears that several years ago a farm drainage was organized in Waupaca county under the farm drainage law as contained in ch. 88, Stats., and that farm drainage bonds were issued by the board of such farm drainage. Drainage assessments were levied by said board against the lands in said farm drainage for the purpose of raising the necessary money to pay the bonds and interest at maturity. Some of these drainage assessments are still outstanding delinquent and unpaid and for this reason a balance of $3,500 of said bonds remains unpaid although past due. In 1931 the county board of Waupaca adopted the following resolution:

"WHEREAS, a drainage district under the farm drainage act, designated as Drainage District No. 1 of Waupaca county was organized in 1918 by the Honorable John C. Hart, county judge, at that time, and, whereas, the special tax for said drainage has been returned unpaid on several tracts of said drainage district, and, whereas, there are several tax certificates outstanding against tracts of land in said district and, whereas there are applications pending for the purchase of certain tracts of land in said district and accumulation of interest on said certificates and so forth are increasing now, therefore, be it resolved that the finance committee of Waupaca county be and hereby is authorized and empowered to take up in behalf of the county such taxes and certificates as it may deem, in its judgment, to be necessary and to hold same subject to sale and after it causes said tracts of land to be appraised to sell said tracts for said special and other taxes and all it can get for said tracts in addition to said taxes and thereby void the accumulation of interest and to pay bonds outstanding against said district."

It appears that there was a belief on the part of the bondholders that said bonds were guaranteed by the county

and it was for this reason that the county board adopted the foregoing resolution. Nothing has been done by or on behalf of the county pursuant to the resolution.

You present the question as to whether the county board had any authority to pass such a resolution and whether the county could thus assume liability for the payment of the outstanding bonds.

It is considered that both phases of the question presented should be answered in the negative. Farm drainage bonds are issued by the board of the farm drainage, sec. 88.12, and the board levies the necessary drainage assessments against the land in the farm drainage, sec. 88.14. The county has nothing to do therewith. The county is not a guarantor nor has it any liability to pay farm drainage bonds nor is it authorized by any statute to assume liability to pay such bonds. The drainage assessments are inserted in the tax roll of the municipality in which the lands are situated and if they are unpaid such drainage assessments are returned to the county treasurer as delinquent in the same manner that unpaid general taxes are returned as delinquent. Sec. 88.14. If collections are made on the delinquent drainage assessments, then the moneys so collected are required to be kept by the county treasurer in a separate account for the farm drainage. Sec. 88.18. If any lands in the farm drainage are sold for delinquent general taxes as well as for delinquent drainage assessments and the county bids in the land for the delinquent general taxes, then the county also becomes the holder of the drainage assessment certificates. Sec. 88.14. This is by reason of the fact that that section provides to the effect that "if taxes and drainage assessments against the same lands are sold at the annual tax sale they shall be sold together to the same bidder." However, the county is not liable to pay the amount of the delinquent drainage assessments into the farm drainage fund until collection of such delinquent drainage assessments has actually been made. XX Op. Atty. Gen. 969. That is the extent of the county's liability in the premises. As we understand the plan of the resolution adopted by the Waupaca county board, it proposes that the county shall take over and sell a part of the lands in the farm drainage against which

there are unpaid delinquent general taxes and unpaid delinquent drainage assessments and use the proceeds of the sale to pay off all of the outstanding farm drainage bonds. It is considered that the county has no authority to carry out such a plan nor in such manner to assume liability to pay off the outstanding bonds.

It would seem also that a matter of this kind cannot be delegated by the county board to the finance committee. See XXII Op. Atty. Gen. 79 and 387.

In addition it will be noted that the resolution in question is so ambiguous as to make its interpretation exceedingly doubtful. For example, the resolution states that the finance committee is authorized and empowered "to take up in behalf of the county such taxes and certificates as it may deem, in its judgment, to be necessary." The meaning of that language is certainly obscure.

JEF

Indigent, Insane, etc.—Transient Paupers—Pauper having no legal settlement in this state is to be afforded relief by county in which he is located.

November 14, 1933.

R. W. PETERSON,
District Attorney,
Berlin, Wisconsin.

The facts in this matter are these: A. lived in the city of W., in the county of D., for five years up to and including October 15, 1931 and at no time asked for aid while there. On October 15, 1931 he removed to the town of M. in G. county and resided there until October 1, 1932, when he removed to the town of L. in G. county and resided there continuously until September 15, 1933, when he asked for aid for the first time. The question presented is whether A. may be considered as having lost his legal settlement entirely and be afforded relief as a transient pauper.

This proposition must be answered in the affirmative.

It is quite clear, under the provisions of subsec. (4), sec. 49.02, Stats., that A. had a legal settlement in the city of W. on October 15, 1931. On that date A. removed to the town of M. in G. county and lived there for eleven months and fifteen days, till October 1, 1932. At the end of that period A. still retained his legal settlement in the city of W. Such legal settlement can be lost in only one of two ways, as set out in subsec. (7), sec. 49.02, Stats., which provides:

"Every settlement once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town, village, or city in which such legal settlement shall have been gained for one whole year or upward; and upon acquiring a new settlement or upon the happening of such voluntary and uninterrupted absence all former settlements shall be defeated and lost."

Under the provisions of subsec. (4), sec. 49.02, A. did not acquire a legal settlement in the town of M., as he resided there less than a year. Nor, under the provisions of the above quoted statute, did A. lose his legal settlement in the city of W. for the reason that he had not been absent therefrom for one whole year. On October 1, 1932, A. again changed his residence, this time to the town of L. in G. county, where he resided until September 15, 1933, on which date the relief in question was requested. On October 15, 1932, A. had been voluntarily absent from the city of W. for an uninterrupted period of one year and, by the terms of subsec. (7), sec. 49.02, on that date he lost his legal settlement in the city of W. Nor did A. acquire a new legal settlement in the town of L. prior to September 15, 1933, for the reason that his residence there was for a period less than the year required by subsec. (4), sec. 49.02. Hence the situation is one in which A. has no legal settlement within this state. This is entirely possible as the following quotation from XII Op. Atty. Gen. 490, 491, indicates:

"* * * Her absence having been voluntary and uninterrupted, she lost her Wisconsin settlement whether she gained a new one in California or not. A person may lose one settlement without gaining another. 21 R. C. L. 716."

See also XIV Op. Atty. Gen. 604; VIII Op. Atty. Gen. 213.

Authority is given a county board to extend relief to persons in the situation of A. here by subsec. (1), sec. 49.04, which provides:

"The county board of each county shall have the care of all poor persons in said county who have no legal settlement in the town, city or village where they may be, except as provided in section 49.03, and shall see that they are properly relieved and taken care of at the expense of the county."

Therefore, it is concluded under the facts submitted that A. is to be afforded relief by the county in which he is located regardless of the fact that he has no legal settlement in any town, city or village in this state.

JEF

Mothers' Pensions—Mothers' pension fund may be transferred to become part of general relief fund of county.

November 15, 1933.

CURT W. AUGUSTINE,
District Attorney,
Eau Claire, Wisconsin.

You state that at the request of the county board you submit the following question for an official opinion:

"Can the mothers' pension fund be transferred to the general relief fund of the county?"

The provisions for the aid to dependent children, sometimes referred to as the mothers' pension, are contained in sec. 48.33, Stats. Subsec. (9) provides:

"The county board of each county shall annually appropriate a sum of money sufficient to carry out the provisions of this section. Upon the orders of the judge of the court having jurisdiction, the county treasurer shall pay out the amounts ordered to be paid as aid, under the provisions of this section."

The above provision was enacted in the language as here quoted by ch. 637, Laws 1915. Prior to that time the provision covering the same subject was enacted in sec. 573*f*, subsec. 9, Stats. 1913, in the following language:

"The county board of supervisors may annually appropriate out of the funds in the county treasury such an amount as it shall deem sufficient to carry out the provisions of this section. Money so appropriated shall be placed in a special fund and shall be paid out by the county treasurer upon order of the court having jurisdiction to receive applications and grant aid under this section."

It will be noted that under the last quoted provision the county board was authorized to appropriate out of the funds of the county an amount deemed by them sufficient to carry out the provisions of the section, that this money was placed in a special fund and the county treasurer paid out the same on orders of the court. You will also note that the provision covering the same subject as above quoted, as enacted in ch. 637, Laws 1915, does not require the county board to annually appropriate a certain definite sum of money but they should appropriate a sum of money sufficient to carry out the provisions of this act. There is no provision that the money so appropriated shall be placed in a special fund. The appropriation is rather a general appropriation for so large a sum as will be required to meet the needs for mothers' pension in the county during the year. The county board is unable to definitely determine beforehand how much money is required.

In an official opinion by this department in V Op. Atty. Gen. 5, it was held that it was not necessary, but desirable, that the county board should make an appropriation for mothers' pension. In an official opinion in VII Op. Atty. Gen. 482, it was held by this department that aid may be granted as a mothers' pension without regard to the county appropriation, and that the orders for aid should be paid if there are any funds available therefor. In another opinion in XII Op. Atty. Gen. 186 it was again held that the county judge may grant aid without regard to the amount appropriated by the county board and that orders of the judge for aid should be paid if there is any money in the general fund unappropriated to specific purposes.

We know of no statutory mandate to the county board requiring it to keep the mothers' pension appropriation in a special fund. We therefore answer your question in the affirmative.
JEF

Indigent, Insane, etc.—Military Service—Wisconsin Veterans' Home — Inmate of Wisconsin Veterans' Home at Waupaca cannot acquire legal settlement in town of Farmington, where said home is located, by continuous residence of one year in said institution.

November 15, 1933.

BOARD OF CONTROL.

You refer to an opinion given to the district attorney of Waupaca county in XXII Op. Atty. Gen. 690, to the effect that an inmate of the Wisconsin Veterans' Home at Waupaca has a legal settlement in the town of Farmington and by continuous residence of one year acquires legal settlement in such town, that this is true although the person was indigent when he went to said home but received no support from the town nor from the county while in said home. You direct our attention to ch. 408, Laws 1933. You inquire whether said statute changes the conclusion reached in said opinion.

Said ch. 408, Laws 1933, amended sec. 49.02, subsec. (4), Stats., to read as follows, the italicized portion being the part added:

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein. *The time spent by any person as an inmate of any home, asylum or institution for the care of aged, neglected or indigent persons, maintained by any lodge, society or corporation, or of any state or United States institution for the care of veterans of the military and naval service shall not be included as part of the year necessary*

to acquire a legal settlement in the town, city or village in which said home, asylum or institution is located, nor shall such time so spent be included as part of the year necessary to have a legal settlement in any other town, city or village of this state."

Here it is provided that "the time spent by any person as an inmate of any home, asylum or institution for the care of * * * veterans of the military and naval service shall not be included as part of the year necessary to acquire a legal settlement in the town, city or village in which said home, asylum or institution is located, nor shall such time so spent be included as part of the year necessary to have a legal settlement in any other town, city or village of this state."

You are therefore advised that this statute changes the ruling of this department in the above opinion referred to, and a person who receives aid in the Wisconsin Veterans' Home at Waupaca cannot acquire, since the enactment of the said law, a legal settlement in the town of Farmington by continuous residence of one year in said institution.

JEF

Public Health—Sewerage and Waterworks—Words and Phrases—Human Habitation—Words "building used for human habitation" in sec. 144.06, Stats., are not limited to dwelling houses, but include other buildings, such as store and other places of business where human beings are in need of sewerage and waterworks.

November 15, 1933.

BOARD OF HEALTH.

You state that the question has been brought to your office as to the interpretation of sec. 144.06, Stats., particularly as it pertains to the term "buildings used for human habitation." You say that it is claimed by certain individuals engaged in a business or store that the law is not applicable to such individuals but is applicable only to

the homes of such individuals. You state that it has always been held by you prior to having the issue raised at this time that this section was applicable to all buildings having waterworks and sewerage available, whether such buildings were considered the homes of the individuals or buildings used for business, and that you assumed that any building fit for human habitation came under the provisions of this section. You say you believe that the term "human habitation" was used to eliminate the necessity of connecting buildings not fit for business or housing of individuals, such as broken down shacks, barns, etc. You ask for an interpretation of the terms "buildings used for human habitation" as used in this statute.

This statute was originally enacted in ch. 283, Laws 1917, and read in part as follows:

"Any city or incorporated village having systems of waterworks and sewerage may by ordinance require *dwelling houses or other buildings used for human habitation* within the corporate limits of such city or village, when such building or buildings are located adjacent to a public sewer and a public water supply, or in a block through which sewer and water systems extend, to be connected with such sewer and water systems in such manner as may be deemed necessary by the board of health, or by the board of public works where such board exists. * * *"

Here the statute covers other buildings besides dwelling houses.

The wording of this statute remained the same until it was changed and revised by ch. 448, Laws 1923. This was a revisor's bill and the wording of said section in part was altered to read thus:

"Any city or incorporated village having systems of waterworks and sewerage may by ordinance require *buildings used for human habitation* and located adjacent to a sewer and water main, or in a block through which the systems extend, to be connected therewith in manner prescribed by the board of health or by the board of public works where such board exists. * * *"

There is no revisor's note attached to this bill with reference to this section. It is apparent that the revisor did not intend to change the meaning of the section as to the

buildings to which it is applicable. Instead of using the words "dwelling house or other buildings used for human habitation" he put the caption "house connections" at the beginning of the section and inserted in the statute the words "buildings used for human habitation." Certainly these words are intended to have the same significance as those originally contained in the statute.

There has been no construction by the courts or this department of the wording in this statute. The word "habitation" has a broad and also a narrow meaning. It may be used in the narrower sense of a dwelling house, but it may also be used in the broader sense meaning a building in which human beings may abide for certain purposes. I believe Bacon's Maxims of the Law, Regula X, as quoted in *Union Hotel Company v. Hersee,* 79 N. Y. 454, 461, is applicable. It reads:

"* * * 'all words, whether they be in deeds or statutes, or otherwise, if they be general and not express and precise, shall be restrained unto the fitness of the matter or person:' * * *"

The question there was, what was intended by the words "citizens of Buffalo" and it was held, p. 461:

"* * * a citizen is 'an inhabitant of a city, town or place,' and so would include every person dwelling in the place named; but it is subject to various limitations depending upon the context in which it is found. It may indicate a permanent resident, or one who remains for a time or from time to time. * * *"

The court then refers to various meanings that have been given to the word "citizen" and it is pointed out that a man may be a resident of two places at one and the same time and that to establish a residence requires a less permanent abode than to give a domicile, or even to create an inhabitance.

In that case a subscription was made for building a hotel on the condition that the sum of $200,000 be subscribed by the citizens of Buffalo. One of the subscribers had, at the time of his subscription, his domicile in Batavia, but boarded in Buffalo, was engaged in business and spent nearly all of his time there. It was held that he was a

citizen of Buffalo within the meaning of the subscription papers. The court said he "resided, at the time of the trial, in Buffalo, but at the time of the subscription, had his house and legal residence in Batavia." His domicile then was Batavia but that is in no respect inconsistent with the fact that his residence was in Buffalo. He was actually there the greater part of the time and was permanently there for business purposes.

The principle applied in the above New York case is applicable here. The language used in the statute must be construed consistently with the object and purpose of the statute. In all places where human beings abide either in dwelling houses or in business places, so that they have or need toilets or water for human consumption, the buildings occupied come within the terms of the statute as included in the words "buildings for human habitation." The phrase "human habitation" is used in its broadest sense and is not limited strictly to homes and dwelling places.

You are therefore advised that your construction of the statute is correct.

JEF

Fish and Game—Wild life refuge established under sec. 29.57, Stats., continues for five years; conservation commission has no power to remove said lands from refuge before expiration of five years.

November 15, 1933.

PAUL D. KELLETER,
Conservation Director.

You state that sec. 29.57, Stats., provides for the establishment of wild life refuges, and the question has arisen under subsec. (3) as to whether the conservation department has authority to remove the lands from the wild life refuge before the expiration of the five years.

Sec. 29.57, provides the procedural steps to be taken by the conservation commission in order to establish a wild life refuge, and in subsec. (3) it is provided:

"* * * Thereupon the said lands shall be a wild life refuge, and shall so remain for a period of not less than five years, from and after the date of effect stated in said order."

There is no provision in the statute which authorizes, either directly or impliedly, the conservation commission to discontinue a wild life refuge after it has once been established. The language above quoted is specific and unambiguous and you are advised that the conservation department has no authority to remove the lands from the wild life refuge before the expiration of the five years.
JEF

Public Officers—Register of Deeds—Filing fees for abstracts of chattel mortgages are determined by sec. 59.57, subsec. (4), Stats., and are ten cents for each folio and twenty-five cents for recorder's certificate.

Register of deeds may charge for recording mortgages to federal land banks sum of ten cents for each folio and three cents for every necessary entry thereof in tract index, when kept, with minimum fee of one dollar.

November 15, 1933.

FRED RISSER,
District Attorney,
Madison, Wisconsin.

You request the opinion of this department based upon questions submitted to you in a communication signed by Mr. C. A. Lewis, register of deeds for Dane county, Wisconsin. The register of deeds for Dane county, Mr. Lewis, states that he, in common with other county recorders, is in doubt as to the proper fees to be charged for making an abstract on chattel mortgages and as to the proper fees on federal land bank mortgages, which do not conform to any of the forms approved by sec. 235.16, Wisconsin statutes. These questions will be answered *seriatim*.

1. It is the opinion of this department that the proper fee to be charged for making an abstract of a chattel mort-

gage is ten cents for each folio and twenty-five cents for the recorder's certificate in accordance with the provisions of sec. 59.57, subsec. (4), Stats. After a careful examination of the statutes we were unable to find any provision therein which specifically refers to the power of the recorder to engage in such work. However, considering an abstract as a copy of the records on file in the office of the recorder, we find that the recorder would have the power to make copies of such records and to make a charge therefor. Such provision is found in that section of the statutes fixing the fees which the recorder may charge, namely sec. 59.57, Stats. Subsec. (4) thereof provides for the fees which may be charged for making copies of any records or papers in the office of the recorder and reads as follows:

"For copies of any records or papers, ten cents for each folio, and twenty-five cents for his certificate."

The above quoted section of the statutes then governs the charging of fees for making so-called abstracts. We are aware of the fact that sec. 59.58, Stats., provides for the position of county abstractor, but it should be noted that that section applies only to the abstract of title to lands and not to the abstract of chattel mortgages.

2. In answer to your second question, we are of the opinion that the register of deeds may charge for entering and recording a federal land bank mortgage, the sum of ten cents for each folio and three cents for every necessary entry thereof in the tract index, when kept, with a minimum charge of one dollar pursuant to the provisions of sec. 59.57 (1). This is in conformity with an opinion rendered by this department in XII Op. Atty. Gen. 202, where this office ruled that "register of deeds may charge only rate provided in sec. 59.57 (1) for recording mortgages to federal land banks."

JEF

Indigent, Insane, etc. — Legal Settlement — Residence which enables individual to gain legal settlement is not synonymous with legal residence but is practical concept denoting place where individual actually lived.

November 17, 1933.

HERBERT J. GERGEN,
District Attorney,
Beaver Dam, Wisconsin.

There is at present in Dodge county a family who is receiving aid in the city of Waupun; the man and his wife were married about two years ago; the husband's folks have always lived in Milwaukee and, prior to the marriage of the parties, the husband claimed his home as Milwaukee, although for several years he worked off and on in Dodge county. He claims that he always left certain of his personal property at the home of his folks in Milwaukee and always considered that as his home. You present the question as to whether or not the intention of an indigent person with reference to the establishment of a legal settlement may be considered in determining where he has a legal settlement.

The blanket statement cannot be made that the intention of an individual is never to be considered in determining where he has a legal settlement. It is our opinion, however, that the cases in which the intent of the indigent person is material are very few. It may well be said at the outset that legal settlement and legal residence are not in any sense identical terms. Legal residence depends, to a great extent, upon the intent of the individual. It is material in determining the place where he may vote, the governmental unit which has authority to impose certain taxes, in establishing citizenship, etc. Legal settlement is the basis for determining liability for support and other assistance furnished as a governmental charity.

Sec. 49.02, subsec. (4), Stats., provides in part:

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; but no residence of a

person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein."

It is our opinion that a person has *resided* in a place, within the meaning of this statute, when he has actually lived in that place — in other words, residence is akin to abode, and intention is of very slight, if any materiality.

In the case of *City of Enderlin v. Pontiac Township,* 242 N. W. 117, it was held that the term "resided" and term "residence" within the meaning of the statutes relating to poor relief, refer to actual residence as distinguished from legal or technical residence or domicile.

In *Town of Smiley v. Village of St. Hilaire, et al.,* 183 Minn. 533, 237 N. W. 416, it was held that the term "reside," within the meaning of a statute relating to relief for paupers, means the place where a person has lived or existed the longest within one year immediately preceding the commencement of proceedings and that this term when used in statutes relating to relief for paupers does not refer to technical legal residence.

In *Hartford Hospital v. Town of Glastonbury,* 112 Conn. 403, 152 Atl. 576, it was decided that a pauper resides in the town in which he becomes ill and in need of medical treatment within the meaning of a statute requiring support.

These cases also indicate that residence as understood in poor relief statutes is almost exclusively a practical concept.

In the particular case which you have cited, the avowed intention of the husband to consider Milwaukee as his home does not operate to make Milwaukee the place of his legal settlement nor does the fact that he has kept a portion of his personal belongings there mean that his legal settlement is in Milwaukee.

JEF

Taxation—Tax Collection—Apportionment—Under sec. 74.27, Stats., county treasurer must certify and collect amount certified by secretary of state when it includes amount certified previous year but not paid to state treasurer.

November 17, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

Last year the secretary of state certified to your county treasurer a large sum of money to be collected as taxes for the purpose of paying state special charges and principal and interest on loans from the state trust funds. The proper amounts were in turn certified by the county treasurer to the local units of government and spread upon the tax roll by them, or spread over the entire property of the county for the purpose of collecting the county's share. This money, due to the state, was collected both from the local units and from the county assessment. It appears that this money, due from the local units of government, was deposited in banks which were closed prior to the time when it should have been turned over to the county treasurer for payment to the state. The money which was raised by the county as its share of the money due the state was also deposited in banks which subsequently were closed before the money was paid to the state treasurer. The banks in which the money raised by the local units and by the county was deposited are still closed, so that the state has not as yet received the money due it.

The question arises whether this amount, which was certified last year by the secretary of state and remains unpaid at the present time, should again be included in the amount which should be raised for this year. It is argued that if an affirmative answer is given to this question, a double assessment will result, which will not only be an embarrassment and a hardship for the taxpayers but might be open to criticism as illegal taxation.

Sec. 74.27, Stats., provides, in part:

"* * * The secretary of state shall annually, at the time he is by law directed to apportion the state tax, add to the amount charged to each county respectively all amounts which may be due the state and unpaid from such county on any former tax, together with interest thereon at the rate aforesaid up to the first day of January following such apportionment; and the amount so found shall be the amount of the state tax to be paid by such county for the year, and shall be certified, levied, collected and paid into the state treasury as provided by law; * * *"

On November 7, 1933, an opinion was rendered by this office to the Honorable Theodore Dammann, secretary of state,* holding that under this statute he was obliged to include in the next apportionment principal and interest on school district loans, charges for charitable and penal institutional services due from counties, and charges made by the tax commission and conservation commission for services rendered the counties. It was held that he had no discretion in this matter and had no authority to waive the interest on delinquent payments. It was stated in the opinion:- "The word 'shall' makes this provision mandatory on the secretary of state. *Equitable Life Insurance Society v. Host,* 124 Wis. 657, 102 N. W. 579 (1905)."

It might be stated as an additional reason for holding this statute mandatory that the provisions for certification and collection are of the very essence of the statute itself. It could not be held to be a directory statute because these requirements are of the substance of the thing provided for. *Wendel v. Durbin,* 26 Wis. 390. The same case holds that statutes imposing a duty for the benefit of others and giving the means of performing it, such as requiring action of an officer, are to be deemed mandatory. Sec. 74.27 thus imposes very definite duties, both upon the secretary of state and upon the county treasurer in the matter of certification, and additional duties upon the county treasurer in the matter of collecting and paying into the state treasury. It is our opinion that there is no legal foundation for giving this statute other than mandatory significance. The county treasurer, therefore, must include in his certification the amount certified to him by the secre-

* Page 899 of this volume.

tary of state when such certification includes the amount levied the previous year and collected but not paid by the county to the state treasurer.

It is academic that there are substantial grounds for the passage of statutes guaranteeing as fully as possible the consistent collection of revenues for the purpose of assuring continued operation of the state government, including its subsidiary functions. It has been held that the duty of contributing to the support of the state government is one of the most important obligations. For that reason, statutes providing for tax collections have been upheld, where similar statutes providing for the collection of private debts in the same manner would probably be held violative of constitutional provisions.

The contention has been made that if the county treasurer again certifies the amount collected for the previous year but not paid to the state treasurer, it will result in double taxation. Our supreme court has stated, in the case of *Kingsley v. Merrill,* 122 Wis. 185, 200:

"'In order to render taxation double, one person or known subject of taxation must be required to contribute twice directly to the same burden, while other subjects of taxation are required to contribute but once.' *Second Ward S. Bank v. Milwaukee,* 94 Wis. 587, 69 N. W. 359."

There is a presumption against the existence of an intention to impose double taxation until overcome by the express language of the statute. *Milwaukee Electric Railway & Light Company v. Tax Commission,* 207 Wis. 523.

