

OPINIONS  
OF THE  
ATTORNEY GENERAL  
OF THE  
STATE OF WISCONSIN

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VOL. XXIII  
January 1, 1934 through December 31, 1934

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JAMES E. FINNEGAN  
Attorney General

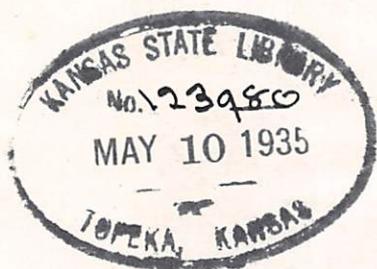


MADISON, WISCONSIN  
1934

Wis.

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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, Manito-  
woc -----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, to -----

## ATTORNEY GENERAL'S OFFICE

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|                         |                            |
|-------------------------|----------------------------|
| JAMES E. FINNEGAN       | Attorney General           |
| JOSEPH G. HIRSCHBERG    | Deputy Attorney General    |
| JOSEPH E. MESSERSCHMIDT | Assistant Attorney General |
| MORTIMER LEVITAN        | Assistant Attorney General |
| F. C. SEIBOLD*          | Assistant Attorney General |
| HERBERT H. NAUJOKS      | Assistant Attorney General |
| WARREN H. RESH**        | Assistant Attorney General |
| A. T. TORGE             | Assistant Attorney General |
| R. M. ORCHARD           | Assistant Attorney General |
| W. J. KERSHAW           | Assistant Attorney General |
| H. T. FERGUSON          | Assistant Attorney General |

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\* Resigned February 28, 1934.

\*\* Appointed April 2, 1934.

OPINIONS  
OF THE  
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VOL. XXIII

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*Education—County Normal Schools—Ch. 241, Laws 1933, amending sec. 41.46, Stats., by changing maximum rate of tuition which school boards may charge nonresidents from one dollar to two dollars, is prospective and not retroactive. It does not apply to school year of 1932–1933.*

January 2, 1934.

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

In your communication of December 22 you refer us to ch. 241, Laws 1933, and you state that this bill, No. 120, S., was signed by the governor on June 9 and was published in the official state newspaper on June 12. You say that sec. 2 of this chapter reads as follows:

“This act shall take effect upon passage and publication.”

You ask for an opinion as to whether this amended law applies to tuition claims for the school year ending June 30, 1933.

Sec. 41.46, Stats., was amended by said ch. 241, as follows:

"The board may charge nonresident students a tuition to be fixed by said board, which tuition shall not exceed two dollars per week, and which shall be a charge against the county in which such students reside, and shall be by it paid to the treasurer of the normal school enrolling such students."

The only change in the statutes was the rate of tuition from one dollar to two dollars per week. This law is not retroactive but prospective. The tuition which was fixed for nonresident students prior to the enactment of this law is the one on which tuition claims for the school year ending June 30th are based. You will note that the statute does not change the tuition charges but only authorizes the board to fix them at not to exceed a certain amount. The tuition fee as fixed under the old law is still the one to be collected until the school board has fixed a new tuition charge per week.

JEF

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*Corporations—Reports to Secretary of State—Association which has not completed its organization by filing copy of its articles of incorporation with register of deeds has no legal existence and secretary of state cannot require it to file report as provided by sec. 185.18, Stats.*

January 2, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You state that on September 13, 1932, the Mosinee Farmers Union Co-operative Live Stock Shipping Association filed articles of incorporation in your department. You say that these articles were never recorded with the register of deeds of Marathon county and you are now in receipt of a request for information as to whether these articles may now be recorded. You refer to an opinion of this

department under date of June 1, 1911, I Op. Atty. Gen. 119, and one under date of December 29, 1914, found in III Op. Atty. Gen. 168, where it was held that a register of deeds must record amendments to articles of incorporation when presented, although thirty days have elapsed since the same were filed with the secretary of state.

You state that there is another question involved which involves the delinquency of this company as having failed to file an annual report in your department as of January 1, 1933. You say that ordinarily if this company had completed its organization by recording these articles prior to April 1, 1933, in order to file its annual report at this time, you would have charged them \$14.80, covering penalty of \$10 for failure to file by April 1, 1933 and cost of publication \$4.80, as provided by sec. 180.08, Stats.

You inquire whether you can permit this company to complete its organization by recording at this time, and then permit it to file an annual report provided by sec. 185.18, Stats., without paying these charges of \$14.80.

This association did not have legal existence under the statute until it had completed its organization by filing a copy of its articles with the register of deeds. Sec. 180.02, subsec. (2). It is therefore not required under the statute to file a report. Forfeitures are not favored in the law and there is no authority in the statute, under the facts stated, that gives you the power to collect the penalty and publication fees for failing to file a report under sec. 185.18.  
JEF

*Courts—Criminal Law—Arrest and Examination—John Doe Proceedings*—Municipal court of Outagamie county has exclusive jurisdiction to institute John Doe proceeding in criminal cases except for crimes of murder and manslaughter, notwithstanding provisions of secs. 361.01 and 361.02, Stats.

January 2, 1934.

FRANK F. WHEELER,  
*District Attorney,*  
 Appleton, Wisconsin.

You state that the county board has directed you to institute John Doe proceedings with the purpose in view of determining whether there has been any violation of law in certain transactions in your county. You say a serious question has arisen as to the procedure to be invoked because of the apparent conflict between certain statutes in Wisconsin and the municipal court act as amended of Outagamie county. After citing the general statutes as to John Doe proceedings and the statutes creating the municipal court of Outagamie county, and those amending the same, you require: Does subsec. 2, sec. 24 of the municipal court act deprive a court commissioner of this county of the power to conduct a John Doe proceeding apparently authorized in sec. 361.01 and 361.02, Stats.?

Ch. 23, Laws 1907, created the municipal court of Outagamie county. Secs. 23 and 24 of said act were amended by ch. 54, Laws 1913, to read as follows:

“23. The municipal judge shall have exclusive original jurisdiction to hear, try and determine all criminal actions arising within said county \* \* \* which would otherwise be cognizable by justices of the peace, including also proceedings to prevent the commission of crime, \* \* \* and excepting \* \* \* that such jurisdiction in tramp cases shall be exclusive only within the city of Appleton and concurrent elsewhere.

“24. 1. Said judge shall have exclusive jurisdiction to institute and conduct examinations in all criminal and bastardy cases arising within \* \* \* said county and the power and jurisdiction to cause to come before him the persons so charged with committing bastardy or criminal offense, \* \* \* and commit them to jail or bind them

over as the case may require, and on a plea of guilty by the accused and a request by him to be sentenced, the *said* judge shall have power, authority and jurisdiction to sentence the accused for \* \* \* such offense \* \* \*.

"2. Such jurisdiction as may have been heretofore conferred upon other courts or magistrates by the provisions of any special charter or general law of this state is repealed in so far as the same may be in conflict with this and the preceding section.

"3. The said municipal court shall have and exercise powers and jurisdiction equal and concurrent with the circuit court of Outagamie county in all cases of crimes and misdemeanors arising in said county, except the crimes of murder and manslaughter."

You will note that in sec. 24, it is provided:

"Said judge shall have exclusive jurisdiction to institute and conduct examinations in all criminal and bastardy cases arising within said county," etc.

Crimes of murder and manslaughter are excepted under subsec. 3. This, in connection with the provisions of subsec. 2 of said section, above cited, makes it clear that your question should be answered "Yes."

The provisions of sec. 361.01 and sec. 361.02, Stats., are general provisions. The provision in the above ch. 54, secs. 23 and 24, above cited, are special statutes and will take precedence over the general statute contained in secs. 361.01 and 361.02. The general statutes cover all cases that are not included within the special provisions as contained in said ch. 54.

A John Doe proceeding comes under criminal proceedings and not civil proceedings. The affidavit that is filed is one that alleges that a crime has been committed and the examination is made to ascertain who committed the crime. It clearly comes within purview of the statutes above cited. It is not necessary to cite authorities on these propositions.

JEF

*Corporations*—Preferred stock may not have exclusive voting rights.

Sec. 182.13, Stats., is construed to require preferred stock to have preference in distribution of dividends.

January 3, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You ask whether the types of stock contemplated by the enclosed articles of incorporation sought to be filed in your office are in compliance with the Wisconsin statutes. Briefly, they provide for preferred and common stock which are equal in all respects with the following exceptions: The common stock is preferred in the distribution of additional or excess dividends over and above an original eight per cent regular dividend declared contemporaneously on both types of stock. The common stock is preferred in the distribution of assets and profits on dissolution in case an excess exists over the par values of the common and preferred stock plus the amount required to pay a regular cumulative dividend. The preferred stock is preferred in case a deficit exists on dissolution and in that it holds the exclusive voting power.

The statutory provisions of this state are very meager in dealing with the type of stock which a corporation may issue and particularly so as concerns preferred stock. The only section applicable to the latter is sec. 182.13, which provides in part:

“(1) Any corporation *may*, in its original articles, or by amendment thereto adopted by a three-fourths vote of the stock, provide for *preferred stock*; for the payment of dividends thereon at a specified rate before dividends are paid upon common stock; for the accumulation of such dividends; for a preference of such preferred stock not exceeding the par value thereof, over the common stock in the distribution of the corporate assets other than profits; for the redemption of such preferred stock, and for denying or restricting the voting power of such preferred stock.”

Hence, it is necessary to determine whether the proposed articles violate any of the provisions of the above

statute, there being no statute specifically restricting the type of common stock which a corporation may issue.

After quoting sec. 182.13, Stats., it was said in XII Op. Atty. Gen. 194:

"It is my opinion that it was the intention of the legislature, sufficiently expressed in the foregoing statute, not only to prescribe the conditions under which preferred stock may be issued, but also to provide the only conditions therefor. \* \* \*"

See also XVIII Op. Atty. Gen. 398; X Op. Atty. Gen. 1037.

The proposed articles of incorporation here provide that while any preferred stock is outstanding exclusive voting power shall be in said stock. Sec. 182.15, Stats., provides in part:

"(1) Unless a provision to the contrary is inserted in the articles of incorporation and recited in each certificate for any share of stock issued by the corporation, every stockholder of any corporation shall be entitled to one vote for each share of stock held and owned by him at every meeting of the stockholders and at every election of the officers thereof, \* \* \*"

Sec. 180.02, subsec. (1), par. (h) provides that there may be inserted in the articles of incorporation any provisions not "inconsistent with law."

Sec. 182.13 (1) provides in part:

"Any corporation may \* \* \* provide \* \* \* for *denying or restricting* the voting power of such preferred stock."

It is within the election of a corporation to avail itself of this provision. If it does not do so, by sec. 182.15 (1), its preferred stock has the same voting power as common stock. Under the above quoted provision a corporation may deny entirely the voting power of preferred stock or it may restrict its voting power but no provision is made authorizing the extension of exclusive voting power to preferred stock. As has been before stated, sec. 182.13 contains a statement of all the possible features which may be incorporated in issues of preferred stock. Hence, it is

concluded that the extention of exclusive voting power to preferred stock as contemplated in the proposed articles is contrary to sec. 182.13.

In another respect the proposed articles of incorporation fail to comply with sec. 182.13. It is said in the case of *Koeppler v. Crocker Chair Co.*, 200 Wis. 476, 479:

“\* \* \* Designating securities as preferred stock does not determine their real nature. \* \* \*”

See also *Wright v. Johnston*, 183 Iowa 807, 167 N. W. 680; *Heller v. National Marine Bank*, 89 Md. 602, 43 Atl. 800; *Coggeshall v. Ga. Land and Investment Co.*, 14 Ga. App. 637, 82 S. E. 156.

While sec. 182.13 is permissive in form, nevertheless, as regards the item of preference to preferred stock in the distribution of dividends, this statute is construed to be mandatory and the word “may” held to mean “must.” See *Market National Bank of New York v. Hagan*, 21 Wis. 322; *Barber Asphalt Paving Co. v. City of Oshkosh*, 140 Wis. 58; *Cliffs Chemical Co. v. Tax Comm.*, 193 Wis. 295.

This construction is warranted by the fact that the generally accepted definition of preferred stock requires a preference in the distribution of dividends to said stock as an essential characteristic thereof. The following statement is quoted from X Op. Atty. Gen. 1037, 1040:

“This view is strengthened by the fact that we have in our law a special statutory provision for the issuance of preferred stock, the principal distinguishing characteristic of which is that it is preferred over the common stock as to dividends. \* \* \*”

See also *Fletcher on Corporations*, Vol. 11, sec. 5283; *Cook on Corporations* (8th ed.) Vol. 1, sec. 267, p. 884; *Coggeshall v. Ga. Land and Investment Co.*, 14 Ga. App. 637; 82 S. E. 156; *Allen v. Montana Refining Co.*, 71 Mont. 105, 227 Pac. 582; *Booth v. Union Fiber Co.*, 137 Minn. 7, 162 N. W. 677; *Kain v. Bugle*, 111 Va. 415, 69 S. E. 355.

Were any other construction put upon this particular provision of sec. 182.13, Stats., a potential injury to the public would exist in that unwary purchasers might be sold stock labeled “preferred” which in fact lacked the essen-

tial attribute of preferred stock. A similar situation exists in the case of insurance contracts. See *State ex rel. United States Fidelity and Guaranty Co. v. Smith*, 184 Wis. 309. Hence, it is concluded that stock, to be preferred stock in compliance with sec. 182.13, must at least be entitled to a preference in the distribution of dividends.

JEF

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*Indigent, Insane, etc.—Prisons—Prisoners*—Board of control may charge county of legal settlement for support of insane person transferred from Waupun to central state hospital for insane. Such charge may be made retroactive for all time spent in central state hospital.

January 8, 1934.

#### BOARD OF CONTROL.

Under the provisions of sec. 51.22, Stats., the state board of control, acting as a commission in lunacy, from time to time adjudges prisoners in the Wisconsin state prison to be insane. Later these insane persons are duly transferred to the central state hospital for the insane. Your board has billed the county in which each insane prison inmate had legal settlement at the time of his commitment, for the purpose of making collection for his board. An objection to this practice has been raised by X county in the case of Mr. A, who was sentenced to the state prison on November 4, 1891, for life, was later found to be insane by the board of control and transferred to the central state hospital for the insane on January 15, 1914. It was only recently determined that Mr. A had a legal settlement in X county. The charges were retroactively made against the said county from January 15, 1914. The objection raised is that a life term prisoner at the state prison is a state prisoner, and inasmuch as his maintenance while in that state prison is not chargeable against the county, it should follow that if he becomes insane thereafter the county still cannot be charged. You desire our opinion

as to the correctness of that practice in this as in similar cases.

It is the opinion of this department that your practice is authorized by the statutes and decisions in this state.

Sec. 51.23, subsec. (1), Stats., provides:

“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.”

This section makes the provisions of secs. 51.08 and 46.10 of the statutes applicable to the central state hospital. Under sec. 51.08 a portion of the cost of the support of an inmate in a state hospital is chargeable to the county where the inmate has a legal settlement. Sec. 46.10 makes provision for the collection of the sum chargeable to a county.

Mr. A did not lose his legal settlement in X county by virtue of his incarceration in Waupun since November, 1891. XXII Op. Atty. Gen. 786, 1041. See also XXI Op. Atty. Gen. 186.

The objection raised by X county in the present case is based upon a process of reasoning. The conclusion, however, disregards entirely the provisions of the statute which definitely include all prisoners in the state hospitals without making an exception in the case of those who are transferred from the state prison. The determination of whether a charge shall be made against the county is one for the legislature. It decided that in the case of persons incarcerated at Waupun there should be no liability upon the county. Its decision was otherwise in the case of persons in the state hospitals. In the case of *State ex rel. Grant County v. State Board of Supervision*, 72 Wis. 108, it was held that the state was obliged to rectify an error in the charge which had obtained for some time. The adjustment was permitted in that case under the provisions of ch. 229, Laws 1881. A portion of the said chapter, with changes which are not material in the present case, is found in sec. 46.10, subsec. (4) and subsec. (6), Stats. The said subsec. (6) provides as follows:

"If any error has been or shall be committed in the accounts between the state and any county in making charges for the support of any inmate in any charitable, curative, reformatory, or penal institution, or in the amount certified to any county as due and to be assessed upon it on account of such support, and such error shall be certified by the state board of control, the secretary of state shall correct such error by a proper charge or credit on the state tax next accruing."

It is our opinion that under the authority of this statute the board of control may legally charge X county with the board of Mr. A since January 15, 1914.

JEF

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*Real Estate—Platting Lands—Taxation—Assessment—*  
Plats of town lands made as federal civil works administration project will be valid without sending notices provided for in sec. 70.26, Stats.

Suggestion is made that map of platted lands be submitted to town board for approval and copy of map with town board's approval be filed as provided in sec. 236.08.

January 8, 1934.

ROSCOE GRIMM,  
*District Attorney,*  
Janesville, Wisconsin.

One of the projects approved for employment under the federal civil works administration in your county has been the preparation by engineers who would not otherwise be employed of assessors' plats and accompanying lists for certain towns in your county. Work has been commenced on this project and is well under way at the present time. You refer to sec. 70.26, Wis. Stats., which authorizes the county clerk to order the platting of lands for assessment purposes. The said sec. 70.26 requires the furnishing of notices to the owners of such property in order that the said owners may be chargeable for the expense of the platting. If the notices therein mentioned are given, it will require several months' time. A question arises as to the

validity of these plats in the absence of the furnishing of the notices.

It is our opinion that the plats will be valid even though the notices provided for by sec. 70.26 are not given. The notices therein provided for are for the purpose of providing due process of law before the owners of the property platted can be charged. In the present instance there will be no charge whatsoever made against the owners, as any expense will be paid from funds supplied by the federal government. The notice requirements found in sec. 70.26 may, therefore, be waived in the present case without injuring the validity of the plats.

Your attention is directed to sec. 236.08, Stats., however, which relates to plats in towns and villages. It is suggested that it will be advisable, when the engineers have completed the surveys and platting, to submit a map of the platted area to the town board of that area for the approval of the said town board, and that a copy of the plat and the approval be filed as provided for in sec. 236.08.  
JEF

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*Recovery Act—Antitrust Laws—School Districts—Textbooks—Sec. 110.07, Stats., created by ch. 476, Laws 1933, does not exempt sec. 40.28, Stats., from antitrust laws.*

January 8, 1934.

HONORABLE A. G. SCHMEDEMAN,  
*Governor.*

You inquire whether sec. 109.07, Stats., as created by ch. 476, Laws 1933 (sec. 110.07, Stats., under the provisions of sec. 43.08 (2) ), will permit those who are engaged in the manufacture, sale and distribution of school textbooks to enter into code agreements under the provisions of the national industrial recovery act, notwithstanding any provision that may be contained in sec. 40.28, Wis. Stats., and more particularly subsec. (3) of said section.

Subsec. (3), sec. 40.28, provides as follows:

"He shall file with the state superintendent a bond to the state with a licensed surety company as surety in a penal sum to be determined by the state superintendent, not less than two thousand dollars nor more than ten thousand dollars, conditioned that he will furnish any of the books listed in said statement and in any statement subsequently filed by him within five years, to any school district, corporation or person in the state at the lowest price shown in said statement, and that he will maintain said price uniformly throughout the state; that he will reduce such prices in Wisconsin whenever reductions are made elsewhere in the United States, so that at no time shall any book so filed and listed by him be sold in Wisconsin at a higher net price than the lowest price received for such book in the United States; that all textbooks and encyclopedias and other reference books offered for sale, adoption or exchange in this state shall be equal in quality to those deposited in the office of the state superintendent; that in case he shall prepare an abridged or special edition of any of the books so listed by him, and shall sell such special edition at a lower wholesale price than the wholesale price of the earlier or unabridged edition scheduled with the state superintendent, he will file a copy of such special edition together with the price therefor, as above stated, with the state superintendent; that he will not enter into any understanding, agreement or combination to control the prices or to restrict competition in the sale of school textbooks or encyclopedias or other reference books."

Sec. 110.07, Stats., created by ch. 476, Laws 1933, reads as follows:

"While this chapter is in effect and for sixty days thereafter, any code, agreement, plan or license, if approved by the governor pursuant to his rules and regulations, and any action complying with the provisions thereof taken during said period, and any code, agreement or license approved, prescribed and in effect pursuant to any federal law, which by such law are exempt from the provisions of the anti-trust laws of the United States, as long as such exemption from the anti-trust laws of the United States prevail, shall be exempt from the application of the provisions of the anti-trust laws of this state and more particularly the following trade statutes: 31.22, 99.14, 111.07 to 111.10, 133.01 to 133.05, 133.09 to 133.24, 134.01, 226.07 to 226.09, 286.32, 286.36, 294.04, 343.33, 343.413, 343.681, 348.40, 352.08."

While sec. 40.28, Stats., does not seem to be an antitrust law, it must be borne in mind that even if it were, it ap-

pears that it is not among those sections enumerated in sec. 110.07, which are exempted from the antitrust laws.

Your question is, therefore, answered in the negative, and sec. 40.28, Stats., must be complied with by those to whom it applies.

JEF

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*Appropriations and Expenditures—Golf Club—Public Officers—Malfeasance—City may not appropriate money for greens keeper for private golf club.*

Expenditure of city funds for this purpose constitutes malfeasance.

January 10, 1934.

J. C. DAVIS,  
*District Attorney,*  
Hayward, Wisconsin.

The Hayward Golf Club is an organization located in the city of Hayward. The stock is all owned by individuals, the city having no financial interest in the golf club whatsoever. For the past several years the city has been paying for the services of the greens keeper employed at the golf club, for a period of six months out of each year, the salary coming from the general funds of the city. The man is employed each year by the city council. You desire an opinion as to whether the payment of this salary to the greens keeper is a misappropriation of city funds and whether such expenditure by the council constitutes malfeasance in office.

It is our opinion that an affirmative answer must be given to both of your questions. The power of taxation may be exercised by state governments or political subdivisions thereof only in those cases where the money raised will be expended for a public purpose and where the public will derive some direct benefit therefrom as contrasted with a possible indirect benefit. Our supreme court in the early case of *Curtis's Administrator v. Whipple et al.*, 24

Wis. 350, discussed this question at some length, using in that discussion the following language, pp. 354-355:

“\* \* \* Nor will the location of the institution at Jefferson, and the incidental benefits which may thereby arise to the people of the town, sustain the tax. That is not the kind of public benefit and interest which will authorize a resort to the power of taxation. Such benefits accrue to the people of all communities from the exercise in their midst of any useful trade or employment, and the argument, pursued to its logical result, would prove that compulsory payment or taxation might be made use of for the purpose of building up and sustaining every such trade or employment, though carried on by private persons for private ends, or the purposes of mere individual gain and emolument. That there exists in the state no power to tax for such purposes, is a proposition too plain to admit of controversy. Such a power would be obviously incompatible with the genius and institutions of a free people; and the practice of all liberal governments, as well as all judicial authority, is against it. 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; or because the proceeds of the tax were to be expended in defraying the legitimate expenses of government, and in promoting the peace, good order and welfare of society. 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.  
\* \* \*”

It was also stated in *Wisconsin Industrial School for Girls v. Clark County*, 103 Wis. 651, 668:

“\* \* \* As indicated in *Curtis's Adm'r v. Whipple*, 24 Wis. 350, it is not sufficient that an enterprise be one in which the public are interested and which might be conducted at public expense, to warrant the using of the taxing power to aid it *ex donatio*; but it may be used for the purpose of compensating for an equivalent in public service rendered under proper regulations to protect municipal interests, \* \* \*”

The Hayward Golf Club receives the entire benefit from the expenditure of funds to pay the salary of the greens keeper. To the extent that this expenditure lessens the cost of the golf club upkeep, it is a direct benefit to individuals, namely, those persons who own stock in the club. The expenditure of this money, therefore, is tantamount to the exercise of the power of taxation for a private purpose. Probably a very small percentage of the residents of Hayward are in any way connected with this golf club. It is our opinion that the public benefit which might result from this expenditure is indirect, rather than direct, and that the expenditure, therefore, is in violation of law.

Section 348.28, Wisconsin Stats., provides:

"Any officer \* \* \* of the state or of any \* \* \* city therein \* \* \* who shall make any contract or pledge, or contract any indebtedness or liability, or do any other act in his official capacity, or in any public or official service not authorized or required by law \* \* \* shall be punished by imprisonment in the county jail not more than one year, or in the state prison not more than five years, or by fine not exceeding five hundred dollars; \* \* \*"

The expenditure of public funds for an unauthorized purpose is an act not authorized or required by law and is covered by the terms of this statute.

JEF

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*School Districts—State Aid*—Districts formed November 12, 1932, and performing functions of school districts for school year 1932-1933 are entitled to state aid for said school year.

January 10, 1934.

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

In 1927 a portion of a school district maintaining a high school was detached, under the provisions of sec. 40.85, Stats. The detached portion operated as one large com-

mon school district until the early part of November, 1932. During this five-year period, the district formed from the detached area operated without any schools but made provision for sending the school children to the schools in the area from which the district was detached. It also made provision for the payment of tuition and transportation charges for the children in the district. In the early part of November, 1932, specifically on November 12, an order was entered dividing this large common school district into three districts, under the provisions of sec. 40.30, Stats. An affidavit has been submitted to the effect that at the time of the division each of the three districts contained property of the required assessed valuation. The organization meeting was held for each of the three districts, officers were elected, and notices were filed with the county superintendent of schools. Taxes were levied separately in each of the districts and annual reports were filed. The same plan of operation was followed, but the expense for the tuition and transportation for the full school year of 1932-1933 was paid by each of the three districts themselves, although they did not come into existence until the 12th day of November—approximately two months after school had commenced. The state superintendent of schools has neglected and refused to certify these districts as being eligible for state aid for the school year 1932-1933 because the districts were not created until the second week in November, and because at the time of the division there were only approximately thirty-three pupils in the large common school district. It is contended by these newly created districts that the date that state aid is paid (usually in February or March for the preceding school year) these school districts will have operated as school districts for over fifteen months and that, for all practical purposes such as levying taxes, paying tuition, bonded indebtedness, and transportation to parents, they have operated for the school year 1932-1933 as separate units, although the actual division and town board order was not issued until the second week in November. The question arises whether these newly created districts are eligible for state aid for the school year 1932-1933.

It is our opinion that they are entitled to this aid. The state equalization law is found in sec. 40.87, Wis. Stats. The division of the large common school district into the three smaller ones was validly made under the provisions of sec. 40.30. Sec. 40.87, Stats. 1931, must be read as applying to the three newly formed districts. Subsec. (1) provides as follows:

"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. Provided, that the number of teachers for which any district or city shall receive aid hereunder shall not exceed the number of elementary teachers employed on May 1, 1929, unless the average daily attendance of pupils below the ninth grade during the preceding school year shall have been at least equal to the following average number of pupils per elementary teacher:

- "(a) Twenty, if two teachers are employed;
- "(b) Twenty-five, if three or four teachers are employed;
- "(c) Thirty, if more than four teachers are employed."

Subsec. (4) par. (b) provides, in part:

"No aid shall be paid \* \* \* for any school district \* \* \* for any year during which such district shall not have maintained a common school taught by a qualified teacher \* \* \* for at least eight months; unless the state superintendent shall be satisfied that such school was maintained and so taught for at least three months, and the failure to maintain and so teach it for eight months was occasioned by some extraordinary cause not arising from intention or neglect on the part of the responsible officers. \* \* \*"

Subsec. (4) par. (f) provides:

"Provisions by a school district for the transportation and tuition of its pupils to and their instruction in some other district as prescribed by law shall entitle the former to share in the aid as though such district had maintained school, and shall be considered as having one elementary teacher employed, but no district shall receive more state and county aid than the operating expense of such school."

By ch. 445, Laws 1933, which was published July 26 and became effective July 27, 1933, sec. 40.87, subsec. (1), was amended to read as follows:

"Annually, to each school district or city of the state two hundred fifty dollars for each elementary teacher actually employed by such district or city in the preceding school year. The number of teachers for which any district or city shall receive aid, however, shall not exceed:

"(a) One teacher, if the average daily attendance in such preceding school year was below twenty-five; and no school with one elementary teacher can add another elementary teacher unless the average daily attendance is at least forty, or an average daily attendance of twenty pupils, for each of the two elementary teachers;

"(b) Two teachers, if the average daily attendance was from twenty-five to sixty;

"(c) Three teachers, if the average daily attendance was from sixty-one to ninety;

"(d) Four teachers, if the average daily attendance was from ninety-one to one hundred twenty;

"(e) Five teachers, if the average daily attendance was from one hundred twenty-one to one hundred fifty;

"(f) Such number of teachers in excess of five, as is obtained by dividing the average daily attendance in excess of one hundred fifty by thirty, counting fractions as whole numbers."

By ch. 232, Laws 1933, an immaterial change was made in sec. 40.87, subsec. (4) (b). Subsec. (4) (f) was not in any way altered. It is unnecessary to decide whether ch. 445 would apply to the payment of state aid for the year 1932-1933 or whether it was intended to apply for the first time to the school year 1933-1934 because the answer to this question does not affect the conclusion. Under sec. 40.87, subsec. (1), Stats. 1931, there is no limitation placed upon the number of pupils who must attend school before state aid can be paid upon the basis of one teacher. Sec. 40.87, subsec. (4) (f), permits the payment of state aid to a school district which has made provision for the transportation, tuition and instruction of its pupils in some other district, the transporting district being considered as having one elementary teacher employed. Here, again, there is no requirement as to the number of pupils who must attend school from the transporting district before the district is entitled to aid upon the basis of one elementary teacher. Sec. 40.87, subsec. (4) (b), relating to maintenance of school for eight months, has no application whatsoever, for the reason that the transporting districts in the

present case do not hire any teacher at all or maintain a common school.

The pupils in the three districts involved received the benefit of instruction for the full nine-months' period, and were not in any way harmed by the failure of the district to organize prior to the commencement of school in September, 1933. It is contended that if the payment of state aid is made to the three districts it will virtually be permitting an increase of teachers from one to three, without the pupil attendance specified in sec. 40.87, subsec. (1), Stats. 1931. The three newly created districts were not in existence on May 1, 1929, and this date as to them can have no significance. They are asking for aid upon the basis of one elementary teacher. This statute would prevent the original large common school district from increasing the number of teachers from one to three, unless the average number of pupils per elementary teacher was twenty-five. It does not prevent the creation of three new districts out of the one large one and the payment of state aid to each of the three.