In the event that the amount certified by the secretary of state last year is again certified and collected this year by the county, it is very doubtful whether this would be held to be double taxation because no individuals would be singled out and required to contribute twice directly to the same burden while other subjects equally liable are required to contribute but once. The United States supreme court, however, has said that "* * * the Fourteenth Amendment does not prohibit double taxation. * * *." *Cream of Wheat Company v. County of Grand Forks,* 253 U. S. 325, 330. In a later case it stated:

"* * * When, as here, Congress has clearly expressed its intention, the statute must be sustained even though

double taxation results. * * *" *Hellmich v. Hellman*, 276 U. S. 233, 238.

The county treasurer must obey the clear requirement of sec. 74.27 and certify and collect the amounts certified by the secretary of state when such certification includes an amount certified the previous year but due from the county and not paid to the state treasurer.
JEF

Prisons—Prisoners—Parole—Person committed to state prison to serve term of not less than twenty years and not more than twenty years for assault with intent to murder, where statutory penalty is from one to thirty years in state prison, is not eligible to parole after having served two years, under sec. 57.06, Stats., as amended by ch. 384, Laws 1933.

November 21, 1933.

BOARD OF CONTROL.

You state that one R. P. was sentenced to the Wisconsin state prison on the 29th day of April, 1929, to serve a term of not less than twenty years and not more than twenty years, for the crime of assault with intent to commit murder. You inquire whether this person is eligible to parole consideration if she has served a period of two years under the provisions of ch. 384, Laws 1933.

Ch. 384, Laws 1933, amends subsec. (1), sec. 57.06 of the statutes relating to paroles from the state prison and the Milwaukee house of correction, and reads as follows:

"The board of control, with the approval of the governor, may, upon ten days' written notice to the district attorney and judge who participated in the trial of the prisoner, parole any prisoner convicted of a felony and imprisoned in the state prison or in the house of correction of Milwaukee county who, if sentenced for less than life, shall have served at least one-half of the term for which he was sentenced, not deducting any allowance of time for good behavior, or who, if sentenced for life, shall have served thirty years less the diminution which would have

been allowed for good conduct, pursuant to law, had his sentence been for thirty years, or who if he is a first offender and is sentenced for *an* indeterminate term, shall have served the minimum for which he was sentenced not deducting any allowance for time for good behavior *or who, if he is a first offender and is sentenced under a statute imposing a minimum in excess of two years, shall have served two years, not deducting any allowance of time for good behavior.*"

The italicized portion is that part which was added by the amendment. The crime of assault with intent to murder is provided for in sec. 340.40, Stats., and it provides a punishment by imprisonment in the state prison not more than thirty years nor less than one year.

You will note that this statute does not impose a minimum in excess of two years and consequently does not come within sec. 57.06 (1) as amended. You are therefore advised that the person is not eligible to parole consideration after serving two years.

JEF

Indigent, Insane, etc. — Legal Settlement — Person who receives aid from town as poor person is pauper and town in which he has legal settlement is liable for relief furnished him.

November 21, 1933.

EARL F. KILEEN,
District Attorney,
Wautoma, Wisconsin.

You state that one A, a man about thirty years of age with a wife and four children, the children ranging in age from one to twelve years, has lived in the town of Richford, Waushara county for two years and obtained a settlement therein. He is a strong able-bodied man with no physical or mental defects. You say that on April 7, 1933 he moved over into the town of Crystal Lake in Marquette county and has been living there ever since; that he has been working on a farm in the town of Crystal Lake, getting free house

rent, free fuel, milk from one cow and thirteen dollars a month. During the fall and winter months he is to get eight dollars a month and free house rent, fuel and milk from one cow.

You further state that on October 10, 1933 the town of Crystal Lake furnished him clothing for his children and his wife in the total sum of seven dollars and twelve cents; that he stated that he needed the clothing at that time in order to send his children to school, and he claims that he will be self-supporting from now on as long as he has work. You state that the town of Crystal Lake has filed notice with your county clerk and the county clerk has notified the town of Richford in your county that Crystal Lake wants the town of Richford to pay the bill of seven dollars and twelve cents.

You inquire whether this person is a pauper or whether he is receiving emergency public relief and whether by receiving such relief he would be considered a pauper. You also inquire whether the town of Richford or the town of Crystal Lake is responsible for the bill incurred.

In order to receive emergency relief, it is necessary that the party "be taken sick, lame, or otherwise disabled in any town, city or village" when not having a legal settlement in said town. Sec. 49.03, subsec. (1), Stats. This party, however, received aid because he was a poor person and unable to support himself. There was no sickness, no lameness nor any disability that came to him in said town.

Under the provisions of subsec. (4), sec. 49.02 it is provided:

"* * * but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein."

Our court has given a liberal construction to the meaning of paupers. See the late case of *Town of Rolling et al. v. City of Antigo,* 248 N. W. 119. The town of Richford is liable for the support given him. See sec. 49.03 and sec. 49.04.

JEF

Municipal Corporations—Beer Licenses—Under ch. 207, Laws 1933, tavern keeper may not transfer license either from place to place or from person to person.

November 21, 1933.

FRED RISSER,
District Attorney,
Madison, Wisconsin.

Some time ago one A was duly licensed to operate a tavern; after operating for some length of time, he sold the tavern to B. B contends that he may continue to operate the tavern under the license issued to A as long as he operates the tavern at the location described in the license. In other words, B contends that the license is transferable from person to person. You inquire whether the contention of B is correct.

It is our opinion that B's contention is not correct and that a tavern license may not be transferred by the tavern operator, either from place to place or from person to person. Sec. 66.05, subsec. (10), subd. (d), par. 4, Stats., as enacted in ch. 207, Laws 1933, provides:

"All licenses shall be granted only upon written application and shall be issued for a period of one year to expire on the thirtieth day of June of each calendar year; provided, that licenses may be granted which shall expire on the thirtieth day of June, 1933, upon payment of one-fourth of the annual license fee. A separate license shall be required for each place of business. Said licenses shall particularly describe the premises for which issued, shall not be transferable, and shall be subject to revocation for violation of any of the terms or provisions thereof or of any of the provisions of this subsection."

The above quoted section definitely provides that tavern licenses shall not be transferable. In the absence of a restricting statute, tavern licenses could conceivably be transferred in two ways: that is, from person to person or from place to place. The section of the statutes previously quoted does not make any exception in the case of transfers from person to person. It is our opinion that no exception can be read into the statute. The contention that the limitation on transferability is confined to transfers from place to

place must be based upon the argument that the statutes specifically require that the license shall particularly describe the premises for which issued, and the fact that the limitation on transferability directly follows this, indicates that the limitation applies only to the transfer of license from place to place.

The statutes relating to issuance of tavern licenses contain restrictions both as to the persons who are entitled to licenses and to the premises for which licenses may be issued. The governing body to which the application for license is made has the authority and the duty of passing upon the individual as well as upon the premises. In addition to determining that no business prohibited by statute is being conducted on the premises for which a Class "B" license is requested, the governing body must determine that the applicant is a person of good moral character, a citizen of the United States and of the state of Wisconsin, and one who has resided in this state continuously for not less than one year prior to the date of the filing of the application. If the applicant lacks any of these prerequisites the governing body is not entitled to issue a license to him. The governing body has a duty to pass upon the qualifications of each and every individual who seeks to operate a tavern by virtue of a license issued from that governing body. If a license could be transferred by one licensee to another, the governing body would be deprived of this right to pass upon the qualifications of the prospective tavern keeper and, in the event that it later determined that he was not entitled to a license, would be under the necessity of taking affirmative action to prevent his operations.

For the above reasons, tavern licenses issued by local governing bodies are not transferable by tavern keepers either from place to place or from person to person.

JEF

Courts — Habeas Corpus — Prisons — Prisoners — Only process authorized by which to bring person in legal confinement into court to testify is that of writ of habeas corpus ad testificandum.

November 22, 1933.

BOARD OF CONTROL.

Attention A. W. BAYLEY, *Secretary.*

The opinion of this office has been requested concerning the manner in which an inmate of a state penal institution is to be brought before a court for the purpose of giving testimony therein.

Sec. 292.44, Stats., provides:

"Nothing contained in this chapter shall be construed to restrain the power of any court to issue a writ of habeas corpus, when necessary to bring before them any prisoner for trial in any criminal case lawfully pending in the same court, or to bring any prisoner to be examined as a witness in any action or proceeding, civil or criminal, pending in such court, when they shall think the personal attendance and examination of the witness necessary for the attainment of justice."

In X Op. Atty. Gen. 339 (1921), is to be found this statement following the quotation of the above statute:

"I know of no other way in which a prisoner can be secured in court for the purpose of testifying, and a subpoena issued to an inmate of an institution cannot be complied with for the reason that there is no statutory authority for such procedure. You are therefore advised that unless a writ of *habeas corpus ad testificandum* is secured, it will not be necessary for Mr. Coles to produce the two inmates in court." (P. 340.)

Since the above opinion was published the legislature, in 1927, added a new section to ch. 292, Stats. It is sec. 292.45 and provides:

"In the event that an inmate of any state institution or house of correction is brought into court in response to a writ of habeas corpus, ad testificandum, or subpoena, the institution from which the prisoner or inmate has been brought shall be reimbursed by the court in which the case originated the time of the officer conducting such inmate

and the actual and necessary traveling expenses incurred in taking such inmate into court on said process and returning him to the institution. The superintendent of the institution shall file with the clerk of such court a statement of such expenses, and the same shall be certified by him to the county treasurer, who shall pay over to the superintendent of the institution the amount so certified, provided, that in civil action, such expenses shall be paid by the party requesting the presence of such inmate."

It is to be noted that subpoenas are included in the above statute with writs of habeas corpus. Nevertheless, we are of the opinion that this latter section does not broaden the provisions of sec. 292.44, Stats., so as to authorize the production of an inmate in court on a subpoena. Sec. 292.45, deals primarily with the expenses incurred in bringing one legally detained into court. The inclusion of subpoenas with writs of habeas corpus is construed, not to authorize the former procedure, but rather to provide that if a prisoner should be brought into court by a subpoena the expenses thereof be paid by the party requesting said process.

The effect of this construction is in accord with the authorities on the subject. Wigmore on Evidence (second edition) Vol. 4, sec. 2199, p. 666, contains this statement:

"* * * If the desired witness is *confined in jail,* a subpoena would be of no avail, since he could not obey it and his custodian would still lack authority to bring him; accordingly, a writ to the custodian is necessary, ordering the prisoner to be brought to give testimony; this writ of 'habeas corpus ad testificandum,' grantable in discretion at common law, is now usually authorized by statute as a matter of course."

Therefore, it is concluded that the only manner in which a person in legal confinement can be brought into court to give testimony is by a writ of *habeas corpus ad testificandum* as authorized by sec. 292.44.

JEF

Tuberculosis Sanatoriums—In view of amendment to sec. 50.07, Stats., by ch. 277, Laws 1933, ruling in XXII Op. Atty. Gen. 343 must be modified to extent that order of county judge is no longer required when work or operation to be performed is incident to services that patient is to receive in said institution.

November 22, 1933.

BOARD OF CONTROL.

You refer to an opinion given by this department in XXII Op. Atty. Gen. 343, in which it was held that an operation on tubercular patients committed to the county sanatorium can be performed away from the sanatorium only upon the order of the county judge.

You direct our attention to the provisions of ch. 277, Laws 1933, which amends sec. 50.07, Stats., upon which said opinion was based and subsequent to the rendering of said opinion. You state that the board of control is keenly realizing the necessity of standardizing the service and treatment offered in the twenty sanatoria of the state and is arriving at certain definite conclusions as to what should be provided as a minimum of service and what should constitute routine or standard care of a tuberculosis case.

You state that to your knowledge some of the services which you consider routine in the treatment of tuberculosis are not available in some of the institutions and either will not be available for the patient or else will have to be provided for elsewhere, providing approval of the county judge can be secured. With these two things in mind, namely, ch. 277, Laws 1933, and the great range of differences in service offered to a tuberculous case in the several county institutions, the board is asking for a review of the opinion given to the district attorney of Winnebago county.

Sec. 50.07, subsec. (2), as amended by ch. 277, Laws 1933, reads as follows:

"Any such person who is unable to pay for his care may be admitted and maintained in such institution at the charge of the county in which he has his legal settlement, pur-

suant to subsection (2) of section 50.03, except that the county chargeability shall be determined by his legal settlement in the county charged. Such maintenance shall include necessary traveling expenses including the expenses for an attendant when such person cannot travel alone, necessary clothing, toilet articles, emergency surgical and dental work, and *such* other necessary and reasonable expenses incident to his care in such institution *as shall be determined by the state board of control.*

"In order to obtain uniformity in sanatorium charges, the state board of control shall as soon as possible after the passage of this subsection and thereafter from time to time issue its rules and regulations to the county sanatoria specifying what items of expense incident to the care of patients in these institutions shall be included in the actual cost of maintenance and what of such items shall be charged as extra items to the counties of legal settlement or to the state in the case of state-at-large patients."

In view of the amendment to said statute giving the state board of control specific authority in regulating the work in the sanatoria, we believe that such amendment necessitates a different ruling as to securing the approval of the county judge in those operations that are necessarily required to be performed in other institutions. We believe that ch. 277, Laws 1933, does away with that necessity so long as the work that is required to be performed is incident to the work the patient receives by hospitalization.

JEF

Physicians and Surgeons—Basic Science Law—Prisons —Prisoners—Pardons—Where license to practice medicine is revoked by board because of conviction for crime, pardon by governor does not automatically restore right to practice.

November 22, 1933.

BOARD OF MEDICAL EXAMINERS,
La Crosse, Wisconsin.

Attention Dr. Robert E. Flynn, *Secretary.*

On November 22, 1930, one Dr. P., was convicted of manslaughter in the second degree and sentenced to an

indeterminate term of not less than four years nor more than five years, at hard labor, in the state prison at Waupun. Under sec. 147.20, subsec. (3), Stats., your board upon receiving a certified copy of the information, verdict and judgment, revoked the license of the doctor to practice in Wisconsin. A short while ago Dr. P. received a pardon from the governor. You desire to know whether this pardon carries with it the right of Dr. P. to resume practice, or whether the license must be reinstated, in accordance with sec. 147.20, subsec. (4), before Dr. P. is entitled to practice in Wisconsin.

It is our opinion that this license must be reinstated before the doctor is legally entitled to practice in this state. Sec. 147.14, subsec. (1), provides:

"No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery or osteopathy, or any other system of treating bodily or mental ailments or injuries of human beings, without a license or certificate of registration from the state board of medical examiners, except as otherwise specifically provided by statute, nor unless he shall record the same with the county clerk of the county in which he shall practice and pay a fee of fifty cents for each recording. * * *"

Certain exceptions are found in sec. 147.19 but are not material in the present case as affecting Dr. P's right to practice. Sec. 147.20, subsec. (4), provides:

"When a license or certificate is revoked no license or certificate shall be granted thereafter to such person. Any license or certificate heretofore or hereafter revoked may be restored by subsequent order of the trial court, but only after a first revocation, upon notice to the district attorney who prosecuted, or, in the event of his disability, his successor in office, upon written recommendation by the president of the state board of medical examiners, and upon findings by the court that the applicant for restoration of license or certificate is presently of good moral and professional character and that justice demands the restoration."

The pardon given to Dr. P. by the governor operates to restore to him only those civil rights which were lost by virtue of his conviction. The right of Dr. P. to practice medicine was not lost by virtue of the conviction itself;

that conviction was merely the basis for the action taken by your board to revoke his license. The right to practice medicine is not one of the civil rights possessed by every citizen and is not one of the rights which are *ipso facto* lost by conviction for crime or restored by pardon. The pardon by the governor relieves Dr. P. from the necessity of serving the full time provided in the sentence. It does not and cannot authorize Dr. P. to practice medicine without a license or certificate and in violation of Wisconsin statutes. At the present time Dr. P. does not have a license or a certificate authorizing him to practice medicine in Wisconsin. He is not among those whom the statutes exempt from the license or certificate requirement. Without a license or certificate he cannot legally practice in Wisconsin. Before Dr. P. is entitled to resume practice, his license must be restored by order of the trial court, upon notice to the district attorney who prosecuted, or his successor, and upon written recommendation by the president of the state board of medical examiners. There must also be the additional finding by the court that the said Dr. P. is presently of good moral and professional character, and that justice demands the restoration of his license. It is assumed that the license of Dr. P. has not been previously revoked. Under the statute, restoration is permissible only after the first revocation.
JEF

Indigent, Insane, etc. — Legal Settlement — Wisconsin woman married to out-of-state resident does not lose legal settlement by marriage and may gain legal settlement of her own in Wisconsin.

November 22, 1933.

CHAS. K. BONG,
Assistant District Attorney,
Green Bay, Wisconsin.

A man who is a resident of the state of Michigan came to Green Bay some time ago and married a woman living in that city. The wife contends that she is afraid of the

husband and refuses to go and live with him. Neither of the parties has applied for a divorce but the wife is residing in the city of Green Bay apart from the husband, who refuses to support her unless she goes to live with him in the state of Michigan. The question arises whether the wife, by living in the city of Green Bay long enough, can obtain a legal settlement in the city so that she may be entitled to aid under the provisions of ch. 49, Wis. Stats.

It does not appear from your letter whether the wife had a legal settlement any place in Wisconsin prior to the time of her marriage. Sec. 49.02, subsec. (1), provides:

"A married woman shall always follow and have the settlement of her husband if he have any within the state; otherwise her own at the time of marriage, and if she then had any settlement it shall not be lost or suspended by the marriage; * * *"

The above statute does not apply to require a married woman to take the legal settlement of her husband unless the legal settlement of the husband is in the state of Wisconsin. The husband in this case, of course, did not have a legal settlement in Wisconsin. If the wife had a legal settlement in Wisconsin at the time of her marriage, that legal settlement was not lost by the marriage. See XXII Op. Atty. Gen. 665.

If the wife did not have a legal settlement in Wisconsin at the time of her marriage, sec. 49.02 (4) applies, which provides:

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village, or city while supported therein as a pauper shall operate to give such person a settlement therein. * * *"

Sec. 49.02 (7), providing for the loss of legal settlement, would also apply to the wife. It is our opinion that it is possible for this woman to gain a legal settlement in the city of Green Bay, if she does not already have one there, by living in that city for a period of one year without being supported therein as a pauper.

JEF

Taxation—Tax Collection—Delinquent Taxes—Action of debt under sec. 74.12, Stats., to collect unpaid delinquent personal property taxes may be commenced independently of whether or not county treasurer has delivered delinquent tax schedule and warrant to sheriff under secs. 74.29 and 74.30.

Such action of debt may be brought in name of county at request of county treasurer, without authorization from county board.

November 22, 1933.

CHARLES A. COPP,
District Attorney,
Sheboygan, Wisconsin.

You state with regard to delinquent personal property taxes returned to the county treasurer of Sheboygan county in March of 1933, that he failed to prepare a schedule thereof and to attach a warrant thereto, as required by sec. 74.29, Stats.

Subsec. (1), sec. 74.29, provides in part, as follows:

"The county treasurer shall annually, within thirty days after the several town treasurers shall have made their returns of the delinquent taxes as provided by law, make a schedule of all the taxes on personal property in his county so returned delinquent and which shall remain unpaid at the time of making such schedule, including the two per cent penalty. * * *."

Subsec. (2), sec. 74.29, provides in part, as follows:

"The county treasurer shall, within the time aforesaid, annex to such schedule a warrant under his hand, directed to the sheriff of his county, commanding him to collect from each of the persons and corporations named in said schedule the amount of the unpaid taxes set down in such schedule opposite to their respective names, * * * and to pay the same to the county treasurer, and to make return of such warrant within sixty days after the date thereof; * * * The county treasurer may renew, by indorsement thereon, such general or special warrants from time to time, either before or after the return thereof, for sixty days at one time and not longer than one year after the date thereof."

Subsec. (2), sec. 74.30, provides in part, as follows:

"In case any of such taxes shall be returned unpaid in whole or in part the said treasurer may, at any time within six years thereafter, bring an action or actions in the name of his county to recover such unpaid taxes and the costs and charges thereon against the persons or corporation charged therewith in any court of competent jurisdiction; * * * and upon the return of such general warrant the county treasurer is also authorized to institute against any person charged with any personal tax which remains uncollected supplementary proceedings for the collection thereof; * * *."

(1) The first question which you submit is whether the delivery of the schedule and warrant to the sheriff and the return of the warrant unsatisfied by the sheriff constitutes a condition precedent to the bringing of an action by the county treasurer for the collection of such unpaid delinquent personal property taxes.

It is considered that question (1) is answered, No, because of subsec. (1), sec. 74.12, which provides, in part,

"In addition to the other remedies provided in this chapter an action of debt or an action of attachment *shall lie* in the name of the town, city or village, and, *after the tax is returned as delinquent, in the name of the county, for any tax assessed against any person upon personal property remaining unpaid after the last day of January. Summons* or warrants in such action *shall issue at the request of the treasurer of the* town, city, village or *county* as the case may be and shall be subject to all the rules of law and practice applicable to actions of debt or attachment, except that the warrant of attachment shall be issued on the making and filing of an affidavit by the proper treasurer or district attorney that such taxes are delinquent. * * *."

It will be noted that the action of debt authorized by sec. 74.12 is "in addition to the other remedies provided in this chapter." The collection remedy under sec. 74.12 and that under secs. 74.29 and 74.30 are separate and independent of each other. Proceedings under the one in no way depend upon proceedings under the other. Accordingly, it has been previously ruled by this department that an action of debt under sec. 74.12, to collect unpaid delinquent personal property taxes, may be commenced

independently of the issue of the delinquent tax schedule and warrant for collection to the sheriff under secs. 74.29 and 74.30, although such schedule and warrant should be delivered to the sheriff because the latter sections command the same to be done. X Op. Atty. Gen. 678, XVIII Op. Atty. Gen. 42. The previous rulings are adhered to.

(2) The second question which you submit is whether the county treasurer (having failed to deliver the delinquent tax schedule and warrant as required by secs. 74.29 and 74.30) may commence an action to recover the unpaid delinquent personal property taxes without first being authorized to do so by resolution of the county board.

Question (2) is answered by saying that an action of debt to collect unpaid delinquent personal property taxes under sec. 74.12 may be commenced without any authorization from the county board. That section authorizes the bringing of an action of debt in the name of the county, and "summons * * * in such action shall issue at the request of the treasurer of the * * * county." It therefore seems plain that no authorization from the county board is necessary.

JEF

Bonds—Public Officers—Official Bonds—Traffic Inspectors—Title of office to which principal obligor is elected must be inserted in bond.

Bonds of traffic inspectors must be filed in office of secretary of state.

Official bond should not run in name of any particular obligee but subscribers should undertake to respond to any party damaged by breach.

November 22, 1933.

THEODORE DAMMANN,
Secretary of State.

1. You state that certain state inspectors have had the names of their official positions changed and you inquire

whether or not it will be necessary to secure a change in the surety bond of such officials.

We think that such change is necessary.

Since the title is changed, these officers no longer have any duties to fulfill under the old positions and the bondsmen would not, therefore, be liable to the state since that liability is predicated upon the breach of some duty connected with their official position. Sec. 19.01, subsec. (2), Stats.

2. You state further that your department desires to know whether these bonds are to be filed with your department or with the treasury department.

Under sec. 14.27, and sec. 19.01 (4) (a), these bonds must be filed with your department. See notes to ch. 19 in Wisconsin Annotations (1930).

3. You also ask whether the bond should run to the secretary of state, to the state treasurer or to the state of Wisconsin.

Under the provisions of sec. 19.01 (2), this bond does not run in the name of any particular person or body but the subscribers undertake to respond to any party damaged by a breach, whether that party shall be the state, a board, a commission or a person. The reason for this, as stated in the note to this section in the 1930 Annotations, is to strengthen the official bond so that it secures the performance of every official duty whatever that duty may be and so as to make the subscribers undertake to respond to any party damaged by a breach of official duty. It only weakens the obligation to repeat in the bond an enumeration of duties or of persons who may sue upon the bond.

JEF

Taxation—Tax Collection — Delinquent Taxes — County board has no power to authorize or direct county treasurer to satisfy village's equity in delinquent taxes returned from said village by assigning tax certificates upon such delinquent taxes to village in return for payment by village to county of amount of county's claim for unpaid state special taxes and county school tax liability for which village disputes.

November 22, 1933.

OLE J. EGGUM,
District Attorney,
Whitehall, Wisconsin.

It appears that there were certified to the village of Blair, and spread on its tax roll for 1932, certain state special charges and that portion of the county school tax to be raised by the village. Said special state charges and county school tax became payable to the county treasurer of Trempealeau county on the first Monday in March, 1933. Sec. 74.15, Stats. Sufficient tax money was collected by the village treasurer to pay the state special charges and county school tax to the county treasurer in cash, but such tax money was deposited by the local treasurer in local bank depositories and, when the time for payment to the county treasurer arrived, the bank moratorium had been declared, with the result that the village treasurer was unable to pay to the county treasurer state special charges and county school tax, in the amount of $2,487.69, and such amount remains unpaid at this date. In view of such existing situation it has been proposed that the county and the village enter into an agreement providing that for the purpose of avoiding litigation and to obtain a full settlement and adjustment of taxes for the years 1931 and 1932 the village of Blair should pay immediately to the county treasurer $2,487.69 in cash and Trempealeau county should sell, assign, transfer and set over to the village of Blair tax certificates to be selected by the proper representatives of the village from the delinquent tax rolls of the village, i. e., tax certificates of the face value of $1,854.48 from the 1931 delinquent tax roll and of the face value of $1,033.58 from the 1932 delinquent tax roll with no interest added. The

agreement provided for approval by the county board of supervisors of the county and village and provided also that the county treasurer and his bondsmen should be released from any liability incurred by reason of his complying with the terms of the agreement.

The question which you present is whether the county board has the necessary power in the premises.

It is considered that this question must be answered, No.

It is apparent that part of the agreement contemplates that the village's equity of $1,854.48 in the 1931 delinquent taxes returned from the village to the county treasurer is to be presently satisfied by the assignment to the village of an equal amount of tax certificates held by the county, and a similar arrangement is contemplated with respect to the village's equity of $1,033.58 in the 1932 delinquent taxes. Under the provisions of subsec. (3), sec. 74.19, Stats., however, the county treasurer is authorized to satisfy the equity of a local municipality in the delinquent taxes of a given year only by paying over to the municipality the proceeds of actual collections made by him thereon, and this only after the county's claim for unpaid taxes of that year has been satisfied out of the proceeds of such collections. See XXII Op. Atty. Gen. 548. Here the fact is that neither the county's claim for 1931 unpaid taxes nor for 1932 unpaid taxes (from the village of Blair) has been satisfied. Even if satisfied, there is no authority for the county treasurer thereupon to satisfy the village's equity by assigning to it the remaining delinquent tax certificates. The only authority given to the county treasurer, after the county's claim is satisfied, is to pay over to the village the proceeds of actual collections subsequently made. It has not been overlooked that the county treasurer is authorized by sec. 75.34 to assign tax certificates held by the county to any person offering to "purchase" the same. It seems manifest, however, that the village of Blair is not a "purchaser" of tax certificates under the circumstances outlined in the proposed agreement. The county treasurer is authorized to proceed only in the manner provided by the statutes, and no statute is found which empowers the county board to authorize some different procedure. It must be concluded, therefore, that the county board is without power in the premises.

This conclusion finds support in ch. 292, Laws 1933, which provides:

"A new subsection is added to section 59.07 and a new subsection is added to section 60.29 of the statutes to be numbered and to read: (59.07) (21) To authorize the county treasurer to deed county-owned lands to towns having an excess of delinquent real estate taxes to their credit in exchange for such credit. The county lands so conveyed shall not be valued at less than the face value of the certificates covering such lands.

"(60.29) (32) The town board is empowered to authorize the town treasurer to exchange the town delinquent real estate tax credit existing with the county for county-owned lands."

In other words, the legislature considered that an express statute was necessary in order to authorize the county treasurer to satisfy a local municipality's equity other than out of the proceeds of actual collections, and in order to authorize the local municipality to accept other than such proceeds in satisfaction of its equity. It will be noted, further, that the authority given by ch. 292, Laws 1933, extends only to the case of delinquent taxes from *towns*, and does not extend to cases of delinquent taxes from villages or cities.
JEF

Indigent, Insane, etc.—Poor Relief—Mother's Pensions—County is not entitled to return of fifty per cent or more of total amount expended each month for mothers' pensions under ch. 363, Laws 1933, secs. 5 and 6.

November 22, 1933.

WILLIAM M. GLEISS,
District Attorney,
Sparta, Wisconsin.

You direct us to the so-called emergency relief act, ch. 363, Laws 1933, and you say that the county furnishes relief in the form of mothers' pensions. You inquire whether under the provisions of sec. 5 of said chapter the county is

entitled to a return of fifty per cent or more of the total amount expended each month for mothers' pensions.

Said sec. 5, ch. 363, Laws 1933, provides:

"There shall be allotted by the industrial commission to county and local relief agencies administering relief in accordance with the provisions of section 6, not less than fifty per cent of the total local relief expenditures out of public moneys from all sources. Additional amounts may be allotted by the industrial commission to such public relief agencies where the total funds available from all sources are not adequate to provide relief in accordance with the standards prescribed in such section."

Subsec. (8), sec. 6 provides:

"In all other respects, relief under this act shall be governed by chapter 49 of the statutes."

The so-called mothers' pension law is contained in sec. 48.33 and is a special provision and provides a refunding to the county by the state of all the moneys expended by the county on the order of the county judge under par. (c), subsec. (5) of said section and one-third of the amount paid in other cases (sec. 48.33 (11) (b)), by giving credit to the county for said amount. The mothers' pension is paid on order of the county judge. The procedural steps to be taken are provided in sec. 48.33. It is on a different basis than money administered by local relief agencies.

The general provisions in ch. 363, secs. 5 and 6, are not applicable, we believe, to the special provisions contained in the mother's pension law (sec. 48.33). A careful reading of said sections 5 and 6 of ch. 363 confirms us in that belief. We do not believe that there was intended to be any interference with the administration of the mothers' pension act. You are therefore advised that the county is not entitled to a return of fifty per cent or more of the total amount expended each month for mothers' pensions under ch. 363, secs. 5 and 6.

JEF

Contracts—Liens—Claims—Payment of premium on contract bond is not lienable. Highway commission is advised to secure agreement to save state harmless from claim before releasing surety.

November 22, 1933.

CHAS. A. HALBERT, *State Chief Engineer, Bureau of Engineering.*

You state that the X Company, a surety on the contract bond of A, wishes to be released as such surety upon proof of payment of all claims against the said A except the proof of payment of the Y Company, which claims a lien for the amount of the unpaid premium on this bond. The Y Company was formerly the agent of the surety company and apparently paid some $148.94 on this premium. The Y Company now claims a lien for this amount. Your question is whether the Y Company has a lien upon the moneys that would come into your hands from the surety. If it has not you could release the surety. If it has a lien you could not do so. The answer is that it has no lienable claim.

Sec. 289.53, Stats., provides:

"(1) Any person, firm or corporation furnishing any materials to be used or consumed in making such public improvement or performing such public work, including without limitation because of specific enumeration fuel, lumber, building materials, *machinery, vehicles, tractors, equipment, fixtures, apparatus, tools, appliances, supplies, electric energy, gasoline and other motor oil, lubricating oil, greases,* apparatus, fixtures, machinery or labor, including the premiums for workmen's compensation insurance, to any contractor for public improvements in this state, except in cities of the first class, however organized, shall have a lien * * *."

This is the law as amended by chs. 83 and 316, Laws 1933. The amendments are italicized. The obvious purpose of this law was to change the decision of the supreme court as rendered in *Southern Surety Co. v. Metro S. Comm.*, 187 Wis. 206 (1925).

In that decision the supreme court held that the premiums paid on a workmen's compensation insurance bond was not a lienable claim, following the decision in *Bay State Dredge*

& Contracting Co. v. W. H. Ellis & Son Co., 126 N. E. 468, 235 Mass. 263 (1920), where the Massachusetts court held that a premium paid on an insurance liability policy was not lienable. The court refused to follow other decisions holding such a claim to be lienable. Under the rule laid down in *Barker & Stewart Lumber Co. v. M. P. M. Co.*, 146 Wis. 12, 23, 130 N. W. 866 (1911), where the court said that, where material has been consumed in the construction, and having had physical contact or immediate connection with the structure itself, it will be a lien therefor but if the material is used only to facilitate or to make possible the employment of agents which, in turn, operate on the structure, there can be no lien, and under the reasoning in *Southern Sure Co., supra,* we hold that this premium would not be a lienable claim.

However, the effect of the amendments referred to may be such as to cause the court to change its position to such an extent as to hold that payments made on all bonds are lienable. Such being our apprehension, we would advise that you secure from the surety company, as a condition precedent to the release, an agreement to save the state harmless from any suit which may be brought on this claim. This is in accordance with the advice given under other fact situations where an official still has in his hands money due to the contractor. See XX Op. Atty. Gen. 422, id. 947.

JEF

Appropriations and Expenditures—Counties—Forest Reserves—Under subsec. (5), sec. 59.98, Stats., as amended by ch. 128, Laws 1933, state aid to counties for county forest reserve payable in March, 1934, should be made on lands entered in 1933.

November 22, 1933.

ROBERT K. HENRY,
State Treasurer.

You submit the following question:

"Are lands in a county forest reserve which were entered under the forest crop law prior to January 1, 1933, and on

which state aid of ten cents per acre was to be paid in 1933, to be again included in the lands on which state aid is to be paid in March, 1934? In other words, is the state aid that is to be paid in March, 1934, to be paid only on lands entered in 1933 or is it to be paid also on the lands entered prior to January 1, 1933?"

The question arises by reason of the amendment of subsec. (5), sec. 59.98, Stats., by ch. 128, Laws 1933, and particularly by reason of the exception contained in such amendment.

Subsec. (5), sec. 59.98, prior to the amendment, provided:

"Any county having established and maintaining a county forest reserve under the provisions of this section and having entered the same under the forest crop law shall receive from the state an amount equal to ten cents for each acre of land within such forest reserve, to be used for the purchase, development, preservation and maintenance of such forest reserve. On or before the *first* day of *April* of each year the county clerk or town clerk shall certify to the state treasurer the number of acres included within the forest reserve of his county together with the legal description of such forest reserve, and the state treasurer shall pay to such county the amount due to it as state aid on or before the *first* day of *May* of each year."

Subsec. (5), sec. 59.98, as amended (including the further amendment made by ch. 454, Laws 1933), provides:

"Any county having established and maintaining a county forest reserve under the provisions of this section and having entered the same under the forest crop law shall receive from the state an amount equal to ten cents for each acre of land within such forest reserve, to be used for the purchase, development, preservation and maintenance of such forest reserve. On or before the *thirtieth* day of *June* of each year the county clerk shall certify to the state treasurer the number of acres included within the forest reserve of his county together with the legal description of such forest reserve, and the state treasurer shall pay to such county the amount due to it as state aid on or before the *following thirty-first* day of *March, except that payment on lands entered under the forest crop law prior to January 1, 1933 shall be made in May, 1933, and on lands entered in 1933 payment shall be made in March, 1934.*"

It will be noted that the annual state aid as provided in subsec. (5), sec. 59.98, both before and after the amend-

ment, is based upon the *total* number of acres previously entered by the county under the forest crop law and not merely upon the number of acres entered in the year in which the county clerk makes his report to the state treasurer. It will be noted, further, by the provisions of subsec. (3), sec. 77.02, that lands approved for entry by the conservation commission after March 20 in any year are not considered as entered until the following year, while lands so approved for entry on or before March 20 in any year are considered as entered that same year. So that, lands so approved for entry between March 21, 1932 and March 20, 1933 would constitute the lands entered in 1933. Accordingly, the 1933 report of the county clerk, whether made on April 1 under subsec. (5) of sec. 59.98 prior to amendment, with the state aid payable on May 1, 1933, or whether made on June 1 under subsec. (5) as amended, with the aid payable on March 31, 1934, would include not only the lands entered in 1933 but also the lands entered prior to 1933.

It will be noted, further, that ch. 128, Laws 1933, amending subsec. (5), sec. 59.98, did not become a law until May 17, 1933, which was after the date on which state aid became payable on the lands entered both in 1933 and prior to 1933 under subsec. (5), sec. 59.98 as it existed prior to such amendment. However, because the amendment was pending in the legislature, the reports of the county clerks were not made on April 1, 1933, and the state aid was not paid on May 1, 1933. When the amendment became a law it provided that the report of the county clerk should be made on the thirtieth day of June in each year, and that the state aid should be payable on the thirty-first day of March in the year following. Considering *those* changes alone, the lands entered in 1933, as well as the lands entered prior to 1933, would no doubt have furnished the basis for the state aid payable in March, 1934. However, the legislature saw fit to provide an exception, which exception seems to provide a special basis not only for the state aid payable in 1933, but also for the state aid payable in March, 1934. The exception is:

"* * * payment on lands entered under the forest crop law prior to January 1, 1933, shall be made in May,

1933, and on lands entered in 1933 payment shall be made in March, 1934."

Such exception, as it seems to us, provides that the state aid payable in March, 1934 should be based on the lands entered in 1933, and that the state aid payable in 1933, should be based on the lands entered prior to January 1, 1933. If, on May 1, 1933, which was prior to the effective date of the amendment, the state treasurer had paid out state aid based on the lands entered in 1933, as well as on the lands entered prior to January 1, 1933, the exception in such amendment would, in our judgment, have prevented any further payments of state aid in March, 1934.

If the exception had stopped with, "payment on lands entered * * * prior to January 1, 1933 shall be made in May, 1933" it would have been plain that the legislature was merely providing as to the basis for the 1933 payment, but the exception went on to provide: "and on lands entered in 1933 payment shall be made in March, 1934." While it may be arguable that the addition of the last quoted language was designed only to show that the lands entered in 1933 were not to be included in the basis for the 1933 payment and was not intended to make the lands entered in 1933 the *sole* basis for the 1934 payment, yet the addition of such language at least makes it doubtful whether the legislature intended that the 1934 payment should be made on any other than lands entered in 1933, and makes it doubtful whether the legislature intended that the lands entered prior to January 1, 1933 should be included in the basis for the 1934 payment.

As we construe the exception, it provides for the payment of state aid in 1933 on the lands entered prior to January 1, 1933, and for the payment of state aid in 1934 on the lands entered in 1933, but it does not allow payment in 1934 on both the lands entered in 1933 and the lands entered prior to January 1, 1933.

You are therefore advised that the payment in March, 1934 should be made only on the lands entered in 1933.
JEF

Bridges and Highways—Discontinuance of Highways— Highway commission has no power to order vacation or abandonment of highways.

Towns and counties may order abandonment of highways, pursuant to sec. 59.08, subsec. (4a), and sec. 60.29, subsec. (27), Stats.

November 22, 1933.

HIGHWAY COMMISSION.

Attention WM. E. O'BRIEN, *Chairman.*

You state that a road is being relocated in Milwaukee county which will not leave any private property between the old and the new road. You want to know if the commission has the power to order the vacation of this old highway.

We have searched the statutes which give to the highway commission its powers and have found none which would give the commission power to order the vacation of this old road.

That power to order vacation of an old highway would appear to be vested in the county board under the provisions of sec. 59.08, subsec. (4a), Stats. The power is also vested in the towns by virtue of sec. 60.29 (27), which incorporates secs. 61.38 and 61.39, Stats.

Secs. 80.01 (3) and 80.32 (3) would not apply until the vacation and abandonment have been made. The first determination is to vacate the road.

Under the facts, as stated, there would be no discontinuance as a matter of law since the old road abuts upon the new. The word "abut" means that the lines of the road coincide. *Northern P. R. Co. v. Douglas Co.*, 145 Wis. 288, 130 N. W. 246. Therefore, sec. 80.01 (3) does not apply.

Sec. 80.32 (3), would apply after the proper authorities acted. Then the old highway would revert to the owners whose lands adjoin that strip which would be discontinued.
JEF

Courts—Forfeitures—Labor—Minors—Child Labor Law —Injunction will not lie to supplement forfeiture proceedings set out by statute for violation of those statutes pertaining to employment of minors and minimum wage law.

November 22, 1933.

INDUSTRIAL COMMISSION.

Attention VOYTA WRABETZ, *Chairman.*

The facts submitted are these: An employer who is insolvent and against whom there are a number of uncollectible judgments persists in employing minors and paying them less than the minimum wage. Also, said employer refuses to keep the records required to be kept by order of the industrial commission relative to such employment. In such a situation a suit to collect the forfeitures as provided by statute would result in merely an uncollectible judgment.

It is asked whether this employer may be enjoined from further violations. This must be answered in the negative.

Concerning the employment of minors and the refusal of the employer to keep the required records, subsec. (1), sec. 103.15, Stats., provides in part:

"(a) Any employer who shall employ, or permit any minor or any female to work in any employment in violation of any of the provisions of sections 103.05 to 103.15, inclusive, of the statutes or of any order of the industrial commission issued under the provisions of said sections, or shall hinder or delay the industrial commission or truant officers in the performance of their duties, or refuse to admit or lock out any such officer from any place required to be inspected under the provisions of sections 103.05 to 103.15, inclusive, of the statutes, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than ten dollars nor more than one hundred dollars for each offense, or imprisoned in the county jail not longer than thirty days. Every day during which such violation continues shall constitute a separate and distinct offense.

"(b) The penalties specified in paragraph (a) of this section may be recovered by the state against any employer in an action for debt brought before any court of competent jurisdiction."

Ch. 104, Stats., contains the "minimum wage law." Sec. 104.04 thereof, provides in part:

"* * * every order of the said commission shall have the same force and effect as the orders issued pursuant to said sections 101.01 to 101.28, inclusive, of the statutes, and the penalties therein shall apply to and be imposed for any violation of sections 104.01 to 104.12, inclusive, of the statutes."

Hence the penalty prescribed for violation of the "minimum wage law" is to be found in sec. 101.28, Stats., which provides in part:

"If any employer, employe, owner, or other person shall violate any provisions of sections 101.01 to 101.13, inclusive, of the statutes, or shall do any act prohibited in sections 101.01 to 101.29, inclusive, or shall fail or refuse to perform any duty lawfully enjoined, within the time prescribed by the commission, for which no penalty has been specifically provided, or shall fail, neglect or refuse to obey any lawful order given or made by the commission, or any judgment or decree made by any court in connection with the provisions of sections 101.01 to 101.29, inclusive, for each such violation, failure or refusal, such employer, employe, owner or other person shall forfeit and pay into the state treasury a sum not less than ten dollars nor more than one hundred dollars for each such offense. * * *."

These are the only sections in the statutes providing penalties for the violations here concerned. It is to be noted that no provision in the above statutes is made for an injunction as an alternative means of enforcing these provisions, nor is any to be found in ch. 288, Stats., pertaining to the collection of forfeitures. In certain instances, such as in subsec. (4), sec. 102.28, Stats., the legislature has expressly permitted an injunction. None is so permitted here. It was said in the case of *State v. Howard W. Russell, Inc.*, 181 Wis. 76, 82:

"It is true that statutes imposing penalties are subject to the rule of strict construction. *State v. Wis. Cent. R. Co.*, 133 Wis. 478, 113 N. W. 952; 21 Ruling Case Law 209."

It has been repeatedly held that an injunction will not be issued to aid the enforcement of a city ordinance or a statute unless the contemplated act will work an injury to public or private property. This doctrine is quite aptly stated by Justice Pinney in the case of *Tiede v. Schneidt*, 99 Wis. 201, 213–214:

"* * * it is no part of the jurisdiction of a court of equity to enforce by injunction the criminal or penal statutes of the state, nor will it interfere for the prevention of an illegal act merely because it is illegal. In the absence of any injury to property or property rights, it will not lend its aid by injunction to restrain the violation of public or penal statutes, or the commission of immoral or illegal acts. * * *"

On this point see also *Village of Waupun v. Moore,* 34 Wis. 450; *City of Janesville v. Carpenter,* 77 Wis. 288; *Halzbauer v. Ritter,* 184 Wis. 35; *Bouchard v. Zetley,* 196 Wis. 635.

In the case presented no property rights, either public or private, are jeopardized. Hence, regardless of the apparent ineffectiveness of the coercive procedure set out in the statutes, no injunctional relief is authorized under the facts submitted.

JEF

Bridges and Highways—Trunk Highways—Legislative committee created by ch. 447, Laws 1933, and Wisconsin highway commission need not secure approval of county board as provided in ch. 196, Laws 1933, to revise state trunk highway system.

November 22, 1933.

G. ARTHUR JOHNSON,
District Attorney,
Ashland, Wisconsin.

You request the opinion of this office as to the effect of ch. 447, Laws 1933, upon ch. 196, Laws 1933, and particularly whether, under the former chapter, the legislative committee created thereby and the Wisconsin highway commission may, independently of the county board or any other municipal governing body, remove from the state highway system such highways or portions thereof as it may see fit, after due hearing as provided in the said ch. 447.

Sec. 1, ch. 196, Laws 1933, provides:

"Paragraph (a) of subsection (3) of section 84.02 of the statutes is amended to read: (84.02) (3) (a) Any necessary changes may be made in the trunk system from time to time by the commission, if it deems that the public good is best served by making such changes. Due notice shall be given to the localities concerned of the intention to make such changes or discontinuances, and if the proposed change affects more than one mile of the system, a hearing at or near the proposed change shall be held prior to making the change effective. Whenever the commission shall decide to change more than one mile of the system, such change shall not be effective until the decision of the commission shall have been referred to and approved by the county board of each county in which any part of such proposed change is situated. A copy of such decision shall be filed in the office of the clerk of each county in which a change is made or proposed."

This chapter was approved June 2, 1933, published June 5, 1933 and so became effective on June 6, 1933.

Ch. 447, Laws 1933, provided for the creation of a special legislative committee to act in conjunction with the Wisconsin highway commission for the purpose of revising the state trunk and federal aid highway systems of Wisconsin.

Sec. 1 of the said ch. 447 provides, in part:

"* * * 84.025 * * * (1) AUTHORITY FOR REVISION. In order that the state trunk highway system may be laid out so as better to serve the state, the legislative committee appointed under this section and the state highway commission are authorized to revise such system as provided in this section. Such revision shall be accomplished by removing from the system such highways or portions thereof as shall be deemed to be not of state-wide importance, and by substituting therefor other highways deemed to be of state-wide importance; provided that the mileage so revised shall not exceed four hundred miles nor shall the mileage of highways on the state trunk highway system after such revision exceed the present mileage.
"* * *

"(3) The legislative committee and the highway commission shall hold a joint hearing or hearings at the county seats of every county in which any revision is contemplated. Due notice of the hearing, setting forth the contemplated revision, shall be given by publication in at least one newspaper of general circulation in the county. No roads shall be added to the state trunk system or removed

therefrom unless due notice of the proposed revision or a substantially similar revision shall be given in the published notice, and discussed at the hearing. No roads shall be so added or removed unless such addition or removal is separately agreed to by the legislative committee and the highway commission."

Ch. 447 was approved July 25, 1933, published July 26, 1933 and became effective on July 27, 1933.

Ch. 447 makes no reference whatsoever to ch. 196 and does not provide that the special legislative committee and the Wisconsin highway commission must secure the approval of the county board before any revision made by the committee and the highway commission becomes effective. Ch. 447 covers very much the same, if not the identical subject matter covered by ch. 196. It is quite possible that the legislature felt that the public hearing which must be held in each county before the revision provided for in ch. 447 became effective would eliminate the necessity for securing the approval of the county board because of the fact that the legislative committee and the highway commission would be guided by the attitude exhibited by the people of the county at such public hearing. The additional fact that the county boards meet infrequently throughout the year would seriously handicap the activities of the legislative committee and the highway commission if they were obliged to secure their approval when making the revision. Suffice it to say that the language of ch. 447 is clear in referring to the state trunk highway system:

"* * * the legislative committee appointed under this section and the state highway commission are authorized to revise such system as provided in this section."

There is no ambiguity in this language, and the following portions of section 1, from which the quotation was taken, do not in any way, either specifically or by inference, incorporate the requirements of ch. 196 before any action of the legislative committee and the highway commission shall be effective.

The activities of the legislative committee created by ch. 447 must terminate December 31, 1934. Full effect cannot be given to ch. 196 and ch. 447 at the present time with-

out a resulting conflict. Subsequent to the termination of the activity of the legislative committee provided for in ch. 447 revision of the state trunk highway system will be governed by ch. 196 unless that chapter is altered prior to that time. As stated in XXII Op. Atty. Gen. 226, 228:

"If a supposed incongruity between statutes can be avoided by reasonable construction, such construction should be adopted, but where it is manifest that two statutes conflict, the later statute supersedes the earlier so far as full effect cannot be given to both. *Hite v. Keene,* 137 Wis. 625, 119 N. W. 303; *State ex rel. M. A. Hanna Dock Co. v. Wilcuts,* 143 Wis. 449, 128 N. W. 97."

It is our opinion that the operation of those portions of ch. 196 which conflict with ch. 447 is temporarily suspended and that it is not necessary for the legislative committee created by ch. 447 and the Wisconsin highway commission to secure the approval of the county board or any other municipal governing body in order to remove from the state trunk highway system any highway or portions thereof.

JEF

Agriculture—Storage—Furrier who stores furs during summer for customers for consideration is "warehouseman" as defined in sec. 99.32, Stats., as created by ch. 456, Laws 1933, and is subject to provisions of that act.

November 22, 1933.

OLIVER L. O'BOYLE, *Corporation Counsel,*
Office of District Attorney,
Milwaukee, Wisconsin.

You submit the question as to whether the provisions of ch. 456, Laws 1933, are intended to apply to furriers who store furs during the summer for a consideration.

The question submitted is answered, Yes.

The act in question creates sec. 99.32, Stats., licensing and regulating certain warehousemen. The term "warehouseman," as used in the act, is defined as including every

corporation, individual, firm or partnership "storing personal property for hire" with certain exceptions not material here. Under that definition it must be concluded that a furrier who stores furs for his customers for a consideration is a "warehouseman" and, therefore, subject to the provisions of the act.

The act is administered by the department of agriculture and markets and we are informed that the department has adopted certain rules and regulations with respect to furs. Accordingly, any furrier affected by the act should get in touch with that department.

JEF

Minors—Child Labor—Children working at home in agricultural and domestic pursuits do not come within purview of ch. 143, Laws 1933, sec. 103.05, subsec. (4), Stats.

November 22, 1933.

N. H. RODEN,
District Attorney,
Port Washington, Wisconsin.

You ask this department to render an opinion upon the following question:

"Does ch. 143, Laws 1933, apply to agricultural workers at home and to domestic workers in the home, provided they are more than fourteen years of age but have not completed their course of study?"

This question presents the problem of whether the child may work around the home, performing the chores which are the usual lot of the child. We must assume that such work around the home is for the family of the child. The statute reads as follows:

"103.05 (4) (a) Except as otherwise provided in subsection (4a) and in paragraph (d) of subsection (6) of this section and in sections 103.12 and in sections 103.21 to 103.33, no child under seventeen years of age, unless indentured as an apprentice in accordance with section 106.01, shall be employed or permitted to work at any time

in any *gainful occupation or employment,* unless there is first obtained from the industrial commission, or from some person designated by the commission, a written permit authorizing the employment of such child within such periods of time as may be stated therein, which shall not exceed the maximum hours prescribed by law."