If ch. 445 were held applicable to the school year 1932-1933, there would still be no minimum requirement as to pupil attendance before state aid could be paid upon the basis of one elementary teacher as provided in sec. 40.87, subsec. (4) (f), which would still be applicable in the present instance.

JEF

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*Counties—County Board—Taxation—Tax Sales—County board may not delegate its power to sell lands acquired by county by tax deed to private individual, firm or corporation; and board may delegate its power only to committee provided for by subsec. (18), sec. 59.08, Stats., as created by ch. 475, Laws 1933.*

January 11, 1934.

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

Resolution No. 14, S., requests the opinion of the attorney general on the following questions.

"1. Has a county board the right, under chapter 475, laws of 1933, or under any other provision of the statutes, to delegate its power to sell lands acquired by tax deed to a private individual or firm or corporation, such sales to be made on a commission or salary basis?"

Question 1 is answered in the negative.

Under the statutes as they existed prior to the enactment of ch. 475, Laws 1933, it was ruled that the county board had no such right. XXII Op. Atty. Gen. 484.

It is self-evident that no such right is conferred upon the county board by ch. 475, Laws 1933, which creates a new subsec. (18), sec. 59.08, as follows:

"The county board may delegate its power to sell lands acquired by tax deed to a committee consisting of the county clerk, county treasurer and the chairman of the town wherein the particular lands are situated. The members of such committee shall receive no extra compensation for such services."

The second question is

"2. Can such power to sell lands acquired by tax deed be delegated by the county board to any agency other than the committee designated in chapter 475, laws of 1933?"

Question 2 is likewise answered in the negative.

The county board may exercise its power to sell such lands by proceeding under sec. 75.35, Stats., which provides to the effect that 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 any such lands by quitclaim deed. The only statute, however, which authorizes the county board to delegate its said power is the above quoted subsec. (18), sec. 59.08, Stats., as created by ch. 475, Laws 1933.

JEF

*Intoxicating Liquors — Taxation* — Occupational tax on intoxicating liquors provided by ch. 3, Laws Special Session 1933, is not retroactive but is operative for first time January 13, 1934.

January 12, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

On January 11, 1934, the governor approved ch. 3, Laws Special Session, 1933, relating to an occupational tax on intoxicating liquors and an occupational tax on fermented malt beverages. This act was published on January 12, 1934 and becomes effective January 13, 1934. XVIII Op. Atty. Gen. 615, 616, X Op. Atty. Gen. 1099. See also *O'Connor v. City of Fond du Lac*, 109 Wis. 253.

You inquire whether that portion of the act providing for an occupational tax on intoxicating liquors is retroactive to December 5, 1933. In our opinion this question must be answered in the negative.

Ch. 207, Laws 1933, was a regulatory measure governing the sale of fermented malt beverages and light wines. The said ch. 207, creating sec. 66.05 (10), Wis. Stats., contained definitions of fermented malt beverages and light wines. Ch. 361, Laws 1933, imposed an occupational tax upon fermented malt beverages and light wines as defined in the said ch. 207. Fermented malt beverages as defined in ch. 207 and as taxed in the said ch. 361 was limited in the former chapter to mean "any liquor or liquid capable of being used for beverage purposes, made by the alcoholic fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains or decorticated and degerminated grains or sugar containing one-half of one per centum or more of alcohol by volume and not more than three and two-tenths per centum of alcohol by weight." Light wines were also defined in ch. 207 but the definition is immaterial at the present time.

Ch. 361, Laws 1933, providing for the occupational tax on fermented malt beverages, created ch. 139 of the statutes with ten sections, numbered 139.01 to 139.10, inclusive.

Sec. 2, ch. 3, Laws Special Session 1933, repealed the definition of light wines, which was found in ch. 207, Laws 1933. Sec. 3 of the said ch. 3 of the Special Session of 1933 struck from chs. 207 and 361, Laws 1933, the words "or light wine" and "and light wines" wherever they appeared in those chapters. Since the enactment of ch. 361, Laws 1933, the sale of fermented malt beverages with an alcoholic content in excess of 3.2% by weight had been legalized.

By sec. 4, ch. 3, Laws Special Session 1933, the legislature provided for the taxation of fermented malt beverages having an alcoholic content in excess of 3.2 by weight by amending the definition of fermented malt beverages found in ch. 207, Laws 1933 so that it struck from such definition the maximum limitation of 3.2% by weight.

Ch. 3, Laws Special Session 1933, which provides for the new occupational tax on intoxicating liquors, does so by adding five new sections to the aforesaid ch. 139, Stats., which already contains the occupational tax upon fermented malt beverages. The newly created sections of the statute are 139.25 to 139.29, inclusive. Sec. 139.25 contains definitions. Subsec. (1) provides:

"Intoxicating liquors" includes all ardent, spirituous, distilled, or vinous liquors, liquids, or compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes, but shall not include 'fermented malt beverages' as defined in subsection (10) of section 66.05."

Sec. 139.26 (1) provides:

"An occupational tax to be collected as a stamp tax is assessed, imposed, and levied upon the sale, exchange, offering or exposing for sale or exchange, having in possession with intent to sell or exchange, or removal for consumption, exchange, or sale other than for shipment in interstate or foreign commerce or for shipment, sale, or exchange by a manufacturer to a rectifier of intoxicating liquors, other than wine used for sacramental purposes and alcohol used for industrial purposes. The rate of such tax shall be twenty-five cents per wine gallon on intoxicating liquors containing less than twenty-one per centum of alcohol by volume and one dollar per wine gallon on

intoxicating liquors containing twenty-one per centum of alcohol by volume or more. The rates herein specified per wine gallon shall be applicable on a proportionate basis to any other quantity or fractional parts thereof."

To hold that the occupational tax levied upon intoxicating liquors by ch. 3, Laws Special Session 1933, applies to transactions upon and subsequent to December 5, 1933, would be giving to the act a retroactive operation.

The general principles regarding the prospective or retrospective operation of statutes are found in the following expressions from the language of our supreme court:

"\* \* \* But we are satisfied that we cannot, consistently with the rules of construction, hold the act in question to have been intended to operate retrospectively. Statutes are never so construed unless the intention that they should so operate is unmistakable. Smith's Commentaries, p. 679; Sedgwick on Stat. & Con. Law, p. 188, *et seq.* That intention is not to be assumed from the mere fact that general language is used which might include past transactions as well as future. Statutes are frequently drawn in such a manner. Yet such general language is held to have been used in view of the established rule that statutes are construed as relating to future transactions and not to past. \* \* \*" *Seamans v. Carter and another*, 15 Wis. 548-549.

"The rule applicable to the construction of statutes, as laid down by the authorities, is, that statutes are never to be construed to act retrospectively unless the intention that they should so operate is unmistakable. Smith's Commentaries, p. 679, and note, with cases cited; Potter's Dwarrris on Stat. Con., p. 162; Cooley's Constitutional Limitations, p. 62. And Sedgwick on Stat. & Con. Law, p. 164, lays down the English rule thus: 'The principle is one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively;' and then remarks: 'This principle may have been lost sight of in some cases, but has on the whole been steadily adhered to.' The rule above stated has been affirmed by this court in *Seamans v. Carter*, 15 Wis., 548; *Finney v. Ackerman*, 21 id., 269; *Rheinstrom v. Cone*, 26 id., 163; *Austin v. Burgess*, 36 id., 186-9; *State v. Atwood*, 11 id., 422. In the last case, the late learned Chief Justice Dixon says: 'It is a well settled rule of construction, that statutes are not to be con-

strued retrospectively, or to have a retrospective effect, unless it shall clearly appear that it was so intended by the legislature, and not even then, if such construction would impair vested rights.' \* \* \*” *Vanderpool and others v. La Crosse & Milwaukee R. R. Co.*, 44 Wis. 652, 663.

This rule of statutory construction was first enunciated in *State v. Atwood*, 11 Wis. 422. It has since been consistently followed in a long line of decisions which include the cases cited above and *Finney v. Ackerman*, 21 Wis. 269; *Rheinstrom v. Cone*, 26 Wis. 163; *Austin v. Burgess*, 36 Wis. 186; *State ex rel. Davis & Starr Lumber Co. v. Pors*, 107 Wis. 420; *Chicago Title & Trust Co. v. Bashford*, 120 Wis. 281; *Winneconne v. Winneconne*, 122 Wis. 351; *Quinn v. Chicago M. & St. P. R. Co.*, 141 Wis. 497; *Read v. Madison*, 162 Wis. 94; *Chicago, M. & St. P. R. C. v. Railroad Comm.*, 187 Wis. 380; *In re Dancy Drainage District*, 199 Wis. 85.

Sec. 5, ch. 3, Laws Special Session 1933, provides:

“The emergency occupational tax provided for in chapter 139 of the statutes is assessed, imposed, and levied upon the sale, exchange, offering or exposing for sale, having in possession with intent to sell, or removal for consumption or sale from December 5, 1933, to the effective date of this act, of all fermented malt beverages containing more than three and two-tenths per centum of alcohol by weight other than for shipment in interstate or foreign commerce or for shipment or sale by a brewer to a bottler or sales company. \* \* \*”

Sec. 6 provides:

“It is the intent of sections 4 and 5 of this act to make the tax on fermented malt beverages imposed in chapter 139 of the statutes applicable to such beverages of an alcoholic content greater than three and two-tenths per centum by weight on the same basis as those containing not more than three and two-tenths per centum of alcohol by weight and to make this provision retroactive to December 5, 1933, when the sale of beverages of more than three and two-tenths per centum of alcohol by weight again became legal.”

Both of the above-quoted sections relating to the retrospective operation of the emergency occupational tax provided for in the said ch. 3, Laws Special Session 1933, are

confined to "fermented malt beverages." It will be recalled that the tax on fermented malt beverages, as well as the tax on intoxicating liquors is found in ch. 139, Stats. The legislature specifically referred, however, only to the tax found in ch. 139, which related to fermented malt beverages. As indicated above, a separate definition is provided for fermented malt beverages and for intoxicating liquors. Fermented malt beverages do not include intoxicating liquors and the definition of intoxicating liquors specifically excludes fermented malt beverages. The legislative declarations found in sec. 5 and sec. 6 of ch. 3, Laws Special Session 1933, is quite explicit. There is no opportunity from this language to read into it an intention to make the tax on intoxicating liquors retroactive. The tax on intoxicating liquors is levied *in praesenti* and sec. 7, ch. 3, Laws Special Session 1933, provides: "This act shall take effect upon passage and publication."

In the light of the above statutes and decisions and in the absence of specific language indicating the tax on intoxicating liquors retroactive to December 5, 1933, it must be held that this tax takes effect for the first time at the beginning of January 13, 1934.

JEF

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*Corporations—Foreign Corporations*—Required appointment of secretary of state as agent of foreign corporation for service of process may not be formally revoked. Revocation of said appointment is automatic when all liability of corporation in this state expires.

January 15, 1934.

HONORABLE THEODORE DAMMANN,  
*Secretary of State.*

You state that several years ago a foreign corporation was admitted into this state to transact the restricted types of business set out in subsec. (2), sec. 226.02, Stats. Coming under this particular provision, said foreign corporation was not required to take out the usual license. Con-

cerning the admission of such corporations without a license, a portion of said subsection reads:

“\* \* \* provided, that any such corporation which shall transact the business above provided for shall first file with the secretary of state a statement signed by its president, secretary, treasurer or general manager that it constitutes the secretary of state its attorney for the service of process as provided in paragraph (f) of subsection (3) of this section; \* \* \*.”

You ask whether, in that said certain foreign corporation has now suspended all business in this state, the above required appointment may be revoked by said corporation. This question is answered in the negative. Par. (f), subsec. (3), sec. 226.02, Stats., is incorporated by reference in subsec. (2) of that section. The former provides in part that a foreign corporation,

“Shall constitute and appoint the secretary of state its true and lawful attorney upon whom the summons, notices, pleadings or process in any action or proceeding against it may be served in respect to any liability arising out of any business, contract or transaction in this state, and stipulate that service thereof upon the secretary of state, or his assistant, shall be accepted irrevocably as a valid service upon it, and that *such appointment and stipulation shall continue in force irrevocably so long as any liability of such corporation remains outstanding in this state.* \* \* \*.”

No provision is found in the statutes for a formal revocation of this appointment. In view of the italicized portion of the above statute it is reasonable to conclude that none is intended. The revocation contemplated by the statute is one which operates automatically whenever all liability of the foreign corporation arising out of “any business, contract or transaction” in this state is extinguished either by satisfaction or by the operation of the statute of limitations. It is said at p. 607 of the case of *Paulus v. Hart-Parr Co.*, 136 Wis. 601:

“It is also insisted that, after defendant’s license to do business in Wisconsin had been revoked, service could not be made upon the assistant secretary of state under the appointment. This position we think untenable, under the statutes heretofore referred to, as well as the power

which continued in force irrevocably the appointment of the secretary of state and his assistant to receive service of process as long as any liability of the defendant remained outstanding in the state of Wisconsin. The cause of action arose before the defendant's license was forfeited and remained an outstanding liability against the defendant when this action was commenced. Hence the fact that at the time the action was commenced the defendant had removed from the state does not affect the service. The right to serve upon the assistant secretary of state continued so long as any liability remained outstanding in the state. \* \* \*

See also XVIII Op. Atty. Gen. 88; 30 L. R. A. (n.s.) 678, note; Ann. Cas. 1916D 379; Ann. Cas. 1918A 395.

It is therefore concluded that the power of attorney for the service of process required by subsec. (2), sec. 226.02, to be conferred upon the secretary of state by a foreign corporation is not subject to formal revocation but is revoked automatically when all liability of said corporation arising out of "any business, contract or transaction" in this state expires.

JEF

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*Tuberculosis Sanatoriums—Wisconsin Statutes—Words "as shall be determined by the state board of control" in ch. 277, Laws 1933, modify only "other necessary and reasonable expenses incident to his care in such institution," and do not modify specific items previously enumerated.*

January 18, 1934.

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

Resolution No. 14, A., requests this office to render an opinion as to the interpretation of ch. 277, Laws 1933, particularly with respect to the extent of the board of control's authority to classify items of expense under the said chapter.

Ch. 277, Laws 1933, amended subsec. (2), sec. 50.07, Stats., relating to the admission of patients to tuberculosis sanatoriums, to read 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, 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 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."

The last paragraph of the subsection above quoted was all added by the said ch. 277. In addition thereto this chapter struck from the last sentence of the first paragraph the word "all" which appeared before the word "other" in the 1931 statutes, and inserted in the place thereof the word "such" and added the words—"as shall be determined by the state board of control" to the last sentence of the first paragraph of this subsection. Ch. 277 was Bill No. 502, A. It originally struck other words from this law as it appeared in the 1931 statutes. By amendment No. 1, A., to Bill No. 502, A., most of the material originally stricken in Bill No. 502, A., was restored. No effort was made in the amendment, however, to alter the substitution of the word "such" for the word "all." Amendment No. 1, A., to Bill No. 502, A., was adopted. The substitution of the word "such" for the word "all" apparently was intended for the purpose of making the phrase "such other necessary and reasonable expenses incident to his care in such institution" a separate entity in this section, rather than an integral part of the sentence as it would have been had the word "all" been left there. It is apparent that the words "such \* \* \* as shall be determined by the state board of control" were intended to modify "other

necessary and reasonable expenses incident to his care in such institution."

The similarity in the language found in the last paragraph of sec. 50.07, subsec. (2) to the language found in the last portion of the first paragraph of the said subsection further strengthens this conclusion and indicates that the legislature, in adding the last paragraph, had in mind those other necessary and reasonable expenses incident to care in the institution, in addition to the expenses specifically enumerated in the first paragraph. This kindred language found in the last paragraph of sec. 50.07, subsec. (2), is as follows:—"expenses incident to the care of patients in these institutions."

The language of sec. 50.07, subsec. (2), provides that maintenance *shall* include certain enumerated things. This language is mandatory and does not place upon the board of control any discretion in the matter of including those enumerated items.

This conclusion is further strengthened by the application of the rule of statutory construction known as the doctrine of the last antecedent. That rule was laid down by our supreme court in the case of *Jorgenson et al. v. City of Superior*, 111 Wis. 561, 566, where it was said:

"\* \* \* The rule is that 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. Black, Interpretation of Laws, 150; *State ex rel. Holland v. Lammers*, 86 N. W. 677. \* \* \*"

It was again stated in the case of *Zwietusch v. East Milwaukee*, 161 Wis. 519, 522:

"By what is known as the doctrine of the 'last antecedent,' relative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote, unless such extension is clearly required by a consideration of the entire act.' 36 Cyc. 1123, j, and cases cited; 2 Lewis's Sutherland, Stat. Constr. (2d ed.) secs. 420, 421; *Jorgenson v. Superior*, 111 Wis. 561, 87 N. W. 565."

This doctrine was again referred to in the case of *Dagan v. The State*, 162 Wis. 353, and *Charette v. Prudential Insurance Company of America*, 202 Wis. 470.

The act under construction in this opinion appears to be a proper one for the application of this doctrine. It is our opinion, therefore, that the words "as shall be determined by the state board of control" modify "other necessary and reasonable expenses incident to his care in such institution" and do not modify the other items specifically enumerated in the first paragraph of sec. 50.07, subsec. (2).  
JEF

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*School Districts—State Aid*—Where school districts were created by town board having jurisdiction and have operated fourteen months, sec. 40.31, subsec. (1), Stats., prevents state superintendent from refusing state aid under sec. 40.87, on ground that districts did not have required assessed valuation.

January 19, 1934.

DEPARTMENT OF PUBLIC INSTRUCTION.

On January 10, 1934, an opinion was rendered by this office to Mr. Helmar A. Lewis, district attorney of Grant county,\* relating to the right of three school districts of that county to receive state aid under sec. 40.87, Stats., for the school year 1932-1933. That opinion involved school districts known as Joint 13, North Lancaster and South Lancaster, Joint 9, South Lancaster and Ellenboro, and No. 2, South Lancaster. As stated in the previous opinion, one large school district formed by detachment in 1927 under sec. 40.85, Stats., was divided into these three school districts in the early part of November, 1932. You have submitted statistics compiled by the Wisconsin tax commission indicating the 1931, 1932 and 1933 assessments of the towns of Ellenboro, North Lancaster and South Lancaster in Grant county. You have also submit-

\* Page 16 of this volume.

ted statistics from the same source showing that according to the assessment roll for the year 1932, the three school districts had the following assessed valuation:

|  |           |
|--|-----------|
| Joint 13—North Lancaster and South Lancaster | \$172,370 |
| Joint 9—South Lancaster and Ellenboro        | \$111,420 |
| No. 2, South Lancaster                       | \$157,827 |

The division made in 1932 was done under sec. 40.30, Stats. Subsec. (1) of that section provides in part as follows:

“\* \* \* no district shall be created having less than one hundred fifty thousand dollars of taxable property as shown by the last assessment roll.”

You inquire whether the division was legal, and as to the status of these districts in respect to sharing in state aid for the school year 1932–1933 under sec. 40.87, Stats., in view of the fact that the assessed valuation of the taxable property in the district according to the 1932 assessment roll was less than \$150,000.

Your attention is directed to the following language taken from the opinion rendered on January 10, 1934, to Mr. Lewis:

“\* \* \* In the early part of November, 1932, specifically on November 12, an order was entered dividing this large common school district into three districts, under the provisions of sec. 40.30, Stats. \* \* \* The organization meeting was held for each of the three districts, officers were elected, and notices were filed with the county superintendent of schools. Taxes were levied separately in each of the districts and annual reports were filed. The same plan of operation was followed [transportation of children to nearby district], but the expense for the tuition and transportation for the full school year of 1932–1933 was paid by each of the three districts themselves, although they did not come into existence until the 12th day of November—approximately two months after school had commenced. \* \* \*”

There is nothing whatsoever to indicate that the town board did not acquire jurisdiction in the matter of making the order creating the three new districts.

Sec. 40.31, subsec. (1), Stats., in relation to school districts, provides:

“When a district has exercised the rights and privileges of a school district for a period of four months, no appeal or other action attacking the legality of the formation of such district, either directly or indirectly, shall be taken.”

In the 1930 Wisconsin annotations to sec. 40.31, the revisor’s note of 1927 states:

“Section 40.31 is derived from old section 40.03 \* \* \*  
The revision makes no change in the meaning. \* \* \*\*”

The old section, 40.03, subsec. (1), Stats. 1925, provided:

“A district shall be deemed organized when any two of the officers elected at its first legal meeting file with the clerk and cause to be recorded in the minutes of such meeting their written acceptance of the offices to which they have been respectively elected or when said officers shall have failed for a period of ten days or more to state their refusal in writing. A district shall also be deemed legally formed when it has been duly organized and has exercised the rights and privileges of a district for a period of four or more months, and no appeal or other action attacking the legality of the formation of such district, either directly or collaterally, shall be taken after such period has expired.”

This statute was the subject of discussion in the case of *Kittelson v. Dettinger*, 174 Wis. 71, where it was stated, pp. 74, 75 and 76:

“Unless there had been some fatal defect before the acts purporting to organize the district, it was formed on October 30, 1919, the date of the first meeting above mentioned, and it has since exercised the rights and privileges of its organization. This action was commenced May 1, 1920, more than four months afterward. The consolidation of school districts is an important matter. Such districts have very considerable power and the interests of many citizens are affected thereby. The legislature doubtless deemed it important that questions of legality affecting the proceedings should be settled with reasonable dispatch, and assumed that four months would afford sufficient time for bringing actions to test such legality. \* \* \*

“Appellant’s counsel have made and ingeniously argued several other objections to the proceedings taken by the town boards and the consolidated district, but we do not consider that the objections go to matters of jurisdiction and it does not seem necessary to consider them. The town boards clearly gained jurisdiction; the proceedings

seem to have been conducted fairly; all persons interested had notice and full opportunity to be heard; and so far as the record shows the consolidation was desired by a large majority of those interested. \* \* \*

“\* \* \* Although the statutes must be complied with in acquiring jurisdiction, we are not inclined to construe them so strictly that unimportant mistakes in subsequent proceedings will defeat the wishes of the communities affected or the purpose for which the statutes were enacted. *State ex rel. Taylor v. McKinny*, 146 Wis. 673, 132 N. W. 600.”

It is also deemed advisable to quote at some length from the opinion of the court in the case of *State ex rel. Stroh-mayer v. Melstrand*, 181 Wis. 418, 419-421:

“It will be noticed that the statute provides two methods for curing defects in the organization of a district; first, when any two officers elected at the first legal meeting file a written acceptance of their election, or when they have failed for ten days to state their refusal in writing; and second, when it has been duly organized and has exercised the rights and privileges of a district for a period of four or more months. And then it provides that after the expiration of such four or more months ‘no appeal or other action attacking the legality of the formation of such district, either directly or collaterally, shall be taken.’

“Counsel for relator argues that the statute calls for a *legal* meeting and that there can be none such where the statute has not been followed; also that it calls for a *duly* organized district and that there can be none such unless the statute has been complied with. The argument standing alone is plausible, but taken in connection with the purpose of the statute it falls. The statute is a curative one, enacted for the purpose of validating the formation of districts where irregularities have occurred. A proceeding in all respects regular under the statute needs no cure and a district so formed is valid from the date of its organization. It needs no four months to ripen into a valid district. So we see we cannot give the strict technical meaning to the words ‘legal’ and ‘duly’ that counsel suggests, for if we do we reach the absurdity of declaring that a proceeding entirely regular needs a curative statute to make it effective. The ‘legal meeting’ meant by the statute is one called under the authority of the law relating to the formation of school districts and may include one in which irregularities may have intervened. And likewise ‘duly organized’ means a district organized pur-

suant to the provisions of law relating thereto though not in all respects regular. Only by such a construction can the statute have a meaning and effectuate a purpose, namely, to cure defects in the organization of school districts. The need of such a statute is apparent. This case furnishes a good example of such need. The district was formed, officers were elected and entered upon their duties; taxes were levied and collected; teachers were hired and schools maintained for over eight months before the relator began to question the validity of the formation of the district. The legislature has wisely said: You come too late; four months is ample time for you to make up your mind in and to commence proceedings if you wish to contest the validity of the formation of the district.

"The case of *Kittelson v. Dettinger*, 174 Wis. 71, 182 N. W. 340, might well have been disposed of on the single ground suggested by Mr. Justice Owen, namely, that the statute had run on the right to maintain the action. It follows that the trial court correctly held that sec. 40.03 barred this action."

In the event that a mandamus action is brought to compel your office to pay state aid under sec. 40.87, the defense would undoubtedly be that the districts, or one of them at least, were not validly created, because the taxable property therein did not have the assessed valuation of \$150,000. To permit the interposition of this defense would have the effect of overturning the creation of this district which was organized over fourteen months ago, and of disturbing individual rights which have accrued since that time. The requirement of \$150,000 of taxable property was quite properly placed there for the benefit of the taxpayers in the district, who would be obliged to shoulder a large school tax unless the school district budget could be spread over taxable property of considerable value. In the present instance, the taxpayers in these three districts have acquiesced in the creation and organization of the districts. They are the persons most interested, and the situation is satisfactory to them. It appears also that your department has already officially recognized the existence of these three districts by paying them transportation money during the month of November, 1933. It is our opinion that sec. 40.31, being a curative statute and intended for the purposes set forth in the decisions quoted

from above, would prevent your raising any question as to the validity of the creation of these districts. They are, therefore, entitled to receive state aid under sec. 40.87, for the school year 1932-1933.

JEF

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*Intoxicating Liquors — Taxation — Occupational Tax —*  
Under ch. 3, Laws Special Session 1933, occupational tax is not confined to liquids which are intended for beverage purposes.

Tax is imposed upon liquids reasonably capable of being drunk either for pleasure or for after effect.

Tax does not apply to liquid that it is possible to swallow but is not reasonably fit or palatable.

Liquid is fit for beverage purposes and taxable when it can with little or very simple change by dilution or subtraction be put in condition for use as beverage.

Act exempts from occupational tax sacramental wines, alcohol used for industrial purposes, fermented malt beverages as defined in sec. 66.05, subsec. (10), Stats., as well as wines and fermented malt beverages made in home and used solely for home consumption.

January 19, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

Bill No. 2, S., which became ch. 3, Laws Special Session 1933, and which created sections 139.25 to 139.29, inclusive, Stats., placed an occupational tax on intoxicating liquors. The question arises whether this occupational tax on intoxicating liquor "means all liquor which can be used for beverage purposes or does it mean only liquors which are intended for such purposes."

It is our opinion that the tax imposed under this act is not sufficiently comprehensive to include all liquor which could be used for beverage purposes, nor so restricted as to be limited only to those which are intended for beverage purposes. It is our further opinion that the taxability

of a liquid in those cases where a court refuses to take judicial notice of the characteristics and adaptability of the liquid for beverage purposes is a question of fact. The following resumé of cases from both federal and state courts will serve, however, to assist in determining whether or not a liquid is subject to tax.

The occupational tax provided for in ch. 3, Laws Special Session 1933, is imposed upon "intoxicating liquors," which, by sec. 139.25 (1), "includes all ardent, spirituous, distilled, or vinous liquors, liquids, or compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes, but shall not include 'fermented malt beverages' as defined in subsection (10) of section 66.05."

The answer to the question hinges upon the meaning and interpretation which must be given to the phrase, "fit for use for beverage purposes." There are on the market certain liquids known as whisky, brandy, rum, gin, etc., which are judicially recognized as being intoxicating liquors and ordinarily considered as fit for, and used for beverage purposes. There are also on the market certain other liquid preparations which could physically be drunk, in some quantities at least, although the liquids themselves might contain poisonous or deleterious substances or ingredients which would result in the ruination of health and perhaps in fatalities. The latter class of liquids, while perhaps not designed for use for beverage purposes, are not considered as intoxicating liquors, although possibly in fact intoxicating, and would unquestionably not be considered as fit for use for beverage purposes. Between these two extremes there exists a class of liquids composed of tinctures, extracts, syrups, toilet, medicinal, pharmaceutical and antiseptic preparations. Many of these articles are manufactured in good faith and intended by the manufacturer for use exclusively as medicinal, toilet or flavoring liquids, etc. Many of them have an alcoholic content ranging as high as 80 to 90 per cent or possibly in excess of this. Many of these preparations have been prostituted for uses for which they were not originally

designed, and for which they are not particularly adapted—namely, to uses for beverage purposes. In a few instances products of this intermediate class have been placed upon the market by the manufacturer with the intention of selling them for beverage purposes, although the label upon each article itself purported to represent that it was intended as a tonic, a laxative, or some other nonstimulating and inoffensive preparation.

Although, as stated before, many of these preparations were not designed for beverage purposes, they can be, and have been successfully drunk with the desired result—namely, the production of various stages or states of intoxication. During the course of legislative debate upon Bill No. 2, S., which ultimately became ch. 3, Laws Special Session 1933, numerous amendments to the bill were introduced in both the senate and the assembly. Several amendments, specifically amendments No. 8, S., 22 S. and 2, A., related to the exemption from taxation of these preparations which have just been mentioned and discussed as being in the intermediate class. Each of those amendments, which attempted to exclude these articles from taxation was defeated by the legislature, indicating very definitely the legislative intent that those among this class which could be considered as “fit for use for beverage purposes” should be subject to the occupational tax.

The latter portion of the definition of intoxicating liquor, as found in the said ch. 3, follows very closely the definition of intoxicating liquor used in the federal statutes, where it is defined to include “\* \* \* any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: \* \* \* U. S. C. A., Title 27, sec. 4.

The phrase, “fit for use for beverage purposes,” as used in the federal statute, has been the subject of discussion in several cases in the United States district courts. It was held, in *Middlebrooks et al. v. United States*, 23 Fed. (2d) 244, that the “\* \* \* expression ‘fit for beverage

purposes' describes equally well both beverage and non-beverage liquor \* \* \*'' (p. 244).

It was again stated, in *Blaine et al. v. United States*, 29 Fed. (2d) 651, 653:

“\* \* \* The indictment was better for omitting to allege that the liquor was ‘fit’ for beverage purposes, because that would describe equally well beverage and nonbeverage liquor. *Middlebrooks v. United States* (C.C.A.) 23 Fed. (2d) 244.”

The case of *Hawthorne et al. v. United States*, 37 Fed. (2d) 316, was an appeal from a conviction on a charge of possession and transportation of intoxicating liquor. The specific liquid involved was represented by the defendants as being toilet water. It was essentially a preparation of alcohol, especially denatured with the addition of an oil. The evidence proved that the liquid, as denatured, was not in any sense a toilet water, and had no known use in the science or in the arts, showing that the denaturing was done for the sole purpose of disguising the alcohol and rendering easy the violation of the law in transportation. In this opinion, the United States district court, speaking by Mr. Northcott, said, pp. 317, 318:

“With regard to the third question as to whether the trial court should have instructed a verdict of not guilty unless the jury found the liquid in evidence was fit for beverage purposes, the trial court instructed the jury:

“I instruct you further that since the National Prohibition act uses the words, “alcohol,” “whisky,” “brandy,” “wine,” and other words in the broad generic sense, it is not necessary that there be proof of actual fitness of this alcohol for beverage purposes at the given time, provided it is reasonably fit in the sense that it is an article which, with little, or with a very simple change, can be put in the customary condition for beverage purposes. That, I understand, to be the proper construction of the law, because, otherwise, the very purpose of the law might be defeated by an obviously simple method of temporarily changing the liquid into a state which did not, fundamentally, affect its use for beverage purposes, but, temporarily, might make it, to a certain extent, unfit, but not poisonous. And, therefore, because “alcohol” is one of the generic terms used in the Act, just as is “whisky,” it is not necessary, as it would be with respect to some other kinds of drinks or liquors not so mentioned, to prove the complete fitness at the given time for beverage purposes.’”

“\* \* \*

“\* \* \* it would be illogical to hold that a disguising or denaturing of alcohol in a way that could have served no other purpose than to aid in the violation of the law was a good defense to the charge of transporting alcohol. Such a subterfuge should not be allowed to cover up violations of the law. \* \* \*”

It would be equally illogical to condone a similar subterfuge as a method of evading payment of an occupational tax. The latter portion of the instructions of the court might indicate that the rule which was applied to the alcohol involved in that case might not be applied to those liquids whose generic appellation was not found in the statute. Such a construction, however, was not placed upon this language in subsequent decisions of the United States district court which cited the opinion in the *Hawthorne* case. The following quotation is taken from *United States v. Nomel Products Company, Inc., et al.*, 41 Fed. (2d) 544, 545-546, which related to a fluid extract of ginger having an alcoholic content in excess of 81 per cent by volume:

“Among the definitions of the adjective ‘fit,’ given in Webster’s Dictionary and in the Standard Dictionary, are:

“Webster: ‘Adapted to an end, object or design; suitable by nature or by art; suited by character, qualities, circumstances, education, etc.; qualified; competent; worthy.’

“Standard: ‘Adapted to an end, aim, work, or design; adequate; competent; qualified; \* \* \* conformed to a standard of duty or taste; congruous; suitable; appropriate; \* \* \* in a state of preparation; ready; \* \* \* as if; all but; well nigh. \* \* \*’

“In harmony with both dictionaries, it is open to us to attribute to the word ‘fit’ the significance either of an existing capacity or of a capacity that may be consummated by further action. In these circumstances, it seems clear that the court is required to select, as between the two permissible alternatives, that interpretation which harmonizes with the general scheme of the statute and which would assist in the ultimate realization of the indisputable aim of Congress. Plainly evasion of the prohibitions of the statute would be easy if nonpermitters were left free to handle at will substances containing 81 per cent. of alcohol which become drinkable by mere dilution with water.”

“\* \* \*

"It has been held, *Hawthorne v. United States* (C.C.A.) 37 F. (2d) 316, 318, that an article of the prohibited alcoholic content which at the moment was not so prepared that humans could appropriately use it as a beverage, but which, by elimination from it of oil, could easily be rendered so usable, is within the terms of section 1 of title 2, an article which is 'fit for use for beverage purposes.' The instructions by the lower court to the jury (page 317 of 37 F. (2d)), sustained on appeal, were that: 'It is not necessary that there be proof of actual fitness of this alcohol for beverage purposes at the given time, provided it is reasonably fit in the sense that it is an article which, with little, or with a very simple change, can be put in the customary condition for beverage purposes.'

"Here combination of water with the extract of ginger makes the fluid an acceptable beverage. Certainly that change is 'little,' or 'simple.' I see no difference between addition and subtraction as the process required to render the substance dealt with ready for beverage use. \* \* \*"

In a supplemental opinion the court discussed the holding of *Campbell v. Galeno Chemical Co.*, 50 S. Ct. 412, and *Campbell v. Long & Co.*, 50 S. Ct. 415, holding that neither of these decisions conflicted with his own ruling.

In the case of *Burnett et al. v. United States*, 62 Fed. (2d) 452, (Dec. 1932), also involving the fluid extract of ginger, the court stated, p. 455:

"It is contended that the fluid extract of ginger was not fit for use for beverage purposes because it had to be diluted before it could be drunk. We are of the opinion that a compound or liquid is fit for beverage purposes, within the meaning of section 4, if it can be made potable by a simple process, such as dilution with water, ginger ale, or the like. *Hawthorne v. United States* (C.C.A. 4) 37 F. (2d) 316."

The case of *United States v. Nomel Products Co.*, 47 F. (2d) 575, might seem to indicate that extract of ginger possessed as a medicinal preparation was there held as a matter of law to be not fit for beverage purposes. That case, however, related simply to the question of the sufficiency of an affidavit made for the purpose of securing a search warrant. The affidavit stated in so many words that the extract of ginger was not fit for use for beverage purposes when seized. This affidavit, therefore, was not sufficient as the basis for the issuance of a search war-

rant. The case must not be regarded as in conflict with the other cases cited to the effect that fluid extract of ginger is fit for use for beverage purposes when mixed with a diluent.

Numerous state courts have had occasion to pass upon the meaning of certain phrases relative to liquids which have been used for beverages, but are generally considered as being nonbeverage liquids. The phrase "capable of being used as a beverage" was held in the case of *Tenant v. F. C. Whitney & Sons*, (Wash.) 234 Pac. 666, to mean "\* \* \* a liquid that is reasonably capable of being drunk, either for the pleasure of drinking or its after effect, and does not apply to a liquid that it is possible to swallow, but not reasonably fit or palatable" (p. 670).

It will be noted that in this definition the word "fit" is used. Reference to Webster's Dictionary will disclose that the word "fit" is given as a synonym for "capable." The same court further elaborated upon this phrase in the case of *State v. Powers et al.*, 271 Pac. 584, where it was said, p. 586:

"It is next urged that the evidence did not show that Abbott's Bitters is an intoxicating liquor and that it is capable of being used as a beverage. The question of whether a given liquid is capable of being used as a beverage manifestly is a question of fact. There is no marked dividing line between those liquids which are generally known to be for beverage purposes and those which are strictly nonbeverage. It should be noticed at the outset, in determining this question, that the statute defining intoxicating liquors does not classify the liquids as 'beverages,' but includes within its scope liquids that are 'capable of being used as a beverage.' This is a very broad term and must include within its purview those liquids which, although not generally considered as beverages, are yet capable of being so used. This must necessarily be so when we consider that the purpose of initiative measure No. 3 was to prohibit the sale of intoxicating liquor. In doing so, it was realized that many persons accustomed to ordinary intoxicants would turn to other liquids for a substitute. It might be that the other liquids would not be so palatable and have after effects somewhat undesirable, but whether these things would be sufficient to deter the person from drinking them would depend to a large

extent upon the individual. Keeping in mind then the purpose of the statute and its wide scope, it is easily seen that there is a large zone within which there fall many liquids theretofore generally associated in the public mind with wholly nonbeverage drinks."

The case of *Ballabanos v. The State of Ohio*, 15 Ohio App. 520, discussed the same phrase which is found in our own statute, as it applied to Jamaica ginger.

"The principal contention of counsel for plaintiffs in error is that this compound was not fit for beverage purposes, and, therefore, did not come within the statute. It is undisputed that persons did purchase and use it for beverage purposes, and became intoxicated from drinking it. The use of the word 'fit' in this statute must have been intended by the legislature to refer to or be 'in correspondence with' liquor, to-wit: brandy, whiskey, alcohol, etc. The compound contained ninety per cent, of alcohol by volume. It was sold and used for beverage purposes. It cannot be said that because it might be injurious to health it could be sold and the vendor not be liable for a violation of the prohibition act" (p. 522).

The following cases also indicate quite conclusively that Jamaica ginger can be considered as an intoxicating liquor: *McLean v. People*, (Colo.) 180 Pac. 676; *Young v. State*, (Miss.) 102 So. 161; *Ex parte Sharp*, 13 Fed. (2d) 651; *People v. Philpott*, (Mich.) 188 N. W. 497; *Davis v. State*, (Tex.) 292 S. W. 1109; *Carson v. State*, (Ind.) 182 N. E. 246.

That tincture of ginger, a solution pharmaceutically prepared by using diluted alcohol as a solvent on ginger roots could also be considered as an intoxicating liquor is shown by the case of *Ellwanger v. State*, (Ind.) 180 N. E. 287.

It was also held by the supreme court of the state of Washington, in the case of *State v. Ebel*, 13 Pac. (2d) 1091, 1092, that under the prohibition act of that state,

"The term 'capable of being used as a beverage' must not be limited to liquor that might be supposed to be reasonably fit to drink, or which some persons might consider palatable."

In the case of *Boliver v. Monnat*, (N. Y.) 238 N. Y. S. 616, 620, it was held, in reference to the national prohibition act which, it will be recalled, has in its definition of

intoxicating liquor the same phrase which is found in our own statute,

“\* \* \* It is alleged in the complaint that the liquid sold by the defendant to the plaintiff contained methyl or wood alcohol. If it contained this deleterious ingredient, it was not a liquor or an intoxicating liquor ‘fit for use for beverage purposes.’ \* \* \*”

The liquid in this case was a kind of a whisky which was drunk by the purchaser, who became blind as a result of the drink. The methyl or wood alcohol did not render the liquid undrinkable but, in the light of the holding of this case, it cannot be said that the phrase “fit for use for beverage purposes” would include all liquids which can conceivably be used for beverage purposes.

*Commonwealth v. Brennan*, (Mass.) 159 N. E. 633, was a prosecution for the unlawful sale of intoxicating liquors. Defendant was a salesman in the employ of the Virginia Dare Extract Company, a firm engaged in the manufacture and sale of flavoring extracts, which were sold to various grocery stores and jobbers. The court, at p. 634, quoted from the case of *Commonwealth v. Lanides*, 239 Mass. 103:

“It is a question of fact whether the preparation is a beverage, and if used extensively for such purposes and is intoxicating, a jury is warranted in finding that it is an intoxicating beverage, although it is called a medicine and is taken by many only for medicinal purposes. \* \* \* When such an article is kept for sale, the question to be decided is, Is the substance an intoxicating beverage? If there is any evidence to show its common use as such, then the question is one of fact.’”

*Brandon v. State*, (Ala.) 134 So. 890, was a prosecution for the sale and possession of lemon and vanilla extracts, charged as being a liquor, liquid, or drink made or used for beverage purposes containing alcohol. The court said, p. 891:

“It, therefore, becomes a question for the jury under the facts as to whether in good faith the defendant kept and sold the lemon or vanilla extract as a culinary article of commerce or as a beverage. In passing on this question, the intent of the buyer as to the use to be made of the extract and the intent of the seller are to be considered,

and any evidence tending to establish these facts is relevant. 33 Corpus Juris, 492 (2) 2.”

Reference is made again to the case of *State v. Powers et al.*, 271 Pac. 584, where it was said p. 586:

“\* \* \* The question of whether a given liquid is capable of being used as a beverage manifestly is a question of fact.”

Under ch. 3, Laws Special Session 1933, an occupational tax should be collected upon all ardent, spirituous, distilled, or vinous liquors, liquids, or compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes, but these shall not include “fermented malt beverages” as defined in subsec. (10), sec. 66.05, Wis. Stats. It is our opinion that the phrase, “fit for use for beverage purposes,” as used in the said ch. 3, is not confined only to liquors which are intended for beverage purposes. It means a liquid that is reasonably capable of being drunk, either for the pleasure of drinking, or its after effect, and does not apply to a liquor that it is possible to swallow but that is not reasonably fit or palatable. A liquid is fit, however, within the meaning of this statute when it can, with little or with a very simple change, be put in condition for use for beverage purposes, whether such process be by addition in the form of dilution or by subtraction. This office cannot go beyond this point in stating, as a matter of law, what is taxable and what is not taxable. The determination of the question of whether a liquid is fit for use for beverage purposes will, in a great many cases, be one of fact rather than one of law.

Attention is directed to the provisions of sec. 139.26, subsecs. (1) and (2) which exempt from the occupational tax provided for in ch. 3, Laws Special Session 1933, “\* \* \* wine used for sacramental purposes and alcohol used for industrial purposes,” as well as “\* \* \* wines and fermented malt beverages made in the home and used solely for home consumption.” Nothing in the above opin-

ion is intended as in any way limiting the exemptions which are specifically provided in the two subsections just mentioned.

JEF

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*Banks and Banking—Public Deposits—Taxation—*Under ch. 435, Laws 1933, income tax money collected by Wisconsin tax commission and deposited in various banks is classed as state money until distributed to counties, towns, cities and villages, for purposes of payment into deposit fund, and two per cent insurance on this money payable to state deposit fund must be paid by state treasurer out of general fund.

January 23, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

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

“Under ch. 367, Laws 1933, the tax commission is empowered to collect the income tax. The state of Wisconsin will be divided into eight subdivisions to facilitate collections. The money collected each day will be placed on deposit in a local bank and remitted to the state treasurer once in every ten days.

“Upon the first day of March, June, September, and December, sixty per cent of the income tax collected by the tax commission is distributed to the counties, towns, cities and villages of the state.

“Under ch. 435, Laws 1933, the state is required to pay two per cent of its average daily bank deposits every quarter into the state deposit fund for insurance.”

The question raised in this connection is as follows:

“Is the income tax money collected by the tax commission and deposited in the various banks classed as state money, and shall the general fund pay the two per cent insurance on this money to the deposit fund as it does upon the daily balances the treasurer has in his state depositories?”

It is the opinion of this department that under ch. 435, Laws 1933, income tax money collected by the tax commission and deposited in the various banks must be classed as state money, until distributed to the counties, towns, cities and villages of the state, for the purpose of paying the insurance percentage into the deposit fund, and the general fund is liable to pay the two per cent insurance on this money to the board of deposits of Wisconsin, just as is done in the case of the daily balances which the state treasurer has in his state depositories.

While the statutes are not entirely clear on this question, it would seem that it was the intention of the legislature in the situation described above to require that the income tax money collected by the Wisconsin tax commission and held in the various banks be classed as state money, at least for the purpose of payment to the state deposit fund, and that the two per cent insurance on this money should be paid out of the general fund, and you are so advised.

JEF

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*Agriculture—Storage—Words and Phrases—Warehouseman—Owner or operator of garage or of automobile parking space for storage of automobiles is not included within definition of term "warehouseman" as used in sec. 99.32, subsec. (1), par. (a), Stats., is not subject to ch. 456, Laws 1933 and is not required to secure warehouseman's license.*

January 25, 1934.

CHARLES L. HILL,

*Department of Agriculture and Markets.*

You make inquiry as to whether or not a person operating a garage in which automobiles are stored by the day, week or month should secure a license under the provisions of ch. 456, Laws 1933.

You also ask if a person operating a parking space for the storage of automobiles is subject to the same law.

Sec. 99.32, subsec. (1), par. (c), Stats., provides:

“No person, firm or corporation shall act as a warehouseman as heretofore defined without a license so to do issued by the department of agriculture and markets. \* \* \*.”

Sec. 99.32, (1) (a) defines a warehouseman as follows:

“The term ‘warehouseman’ when used in this act shall include every corporation other than a municipal corporation or municipal board or commission or a railroad corporation, individual, firm or partnership storing personal property for hire except those warehousemen licensed under the provisions of section 111.02 and section 126.07 of the Wisconsin statutes and co-operative associations storing farm products and merchandise for its members and warehouses owned by individuals, partnerships or corporations using warehouses for storage of manufactured dairy products, or canned produce and dairy products, manufactured by them and except also field warehouses.”

The question which arises in this connection is whether an ordinary garage man or the operator of a parking space for the storage of automobiles is included within the definition of the term “warehouseman,” within the meaning of sec. 99.32 (1) (a), Wis. Stats. While the position might be taken that a garage man and the operator of a parking space for the storage of automobiles is subject to the state warehouseman statute (*New Jersey Manufacturers Asso. Fire Ins. Co. v. Galowitz*, 106 N. J. Law 493, 150 Atl. 408, 409), it would seem that in the common language and common understanding a garage man is not a “warehouseman.” See *Lewis v. Best Bi-Test Garage*, 200 Iowa 1051, 205 N. W. 983; *Wadhams Oil Co. v. State*, 210 Wis. 448, 456.

As the Wisconsin supreme court has so often said 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 Company v. State*, 210 Wis. 448, 456. In the common language a “garage man” is not a warehouseman. The term “warehouseman” has a well-defined and well-understood meaning. As was said in the *Wadhams Oil Company* case, *supra*, if one were to stop five hundred well informed intelligent persons and ask them where one

could locate a "warehouseman" it is quite probable that not a single one would suggest a garage man or parking space operator.

"This distinction which exists in the minds of the great majority of people in the use of these terms must have been present in the minds of the legislature when the act was passed."

Had the legislature intended to include "garage man" and "operators of automobile parking space," it would have used appropriate language for that purpose. We therefore conclude that "garage man" and "operator of automobile parking space" are not within the terms of sec. 99.32 (1) (a), Stats.

There are owners or operators of many other places where personal property is kept for storage for hire who would not be understood, according to the common and ordinary use of the language, to be "warehousemen" within the meaning of the Wisconsin statutes. Among these might be enumerated owners or operators of dance halls, theaters, and other amusement places, where coats, hats and sundry wearing apparel are stored for hire; railroad corporations and bus companies whose agents store grips, packages, parcels and other personal property for hire; the promoters of social affairs and other gatherings where wearing apparel is stored for hire, and the like.

Moreover, the statutes provide that a warehouse receipt may be issued for goods stored by a warehouseman. These warehouse receipts must embody within their written or printed terms, (a) the location of the warehouse where the goods are stored; (b) the date of issue of the receipt; (c) the consecutive number of the receipt; (d) a statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order; (e) the rate of storage charges; (f) a description of the goods or of the packages containing them; (g) the signature of the warehouseman, which may be made by his authorized agent; (h) if the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and (i) a statement of the amount of advances

made and of liabilities incurred for which the warehouseman claims a lien. See sec. 119.02 (1), Stats. Moreover, under subsec. (2), sec. 119.02 a warehouseman shall be liable to any person injured thereby, for all damage caused by the omission from a negotiable receipt of any of the terms required.

It is manifest that the warehouse receipts act has no application to a garage or automobile parking space or the owners or operators thereof.

This conclusion is strengthened by the fact that under the Wisconsin statutes the lien which a garage man has is not the same as the lien of a warehouseman. Under sec. 289.43 every keeper of a garage shall have a lien upon and may retain possession of any automobiles for the amount which may be due him for the keeping thereof until such amount is paid. The lien of the "warehouseman" is fixed by the provisions of secs. 119.29, *et seq.* See *Lewis v. Best Bi-Test Garage*, 200 Iowa 1051, 205 N. W. 983.

JEF

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*Banks and Banking—Public Deposits*—Board of deposits may enter into agreement to accept nonassessable capital stock of newly organized national bank in lieu of part of its claim against old bank.

Board of deposits may not enter into agreement to accept capital stock of state bank which is subject to statutory assessment in lieu of part of its claim.

January 26, 1934.

**BOARD OF DEPOSITS.**

Attention Gerald C. Maloney, *Assistant Secretary.*

You request the opinion of this department upon the following questions:

1. You state that a national bank located in Wisconsin, which is in the hands of a conservator, has proposed a reorganization plan whereby depositors are to waive a certain percentage of their claim against the bank, and,

for the remainder, are to receive a certain percentage in cash, and the balance in form of capital stock of the new bank which, under the federal statutes, is nonassessable.

The question which arises in this connection is: Can the board of deposits of Wisconsin enter such agreement and accept nonassessable capital stock of a newly organized national bank in lieu of a part of its claim against the old bank?

A careful consideration of the powers of the board of deposits of Wisconsin as contained in the Wisconsin statutes and of the purposes of such board would indicate and, it is the opinion of this department, that the board of deposits may enter into the proposed agreement. While the express powers conferred by statute upon the board would not seem to authorize the board to enter into the proposed agreement, in view of the broad powers conferred upon the board and considering the intention of the legislature in adopting the act, this department must hold that the board of deposits has power to enter into the proposed agreement.

2. A state bank now in the hands of the banking commission for the purpose of liquidation has proposed a reorganization plan whereby depositors are to waive 70% of their claim against the bank, and are to receive in lieu thereof a participating trust certificate payable out of certain assets of the old bank. The depositor is to receive capital stock of the reorganized bank equal to 30% of such deposits, which stock will be liable for the statutory assessment of 100%.

The question which arises in this connection is: Can the board of deposits of Wisconsin enter such agreement and accept capital stock of a state bank which is subject to a statutory assessment in lieu of a part of its claim?

It is the opinion of this department that the board of deposits of Wisconsin has no power to enter into the proposed agreement referred to in your second inquiry and may not accept capital stock of a state bank which is subject to a statutory assessment. The facts as propounded in the second question are quite different from the facts submitted in your first question. In the first question the

capital stock of the national bank is, under the federal statutes, nonassessable. Moreover, in the first situation, while the depositors are required to waive a certain percentage of their claims against the bank for the remainder, they do receive a certain percentage *in cash* and the balance in the form of capital stock.

Under the facts submitted in the second situation not only would the depositors waive 70% of their claims against the bank but for the remaining 30% would receive no cash whatsoever and would receive only capital stock of the reorganized bank, which stock, under the state statutes, may be liable for the statutory assessment of 100%. In other words, in this situation the board of deposits would receive nothing of value and might, perhaps, subject itself to an additional liability because of its ownership of capital stock of the reorganized state bank.

We therefore are of the opinion, and you are so advised, that the board of deposits has no power to enter into the agreement outlined in your second question.

JEF

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*Automobiles — Taxation — Common Carriers — School Busses*—Bus used entirely for hauling school children under contract with school district is not subject to provisions of ch. 488, Laws 1933, which regulates and provides tax upon motor carriers.

January 26, 1934.

EDMUND H. DRAGER,  
*District Attorney,*  
Eagle River, Wisconsin.

You have inquired whether a bus used entirely for the hauling of school children, where such hauling is done pursuant to a contract between the owner of the bus and a school district, is subject to the provisions of ch. 488, Laws 1933.

The answer is in the negative.

So far as the transportation of passengers by motor vehicle over the highways of Wisconsin is concerned, the

only operations of motor vehicles which are subject to the law are those which are performed by what the law defines as common motor carriers of passengers. In other words, unless a person engaged in the business of transporting passengers (and not property) by motor vehicle on the highways of Wisconsin is what the law designates and defines as a common motor carrier of passengers, he is not subject to the law at all. Sec. 194.07, Stats.

By the terms of the law, a common motor carrier of passengers is one who (1) holds himself out to the public, (2) as willing to undertake for hire (3) to transport persons by motor vehicle (4) between fixed termini or over a regular route upon the public highway. Sec. 194.01, subsec. (6). Fixed termini, as used in the above definition, is defined in the law as "incorporated or unincorporated municipalities in this state or the boundary lines of this state." Sec. 194.01 (7).

It is our opinion that the operator of a school bus, as described in your question, is not a common motor carrier of passengers as defined in the law, for the reason that he does not hold himself out to the public as willing to undertake any service within the limit of his facilities and, in many instances at least, he does not operate between fixed termini as defined by the statute. If there were such a thing, the operator of a bus would be a contract motor carrier of passengers, comparable to the contract motor carrier of property as such contract carrier is distinguished from a common motor carrier of property. Accordingly, it is not necessary for the owner of a school bus which he uses exclusively for the purpose outlined in your question to obtain any special permit from the public service commission or to pay any fees therefor.

It has been suggested that, inasmuch as by the provisions of sec. 194.02 the public service commission is given power and authority as well as the duty to supervise and regulate the transportation of persons and property by motor vehicles upon the public highways, it is the duty of the public service commission to regulate school busses. But whatever may be the effect of the general expression of legislative intent in sec. 194.02, that general expression is insufficient to authorize the public service commission

to exact fees for or taxes upon the operation of vehicles upon the public highways of Wisconsin. We are of the opinion that this would be an attempt to confer legislative power upon the public service commission, which the legislature could not do, even if it intended to and made its intention clear and unmistakable. The power to regulate and supervise, whatever it may amount to, is not a grant of legislative power and does not include the authority to exact fees, taxes or penalties unless the same are expressly provided in the legislative act itself.

You inquire further as to whether the use of these school busses for other purposes makes them subject to the law. They become subject to the law when and if the operator thereof becomes a common motor carrier of passengers as defined by subsec. (6), sec. 194.01, Stats. And you are advised that in order to be a common motor carrier of passengers a person must do not merely one but all of the things set forth in the definition of that term, which have been outlined above. It is possible for the owner of a so-called school bus to use it in his operations as a common motor carrier of passengers. If he does so he is subject to the law and must obtain a certificate as well as a permit for the vehicle so used, and such vehicle would not be exempt from the provisions of the law merely by reason of the fact that it was used part of the time as a carrier of school children, under contract with the school district or the parents of such children.

JEF

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*Elections—Nominations—Primaries—Commission cities under secs. 63.01 to 63.14, Stats., must hold primaries pursuant to sec. 10.39, notwithstanding provisions of sec. 5.025.*

January 29, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You request the opinion of this department on the following statement of facts:

"Ch. 433, Laws 1933, created sec. 5.025 prohibiting city primaries, except in city of Milwaukee, unless ordered by the governing body, or by petition.

"The same chapter re-enacts and renumbers 6.045 and 10.32 to be sec. 10.39 and amends subsec. (1) without eliminating the requirement of primaries in commission cities.

"Are commission cities required to hold primaries notwithstanding the apparent prohibition contained in the new sec. 5.025?"

Sec. 3, ch. 433, Laws 1933, among other things, re-enacts and renumbers former sec. 10.32 to be sec. 10.39 and amends subsec. (1) thereof by adding at the beginning of the paragraph the italicized words as follows:

*"In cities operating pursuant to sections 63.01 to 63.14 of the statutes candidates for mayor and councilmen shall be nominated at large by a primary election three weeks before the municipal election in the manner provided for the nonpartisan nomination of candidates for elective city offices by chapter 5, so far as such provisions are applicable, and shall be elected by the voters of the city at large."*

Sec. 4, ch. 433, Laws 1933, among other things, added sec. 5.025 to the statutes which reads as follows:

"Except in cities of the first class no primary election shall be held in any city for the nomination of candidates for city office, including city supervisor, unless ninety days prior to the city election such city either by a three-fourths vote of its governing body shall provide for, or by a petition signed by electors of said city equal in number to not less than fifteen per cent of the vote cast therein for governor at the last preceding general election and filed with the city clerk shall require, a primary for any specific election. When no primary election is held, the candidates for such offices shall be nominated in the manner provided in section 5.26."

A reading of the above quoted statutes might indicate to some persons an apparent conflict between the two sections. However, in the view that we take of this matter, it is unnecessary to discuss at length either the history, scope or purpose of the statutes or the various constructions that might be placed thereon, for, after careful consideration and study, we are of the opinion that it was the manifest intention of the legislature that commission

cities operating pursuant to secs. 63.01 to 63.14 of the statutes must, under sec. 10.39, hold primaries, notwithstanding the provisions of sec. 5.025 of the statutes.

However, commission cities not operating under secs. 63.01 to 63.14 are governed by the provisions of sec. 5.025 and, hence, except in the city of Milwaukee, may not hold primaries unless ordered by the governing body or by petition.

JEF

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*Public Officers—District Attorney*—It is not duty of district attorney to defend sheriff in civil action brought against him for damages on account of shooting of person engaged in picketing.

January 29, 1934.

FRANK F. WHEELER,  
*District Attorney,*  
Appleton, Wisconsin.

You state that during the recent milk strike a deputy sheriff shot a person who was engaged in picketing, and that the county sheriff and his said deputy are now defendants in a civil action brought by the injured party to recover damages.

The question presented is whether it is your duty, as district attorney, to defend the sheriff in such action.

The question must be answered, No. Sec. 59.47, Stats., defining the duties of the district attorney, does not extend his duties to such a case as is here presented. The attorney general has previously ruled that it is not the duty of the district attorney to defend a county police officer in a civil action brought against him for false arrest and imprisonment. XXI Op. Atty. Gen. 430. That ruling is equally applicable to the instant case. Other analogous rulings are found in XIV Op. Atty. Gen. 602, III Op. Atty. Gen. 684.

JEF

*Contracts—Corporations—Small Loans Act*—Loan contracts made prior to effective date of order by banking commission establishing new small loan rate of 15% pursuant to authority granted commission by ch. 347, Laws 1933, will not be affected by that order.

It is permissible to issue two small loan licenses to one person, partnership or corporation to do business in same office, difference being one in name only.

It is necessary for small loan company which is discontinuing business and liquidating its loans to secure license.

January 30, 1934.

BANKING DEPARTMENT,  
*Banking Commission.*

You ask what effect the new small loan rate of 15% per annum as established by an order of the banking commission pursuant to authority granted it by ch. 347, Laws 1933, will have upon loan contracts made prior to the effective date of that order.

Loan contracts made prior to the effective date of an order by the banking commission establishing a new small loan rate of 15% pursuant to authority granted the banking commission by ch. 347, Laws 1933, will not be affected.