Under the facts stated the children are not employed in a gainful occupation or employment so as to come within the provisions of ch. 143, sec. 2, and the section of the statutes quoted above would not, therefore, apply. This we believe to be in accordance with a well settled governmental policy to refrain from interfering too greatly with the rearing of children in the home.

We do not of course, attempt to apply any other provisions of the statutes save the one mentioned in your communication.

JEF

Municipal Corporations—Beer Licenses—Under ch. 207, Laws 1933, brewer does not need wholesaler's license unless operating depots or warehouses in nature of distributing point, separate from brewing plant.

Foreign corporation licensed to operate in this state cannot obtain wholesalers' license under ch. 207, Laws 1933, as domestic corporation.

November 22, 1933.

GROVER M. STAPLETON,
District Attorney,
Sturgeon Bay, Wisconsin.

The S. Brewing Company, located near Sturgeon Bay, Wisconsin, has complied with the federal laws and secured a permit to manufacture fermented malt beverages; it has also registered with the state treasurer in accordance with the Wisconsin statutes. The company is a foreign corporation, incorporated under the laws of the state of Illinois, but licensed by our secretary of state to do business in Wisconsin. This brewing company desires to sell its beer to licensed wholesalers in that community, who will

in turn dispose of the beer in this state. You inquire whether the S. Brewing Company must obtain a wholesaler's license from the local governing board under the provisions of ch. 207, Laws 1933.

It is our opinion that the S. Brewing Company is not obliged to obtain a wholesaler's license for such sales. Sec. 66.05, subsec. (10), par. (a) subd. 1, Wis. Stats., as enacted by ch. 207, Laws 1933, provides:

" 'Brewer' shall mean any person, firm or corporation who shall manufacture for the purpose of sale, barter, exchange or transportation fermented malt beverages or light wines as defined herein."

The S. Brewing Company is a brewer within the meaning of the above quoted section.

Sec. 66.05, (10) (a) 3, provides:

" 'Wholesaler' shall mean any person, firm or corporation, *other than a brewer or bottler,* who shall sell, barter, exchange, offer for sale, have in possession with intent to sell, deal or traffic in fermented malt beverages or light wines as herein defined, in quantities of not less than four and one-half gallons at one time, not to be consumed in or about the premises where sold."

In accordance with the above definition, in order to be a wholesaler it is necessary to be some one or something other than a brewer or bottler. The word "brewer" used in the definition of the "wholesaler" of course has that meaning which is given to it by the definition of the word "brewer" quoted above. Sec. 66.05 (10) (c), is entitled:- "Restrictions on brewers, bottlers and wholesalers." Subds. 3 and 4 under this section provide:

"3. A brewer or bottler may own and operate depots or warehouses, from which sales of fermented malt beverages or light wines, not to be consumed in or about the premises where sold, may be made in original packages in quantities of not less than four and one-half gallons at any one time. A separate wholesaler's license shall be required for each warehouse or depot maintained or operated.

"4. 'Brewers' and 'Bottlers' who shall desire to sell (in the original packages or containers) fermented malt beverages or light wines not to be consumed in or upon the premises where sold, shall be required to obtain a whole-

saler's license if said fermented malt beverages or light wines are sold in quantities of not less than four and one-half gallons at any one time, or a class 'A' license if such sales are made in quantities of less than four and one-half gallons at any one time."

These sections must be read and construed together. They refer to actual wholesale operations by brewers or bottlers. These wholesale operations would be in the nature of the maintenance of a depot or warehouse as a distributing point, separate and distinct from the brewing and bottling plants. The ordinary operations of a brewer, namely, the manufacture, sale and offering for sale of fermented malt beverages at the brewing plant, or the warehouse, necessarily incidental thereto, are not such wholesale operations as would necessitate obtaining the wholesaler's license provided for in ch. 207 from the local governing board.

It is true that the permit issued by the federal government authorizes only the manufacture of fermented malt beverages, and does not purport to authorize by its terms the sale or offering for sale of such beverages which have been manufactured by virtue of the permit. It would present a rather anomalous situation, however, if a brewer were permitted by a federal permit to manufacture fermented malt beverages and forbidden by a town, city, or village governing body to dispose of any of the fermented malt beverages manufactured.

The fermented malt beverages once manufactured cannot immediately be sold, but must be stored for some time in warehouses contiguous to the brewery. Such storage is necessarily an incidental part of the operations of a brewery. The maintenance of depots, or warehouses, separate and distinct from the brewery, for the purpose of serving trade which quite probably would not buy from the brewery itself, is not necessarily an incidental part of the operations of a brewery and, in maintaining such a depot or warehouse, the brewer is carrying on wholesale operations and must obtain a wholesaler's license for the warehouse which he maintains as a distributing point.

Sec. 66.05 (10) (e) as enacted by ch. 207, Laws 1933, provides:

"Wholesalers' licenses may be issued only to domestic corporations or to persons of good moral character who shall have been residents of this state continuously for not less than one year prior to the date of filing application for said license. * * *"

Some meaning must attach to and be given the word "domestic" as it modifies the word "corporation" in this section. It could only have been used as meaning a Wisconsin corporation as distinguished from a foreign corporation. Corporations exist by virtue of statutes rather than by virtue of the common law. Inasmuch as they are creatures of the state law, any corporation organized under and by virtue of the Wisconsin law is said to be a domestic corporation. The S. Brewing Company is organized under and by virtue of the laws of the state of Illinois. Although licensed by the Wisconsin secretary of state to do business in Wisconsin, its existence is not due to the Wisconsin law. The license issued by our secretary of state simply authorizes its operations in Wisconsin. This license does not change the status of the S. Brewing Company from a foreign to a domestic corporation. The S. Brewing Company, therefore, is not entitled to obtain a wholesaler's license, which would be necessary in the event that it elected to conduct wholesale operations in Wisconsin, as described in the first part of this opinion.
JEF

Taxation—Transfer of bonds by state annuity and investment board of state is not subject to federal stamp tax under Schedule A–9, Title VIII of revenue act of 1926 as amended by sec. 724 of revenue act of 1932.

November 22, 1933.

ALBERT TRATHEN,
Director of Investments,
Annuity and Investment Board.

Some time ago you submitted the question whether the transfer of bonds by the state annuity and investment board of Wisconsin is subject to the federal stamp tax

imposed by Schedule A–9, Title VIII of the revenue act of 1926, as amended by sec. 724 of the revenue act of 1932.

We are this date in receipt of a copy of a ruling by the acting deputy commissioner, of internal revenue, addressed to the collector of internal revenue, Milwaukee, Wisconsin, and dated November 3, 1933, in which it is held that the transfer of bonds by the state annuity and investment board of the state of Wisconsin is not subject to the federal stamp tax under Schedule A–9, of the above mentioned title and act. A copy of that ruling is herewith enclosed.

That ruling is adopted as the opinion of this department. JEF

Washington, D. C.
November 3, 1933.

Collector of Internal Revenue,
Milwaukee, Wis.

Attention C*CJB

* * *

You are advised that the bureau has uniformly held that a state board which is of a strictly governmental character is exempt from the payment of the transfer tax on bonds. Doubtless the maintenance of the state annuity and investment board is in connection with the exercise of an essential governmental function. The board maintains a sinking fund and has exclusive control of the investment and collection of the principal and interest loaned or invested from certain state funds which are transferred to the sinking fund. The purchase and sale of bonds would be merely an incident to the exercise of an essential governmental function and the collection of the transfer tax under Schedule A–9 of the above mentioned title and act on the purchase and sale of bonds, even though collected from the other party, would result in a burden on the state.

It is held, therefore, that the transfer of bonds by the state annuity and investment board of the state of Wisconsin is not subject to the stamp tax under Schedule A–9 of the above mentioned title and act.

D. S. Bliss,
Acting Deputy Commissioner.

Peddlers—Conviction of licensee for fraud, false representation, etc., is necessary before peddler's license can be revoked.

Deputy treasury agent is under no obligation to prosecute licensed peddler who he believes is vagrant.

November 22, 1933.

GEORGE WARNER, *Chief Inspector,*
Weights and Measures,
Department of Agriculture and Markets.

You state that a foot peddler legally licensed under sec. 129.02 has been selling ABC cards upon which there is a finger alphabet illustration, a few mottoes or verses and a notation to please buy from the deaf mute, by distributing these cards among a group of people, then retracing his steps, collecting cash at the rate of ten cents for each card or retrieving the card where no sale is made. You inquire whether or not your department can revoke the license on the ground that the method above described constitutes begging.

Sec. 129.08 provides:

"Any license issued by the treasury agent pursuant to this chapter may be revoked by him upon the conviction of the licensee of fraud, false representation, misrepresentation or imposition in the sale of any goods, wares or merchandise or of the sale of any adulterated food, drink or drug, or of any food deleterious to health, and the filing with the treasury agent of a certified copy of the final judgment of conviction shall be sufficient authority for the revocation of such license, and any license issued under section 129.14 may likewise be revoked for any violation by the licensee or with his consent, express or implied, of the statutes which prohibit gambling or immoral exhibitions."

In XVI Op. Atty. Gen. 566 it was held:

"If state treasury agent has evidence of violation of showman's license statute he may revoke licenses, irrespective of conviction for such violation."

I believe this opinion must be limited to a showman's license and cannot be extended to a peddler's license.

The statute, sec. 129.08, authorizes the revocation upon conviction of the licensee of fraud, etc., i. e., conviction is a condition precedent before the license can be revoked.

Sec. 348.351 defines vagrancy as follows:

"All persons of the classes enumerated in this section, except dependent, neglected, or delinquent children as defined in section 48.01 shall be deemed vagrants, namely: All idle persons who, not having visible means to maintain themselves, live without employment; all persons wandering abroad and lodging in groceries, beerhouses, outhouses, market places, sheds or barns or in the open air, all common drunkards; all lewd, wanton, lascivious persons in speech or behavior; all persons wandering abroad or begging or who go about from door to door or place themselves in the streets, highways, passages or other public places to beg or receive alms, or fortune tellers and other like impostors or gamblers, and persons having no visible occupation and unable to give a satisfactory account of themselves, and every female who shall be found wandering about the streets and addressing male persons for the purpose of soliciting the commission of any lewd, indecent or unlawful act, or for the purpose of enticing any male person into a house of prostitution, bed house, room or other place for any unlawful purpose, or any female inmate of any bawdyhouse, or house of prostitution, or assignation house or brothel, or any common prostitute who shall be found wandering about the streets or loitering in or about any restaurant, lodging house, saloon or place where intoxicating liquors are sold; and shall be punished by imprisonment at hard labor in the county jail not exceeding ninety days or by solitary confinement therein not less than three days nor more than ten days."

Whether or not the person you refer to is a vagrant would depend upon whether or not he comes within the provisions of the above statute. It would be a question for a jury to determine in a proper proceeding.

It is the duty of the treasury agent to superintend and enforce the collection of all license fees required to be paid to the state under the provisions of secs. 129.01 to 129.24, inclusive, or of any act relating to hawkers, peddlers or transient merchants and to perform such other duties as the secretary of state may prescribe under any other license law. Sec. 129.11, Stats.

If the treasury agent feels that the person in question

is perpetrating fraud upon the public, he, as a public spirited citizen, should bring the matter to the attention of the district attorney, but I do not feel that he is under any more obligation to do so than any other citizen.
JEF

Banks and Banking—Public Deposits—Courts—Clerk of Circuit Court—Ch. 34, Stats., relating to public deposits, as applied to moneys in hands of clerk of circuit court, is interpreted.

November 23, 1933.

CARL CHRISTIANSON,
Assistant District Attorney,
Madison, Wisconsin.

From time to time certain moneys come into the hands of the clerk of the circuit court by virtue of his official position. These moneys are received by him because of tenders, garnishments, sums paid into court pending settlement, and sums paid into court in illegitimacy cases, divorce cases, etc. The following questions arise concerning the disposition of this money under ch. 34, Stats., known as the public deposits law:

1. Under sec. 34.01, subsec. (4) is the clerk of the circuit court or the county board, the "governing board?"

The said sec. 34.01, subsec. (4), as amended by ch. 435, Laws 1933, provides:

" 'Governing board' shall mean the county board or committee designated by the county board to designate public depositories in the case of a county, the city council in the case of a city, the village board in case of a village, the town board in case of a town, the school board in the case of a school district, and any other commission, committee, board or officer of any governmental subdivision of the state not hereinbefore mentioned."

From a reading of secs. 59.12, 59.13 and 59.15, subsecs. (1), (e) and (9), it is apparent that the clerk of the circuit court is a county officer. Sec. 34.01, provides that the governing board in the case of a county shall mean the

county board or the committee designated by the county board to select public depositories. The last portion of this statute, referring to an officer of any governmental subdivision of the state, covers only governmental subdivisions of the state "not hereinbefore mentioned." Inasmuch as a county was mentioned before in the statute, the clerk of the circuit court cannot be the governing board for the county. It is our opinion that the county board or the committee designated by the county board to select public depositories, in the case of a county, is the governing board which selects the place or places where the moneys coming into the hands of the clerk of the circuit court, by virtue of his official capacity, shall be placed in order to be covered by ch. 34.

Sec. 34.01, subsec. (1), as amended by ch. 435, provides:

"'Public deposit' shall mean moneys deposited by * * * any * * * officer of any governmental subdivision of the state * * * including private funds held in trust by a public officer for private persons, corporations or associations of individuals."

This definition of "public deposit" would seem to include the money hereinbefore mentioned as coming into the hands of the clerk of the circuit court.

(2) Is the clerk of the circuit court a "treasurer" under sec. 34.01, subsec. (7)?

Subsec. (7), sec. 34.01, provides:

"'Treasurer' shall mean any duly elected, appointed or acting official of the state or of any county, city, village, town, drainage district, power district, school district, sewer district, or of any commission, committee, board or officer of any governmental subdivision of the state whose official duties require that he receive and account for public moneys."

As stated before, the clerk of the circuit court is a county officer. Numerous statutes provide for turning over to him the moneys hereinbefore mentioned. See secs. 267.11, 247.29 and 269.06.

Other statutes require that an accounting be made by county officers for moneys coming into the hands of such officers. Sec. 34.01, (5) provides:

"'Public moneys' shall include all moneys coming into the hands of * * * any * * * officer of any govern-

mental subdivision of the state, by virtue of his office without regard to the ownership thereof."

This definition would also cover the moneys which are the subject of discussion in this opinion. Your second question must be answered in the affirmative.

(3) Is the clerk of the circuit court a "public depositor" under sec. 34.01 (3)?

This subsection provides:

"'Public depositor' shall mean the state or any county, city, village, town, drainage district, power district, school district, sewer district, or any commission, committee, board or officer of any governmental subdivision of the state which deposits any moneys in a public depository."

As the clerk of the circuit court is a county officer, he is a public depositor when depositing these moneys in the public depository.

It has been suggested that the circuit judge is the "governing board," having the right to designate the public depository in which the clerk of the court should deposit these moneys coming into his hands. A circuit judge is a state officer. *Milwaukee County v. Halsey,* 149 Wis. 82. It is doubtful whether that territory included within a court circuit would be classed as a governmental subdivision of the state, and it is equally doubtful whether the circuit judge could be called an officer of such governmental subdivision even if it were classed as one. Although the question is not entirely free from doubt, it is suggested as being by far the safer course that when the circuit judge nominates the place where he desires the clerk of the court to deposit moneys, some one of the public depositories selected by the county board be named. It would seem that although this money is paid into court, the responsibility for its safe keeping rests with the clerk of the circuit court rather than with the judge.

JEF

Indigent, Insane, etc. — Minors — Legal settlement of minor and her illegitimate child is that of parent having legal settlement in this state.

Fact that minor is emancipated is not material in determining legal settlement.

November 23, 1933.

N. H. RODEN,
District Attorney,
Port Washington, Wisconsin.

The following statement is taken from your recent letter:

"A girl who now is 20 years of age, but will be 21 in a short time, gave birth to a child about a year ago. Ever since she has been sixteen years of age she has not lived with the father and mother and during all these years has never given any of her earnings to her stepfather and mother for the support of this baby.

"The stepfather and mother and baby reside in Town A, Ozaukee county. The girl, however, has lived in Milwaukee for more than two years. Town A in Ozaukee county has been notified that they must support this child due to the fact that this girl is destitute at the present time. There are also doctor and hospital bills which were incurred and which Milwaukee county want Town A to pay. The girl is also completely emancipated.

"Is Town A responsible in this matter or is the city of Milwaukee liable?"

It is our opinion that Town A is responsible for the support of the girl and her child. Sec. 49.02, subsec. (2), Stats., provides:

"Legitimate children shall follow and have the settlement of their father if he have any within the state until they gain a settlement of their own; but if the father have no settlement they shall in like manner follow and have the settlement of their mother if she have any."

Presumably the girl was a legitimate child and her legal settlement must be governed by the provisions of the statute above quoted. The legal settlement of the stepfather and the mother is in Ozaukee county. It is unnecessary here to decide whether the legal settlement of the girl follows that of the stepfather or the mother. It follows one

of the two and, in either event, her legal settlement is in the Town A, in Ozaukee county.

Under sec. 49.02, subsec. (5), it is only a minor whose parent has no legal settlement in this state who is permitted to gain a legal settlement of his own.

Under sec. 49.02, subsec. (4), "Every person of full age" is permitted to gain a legal settlement with exceptions which are immaterial. A person is of full age on the day preceding the twenty-first anniversary of his birth. *Hamlin v. Stevenson,* 34 Ky. 597;

See also sec. 319.01, Stats., which provides in part:

"All persons under the age of twenty-one years shall be deemed minors, * * *."

"This girl, who is now twenty years of age, is still a minor and, in view of the fact that she has a parent living with a legal settlement in Wisconsin, she cannot gain a legal settlement of her own. Assuming that the emancipation is complete, it does not alter the question of determining legal settlement. The emancipation of minors is a principle of common law, and is applicable only when not abrogated by statutory provisions. Ch. 49, Stats., purports to cover the entire field relating to the establishment of legal settlements. No exception concerning the establishment of legal settlement is made in the case of emancipated minors different from that applicable to unemancipated minors.

The purpose of the law in permitting the emancipation of certain minors was to allow those minors to make certain contracts which they could not otherwise make, and particularly to allow them to retain any money which they might earn and to make certain decisions for themselves which could not otherwise be made. The emancipation of a minor does not operate to make that minor actually twenty-one years of age. It does not permit him to vote and it does not legally sever all connection between him and his family. In short, the emancipation is a limited one and for specific purposes. In this connection it might be advisable to call your attention to the provisions of sec. 49.11, which imposes upon minors, whether emancipated or unemancipated, a duty to support their parents in time of need, and a corresponding duty upon the parents to support children in time of

need, whether those children are emancipated or not. The legislature has taken pains to specify at length the manner in which individuals may gain and lose legal settlements, those statutes particularly covering father, wife, legitimate children, illegitimate children, married women whose husbands have no legal settlements in this state, etc. Under our constitution, those principles of the common law are applicable in this state except as modified by statute. In the present case the legislature has seen fit to embrace the whole field concerning the establishment of legal settlement. Exceptions cannot be read into sec. 49.02, simply for the purpose of preserving the operation of any common law principles with which that section might conflict.

Sec. 49.02, subsec. (3), provides:

"Illegitimate children shall follow and have the settlement of their mother at the time of their birth if she then have any within the state; * * *"

The legal settlement of the baby follows the legal settlement of the girl under this section of the statutes. The legal settlement of the girl follows that of either the stepfather or the mother. The legal settlement of both the girl and the baby is in Town A, Ozaukee county, which is responsible for their support.

JEF

Education—Teachers—School Districts—School board cannot delegate to electors right to contract with teacher. Valid contract between school district and teacher can be made only by board.

November 25, 1933.

ROSS BENNETT,
District Attorney,
Portage, Wisconsin.

The board of a school district located in your county voted to submit to the annual school meeting the question of hiring a teacher, and to let the contract for the coming year to the teacher chosen by the voters. You enclose a

copy of the resolution by which this action of the board was taken. Following this decision, and at a regular annual school meeting, there were thirty-three ballots cast of which "A" received thirty and "B" received two. There was one blank among the ballots. At a subsequent meeting of the school board the said board hired a third party as teacher, disregarding the vote at the school meeting, and disregarding the former resolution. The third party is qualified and is the acting teacher. The questions arise whether the district is liable to the teacher who received the majority of the votes at the school meeting and, if so, whether the said teacher can obtain a writ of mandamus and insist upon a contract. It appears that the teacher who received the largest number of votes at the annual school meeting was qualified to teach and was actually the former teacher of said district.

It is our opinion that the school district is not liable to the teacher who received the majority of votes at the school meeting, and that consequently she is not entitled to a writ of mandamus for the purpose of securing a contract.

This question appears to have been conclusively decided by our supreme court in the case of *Leahy v. Joint School District,* 194 Wis. 530. The following language is taken from pages 533–534 of the opinion in that case:

"From early times in this state the legislature, while expressly granting to the electors of the school district in annual meeting duly assembled many and varied powers and duties, and as now expressed in sec. 40.09, Stats., such as voting upon the amount to be raised for building or leasing schoolhouses; for teachers' wages; for additional teachers; for the purchase of supplies; the length of the school year; to provide for the prosecution or defense of legal proceedings; and by sec. 40.26 that they shall direct the board to build, purchase, or lease schoolhouses, nevertheless by sec. 40.28 it is not the *school district,* but 'The *board shall contract* with qualified teachers, specify in the contract the wages . . . to be paid,' etc.

"Just why such a vital and important distinction should be made between the school district as such and its officers, the school board, it is now immaterial to question. The legislature made and has continued such distinction and mandate, and this court must continue to so recognize and uphold, as it has repeatedly done in the past, the law that

it is the school board and not the school district which must be the agreeing body with the teacher in order that there be validity to such a contract, and as shown in the following among other cases: *Tripp v. School Dist.* 50 Wis. 651, 655, 659, 7 N. W. 840; * * *"

"Many other courts are in accord with the rulings in our decisions as to the strictness with which such provisions are to be construed and that persons dealing with such bodies are bound to know thereof at their peril. *Martin v. Common School Dist.* 163 Minn. 427, 204 N. W. 320; * * *"

Your attention is also directed to the case of *Webster v. School District No. 4,* 16 Wis. 316; *Hemingway v. Joint School District No. 1,* 118 Wis. 294, and an opinion from this office in VIII Op. Atty. Gen. 93.

There is nothing that need be added from this office to the decision in the *Leahy* case concerning the fact that the electors of a school district cannot, by their action, bind the district in the matter of contracting with a teacher. The contract between the school district and the teacher must be entered into by the school board. The matter of hiring a teacher is certainly one that involves the exercise of judgment and discretion. This duty could not validly be delegated to the electors of a district. Regardless of the first resolution of the school board, and of the vote taken at the annual school meeting, the fact remains that the school board did not contract with "A," who received thirty votes at the school meeting. The contract between the school district and the teacher must be in writing and must be authorized at a legal meeting of the board. Inasmuch as "A" is not entitled to a contract, a writ of mandamus will not issue to secure one.

JEF

Corporations—Co-operative Associations—Where general corporation is converted into co-operative association and resolution also contains article of amendment, filing fee is amount provided by sec. 185.04, Stats., and not sec. 180.02 (3) (b).

November 25, 1933.

THEODORE DAMMANN,
Secretary of State.

A corporation organized under ch. 180, Wis. Stats., recently passed a resolution adopted by a majority vote of its members at a legal meeting, converting the corporation into a co-operative association. The said corporation previously operated upon a co-operative basis as defined in sec. 185.01, Stats. In connection with the resolution providing for the conversion of this corporation, there was passed an amendment of the articles of incorporation. The question arises whether the filing fee for this amendment should be a fee of five dollars, as provided by sec. 185.04, or whether it would also be necessary to pay the ten dollar amendment fee provided for by sec. 182.02, subsec. (3), par. (b), Stats.

Sec. 185.19 provides:

"Any corporation organized under the general corporation law of this state, if such corporation is doing business upon a co-operative basis, as defined in section 185.01, may convert itself into a co-operative association under sections 185.01 to 185.22, inclusive, by a resolution adopted by a majority vote of its members at any regular or special meeting, legally called. * * * The said resolution may contain any amendments of the articles of incorporation necessary or desirable, in which case there shall be paid the fees provided by section 185.04 for filing and recording amendments."

Sec. 185.04 provides:

"For filing the articles of incorporation of associations there shall be paid the secretary of state ten dollars, and for filing an amendment to such articles, five dollars; * * *"

Ch. 185, Stats., from which the above two sections are taken, relates to "co-operative associations" and sets forth at length the statutory provisions relating to the same.

Ch. 180, Stats., contains the general corporation law, and relates to the organization and powers of domestic corporations. Sec. 180.01 provides:

"Three or more adult residents of this state may form a corporation in the manner provided in this chapter * * * *but subject always to provisions elsewhere in the statutes relating to the organization of specified kinds or classes of corporations.*"

Sec. 180.02, subsec. (3), relates to the filing fees which shall be paid to the secretary of state. Par. (a) enumerates a number of corporations organized for specific purposes. Par. (b) provides:

By every other corporation, *except as is otherwise provided,* * * * ten dollars for each amendment * * *."

Turning again to ch. 185, it is found that sec. 185.20 provides:

"The general corporation law of this state shall apply to all associations, except where said general corporation law expressly exempts such associations, or where the provisions of said general corporation law are opposed to or inconsistent with the provisions of this chapter."