The constitution of the United States, art. I, sec. 10, cl. 1, provides:

“No State shall \* \* \* pass any \* \*. \* law impairing the Obligation of Contracts, \* \* \*”

It is stated in 6 R. C. L. 350:

“\* \* \* The general rule is that the rate of interest allowed by law at the time a contract is made is deemed to be a part of such contract and protected from impairment by subsequent legislation. \* \* \*”

And in *Koshkonong v. Burton*, 104 U. S. 668, it was held that the right to interest upon interest, if allowed by statutes then in force, cannot be impaired by subsequent legislation declaring their true intent and meaning. Such legislation can only be applied to *future transactions*. It therefore follows that loan contracts entered into before the effective date of an order by the banking commission estab-

lishing a new small loan interest rate of 15% are not affected.

You ask whether loan contracts made prior to the effective date of an order by the banking commission establishing a new rate of interest for small loans, but renewed subsequent to such order, will be affected. Such loan contracts, where renewed subsequent to the effective date of an order by the banking commission establishing a new small loan interest rate of 15% per annum, must comply with the requirements of such an order.

The state has the right to fix (the right to fix includes the right to change) the rate of interest which any person, partnership or corporation may charge for the use or forbearance of money. *State ex rel. Ornstine v. Carey*, 126 Wis. 135 and *Fahringer v. State*, 148 Wis. 291.

There is no unconstitutional exercise of that right where an order establishing a new small loan interest rate is made applicable to *future transactions only*. *Koshkonong v. Burton, supra*.

Ch. 347, Laws 1933 (sec. 214.25, subsec. (1), Stats.) reads in part:

"Until the rate of interest or charges fixed by the department, under authority of sec. 214.07, shall be in effect, the maximum rate of interest permitted under sec. 214.19 shall be three and one-half per cent per month \* \* \*."

It is apparent that the legislature did not make the rate as fixed by the banking commission retroactive in its nature.

The renewal of a loan contract (which was entered into before the effective date of an order establishing the new small loan interest rate) subsequent to the effective date of that order is such a *future transaction* and must necessarily be controlled by the statutes and orders issued pursuant thereto then in force.

You ask whether it is permissible to issue two small loan licenses to one person, partnership or corporation to do business in the same office, the difference to be one in name only.

It is permissible to issue two small loan licenses to one

person, partnership or corporation to do business in the same office, the difference being one in name only.

Ch. 347, Laws 1933, (sec. 214.02 (1), Stats.) relating to the licensing of small loan companies says:

“Application for a separate license to make small loans at each office to be operated under the provisions of this chapter shall be made to the department in writing, under oath, in a form to be prescribed by the department. *The department may issue more than one license to the same licensee.*”

A separate investigation fee may be charged for each application. Ch. 347, Laws 1933. (sec. 214.02 (2) ) reads in part:

“Every application for a license shall be accompanied by a fee of one hundred dollars for investigating the application \* \* \*.”

You ask whether it will be necessary for a small loan company which is discontinuing business and liquidating its loans to secure a license.

It is necessary for a small loan company which is discontinuing business and liquidating its loans to secure a license.

Sec. 115.09, subsec. (9), Stats., reads in part:

“No person, copartnership or corporation, except as authorized by this section and chapter 214 of the statutes, shall directly or indirectly charge, contract for or receive any interest or consideration greater than ten per centum per annum upon any loan. \* \* \*.”

The order of the banking commission made pursuant to authority vested in it by ch. 347, Laws 1933, temporarily fixes the new small loan rate at 15% per annum. Since 15% is in excess of 10% it will be necessary for a person who directly or indirectly charges, contracts for or receives any interest or consideration greater than 10% per annum to do so by authority of either ch. 115 or ch. 214, Stats. Small loan companies are regulated under ch. 214. Ch. 347, Laws 1933 (sec. 214.25 (2) Stats.) reads in part:

“Any person having a license under chapter 214, statutes of 1931, shall notwithstanding the repeal of said chap-

ter be deemed to have a license under this chapter for the remainder of the current calendar year, if not sooner revoked, suspended or surrendered, provided that such person shall have paid or shall pay to the department as a license fee for such period the sum of fifty dollars  
\* \* \*

It will be noticed that as a condition precedent to a continued license under ch. 214 it is necessary to pay to the department the sum of fifty dollars. If this condition is not complied with the company so failing to comply is without a license from the commission to operate and any continuation of operations would be in violation of the statutes. See sec. 115.09 (9), *supra*.

The fundamental purpose of ch. 214 is to vest in the banking commission control over small loan companies. To hold that a small loan company liquidating and discontinuing its business need not have a license is to divest the banking commission of control over such companies. Such a result is clearly contrary to the plain meaning of ch. 214.  
JEF

*Athletic Commission—Education—Boxing Exhibitions—*  
Social center boxing exhibitions held under auspices of high school are not under supervision of Wisconsin athletic commission.

February 1, 1934.

ATHLETIC COMMISSION.

Milwaukee, Wisconsin.

In a recent letter you ask the opinion of this department as to whether inter-social center boxing exhibitions would come under the general provisions of ch. 169, Stats., or whether these would be construed to come under subsec. (20), sec. 169.01 and thus without the jurisdiction of the state athletic commission.

Sec. 169.01 (20) reads:

“Nothing in this section shall be construed to apply to amateur boxing or sparring matches or exhibitions *conducted by or held under the auspices of* any university, college, normal school, or high school of the state, nor to any matches or exhibitions conducted by the American Legion for which no admission fee is charged.”

You enclose a letter from Miss Dorothy C. Enderis assistant superintendent of Milwaukee public schools, in which she writes that the Milwaukee public schools extension department, conducted by the Milwaukee board of school directors, holds boxing classes in its social centers.

It is the opinion of this department that the boxing activities contemplated by the classes in the Milwaukee social centers would come within the letter as well as the spirit of the exception set forth in sec. 169.01 (20) and thus would not be under the jurisdiction of the Wisconsin athletic commission. The social centers are one phase of the activities of the Milwaukee public schools extension department, conducted by the Milwaukee board of school directors, which also runs the schools of Milwaukee, so that we feel boxing activities can be said to be conducted or held under the auspices of a high school of the state.

As to the Madison social centers, the answer will have to depend upon by whom such centers are supervised and under what auspices they are conducted. Exceptions to

statutes must be strictly construed. If the social center is conducted in the same way and under the same type of management as the Milwaukee social centers, that is, if it is a part of the school system, then it would fall within the scope of sec. 169.01 (20). However, if the social centers are not conducted or held under the auspices of the school system they would be under the jurisdiction of the athletic commission.

Boxing exhibitions under the auspices of civic clubs are not exempt under sec. 169.01 (20) unless they are also under the auspices of some school.

JEF

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*School Districts—School Taxes—Taxation—Forest Crop Lands*—Local school taxes levied by school district must be entered on town tax roll and collected, irrespective of fact that town has in its possession forest crop land money portion of which it must also pay over to school district.

February 1, 1934.

THOMAS E. MCDUGAL,  
*District Attorney,*  
Antigo, Wisconsin.

You present the question as to whether a town which has received money on account of forest crop lands in the town may use such money for the purpose of paying the local school districts their annual school tax levies. In other words, may the town keep the local school tax levies off the town tax roll and not collect the same but, instead, pay such levies by means of the forest crop land money?

The question is answered, No.

Under the forest crop land law, ch. 77, Stats., and particularly by secs. 77.04 and 77.05, the money received by a town on account of forest crop lands in the town is represented by a charge of ten cents per acre paid by the owner of the land, plus certain aid paid by the state. A portion of such forest crop land money is required to be paid by the town treasurer to the various school districts

in the town. However, payment of any *such* money to any school district has no relation whatsoever to, and is in no sense a payment of, the local school taxes levied by the school district.

Local school taxes are levied by the school district and, when levied, they must be assessed and entered on the town tax roll. The school district clerk certifies the amount of such school taxes to the town clerk. It then becomes the duty of the town clerk to enter the same on the town tax roll. It then becomes the duty of the town treasurer to collect the same. When collected, it becomes the duty of the town treasurer to pay the same over to the school district, subject to the provisions of sec. 74.15, subsec (2), Stats. There is no choice in the matter. In short, the levy, assessment, entry, collection and distribution of local school taxes constitute a matter which is separate and independent of, and which has no relation to, the receipt and distribution of forest crop land money. See *State ex rel. Carlson v. Kingston*, 210 Wis. 301.

JEF

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*Public Officers*—Sheriff has no legal claim against county for reimbursement for expenditures incurred by him in successfully defending civil action brought against him for killing person while attempting to arrest him.

Sec. 331.35, subsec. (1), Stats., which authorizes county to reimburse county officer who is on salary basis for expenses incurred in successfully defending action for personal liability growing out of performance of official duties is permissive only; under it county board may exercise its discretion as to whether claim for such expenses shall be allowed.

February 1, 1934.

WENDELL MCHENRY,  
*District Attorney,*  
Waupaca, Wisconsin.

You state that the county sheriff has filed a claim against the county for reimbursement for expenditures incurred by him for legal services in successfully defending a civil

action brought against him for the killing of a person while attempting to arrest him.

The question presented is whether this claim constitutes a *legal charge* against the county.

The question must be answered, No, the reason being that there is no statute imposing liability upon the county for such a claim. In the absence of a statute imposing liability on the county,

“\* \* \*. When a citizen accepts a public office, he assumes the risk of defending himself against unfounded accusations at his own expense. \* \* \*.” *Chapman v. City of New York*, (N. Y.) 61 N. E. 108, 110.

It has not been overlooked that subsec. (1), sec. 331.35, Stats., provides as follows:

“Whenever in any city, town, village, or county charges of any kind shall be filed or an action be brought against any officer thereof in his official capacity, or to subject any such officer, who is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action shall be discontinued or dismissed or such matter shall be determined favorably to such officer, or such officer shall be reinstated, or in case such officer, without fault on his part, shall be subjected to a personal liability as aforesaid, such city, town, village, or county may pay all reasonable expenses which such officer necessarily expended by reason thereof. Such expenses may likewise be paid, even though decided adversely to such officer, where it shall appear from the certificate of the trial judge that the action involved the constitutionality of a statute, not theretofore construed, relating to the performance of the official duties of said officer.”

However, that statute is purely permissive. Our own supreme court has held that a somewhat similar statute providing to the effect that a city official “may” be reimbursed for expenses incurred when proceeded against in his official capacity or because of some act arising out of the performance of his official duty, is permissive only, and *vests no right* in the official to recover any portion of such expenses from the city. *Curry v. Portage*, 195 Wis. 35.

JEF

*Constitutional Law — Legislature — Joint Resolutions — Special Session*—Joint resolution amending constitution of Wisconsin cannot be considered at special session of legislature if such subject is not included within governor's call.

February 2, 1934.

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

Resolution No. 21, S.

"Resolved by the senate, That the attorney-general be and he is hereby respectfully requested to render an official opinion as promptly as possible on the question whether a joint resolution amending the constitution of Wisconsin can be considered at this special session of the legislature if such subject is not included within the governor's call.  
\* \* \*"

It is the opinion of this department that under the constitutional provision of this state the governor is required in his proclamation to state the purpose for which the special session has been called, and the power of the legislature to legislate when convened in such special session is limited to the transaction of business deemed necessary to accomplish the special purposes for which it was convened. In other words, under the express provisions of art. IV, sec. 11, Wisconsin Const., when the legislature is convened by the governor in special session,

"\* \* \* no business shall be transacted except as shall be necessary to accomplish the special purposes for which it was convened."

See the following Op. Atty. Gen.: VIII 663, XI 249, XVII 171. See also: 36 Cyc. 944; 59 C. J. 91; *In re Governor's Proclamation*, 35 Pac. 530, 531, 19 Colo. 333; *State v. Clancy*, 77 Pac. 312, 30 Mont. 529; *Chicago B. & Q. R. Co. v. Wolfe*, 61 Neb. 502, 86 N. W. 441, affirmed without opinion, 187 U. S. 638, 47 L. Ed. 344, 23 S. Ct. 847; *Denver & R. Co. v. Moss*, 50 Colo. 282, 115 Pac. 696.

The governor may amend his call for a special session of the legislature, adding new subjects or he may issue

a new call for the same time, adding new subjects. See VII Op. Atty. Gen. 49.

The question of whether particular legislation falls within the purposes for which the special session was convened is one of fact to be determined when the occasion arises, for although a call for a special session of the legislature specifies in minute detail the laws which the governor wishes enacted, the legislature has power to enact any law designed to accomplish the purposes for which it was convened. See XI Op. Atty. Gen. 249.

The passage of memorials and resolutions merely expressive of the opinion of the legislature do not constitute "business" within the meaning of sec. 11, art. IV quoted above, and may be entertained by the legislature at a special session even though not enumerated in the governor's call. VIII Op. Atty. Gen. 663. However, a resolution amending the state constitution is not a resolution merely expressive of opinion so as to bring it within the exception noted in that opinion, but must be classified as legislation. See *The People ex rel. Attorney General, v. Charles F. Curry, Secretary of State*, 130 Cal. (Pomeroy) 82, which case involved the interpretation of a provision of the California constitution which provides that the governor "may, on extraordinary occasions convene the legislature by proclamation, stating the purposes for which he has convened it; and when so convened it shall have no power to legislate on any subjects other than those specified in the proclamation, but may provide for the expenses of the session and other matters incidental thereto" (Const. Cal. art. V, sec. 9). It will be seen that this provision is similar to that contained in art. IV, sec. 11, Wis. Const. In the California case a joint resolution, proposing to the people of the state an amendment to the constitution, was passed at a special session, although there was no mention of constitutional legislation in the governor's message, and the court said, p. 89:

"It may be admitted that proposing constitutional amendments is not legislation in the sense of passing statutory laws, but it is nevertheless performing a legislative function. It is one of the modes pointed out to initiate the enactment of constitutional law. The performance of such

a duty is neither executive or judicial, but purely legislative. No one would contend that the senate and assembly could propose constitutional amendments, except at the session of the legislature and while it is in session, and not before or afterward—that is, both houses in session, which constitute the legislature. \* \* \*

See also, page 90:

“The evident purpose of the restriction placed upon the action of the legislature when called together in extraordinary session by proclamation was to regulate the duration of such session, and thus diminish expenses, and the court should not, by a strained or strict construction, defeat these purposes. We are therefore, of the opinion, for the reasons stated, that the proposed constitutional amendment proposed at the extra session of the legislature [because not specified in the governor’s proclamation convening the legislature] \* \* \* is invalid \* \* \*”

Thus a joint resolution amending the constitution is not a resolution merely expressive of opinion, but is really legislation and cannot be valid unless there has been in the governor’s message calling together the special session or its amendments some authorization for such procedure on the part of the legislature. There was in Governor Schmedeman’s message to the special session of 1933 of the legislature, and in his additions by proclamations thereto, no mention of any constitutional amendment. Therefore, this special session (called in 1933) can *not* consider a joint resolution amending the constitution of Wisconsin.

JEF

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*Public Officers—Alderman—Malfeasance—Public Utilities Operator—Alderman may not lawfully be employed as operator of public utility which is owned and operated by his city.*

February 2, 1934.

HANS HANSON,

*District Attorney,*

Black River Falls, Wisconsin.

You ask whether an alderman may be employed as operator of the municipally owned electric power plant of his city.

The question is answered in the negative.

You state that selection to the position in question is vested in the city council. If such is the case the selection and employment of an alderman in such position is in direct violation of subsec. (2), sec. 66.11, Stats., which provides to the effect that 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 "the selection to which is vested in, such board or council." See the following Op. Atty. Gen.: XXII 480, XXI 209, XX 1193, XIX 267, XIV 494.

Under subsec. (10), sec. 66.06, however, it is provided to the effect that the city council shall appoint a board of public utility commissioners, but that the *commissioners* shall appoint a "manager" and "such subordinates" as may be necessary. However, the powers of the commissioners, at least so far as supervising the operation of the utility is concerned, are "under the general control and supervision of the \* \* \* council." There may be considerable question, therefore, as to whether the above provisions of subsec. (2), sec. 66.11 are strictly applicable in the premises. Be this as it may, there are other statutory provisions which are strictly applicable.

An alderman who at the same time is employed as operator of the municipally owned public utility of his city violates par. (d), subsec. (7), sec. 62.09, which provides in part:

"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. \* \* \*"

He also violates sec. 348.28, which forbids any officer of the state or of any city or other municipality to "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 or real property or thing in action, or in any contract, proposal or bid in relation to the same, or in relation to any public service, \* \* \* made by, to or with him

in his official capacity or employment, or in any public or official service.”

These conclusions are supported by numerous rulings, some of which are the following Op. Atty. Gen.: XII 537, 400, XX 1193, 196, XIX 268.

In XX Op. Atty. Gen. 196 at 198 it was said that if a county clerk were appointed to the position of county purchasing agent “\* \* \* his acceptance of the position would make him pecuniarily interested in a contract with the county in violation of sec. 348.28, Stats., as construed in *Henry v. Dolen*, 186 Wis. 622.” See also *Antigo Water Co. v. Antigo*, 144 Wis. 156.

JEF

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*Constitutional Law—Intoxicating Liquors—Public Officers—Common Council Member—Town Board Member—Village Board Member—Provision in liquor law prohibiting member of town board, village board or common council from selling, directly or indirectly, to any person, firm or corporation holding liquor license any material or thing that may be used by such licensee in his or its business is constitutional legislation.*

February 2, 1934.

N. H. RODEN,

*District Attorney,*

Port Washington, Wisconsin.

It appears that in the recent enactment adopted by the Special Session of the 1933-34 legislature, in ch. 13, the following provision was inserted:

“No member of any such town board, village board, or common council shall sell directly or indirectly or offer for sale, to any person, firm, or corporation that holds or applies for any such license any bond, material, product, or other matter or thing that may be used by any such licensee or prospective licensee in the carrying on of his or its said business.”

The question raised in this connection is whether the above quoted provision is constitutional.

It is well settled that any enactment by the legislature of necessary police regulations for the promotion of the public health, morals and safety, is valid if it tends to accomplish the purpose for which it was passed, if such purpose is a legitimate one and if such enactment applies equally to all people in the class.

In enacting legislation under its police powers the legislature may include within the purview of the statute certain acts which might in themselves be innocent and not the subject of police regulation, where the inclusion of such acts is necessary in the opinion of the legislature to make the police regulation effective.

It is manifest that the purpose of said ch. 13 was to regulate the sale of hard liquors within the state. It is clear that the purpose of the provision above referred to and here in question is to assist in carrying out such regulation. We are of the opinion that the provision in question is clearly constitutional legislation. No person has a vested right to any public office, nor has any one a vested right to sell hard liquors.

As was said in *State ex rel. Attorney General v. Thekan*, 184 Wis. 42, 48:

“\* \* \* Considerations of the public health and welfare are superior to the rights of private property and so-called vested rights. \* \* \*”

Without considering every conceivable objection that might be raised against the validity of the provision in question, we are of the opinion that the decisions in Wisconsin, as well as elsewhere, uphold such enactment. Among the decisions which might be cited as sustaining such legislation are the following: *Pennell v. State*, 141 Wis. 35; *Silber v. Bloodgood*, 177 Wis. 608; *Alby v. Smith*, 178 Wis. 138; *Pelkowski v. State*, 183 Wis. 322; *State v. Thekan*, 184 Wis. 42; *Day-Bergwald Company v. State*, 190 Wis. 8.

In view of the foregoing, you are advised that the provision in question is constitutional legislation.

JEF

*Building and Loan Associations—Insurance*—Domestic insurance company may not invest assets in paid up stock of building and loan association.

February 5, 1934.

PETER A. CLEARY, *Commissioner,*  
*Banking Commission.*

The question arises whether domestic insurance companies are authorized by the laws of this state to invest in paid up stock of a building and loan association. It is our opinion that this question must be answered in the negative. Sec. 201.25, Stats., relates to the investments of domestic insurance companies and lists a number of places where it is permissible for an insurance company to invest its assets. Subsec. (1) par. (f), provides in part:

“\* \* \* No such investment shall be made \* \* \* in the stocks, bonds or other evidences of indebtedness of any corporation, the owners or holders of which may, in any event, be or become liable on account thereof to any assessment except for taxes or laborers’ liens.”

In the case of *Northwestern National Insurance Company v. Freedy*, 201 Wis. 51, the language “owners or holders of which” etc., found in the above statute, modifies “stocks.” It is to be noted that this limitation upon the investment of insurance funds concerns investment in stocks, bonds or other evidences of indebtedness of any corporation where the owners or holders may, *in any event*, become liable to an assessment except for taxes and laborers’ liens.

Ch. 215 of the statutes provides for the creation and organization of building and loan associations and contains statutory regulations for the same. Sec. 215.33 concerns the liquidation of a building and loan association and taking possession of the same by the commissioner of banking. Sec. 215.33, subsec. (4) provides as follows:

“Upon taking possession of the property and business of such building and loan association, the commissioner of banking is authorized to collect moneys due to such building and loan associations, and do such other acts as are necessary to conserve its assets and business, and shall

proceed to liquidate the affairs thereof, as hereinafter provided. The commissioner of banking shall collect all debts due and claims belonging to it, and upon the order of the circuit court may sell or compound all bad or doubtful debts, and on like order may sell all the real and personal property of such building and loan associations on such terms as the court shall direct; and may, if necessary to pay the debts of such corporations, enforce individual liability to the stockholders."

The individual liability mentioned in the last portion of the statute just quoted probably refers to assessments of a nature similar to those which may be made against stockholders of a bank. Our supreme court has not had occasion to give an exact interpretation of this language. As a practical matter, it probably never will become necessary in the liquidation of a building and loan association to levy a cash assessment upon the stockholders to satisfy creditors, for the reason that it would be virtually impossible to so dissipate the assets of a building and loan association as to leave insufficient money to satisfy at least the creditors. In our view of the matter it becomes unnecessary to base the decision in this opinion entirely upon this statute however; but it may be well to quote from the case of *Leahy v. The National Building & Loan Association*, 100 Wis. 555. See pp. 565, 568-569:

"The fundamental idea of a building and loan association is mutual profit sharing. Its business necessarily is confined to its own members. Its object is to raise a fund to be loaned to its members. Each shareholder, whether a borrower or nonborrower, participates alike in all profits earned, and alike must assist in bearing the burden of expenses and losses. Such associations are the only ones that can issue their capital stock before it is paid for. The member makes his application, receives his stock, and agrees to pay for it in monthly instalments at a fixed rate. In case of default, he is subject to fine, which goes into the general profit fund for all alike. When the aggregate dues he has paid, with the credited earnings, equal the face value of his stock, he can no longer share in the earnings, and his stock is retired, and his membership in the corporation ceases. But the member has no claim to, or property in, any specific fund of the association. *Atwood v. Dumas*, 149 Mass. 167. The theory of our statutes and the law of all the cases is to the effect that such associa-

tions are purely mutual in their character, and that the members share in the common gains, and, from the very necessity of their relations, must bear a proportionate share of the losses, \* \* \*

“\* \* \*

“In this connection it may be well to refer to a clause on each certificate of membership issued prior to 1895. After certifying that the member is the holder of so many shares of stock of a certain maturity value, and in consideration of the first payment, together with the agreements contained in the application for membership, etc., the association will pay the member the maturity value of the stock upon the expiration of the period therein limited, the stock certificate further says: ‘This certificate is issued to and accepted by the holder upon the following express terms and conditions: 1st. The said shareholder shall not have any claim or interest in the affairs, assets, or funds of this association, nor the control of them, except as above specifically set forth, and assumes no liability of any kind whatsoever except as hereinbefore described.’ It is urged that under this contract the shareholder had no liability except the payment of his monthly instalments, and it follows as a necessary corollary that he is not liable for any losses or expenses. It is doubtful if this would be the legal effect of the contract when we come to consult the by-laws, which are printed on the back of all stock except prepaid certificates. But, whether it would or not, the insolvency of the association is alike fatal to this as well as to the other terms of the contract. If this were not so, it would lead to endless confusion and complication. If this claim is good for one, it is good for all. If these borrowers are exempted from liability for losses then every nonborrower may claim the same privilege, and each stockholder would, in legal effect, become a preferred creditor in the order in which he took membership,—a proposition utterly at variance with the scheme of the organization, and in violation of the plainest principles of equity.”

By ch. 250, Laws 1933, the legislature created sec. 215.336 (3), which provides as follows:

“After the commissioner shall have determined the losses existing, or which he shall determine may reasonably be sustained in the near future, he shall issue an order providing that the book value of each share be depreciated as stated in such order, and the officers shall forthwith proceed to depreciate the book value of all shares as ordered. A record shall be made on the books showing the amount by which the book value of the shares were depre-

ciated, and a copy of such record shall be filed with the commissioner. All dividends declared thereafter shall be credited to the book value of the shares as depreciated until such shares shall have reached the same value that such shares had immediately before the shares were so depreciated, thereafter the paid-up shares shall receive cash dividends and at the same time the installment shares shall be credited with dividends as earned and ordered by the commissioner."

Ch. 452, Laws 1933, provides for a similar depreciation of the book value of building and loan stock as a method of relief to associations in liquidation. Although as stated in the quotation from the *Leahy* case, a building and loan association is a mutual organization, the stock constitutes a liability of the association. Whenever the book value of the stock is depreciated, as provided by the statutes, some of the liabilities of the association to its stockholders have been decreased, and to the extent of that decrease certain moneys have been made available for use in other ways, as, for example, in the payment of creditors. There would seem to be no difference in the result between depreciating of the book value of the stock, and levying an actual cash assessment upon the stockholders. In our opinion this depreciation of the book value must be considered an assessment. That this interpretation quite possibly would be given by our supreme court is indicated by the following language taken from *Continental Investment & Loan Soc. v. People ex-rel. Gore*, (Ill.) 47 N. E. 381, 383:

"\* \* \* This difference of 20 per cent. was charged off to each member by an entry in his account on the stock ledger, and subsequently the total of the amounts so charged off was carried into the general ledger to the credit of the installment account. The effect of these entries was to reduce, to the extent of 20 per cent. of the previous payments, the amount carried to the credit of the several members, and to reduce to that extent the apparent liabilities. In other words, the association proceeded to distribute the \$35,000 against its shares of stock then outstanding by charging off on the books of the company each share's proportion of said amount. This method of increasing the assets or wiping out the shortage was indorsed by this court in the case of *Broadwell v. Association*, 161 Ill. 327, 43 N. E. 1067. There the stockholders of the as-

sociation held a meeting at which about three-fourths of the stock was represented, either in person or by proxy, and at which a resolution was adopted that the stock should be scaled down by charging against each member his pro rata share of such sum as might be necessary to meet any deficiency between the assets and liabilities; and in that case we said: 'Section 17, supra, by providing that the association shall be allowed sixty days within which to make the assets sufficient, clearly contemplates the right of the board of directors to increase its assets, and we are unable to perceive how that could be done in any other way than by making assessments against its shareholders. Nor can we see how the shareholders would be injured by making that assessment available by charging upon the books of the association the per cent. necessary to make the association solvent against the amount each shareholder paid in upon his stock.' \* \* \*"

Sec. 201.25 (1) (dm) provides for the investment by a domestic insurance company of its assets "In interest bearing notes of any building and loan association organized under the laws of this state." This provision was added by ch. 30, Laws 1931. An examination of the history of this act reveals that no effort was made to include with the interest bearing notes stocks and/or bonds. The legislature evidently felt that before a domestic insurance company could invest in the interest bearing notes of a domestic building and loan association a specific statute authorizing it, was necessary. The conclusion may be drawn, not unreasonably, that the legislature believed that sec. 201.25, subsec. (1) (f) prevented this investment. If such were the case, the same statute would prevent the investment by domestic insurance companies of their assets in stocks and bonds of building and loan associations. For the above reasons domestic insurance companies may not invest their funds in paid up stock of building and loan associations.

JEF

*Corporations — Securities Law* — Deposit of bond with trustee who endorses thereupon extension of maturity or reduction of interest and returns same to former holder does not constitute sale of security, subject to regulation by public service commission.

February 5, 1934.

WM. M. DINNEEN, *Secretary,*  
*Public Service Commission.*

You set forth two methods of dealing with the holders of bonds which have defaulted in payment of principal and interest:

(1) New securities are delivered to the holders of the outstanding securities in exchange for their holdings; or

(2) The terms of the securities are modified in the following ways,—

(a) If the maturity of the bond is to be extended, that fact is endorsed on the original bond and the bond, together with a new set of coupons, is returned to the bondholder;

(b) If the maturity of the bond is not extended but the interest is reduced, the original coupons are detached and a new set is delivered to the bondholder, with proper endorsement on the bond, or the bond and original coupons are endorsed to indicate the interest is lowered.

These changes are usually incorporated in a supplemental trust indenture executed by the issuer and the trustee, which is properly recorded so that the public has notice of the modification of terms.

You ask whether the endorsement of the statement on the extension of maturity or of reduction of interest and the execution of a supplemental trust indenture create a new security. You say the commission has considered that such modification of the terms of the original contract by direct action of the bondholders and the trustees does not create a new issue of securities.

It is our opinion that your construction is correct and that the modification of the terms of the bonds, as set forth in the second case, does not result in the issuance of a new security and consequently does not result in the ex-

change of a new bond for an old one. These transactions, therefore, are not subject to regulation by the commission.

Ch. 158, Laws 1933, relating to securities, repealed old secs. 189.01 to 189.31 and created new secs. 189.01 to 189.24. Sec. 189.06, subsec. (1), provides as follows:

“Except as provided in sections 189.03, 189.04, 189.05, and 189.08, no issuer, dealer or other person, directly or through an agent, shall in this state sell or take subscriptions for any security which has not theretofore been registered by the commission.”

Sec. 189.02 contains definitions. Subsec. (7) provides:

“‘Security’ or ‘securities’ includes all bonds, stocks, beneficial interests, investment contracts, interests in oil, gas or mining leases or royalties, preorganization subscriptions or certificates, land trust certificates, collateral trust certificates, mortgage certificates, certificates of interest in a profit-sharing agreement, notes, debentures, or other evidences of debt or of interest in or lien upon any or all of the property or profits of an issuer, any interest in the profits of a venture, the memberships of corporations organized without capital stock, and all other instruments or interests commonly known as securities.”