Those portions of secs. 180.01 and 180.02 (3) (b) which have been quoted indicate that the general corporation law is not intended to apply in the case of co-operative associations, where ch. 185 makes specific provisions which are inconsistent. Sec. 185.20 also indicates, quite conclusively, that wherever there is a conflict between the general law and the law applicable to co-operative associations, the latter shall prevail. In the present instance there is an inconsistency between the general corporation law and the co-operative association law in the matter of the fee to be paid the secretary of state when filing amendments. It is our opinion that the five dollar fee specified in sec. 185.04 should be charged in the present case, and that no further charge is authorized for this service, by virtue of sec. 180.02 (3) (b). There is nothing in the statutes to indicate that

the legislature desired to impose a fifteen dollar fee for such service, and apparently no practical reason why the nature of the service should require a greater fee for filing an amendment of this sort than for the filing of an amendment under the general corporation law.
JEF

Counties—Taxation—Tax Sales—Ch. 292, Laws 1933, does not authorize transfer by county of one year's tax certificates in exchange for town's credit on delinquent real estate taxes.

November 25, 1933.

F. W. HORNE,
District Attorney,
Crandon, Wisconsin.

You refer to ch. 292, Laws 1933, and inquire whether the lands which a county treasurer may deed to towns having an excess of delinquent real estate taxes to their credit, in exchange for such credit, must be lands to which the county has taken a deed, or whether it is possible to make an exchange of lands to which the county holds one year's tax certificates.

Sec. 1, ch. 292, Laws 1933, creates sec. 59.07, subsec. (21), Stats., which empowers the county board -

"To authorize the county treasurer to deed county-owned lands to towns having an excess of delinquent real estate taxes to their credit in exchange for such credit. The county lands so conveyed shall not be valued at less than the face value of the certificates covering such lands."

It is our opinion that this section does not authorize the transfer by a county of one year's tax certificates in exchange for credit which a town may have for delinquent real estate taxes. The statute authorizes the transfer only of "county-owned lands." Ownership implies a fee title. The holder of a tax certificate has nothing more than a contingent right to a tax deed at some period in the future. The interest which the holder of a tax certificate has in

the land covered by the certificate is not such that it can be said that the holder has any right in the land akin to ownership.

Under this statute a county may *deed* certain lands. A tax certificate may be assigned, but only interests in land can be deeded. In addition the legislature provided that the county lands which might be conveyed should not be valued at less than the face value of the *certificates* covering *such* lands. The legislature here apparently had in mind definitely the distinction between tax certificates and lands to which the county had already taken a deed.
JEF

Counties—County Board—Education—County Superintendent of Schools—Supervising Teachers—County board has no power to change salary of county superintendent at adjourned meeting on March 31 of year when such superintendent is elected.

County board may not change per diem of new members on March 31 from $4.50 to $4.00.

County board may on said date reduce salary of supervising teachers from $2,000 to $1,500.

November 25, 1933.

FRANK F. WHEELER,
District Attorney,
Appleton, Wisconsin.

In your letter of November 22 you submit the following:

"At an adjourned annual meeting of the Outagamie county board on March 31, 1933, a special salary committee appointed at a previous meeting to consider salaries of the county superintendent of schools and the supervising teachers filed the committee's report. The minutes of the county clerk on this adjourned meeting of March 31, 1933 read as follows:

" 'Report of the special salary committee. Superv. Muenster moved to adopt. Superv. Smith moved to amend the report to read that the salary of the supt. of schools be

reduced from $2700 to $2000 per year, and the balance of the report open for further amendments. Superv. Schultz moved to amend the amendment to table the report and take up salaries one at a time. Amendment carried.

" 'Superv. Sievert moved that we reduce the county board's per diem from $4.50 to $4.00 per day. Roll call. 40 aye, 1 absent. Motion adopted.

" 'Superv. Smith moved that the salary of the superintendent of schools be cut from $2700 to $2000 per year. Roll call, 28 aye, 1 absent. Supervs. from Appleton, Kaukauna and 3rd ward New London not voting. Motion adopted.

" 'Superv. Esler moved that the salaries of the supervising teachers be reduced from $2000 to $1500 per year beginning July 1, 1933. Roll call, 39 aye, 1 nay, 1 absent. Motion adopted.'

"That adjourned meeting of the county board adjourned sine die on March 31, 1933. At the time of the meeting of March 31, 1933, the county board had never formally adopted any parliamentary rules for guiding the chairman of the board in the conduct of the meetings, but, nevertheless, whenever a question of parliamentary procedure had been presented, the chairman usually referred to Robert's Rules of Order to determine the proper parliamentary procedure. * * *"

You inquire what the legal effect is on the salaries and per diem of the officers in question at the meeting of the board on March 31, 1933, as shown by the minutes of the clerk.

I will first answer the question as to the salary of the county superintendent of schools.

Sec. 39.01, subsec. (3), Stats., provides as follows:

"The county board, at its annual meeting next preceding the election of such school superintendent, shall fix his annual salary and when so fixed, it shall continue to be the salary of said officer until changed by the board or by operation of law. * * *"

This language is somewhat similar to that of sec. 59.15 (1), Stats. In XXI Op. Atty. Gen. 602, this office had occasion to construe the provisions of sec. 59.15 (1) and it rendered an opinion which held that the county board could, at an adjourned annual meeting held on May 10, fix the salary to be paid to an elective county officer to be

elected during the year in which such action was taken. This opinion was based on decisions of our supreme court.

In the case of *Hull v. Winnebago County,* 54 Wis. 291, our court held that under sec. 59.15 (1) the salary of the county treasurer to be elected in the year following the November in which the annual meeting is begun may be fixed at an adjourned annual meeting of the county board as late as the 12th day of March next following." The court said, pp. 293–294, 295:

"* * * It is quite clear that the statute contemplates that the power shall be exercised at a period remote from the time when such officers were to be chosen, in order to prevent the influence of partisan bias or personal feeling on the part of the members of the board in fixing the salary. And, furthermore, it was probably deemed desirable that candidates for office should know precisely what compensation was attached to the office. Hence the statute provided that the board should fix, at its annual meeting, the amount of annual salary which each county officer should receive. * * *

"* * * The plaintiff, long before his election, had full notice what his salary was to be. He accepted the position with full knowledge on his part of what compensation was attached to the office, and no wrong has been done him. And we fully agree with the counsel for the county that the spirit of the statute was complied with by the board when it changed the salary in March."

In XXI Op. Atty. Gen. 602, already referred to, it was held, p. 605:

"* * * Having in mind the language of the case of *Hull v. Winnebago Co.,* above quoted, it would seem that a definite time limit, after which the salary of such elective officials cannot be fixed, would be the date fixed by statute for the beginning of the circulation of nomination papers. At that date, the legally recognized campaign for office starts. That date is fixed at June 10, for the present year, by secs. 5.05 (4) and 5.26 (6)."

The county superintendent of schools is elected in the spring election and the nomination papers therefore can be circulated in the beginning of March. The nomination papers must be filed not more than forty nor less than twenty-five days before such election. See sec. 5.26 (6). It thus appears that the salary of the superintendent of

schools was fixed at the annual meeting of the county board after the time for filing the nomination papers had passed and the candidates for that office had filed their nomination papers, having in view the office with the salary of $2,700 a year. We believe under the decision of the supreme court and an opinion of this department in XXII Op. Atty. Gen. 56 that this is too late to change the salary.

In an official opinion in XXII Op. Atty. Gen. 603 it was held that a change in salary of a county superintendent at a special meeting in July prior to his election is not in compliance with the statute; such change of salary is void. In *Sheboygan County v. Gaffron,* 143 Wis. 124 it was held that the county superintendent of schools "is a county officer whose term of office continues for two years and until his successor is qualified, and under sec. 694, Stats. (1898) [now sec. 59.15], his salary cannot be increased or diminished during such term."

We are of the opinion that in view of the decisions of our court the salary cannot be changed at an adjourned meeting so late as is the case under the facts stated by you, after the time for filing the nomination papers has passed. The salary of $2700 continues to be the salary of the superintendent of schools during the term for which he was elected.

As to the change in salary of the supervising teachers, I will say that in sec. 39.14, subsec. (2), it is provided:

"The county board shall fix the salary of such teacher which shall be not less than one thousand dollars for ten months in each year. The supervising teacher shall be reimbursed for actual and necessary expenses incurred in the performance of her duties. * * *"

There is no provision here prohibiting the change of salary, neither is the fixing of the salary limited to an annual meeting. The salary of supervising teachers is $1,500 per year beginning July, 1933. We are of the opinion that in view of the fact that there is no limitation on the county board to a change in salary of the supervising teachers, the change from $2,000 to $1,500 per year is valid.

Concerning the change in salary of members of the

county board, we will say that under sec. 59.03 (2) (f), it is provided:

"* * * any county board may at its annual meeting, by resolution, fix the compensation of the members of such board to be elected at the next ensuing election, at any sum not exceeding five dollars per day."

In view of the fact that this was a change of the salary just a few days before the election of the new members of the county board and all nominations had already been made, we are of the opinion that this change in salary was invalid and that the present members are entitled to $4.50 per day.

JEF

Taxation—Assessment—Property in possession and enjoyment of city as vendee under contract by which vendor retains title until purchase price is fully paid is not subject to assessment against vendor for taxation.

November 29, 1933.

LEO W. BRUEMMER,
District Attorney,
Kewaunee, Wisconsin.

You state that several years ago the city of Kewaunee purchased and installed a Diesel engine for operating the local municipal light and power plant; that some balance of the purchase price for the engine remains unpaid; that the contract provides to the effect that title to the engine does not pass from the seller to the city until the engine is fully paid for.

Under those circumstances, you ask whether the engine is assessable as personal property against the seller for taxation in the city of Kewaunee.

Subsec. (1), sec. 70.18, Stats., provides as to the person against whom personal property is to be assessed, in the following language:

"Personal property shall be assessed to the owner thereof, except that when it shall be in the charge or possession of some person other than the owner or person beneficially entitled thereto in the capacity of parent, guardian, husband, agent, lessee, occupant, mortgagee, pledgee, executor, administrator, trustee, assignee, receiver, or other representative capacity, it shall be assessed to the person so in charge or possession of the same."

While the statute provides to the effect that personal property shall be assessed to the "owner" thereof, it also provides to the effect that where it is in the possession of some person "other than the owner or person beneficially entitled thereto" in some representative capacity, it shall be assessed to the person so in possession of the same. That language strongly indicates that where possession and beneficial ownership (as distinguished from legal ownership) coincide, the property is to be assessed to the person in whom the possession and beneficial ownership coincide. That such is the sense of the statute is inferred, although not expressly held, by the supreme court in *Herzfeld-Phillipsborn Co. v. Milwaukee,* 177 Wis. 431, 434. In the instant case the seller has legal ownership of the property, since it has retained title thereto pending payment of the purchase price, but the possession and the beneficial ownership are in the buyer. Under those circumstances the strong implication of the statute is that the property is not to be assessed to the seller.

The same conclusion would be reached even if the statute merely provided that personal property shall be assessed to the "owner," without any qualifying words. Under similar statutes it is generally held that personal property in the buyer's possession under a conditional sale contract is not assessable to the seller. *State v. White Furniture Co.* (Ala.), 90 So. 896; *Massey-Harris Co. v. Lerum* (So. Dak.), 242 N. W. 597; *State v. J. I. Case Co.* (Minn.) 248 N. W. 726. Those cases hold that such seller is not an "owner" within the meaning of the assessment statute. The basis of the decisions is that although the conditional vendor retains title to the property, yet this is at most a form of security for the payment of the purchase price, and the general and beneficial ownership is in the condi-

tional vendee, who has the possession and actual enjoyment of the property.

It is considered, therefore, that the property in question is not assessable against the seller.

JEF

Courts—Public Officers—Court commissioner who is attorney may defend criminal before judge who appointed him as court commissioner.

November 29, 1933.

HERBERT J. GERGEN,
District Attorney,
Beaver Dam, Wisconsin.

You request the opinion of this office as to whether a court commissioner who is an attorney would be permitted to handle the defense of criminal actions tried before the circuit judge who appointed him as court commissioner. It is our opinion that your question should be answered in the affirmative. No question of incompatibility arises for the reason that incompatibility concerns only public offices. While an attorney is sometimes considered an officer of the court, he is not a public officer as the term is ordinarily understood or as it is used in reference to determining the compatibility of some office with another.

Secs. 256.22 and 256.23, Stats., designate certain things which a court commissioner may not do. These statutes cover a multitude of situations. Neither of them, however, could be considered as prohibiting the practice about which you have raised a question. It would seem that the conclusion should be drawn that the legislature did not intend to prohibit the practice, or it would have indicted it when enacting the exhaustive prohibitions found in secs. 256.22 and 256.23.

Upon principle there is no strong reason for prohibiting a court commissioner who is an attorney from defending a criminal before the judge who appointed him as court commissioner. The court commissioner owes his appointment

to the judge. The judge does not owe his appointment to the court commissioner. If either can be said to be in the superior office, it is the judge rather than the court commissioner. There would, therefore, be no tendency or incentive upon the part of the judge to curry favor by showing partiality to the court commissioner practicing before him.

This office is constrained to hold that an attorney who has been appointed court commissioner may appear at the defense of criminal actions before the circuit judge who appointed him as court commissioner.

Public Officers—County Highway Committee—Sec. 82.05, Stats., and not sec. 59.95, subsec. (15), par. (f), limits compensation of members of county highway committee.

November 29, 1933.

SAMUEL GOODSITT,
District Attorney,
Ladysmith, Wisconsin.

You call our attention to sec. 59.95, subsec. (15), par. (f), Stats., relating to the total compensation to be received by all the commissioners in a county operating under the commission form of government, and to sec. 82.05, providing for the creation of a county highway committee and specifying the compensation of the same. You inquire whether the provisions of sec. 59.95 (15) (f) were intended to apply to the county highway committee so that the compensation of the county highway committee members is limited by the provisions of this section. In other words, is membership on a county highway committee the kind of committee work referred to in sec. 59.95 (15) (f), or is the membership of the commissioners on the county highway committee and the compensation which they receive for such services independent of the compensation which they may receive for committee work in connection with their regular duties as commissioners?

It is our opinion that sec. 59.95 (15) (f) was not intended to apply as a limitation upon the compensation

which might be received by members of the county highway committee.

That section provides:

"In addition to his annual salary, each commissioner shall receive four dollars per day for committee work when the board is not in session, but the total compensation received by all the commissioners in any year for such committee work shall not exceed the total amount received by such commissioners as salaries."

This section of the statutes is peculiarly worded to say the least. It would seem that the word "any" should be read into the statute in the place of the word "all," in order to make the statute intelligently operative. There is a bare possibility that it might be held to be void for indefiniteness. It is not necessary, however, to pass upon that question now. It has been held by this office that the members of the county highway committee need not be members of the county board. In a county operating under the commission form of government it would not be necessary for the members of the county highway committee to be county commissioners. Assuming that none of the members of the county highway committee were commissioners, sec. 59.95 (15) (f) would not be applicable at all to limit their compensation. In can hardly be supposed that this section was intended to apply in case the members of the county highway committee were commissioners, and to be inapplicable when such was not the case.

Sec. 82.05 of the statutes requires each county to have a county highway committee elected by the county board. In a county operating under the commission form of government, the county commissioners select such committee. It is not a committee which the county board has any discretion in providing for. Other committees of the county board may be provided for, or not, as the board sees fit. Other county board committees must be composed of members of the board. Sec. 82.05, providing for the county highway committee and its compensation, is a specific statute, while sec. 59.95 (15) (f) is a general one. It is a fundamental rule of statutory construction that a specific statute prevails over a general one. *Hite v. Keene,* 137 Wis. 625; *Kollock v. Dodge,* 105 Wis. 187; *Wisconsin Gas*

& Electric Company v. City of Ft. Atkinson, 193 Wis. 232. See also *State ex rel. Donnelly v. Hobe,* 106 Wis. 411, and *Hall v. City of Racine,* 81 Wis. 72.

It is our opinion that the compensation of members of the county highway committee is limited by the provisions of sec. 82.05 rather than by the provisions of sec. 59.95 (15) (f).

The ordinary committees of a county board function infrequently. The members of the county highway committee are required to function very often for the purpose of purchasing machinery, securing property for highway purposes, entering into contracts, letting bids, directing the expenditure of highway funds, and auditing the pay rolls of persons engaged in highway work. This fact would seem to be an additional reason for believing that the legislature did not intend that the compensation of county highway committee members should be governed by sec. 59.95 (15) (f).

JEF

Taxation—Tax Sales—Where no excess delinquent tax roll is involved county board may authorize sale of lands on which county holds tax deeds, for actual amount of back taxes against such lands, excluding interest and charges thereon.

November 29, 1933.

SIDNEY J. HANSEN,
District Attorney,
Richland Center, Wisconsin.

You state that Richland county has taken tax deeds to a number of parcels of land; that no excess delinquent tax roll is involved; and that, therefore, no local municipality has any interest in the proceeds which may be realized upon the sale of such lands by the county.

You submit the question as to whether the county board may authorize the sale of such lands for the actual amount of back taxes against the same, excluding interest and other charges thereon.

The question is answered, Yes.

No excess delinquent tax roll being involved, it is clear that the county is sole proprietor of the lands and may dispose of the same in the same manner that any private owner could. Sec. 75.36, Stats., *Spooner v. Washburn Co.*, 124 Wis. 24, 33–34.

Under sec. 75.36 it *seems*, even where an excess delinquent tax roll is involved, that the county board has discretionary powers as to the amount at which lands on which the county holds tax deeds shall be sold.

JEF

Appropriations and Expenditures—Public Printing—Expense of printing reports and annual proceedings of certain war organizations as authorized by sec. 35.305, Stats., is properly chargeable against appropriation provided by subsec. (4), sec. 20.10, not to exceed two hundred dollars for each such organization.

November 29, 1933.

F. X. RITGER,
Director of Purchases.

You ask whether the director of purchases may have printed the reports, etc., of certain war organizations as provided by sec. 35.305, Stats., and charge the expense thereof, not to exceed two hundred dollars for each such organization, against the appropriation provided by subsec. (4), sec. 20.10.

The question is answered, Yes.

Sec. 35.305 was amended by ch. 132, Laws 1933, and as amended provides:

"Upon receiving the necessary printer's copy, the director of purchases shall have printed and bound in suitable form, by the state printer, and delivered to the proper officer of each organization, all required copies of department orders, reports of officers, other historical matter and the annual proceedings of the following Wisconsin organizations of service men: United Spanish War Veterans and their auxiliary, the Wisconsin Department of the American

Legion and its auxiliary, the Wisconsin Department of the Veterans of Foreign Wars and its auxiliary, and the Wisconsin Department of the Disabled American Veterans of the World War. Not to exceed two hundred dollars shall be expended annually for each of the four veterans' organizations named, together with their auxiliaries."

Ch. 140, Laws 1933, repealed sec. 35.305, but ch. 494, Laws 1933, in sec. 11, provides as follows:

"Chapter 132, Laws 1933, is not repealed by chapter 140, Laws of 1933."

The result is that section 35.305, as amended by ch. 132, Laws 1933, remains in existence and in effect.

However, ch. 140, Laws 1933, also repealed the specific appropriation made to the director of purchases to carry out the provisions of sec. 35.305, which repealed specific appropriation was subsec. (5) of sec. 20.10 as follows:

"Annually, beginning July 1, 1929, a sum not exceeding six hundred dollars to carry out the provisions of section 35.305."

Subsec. (5) sec. 20.10 was not revived by any subsequent act of 1933.

However, subsec. (4), sec. 20.10 makes an appropriation to the director of purchases as follows:

Annually, beginning July 1, 1913, such sums as may be necessary for all *public printing,* which includes paper, plates and electrotypes, stationery, binding, and all other printing expenses, prescribed by law to be furnished to any state office or officer, or other body, and *for which there is no other appropriation properly chargeable therewith."*

It is considered that the appropriation provided by subsec. (4), sec. 20.10 is broad enough to allow the cost of printing authorized by sec. 35.305 to be charged against such appropriation. The provision in question appropriates such sums as may be necessary for all *public printing for which there is no other appropriation properly chargeable therewith.* It seems clear that the printing authorized by sec. 35.305 is "public printing." Sec. 35.01 classifies public printing as including "Fourth. All job printing and *all printing not otherwise classified."*

JEF

Appropriations and Expenditures — Counties — County Board Committees — County Board Resolutions — County board may not appropriate money for American Legion convention.

Sec. 59.06, subsec. (1), Stats., does not govern appointment of committee after meeting of board.

Except as provided in sec. 59.06 (1) county board committee may be appointed in accordance with procedural rules of board itself.

December 1, 1933.

CHAS. K. BONG,
Assistant District Attorney,
Green Bay, Wisconsin.

You request our opinion on the following two questions:

1. "Can the board of supervisors appropriate out of public funds money to be used for the American Legion convention to be held at Green Bay, Brown county, next year?
2. "Can the county board of supervisors of Brown county elect by ballot a special building committee or is that to be appointed by the chairman of the board?

"If appointed by the chairman must that appointment be delayed until after January 1, 1934, to comply with sec. 59.06 (1), or can it be appointed now being after November 1?"

Your first question must be answered in the negative. You are referred to the following opinions of the attorney general, involving the power of the county board to make certain appropriations out of public funds: XVIII Op. Atty. Gen. 129, 596; XVII 7, 571; XVI 229; II 268.

The opinion last cited, in II Op. Atty. Gen. 268, contains an exhaustive discussion of the power of the county board to make appropriations of public funds. The above opinions all hold very definitely that the county board does not have the right to make appropriations, unless authority for the same can be specifically found in some statute. This is because of the fact that a county is a quasi-municipal corporation and has only such powers as are specifically delegated by statute, or necessarily implied from the powers specifically delegated. Inasmuch as no statutory authority can be found which would authorize the board of

supervisors to appropriate money for an American Legion convention, it must be held that such authority does not exist.

A categorical answer cannot be given to your second question. Sec. 59.06, subsec. (1), Stats., provides:

"Any county board may, by resolution designating the purposes and prescribing the duties thereof and manner of reporting, authorize their chairman to appoint before the first day of November in any year a committee or committees from the members of the county board elect, and the committees so appointed shall perform the duties and report as prescribed in such resolution."

This section is not applicable at the present time in the matter of governing the method of appointment of a special building committee. The section refers to committee appointments by the chairman of the board prior to the first day of November from the members of the *county board elect,* and in accordance with a prior resolution of the board itself, which resolution prescribed the duties and designated the purposes of the committee to be appointed. The members of the county board do not all take office at the same time. XXI Op. Atty. Gen. 378. The statutes make definite provision as to the time when the various members assume the duties of their office. Vacancies on the board, and incidentally vacancies on the committees, are thus created at various times during the year. Sec. 59.06 (1) was probably enacted for the purpose of allowing the chairman to fill the committee vacancies as soon as possible in order that the incoming members of the board should be apprized of transactions taking place prior to the board meeting, but which would be discussed by the board at its meeting. In this way, as a matter of courtesy and as a matter of good business, incoming members rather than outgoing members have an opportunity of determining the policies relative to which the board will act while the incoming members sit upon the county board.

The annual meeting of the county board commences on the Tuesday next succeeding the second Monday of November in each year. Sec. 59.04 (1). Between the time of their election and the time at which they take office persons who will compose the county board are members elect.

That status disappears after the taking of office. The persons now composing the Brown county board are not at the present time members elect. This would be one reason for holding that sec. 59.06 (1) would not apply at the present time in the matter of the appointment of a special building committee.

Sec. 59.04 (3) provides:

"A majority of the supervisors entitled to a seat in the county board shall constitute a quorum for the transaction of business. All questions shall be determined by a majority of the supervisors present unless otherwise provided."

"In the absence of any statutory limitation or prohibition the board is a law to itself as to the proceedings or manner of proceedings in the transaction of its business. I do not think the adoption of such a resolution, however meritorious it might be, would prevent the board from taking any action itself at any meeting and in any manner or form of procedure it decided upon by proper vote of its members if the motion was not ruled out of order.

"A mere rule adopted by the board can be suspended, amended, repealed or modified, or if no question is raised it might be disregarded by the board, so from your statement of the facts we cannot say that the action in this case was illegal, there being no statutory prohibition against it." XVIII Op. Atty. Gen. 268, 269.

The conclusion reached in the opinion just quoted from was approved in XXI Op. Atty. Gen. 214. The appointment of the special building committee should be in accordance with the procedural rules which the board has established for its own government, or in accordance with such rule as it now sees fit to establish. The appointment of the building committee need not be delayed until after January 1, 1934, to comply with sec. 59.06 (1).

JEF

Banks and Banking—Public Deposits—Taxation—Local treasurer who deposits tax money in duly designated depository and is unable to pay over such money to county treasurer on date due by reason of closing of such depository is not to be charged with penalties imposed by sec. 74.22, Stats., for failure to make settlement with county treasurer.

December 5, 1933.

R. W. PETERSON,
District Attorney,
Berlin, Wisconsin.

You state that in making the 1933 settlement with the county treasurer for taxes of 1932 the town, village and city treasurers of your county were unable, *because of closed banks,* to pay over to the county treasurer some $20,000 due the county.

Under those circumstances, you ask whether the county treasurer should charge against the local treasurers the damages and interest provided for by sec. 74.22, Stats.

For the purposes of this opinion it will be assumed that the banks in which the local treasurers deposited the tax money collected by them were duly designated public depositories. On that assumption, the answer to the question is, No.