Subsec. (6) provides in part:

“‘Sale’ or ‘sell’ includes every \* \* \* exchange of a security for property, \* \* \*.”

Some question has arisen as to whether the transactions mentioned above would not be exempt by virtue of sec. 189.05, subsec. (15), as being “The issue in good faith of securities by a company to its security holders, or creditors, in the process of a bona fide reorganization of the company made in good faith, \* \* \*.”

It becomes unnecessary to discuss this question because of the fact that if the transactions in question are not sales, they would not be subject to the jurisdiction of the commission in any event. The bonds which the owners place in the hands of the trustee nominated by the issuer are, of course, securities. They have been authorized, executed, delivered, etc. They have been outstanding in the hands of bona fide purchasers and have been valid obligations of the company for some period of time. After the ma-

turity of the bond has been extended by endorsement upon the original bond, or the interest rate reduced in a similar manner, the bond is returned to the owner. The bond so returned is a security under the definition found in sec. 189.02, subsec. (7). If, by virtue of these transactions, there has been an exchange of securities, it has come about because a new security has been sent to the former bondholder in place of the old security sent by him to the trustee. If the bond sent by the trustee to the former bondholder is a new security, the transactions which resulted in the endorsement for the purpose of extending the maturity or reducing the interest must be considered as an *issue* of these securities. As stated previously, there has been no new execution, no new authentication and no further payment of any kind made by the bondholder.

Bonds are sometimes said to be issued when they are merely authorized. Again, they are said to be issued when they are executed and delivered for value. *Wright v. East Riverside Irrigation District*, 138 Fed. 313. In the case of *Zimmermann v. Timmermann*, (N. Y.), 86 N. E. 540, it was held that a bond is issued when it comes into the hands of the holder so executed and delivered as to bind the obligor. In the case of *State National Bank v. Board of Commissioners of Port of New Orleans*, (La.) 46 So. 307, the court said, p. 310,

“\* \* \* ‘when the bonds are delivered to the purchaser, they will be issued to him.’”

Substantially the same holding was made in the following cases: *Turner v. Roseberry Irrigation District* (Idaho), 198 Pac. 465; *Estabrook & Company v. Consolidated Gas, Electric Light & Power Company of Baltimore* (Md.), 90 A. 523; *Yesler v. City of Seattle*, (Wash.), 25 Pac. 1014; *Gage v. McCord* (Ariz.), 51 Pac. 977.

When the bond is sent to the former bondholder by the trustee, no new payment of any kind is made which could result in the former bondholder's becoming a purchaser at that time. He became the purchaser when the properly authenticated and executed bond was first delivered to him, upon his payment of consideration therefor. Under

the negotiable instruments law, it is provided, in sec. 116.01:

“Issue’ means the first delivery of the instrument, complete in form, to a person who takes it as a holder.”

The following quotation is taken from the case of *Rosendale State Bank v. Holland*, 195 Wis. 131, 132:

“It is the long and well settled doctrine in this state that a renewal by the giving of a new note or the extension of time in which to pay a pre-existing debt is not a discharge of the old and original obligation and the creation of a new obligation, but a mere carrying on of the prior obligation, unless and except it appears that the parties agreed that it should be a destruction of the old and the creation of a new obligation.’ *Wisconsin Trust Co. v. Cousins*, 172 Wis. 486, 503, 179 N. W. 801.”

After the transactions in question have been completed, the bondholder is secured by the same assets as secured his bond before its return to the trustee. There has simply been a modification of the contract. The original obligation evidenced by the bond which was returned to the trustee was not discharged by such return; this obligation was carried on and evidenced by the bond sent back to the bondholder. It is our opinion that in such a case it is the original bond rather than a new security which is returned, and that the transaction is not a sale, subject to regulation by the public service commission.

JEF

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*Normal Schools—Tuition*—Under sec. 37.11, Stats., dependent son who moves with father’s family to La Crosse from Minnesota in September, 1932, and who enrolled in state teachers college at La Crosse in February, 1933, must pay nonresident tuition fee.

February 5, 1934.

EDGAR G. DOUDNA, *Secretary*,  
*Board of Regents of Normal Schools.*

You request the opinion of this department upon the following statement of facts:

It appears that in September, 1932, one A. T. Hughes moved to La Crosse, Wisconsin, from Minnesota to become pastor of the First M. E. Church of La Crosse. His son, Borden, a dependent, although not a minor, also came to La Crosse with him.

In February, 1933, Borden Hughes enrolled in the state teachers college at La Crosse and paid his fees as a resident student. Later in the year (1933), it was discovered that Borden Hughes had not yet attained residence in Wisconsin and was, therefore, subject to paying the nonresident fee of \$25.00. It further appears that during the second semester of 1933 Borden Hughes carried but a few hours' work but refused to pay the nonresident fee and suggested that his registration be thrown out and that he receive no credit for his work. However, since Borden Hughes had already paid his fees and they had been remitted to the state, this was not possible.

In the fall of 1933 Borden Hughes again enrolled in the state teachers college at La Crosse and paid a resident fee with the understanding that if it was decided later that he was, as a matter of law, a nonresident, he would pay the additional fee.

It is the opinion of this department that under the facts above stated Borden Hughes must, under the statutes, pay the nonresident tuition fee in the La Crosse state teachers college.

Sec. 37.11 of the statutes relates to the powers of the board as to the normal schools, and subsec. (8) thereof provides:

"To require any applicant for admission, who shall not have been exempted by any of the provisions of this section, to pay or to secure to be paid such fees for tuition as the board may deem proper and reasonable. The board may also charge any student laboratory fees, book rents, fees for special departments or an incidental fee covering all such special costs. Any student who shall have been a resident of the state for one year next preceding his first admission to a normal school or any minor student whose parents have been bona fide residents of this state for one year next preceding the beginning of any semester for which such student enters a normal school shall, while he continues a resident of the state, be entitled to exemption

from fees for tuition but not from incidental fees in the normal school. Any student who shall not have been a resident of the state for one year next preceding his first admission to a normal school, except as above provided, shall not be exempt from the payment of the tuition fees until he shall have attended a normal school for four academic years; but if he shall have attended a normal school and thereafter shall continuously have been a resident of this state for a period of combined attendance at a normal school and subsequent residence in the state of not less than four years, he shall, while he continues a resident of the state, be entitled to exemption from payment of tuition fees upon re-entering a normal school."

It is manifest from an examination of the statement of facts that Borden Hughes was clearly a nonresident when he first entered the La Crosse state teachers college as a student. Sec. 37.11, subsec. (8), Stats., states that one who is a nonresident shall continue as such until he shall have been a resident of this state for a period of combined attendance at a normal school and subsequent residence in the state of not less than four years.

You are therefore advised that on the basis of the facts as stated above, Borden Hughes must pay the nonresident tuition fees of \$25.00. See XVIII Op. Atty. Gen. 199; VI Op. Atty. Gen. 82; IV Op. Atty. Gen. 929.

JEF

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*Insurance—Mutual Insurance Companies*—Counties and other municipal corporations may purchase insurance in mutual companies under provisions of sec 59.07, subsec. (4) and sec. 201.17, subsec. (1), Stats.

February 5, 1934.

JAMES L. MCGINNIS,  
*District Attorney,*  
Amery, Wisconsin.

In a recent letter to this department you call our attention to a recent decision of a circuit court in Minnesota holding that not only the state but the counties, towns, villages, cities and school districts have no right to insure

public property in a mutual insurance company because such action was in effect going into the insurance business and thus violated a constitutional provision against giving or loaning public credit to an individual, association or corporation. You point out that the provision of the Minnesota constitution, upon which this decision is based, i. e. art. IX, sec. 10, is similar to the provision found in art. VIII, sec. 3, Wis. Const., and ask whether a similar ruling would apply to counties in this state.

Sec. 59.07, subsec. (4), Stats., gives the county board power to

“Build and keep in repair the county buildings and *cause the same to be insured* in the name and for the benefit of the county, \* \* \*”

IX Op. Atty. Gen. 590 held that this statute authorizes the county board to insure county buildings in a mutual company.

“As indicating the legislature did not intend to confine the county to old-line insurance, your attention is called to sec. 1978*d*, which authorizes the county board to avail itself, in behalf of the county, of the state insurance, for public buildings. \* \* \*” (p. 591).

Sec. 201.11, subsec. (3), Wis. Stats, 1931, renumbered to be 201.17, (1), Stats., expressly allows insurance in mutual companies:

“\* \* \* and any public or private corporation, board or association of this state is authorized to make applications, enter into agreements for and hold policies in any mutual insurance company.”

Unless these statutes are violative of art. VIII, sec. 3, or some other constitutional provision, it is proper for a county to invest in mutual insurance. That there are no constitutional objections to the above statutory provisions was given out in an unofficial opinion of this department by H. A. Minahan, former deputy attorney general, on August 27, 1928 in a telegram.

We are not aware that any court in this state has ruled on that particular point, but it is our opinion that the supreme court of Wisconsin would probably rule sec. 201.11

(3) constitutional, because that tribunal has held, in deciding the constitutionality of other statutes, that art. VIII, secs. 3 and 10, relates exclusively to the state as a whole.

*Clark et al. v. The City of Janesville*, 10 Wis. 136, holds that the granting of authority to cities, counties or towns to lend their credit in aid of a railroad company is neither a loaning of the credit of the state in aid of such corporation (art. VIII, sec. 3) nor the creation of a state debt for internal improvements (art. VIII, sec. 10). Paine, J., at 171-172 says:

“\* \* \* These two sections, like nearly all in article VIII relate exclusively to the state, as a whole, and were not designed to regulate or limit the powers of counties, cities, or towns. This seems obvious on the slightest inspection of its provisions. \* \* \*

“\* \* \* Thus, while section 3 of this article prohibits the state from loaning its credit at all, yet section 3 of article IX, expressly recognizes the power of *municipal corporations to loan their credit*, and requires the legislature to properly restrict it.” (Italics ours.)

In *Bushnell v. Beloit*, 10 Wis. 195, 221-222, Cole, J., in speaking of the same sections of the constitution referred to in the Janesville case cited above, says:

“\* \* \* The whole article [VIII] appears to be designed to regulate the finances of the state proper. This is the fair, reasonable and consistent construction to be placed upon its provisions. \* \* \*”

See the discussion at 222, *et seq.*

*Oleson v. Green Bay and Lake Pepin Railway Company et al.*, 36 Wis. 383, holds that the constitutionality of acts like that of 1867, permitting counties, towns, etc. to subscribe for the capital stock of railroad companies and to issue their bonds and levy taxes to pay for such stock, is no longer an open question in the supreme court of Wisconsin. *Phillips et al. v. The Town of Albany et al.*, 28 Wis. 340, holds the same.

In view of the above decisions it is difficult to see how the supreme court of this state could hold the statute authorizing counties to purchase insurance in mutual companies unconstitutional. At any rate, there has been no

such ruling up to date and until the supreme court has held a statute unconstitutional, it must be given full force and effect. Therefore you are advised that it is the opinion of this department, as it has been in the past, that it is proper for a county to take insurance in a mutual company.

JEF

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*Recovery Act — Taxation — Gasoline Tax — Refunds —*  
County is not entitled to refund of state gasoline tax paid by it, when gasoline is used in recovery program projects.

February 8, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

In connection with the construction activities inaugurated by virtue of the federal recovery program, certain county highway equipment has been used for the transportation of men and materials. In many instances the trucks were furnished, and the gasoline to run them was taken from the county tanks. The state tax upon this gasoline had been paid at the time the gasoline was purchased. A record of the gasoline so used was kept by the county highway authorities. The authorities administering the federal funds have refused to reimburse the county for the state tax which has been paid upon this gasoline, stating that the federal government will not pay state taxes. Some counties which have been refused this reimbursement, have now applied to you for a refund of the said tax. You inquire as to your authority to make this refund.

It is our opinion that these counties are not entitled to a refund upon this gasoline used in this manner. The application for the refund is based upon the theory that the gasoline was sold to the federal government and that the state does not have authority to burden governmental agencies of the United States by the imposition of taxes upon them. Reference to the federal enactments, relating to construction and unemployment projects, will show that some

of these projects could be undertaken directly by the federal government and others by the states and local municipalities with money furnished by the federal government. In the case of those projects undertaken by the states or political subdivisions thereof, money to finance the cost of them, or a portion of such cost, was furnished by the United States. This money came in the form of loans and gifts. As an administrative proposition, money was distributed, in many cases, as a reimbursement of the municipalities for money expended by them, or direct payment of the cost of certain materials and labor services furnished to the state or the political subdivision. These improvements, however, were undertaken by the state or the subdivision and were for the benefit of the state or the political subdivision. The highways upon which these federal funds were expended, did not, by virtue of such expenditure, become federal highways. Neither did the buildings upon which the federal funds were expended become buildings belonging to the United States government. It cannot be said that the materials or services were furnished to the United States. If the federal government elects not to reimburse a subdivision of the state for certain expenditures, or to advance money for the purchase of a particular kind of material, it may do so. Limitations of this sort can be imposed as conditions of the grants or loans. The counties, therefore, are not entitled to be reimbursed for the state gasoline tax paid out by them on gasoline used in the recovery program activities.

The United States government has furnished credentials to those persons or agencies who are entitled to apply for state gasoline tax refund upon gasoline which is sold to the federal government. The fact that it has not furnished those credentials to county highway commissions is quite indicative of the attitude adopted by the federal government and also, by implication, sustains the opinion herein given.

It is realized that the result of this holding will mean a diminution in the amount of funds available to the county highway department. The county highway department, however, cannot be divorced from the remainder of the

county for which it acts. The counties have been greatly benefited by the financial assistance which has come from the federal government under the recovery program. It would seem, as a practical matter, that the amount of money which the highway department will lose in this manner is small compared with the benefit which the county has received, and that no complaint should be made.

JEF

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*Counties — County Board — Mortgages, Deeds, etc. —*  
County board is without power to appropriate money to pay off mortgage existing against real estate conveyed to county by inmate of county home.

February 8, 1934.

JAMES L. MCGINNIS,  
*District Attorney,*  
Amery, Wisconsin.

You state that occasionally Polk county becomes the grantee of real estate from persons who have been admitted to the county home, and that the question has arisen as to whether the county board may appropriate money to pay off a mortgage existing against property acquired by the county in this way.

Your opinion is that the county board does not possess the power. With that opinion this department agrees. The county and the county board possess only such powers as are expressly given by statute and such additional powers as are necessarily implied from the powers expressly given. See XXI Op. Atty. Gen. 531 and cases there cited. A careful search of the statutes has failed to reveal any statute which, either expressly or by necessary implication, gives the power here sought. Sec. 59.01, Stats., gives the county power to make such contracts and do such other acts as are necessary and proper to the exercise of the powers granted to it, while subsec. (6), sec. 59.07 empowers the county board to have the care of the county property, and subsec. (1) thereof empowers the board to make

such orders concerning the corporate property of the county as they may deem expedient. It is considered, however, that none of those statutes imply any power to discharge a mortgage existing against property acquired by the county under the circumstances above outlined.

A county may acquire and hold land only for some authorized public purpose. Since a county is authorized to expend money for the support and maintenance of inmates of the county home and since, by sec. 49.10, a county has the right to collect the value of such support and maintenance out of the property of an inmate, the county undoubtedly may, for that purpose, acquire land of such inmate by a voluntary conveyance from him. However, it would seem that the power of the county in the premises should extend no farther than to acquire the interest of the inmate in the land to dispose of such interest in accordance with sec. 59.67, which in subsec. (2), provides that the county board may authorize the sale and conveyance of real estate of the county and that the deed shall convey all the right, title and interest "which the county may have in and to the land so conveyed."

JEF

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*Public Health—Basic Science Law*—Previous practice certificate procured under sec. 147.09, Stats., neither imposes limitation nor grants right to practice. It is alternative method of securing certificate of registration from board of examiners in basic sciences.

Certificate from said board is prerequisite to chiropractic or medical practice.

February 8, 1934.

ARNO J. MILLER,  
*District Attorney,*  
Portage, Wisconsin.

You have asked for a construction of sec. 147.09 Stats., saying you would like to be advised "as to the limits allowed a party practicing under a previous practice certificate granted by the state board of examiners in basic sciences."

First of all, it may be well to state that sec. 147.09 in and of itself confers no rights to practice nor does it place any limitations on the practice of one having a "previous practice certificate." This section merely provides a way of removing a disability.

Sec. 147.02 provides:

"No person shall treat, or attempt to treat, the sick unless he shall have a certificate of registration in the basic sciences, \* \* \*"

Such a certificate can be obtained upon satisfactorily passing an examination. Secs. 147.05, 147.06 and 147.07. Today the *only* way such a certificate may be obtained is by the above method. At the time when the requirement for a certificate of registration was set up, the legislature recognized the fact that standards in medical schools are constantly changing and appreciated the fact that some of the older practitioners might not be able to pass so exacting a formal examination although their lack of formal training was made up by their practical experience. Wishing to secure these older men in their manner of obtaining a livelihood, it passed sec. 147.09, providing a way of overcoming the disability of not having the certificate required by sec. 147.02, in a way other than by passing an examination.

The first sentence of sec. 147.09 provided that all of those men who were regularly licensed or registered in the state of Wisconsin to treat the sick on February 1, 1925 need not be registered under the basic science law. These men, without securing the certificate required by sec. 147.02 could go on practicing without violating the law.

The second sentence of sec. 147.09 provided for what you describe as "a previous practice certificate." Any one not registered or licensed in the state of Wisconsin to treat the sick on February 1, 1925, but who nevertheless on that date was lawfully engaged in this state in treating the sick could secure a certificate by applying therefor within a certain period. Such person could then continue practicing. XV Op. Atty. Gen. 23 held that chiropractors were the only persons falling within the provisions of the second sentence of sec. 147.09. The time limit for securing a "previous practice certificate" has long since expired.

Sec. 147.23 (1) provides:

“No person shall practice chiropractic \* \* \* unless he have a certificate of registration in the basic sciences and a license to practice chiropractic from the state board of examiners in chiropractic, \* \* \*”

Sec. 147.23 (5) provides:

“The board shall grant without examination a license to practice chiropractic in this state to any person who was on February 1, 1925, a reputable practitioner in chiropractic in this state, and who shall present to the board of examiners in chiropractic, prior to September 1, 1925, sufficient and satisfactory evidence of the same.”

Therefore, even though a chiropractor had procured a “previous practice certificate” provided for in the second sentence of sec. 147.09, he could not continue to practice his profession unless he complied with section 147.23 (5) or had secured a license under sec. 147.23 (3), and (4). Then, after securing an original license, such license must be renewed each year. Sec. 147.23 (7).

In order to practice medicine after procuring a certificate of registration in the basic sciences a person must be licensed by the state board of medical examiners under the provisions of sec. 147.14.

Thus it will be seen that sec. 147.09 is but an alternative to sec. 147.05, 147.06 and 147.07 to fulfill the requirements of sec. 147.02. A certificate of registration in the basic sciences is merely a preliminary requirement to the practicing of either medicine (physicians' and surgeons' practice) or chiropractic. In order to enter either field or to continue practicing a man must also have met the requirements of either sec. 147.14 (physicians, surgeons, osteopaths) or of sec. 147.23 (chiropractors).

A “previous practice certificate” in and of itself imposes no limitations on a practice otherwise lawful, nor does it of itself confer any right to practice where no right previously existed. It is merely one form of compliance with the requirements of sec. 147.02, which is but a preliminary step in securing the right to practice either medicine or chiropractic.

JEF

*Bonds—Municipal Borrowing—Public Lands—Taxation*  
 —Lands conveyed to United States or other tax-exempt body are exempt from taxation for taxes levied to pay existing bonded indebtedness (incurred under ch. 67, Stats.) of county in which lands are situated, except that if such lands are so conveyed after date on which lien for taxes of that year become effective, then such lands continue liable for taxes of that year.

Opinions in XX Op. Atty. Gen. 214 and XXII Op. Atty. Gen. 897, ruling on situations involving loans from state trust funds, distinguished.

February 8, 1934.

#### TAX COMMISSION.

Attention Alvin M. Johnson, *Commissioner*.

You ask the question whether Wisconsin lands conveyed to the United States or other tax-exempt body are exempt from taxation for taxes levied to pay existing bonded indebtedness of the county in which the lands are situated.

The question is answered in the affirmative, except that if such lands are conveyed after the date on which the lien for taxes of that year becomes effective, then the lands continue liable to taxation for the taxes of that year.

Art. XI, sec. 3, Wis. Const., provides to the effect that any municipality incurring an indebtedness "shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same; \* \* \*"

Municipal bonds are issued and bonded indebtedness is incurred in accordance with the provisions of ch. 67, Stats., subsec. (10), sec. 67.05 of which provides:

"The governing body of every municipality proceeding under this chapter shall, at the time of or after the adoption of an initial resolution in compliance with subsection (1) or subsection (2), or, after the approval of such resolution by popular vote when such approval is required, and before issuing any of the contemplated bonds, levy by recorded resolution a direct, annual tax sufficient in amount to pay and for the express purpose of paying the interest

on such bonds as it falls due, and also to pay and discharge the principal thereof at maturity. The municipality shall be and continue without power to repeal such levy or obstruct the collection of said tax until all such payments have been made or provided for. After the issue of said bonds such tax shall be from year to year carried into the tax roll of the municipality and collected as other taxes are collected. No further or annual levy for that purpose shall be necessary."

Considering the foregoing constitutional and statutory provisions, it has been ruled that forest crop lands (which are by statute exempted from taxation) are exempt from taxation on account of bonded indebtedness previously incurred under ch. 67, Stats. XVII Op. Atty. Gen. 615. See pp. 616-617:

It is considered that the reasoning and the conclusions there stated are sound, and the same are followed and adopted as applicable herein.

In closing it should be noted that opinions reaching a contrary conclusion have been rendered with regard to lands conveyed to the United States where such lands were situated in a municipality indebted to the state for *a loan from the state trust funds* under ch. 25, Stats. XX Op. Atty. Gen. 214, XXII 897. Those opinions, however, are not in conflict with the opinion herein, as they are based on special statutory provisions applicable to loans from the state trust fund. See sec. 25.07, Stats. See also, *State ex rel. Owen v. Rogers*, 166 Wis. 628.

It should also be pointed out that the opinion herein is not intended to lay down any rule as regards the situation where territory is *detached* from a municipality having a bonded or other indebtedness. That situation is taken care of by the provisions of subsec. (7), sec. 66.03, relating to adjustment of assets and liabilities on the division of territory.

JEF

*Public Health—Embalming*—State board of health, under provisions of ch. 156, Stats., may not require that funeral director own property and equipment used in conduct of his business.

February 12, 1934.

BOARD OF HEALTH,

Attention Dr. C. A. Harper, *State Health Officer*.

The facts which prompt this request for an opinion are these: Mr. A. is a licensed funeral director owning and operating a fixed place of business. Mr. B. is regularly employed in a line of work other than that of funeral directing. He desires, however, to secure a funeral director's license and conduct funerals from time to time. Mr. B. leases from Mr. A. the right to use Mr. A's funeral parlor for the purpose of conducting funerals therein when said facilities are not being used by Mr. A. The present inquiry is whether such an arrangement as this is in sufficient compliance with sec. 156.04, Stats., and the rules of the state board of health to warrant the issuance of a funeral director's license to Mr. B.

It is sought by the state board of health to require funeral directors to own the equipment used by them in conducting their business. Rule (7) of the regulations governing funeral directors provides:

"An applicant for a funeral director's license must present proof that he is the owner, either individually or as a member of a firm, or a full time employee of such owner or firm operating the business of funeral directing at a fixed place or establishment, as defined in rule (9)."

It is claimed by the board that authority for the result sought to be accomplished by the above rule is to be found in sec. 156.03, Stats., which provides in part:

"The board shall have power and it shall be its duty:

"\* \* \*

"(3) To make and enforce all necessary rules and regulations, not inconsistent with this chapter, for \* \* \* the general practice of funeral directing; \* \* \*"

It is to be noted that the board may make rules and regulations "not inconsistent with this chapter." There is

to be found no provision in the statutes which requires a funeral director to own the equipment used by him. On the contrary, the following provisions indicate that a director need not own such equipment.

Sec. 156.01 provides in part:

“DEFINITIONS. As used in this chapter:

“\* \* \*

“(3) A ‘funeral director’ is a person engaged in or conducting or holding himself out as engaged in or conducting the business of \* \* \* (b) *providing for* or maintaining a place for the preparation, for the disposition or for the care of dead human bodies, \* \* \*.”

Sec. 156.04 provides in part:

“(1) The business of a funeral director must be *conducted in a fixed place or establishment* equipped for the care and preparation for burial or transportation of dead human bodies. What shall be deemed ‘necessary equipment’ shall be defined in the rules and regulations to be adopted by the board.”

Hence, from the above provisions, it is evident that the business must be conducted in a fixed place or establishment but that neither the building nor the equipment need be owned by the funeral director. This invalidates the attempted requirement set out in rule (7), previously quoted.

Therefore, it is concluded that a funeral director’s license may be issued to Mr. B., in that his business is conducted in a fixed establishment even though the right to use said establishment when necessary is held by him, not as owner, but under a continuing lease from Mr. A.

JEF

*School Districts—Transportation of School Children—*  
Word "may" in sec. 40.34, subsec. (1m), Stats., has permissive significance, giving school board discretionary power to furnish transportation for crippled children.

February 12, 1934.

LEO W. BRUEMMER,  
*District Attorney,*  
Kewaunee, Wisconsin.

You refer to sec. 40.34, subsec. (1m), which is a new section added to the statutes by ch. 154, Laws 1933, and provides in part as follows:

"Any district may provide transportation for crippled children to any schools located in said district regardless of distance, provided the request for such service is approved by the Crippled Children Division before any reimbursement is made for service. \* \* \*"

You say:

"Given a proper case, is there any discretion in the school board as to whether they will or will not furnish transportation, or in other words, what construction is placed upon the word "may?"

You will note that the subsection referred to and partly quoted above is inserted in the statute between sec. 40.34, subsec. (1) and sec. 40.34, subsec. (2). The word "may" is used in subsec. (1) in a permissive sense and the word "shall" is used with a mandatory significance. The word "shall" in subsec. (2) is also used in a peremptory sense. It is apparent that the word "may" in subsec. (1m) is used only in a permissive sense and you are therefore advised that there is a discretion in the school board as to whether it will or will not furnish transportation.

A careful reading of the statutes will disclose that there are other ways of giving crippled children school facilities without transportation.

JEF

*Hotels and Restaurants*—Taverns furnishing free lunches are restaurants within meaning of sec. 160.01, subsec. (2), Stats.

Whether service of edibles constitutes serving of meal or lunch is question to be determined by board of health.

February 12, 1934.

DR. C. A. HARPER, *State Health Officer,*  
*Board of Health.*

Following the repeal of the 18th amendment, many taverns have been established throughout this state selling alcoholic beverages. Many of these places are prepared to serve free lunches in connection with the sale of beer and similar alcoholic drinks. Sec. 160.01, subsec. (2), Stats., provides:

“‘Restaurant’ means all places wherein meals or lunches are served transients without sleeping accommodations and all places used in connection.”

You inquire whether this section applies to an establishment serving lunches without compensation, the same as it does to those establishments serving meals or lunches for compensation.

It is our opinion that this question must be answered in the affirmative. In IV Op. Atty. Gen. 1070 it was held that ice cream parlors, confectionery stores, etc., selling malted milk and refreshments in the nature of light lunches, were not required to take out a license for a restaurant. This opinion was rendered to you on December 9, 1915. At that time sec. 1408m—10 (now sec. 160.01 (2) ) defined a restaurant as—“Any building or structure wherein meals and lunches are served without sleeping accommodations for transient guests.”

The holding in the opinion was based upon the fact that, in order for an establishment to be classified as a restaurant it must serve “meals *and* lunches.” The service of lunches was held to be insufficient to constitute an establishment a restaurant, unless meals were also served. Other language in that opinion would indicate that the food served in the taverns in connection with the sale of alco-

holic beverages would not be classified as a meal but as a lunch. By ch. 129, Laws 1917, however, the legislature, possibly in response to the opinion, altered the definition of a restaurant and placed the disjunctive word "or" in place of the conjunctive word "and" where it appeared between the words "meals" and "lunches." In addition, it removed the word "guests" from the definition. The present sec. 160.01, subsec. (2), does not make payment of compensation for the lunches served in an establishment a prerequisite to the classification of such a place as a restaurant. No such requirement can be read into the statute. It is possible, moreover, that the court might well hold that the lunches furnished are not furnished free. The law could presume that some portion of the money paid for the alcoholic beverage was paid for the food which could be had in connection with the drink. Persons occasionally obtain some of the food without purchasing drinks, but quite certain it is that the proprietor of the establishment would not indefinitely continue to furnish food unless he sold beverages upon which he could make some money.

It is deemed advisable to call attention to certain provisions of ch. 13, Laws Special Session 1933, relating to the manufacture and sale of intoxicating liquors. The said ch. 13 created ch. 176, Stats. Sec. 176.05, (10) (b) provides:

"No retail 'Class B' license shall be issued to any person who does not have, or to whom is not issued, a 'Class B' retailer's license to sell fermented malt beverages under subsection (10) of section 66.05."

Sec 176.05 (6a) provides:

"The rules and regulations made by the state board of health governing sanitation in restaurants shall apply to all 'Class B' licenses issued under this section. No 'Class B' license shall be issued unless the premises to be licensed conform to such rules and regulations."

Sec. 176.05, (10) (a) provides:

"Intoxicating liquor shall be sold in restaurants only at tables and to seated customers."

Ch. 13, however, by sec. 176.01 (6) gives a different definition of the word "restaurant" than is found in sec.

160.01 (2). This opinion should not be construed as holding that all establishments, licensed to sell intoxicating liquors, should be classified as restaurants; nor as holding that alcoholic beverages cannot under any circumstances be sold at a bar.

Ch. 11, Laws Special Session 1933, created sec. 176.50 of the statutes relating to free lunches. It prohibits a tavern keeper from giving away or furnishing free of charge, on his licensed premises, any but certain foods and delicacies therein specified. It also prevents a person holding a permit to operate a restaurant from giving away or furnishing free of charge any fermented malt beverage or intoxicating liquor on his restaurant premises. This chapter must not be construed as a grant of authority to tavern keepers to furnish the things therein specified free of charge without a restaurant permit. It quite probably was enacted to prevent such competition between restaurateurs and tavern keepers as would be financially ruinous to the business of either or both.

This office does not undertake to specify exactly what edibles would be classified as meals or lunches. Whether a tavern is serving or preparing a meal or lunch is an administrative question to be determined in each case by your board. The law should be so administered as to effectuate the legislative intent. The determination of your board, which is the agency administering ch. 160 would be entitled to great weight. *Harrington v. Smith*, 28 Wis. 43; *Scanlan v. Childs*, 33 Wis. 663; *Wright v. Forrestal*, 65 Wis. 341; *State ex rel. Hayden v. Arnold*, 151 Wis. 19; *Van Dyke v. City of Milwaukee*, 159 Wis. 460; *State v. Johnson*, 186 Wis. 59.

JEF

*Taxation—Income Taxes—Refunds*—Methods of handling refunds of normal income taxes certified to county treasurer but not paid by him prior to January 1, 1934, are discussed and recommendations are made.

Under present law interest and penalties on delinquent normal taxes collected by tax commission are to be distributed to state, county and local units as part of such taxes in proportions provided for by subsec. (1), sec. 71.19, Stats.

February 12, 1934.

OLIVER L. O'BOYLE, *Corporation Counsel,*  
*Office of District Attorney,*  
Milwaukee, Wisconsin.

You present the following situation: As the law existed prior to January 1, 1934, normal income taxes were collected by the county treasurer and by him distributed to the state, county and local units. Refunds of such taxes were certified to the county treasurer and by him paid to the individual or corporation entitled to the same. When refunds were thus paid by the county treasurer they were proportionately deducted from income tax money in his possession to the credit of the state, county and local units, or such refunds so paid out were held out of income taxes subsequently collected for the benefit of such units.

The foregoing system has been changed, beginning with January 1, 1934, by ch. 367, Laws 1933. Under the present law such income taxes are collected by the tax commission, paid into the state treasury, and by the state treasurer distributed to the state, county and local units. Under the present law refunds are to be certified to the state treasurer and by him paid to the individual or corporation entitled to the same. When such refunds are paid by the state treasurer, he will proportionately deduct the same from income tax money in his possession to the credit of the county and local units, or such refunds so paid out will be held out of income taxes subsequently collected for the benefit of such units.

The question is submitted as to how to handle refunds

which were certified to the county treasurer under the old law, but which were not paid out by him prior to January 1, 1934, when the new law took effect.

Three methods are suggested by you: First, such refunds could be recertified to the state treasurer, to be taken care of by him directly under the new law, to be in turn charged back by the state against the county and local units in future accountings for income taxes collected. Second, the county treasurer could pay such refunds out of county funds, and be subsequently reimbursed by the state treasurer as to the share of the local unit contained therein, this to be in turn charged by the state against the local unit in subsequent accountings. Third, such refunds could be paid by the county treasurer and pro rata shares billed by Milwaukee county to the local units.

As regards Milwaukee county, it does not seem necessary to follow any of the methods above suggested. The fact appears that the Milwaukee treasurer has in his possession income tax money to the credit of the state, county and local units sufficient to adjust such refunds certified to the county treasurer but not paid out by him. Such being the case, it is considered that the proper and lawful procedure for the county treasurer to follow will be to settle with the state, county and local units by paying over to them only the difference between the respective shares to their credit and the amount of such refunds, thus retaining in the county treasury a sufficient amount to take care of the payment of such refunds.

As regards cases where refunds have been certified to the county treasurer subsequent to the time when the county treasurer turned over their respective shares of income tax money to the state, county and local units, it is considered that it will be proper and lawful to recertify such unpaid refunds to the state treasurer, to be taken care of by the latter directly under the new law, and it is recommended that such method be followed. The mechanics of the recertification is a matter upon which the attorney general will not undertake to advise, but it can be readily worked out between the proper state and county administrative officials.

2. The further question is submitted as to whether the interest and the two per cent penalty on delinquent normal income taxes collected by the tax commission under the new law subsequent to January 1, 1934, are to be distributed as part of such taxes in the proportions provided for by subsec. (1), sec. 71.19, or whether such interest and penalty, or either, are to be retained by the state.

Subsec. (1), sec. 71.19 now provides, the same as it did under the old law:

“All income taxes collected in cash shall be divided as follows, to wit: Forty per cent to the state, ten per cent to the county, and the balance to the town, city or village from which the income was derived \* \* \*.”

Subsec. (3), sec. 71.19, under the old law, provided:

“The county treasurer shall account for and pay all delinquent taxes collected by him, upon the basis hereinbefore provided, to the state treasurer, and to the several town, city and village treasurers entitled thereto at the time of the next division of revenue as provided for in section 74.26 (1).”

Par. (d), subsec. (4), sec. 71.10, under the old law, provided for the collection of delinquent normal income taxes, interest and two per cent penalty by the county treasurer and, further:

“\* \* \* the county shall retain all such delinquent penalties and interest for such collections.”

Under the foregoing specific provision that the delinquent penalties and interest should be retained by the county, it was plain, during the time when the collection of delinquent normal income taxes was made by the county treasurer, that only the taxes proper were to be distributed as provided by sec. 71.19.

Par. (d), subsec. (4), sec. 71.10 was, however, repealed by ch. 367, Laws 1933, and it was superseded by a new par. (f), subsec. (3), sec. 71.10, placing the collection of delinquent normal income taxes in the hands of the tax commission in the following language:

“Income taxes shall become delinquent if not paid when due as provided in this section, and when delinquent shall

be subject to a penalty of two per cent on the amount of the tax and interest at the rate of one per cent per month until paid, and the tax commission shall immediately proceed to collect the same. For the purpose of such collection the tax commission or its duly authorized agent shall have the same powers as conferred by law upon the county treasurer, county clerk, sheriff and district attorney."

Subsec. (3), sec. 71.19 was by the same chapter amended so as to read:

"The tax commission shall account for and pay all delinquent taxes collected by it, to the state treasurer, who shall apportion and pay the same to the several county, town, city and village treasurers entitled thereto at the time of the next division of revenues as provided for in subsection (4m) of section 71.10."

Under the new law, therefore, although there is specific provision for the collection of delinquent normal income taxes by the tax commission, there is no specific provision with respect to the distribution or retention of the interest and the two per cent penalty thereon.

It was held in *Westby v. Bekkedal*, 172 Wis. 114, 122-123, that a penalty on delinquent taxes becomes a part of the tax. It follows, therefore, that unless otherwise directed, interest and penalties on delinquent taxes are to be distributed in the same proportion as is provided for the distribution of the tax proper. This is in accord with the rule as stated in 61 C. J. 1528-1529:

"Unless otherwise directed, interest, penalties, and costs collected on delinquent taxes follow the tax, and go to the state, county, or city, according as the one or the other is entitled to the tax itself; and, in cases where two or more of these are interested in the tax, such interest and penalties should be apportioned among them in the ratio of their respective shares of the tax."

The conclusion, therefore, is that the interest and the two per cent penalty on delinquent normal taxes collected by the tax commission under the new law subsequent to January 1, 1934, are to be distributed as part of such taxes in the proportions provided for by subsec. (1), sec. 71.19, namely, forty per cent to the state, ten per cent to the county, and fifty per cent to the local municipality.

JEF

*Appropriations and Expenditures—Relief Funds—Taxation—Inheritance Taxes*—County is entitled to retain seven and one-half per cent of emergency inheritance taxes collected under sec. 3, ch. 363, Laws 1933.

February 12, 1934.

C. STANLEY PERRY, *Assistant Corporation Counsel.*  
*Office of District Attorney,*  
 Milwaukee, Wisconsin.

You present the following question:

“Under the provisions of subsec. (2), sec. 3, ch. 363, Laws 1933, may the county treasurer retain seven and one-half per cent of collections of the emergency relief taxes on inheritance?”

Ch. 363 is entitled an act “to raise revenues for emergency relief purposes, to provide for their administration, and making appropriations.”

The act, which was Bill No. 922, A., imposes three different types of emergency tax. Sec. 2 imposes an “emergency relief tax on incomes,” hereinafter called the “emergency income tax.” Sec. 3 imposes an “emergency relief tax on transfers of property,” hereinafter called the “emergency inheritance tax.” Sec. 4 imposes an “emergency gift tax,” hereinafter called by that name.

Sec. 3 of the act, by subsec. (1) thereof, imposes an emergency inheritance tax of twenty-five per cent

“In addition to the taxes imposed by chapter 72 of the statutes, \* \* \*.”

Subsec. (2) of the same section provides:

“The emergency tax upon transfers imposed in subsection (1) shall be administered, assessed, collected, and paid in the same manner, at the same time, and subject to the same regulations as is provided for the administration, assessment, collection and payment of the taxes imposed in chapter 72 of the statutes. The whole amount paid into the state treasury under the provisions of this section shall be used for relief purposes as provided in sections 5 to 7 of this act.”

The “chapter 72” referred to is the statutory chapter relating to the normal inheritance tax. Under that chapter the tax is assessed by the county court wherein the

estate is being probated, and the tax is paid by the taxpayer to the county treasurer. Under the same chapter, by sec. 72.19, it is provided that the county treasurer shall pay such taxes received by him to the state treasurer, but by sec. 72.20 it is provided:

“The county treasurer shall retain for the use of the county, out of all taxes paid and accounted for by him each year under sections 72.01 to 72.24, inclusive, seven and one-half per cent on all sums so collected by or paid to said treasurer.”

Since, by the above quoted subsec. (2), sec. 3 of the act here in question, the legislature has expressly stated, without any exception, that the emergency inheritance tax shall be administered, assessed, collected and paid in the same manner, at the same time, and subject to the same regulations as is provided for the administration, assessment, collection and payment of the normal inheritance tax, it would seem that the provision in sec. 72.20 for retention by the county of seven and one-half per cent of the normal inheritance tax collection is equally applicable to the emergency tax collections. This view is strengthened by the fact that the legislature, in the same subsec. (2), sec. 3 of the act has employed the further language that “*the whole amount paid into the state treasury under the provisions of this section*” shall be used for relief purposes, instead of employing, as it might have done, and as it did do with respect to the emergency income tax and the emergency gift tax, that the *whole amount collected* from the tax shall be paid into the state treasury.

With respect to the emergency income tax, it is provided by subsec. (2), sec. 2 of the act that such tax shall be assessed, collected and paid in the same manner, upon the same income, subject to the same regulations, and at the same time as is provided by law for the assessment, collection and payment of the normal income tax but, by subsec. (3) of the same section, it is specifically provided:

“The whole amount collected from the emergency tax on incomes shall, through the same channels as other income taxes are paid, be paid into the state treasury and be used for relief purposes as provided in sections 4 to 7 of this act.”

So with respect to the emergency gift tax, it is generally provided by subsec. (7), sec. 4 of the act that such tax shall be administered by the same administrative authorities as administer the normal income tax (the tax commission and assessors of incomes) and that all nonconflicting provisions of the income tax law shall apply but, by par. (d) of the same subsection, it is specifically provided:

“The whole amount of the tax collected pursuant to this section shall be paid into the treasury at the time when settlement is made for income taxes, and shall be used for relief purposes, as provided in sections 5 to 8 of this act.”

Thus as to both the emergency income tax and the emergency gift tax, the legislature has specifically provided that the *whole amount collected* from the tax shall be paid into the state treasury and used for relief purposes, while as to the emergency inheritance tax on the other hand, the legislature has merely provided that the *whole amount paid into the state treasury* shall be used for relief purposes. It would seem, therefore, that, in this particular, the legislature had a different intent as regards the emergency inheritance tax than it had as regards the emergency income tax and the emergency gift tax.

It will be noted, further, that the emergency gift tax section of the Bill, (No. 922, A.), introduced by amendment No. 7, S., originally provided that such tax be accounted for and paid into the state treasury by the county treasurer at the same time and in the same manner and in the *same proportion* as normal inheritance taxes are accounted for and paid into the state treasury under secs. 72.19 and 72.20, but by amendment No. 2, S., to amendment No. 7, S., such provision was struck out and the above quoted par. (d), subsec. (7), sec. 4 of the act was substituted. Thus the legislature saw fit to amend the emergency gift tax section of the bill so as to provide that the whole amount collected from such tax shall be paid into the state treasury, but it did not see fit similarly to amend the emergency inheritance tax section.

It will be noted, further, that both the emergency income tax and the emergency gift tax are administered through channels provided at the expense of the state,

whereas the emergency inheritance tax is administered through channels provided largely at the expense of the county. In view of the latter fact, it may well be that the legislature intended to reimburse the county by allowing it to retain a percentage of the emergency inheritance collections. Certainly the legislature has employed language expressive of such an intent. Bearing in mind the real nature of such an allowance to the county, construing the act as providing for it does no violence to the express purpose of the act to raise revenue for emergency relief purposes.

Upon all of the foregoing considerations, it is concluded that the question submitted must be answered in the affirmative.

JEF

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*Indigent, Insane, etc. — Minors — Industrial Schools —* County from which incorrigible girl or boy is committed to industrial school is liable for his support, irrespective of his legal settlement.

February 16, 1934.

BOARD OF CONTROL.

You state that X county, through its district attorney, has filed application to be relieved from the chargeability in certain cases where boys were committed to the industrial school for boys and girls to the industrial school for girls, by the juvenile court of X county. You state that in considering these applications a question has arisen with regard to the practice of the board of control. You say that from the very beginning all cases committed to the industrial schools have been considered as charges of the county committing, and this board has under the provisions of secs. 46.10 (2), 48.17 and 48.18 accordingly so charged the committing county. You inquire whether your practice is in accord with the statutes. If not, what county is chargeable and how is it determined?

The real question before us is whether the county in which the person was committed or the county in which he

has a legal settlement is liable for the support, or whether the county from which the person is committed is liable for his support irrespective of the legal settlement of the person.

This question has been passed upon by this department in VI Op. Atty. Gen. 210. It was there held that the county from which an incorrigible girl is sentenced to the industrial school for girls is liable for her support in such institution, irrespective of her legal settlement. We believe this opinion is correct and we adhere to it. We therefore advise that your practice has been in compliance with the statute.

JEF

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*Constitutional Law — Prisons — State Prison — Public Printing*—Board of control cannot, under present constitutional provision, establish printing plant to do state printing at Wisconsin state prison.

February 16, 1934.

BOARD OF CONTROL.

You state that your board has had under consideration for some time the question of the development of a printing plant at the Wisconsin state prison at Waupun, but that before final consideration can be given this matter, you say, one question must be decided, namely, the right legally of the Wisconsin state prison to bid on state printing. You refer us to art. IV, sec. 25, Wis. Const., which provides:

“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.”

Here it is provided that the state printing “shall be let by contract to the lowest bidder.” It is elementary and it need hardly be stated that there must be more than one

party to a contract, for no one can make a binding contract with himself alone, nor can any one sue himself to enforce an obligation. 7 Am. & Eng. Encyc. of Law, 2d ed., 99.

The board of control is an agency of the state and the prison institution is an arm of the state which cannot act independently of the state. When the board of control acts, it acts for the state and it cannot make a contract with the state. There would be only one party to the contract.

I am of the opinion that this consideration alone makes it clear that the board of control cannot establish a printing plant at the Wisconsin state prison under present constitutional provision. There may be other reasons but this is sufficient.

If it is deemed advisable that such a plant should be developed, in our opinion it would be necessary to add a proviso by amendment to this provision of the constitution authorizing the establishment of such a printing plant.

JEF

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*Building and Loan Associations—Constitutional Law—*  
That portion of sec. 215.145, Stats., preventing building and loan associations from charging fines for default in payment of dues or interest since January 1, 1932, is constitutional.

February 16, 1934.

PETER A. CLEARY, *Chairman,*  
*Banking Commission.*

By ch. 229, Laws 1933, the legislature created sec. 215.145, Wis. Stats., relating to building and loan associations. Subsec. (1) of this section provides, in part, as follows:

“\* \* \* No fines for default in the payment of dues or interest since January 1, 1932, shall be charged to any member who has been in default as provided in the association by-laws, or who may hereafter default in such pay-

ments on account of sickness, unemployment or greatly reduced income beyond his control."

Said ch. 229 was published June 10, 1933. By sec. 2 of this chapter it was provided:

"This act shall take effect upon passage and publication."

It is contended that this provision is retroactive and, therefore, unconstitutional.

It is stated that prior to the passage of this act, a number of building and loan associations had charged and collected, and, in many cases, disbursed, some fines for default in payment of dues or interest since January 1, 1932. It is suggested that considerable difficulty and confusion among building and loan associations will result because of the fines which have already been collected and disbursed.

At the outset it should be pointed out that not all retrospective or retroactive statutes are unconstitutional. Technically, a retrospective law is one that looks upon things that are past, while a retroactive law is one that acts upon things that are past. In the popular conception, however, they are synonymous.

"\* \* \* A retroactive or retrospective law, in the legal sense, is one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. However, a statute does not operate retroactively merely because it relates to antecedent events, or because part of the requisites of its action is drawn from time antecedent to its passing. \* \* \*" 59 C. J. 1158-1159.

It is our opinion that the provision quoted above from sec. 215.145, Stats., is not an unconstitutional retroactive law. As stated in sec. 2, ch. 229, it became effective only after passage and publication. Prior to the time as of which it took effect, building and loan associations could legally charge and collect fines for defaults in payment of dues or interest after January 1, 1932. The passage of ch. 229 does not attempt to make illegal the charging and collecting of such fines prior to the effective date of the act. No provision is made for refunding those fines which

were legally collected previous to the effective date of ch. 229. There is, therefore, no obligation upon the building and loan association to make any such refunds. Those fines which legally could have been charged and collected, under the old law for defaults in the payment of dues and interest subsequent to January 1, 1932, but which were not charged and collected prior to the effective date of ch. 229, cannot now legally be charged and collected. The legislature has simply said that a thing which could legally have been done before cannot legally be done now. Building and loan associations exist by virtue of legislative sufferance. Their continued existence must be subject to such regulatory laws as the legislature sees fit to enact.

JEF

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*Courts—Guardianship—Indigent, Insane, etc.*—Maintenance of insane person in county institution must be recovered by action under sec. 319.41, Stats.; such action cannot be brought by filing claim in county court in guardianship matter.

February 16, 1934.

ROSCOE GRIMM,  
*District Attorney,*  
Janesville, Wisconsin.

You state that the superintendent of the Rock county asylum and home for the poor has presented you with an account for collection in the sum of \$1,000 which represents money expended by Rock county for the care of Mr. X who has been insane for many years. Mr. X has considerable property and his wife has been appointed guardian by the county court of Rock county and she has acted as such for many years. The account of Rock county accrued during such period of guardianship. Mr. X is still insane and a charge of Rock county. The real and personal property over which his wife is guardian has, during the financial depression, diminished in value but there is still sufficient by way of assets to cover the claim of the county asylum.

You state that sec. 319.41, Wis. Stats., appears to cover the situation of adjusting claims against the ward such as the one above stated in favor of Rock county. However, you note in the Annotations of this section the following:

“An action cannot be maintained in the circuit court to recover amount expended by a county in maintaining a person in its insane asylum.” Citing *Washington County v. Schrupp*, 139 Wis. 219, 120 N. W. 856.

You say that you also find an opinion of the Attorney General cited in XIII Op. Atty. Gen. 505, was rendered some years after the Wisconsin case just cited, which states that a claim for support of an insane person accruing before the appointment of a guardian can be filed in county court but that a claim accruing during guardianship cannot be filed in county court, that the district attorney must start an action against the guardian in order to collect it and, apparently, the county court would not have jurisdiction. You state that this opinion did not mention the decision in 139 Wis. 219.

You inquire: How shall the district attorney proceed in the collection of the account of Rock county against the guardian or the estate of the ward who is insane when such bill was contracted during the period of guardianship?

When the ruling was made in the case of *Washington County v. Schrupp*, 139 Wis. 219, sec. 604*q*, statutes of 1898 was in force, to which the court referred, and said that the legislature had made specific provision for the examination, settlement and adjudication of this and like claims. This section was repealed in 1919, and when the opinion of the attorney general in XIII Op. Atty. Gen. 505 was given, the statute had to that extent been changed. You will note that sec. 3995*b*, now sec. 319.41, was referred to as applying to claims accruing before the appointment of a guardian, but there is no provision in the statute for the filing of a claim against the guardian which would cover the expense and maintenance incurred after the appointment of the guardian. Said sec. 319.41 is in substantially the same form as it was at the time the opinion was ren-

dered, although there is a slight amendment of said section in ch. 87, Laws 1929.

We therefore believe that the opinion of the attorney general, in view of the change in the statute, is the correct one and that there is no provision in the statute which authorizes a filing of the claim with the guardian, but that an action must be brought under section 319.41, Stats.

JEF

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*Public Officers—County Judge—Court Commissioner—Court Reporter—Register in Probate*—County judge whose salary is fixed by county board under sec. 59.15, Stats., is not entitled to per diem referred to in sec. 253.15, subsec. (2).

County judge is not entitled to receive fees as court commissioner.

Register in probate may not retain fees received for certifying copies of record but must turn them into county treasurer.

Court reporter is entitled to five cents per folio for transcript of testimony furnished private parties.

February 16, 1934.

FRANK B. KEEFE,  
*Assistant District Attorney,*  
Oshkosh, Wisconsin.

You state that on November 15, 1929, the county board of Outagamie county passed a resolution fixing the salary of the county judge at \$4,000 per year and that for the term previous to that a similar resolution was adopted. You ask for an opinion as to whether the county judge is entitled, in addition to his salary, to the per diem for services in matters not pertaining to probate business as provided for by sec. 253.15, subsec. (2), Stats.

Since you have submitted this question the county judge of Outagamie county has submitted a brief to this department, arguing that he is entitled to such additional per diem. The brief submitted is quite comprehensive, con-

sisting of ten pages and is also able and logical and in the words of Chief Justice Vinje in *Gregory v. Milwaukee County*, 186 Wis. 235, 237:

“\* \* \* There is much to be said for this view as a matter of pure logic. But logic sometimes leads to absurd or at least undesirable results which should not be reached except upon the most clear and explicit demands of written law.”

This department has definitely passed upon this question. On September 30, 1919, an official opinion was rendered (VIII Op. Atty. Gen. 720) in which it was held that the salary of a county judge fixed pursuant to sec. 59.15, Stats., is in full compensation for every official service. This is a well considered opinion and the statute at the time was thoroughly reviewed.

Another opinion to the same effect is found in X Op. Atty. Gen. 889. See also XIV Op. Atty. Gen. 176 and XVI 669.

Since these opinions were rendered the legislature has been in session repeatedly and its legislation has affected the county judges of the different counties of the state. No attempt has been made to have the courts pass upon this question nor has the legislature changed the statute to make it read so as to require a contrary construction. Until the supreme court makes a contrary ruling we believe that the decisions of this department should be adhered to.

You also inquire whether the county judge may retain fees collected as court commissioner.

We also have opinions on this question. In Op. Atty. Gen. for 1910, 662, it was held that fees allowed to court commissioners cannot apply to county judges while exercising the powers of court commissioners. To the same effect see IX Op. Atty. Gen. 109.

You further inquire whether the register in probate may keep or hold fees collected for certified copies.

Under sec. 253.29, Stats., it is provided:

“The registers in probate \* \* \* shall \* \* \* certify to copies of any judgment, order, report, or other paper or record of the county courts, and shall collect there-

for the same fees as is provided by law for clerks of the circuit courts for like services, such fees to be disposed of according to law."

If the register in probate is on a salary he will be required to turn these fees into the county treasury.

You further inquire whether the court reporter may keep or retain fees for work done during his hours of employment in reporting an adverse examination taken before the county judge as court commissioner.

Under sec. 253.33 there is a provision for the appointment of court reporter and provision for his salary. In subsec. (4) it is provided:

"Such reporter shall furnish to any party a transcript of the testimony taken by him in any matter or proceeding mentioned in this section upon being paid therefor at the rate of five cents per folio."

I believe he may retain the five cents per folio for the services thus rendered.

JEF

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*Indigent, Insane, etc.—Minors—Legal Settlement—*Upon remarriage of mother she acquires settlement in city where her husband has settlement; her legitimate children follow her settlement and therefore also have legal settlement in same city.

February 16, 1934.

WENDELL MCHENRY,  
*District Attorney,*  
Waupaca, Wisconsin.

You state that X, a divorced woman with three minor children, has been living in the city of B for the past three years and has been receiving aid from the town of A, which was her legal settlement. She has now remarried and the city of B is furnishing aid to X and her husband, but refuses to furnish aid to the three children and claims that they still retain their legal settlement in the town of A.

The town of A claims that the minor children follow the settlement newly acquired by X by reason of her second marriage.

You ask an opinion as to what settlement minor children take upon the remarriage of their mother to a resident in this state.

Under sec. 49.02, subsec. (1), Stats., the legal settlement of a married woman always follows the settlement of her husband if he has any within the state, otherwise her own at the time of marriage. Legitimate children follow and have the settlement of their father if he has any within the state until they demand a settlement of their own, but if the father has no settlement, they follow and have the settlement of their mother if she has any. I assume that the father of these three children has no legal settlement in this state. You do not say so but, from your questions, I would infer that.

She has now, after her remarriage, under the above statute, a legal settlement in the city of B, where her husband has a legal settlement, and this makes it also the legal settlement of the three children. You are therefore advised that the legal settlement of the three children is now the city of B.

JEF

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*Automobiles—Law of Road—Common Carriers—Secretary of state may, upon proper certification of public service commission, lower registered gross weight of motor vehicles to correct errors in such registration.*

February 16, 1934.

PUBLIC SERVICE COMMISSION.

You have requested an opinion upon the following question: May the owner of a motor vehicle properly apply to the secretary of state for a reduction of the gross weight of such vehicle, if it appears to the satisfaction of the public service commission that such reduction is requested in good faith in accordance with the facts as to the actual

gross weight; and may the secretary of state lawfully make such reduction in the license for such vehicle upon certification to him by the commission that the reduction appears to be in good faith, justified and not made for the purpose of evading fees or taxation justly payable under chs. 194 and 85, Stats.?

The answer is in the affirmative.

While a previous opinion was rendered to the secretary of state (XXII Op. Atty. Gen. 884) to the effect that he was without specific authority to lessen the gross weight of vehicles as the same may have been voluntarily registered for any one license year, we are nevertheless of the opinion that where the actual gross weight was misstated by the licensee, it may be changed to correct an actual error and to make the gross weight accord with the actual facts.

One reason for our previous opinion lay in the fact that unrestricted changes of gross weights by the secretary of state without the knowledge of the public service commission would tend to disrupt the practice and procedure of the latter body in the performance of its duty in issuing certificates, licenses and permits under the provisions of ch. 194, Stats. Where any proposed change is clearly made for the purpose of correcting errors and is actually made only upon certification as indicated in your question, the reason for the former opinion to that extent disappears. Accordingly you are advised that under the circumstances described in your question the lowering of the registered gross weight of a motor vehicle may properly be made by the secretary of state.

JEF

*Courts — Garnishment — Quasi-garnishment — Indigent, Insane, etc.—Relief Funds*—Money allowance to be given to relief workers is not subject to quasi-garnishment under sec. 304.21, subsec. (1), Stats.

February 16, 1934.

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

You submit the following as a basis for an official opinion:

“One A is working for the relief department in Iron county, Wisconsin. B has obtained a judgment against A, and has filed a certified copy of the judgment in the office of our county clerk. The county clerk, county treasurer and chairman of the county board sign the checks that are issued to workers in the relief department. The relief checks apparently are issued out of county funds, although I presume the county funds and the relief funds are kept separate.”

You inquire whether the filing of the certified copy of the judgment with the county clerk operates as a quasi-garnishment of the relief worker's allowance.

Sec. 304.21, subsec. (1), Stats., provides in part as follows:

“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 state or any city, county, village, town, school district or other municipal corporation, said judgment creditor may file a certified copy of such judgment with the secretary of state or with the clerk of such county, city, village, town, school district or other municipal corporation, as the case may be; \* \* \*.”

Money to be paid for relief work is not subject to garnishment under the above quoted statute.

The phrase “money due, or to become due” means money owed, and imports the idea of indebtedness. *Trowbridge v. Sickler*, 42 Wis. 417 (1877); *Sather Banking Co. v. Arthur R. Briggs Co.*, 138 Cal. 724, 72 Pac. 352 at 355 (1903).

The word "due" has been defined as meaning "what ought to be paid; what may be demanded." Bouvier's Law Dictionary (8th ed. by Rawle, 1914).

The purpose and effect of the quasi-garnishment statute was stated by the Wisconsin court in the case of *Jefferson Transfer Co. v. Hull*, 166 Wis. 438, 441, 166 N. W. 1 (1918):

"\* \* \* Its manifest purpose is to furnish to the creditors of an employee of the public a remedy practically equivalent to garnishment, it being the policy of the state not to subject the state or its municipalities to garnishee process. Sec. 2752, Stats.; *Burnham v. Fond du Lac*, 15 Wis. 193. \* \* \*

"The right given by this statute is that of a lien on the fund, not ownership thereof. It is closely analogous to the right of a judgment creditor to goods of the debtor seized upon execution; in fact the proceeding may rightly be called an equitable execution \* \* \*"

Sec. 304.21 (1), therefore, is apparently based upon the same fundamental principles that underlie the similar proceedings of garnishment, attachment, and execution. The essential concept of these proceedings is that the debtor must have some interest in, or claim upon, the property to be seized. *Taylor v. Donahoe*, 125 Wis. 513, 103 N. W. 1099 (1905); *Lehman v. Farwell*, 95 Wis. 185, 70 N. W. 180, 37 L. R. A. 333 (1897); 28 C. J. 15, 92, 95, secs. 1, 118 and 121; 12 R. C. L. 775, 778, 793, secs. 2, 8 and 23.

"The general rule is that garnishment, like other proceedings *in invitum*, only affects the actual property, money, credits and effects of the debtor in the hands of the garnishee, \* \* \*" *Hall v. Kansas City Terra Cotta Co.*, 97 Kan. 103, 105, 154 Pac. 210, Ann. Cas. 1918 D, 605, L. R. A. 1916 D, 361 (1916).