Sec. 74.22 provides:

"If any town, city or village treasurer shall fail to make settlement of the taxes included in his tax roll within the time required by law the county treasurer shall charge such town, city or village treasurer five per centum damages and ten per centum interest per annum from the day payment should have been made on the balance of unsettled taxes due from him; and if any town, city or village treasurer shall withhold the payment of any public moneys collected or received by him, after the same should be paid and shall have been demanded, he shall pay ten per cent damages and ten per cent interest, as above specified, on such moneys; which moneys, damages and interests may be collected by action upon such town, city or village treasurer's bond."

The damages and interest therein provided for are not to be imposed under all circumstances where there is a fail-

ure to settle with the county treasurer. They represent penalties which are to be imposed on the local treasurer only for failure to perform the duties imposed on him by law. In *Rinder v. Madison,* 163 Wis. 525, 534, the supreme court construed the section in question, and said:

"* * * *It is manifest from the provisions of this section that these penalties are imposed on the treasurer for official delinquencies resulting from his failure to perform the duties imposed on him by the law.* The defendant *Carl Moe,* as city treasurer, had performed the duties of collecting this tax and was ready to settle with the county treasurer for the tax within the time required by law, but was directed by the common council of the city to retain this money until the validity of the law authorizing the tax had been tested in legal proceedings. The challenged legislation involved constitutional questions of sufficient gravity to justify the treasurer in obeying the direction of the common council. *Under these circumstances it cannot be reasonably said that the city treasurer has failed to perform his official duties* within the requirement of sec. 1117, Stats. 1915. * * *" (Italics ours.)

In the instant case, assuming that each local treasurer deposited the tax money collected by him in a duly designated public depository, it must be held that his inability to pay over the money to the county treasurer when due because of the closing of such depository was not the result of any failure by him to perform the duties imposed on him by law. Under the public deposits law a local treasurer is clearly entitled to deposit tax money collected by him in a duly designated public depository. The public deposits law, sec. 34.02, Stats., provides to the effect that "notwithstanding any other provision of law," such treasurer, upon depositing "public moneys" in any duly designated public depository, "is thereby relieved of liability for any loss of public moneys which results from the failure or insolvency of any such depository." The term "public moneys" is declared to include "all moneys coming into the hands of" such treasurer "by virtue of his office, without regard to the ownership of the moneys." For a discussion of these provisions of the public deposits law see, *Petition of the State,* 210 Wis. 9, 14–15.

JEF

Mothers' Pensions—Woman who is otherwise qualified but whose husband has been deported by United States government has husband living and cannot secure mothers' pension.

December 5, 1933.

WILLIAM A. ZABEL,
District Attorney,
Milwaukee, Wisconsin.

Your office has submitted the question to this department whether a woman in your county with a number of children is eligible to a mother's pension if she is otherwise eligible except for the fact that her husband was deported by the United States government to Italy.

Under sec. 48.33, subsec. (5), par. (d), Stats., it is provided:

"The mother or stepmother must be without a husband; or the wife of a husband who is incapacitated for gainful work by mental or physical disability, likely to continue for at least one year in the opinion of a competent physician; or the wife of a husband who has been sentenced to a penal institution for a period of at least one year; or the wife of a husband who has continuously deserted her for one or more years, if the husband has been legally charged with abandonment for a period of one year; or such mother must be divorced from her husband for a period of at least one year and unable through use of the provisions of law to compel her former husband to support the child for whom aid is sought; provided, however, that the divorce was granted in Wisconsin."

You are advised that it is our opinion that this woman does not come within any of the enumerated classes and that she has a husband living and can not secure a mother's pension.
JEF

Physicians and Surgeons—Basic Science Law—Massage Licenses—State board of medical examiners must determine whether courses taken by applicant for massage license are adequate. If courses are found to be inadequate board may refuse to admit applicant to examination.

December 6, 1933.

BOARD OF MEDICAL EXAMINERS,
La Crosse, Wisconsin.
Attention Dr. Robert E. Flynn, Secretary.

You desire our opinion as to whether it is within the discretion of your board to judge of an applicant's qualifications, particularly his professional school of graduation, when applying for a masseur's certificate of registration, as prescribed under sec. 147.185, Stats.

Sec. 147.185 provides, in part:

"The board of medical examiners may issue certificates of registration to practice massage or hydrotherapy. The applicant therefor shall present satisfactory evidence of good moral and professional character, * * * and of the completion in a scientific or professional school of an adequate course in physiology, descriptive anatomy, pathology and hygiene, * * *. The application shall be accompanied by a fee to be fixed by the board at not more than twenty dollars and five dollars additional for certificate if issued. The applicant shall be examined by the board in physiology, descriptive anatomy, pathology and hygiene, and shall be further examined in massage or hydrotherapy under the supervision of the board, by a registered practitioner in massage or hydrotherapy selected by the board and receiving the same compensation as board members. If a majority of the board find the applicant qualified, it shall issue a certificate of registration to practice massage or hydrotherapy, * * *".

Your board has determined that certain schools do not give adequate courses in the required subjects and for that reason has refused to examine certain applicants. It has been contended that the board has exceeded its jurisdiction in so doing, and it has been argued that the board is obliged to examine an applicant in order to determine whether or not the courses which he has taken are adequate, regardless of the school at which the said courses were studied. It is

our opinion that your board has not exceeded its jurisdiction. In the case of *State ex rel. Coffey v. Chittenden,* 112 Wis. 569, our court passed upon the right of the state board of dental examiners to determine the reputability of a dental school. The following quotation is taken from the opinion in that case, pp. 581, 584–585:

"* * * In passing upon the application of a graduate of a dental college for a license to practice his profession, the board must necessarily, by the exercise of judgment, determine whether his diploma comes from a reputable source, precisely as they must determine any other statutory requisite * * *.

"The learned circuit court erred in holding, as it seems to have done, that every time a person presents himself before the board as a candidate for a state license to practice dentistry, tenders his dollar, presents his diploma, and makes proof of the statutory requisites for the granting of his application, other than that of the reputability of the school graduating him, it is the duty of the board to make an original investigation of and determination as to that subject, by direct evidence of the character of the school at the time of the candidate's graduation, regardless of whether any evidence on the question is tendered by him or any request is made for such investigation. The burden in such a case is on the candidate to demonstrate to the satisfaction of the board the reputability of his *alma mater,* not on the board to establish or disprove it. Having once entered a judgment, so to speak, on a reasonable investigation, condemning the school as not reputable, the board may properly consider such judgment *res adjudicata* when the same subject again comes in question, in the absence of evidence fairly rebutting the presumption of the continuance of the former condition. * * * The character of the school having been once fairly determined by the board, when and under what circumstances a re-examination of the subject should be made must necessarily rest solely in its discretion so long as it acts reasonably. * * *"

The holding in this case has been approved in the case of *State ex rel. Milwaukee Medical College v. Chittenden,* 127 Wis. 468. In our opinion there is no difference in principle in determining the reputability of a school and determining the adequacy of a course. The determination in both cases is one of fact and rests in the discretion of the board. As stated in the case quoted from, p. 582:

"* * * the board might, * * * act upon such trifling circumstances as to be guilty of an abuse of their discretionary power and be a proper subject for coercion by *mandamus;* but it would take a strong case to warrant a court in convicting them of such an offense. * * *"

When the board has determined that a school does not furnish an adequate course in the prescribed subjects, it may refuse to examine the applicant for a certificate of registration. The completion of an adequate course in physiology, descriptive anatomy, pathology and hygiene are prerequisites to the taking of an examination, not simply prerequisites to the issuance of a certificate of registration. If it is necessary for the board, in determining the adequacy of a course, to examine the applicant, there was no point in the legislature's specifically providing, later in the statute, that the board should examine the applicant in the four subjects mentioned.

JEF

Indigent, Insane, etc.—Poor Relief—County may not join group system for relief purposes and so become entitled to partial reimbursement of expenditures.

December 6, 1933.

WENDELL MCHENRY,
District Attorney,
Waupaca, Wisconsin.

You request the opinion of this office as to whether a county can be termed a municipality in order to come under the group system of poor relief and so become entitled to reimbursement to the extent of fifty per cent of its poor relief expenditures. It is our opinion that your question must be answered in the negative. Strictly speaking, a county is not a municipal corporation but is classed as a quasi-municipal corporation. *State ex rel. Bare v. Schinz,* 194 Wis. 397; McQuillan, on Municipal Corporations, Vol. 1, sec. 112. See also *Young v. Juneau County,* 192 Wis. 646; *Norton v. Peck,* 3 Wis. 714; *Kuder v. State,* 172 Wis. 141.

A county is a political subdivision of the state, is a governmental agency of the state and performs primarily the functions of the state locally. It is not created for the local convenience of the inhabitants as in the case of strictly municipal corporations. Ch. 49, Wis. Stats., relating to poor relief, provides for two methods of administering such relief, namely, the county system or the local system. It does not provide for a combination of the two. A hybrid type of poor relief system is not authorized, as was held in XXII Op. Atty. Gen. 189, where it was stated that a form of poor relief which is partly the county system and is partly the township system is not authorized by law in this state. Waupaca county is not operating under the county system of poor relief and does not wish to do so. The primary liability for poor relief in Waupaca county is thus placed upon the cities, towns and villages. By virtue of sec. 49.03 persons in the cities, towns and villages of your county who find themselves in need of relief are entitled to obtain the same through the poor relief authorities of the city, town or village in which the indigent person is located. The question of legal settlement enters only for the purpose of determining the ultimate liability for payment, but does not enter to determine liability for relief in the first instance. If Waupaca county were permitted to become a member of a group furnishing relief it would virtually be acknowledging that there were two systems of poor relief in Waupaca county, that is, both the local system and the county system.

Sec. 5, ch. 363, Laws 1933, provides:

"There shall be allotted by the industrial commission to county and local relief agencies * * * not less than fifty per cent of the total local relief expenditures out of public moneys from all sources. * * *"

Subsec. (4), sec. 6 of said chapter, provides:

"Local units of government responsible for furnishing relief shall join together for the administration of such relief, when such combination is necessary to accomplish the purposes of this section."

Although subsec. (4), quoted above, authorizes a group system of relief, it authorizes only local units of government to join together. It is apparent that the legislature in-

tended to distinguish cities, towns and villages from counties, from an examination of that portion of sec. 5, quoted above. The said sec. 5 makes provision for allotment to county *and* local relief agencies. It is our opinion that the county relief agency which is contemplated by this language is the relief agency operating in a county which is under the county system of relief.
JEF

Taxation—Income Taxes—Ch. 467, Laws 1933, does not authorize tax commission to cancel delinquent income taxes even where petitioner makes affidavit of no assets.

December 6, 1933.

TAX COMMISSION.

You state that a number of requests have been received for compromise of delinquent income taxes in accordance with ch. 467, Laws 1933. The requests in many instances set forth that the delinquent tax payer is unemployed, has no assets, and in some cases has been supported by the county. The petition for compromise does not make any offer of any kind but requests cancellation of the tax. You inquire concerning your authority to cancel these delinquent income taxes without some offer in money being made, even though the petitioner under oath states that he has no money or property with which to pay the tax. It is our opinion that you are not authorized to "compromise" delinquent income taxes under ch. 467 in the absence of some type of money offer.

Sec. 1, ch. 467, Laws 1933, provides:

"(2) Any taxpayer who is delinquent in the payment of his income tax may petition the assessor of incomes or the tax commission to compromise the amount of such tax including the penalties and interest thereon. * * * The tax commission if it shall find that the taxpayer is unable to pay the tax including penalties and interest in full shall determine the amount of tax said petitioner is able to pay and shall enter an order in accordance therewith. Such order shall provide that such compromised amount shall be

effective only if paid within ten days. * * * If within three years of such compromise and the entry of the order thereon the tax commission or assessor of incomes shall ascertain that the taxpayer has an income or property sufficient to enable such taxpayer to pay the remainder of the tax including penalty and interest computed to the date of the order and hearing accorded the taxpayer before the tax commission or assessor of incomes, the tax commission may notwithstanding such previous compromise, reopen said tax matter and order the payment in full of said tax, penalty and interest. * * *"

This chapter purports to authorize a compromise of a tax but does not purport to authorize a cancellation of the same.

A compromise is generally understood as an agreement between two or more persons who, to avoid a lawsuit, amicably settle their differences on such terms as they can agree on. It is essential to a compromise that there be mutual concessions or yielding of opposing claims. *Scott v. Scott,* 268 Pac. 245, 131 Okla. 144; *Hutson et al. v. McConnell, et al.,* 281 Pac. 760, 139 Okla. 240; *Owens v. Lynch,* 297 Pac. 223; *Evans v. Irby, et al.,* 227 Pac. 433.

A compromise is an agreement between two or more parties who adjust differences by mutual concession in a manner which they agree upon and which they prefer to the hope of gaining, balanced by the danger of losing. *Brecht v. Hammons,* 278 Pac. 381.

There is, properly speaking, no compromise when either creditor or debtor merely accedes to the unabated demand of the other. According to approved usage of language, "to compromise" is to adjust and settle by mutual concessions. *Dolan Merc. Co. v. Wholesale Grocery Subscribers at Warner Inter-Insurance Bureau,* 291 Pac. 935.

In the case of *Chilton v. Willford,* 2 Wis. 1, our supreme court held that a compromise means an adjustment of disputed matters by mutual concession or by arbitration. In the light of this meaning which courts attach to the word "compromise," a cancellation of a tax cannot be said to be a compromise of the same. The concession would be entirely upon one side, as the demand of the taxpayer would be entirely unabated. The order for compromise is to be

effective only if the amount fixed is paid within ten days. This would indicate that the incentive of the tax commission to compromise would be due to the possibility of receiving some portion of the tax very soon after the compromise. The tax commission would have nothing to gain by entering an order providing for the cancellation of the tax. It may as well permit the full tax to remain assessed against the taxpayer in the hope that it will be collectible at a future time.

The statutes provide that the tax commission "shall determine the amount of tax said petitioner is able to pay and shall enter an order" providing for payment of the same. It is not for this office to fix a definite percentage below which the tax commission may not go in effecting a compromise because the determination of the amount which the taxpayer is able to pay is a question of fact and not one of law. If the tax commission exercises its best judgment in the discretionary matter of determining the amount which the taxpayer is able to pay, that determination would not be subject to judicial criticism.

JEF

Prisons—Prisoners—Parole—One convicted of felony and later pardoned, then convicted of another offense is second offender for purpose of determining eligibility for parole.

December 8, 1933.

A. W. BAYLEY, *Secretary,*
Board of Control.

You say that Inmate O. C. of the state prison was convicted in Minnesota in 1927 as a habitual offender and was later granted a full pardon. You ask whether he should be classified as a first or a second offender in our state prison, to which he was sentenced for a felony committed in this state.

Sec. 359.12, Stats., reads as follows:

"When any person is convicted of any offense punishable only by imprisonment in the state prison and it is alleged

in the indictment or information therefor and proved or admitted on the trial or ascertained by the court after conviction that he had been before sentenced to punishment by imprisonment in any state prison, or state reformatory, by any court of this state, or any other state or of the United States, and that such sentence remains of record unreversed, whether pardoned therefor or not, he may be punished by imprisonment in the state prison not less than the shortest time fixed for such offense and not more than twenty-five years."

According to the above statute a conviction is not canceled by a pardon for the purposes of increased sentence under the so-called "repeater" statutes. In the case you put the man is a second offender under the definition of sec. 359.12. The logical result is that he is also a second offender for purposes of classification in the state prison to determine eligibility for parole. The previous conviction is not canceled when the pardon is issued.
JEF

Trade Regulation—Trade-marks—Under existing state laws, secretary of state has no power to allow second registration of same trade name.

December 8, 1933.

THEODORE DAMMANN,
Secretary of State.

You ask whether the secretary of state has the power to cancel a trade-mark that is no longer used by an active business in this state.

Art. XIV, sec. 13, Wis. Const., reads as follows:

"Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

As the statute is silent on the right of another person to use a trade-mark that is no longer used by the person originally filing such trade-mark, it would seem that the common law rule as to trade-marks would apply. In fact,

our supreme court has held in *Avenarius v. Kornely,* 139 Wis. 247, 269:

"* * * The registration does not create nor destroy rights in a trade-mark."

The common law rule as to trade-marks is stated in 63 C. J. 323:

"A trade-name or sign of a particular business is auxiliary to, and an inseparable part of, the good will of its possessor. A trade-name exists as an incident of the business in which it was lawfully acquired, and with which it remains identified. It cannot exist as a mere abstract right having no reference to any particular property, commodity, or business. * * *."

The rule as to abandonment of a trade-mark is stated as follows:

"* * * The abandonment and discontinuance of a business and the dissipation of its good will operate as an abandonment of the trade-marks used therein. * * *" 63 C. J. 525.

If a trade name has been abandoned, the right of another to use such name is generally conceded, as use of a trade name alone gives the exclusive right to its use. The power of the state department as to registration of trade-marks is fixed by statute. If the statute is silent on the cancellation of trade-marks which have been filed, it would seem that the secretary of state has no authority to cancel a registered name and allow its registration by another person or corporation. Under the present statutes an abandoned registered trade-name might be used, but the secretary of state has no authority to allow a second registration of the same trade-name.

JEF

Banks and Banking—Public Officers—State Treasurer— Under ch. 1, Laws 1933, bank is liable to state for check paid by bank after receipt of notice by treasury department of its loss or destruction.

Where notice is given under ch. 1, Laws 1933, state treasury need not use "stop payment" form issued by bank in which state funds are deposited.

December 8, 1933.

ROBERT K. HENRY,
State Treasurer.

You ask whether a bank would be liable to the state if such bank pays a check after notice of its loss or destruction has been given by the state treasurer under ch. 1, Laws 1933, sec. 14.50, subsec. (5), Stats.

Sec. 189 of the negotiable instruments law, incorporated in sec. 118.65, Stats., provides:

"A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check."

In cases decided under this section the courts have held that where a depositor gives his bank notice to dishonor a check and the bank inadvertently cashes it, the bank does so at its peril. *American Defense Society v. Sherman National Bank,* 225 N. Y. 506, 122 N. E. 695; *Elliot v. Worchester Trust Co.,* 189 Mass. 542, 75 N. E. 94; *Ozburn v. Com. Exch. National Bank,* 208 Ill. App. 155. These cases were decided on the theory that as a check was not an assignment, the order to pay is merely executory and may be countermanded any time before the bank binds itself to pay by acceptance of a check. 29 Yale Law Journal 543.

As private depositors are protected under the negotiable instruments law and cases cited, it would seem that the same rules would apply where the state was involved. It is the opinion of this office that a bank would be liable to the state for a check paid by it after receipt of the notice by the treasury department under authority of ch. 1, Laws 1933.

You ask whether the state treasurer need accept the "stop payment" form used by the bank which relieves such bank

from liability where a check is paid after notice to stop payment has been received.

"Stop payment" agreements are merely a contractual relationship between the bank and depositor. The state treasurer would not have to enter into such a contract. In fact it is very questionable if the courts would sustain such an agreement where public funds are involved. In passing upon agreements between private depositors and banks stipulating that the bank is not liable if a check is paid inadvertently after notice to stop payment has been received, several courts have held them void as against public policy. *Levine v. Bank*, 229 N. Y. Supp. 108; *Hiroshima v. Bank of Italy*, 78 Cal. App. 362, 248 Pac. 947.

This agreement of public policy would be much stronger in a case where public funds are involved so as to void such agreements made with officers entrusted with the management of such funds

It is the opinion of this office that the state treasurer need not use a "stop payment" form issued by the bank in which state funds are deposited, where notice is given under ch. 1, Laws 1933.

JEF

Counties—County Board—Composition of county board is governed by sec. 59.03, Stats.

City may not disregard sec. 59.03 and elect supervisors for county board in accordance with population of city.

December 8, 1933.

THOMAS E. MCDOUGAL,
District Attorney,
Antigo, Wisconsin.

At the recent meeting of the county board the question was raised as to whether there is a law limiting the supervisors from a city to one from each ward, or whether a county board supervisor could be elected representing so many people in the city. Objection was made that there is a county board supervisor from each town and one from each ward in the city, while in some wards there is double

the population that there is in the town, thus giving the town supervisor the same amount of authority for a small population as the supervisor from the city who represents possibly twice as many persons.

Art. IV, sec. 23 of the Wisconsin constitution provides:

"The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable."

This provision of the constitution has been before our supreme court for construction a number of times. One of the first cases, however, was that of *State ex rel. Peck v. Riordan,* 24 Wis. 484. It was there held, p. 489:

"* * * The uniformity of the system would seem to be as much broken by diversity in the number which should constitute the board in counties of the same population, as by diversity in the distribution of the powers which the board should execute. * * *"

This section of the constitution, however, does not prohibit classification of counties for the purpose of determining the number and method of representation upon the board. *State ex rel. Scanlan v. Archibold,* 146 Wis. 363. Nor does it prevent the legislature from providing that, in a certain county, a city should be represented upon the county board by one man instead of a supervisor from each ward, as was provided for in the case of other cities in the same county. *State ex rel. McCoale v. Kersten,* 118 Wis. 287. This last holding was based upon the fact that the legislature, in accordance with art IV, sec. 23, Wis. Const., had determined that this method of representation was as nearly uniform as practicable, although not as uniform as it could have been made. The important consideration is that any alteration in the method of representation or the number of representatives upon a county board is to be determined by the legislature in accordance with the mandate of art. IV, sec. 23, rather than by the municipalities, which section refers to that board.

Sec. 59.03, Stats., provides that in all counties except those having a population of at least 250,000, the county board shall be composed, in addition to town chairman and village supervisors, "of a supervisor from each city ward

or part of city ward in the county." It is immaterial at the present time how far the legislature could go in providing a different number of county board supervisors for counties having the same population. Suffice it to say that the legislature has made only such provision as is found in sec. 59.03 of the statutes. In the absence of any other legislative action, the composition of county boards throughout the state must be as is provided in the said sec. 59.03. It follows that a city may not disregard the provisions of sec. 59.03 and be represented upon the county board by one supervisor for such number of persons in the city as the city determines.
JEF

School Districts—State Aid—Taxation—Tax Collection—Taxes raised for school equalization fund are to be distributed proportionately. Sum collected is to be proportioned by number of teachers in county, each school district to receive sum based upon number of teachers in district. Fact that township has not paid county its portion of equalization tax presents no excuse which would warrant county in withholding such sums from school districts located in delinquent townships, regardless of reason for failure to pay over tax.

Counties—School Districts—County board has no authority to pay over to school district moneys which were raised for support and governance of county.

December 8, 1933.

CHAS. M. PORS,
District Attorney,
Marshfield, Wisconsin.

On September 22, 1933, you requested an opinion from this department involving the following fact situation: You stated that two towns in Wood county had collected the taxes which the county had levied upon these governmental units as their share of the expenses for the support of the government. These collections were tied up in banks which

had gone on the waiver plan. You wished to know whether or not the county board could authorize the county treasurer to pay over to the school districts located in these two towns their share of the school equalization taxes. This department answered that request by sending an opinion which had lately been written in answer to a request from Mr. G. Arthur Johnson, XXII Op. Atty. Gen. 851. You state that that opinion dealt with a fact situation which was different from the one stated in this: that in the case you submitted the towns had made their collections but had not paid over to the county, whereas, in the latter case, the towns had made the collections partially but had paid over to the county the amounts collected and had been credited with the delinquency. You now request a further opinion relating to the applicability of our former opinion to the fact situation which you have stated.

1. An explanation of the true scope of the opinion previously given in answer to this question will, we believe, show that the reasoning in that opinion applies to this case. The principle which lay behind that opinion was this: that the school district is not concerned in any dispute which may arise between the county and the town or other governmental taxing unit engaged in the collection of the equalization tax. A consideration of the tax collection statutes will show that practically every governmental unit is an agent for collection of taxes of some greater unit. For instance, the county is the agent for collection of income taxes levied by the state. *In re State,* 210 Wis. 9, 245 N. W. 844. Further, we held that in the case of towns collecting the school equalization taxes, the town was only the agent of the county. XXII Op. Atty. Gen. 851. The same ruling applies to the collection of these taxes when the village is involved. XXII Op. Atty. Gen. 638. It is obviously a great deal easier to have the smaller governmental units collect the taxes than have special agents of the larger units do the same work. The smaller unit has taxes of its own to collect and can more expeditiously collect the taxes of the larger unit on the same roll.

The equalization tax is collected by the county on the basis of $250 for every public elementary teacher employed in the county. When this amount is determined, the amount

to be raised for that purpose is levied against all the taxable property in the county. In this way the poorer areas of the county are able to have school at the expense of the richer portions of the county. Obviously, then, the funds raised in one township do not belong to the schools in that township but belong to a common fund administered and distributed by the county on the basis of the teachers in the school districts in the township rather than on the basis of the amount of the taxes raised in the township for the school equalization fund. In other words, the county is the collector of the common fund for the separate entities called the school districts. The school district has no relation with the town save as it may be located within the boundaries of the town. The town has no claim on the school equalization fund nor has the county. Both of these units are set up by the legislature as the media for the collection of the funds raised for the support of the schools.

We must conclude, therefore, that whatever funds come into the county treasury from the collections made by the various towns from the collection of the school equalization tax, they are to be distributed proportionately between the school districts on the basis of the number of teachers engaged at each school. The sum should be at least $250 per teacher. If a sum is not raised sufficient to pay that amount, then, and in that event, a proportion of the amount is to be distributed. So, as to this question, the specific answer must be that the county board may direct the county treasurer to pay over to the school districts a proportion of the amount due to each district on the basis of the number of teachers employed. It makes no difference that the town has or has not collected, whether it has or has not paid over collections to the county, so long as there is some money in the school equalization fund that must be split up among the school districts as indicated.