Thus money turned over to an agent to be paid to the debtor as a mere donation by the principal cannot be made the subject of garnishment. *Neuer v. O'Fallon*, 18 Mo. 277, 59 Am. Dec. 313 (1853).

Grave as may be the moral duty of a state and its municipalities to relieve poverty and want from among their members, nevertheless, such duty in its legal aspect exists solely by virtue of statutory law. *Patrick v. Baldwin*, 109 Wis. 342, 85 N. W. 274, 53 L. R. A. 613 (1901); 48 C. J. 432, sec. 7; 21 R. C. L. 701, sec. 2.

The duty of a public body to support its poor is statutory and not contractual in nature. *City of Augusta v. City of Waterville*, 106 Me. 394, 76 Atl. 707 (1910).

The nature of this duty is not changed by reason of the fact that the municipality offers aid in the form of compensation for services. *In re Moore*, 187 N. E. 219 (Ind. 1933); *Vaivida v. City of Grand Rapids*, 264 Mich. 204, 249 N. W. 826 (1933).

The obligation imposed upon a municipality to relieve its poor does not give use to a right in the indigent person to demand any particular form of relief. No creditor-debtor relationship is created by reason of such obligation. Even if the municipality demand services in return for the relief given, the nature of the obligation is not changed, and money paid out under such arrangement is still a form of relief. Hence funds to be paid out for relief are in no sense property of the indigent which can be made the subject of garnishment.

Money allowance to be given to relief workers, is not "money due, or to become due" within the meaning of the quasi-garnishment statute.

JEF

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*Minors—Child Protection—State Public School—Cost of support of child committed to state public school must be borne by state if child has no legal settlement, unless committing court, by order, provides for liability of committing county.*

February 19, 1934.

BOARD OF CONTROL.

Under the provisions of sec. 48.07, subsec. (1), Stats., the court frequently commits a delinquent, neglected or dependent child to the state public school at Sparta. When the child is so committed, sec. 48.20, subsec. (4), provides that one-half of the cost shall be paid by the county of his legal settlement. When a child is committed to this school, who does not have a legal settlement in any town,

village or city in this state, there is no provision made under sec. 48.20 (4) or any other statute as to who shall pay for his care and maintenance.

You state:

“\* \* \* It is our belief that at this point section 48.07 (6) (a) is controlling and that all of the expense shall be a charge upon the county committing.”

You believe that had there been an intent to make the state chargeable, it would have been definitely expressed by the legislature, as was done in respect to tuberculous cases in sec. 50.075.

It is our opinion that this construction is not correct. In an opinion rendered to you, XXII Op. Atty. Gen. 312, this office definitely held that a child could be committed to the state public school at Sparta as a state at large case. It was further held that where a child having no legal settlement in this state was committed to this school, the cost should be borne by the state. The two questions directly presented in that request were:

1. Whether a child could be committed to the state public school as a “state at large case,” and

2. If question No. 1 was answered in the affirmative, how the provisions of the statute could be met with respect to charging the county of commitment one-half the cost.

That opinion was intended to hold that a court had the right to commit a neglected, dependent or delinquent child to the state public school even though the child had no legal settlement in Wisconsin, and that, inasmuch as the child did not have a legal settlement, no statute provided that one-half of the cost should be borne by the committing county. It is still our belief that this is the law and the holding in that opinion is affirmed.

Sec. 48.07 subsec. (6), par. (a) provides:

“Whenever a child is committed by the court to custody other than that of his parent and no provision is otherwise made by law for the support of such child, compensation for the care of such child, when approved by order of the court, shall be a charge upon the county, \* \* \*.”

Under prior statutes the maintenance cost of children committed to certain public institutions was made a charge

against the county which committed the person. This method of charging took no particular account of the legal settlement of the person committed. The legislature saw fit to alter this situation and make the charging of the cost, or a portion thereof, dependent upon legal settlement. It is not known definitely what the purpose of this was, but it quite probably was to prevent a county from being obliged to assume the cost of the support of a child committed from that county who might have lived in the county but a very short time or perhaps even have been a transient. Those children who have established legal settlements usually have lived at the place of the legal settlement for some period of time. There is, therefore, some ground for making the county in which they lived partially responsible upon their commitment to a public institution. As a matter of equity, a county should not be expected to bear the total cost of the support of a transient child, or one having no legal settlement within the county, when it is obliged to bear only one-half the cost of those children who do have a legal settlement in the county, and who possibly have lived there all of their lives.

It is to be noted that in that portion of sec. 48.07 (6) (a) quoted above the total charge can be assessed against the committing county when no provision is otherwise made by law for the support of the child, only "when this charge is approved by order of the court." It is, of course, presumed that this language used by the legislature has some meaning. The only meaning which can attach to it is that it constitutes a limitation upon the liability of the county for the support of the child. Unless the court which makes the commitment sees fit, by order, to provide that the county shall assume the cost of caring for those children who do not have a legal settlement in the county, such cost must be borne by the state.

*Public Officers—County Commissioner—Town Chairman*  
—Chairman of town is ineligible to serve as commissioner of county under commission form of government.

February 19, 1934.

EDMUND H. DRAGER,  
*District Attorney,*  
Eagle River, Wisconsin.

You have submitted to us the question whether a chairman of a town is eligible to serve as a commissioner of a county organized under the commission form of government in pursuance of sec. 59.95, Stats.

This question raises the problem of when are two offices incompatible when held by the same person. The test of incompatibility is laid down in the case of *State v. Jones*, (1907) 130 Wis. 572, 110 N. W. 431. The court there said, p. 575:

“\* \* \* 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. \* \* \*”

In order to hold these two offices to be incompatible we must determine that there is a conflict of duties between the two offices which will react to the public detriment.

In sec. 59.95, subsec. (16), we find such an incompatibility. Sec. 59.95 (16) reads as follows:

“Any vacancy in the office of county commissioner occurring more than thirty days before the expiration of the term shall be filled, if a commissioner at large, by appointment by the governor, otherwise by a board appointment, consisting of the chairmen of the town board of each town, and the mayor or president of each city and village, in the commissioner district in which any such vacancy occurs, which shall meet at the county clerk's office for that purpose upon three days' written notice given by such clerk and served personally. If such commissioner district is wholly within the limits of an incorporated city or village,

such vacancy shall be filled by the council of such municipality. Absence from the county for six successive months shall be deemed to create a vacancy."

It is entirely conceivable that a situation might arise where the chairman of the town board would be a candidate for the office of county commissioner. If such was the case and sec. 59.95 (16) applied, we would have to hold that the chairman of the town board would be disqualified to vote for the county commissioner. But since such a holding would necessarily deprive the township of a right to vote on the commissioner representing their township we would have to say that the chairman of the town could not be a candidate for the office of county commissioner. If we held otherwise the town would be deprived of its voting rights. We find, therefore, that there are incompatible duties between the office of chairman of the town and the office of commissioner and must hold that the offices are incompatible and cannot be held by the same person.

We recognize that in an opinion written by this department, XIV Op. Atty. Gen. 274, we impliedly held that the offices were compatible. That opinion, however, was written when sec. 59.03 (2) (a) was in force. That section expressly provides that the chairman of the town board shall be a member of the county board. Such a provision, however, does not apply to the commission form of government. Sec. 59.95 (20) provides:

"Any law applicable to each county prior to the taking effect of section 59.95 not inconsistent therewith shall apply to such county."

Sec. 59.03 (2) (a) is obviously in conflict with the provisions of sec. 59.95 and is not, therefore, controlling when we are dealing with the commission form of government.

JEF

*Contracts — Public Officers — Salaries — Wages — Assignment by married man of wages to become due, more than two months in advance, is invalid.*

Salary of public officer or employee may be assigned and such assignment should be recognized by secretary of state if otherwise valid.

February 19, 1934.

C. A. NICKERSON, *Acting Auditor,*  
*Department of State.*

You ask whether a married man may validly assign, for more than two months in advance, that portion of his wages which are not exempt from execution, and also whether you are obliged to accept salary assignments of state employees, and officers.

In connection with your first question, sec. 241.09, Wis. Stats., provides as follows:

“No assignment of the salary or wages of any married man, then or at the accruing thereof exempt by law from garnishment, shall be valid for any purpose unless such assignment shall be in writing signed by the wife, if she at the time be a member of his family, and unless her signature be witnessed by two disinterested witnesses; nor shall any such assignment be valid as to any such salary or wages to accrue more than two months after the date of the making of such assignment.”

It is contended that the words “such salary or wages” refer to the salary or wages of a married man, which are “then or at the accruing thereof exempt by law from garnishment”; and that the assignment by a married man of nonexempt wages for more than two months in advance would be valid for some purposes, one of such purposes being as between the parties. It must be admitted that the presence of the word “such” in the above statute would strongly indicate that it refers to the wages of a married man exempt by law from garnishment.

Our supreme court, in the case of *Porte v. Chicago & Northwestern Railway Company*, 162 Wis. 446, 449–450, uses the following language:

“\* \* \* An additional consideration in plaintiff’s favor arises under the Wisconsin statute, which inhibits

the assignment of any wages for more than sixty days and of all exempt wages unless the assignor's wife joins in the contract of assignment as prescribed by sec. 2313a, Stats. 1915. \* \* \*

Sec. 2313a, Stats. 1915, is the present sec. 241.09. This language, of course, loses some of its force by virtue of the fact that it is *obiter dictum*. It is still significant, however. The printed case contains a copy of the decision of the lower court in the *Porte* case. Judge Graass held specifically that the assignment was invalid "because it assigns wages to accrue more than two months after the date of the said assignment."

In IV Op. Atty. Gen. 1111, p. 1114, sec. 241.09 was quoted and the following statement made thereafter:

"From the above it appears, first, \* \* \* and, second, no assignment of salary beyond two months from the date of the assignment is valid. \* \* \*"

This office feels bound by these citations to hold that any assignment by a married man of wages to accrue more than two months in advance, is invalid.

It is the great weight of authority in the United States, and the practically unanimous decision in England, that the salary of a public officer to accrue in the future cannot validly be assigned. This doctrine is based upon the argument that it is against public policy to permit governmental agents to make assignments of salary not yet due, for the reason that the prospect of receiving no remuneration for services rendered would have a tendency to decrease the quality of such services. No reason is apparent why the same doctrine would not apply to agents and employees who would not technically be classified as officers. In the only decision which has thus far been made in Wisconsin, however, our supreme court apparently adopted the minority view. In *State ex rel. State Bank v. Hastings*, 15 Wis. 75, it was held that the salary of an officer to become due is a possibility, coupled with an interest and as such is capable of being assigned. In that case the circuit judge made an assignment in advance of his quarter's salary. The assignment was directed to the state treasurer. Upon the refusal of the state treasurer

to pay the same, the supreme court awarded a mandamus, to compel payment.

The following is taken from the opinion found in IV Op. Atty. Gen. 1111, 1113:

“\* \* \* In *Bowery National Bank v. Wilson, et al.*, (N. Y.) 9 L. R. A. 706, a sheriff of the county of New York assigned a portion of a sum of money due him for services to be rendered, and the court, in determining the question, said:

“It is settled in this state that an assignment by a public officer of his unearned salary is contrary to public policy and void. \* \* \*

“The same rule is established in England, and in some of the United States. \* \* \*

“\* \* \* The contrary rule would permit the public service to be undermined by assignments to strangers of all the funds appropriated to salaries. \* \* \* It does not need much reflection or observation to understand that such a condition of things would not fail to produce results disastrous to the efficiency of the public service.’ (p. 707).

“In a note to this case, attention is called to *State ex rel. State Bank v. Hastings*, 15 Wis. 75, as being contrary to this decision, and it is the only case cited in that connection.

“In 5 L. R. A. (N.S.) at 567, footnote, in speaking of the case of *State ex rel. State Bank v. Hastings*, 15 Wis. 75, appears the following:

“This case is criticized or disapproved by nearly all the authorities holding a contrary doctrine.’

“The case of *State v. Hastings, supra*, was decided about 1865, and since that time has not been approved or disapproved by our court with reference to this particular question, and in view of the fact that the great weight of authority outside of our state is of a contrary opinion, it is very difficult to conjecture with any degree of certainty as to what our supreme court would do at the present time upon this point, \* \* \*.”

The situation has not changed materially since this opinion was rendered, except that additional decisions have added to the already overwhelming weight of authority, contrary to the Wisconsin holding. The fact remains, however, that the *Hastings* case has not been overruled in this state. Under the circumstances, this office must advise you that, under the Wisconsin law, the salary of a public

officer or employee can be assigned and that it is your duty to recognize such assignments, which are otherwise valid. Sec. 304.21, Stats., relating to quasi-garnishment, by implication recognizes the validity of certain assignments of public officers and employees, where it provides, in subsec. (3), for priority as between an assignment and a judgment.  
JEF

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*Insurance — Town Mutuals — Maximum Single Risks —*  
Forty years' acquiescence in violation of by-law of town mutual insurance company constitutes waiver of provision by members who acquiesce therein.

Penalty for violation of sec. 201.16, Stats., is penalty upon directors of company for excess of such maximum single risk.

February 20, 1934.

ARNO J. MILLER,  
*District Attorney,*  
Portage, Wisconsin.

You have referred to us two questions concerning town mutual insurance companies. You state that officers have been elected by the stockholders in the mutual but that such stockholders had but one vote apiece, regardless of the amount of insurance which they carried, contrary to the provisions of sec. 202.03, subsec. (2), Stats. You also state that at no time had any resolution been adopted changing the rule laid down in the statute above quoted. However, the company has continued since its organization granting but one vote to each stockholder regardless of the amount of stock held. Your question is whether the actions of the company and the acquiescence therein by the stockholders would constitute a waiver of the provisions in sec. 202.03 (2).

The statute sec. 202.01 (2), requires that the articles of a town mutual insurance company shall be drawn up in accordance with the provisions of ch. 202. Sec. 202.03 (2), above referred to, provides as follows:

“Ten members shall constitute a quorum. Each policyholder shall have one vote for each two hundred dollars

of his insurance, but the company may by a resolution adopted at any annual meeting by a two-thirds vote, provide that each member shall have one and only one vote."

This section is then a by-law of the company and under the authorities such a by-law may be waived by the members of the company. Fletcher Encyc. on Corporations, secs. 4200-4201. *Lutheran Trifoldighed Congregation of Neenah v. St. Paul's English Evangelical Lutheran Congregation of Neenah*, (1914) 159 Wis. 56, 150 N. W. 190; *Voss v. N. W. Nat. L. Ins. Co.*, (1909) 137 Wis. 492, 118 N. W. 212.

We must hold, therefore, that the provisions of sec. 202.03 (2) have been waived by the acquiescence of the members of the company for some forty years and that the provisions do not, therefore, protect the officers who were not re-elected at the last election and cannot be taken advantage of by them or by the members of the company at this time.

Your second question is whether the violation of sec. 201.16, relating to the maximum risk which can be taken out by an individual in this company, provides a penalty against the mutual corporation. You cite to us sec. 207.02, which provides a penalty for a violation of the insurance law where no other penalty is prescribed. That section would apply to this company. See the definition of insurance companies in sec. 201.01. If there were no other penalty prescribed we find in sec. 201.12 a specific penalty prescribed for a policy which exceeds the maximum single risk as restricted in sec. 201.16. Sec. 201.12 (2) holds the original incorporators during the first year and the directors thereafter, jointly and severally, personally liable for any losses incurred during the time when such maximum single risk shall become a fixed liability upon the company. Their liability amounts to the excess amount of the policy over the maximum single risk described. We hold, therefore, that the penalty for violation of sec. 201.16 is a liability upon the directors of the company in the amount of the excess of any policy over the maximum single risk so prescribed.

JEF

*Bonds—Public Officers*—County treasurer and his bondsmen are liable on bond for funds received from Reconstruction Finance Corporation through industrial commission for relief projects in this state.

February 20, 1934.

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

You have submitted two questions to this department requesting an official opinion thereon. It appears that the county treasurer receives federal money from the industrial commission for a relief program. He issues receipts for this money and then issues county orders turning the orders over to the relief commissioner. Your first question is whether or not the county could come against the treasurer's bondsmen for these funds as distributed by the relief commissioner.

Sec. 19.01, subsec. (2), Stats., provides that every official bond required by any public officer shall be substantially as follows:

"We, the undersigned, jointly and severally, undertake and agree that . . . . ., who has been elected (or appointed) to the office of . . . . ., will faithfully discharge the duties of his said office according to law, and will pay to the parties entitled to receive the same, such damages, not exceeding in the aggregate . . . . . dollars, as may be suffered by them in consequence of his failure so to discharge such duties.

"Dated . . . . ., , , , 19--

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 (Principal)

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 (Surety)"

The official duties are defined in sec. 19.01, subsec. (3), Stats. The duties therein covered by the bond include such duties as may come to the county treasurer by virtue of his office.

In an opinion rendered by this department in XXII Op. Atty. Gen. 180 we recognized that the county treasurer secured these moneys by virtue of his office and his bonds-

men would, therefore, under the terms of the bond be liable for any defalcations of the county treasurer.

The second question which you refer to us concerns the treasurer's individual liability in case the bondsmen could not be held liable. Since we have answered the first question in the affirmative it will not be necessary to discuss this question.

JEF

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*Public Health—Communicable Diseases—Venereal Diseases—Wisconsin General Hospital*—In cases of venereal diseases in communicable stage provisions of sec. 143.07, Stats., must be complied with. Those venereal diseases which are not in communicable form may be treated in manner provided under ch. 142, Stats.

February 23, 1934.

DR. H. M. GUILFORD, *Director,*  
*Bureau of Communicable Diseases,*  
Board of Health.

You state that you have been requested by one of the deputy state health officers to obtain an interpretation of sec. 143.07, Stats., relating to venereal diseases, and also ch. 142, as far as it relates to the handling of venereal disease. Said deputy state health officer says that sec. 143.07 has been construed to cover all cases of venereal disease applying for relief and that ch. 142 has been construed to be inoperative in such cases.

You say that the opinion so far held by the state board of health is that sec. 143.07 provides only for special phases such as reporting cases to the state board of health and the compulsory institutionalization of those who are refractory in taking treatment and that sec. 143.07 applies only to those cases which are in a communicable stage of the disease.

Your interpretation of the statute is correct. It is, however, true that sec. 143.07 applies specially to venereal diseases in the communicable stage, and all such cases must

be treated and handled as provided in said section of the statutes. The provisions in ch. 142 are however applicable to a venereal disease which is no longer communicable and comes under the designation of an ailment which is broad enough to include such diseases. Such venereal diseases are included and may come under the purview of ch. 142. To protect the public against the spread of communicable venereal diseases the provisions of sec. 143.07 must be followed.

JEF

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*Intoxicating Liquors*—Intoxicating liquor laws of 1933 regular and special sessions are interpreted.

February 23, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

You submit a list of questions which arise in the administration of the new intoxicating liquor law, asking our opinion on the following points:

I. Taking into consideration the definitions set forth in sec. 176.01, subsec. (2), Stats., as created by ch. 13, Laws Special Session 1933, and sec. 66.05, subsec. (10) (a), Stats., created by sec. 1, ch. 207, Laws 1933, and amended by ch. 3, Laws Special Session 1933, you ask whether or not porter, ale, or any of the fermented malt beverages, which were formerly excluded from the definition of alcoholic liquors, are now classed as intoxicating liquors when it comes to the question of deciding whether or not a person requires a permit or license to sell the same.

The answer is, Yes. Porter, ale, and any of the fermented malt beverages containing five per centum, or more, of alcohol by weight, are included in the definition of intoxicating liquors, found in the said ch. 13. The legislature, in sec. 176.01 (2), excepted fermented malt beverages as defined in sec. 66.05 (10) from the definition of intoxicating liquor, provided such fermented malt beverages have an alcoholic content of less than five per cent by weight.

Thus the amount of alcohol permitted in fermented malt beverages sold by persons having a license to sell the same is limited to less than five per cent by weight. If the person wishes to sell porter, ale, or any fermented malt beverages containing five per centum, or more, of alcohol by weight, he must have, in addition to the license provided for in sec. 66.05 (10) (d) 1, the license to sell intoxicating liquors required by sec. 176.04 (1).

II. Sec. 176.04 (1) reads:

“Any person who shall, without a license or permit, vend, sell, deal, or traffic in \* \* \* intoxicating liquor \* \* \* shall be guilty of a misdemeanor \* \* \*.”

You ask:

(a) “Is the term ‘person’ as used in this section broad enough to include corporations, firms, partnerships, associations, etc.?”

Answer, Yes. Sec. 176.04 is entitled “Sale without license; penalty.” It is not reasonable to suppose that the legislature meant to punish only private individuals who deal in liquor without having a license therefor.

Sec. 176.05 (1a) reads:

“\* \* \* If any manufacturer, wholesaler, or rectifier violates any of the provisions of this *chapter*, \* \* \* the court may suspend or revoke such permit for such period of time as it may determine. \* \* \*”

This section implies that the penalties of sec. 176.04 apply to corporations, etc., also.

It will be noticed that sec. 176.04 reads, “without a *license* or *permit*.” Permits are issued to manufacturers, wholesalers and rectifiers, who are more frequently than not corporations, partnerships, associations, etc., rather than individual entrepreneurs.

Sec. 370.01 (12) reads:

“The word ‘person’ may extend and be applied to bodies politic and corporate as well as to individuals.”

Sec. 370.01 (30) provides:

“The word ‘person’ shall extend and be applied to bodies corporate unless plainly inapplicable.”

See also *U. S. Tire Co. v. Keystone Tire Sales Co.*, 150 S. E. 347, 349, 153 S. C. 56, 66 A. L. R. 1264. Generally, when the word "person" or "party" is used in a statute, it is broad enough to include corporations and artificial persons, unless an intention to exclude such artificial persons is plainly obvious.

*Tewksbury v. Schulenberg*, 41 Wis. 584, holds that the term "person" may be applied to corporations. A partnership is considered in law as an artificial person or being, distinct from the individuals composing it, and is treated as such in law and equity.

*Hollingshead v. Curtis*, 14 N. J. Law 402, 410. The word "person" as a general rule is held to include corporations. 6 Words and Phrases, 1st Series, 5327-5329.

(b) Does it ["person"] not include brewers, bottlers, and wholesalers who manufacture or sell fermented malt beverages containing more than five per cent of alcohol by weight?

Answer, Yes. See II (a) above.

III. Ch. 5, Laws Special Session 1933, made it obligatory upon every one selling intoxicating liquor for future delivery or soliciting orders for same to take out a permit.  
\* \* \*

You point out that ch. 5 does not define what is meant by intoxicating liquor and the only statutory definition existing at the time of its passage was that found in ch. 3, Laws Special Session 1933, "which [chapter] imposed an occupational tax on intoxicating liquors and defined them as in sec. 176.01, but expressly excluded *all* fermented malt beverages." You ask whether brewers and wholesalers of a brew containing more than five per cent of alcohol by weight are brought into the class requiring either a permit or license under ch. 5.

Answer, Yes. Ch. 5, Laws Special Session 1933, does not define what is meant by the term intoxicating liquor, but it creates sec. 176.70, which is part of ch. 176 as created by ch. 13 (the Griswold bill). The definition of intoxicating liquor, found in sec. 176.01, is prefaced by the following words: "As used in this *chapter*, or in any *regulation made pursuant thereto*, unless the context or

subject matter otherwise requires \* \* \*." Therefore, the definition of intoxicating liquors to be used in interpreting ch. 5 (sec. 176.70) is found in sec. 176.01, Stats. Ch. 3, Laws Special Session 1933, refers to entirely different chapters, i. e., chs. 20 and 139 of the statutes.

IV. "Sec. 176.05 [1a] provides that no manufacturer, wholesaler or rectifier shall sell intoxicating liquor within the state without obtaining a permit from the state treasurer and paying a fee of \$250.00. In view of the definition of intoxicating liquors given in sec. 176.01, will not the term manufacturer, etc., include brewers of a brew containing five per cent or more of alcohol by weight?"

Answer, Yes. It will include brewers of malt beverages containing five per cent or more of alcohol by weight.

V. You point out:

"In ch. 3, Laws Special Session 1933, in incorporating by reference certain sections of ch. 139, Stats., the legislature provides that when speaking of intoxicating liquors, the word manufacturer should be substituted for brewer and the term rectifier should be substituted for bottler. There is no such provision in the Griswold bill [ch. 13, Laws Special Session 1933], but unless this sec. 176.05 is construed that way and a bottler is classed with a rectifier, the result will be that brewers and wholesalers of brew will have to take out a permit and pay the fee, while the bottler will be allowed to escape. \* \* \*"

Answer. Bottlers, as such, are *not* included. You are advised that sec. 176.05 provides for a permit to *sell*; it is the selling that is licensed. As long as a bottler only bottles, he does not need a permit to sell. The minute he sells intoxicating liquor, he comes under the provisions of sec. 176.05 (1a) because he is then a wholesaler, under sec. 176.01 (11), which states:

"A 'wholesaler' is any person, firm, or corporation, other than a manufacturer or rectifier, that sells intoxicating liquors to retailers or others for the purpose of re-sale."

VI. "Sec. 176.05 (1b) provides that the restrictions and limitations imposed in subsecs. (3), (9) and (13) of this section shall apply to manufacturers and rectifiers and the permits issued by the state treasurer."

You ask what the application of these restrictions and limitations in subsec. (3) is.

Our interpretation is that not more than two permits should be issued to any one manufacturer or rectifier.

VII. Do the restrictions imposed in subsec. (9) apply to wholesalers?

Answer, Yes, if they are individuals or out-of-state corporations; if a Wisconsin corporation, the restrictions apply to the officers and directors of such corporations. They would be included in the word "person" in the first sentence of that subsection:

"No license or permit shall be granted to any *person* or *persons* \* \* \*."

VIII. (a) Do the restrictions and limitations in subsec. (13) apply to wholesalers?

Answer, Yes, if they are also corporations. They would be included under the word *corporation* in the opening sentence of that subsection.

(b) "Is this provision which definitely states that it applies to corporations, rectifiers and manufacturers constitutional in case some of the rectifiers and manufacturers are not corporations?"

Answer, Yes. Subsec. (13) deals with licenses to corporations, i. e., only manufacturers, rectifiers, etc., who are also corporations, are affected by its provisions. By virtue of sec. 176.05 (1b) it applies to permits of manufacturers and rectifiers. The state which grants charters to corporations may impose restrictions on their powers.

(c) "In addition to wholesalers, can we construe it to mean bottlers of a brew containing more than five per cent of alcohol by weight?"

Answer, Yes, if they are corporations, and sell intoxicating liquors in addition to bottling them; otherwise, no.

IX. Sec. 176.05 provides that the permit costing \$250.00 shall expire on July 1. Subsec. (6) of this same section provides that *licenses* may be granted for a shorter term than this, the licensee to pay such a proportionate

share of the annual fee as the number of months remaining in the year bears to the full year.

You ask:

“Can we assume that the same rule applies to permits, or must the rate be a flat \$250.00 for a permit issuing today and expiring July 1 of this year, and then a further charge be made for the ensuing year?”

Answer. The rule in regard to licenses found in subsec. (6) does *not* apply to permits. The rate is a flat \$250.00 for a permit, whenever it is obtained. In the case of licenses, for selling intoxicating liquors, specific provision is made for periods of less than a year. Also ch. 207, Laws 1933, makes specific provision for licenses for selling fermented malt beverages for periods of less than a year. Since no mention is made under sec. 176.05 (1a) of permits for less than a year, the fee for a permit will have to be \$250.00 at any time in the year. You cannot invoke the law applicable to licenses and use it in regard to permits.

X. “Ch. 139, sec. 139.03, which is incorporated by reference into ch. 3, Laws Special Session 1933, provides that we shall not sell stamps to any one but licensed wholesalers and retailers selling the products of manufacturers and rectifiers, who are properly registered with us.

(a) “Will this provision also cover bottlers of a brew over five per cent?”

The provision will cover bottlers of a brew having an alcoholic content of five per cent or over by weight, if they are also wholesalers; otherwise not.

(b) “Does it not render it impossible for us to tax any of the stock of a bootlegger who has in his possession liquor not previously taxed?”

Answer, Yes. Since the bootlegger is not a licensed dealer you cannot sell stamps to him and hence cannot tax him. Goods not previously taxed can then be confiscated by you, or you can have him prosecuted for selling liquor without a permit or license.

JEF

*Contracts — Legislature — Public Officers — Salaries — Wages—Assignments*—Secretary of state should not honor assignments of salaries of members of legislature and other state officers unless assignments conform to sec. 241.09, Stats.

February 24, 1934

DEPARTMENT OF STATE.

Attention C. A. Nickerson, *Acting Auditor*.

Several members of the legislature have filed assignments of all or portions of their salaries for indefinite periods of time, the assignments being signed by the members only. You have refused to accept the assignments on the grounds that they were not in accordance with the provisions of sec. 241.09, Wis. Stats. The assignee contends that this section does not apply to the compensation of legislators or other state officers, but that there is a distinction between their compensation and ordinary salaries or wages. You request an opinion "as to whether members of the legislature or other state officers may assign either the exempt or the nonexempt portions of their salaries without regard to the provisions of sec. 241.09?"

Your question is answered in the negative. The cases of *State ex rel. State Bank v. Hastings*, 15 Wis. 83, and *State ex rel. Zimmermann v. Dammann*, 201 Wis. 84, are cited by the assignee for the proposition that sec. 241.09 is not applicable to the compensation of a legislator who is a constitutional public officer. In the *Hastings* case, a circuit judge, who is a constitutional public officer, was permitted to make an assignment of his quarter's salary and, upon refusal of the state treasurer to honor the assignment, mandamus was issued to compel payment. At the time of the decision in this case (1862), sec. 241.09 could not have been considered because it was enacted by ch. 148, Laws 1905. In our opinion, sec. 241.09 does not in any way conflict with the decision in the *Hastings* case, except that the statute limits the assignment to a period of two months. Neither the *Hastings* case nor the *Zimmerman* case is authority for the proposition cited, and throughout the decisions in both of these cases our supreme court repeatedly uses the word "salary" as relating to the remuneration re-

ceived by public officers, in the *Hastings* case by the circuit judge, and in the *Zimmermann* case by legislators.