In *Frederick v. Douglas County*, 96 Wis. 411, 416–417, the court said:

"* * * 'Counties are, at most, but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. * * * They are purely auxiliaries of the state; and to the general statutes of the state they owe their creation,

and the statutes confer upon them all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject. * * *.'"

In view of this undoubted rule, it is necessary to find within the instrument giving it power, authority conferred upon the county board to pay or donate to the school district county funds raised for county purposes. We have been unable to find any such authority conferred by statute upon the governing council of the county. In the absence of any such provision in the governing articles of the county we must hold that the county board cannot authorize the county treasurer to dip into the county funds to pay over to the school district any other than those moneys levied for the benefit of the school district under the provisions of sec. 59.075, Stats.

2. There may be another question in your request which we did not see as clearly as it might have appeared. Therein we may find the solution of the misunderstanding of our previous opinion. It may be that in this case the county board is authorizing the county treasurer to pay over more than the required proportionate share. In that event, a different question entirely arises.
JEF

Taxation—Tax Collection—Town, city or village cannot bring action for collection of personal property taxes after date when, under statute, they should have been returned to county.

Road construction machinery belonging to corporation and having no fixed location should be assessed either where customarily kept or at place of residence of corporation.

December 13, 1933.

HUGH G. HAIGHT,
District Attorney,
Neillsville, Wisconsin.

You ask the opinion of this department in regard to the following questions:

1. Whether a town, city or village can bring an action for the collection of personal property tax after the date

when, under the statute, taxes should have been returned to the county.

Under the statutes now in force this question must be answered in the negative—such an action cannot be brought.

The following statutes are applicable: Secs. 74.12, subsec. (1), 74.17, 74.19 subsecs. (2) and (3), 74.22, 74.29, Stats. 1931. All of these statutes contemplate action by the *county* treasurer after the date when taxes are required to be returned to the county by the local treasurers. Subsec. (3), sec. 74.19 is especially significant in reaching the answer to your question. If all actions pending for the collection of personal property tax shall after the tax return be prosecuted by the county treasurer, certainly all new actions must be prosecuted by him. If the town, city or village must hand over the prosecution of actions begun in its name before the date of return to the county, it would not be a reasonable interpretation of the law to say that such local governing body may start new actions for the collection of delinquent taxes after that same date.

Although this cannot affect the answer given to your first question, it is pointed out that several of the statutes listed above are amended by ch. 426, Laws 1933.

Sec. 74.19 (3) has been amended by adding the following:

"Any town, city or village may retain for collection the delinquent personal property taxes by including the same as fully paid in arriving at the proportion to be paid as provided for in subsection (5) of section 74.03. All laws applicable to the collection of personal property taxes prior to the return of the tax roll to the county treasurer, shall apply to the collection of the delinquent personal property taxes so retained."

Under this amendment a town, city or village can bring an action for the collection of personal property tax after the date when, under the statute, they should have been returned to the county. *However* ch. 426, Laws 1933, does not go into effect until *October 1, 1935.*

2. Whether road construction machinery belonging to a corporation would be assessable where the same was located on the first day of May, or whether the same should be assessed at the place of residence of the corporation.

The statute covering this question is sec. 70.13 (1), Stats. This statute was construed by the supreme court of Wisconsin in *Wisconsin Transportation Company v. Williams Bay*, 207 Wis. 265, 268:

"* * * It seems clear that the legislature had in contemplation three different classes of personal property and provided generally where each class should be assessed for taxation purposes. One class of property is to be assessed where the same is located, another class where the same is customarily kept, and still another class of property, which has no fixed location, is to be assessed in the district where the owner or the person in charge or possession thereof resides, except as provided in sub. (5) of sec. 70.13. * * *"

At page 269 we find the following definition:

"* * * As to the property which is taxed where customarily kept, it seems clear that the legislature had in mind a large amount of personal property within this state which has no fixed location, which is moved about from place to place for much of the time but which is brought back at some regular interval or intervals to a given place where it reposes for a time in a state of rest, repose, or non-use. * * *"

The construction placed on sec. 70.13 (1), Stats., by Judge Nelson in the above case was cited in a decision of the Wisconsin supreme court November 7, 1933, *Village of Middleton v. William Lathers, Jr.*, August term, 1933, involving personal property tax levied upon certain highway equipment.

Your question cannot be answered definitely since you do not give enough facts.

Since the machinery does not have a fixed location it should be assessed either at the place where customarily kept, if there is such a place other than the place of residence of the corporation, or, if there is no such place, then at the place of residence of the corporation.

JEF

Bonds—Taxation—Under sec. 60.18, subsec. (1), Stats., town may levy total tax in excess of one per cent of assessed valuation when excess is for purpose of paying off old indebtedness.

December 13, 1933.

EDWARD T. VINOPAL, JR.,
District Attorney,
Mauston, Wisconsin.

Sec. 60.18, subsec. (1), Stats., provides that the qualified electors of each town shall have power at any annual town meeting by vote

"To raise money for the repair and building of roads or bridges, or either; for the support of the poor and defraying all other charges and expenses of the town, not exceeding in the aggregate, exclusive of taxes for schools and liabilities theretofore lawfully incurred and not including income taxes in the treasury, one per centum of the assessed valuation of such town for the preceding year as equalized by the town board of review; * * *."

You inquire:

"* * * whether or not a town may levy in excess of the one per cent limit to pay off an old indebtedness?"

It is our opinion that a town may do so. Our supreme court has at least twice had occasion to pass upon the meaning which attaches to the word "liability." In the case of *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.*, 144 Wis. 386, p. 403, it was stated:

"* * * If the term is used in its broadest and most comprehensive sense it would include any obligation which a party was bound in law or justice to perform and is synonymous with responsibility. In its more restricted and perhaps in its popular sense it means that which one is under obligation to pay to another."

The following quotation is taken from the case of *State ex rel. Quinn v. Thompson's M. F. Company*, 160 Wis. 671, 675:

"The word 'liability' has a pretty broad meaning. It is generally held to cover or include legal responsibility and legal duty. Webst. Dict.; Cent. Dict.; 2 Bouv. Law Dict. 206 (Rawle's Rev.); 2 Abbott, Law Dict. 38; Anderson, Law

Dict. 616; *Wood v. Currey,* 57 Cal. 208, 209; *Piller v. S. P. R. Co.* 52 Cal. 42, 44; *Heywood v. Shreve,* 44 N. J. Law, 94, 104; *Joslin v. New Jersey C. S. Co.* 36 N. J. Law, 141, 145: *Benge's Adm'r v. Bowling,* 106 Ky. 575, 51 S. W. 151; *McElfresh v. Kirkendall,* 36 Iowa, 224, 226."

"Liability is 'the state of one who is bound in law and justice to do something which may be enforced by action'. 2 Bouv. Law. Dict.; Piller v. S. P. R. Co., supra; Heywood v. Shreve, supra."

The following cases also make substantially the same holding: *Harper v. Adams,* 141 Miss. 806, 106 So. 354; *Feil v. City of Coeur d' Alene,* 23 Idaho 32, 129 Pac. 643; *State v. State Highway Commission,* 89 Mont. 205, 296 Pac. 1033.

A person who is indebted is under an obligation. A debt is that which is due from one person to another, whether money, goods, or services. A liability is a state or quality of being liable; that which one is under obligation to pay or for which one is liable. It was so held in the case of *State v. Board of Trustees of Missoula County High School,* (Mont.) 7 Pac. (2d) 543, 545, where it was said:

"* * * 'Liability' is a much broader term than the word 'debt,' and is of large and comprehensive significance. * * *"

Debts are contracted; liabilities are incurred. Where a debt is contracted, the act is affirmative. The contracting of a debt automatically results in the incurring of a liability. The liability follows by act or operation of law. See *Boise Development Company v. City of Boise,* 26 Idaho 347, 143 Pac. 531.

Sec. 60.18 (1), Stats., does not prevent a town from levying a total tax in excess of one per centum of the assessed valuation of such town for the preceding year, when such excess is for the purpose of paying off an old indebtedness.

It is also to be noted that ch. 177, Laws 1933, amended sec. 67.035, Wisconsin statutes, created by ch. 101, Laws 1933, to read as follows:

"All taxes levied or to be levied by any municipality proceeding under this chapter for the purpose of paying principal and interest on valid bonds or notes now or hereafter outstanding shall be and the same are hereby declared to be without limitation notwithstanding any legislative lim-

itation now or heretofore existing, and all such limitations are hereby repealed in so far as they apply to taxes levied or to be levied to pay principal and interest upon such bonds or notes."

JEF

Appropriations and Expenditures—Claims—Public Officers—Torts—Board of control is not liable for tort of its ward in state public school.

December 14, 1933.

BOARD OF CONTROL.

You have submitted a letter from Superintendent Lehman of the state public school at Sparta, in which he says that one of the wards of the institution, a boy of thirteen years of age who is being boarded in the home of one A, took two shot gun shells from the house, unbeknown to the boarding mother, and somehow secured a gun from one of the outbuildings, climbed on top of a chicken coop and fired the gun into a crowd of children with whom he had been playing. He hit one of the boys in the thigh. Lehman states that this boy is getting along all right at the present time, but that the mother is a widow and this will be an expensive case for her. Mr. Lehman inquires what the school's responsibility is in this matter and also, if the board is willing, whether it has the power to accept at least a part of the charge for the care of this boy.

In an official opinion to your board in VIII Op. Atty. Gen. 265, it was held that the board of control has no authority in the absence of an appropriation by the legislature to pay for stolen goods or broken window glass, stolen or broken by a boy of the state public school. The statutes were reviewed and it was held that no appropriation was made for that purpose. The statutes were in substantially the same form as they are now. In an official opinion in XVI Op. Atty. Gen. 712 it was held that a municipality is not liable for the torts of its officer performed while engaged in the duties of his office. In 21 R. C. L. 1175 it is held that:

"* * * Since the conduct of a penal institution is a governmental function, to which the rule of respondeat su-

perior does not apply, it has been held that a county cannot be liable to a citizen for injuries sustained as a result of the negligence of a convict working on the roads."

Even a parent is not liable for the tort of its child unless the child acts as the agent of its parent and the parent was negligent. 46 C. J. 1332.

Under the above authorities, you are advised that the board of control has no responsibility in the matter and is not authorized to pay any money for the said purposes under its present appropriation.

JEF

Criminal Law—Fish and Game—Carrying Weapons—Carrying loaded gun in vehicle unless same is unloaded and knocked down or unloaded and inclosed within carrying case is violation of sec. 29.22, Stats., and is criminal offense.

December 14, 1933.

EARL F. KILEEN,
District Attorney,
Wautoma, Wisconsin.

You say that certain persons are conveying their milk and other products to the factory and market accompanied by neighbors and other assistants who carry loaded shot guns and other firearms, not concealed, to protect themselves and their products from the violence of milk strikers. You direct our attention to sec. 29.22, subsec. (1), Stats., which reads as follows:

"No person shall hunt game with any means other than the use of a gun held at arm's length and discharged from the shoulders * * *; or place, spread or set any * * * spring gun, pivot gun, swivel gun, or other similar contrivance for the purpose of catching, or which might catch, take or ensnare game; * * * and no person shall carry with him in any vehicle or automobile, any gun or rifle unless the same is unloaded, and knocked down or unloaded and inclosed within a carrying case. * * *"

You also direct our attention to sec. 340.69, Stats., which reads thus:

"Any person who shall go armed with any concealed and dangerous weapon shall be punished by imprisonment in the county jail not more than three hundred sixty-four days or by fine not exceeding five hundred dollars; provided, that the foregoing shall not apply to any policeman or officer authorized to serve process. * * *"

You state that the men who accompany the milk haulers are not officers authorized to serve process. The weapons they carry are in the open and they ride in the truck in which the product is being conveyed. You say that the strikers are asking that you have those men arrested for violation of the law, and that if it is in violation of the law you will prosecute.

Under the facts stated by you it is apparent that the haulers are not carrying concealed weapons as they are not concealing them, but if they are riding in a vehicle or an automobile they are violating said sec. 29.22 unless the gun is "unloaded and knocked down, or unloaded and inclosed within a carrying case." I know of no reason for holding that these statutes are not applicable or are invalid. It is true that in Amendment II of the constitution of the United States, it is provided:

"* * * the right of the people to keep and bear Arms, shall not be infringed."

This provision, however, is not one which prohibits the state from passing a law such as the laws above quoted, for this amendment is a limitation only upon the power of congress and the national government and not upon the states. See *United States v. Cruikshank,* 92 U. S. 542; *Presser v. Illinois,* 116 U. S. 252, 265; *Jack v. Kansas,* 199 U. S. 372; *Twining v. New Jersey,* 211 U. S. 78.

You are therefore advised that the provision of sec. 29.22, Stats., is a valid enactment and to carry loaded firearms in an automobile or vehicle is in violation of said statute and is a criminal offense.

JEF

Criminal Law—Municipal Corporations—Beer Licenses— Legislature may place upon defendant burden of proof that he had license to sell liquor after state has proved that he sold it or, in case of unlawful possession of liquor, that he comes within exemption of statute.

December 14, 1933.

SENATOR C. H. PHILLIPS,
State Senate.

You have submitted the question whether it is unconstitutional to put the burden of proof on a bootlegger who is charged with the sale of, or offering for sale, bootleg liquor.

Sec. 8, art. I, Wis. Const., has the following provision:

"No person * * * shall be compelled in any criminal case to be a witness against himself. * * *"

There is a similar provision in Amendment V of the constitution of the United States, and it has been held by the United States court in *Boyd v. United States,* 116 U. S. 616 and by the state courts in *Karel v. Conlan,* 155 Wis. 221 and *State ex rel. Schumacher v. Markham,* 162 Wis. 55, that in a criminal case the defendant cannot be compelled to be a witness against himself therein.

As to the burden of proof on certain phases of the crime, our court has held that ch. 256, Laws 1881, providing that in prosecutions thereunder the burden of establishing his right to use the title of doctor shall be upon the defendant, is valid. *Raynor v. State,* 62 Wis. 289, 22 N. W. 430. In the case of *Hatchard v. State,* 79 Wis. 357, 48 N. W. 380, it was held that in a prosecution under sec. 4352, Rev. Stats. 1878, for producing an abortion, etc., the burden of proving that the defendant acted under the advice of two physicians that it was necessary to destroy the child in order to preserve the life of the mother, is upon the defendant. In the case of *Kreutzer v. Westfahl,* 187 Wis. 463, 478–479, it was held that the legislature may place on persons accused of violations of the blue sky law the burden of proving that sales made by them are within the exemptions on which they rely. The court said:

"* * * It is undoubtedly the general rule that the state must prove all the essential facts entering into the

description of the offense. But it has been held in many cases that when a negation of a fact lies peculiarly within the knowledge of the defendant it is incumbent on him to establish that fact. * * *
"* * *

"In this state and in most states there are statutes declaring what shall be *prima facie* evidence of particular facts in certain classes of criminal offenses and statutes placing on the accused the burden of proof as to some particulars. We have no doubt as to the authority of the legislature to place upon defendants accused of offenses under this statute the burden of proving that sales made by them come within the exemptions on which they rely. *Raynor v. State,* 62 Wis. 289, 22 N. W. 430; 1 L. R. An. s. 626. Doubtless statutes of this character might proceed so far as to invade constitutional rights; for example, if they should operate to deprive the accused of due process of law or undertake to make evidence of certain facts conclusive proof of guilt. But under the statute now under consideration accused persons have the full opportunity to present any facts relevant to the issue."

Under these various authorities, it is incumbent upon the state to prove a prima facie case of the guilt of the defendant, but matters of a negative nature peculiarly within the knowledge of the defendant which would be difficult for the state to prove may be placed upon the defendant by statute law. *Coffin v. United States,* 156 U. S. 432; *Kirby v. United States,* 174 U. S. 47; *Banks v. State* (Ga.), 52 S. E. 74; 2 L. R. A. (N. S.) 1007 and note.

The note in the last citation gives instances where the legislature made certain facts prima facie evidence of guilt and such statutes were approved by the court. The power of the legislature to make the possession of intoxicating liquor prima facie evidence of an intent to violate the law against illegal sale is affirmed in the recent case of *State v. Barrett,* 138 N. C. 630, 1 L. R. A. (N. S.) 626. See other cases cited in the note to that case. In the case of *People v. Cannon,* 139 N. Y. 32, 34 N. E. 759, the court said, p. 43:

"* * * The fact upon which the presumption is to rest must have some fair relation to, or natural connection with the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural, or extraordinary. * * *"

In the case of the illegal sale of liquor, if the state proves that the sale was made, the legislature may by statute require the defendant to prove that he had a license to sell such liquor or had the right to sell it under some provision of the statute. Where the statute makes the possession of liquor under certain conditions a crime and a person is found in the possession of liquor under circumstances which may indicate that it was an unlawful possession, the legislature may put the burden upon the defendant to prove that he comes within one of the exceptions to the statute. To this extent the burden of proof may be placed upon the defendant.

JEF

Taxation—Extension of Time for Payment of Taxes—Under ch. 288, Laws 1933, county board has power to adopt resolution waiving payment of interest and penalties on delinquent 1931 and 1932 real estate taxes which are paid subsequent to adoption of resolution and provided such taxes are paid before July 1, 1934; but board does not have power to authorize refund of payments made prior to adoption of such resolution, except as to penalty, interest and charges (except advertising fee) on delinquent real estate taxes paid prior to June 22, 1933.

December 15, 1933.

RALPH V. BROWN,
District Attorney,
Elkhorn, Wisconsin.

You present a question as to the power of the county board under ch. 288, Laws 1933, effective June 22, 1933, and such question is answered as follows:

Under sec. 3 of the act the county board has power to adopt a resolution *waiving* the payment of interest and penalties on delinquent 1931 and 1932 real estate taxes for which the county holds the tax certificates, provided such taxes are paid before July 1, 1934. Sec. 3 does not, however, empower the county board to authorize a *refund* of

interest and penalties on all such taxes paid prior to the adoption of the county board resolution. Sec. 1 of the act contains a provision for *refund,* but it relates only to delinquent 1932 real estate taxes paid prior to the effective date of the act.

Sec. 1 of the act, after extending the time for payment of 1932 real estate taxes to the fourth Monday in June, 1933, without penalty, interest or other charges except the advertising fee, further provides:

"* * * Taxpayers who prior to the effective date of this act paid their delinquent taxes on real estate for the year 1932 shall be entitled to a *refund* of all amounts paid as penalty, interest, or other charges on such delinquent taxes except the fee for advertising the same at the tax sale."

Sec. 3 of the act, on the other hand, provides:

"The governing body of any county or city of the first class, may, but is not required to, *waive* the payment of all or any part of the interest and penalties on delinquent taxes on real estate for the years 1931 and 1932 for which such county or city holds the tax certificates, provided such taxes are paid before July 1, 1934. In no event shall any person be required to pay interest on such taxes paid before July 1, 1934 at a rate in excess of eight per cent per annum."

Sec. 3 is purely a *waiver* provision. The power given to the county board by sec. 3 is to waive, not to refund. To "waive" means to omit to pursue, or to relinquish a known right (8 Words & Phrases 7375), whereas "refund" means the repayment of money received (3 Words & Phrases 342, Fourth Series). The apparent purpose of sec. 3 is to stimulate the payment of taxes. It evinces no purpose authorizing refunds on taxes previously paid.

It must be concluded, therefore, that the only authority for refund is that contained in sec. 1 of the act.

JEF

Municipal Corporations—Public Officers—Police Justice —City of third class is required to have police justice under sec. 62.24, Stats. If none has ever been elected there is no vacancy in office and election should be had. If office has been abolished justice of peace in city has jurisdiction in criminal cases. Court commissioner also has jurisdiction and criminal cases may be commenced before him.

December 15, 1933.

HAROLD M. DAKIN,
District Attorney,
Jefferson, Wisconsin.

You state that Watertown is a city of the third class and that it has never elected a police justice. You ask what magistrate has the power in Watertown now to issue warrants and hold preliminary hearings for crimes committed in that part of the city of Watertown located in Jefferson county.

There is a number of statutes which bear upon the question before us. The first question is: Is there a vacancy in the office of police justice? That depends upon whether your situation comes within any one of the events listed in sec. 17.03 Stats., which causes a vacancy. If no police justice has ever been elected in the city of Watertown, then no vacancy exists, and it could not be filled by the appointment of a police justice. If, however, a vacancy exists under said sec. 17.03 then the vacancy can be filled as provided in sec. 17.23, subsec. (1), par. (b), which provides:

"Vacancies in offices of cities operating under the general law or special charter shall be filled as follows:
"* * *

"(b) In the office of any other elective officer, except the judge of a municipal court created by special act with jurisdiction throughout the city only, and except as provided in section 10.44, by appointment by the mayor subject to confirmation by the council, * * *. A person so appointed and confirmed shall hold office until his successor is elected and qualifies. His successor shall be elected as provided in paragraph (a)."

Sec. 10.44 is the section on recall elections which is, of course, not applicable here. Sec. 62.24 has been amended by ch. 271, Laws 1933, and provides in part as follows:

"A police justice shall be elected every fourth year as other city officers are elected. The council may fix a salary for such justice which shall be in lieu of fees and costs. In case of his absence, sickness or disability, he may, by written order filed in his court, appoint a justice of the peace or a court commissioner in the city to perform his duties during such time."

Sec. 62.24 (2) (a) as amended by ch. 271, Laws 1933, now reads:

"The police justice shall have the jurisdiction of a justice of the peace and exclusive jurisdiction of offenses against ordinances of the city."

Sec. 62.24 (2) (b) as added by ch. 271, Laws 1933, now reads:

"No justice of the peace, except in cities of the fourth class, shall have criminal jurisdiction of offenses committed in the city, nor power to issue warrant for, examine, commit or hold to bail any person charged with an offense therein."

Sec. 62.24 (4) provides in part as follows:

"(a) The council may by ordinance abolish the police court at the end of any term for which the police justice shall have been elected, and thereupon the jurisdiction of said court shall be exercised by any municipal court located in the city, if any, otherwise by the justices of the peace of the city.

* * *

"(c) The council may by ordinance re-establish the police court, whereupon a police justice shall be chosen at the next city election. The mayor may appoint a police justice ad interim."

If the city council in Watertown has ever abolished a police officer, the justice of the peace of the city has jurisdiction and the council may also re-establish by ordinance the police court, and if that is done the mayor may appoint a police justice ad interim. Under sec. 62.24 your city is required to have a police justice. If none has ever been elected, then there is no vacancy in office and an election should be had. While if there is a vacancy it may be filled in the manner provided by statute.

You may bring your criminal cases also before a court

commissioner under sec. 361.01, Stats. See Op. Atty. Gen. for 1908, 306, and a later opinion in IV Op. Atty. Gen. 536. See also the following cases: *Faust v. State,* 45 Wis. 273; *State v. Grunke,* 88 Wis. 159; *Wieden v. State,* 141 Wis. 585.

Under these various authorities and provisions of the statute, I believe you will have no trouble in beginning a criminal prosecution for offenses committed in the city of Watertown.

JEF

Legislature—Public Officers—Members of Legislature—Member of legislature is not prohibited from holding position under federal government but is prohibited from holding office of profit or trust thereunder.

Type of service to federal government determines whether individual furnishing same holds position or office of profit or trust.

December 16, 1933.

JOHN J. SLOCUM, *Chief Clerk,*
Assembly.

This office is in receipt of a copy of Joint Resolution No. 2, A., which reads, in part, as follows:

"RESOLVED by the assembly, the senate concurring, That the attorney-general be and he hereby is respectfully requested to render an opinion to this legislature as to whether or not members of this legislature now holding positions under the federal government are qualified to be members of the legislature."

Art. IV, sec. 13 and art. XIII, sec. 3, of the Wisconsin constitution, provide as follows:

"No person being a member of congress, or holding any military or civil office under the United States, shall be eligible to a seat in the legislature; and if any person shall, after his election as a member of the legislature, be elected to congress, or be appointed to any office, civil or military, under the government of the United States his acceptance thereof shall vacate his seat."

"No member of congress, nor any person holding any office of profit or trust under the United States (postmasters excepted) or under any foreign power; no person convicted of any infamous crime in any court within the United States; and no person being a defaulter to the United States or to this state, or to any county or town therein, or to any state or territory within the United States, shall be eligible to any office of trust, profit or honor in this state."

"A member of the assembly or the senate unquestionably holds an office of trust, profit or honor in this state." XIX Op. Atty. Gen. 241, 242.

Both of the constitutional provisions quoted above prohibit a member of the legislature from holding an *office* under the United States. These provisions of the constitution raise no question relative to the holding of *positions* under the United States. There is no statute prohibiting a member of the legislature from holding a position under the United States government. The principles of the common law relating to compatibility of offices do not apply to positions. The language of the resolution has reference only to those members of the legislature who are holding positions under the federal government and makes no mention of those who may be holding offices under the same. It does not appear whether the word *positions* was used advisedly or inadvertently. If used advisedly, the question raised by the resolution must be answered in the affirmative. If the legislature intended to inquire concerning the right of certain members who hold offices under the United States, a different question is presented. In XIX Op. Atty. Gen. 241 it was held that a person who is a census supervisor holds an office of trust and profit under the United States and cannot at the same time be a member of the legislature. In the same opinion it was held that a census enumerator holds a position rather than an office of profit and trust. In V Op. Atty. Gen. 886, it was held that a deputy internal revenue collector does not hold an office of profit or trust and hence is not amenable to the constitutional provision. In Op. Atty. Gen. for 1908, 739, this office ruled that occasional temporary and incidental employment of an assistant chemist of the dairy and food commission by the federal department of agriculture in

similar laboratory work, which was designated as "employment" in the federal statute, was not at variance with the constitution. In X Op. Atty. Gen. 21, it was held that a mail carrier does not occupy a position of trust or profit under the United States government.

The opinion previously referred to, in XIX Op. Atty. Gen. 241, contains an elaborate discussion of the distinction between an office and employment or position. Reference to this opinion may enable the legislature to pass upon the status of those persons about whom some question has arisen. If further opinion is desired from this office it would be advisable to state specifically the type of service being performed by the legislative members for the federal government.

JEF

Taxation—Assessment, in name of city, of personal property in its possession as conditional vendee does not make conditional vendor liable for tax.

December 19, 1933.

L. W. BRUEMMER,
District Attorney,
Kewaunee, Wisconsin.

In an opinion addressed to you November 29, 1933, * the attorney general ruled that personal property in the possession and enjoyment of a city as vendee under a contract by which the vendor retains title until the purchase price is fully paid is not subject to assessment for taxation against such vendor.

You now inquire whether an assessment of such property (presumably in the name of the city) would result in making the *vendor liable* for the tax.

The answer is, No.

Under the circumstances shown to exist, the vendor is not liable to be assessed for the property in question, and neither is he liable for a tax thereon. The provisions of

* Page 989 of this volume.

secs. 70.19 and 70.20, Stats., to which you refer, have no application in the premises. Those provisions apply only to a case where personal property is assessed to "some person in charge or possession thereof other than the owner or person beneficially entitled thereto." In such a case both the person to whom the property is assessed and the owner himself are expressly made liable for the tax, and such liability may be enforced in a personal action as for a debt. However, no such case is here presented. Here the city is not merely in charge or possession of the property in question—the city is itself the owner or person beneficially entitled thereto. Under these circumstances an assessment to the city would not be an assessment to "some person in charge or possession thereof other than the owner or person beneficially entitled thereto."
JEF

Elections—Expense incurred by inspectors for making preliminary return to county clerk of election under sec. 6.595, Stats., falls on town, city or village on behalf of which inspector acts.

December 19, 1933.

THEODORE DAMMANN,
Secretary of State.

You refer us to sec. 6.595, Stats., as enacted by ch. 56, Laws 1933, requiring inspectors of election to report the results of elections at once (presumably by telephone) to the county clerk. You say that this is preliminary to the mailing of official returns under sec. 6.59. The law is silent as to who shall pay the charge. You inquire whether it will fall on the inspectors of the town, city or village, or on the county?

Sec. 6.59, Stats., which requires the mailing of official returns, also provides as follows:

"* * * The person delivering or sending such returns shall receive as compensation therefor, fifty cents, together with postage and registration fees paid by him, to be paid out of the town, city or village treasury."

The preliminary report to the county clerk, presumably by telephone, as provided for in sec. 6.595, has no provision as to compensation. Sec. 6.76, Stats. 1931, now sec. 6.325, however, contains the following:

"A reasonable compensation shall be paid to inspectors and clerks of election, and to ballot clerks, county canvassers and messengers employed and performing duties under the provisions of this chapter, to be fixed by the town, village or county board or common council, and paid from the treasury of the town, village, county or city by which employed. * * *"

Under this provision, compensation to the inspectors is to be paid by the town, village or city. Under these various provisions we believe that the inspector of election who is required to incur expenses in making the preliminary report is entitled to be reimbursed as part of his compensation for the expense necessarily incurred.

Compensation is defined in Anderson's Law Dictionary:

"That return which is given for something else—a consideration; as the compensation of an office."

You are therefore advised that such charges will fall on the town, city or village for which the inspector is acting.
JEF

Trade Regulation—Unfair Trade Practices—University—Proceeding against Wisconsin Men's Union, Wisconsin University Building Corporation, director of department of speech, theater manager, director of department of dormitories and commons of university of Wisconsin is proceeding against regents of university of Wisconsin.

Department of agriculture and markets has no jurisdiction to conduct hearing and make determination regarding alleged violations by regents of university of Wisconsin of provisions of sec. 99.14, Stats.

December 21, 1933.

HONORABLE GLENN FRANK, *President,*
University of Wisconsin.

You have submitted to me a complaint and notice of hearing from the department of agriculture and markets,

addressed to the Wisconsin Men's Union, Wisconsin University Building Corporation, A. T. Weaver, director of department of speech, J. R. Lane, theater manager, and D. L. Halverson, director of the department of dormitories and commons of the university of Wisconsin. You ask whether the regents of the university of Wisconsin are parties defendant in this proceeding, which is to ascertain whether there has been a violation of sec. 99.14, Stats. The regents of the university of Wisconsin are the real defendants in the proceedings.

The Wisconsin Men's Union is a corporation, the organization of which was authorized by the board of regents on March 7, 1928. The board of regents operates the Memorial Union through an organization known as the Wisconsin Union; and the Wisconsin Men's Union and the Women's Self Government Association represent the student body in the operation and control of the Wisconsin Memorial Union.

The Wisconsin University Building Corporation is a corporation organized for the sole benefit of the University of Wisconsin. The officers are the secretary of the board of regents, the business manager and the comptroller of the university. In *Loomis v. Callahan,* 196 Wis. 518, 529, which was an action seeking to prevent the annuity board from loaning money to the University Building Corporation, the court said:

"It is further claimed that the exemption of these lands from taxation is unconstitutional. This is scarcely worthy of discussion. The title to the land rests in the state and in the building corporation. The buildings are constructed upon property owned by the state. They are built for the use of the state. They are used to carry on the functions of the State University. The state contemplates the ultimate exclusive ownership of the property. To tax this property would react on the state the same as the taxation of any other state property. The same considerations which dictate the exemption of state property from taxation apply with scarcely less force to the property in which the building corporation has a title in the nature of a leasehold interest."

Just as the buildings erected by the Wisconsin University Building Corporation are used to carry on the func-

tions of the state university, so the corporation itself has no other purpose than to carry out the functions of the regents.

A. T. Weaver, J. R. Lane, and D. L. Halverson are university employees acting under the direction and authority of the board of regents. They are the agents of the regents, and any interference with the performance of their duties constitutes an interference with the regents themselves.

It thus appears that the proceeding is directed against two corporations which are mere agencies of the board of regents and against three men who are employees of the board of regents. The complaint is made against certain activities of the university, and hence the university, rather than the corporations or employees, is the real party defendant. The failure to make the regents of the university parties defendant can be explained only on the assumption that it was realized that the department of agriculture and markets has no jurisdiction over the regents of the university of Wisconsin and hence an attempt was made to confer jurisdiction by subterfuge. The courts will take notice of the real parties to a controversy. In *State ex rel. McDonald v. Nemachek*, 199 Wis. 13, 17, where a writ of mandamus was sought to compel the members of the highway commission to audit and issue estimates to the state treasurer of a claim which the petitioners made against the state for highway construction, the court pointed out:

"There cannot be any misunderstanding as to the meaning of the petition. There is a dispute between petitioners and the commission as to the amount due. The contract is not between the commission and the petitioners, but it is between the state and the petitioners. *If there is anything due the petitioners, it is due from the state. The commission is merely the agent of the state.*" (Italics ours.)

You also ask the following question: Assuming that the board of regents of the university of Wisconsin is a party to the proceedings, has the department of agriculture and markets jurisdiction to conduct a hearing and make a determination regarding alleged violation of sec. 99.14, Stats.?

The department of agriculture and markets has no jurisdiction. First, because it has no power to determine whether the regents of the university of Wisconsin are engaged in unfair competition, and secondly, because there are no allegations in the complaint of conduct which could possibly be considered as unfair competition or unfair trade practices.

The proceedings were apparently commenced under the provisions of sec. 99.14, Stats., which provides:

"(1) Methods of competition in business and trade practices in business shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited.

"(2) The department, after public hearing, may issue general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair. The department, after public hearing, may issue general orders prescribing methods of competition in business or trade practices in business which are determined by the department to be fair.

"(3) The department, after public hearing, may issue a special order against any person, enjoining such person from employing any method of competition in business or trade practice in business which is determined by the department to be unfair. The department, after public hearing, may issue a special order against any person, requiring such person to employ the method of competition in business or trade practice in business which is determined by the department to be fair."

In *Sullivan v. Board of Regents of Normal Schools*, 209 Wis. 242, 244, the court pointed out:

"* * * While the statute provides that the Board of Regents is constituted a body corporate, it also provides that as such body corporate it is merely an arm or agency of the state."

What was said in regard to the regents of the normal schools applies with equal force to the regents of the university. The regents of the university of Wisconsin are by law given charge of the university of Wisconsin. No other state department is given authority to determine whether the regents are acting within the scope of their authority. If the regents should exceed their authority,

the courts may be resorted to, but certainly not any state department.

There is another rule which absolutely prevents the department of agriculture and markets from exercising any jurisdiction in the present proceedings. The general rule as laid down in *Milwaukee v. McGregor,* 140 Wis. 35, 37, is:

"'* * * The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not' the sovereign 'in the least, if they may tend to restrain or diminish any of his rights and interests.'"

There is nothing in section 99.14, Stats., which expressly makes the state subject to its provisions and consequently the law against unfair trade practices and unfair competition does not apply to the state.

In view of the fact that the department of agriculture and markets has no jurisdiction in the present proceeding, it is unnecessary to point out that the complaint contains no allegation of any trade practice which could possibly be construed as an unfair trade practice or unfair competition. The allegations reduce themselves to a complaint that some of the university's activities compete with private business. The fact that the university may compete with some private business cannot possibly constitute a violation of sec. 99.14, Stats.

In *Milwaukee Horse & Cow Comm. Co. v. Hill,* 207 Wis. 420, 432, the Milwaukee Horse & Cow Commission Company sought an injunction against the commissioners of agriculture and markets to prevent the leasing of state fair barns to a competitor. In denying the injunction, the court said:

"* * * The only right of the Commission Company which it is alleged has been infringed is the right to be immune from competition. It has no such right in the law. The law does not recognize any injury resulting from competition to any one engaged in trade or commerce. True, there are such things recognized in the law as unfair competition, which the law will suppress, but it goes without saying that this is not within any of the classes of competition recognized as unjust."

If the department of agriculture and markets did not violate the statute against unfair trade practices by leas-

ing state barns to one competitor who could thus carry on a competing business at less expense, certainly the university of Wisconsin does not violate the statute by leasing a barber shop in the Memorial Union, for instance.

In 26 R. C. L. 875, the following statement is made:

"Unfair competition ordinarily consists in the simulation by one person, for the purpose of deceiving the public, of the name, symbols, or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the purchase of his wares and thereby obtaining for himself the benefits properly belonging to his competitor."

There is no allegation of any deceit or anything resembling any unfair competition or trade practices. A review of the cases involved in the federal unfair trade practices will reveal nothing which even remotely suggests that the acts complained of could come within the category of unfair trade practices.

JEF

Indigent, Insane, etc.—Legal Settlement—Mothers' Pensions—Prisons—Prisoners—Absence from place of legal settlement due to operation of law does not cause loss of legal settlement.

Receipt of mother's pension does not prevent mother from gaining legal settlement under sec. 49.02, subsec. (4), Stats.

When is person supported as pauper in order to prevent gaining of legal settlement under sec. 49.02 (4) is question of fact.

Absence from place of legal settlement while supported elsewhere as pauper does not cause loss of legal settlement under sec. 49.02 (7).

December 22, 1933.

JOHN A. CONANT,
District Attorney,
Westfield, Wisconsin.

You have submitted a somewhat complex fact situation relating to the legal settlement of a certain pauper. You

have requested an opinion from this department upon four separate questions. In order to adequately treat the matter we shall answer your questions as we follow the transmigrations set forth in the request.

In 1930, A lived in the town of Harris, Marquette county. In May he moved with his family to Adams county, where he resided until August, 1930. After that A spent a period of nine months at Waupun, then going to the village of Oxford, in Marquette county at the end of that period, his wife having taken up a residence at that place in September, 1930. About the same time the wife received a mother's pension which expired the following September. Here, now, we can answer three of the questions submitted.

First, you inquire whether A has lost his residence in the town of Harris by his confinement in Waupun and his seven months' absence from Harris. The answer is, No. The losing of a residence is provided for by the statute in these words:

Sec. 49.02, subsec. (7):

"Every settlement when once legally acquired shall continue until it be lost or defeated by acquiring a new one in this state or by voluntary and uninterrupted absence from the town, village, or city in which such legal settlement shall have been gained for one whole year or upward; * * *"

Obviously, the absence of seven months while residing in Adams county could not constitute a voluntary and uninterrupted absence for the period of one year as required by statute. The absence from the town of Harris while residing in Waupun could not be held to be such an absence in the face of the holding of this department in VII Op. Atty. Gen. 350. Such absence cannot be said to be voluntary. This does not require us to answer the second part of this first question, relating to the settlement of the wife in case A has lost his settlement.

The next question is whether the granting of the mother's pension while residing in the village of Oxford gave the mother a residence in the village. The next question is the converse of this: Whether the granting of the pension will prevent the securing of a legal settlement.

The granting of the pension does not prevent the mother from securing a residence in the village of Oxford. A person is prohibited from gaining a settlement in the event that he shall have been supported at the site of his residence as a pauper before he has lived there for one year. Sec. 49.02 (4), Stats. 1933. The mother was not supported in the village as a pauper so far as appears from the facts. The pension is given her not for her own support but for the support of the children. V Op. Atty. Gen. 651, VIII Op. Atty. Gen. 607. The children alone are considered in that legislation. The mother is only involved as a supervising body over the children.

Clearly, then, the mother could have gained a settlement in the village of Oxford during this year save for the fact that sec. 49.02 (1), Stats. provides:

"A married woman shall always follow and have the settlement of her husband if he have any within the state; * * *"

At the time we are considering the husband did have a settlement in the state, namely, at the town of Harris. Therefore, the wife does not yet have to resort to the settlement which she had before her marriage.

Now we proceed with the migrations to find that in October of 1931, it seems, the family moved to Adams county, where they received aid at various times. If this change were in October of 1932 or 1933 our conclusion would be different. We assume that 1931 was the year meant. A difficulty also arises here from the fact that the frequency of these aids by Adams county is not stated. Assuming, however, that these aids continued during each year the family was residing in Adams county and were not at any time more than a year apart, then the conclusion must be that the family has lost its residence in the town of Harris and has no legal settlement at the present time. Sec. 49.03 (1). That follows from sec. 49.02 (4), Stats., which reads as follows:

"Every person of full age who shall have resided in any town, village or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village, or city while supported therein

as a pauper shall operate to give such person a settlement therein. * * *"

It would seem that under the fact situation submitted the family was supported as paupers while residing in Adams county during this period and were, therefore, not able to gain a legal settlement in Adams county or in any town, village or city therein. This is, however, a question of fact which we cannot conclusively pass on. *Scott v. Clayton,* 51 Wis. 185, 189, 8 N. W. 171.

Since A cannot gain a legal settlement in Adams county we conclude that the town of Harris is still liable for his support under the ruling of the department in XIII Op. Atty. Gen. 212, 213 and cases cited. This conclusion, however, depends upon the answer to the question whether A has been supported as a pauper as stated above. If he has not, he may have gained a settlement in Adams county. JEF

Appropriations and Expenditures—Workmen's Compensation—Payment of voucher based on award of industrial commission which is by statute (sec. 20.07, subsec. (3)) required to be paid out of certain fund does not require approval of departmental head although expenditure is made out of funds otherwise belonging to his department. Audit of secretary of state alone is required.

December 22, 1933.

INDUSTRIAL COMMISSION.
Attention H. A. Nelson, *Director Workmen's Compensation.*

You have requested an opinion from this department upon the construction of sec. 20.07 (3), Stats. 1933, as applied to a situation where the industrial commission has made an award against a state department, vouchers have been sent to the secretary of state for auditing, but the department against which the award is to be a charge under sec. 20.07 (3) refuses to approve the voucher. Your question is presented by a communication from the secretary of state explaining that he does not feel himself em-

powered to audit the voucher without the approval of the department liable. Does the secretary of state have to secure such approval before auditing the award?

Sec. 20.07, Stats. 1933, reads as follows:

"There is appropriated from the general fund, annually to be paid as herein provided:

"* * *

"(3) Annually, such sums as may be necessary for compensation of persons injured while in the state service, as provided in sections 102.01 to 102.34, and for compensation to inmates of state institutions injured in the performance of work in such institutions, except persons injured in prison industries, as provided in subsection (2) of section 56.21, to cover primary compensation and medical benefits awarded by the industrial commission in excess of two hundred dollars in any individual case. Primary compensation and medical benefits of two hundred dollars or less, as well as all increased compensation payable under the provisions of sections 102.57 and 102.60, shall be paid from the appropriation covering the salary or maintenance of the person injured."

Sec. 14.31, subsec. (1), Stats., reads as follows:

"All claims against the state, when payment thereof out of the state treasury is authorized by law, shall be audited by the secretary of state."

It is clear that sec. 20.07 (3) appropriates as a matter of law, depending upon the finding of the commission, a sum of money out of a certain fund. It is not necessary for any person to approve that appropriation except as a matter of formality required by the constitution (art. VI, sec. 2, Wis. Const.) of the secretary of state. The secretary could be mandamused for failure to audit the award of the industrial commission under the decision of *Sloan and others v. The State,* 51 Wis. 623.

In the *Sloan* case, the proposition before the court was this: The plaintiffs had performed services for the state at the behest of the governor. Those services were to be paid out of the state treasury under the provisions of the statutes applicable. The court held that the action did not lie against the state but the proper procedure would be to make demand upon the secretary of state who, upon

refusal to allow the account, would be subject to mandamus to compel the payment of the sums claimed.

In that case, as in this, the statutes specifically provided for the payment of the amounts claimed. In this case the amounts are claimed by virtue of an award of the commission. In the cited case, the amount was claimed by virtue of services performed in accordance with the statute, the statute providing for the payment of those services. Nowhere is there any discretion upon the part of any officer permitting him to refuse to approve the expenditure. The secretary of state has the sole disposition of the allowance of these claims since the constitution and statute give him that power. The departmental head does not have any control over the allowance of the expenditure, for the reason that the legislature has, by virtue of sec. 20.07 (3), taken whatever power he might otherwise have had away from him.

JEF

Banks and Banking—Mutual Savings Banks—Commerce —Reconstruction Finance Corporation—With approval of banking review board mutual savings banks may issue debentures to Reconstruction Finance Corporation under authority conferred by sec. 220.085, Stats.

December 22, 1933.

HONORABLE S. N. SCHAFER,
Commissioner of Banking.

You ask whether a mutual savings bank has a legal right to issue debentures to the Reconstruction Finance Corporation.

With the approval of the banking review board mutual savings banks may issue debentures to the Reconstruction Finance Corporation under authority conferred by sec. 220.085, Stats. Sec. 220.085, enacted by ch. 26, Laws Special Session 1931–32, provides as follows:

"On approval of the banking review board, any state bank or trust company, or the receiver of any insolvent or

delinquent state bank or trust company, may take advantage of any act that may be enacted by the Congress of the United States for the relief of any state banks or trust companies."

In XXI Op. Atty. Gen. 907 it was held this authorized a mutual savings bank to subscribe for stock in a federal loan bank. The holding in that opinion applies with equal force to the issue of debentures to the Reconstruction Finance Corporation.
JGH

Public Officers—Governor—Town Chairman—Vacancies—Governor has no power to fill vacancy caused by judgment of circuit court declaring office vacant and ousting occupant for irregularities in election to said office. Such vacancy must be filled under sec. 17.25, Stats., by remaining supervisors.

December 22, 1933.

HONORABLE A. G. SCHMEDEMAN,
Governor.

Your executive clerk has submitted a request for an official opinion on the question of whether the vacancy occurring in the office of chairman of the town of Bear Creek in Sauk county, Wisconsin, is one that should be filled by your honor.

It appears that the circuit court of Sauk county on the 15th day of December, 1933, declared the office of chairman vacant on the grounds of irregularities in the election to said office. Under sec. 17.25, Stats., it is provided that vacancies in the town offices shall be filled as follows:

"(1) In the town board, by the remaining supervisors and the town clerk, except when the vacancy is caused by removal by the circuit judge as provided by law, which latter vacancy shall be filled by appointment by the said judge. * * *"

In sec. 17.13 it is provided:

"Officers of towns, * * * may be removed as follows:

"* * *

"(3) Any * * * town * * * officer, elective or appointive, including those embraced within the provisions of subsections (1) and (2), by the judge of the circuit court of the circuit wherein the village, town or school district is situated, in term time or vacation, for cause."

You will note that under this section it is the judge of the circuit court who removes the town officer for cause. This is not true in the case before us. Here a judgment obtained in the circuit court declared the office vacant because of irregularities in the election. This is not a removal from office by the circuit judge, but a declaration of a vacancy and ouster from office by the circuit court.

You will note that in sec. 17.03, Stats., it gives the various events that may cause a vacancy. It says "(3) His removal," and "(6) The decisions of a competent tribunal declaring void his election or appointment * * *."

Under these various provisions of the statutes, it is apparent that in this case the office of chairman was declared vacant by the circuit court, and it does not come within that provision of sec. 17.25 (1), as being a vacancy caused by a removal by the circuit judge. It follows that under the above quoted section 17.25, this vacancy must be filled by the remaining supervisors of the town, and that you have no power to fill such vacancy. Your power to fill a vacancy is only in a case where no other provision is made for filling the same. See sec. 17.27 (4).

JEF

Minors—Adoption—Opinion in XIX Op. Atty. Gen. 265 is adhered to, holding that board of control has not been given power in sec. 322.04, subsec. (2), Stats., to give consent to adoption of child parental rights of whose parents have been terminated unless permanent care, custody or guardianship of such child has been legally transferred by juvenile or other court of competent jurisdiction to such board.

December 28, 1933.

BOARD OF CONTROL.

You have resubmitted the question to us which was answered in an official opinion in XIX Op. Atty. Gen. 265, in which it was held that the board of control has not been given the power in sec. 322.04, subsec. (2), Stats., to give consent to the adoption of a child unless permanent care, custody or guardianship of such child has been legally transferred by a juvenile or other court of competent jurisdiction to such board.

After careful consideration of this matter and also communication from Spencer Haven and Edmund B. Shea and communication with members of the board, we have come to the conclusion that the opinion as rendered should not be modified. We believe the statute as enacted requires the construction placed upon it. Since the opinion was rendered the legislature has been in session and no change has been made. If it is thought proper that the state board of control should have the power, in cases coming under sec. 322.04 (2), to give consent, although permanent care, custody and guardianship of such child has not been transferred by a court of competent jurisdiction to said board, the statute should be modified so as to clearly give the board that power.

The adoption of a child has far-reaching results, not only as to the welfare of that child in general, but also as to property rights that may be involved. If we should write an opinion changing the conclusion arrived at as suggested by Mr. Haven, and the court should thereafter hold that the board of control had no such power, the rights of children who are adopted without the proper consent

being given are seriously affected. We might add that in the memorandum prepared by Mr. Shea the provisions of sec. 48.22 (2) and (3) were evidently not fully appreciated, for there the permanent care, custody and guardianship over children was given to the state board of control when committed to the state public school with like powers as when such child is transferred to a licensed child welfare agency. It must be borne in mind that if the state board of control could give consent under sec. 322.04 (2) in all cases where parental rights have been terminated, then there might be some cases where two bodies could give consent: the state board of control and the licensed child welfare agency to which the child had been permanently transferred, and in other cases the county home for dependent children to which the child had been permanently transferred. This would lead to confusion, as one body might give consent after the other refused. We do not believe the legislature intended such results.

An argument was made that under the decision as rendered there would be no body that could give consent unless the child was committed permanently to either the state board of control, a licensed child welfare agency, or a county home for dependent children. If this is thought to be a defect in the law, then the legislature should be asked to remedy it by amendment. Under present conditions, after the parental rights have been terminated and there is a home into which a child may be adopted, the adoption may be made after the child has been committed to one of these three bodies mentioned in said sec. 322.04 (2) and thereafter the consent obtained.

We believe the state board of control will co-operate with local courts and investigate such homes, and may indicate even before the commitment is made that they will give consent to the adoption so that the matter can be taken care of in that way.

JEF

Indigent, Insane, etc.—Wisconsin General Hospital— There is no appeal from order of county judge under ch. 142, Stats., ordering person to Wisconsin general hospital for treatment at expense of county.

December 28, 1933.

R. W. PETERSON,
District Attorney,
Berlin, Wisconsin.

You state that a short time ago the county judge of your county, under authority of ch. 142, Wisconsin statutes, ordered a person to the Wisconsin general hospital for treatment at the expense of the county. This order was, of course, made after application and investigation by the county judge.

You say that at the recent session of the county board the board passed a resolution directing you to appeal from that order of the court, on the grounds that the person was financially able to support and treat himself medically. You say you are at a loss to know what procedure to take. You do not believe that there is an appeal from this order and that it is your opinion that the only remedy for the county, in the event that the party was improperly sent to the hospital is either to prosecute the parties who testified falsely as to the financial worth of the patient or to bring a civil action against the patient or the persons responsible for his support and collect the money that the county expends for his care.

We believe that you have come to the correct conclusion. We have been unable to find any provision in the statute from which we could conclude that an appeal would lie. This was a matter before the judge of the county court and not before the county board. Appeals are statutory, and unless provided for by statute they do not exist. Of course an action could be started to set aside the order if the order has been obtained by fraud. That would, of course, require a separate action. The matter might be taken up with the judge again to have him rescind his order, in so far as it provided that the expense be paid by the county, unless it is too late to do so.

JEF

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