Sec. 241.09 is not limited in its application to the salary or wages of a married man exempt by law from garnishment. This section forbids any assignment of exempt or nonexempt salary or wages for more than two months. *Porte v. Chicago & N. W. R. Co.*, 162 Wis. 446. See opinion written to you February 19, 1934,\* where this question was directly passed upon and where it was also stated:

“\* \* \* Sec. 304.21, Stats., relating to quasi-garnishment, by implication recognizes the validity of certain assignments of public officers and employees, where it provides, in subsec. (3) for priority as between an assignment and a judgment.”

In connection with this sec. 304.21, our attention is called to the opinion found in XV Op. Atty. Gen. 476, where the question was raised as to the applicability of sec. 304.21 to compensation secured by members of the legislature by sec. 21, art. IV, Const. Since the rendering of that opinion this office squarely held, in XX Op. Atty. Gen. p. 529, that the members of the legislature are liable to the quasi-garnishment statute at all times, except during either the regular or special session of the legislature and fifteen days next before commencement and after termination of each session.

The principal contention raised by the assignee is that the words “salary” or “wages,” found in sec. 241.09, imply a contract of employment and that as a public office is not held by virtue of a contract of employment, public officers’ remuneration is not governed by this section.

54 C. J. 1124, sec. 4, provides:

“The term ‘salary’ implies a contract of employment. It imports a specific contract for a specific sum for a certain period of time; \* \* \*.”

For this proposition the cases of *Davis v. Fall River*, 155 Mass. 96, and *Blick v. Mercantile Trust, etc. Co.*, 113 Md. 487, are cited. The *Davis* case involved the question of whether a janitor was entitled to recover a sum of money

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\* Page 123 of this volume.

based upon a contract of employment. The municipal body which hired him mentioned in a resolution that he should be paid a "salary" of nine dollars per week. The court stated that the presence of the word "salary" implied a contract of employment. No effort was made in this case to draw any distinction between the remuneration of a public officer and any other individual. Neither can it be cited for the proposition that a contract of employment is always incident to a salary. The *Blick* case distinguished between a salary, fees and wages and did not involve the question of distinction between the remuneration paid a public officer and other persons. The *Blick* case, moreover, contains the following language, page 494:

"Salaries are per annum compensation to men in official, and some other situations. *Cowdin v. Huff*, 10 Ind. 83. Salary is a fixed compensation, which is paid at stated times. *Dane v. Smith*, 54 Ala. 47."

This was taken by the court from 7 Words & Phrases, 1st Series, p. 6288.

"In a more technical sense, the term may be employed as having reference to the compensation of officers; and in this sense has been defined as meaning a certain annual stipend, payable to an officer for performing his whole duty; compensation, fixed for official services to be rendered; compensation for the personal discharge of official duty; fixed compensation decreed by authority, for regular work, or made by law to be paid periodically for services, whether there be any services actually rendered or not, or to be established by law, and paid at stated times; per annum compensation of men in official and in some other positions, or situations, or stations; personal compensation provided to be paid to an officer for his own services; or to be paid to a public officer for continuous, as contradistinguished from particular services, usually a fixed sum to be paid by the year, half-year or quarter; stated compensation paid for the performance of official duties, or the rendering of services of a particular kind; to the reward paid to a public officer for the performance of his official duties." 54 C. J. 1122-1123.

To the propositions stated above there are cited a great many authorities from various jurisdictions.

"Salary is a fixed compensation, which is paid at stated times. *Dane v. Smith*, 54 Ala. 47, 50.

“\* \* \*

“Salary signifies the periodical compensation due to men in *official* and other situations. \* \* \*

Cowdin v. Huff, 10 Ind. 83, 85; \* \* \*

“‘Salaries’ are the rewards paid to *public officers* out of public funds for official services rendered to the public. In the ordinary and popular sense, a salary is a certain fixed and periodical remuneration for services. Commonwealth v. Bailey, 3 Ky. Law Rep. 110, 114. \* \* \*”  
7 Words & Phrases, 1st Series, p. 6288.

See also: *Buxton v. Rutherford, County Comr’s.*, 82 N. C. 91, 95; *Board of Commissioners of Teller County v. Trowbridge*, 42 Colo. 449; *Ruperich v. Baehr*, 142 Cal. 190.

It is significant that not one case has been cited or found holding that the remuneration of a public officer could not be considered as salary.

The point has been raised that inasmuch as the constitution mentions the word “emolument” in connection with the remuneration of public officers, the term “salary” should not be applied to the return for their services. It is suggested that emolument is a peculiar incident of an estate called an office. Emolument is a more comprehensive term than salary and includes gain, profit, compensation, etc. *Scharrenbroick v. Lewis & Clark County*, 33 Mont. 250. This same case is cited in 54 C. J. 1122 for the proposition that salary includes the remuneration for services, whether there be any services actually rendered or not. Emolument has been defined to be any perquisite advantage, profit or gain arising from the possession of an office. *Commonwealth v. Mathues*, 59 Atl. 961.

Emolument is the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office, as salary, fees, and perquisites. *Reals v. Smith*, 56 P. 690, 692, 8 Wyo. 159; *Apple v. Crawford County*, 105 Pa. 300, 303, 51 Am. Rep. 205, 14 Wkly Notes Cas. 322, 324, 41 Leg. Int. 322; *Vansant v. State*, 53 Atl. 711, 714, 96 Md. 110; *Town of Bruce v. Dickey*, 6 N. E. 435, 439, 116 Ill. 527.

For other cases having substantially the same holding, see Words & Phrases.

It will thus be seen that the word “emolument” is used

as a comprehensive or all inclusive term rather than as having the meaning suggested by the assignee.

Before concluding this opinion it may be well to point out that in our constitution the words "compensation" and "salary" are synonymous. *Milwaukee Co. v. Halsey*, 149 Wis. 82. In that case the court also speaks of the *salary* of circuit judges who are constitutional officers. In art. IV, sec. 21, Wis. Const., which was repealed in 1929, the compensation of legislators was referred to as salary. Art. IV, sec. 26, of the constitution providing "\* \* \* nor shall the compensation of any public officer be increased or diminished during his term of office," covers legislators. This indicates that a legislator's remuneration is salary under the holding of the *Halsey* case. Art. VII, secs. 7 and 10, Wis. Const., also refer to remuneration due other constitutional officers (supreme and circuit court judges) as salary and compensation.

In view of the above, the secretary of state should not honor assignments of legislators or other state officers when such assignments do not conform to the provisions of sec. 241.09, Stats.

JEF

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*Intoxicating Liquors — Municipal Corporations — Ordinances—Public Officers—District Attorney*—It is not duty of district attorney to prosecute violations of town, village and city ordinances adopted pursuant to ch. 13, Laws 1933, Special Session.

*Public Officers*—Justice of peace holds office until his successor qualifies.

February 24, 1934.

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

You submit the following questions for the consideration of this department:

1. Is it the duty of the district attorney to prosecute violations of town, village and city ordinances adopted pursuant to ch. 13, Laws Special Session 1933?

Answer, No.

The district attorney prosecutes only such liquor violations as are under county or state laws. The duties of the district attorney, except for a few miscellaneous tasks assigned him in other sections of the statutes, are found in sec. 59.47, of which subsecs. (1) and (2) read as follows:

“(1) 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; and when the place of trial is changed in any such action or proceeding to another county, prosecute or defend the same in such other county.

“(2) Prosecute all criminal actions, except for common assault and battery or for the use of language intended or naturally tending to provoke an assault or breach of the peace, before any magistrate in his county, other than those exercising the police jurisdiction of incorporated cities and villages in cases arising under the charter or ordinances thereof, when requested by such magistrate; and upon like request, conduct all criminal examinations which may be had before such magistrate, and prosecute or defend all civil actions before such magistrates in which the county is interested or a party.”

It will be seen that it is the district attorney's duty to act for the state and county. I refer you to II Op. Atty. Gen. 728, which points out:

“Neither the state nor county has an interest in prosecutions for breaches of municipal ordinances, for our supreme court has decided that breaches of municipal ordinances are not offenses against the state. *State v. Hamley*, 137 Wis. 458; *City of Oshkosh v. Schwartz*, 55 Wis. 483.”

2. In towns and villages where a justice of the peace has failed to qualify can a local ordinance be enforced?

Answer, Yes.

Art. VII, sec. 15, Wis. Const., reads:

“The electors of the several towns at their annual town meeting, and the electors of cities and villages at their charter elections, shall, in such manner as the legislature

may direct, elect justices of the peace, whose term of office shall be for two years *and until their successors in office shall be elected and qualified.* \* \* \*” Therefore, if the man you speak of has failed to qualify as justice of the peace the man elected before him is still justice of the peace.

3. “Sec. 61.30 of the Wisconsin statutes provided that a village justice of the peace has exclusive jurisdiction of all cases arising under ordinances and by-laws of the village; therefore must the district attorney travel to each township in said county to prosecute violations of said ordinance adopted, pursuant to the recent Griswold liquor control bill?”

Answer, No. See answer 1 above.

JEF

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*School Districts—Assets and Liabilities*—Town board has no power under sec. 40.30, Stats., to adjust and distribute assets of dissolved school district. This must be done under sec. 66.03 by boards of school districts affected.

February 27, 1934.

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

You have submitted the following question:

“Whose duty is it to distribute the assets and liabilities of a dissolved school district to the districts to which the divided territory of the dissolved district has been distributed under 40.30 and 66.03?”

Under sec. 40.30, Stats., the town board has the power by order to create, alter, consolidate or dissolve common school districts. There is no provision in said section of the statutes, however, to apportion the liabilities and the assets of the different districts. The adjustment of assets and liabilities on division of the territory must be done as provided in sec. 66.03 by the boards of the different school districts interested. See subsecs. (5) and (7).

Formerly this adjustment of the assets was done by the

town board of supervisors but under the laws that exist today it must be done by the school boards of the school districts interested. Sec. 40.30, as appears from the revisor's notes in 1927, is derived from former secs. 40.01, 40.02, and 40.04. You will note, however, that sec. 40.04 as contained in the statutes of 1917 was modified by ch. 276, Laws 1919, repealing subsec. (3), sec. 40.04, which gave to the town board the power to adjust and apportion the assets and liabilities. It follows that the town board no longer has that power but that this must be performed by the school boards as provided under sec. 66.03.  
JEF

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*Prisons—Prisoners—Parole—Ruling of attorney general's department in XVI Op. Atty. Gen. 83 and that in XXII Op. Atty. Gen. 19 are consistent, each applying to facts described in each opinion respectively.*

Amendment to sec. 57.06, subsec. (1), Stats., made by ch. 384, Laws 1933, refers to minimum of indeterminate sentence.

February 28, 1934.

#### BOARD OF CONTROL.

In your letter of January 26 you enclose a request for an opinion from Oscar Lee, warden of the Wisconsin state prison, in which he states that prisoner A was committed to his institution by the circuit court of Racine county on May 21, 1932, for three terms of one to five years running concurrently, and one to five years on the fourth count to run consecutively with the other three counts. The crimes were obtaining money under false pretenses (three counts) and embezzlement (one count), secs. 343.25 and 343.20 respectively, Stats. He was received at this institution on June 4, 1932. Mr. Lee states that he is a first offender, meaning that he has never been, previous to this conviction, incarcerated in any institution for a felony. On admission here his sentence was figured or computed in accordance with subsec. (3), sec. 53.11, which states:

"Whenever any convict is committed under several convictions with separate sentences they shall be construed as one continuous sentence for the purpose of computing the good time made or forfeited \* \* \*."

Mr. Lee states that for all practical purposes this is a maximum sentence of ten years, but in determining this man's parole eligibility he disregarded any such computed minimum as the court has set forth and followed instead the opinion in XVI Op. Atty. Gen. 83, the caption of which is as follows:

"One sentenced to serve from one to five years in state prison under three sentences imposed at same time, two to begin immediately and to run concurrently and last sentence to begin after first two have been served is not eligible for parole until he has served minimum sentence in last sentence, under sec. 359.07, Stats."

Mr. Lee also states that following the procedure set forth by the above given ruling he computed Prisoner A's parole eligibility as follows: With good time allowance off on the three one to five year sentences running concurrently (the same as a term of one to five years) Prisoner A serves three years and nine months. Then, before becoming eligible for parole he would still be required to serve the minimum of the last sentence of one year, making him eligible for parole consideration after serving four years and nine months. The sentence then, for all intents and purposes, is one of four years and nine months to ten years.

The warden states that before he makes the final decision, however, he must consider the ruling in XXII Op. Atty. Gen. 19, with the following summary caption:

"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."

He inquires whether this ruling is to supersede the first above quoted opinion or whether it was rendered to govern cases where the status of the prisoner is that of a second offender (meaning that he has previously been convicted of a felony). He also inquires whether this last ruling makes the first quoted ruling in his letter null and void.

This last question must be answered in the negative.

The opinion in XXII Op. Atty. Gen. 19, last above referred to, is applicable to the facts of that case while the former opinion is not inconsistent with it but is in harmony with it. Mr. Lee also inquires on what date he can rightfully take him before the board of control for parole consideration and whether the parole laws as amended by ch. 384, Laws 1933, can be construed to apply to the case cited above. He states that, literally speaking, prisoner A is serving a sentence of four years nine months to ten years, or in other words, the minimum in this case is in excess of two years.

Your interpretation of the statutes and the ascertaining of the time when this man is subject to parole is correct. Prisoner A is subject to parole in our opinion after he has served four years nine months. The amendment of which you speak, which was added to sec. 57.06, subsec. (1), by ch. 384, Laws 1933, reads as follows:

“\* \* \* 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.”

We believe that when the statute speaks here of the minimum, it means the minimum of an indeterminate sentence and does not refer to the minimum of four years and nine months as computed in your statement. If so construed A has not been sentenced to a minimum sentence exceeding two years. The minimum in every one of the sentences imposed was one year.

JEF

*School Districts—Taxation—Common School Tax—Payments made under provisions of secs. 40.87 and 59.075, Stats., to school districts must be on basis of number of elementary teachers employed.*

February 28, 1934.

EDMUND H. DRAGER,  
*District Attorney,*  
Eagle River, Wisconsin.

The facts which prompt this request for an opinion are these: A certain school district maintained three common schools. Several years ago one of these schools was discontinued, the pupils being sent to the remaining schools. Nevertheless, from that time till the present payments have been made to this school district in the form of state aid and county school taxes on the same basis as when the three schools were in operation. You ask concerning the legality of these payments.

Sec. 59.075, Stats., provides:

“The county board of each county is empowered at or before its November meeting each year to order the levying of a tax upon the aggregate assessed valuation of the county for the common schools in an amount not less than the product of two hundred fifty dollars multiplied by the *number of public elementary teachers employed in the county* during the preceding school year as certified by the county superintendent of schools and by city superintendents of schools not under the supervision of the county superintendent.”

It is to be noted that the same basis for payment, that is the number of elementary teachers, is used in distributing the state aid to common schools as provided in sec. 40.87, Stats. The only instance in which this state aid may be extended without regard for the actual employment of a teacher is that provided for by sec. 40.87, subsec. (4), par. (f), which states:

“Provisions by a school district for the transportation and tuition of its pupils to and their instruction in some other district as prescribed by law shall entitle the former to share in the aid as though such district had maintained school, and shall be considered as having one elementary

teacher employed, but no district shall receive more state and county aid than the operating expense of such school."

Under the facts submitted it is clear that the above quoted provision has no application to the present question in that the pupils here are not being educated in a foreign district but in the two local schools in operation. Therefore it is concluded that the payments here concerned must be made on a basis of the number of elementary teachers actually employed as provided by law without reference to the number of school houses owned by the district.

JEF

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*Automobiles—Common Carriers—Motor Transportation*  
—Under facts stated certain vehicles are not to be classed as common motor carriers of passengers within meaning of ch. 194, Stats.

February 28, 1934.

WENDELL MCHENRY,  
*District Attorney,*  
Waupaca, Wisconsin.

In a recent letter to this department you write that numerous complaints have been made to you concerning private individuals at the Wisconsin Veterans' Home operating their privately owned automobiles in carrying passengers for hire both between the city of Waupaca and the Wisconsin Veterans' Home and other points in the state. You ask our opinion as to whether or not these individuals can be compelled under the provisions of ch. 194, Wis. Stats., to obtain a permit from the public service commission and to furnish the bond required by sec. 194.41, Stats.

It is the opinion of this department that the business of these persons does not come under the provisions of ch. 194, therefore, they cannot be compelled to take out a permit under sec. 194.04, nor can they be compelled to furnish the bond required by sec. 194.41.

Sec. 194.01, subsec. (6), reads as follows:

“‘Common motor carrier of passengers’ means any person who holds himself out to the public as willing to undertake for hire to transport persons by motor vehicle between fixed termini or over a regular route upon the public highways.”

These persons whose activities you describe do not operate between fixed termini—they pick up passengers here and there and take them wherever they want to go, sometimes to the Wisconsin Veterans’ Home, sometimes to other points in the state. They do not have a regular schedule or a route over which they “usually or ordinarily” operate, within the definition set forth in sec. 194.01, subsec. (7) :

“‘Between fixed termini or over a regular route’ means the termini or route between or over which any common motor carrier of passengers or property *usually or ordinarily* operates any motor vehicle, even though there may be *periodical or irregular departures* from such termini or route \* \* \*.”

When these persons pick up the passengers they transport they have no fixed destination nor any settled route over which they mean to carry them. The destination, and hence the route, is picked out by the passenger.

You cite *Anderson v. Yellow Cab Company*, 179 Wis. 300, as an argument in favor of requiring the persons in question to comply with the provisions of ch. 194. You will notice that nowhere in that case did the court mention ch. 194, nor does it hold that taxicabs are under the supervision of the public service commission. It simply holds that to be a *common carrier* it is not necessary that a public conveyance move between fixed termini or even upon fixed routes. This is in conformity with the common law definition of a common carrier as one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place, which has in modern times been enlarged to include within its scope carriers of passengers as well as carriers of goods. 4 R. C. L. 552. To say that a motor vehicle is a common carrier is very far from saying that that same vehicle is such a common carrier of passengers as is defined by sec. 194.01 (6) and hence subject to the supervision of the public service commission.

You point out sec. 194.02, saying that it seems to confer upon the public service commission the authority to supervise and regulate all motor vehicles engaging in the transportation of people and property. Sec. 194.02 does not bring within the provisions of ch. 194 motor vehicles not already within its purview, but merely adds to the legitimate supervision of those already within its terms.

The vehicles you write about would come under the heading of taxis, and taxis are not regulated by the public service commission. Therefore you are advised that these persons whose activities you described cannot be compelled to obtain a permit from the public service commission nor can they be compelled to furnish the bond required by sec. 194.41.

*Public Officers—City Council—Civil Works Administration Officer—County Board—Town Board—Village Board—* Certifying officer under federal Civil Works Administration is ineligible to hold office as member of city council, county board, town board or village board.

Laborer under federal Civil Works Administration may hold office as member of city council, county board, town board or village board.

March 1, 1934.

INDUSTRIAL COMMISSION OF WISCONSIN.

Attention Voyta Wrabetz, *Chairman.*

You state that a serious question has arisen in the administration of the Civil Works Administration in Wisconsin. It appears that many members of county boards, city councils, village boards and town boards are, in fact, needy. Questions arise as to whether or not members of such boards or councils are ineligible to hold positions under the Civil Works Administration. There are two possible positions which these board or council members may hold. The first is an administrative office, such as certifying officer, and the second is a job at either common labor or skilled labor in an approved project.

You refer to art. XIII, sec. 3, Wisconsin constitution, and inquire whether or not the holding of either of the above Civil Works Administration jobs makes the holder of such a job ineligible to continue in his office as a member of a county board, city council, town or village board.

Art. XIII, sec. 3, Wisconsin Const., reads as follows:

“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; \* \* \* shall be eligible to any office of trust, profit or honor in this state.”

In XXII Op. Atty. Gen. 1032, this department held that under the above quoted constitutional provision the type of service rendered by the individual to the federal government determines whether such individual holds a position or an office of profit or trust under the United States. That opinion referred to a previous opinion (XIX Op. Atty. Gen. 241), which contains an elaborate discussion of the distinc-

tion between an office or employment and position. Applying the tests laid down in the court decisions and in the previous opinions of this department, you are advised that an administrative officer under the Civil Works Administration, such as certifying officer, occupies an office of profit or trust under the United States. You state that the individual occupying such office is required to take an oath and to give a bond. His tenure of office is for a fixed term, and his remuneration is fixed by law. In every respect, therefore, the facts fit the definition of a public officer. It is my opinion, therefore, that one who occupies the position under the Civil Works Administration such as certifying officer is an officer as contemplated in sec. 3, art. XIII, Wis. Const., and an individual occupying such office is, therefore, ineligible to act as member of the county board, city council, village board or town board, since these positions are offices "of trust and profit in this state." See *State ex rel. Shea v. Evenson*, 159 Wis. 623, 150 N. W. 984; V Op. Atty. Gen. 886.

The status of a member of a county board, city council, village board or town board accepting a job under the Civil Works Administration, either as a common or skilled laborer, is quite different. A laborer on a Civil Works Administration project is only an employee and not an officer, and the acceptance of such federal employment by a member of a county board, city council, village board or town board does not impair his right to continue in an office of profit, trust or honor in this state.

JEF

*Intoxicating Liquors*—Town and village boards and city councils may issue licenses to sell liquor in such communities in all instances except where community has voted dry within statutory period through referendum provided by ch. 13, Laws 1933, Special Session.

Provisions of secs. 176.20 to 176.25, Stats., apply only to residential district as defined therein and not to whole communities.

March 1, 1934.

OLIVER L. O'BOYLE, *Corporation Counsel,*  
*Office of District Attorney,*  
Milwaukee, Wisconsin.

You state that question has arisen as to the application of the recently enacted liquor law to towns, cities and villages, in the absence of referendum. You state further that it is your opinion that liquor may be sold in such communities in all instances except where the community has voted "dry" within the statutory period through the referendum provided by the act.

It is the opinion of this department that, under the provisions of ch. 13, Laws Special Session 1933, liquor may be sold in towns, cities and villages where the town board, city council, or village board has issued licenses in all instances except where the particular community has voted "dry," in accordance with the local option provisions provided by the act.

Sec. 176.38, Stats., as created by ch. 13, Laws Special Session 1933, provides as follows:

"(1) Whenever a number of the qualified electors of any town, village, or city equal to, or more than, fifteen per centum of the number of votes cast therein for governor at the last general election shall present to the clerk thereof a petition in writing, signed by them, praying that the electors thereof may have submitted to them the question whether or not any person shall be licensed to deal or traffic in any intoxicating liquors as a beverage, or the question whether or not liquor stores as provided for in section 176.08 shall be established, maintained, and operated, or that both such questions be submitted to them, and shall file such petition with the clerk at least thirty days prior to the first Tuesday of April next succeeding, such clerk

shall forthwith make an order providing that such question or questions shall be so submitted on the first Tuesday of April next succeeding the date of such order.

"(2) The city clerk making such order shall give notice of the election to be held on such question or questions in the manner notice is given of the regular city election; town and village clerks who make such orders shall give such notice by posting written or printed notices in at least five public places in the town or village not less than ten days before the day of election. The election on such question or questions shall be held and conducted, and the returns canvassed, in the manner in which elections in such city, town, or village on other questions are conducted and the returns thereof canvassed. The result shall be certified by the canvassers immediately upon the determination thereof, and be entered upon the records of the town, village, or city, and shall remain in effect until changed by ballot at another election held for the same purpose."

Sec. 176.04, subsec. (1), provides:

"Any person who shall, without a license or permit, vend, sell, deal, or traffic in, or, for the purpose of evading any law of this state, give away any intoxicating liquors in any quantity whatever, shall be guilty of a misdemeanor and be punished by a fine of not less than twenty-five dollars nor more than two hundred dollars, besides the costs; or, in lieu of such fine, by imprisonment in the county jail or house of correction not to exceed one year nor less than three months, and in case of punishment by fine unless the fine and costs be paid forthwith be committed to the county jail or house of correction until they are paid or until discharged by due course of law; and in case of a second or subsequent conviction of the same person during any year the punishment shall be both by fine and imprisonment."

Sec. 176.05 (1), provides in part:

"Each town board, village board, and common council may grant retail licenses, under the conditions and restrictions in this chapter contained, to such persons entitled to a license under this chapter as they deem proper to keep places within their respective towns, villages, or cities for the sale of intoxicating liquors. \* \* \*"

It is manifest that, under the express provisions of the statutes, town boards, city councils, and village boards have authority to issue liquor licenses and persons holding such licenses may lawfully sell liquor in such towns, cities and

villages in all instances, unless and until the community has voted "dry" within the statutory period through the referendum provided by the local option provisions of the state liquor law.

There would seem to be no doubt as to the intention of the legislature in the enactment of the Griswold bill (now ch. 13, Laws Special Session 1933), to provide that all communities should be "wet" and that liquor may be lawfully sold by persons holding licenses from the proper authorities in all towns, cities and villages except where the electors of the particular community have voted "dry" through the referendum provided by the act.

You also inquire as to the application of the provisions of secs. 176.20 to 176.25.

Sec. 176.20 (1) provides in part:

"Any clearly described, contiguous, compact territory in cities, villages, or towns bounded by corporation or ward lines, public streets, public alleys, or watercourses, in which actually reside not less than one hundred nor more than seven hundred and fifty qualified electors may be constituted a residence district. Its greatest length shall not be more than four times its narrowest width. No part of any one district once used to determine one residence district, and no territory, which in any other manner shall have been constituted a no-license area, while continued as such, shall be used in fixing another residence district."

Sec. 176.21 provides:

"(1) Any compact, contiguous territory in any town, village, or city in this state, wherein no license to sell, deal, or traffic in intoxicating liquors has been issued or granted prior to the filing of the remonstrance hereinafter referred to and containing not less than one hundred nor more than seven hundred and fifty resident electors, which district is bounded by corporation or ward lines, public streets, or public alleys, and the greatest length of which shall not be more than four times its narrowest width, may be constituted a residence district if a majority of the resident electors therein shall on or before May first in any year file with the town, village, or city clerk a remonstrance in writing describing the boundaries of such district and signed by said electors together with their residence address. Except as provided in subsection (2), no such license shall be

granted or issued in any such district after the filing of such remonstrance unless a majority of the electors in such district shall thereafter consent thereto in writing, specifying the location in such district from which such license may be issued or granted. The provision of section 176.23 shall apply to the remonstrance or consent herein provided for.

“(2) The provisions of subsection (1) shall not apply to actual and bona fide hotels specified in paragraph (e) of subsection (2) of section 176.20.”

Sec. 176.22 provides:

“No license shall be issued or granted to any person to sell or traffic in any intoxicating liquors within any residence district as defined in section 176.20 if a majority of the qualified electors residing in such district shall, not earlier than the first day of May nor later than the fifteenth day of May in any year, present to and file with the clerk of any such city, village, or town in which such residence district is situated, a remonstrance in writing, signed by a majority of said electors, as hereinafter provided, and describing the boundaries of said residence district objecting to the granting of any such license or permit within said district, until a counter petition signed by a majority of said electors in such district praying that such license may be granted in said district shall be filed with such clerk, when it shall be lawful for the proper authorities to issue license in said district.”

Sec. 176.23 relates to signature gatherers and electoral population, and who may sign petitions. Sec. 176.24 pertains to a review of the remonstrance or counter petitions filed with the proper authorities of any city, town or village.

It is manifest that the above quoted sections of the statutes apply only to residential districts of cities, towns and villages and do not pertain to whole communities. In accordance with the provisions of the above quoted sections of the statutes, a majority of the qualified electors residing in any such residential district may, by petition properly signed and filed, determine whether licenses to sell, deal, or traffic in intoxicating liquors within such district may be granted by the proper authorities. It will be noted that the method adopted by the legislature, in determining whether a particular residential district shall be constituted a license or a no-license district, is to be determined by

petition rather than by a referendum or vote at a regular or special election. It should also be noted that under the provisions of sec. 176.21, if no license to sell, deal, or traffic in intoxicating liquors has been issued or granted within such residential district prior to the filing of a remonstrance, then no license to sell intoxicating liquors shall be granted or issued in such district after the filing of such remonstrance, unless a majority of the electors in such district shall thereafter consent thereto in writing, specifying the location in such district from which such license may be granted or issued.

JEF

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*Minors—Adoption*—Written consent given in court to adoption of child by mother without her knowing who persons are that adopt child is legal and binding and satisfies requirements of statute.

March 2, 1934.

BOARD OF CONTROL.

You state that you are considering two adoption proceedings which raise some questions. First, the consent contains the names of the adopting parents but it is admitted that their names were covered while the mother signed, or added after the mother's signature so that she would not be informed of their identity. You inquire whether this condition affects the legality of the procedure. Second, the mother dies not knowing the name nor whereabouts of the foster parents. The mother signs a consent worded as follows: "\* \* \* enters her appearance in the within proceeding and consents to the granting of the application filed herein for the adoption of the said \* \* \* (child)." You inquire whether sec. 48.37, subsec. (1), Stats., taken with sec. 322.04 does not indicate that the mother placing the child and giving consent to his adoption must know where she is placing him.

Sec. 322.04 (1) provides:

“Except as otherwise specified in this section, no adoption shall be permitted except with the written consent of the living parents of a child. \* \* \*”

The question is: Is the consent given in these proceedings sufficient to bind the mother and to satisfy the call of the statute? The fact that the mother in both cases formally gave her consent to that particular proceeding and adoption without knowing at the time who the adopted parents were, seems to me to be sufficient to satisfy the requirements of the statute. She could have informed herself at the time if she wanted to as to who the parents were, or might examine the records thereafter to see who they were. She evidently gave consent to the adoption as determined by the judge and those who had knowledge of the facts. Having confidence therein, she gave her consent even though she did not know who the adoptive parents were. I see no reason why this would not be sufficient. Of course a mother does not have to give her consent unless she knows who the person is that adopts the child. The provisions of sec. 48.37 (1) do not necessitate a different ruling.

JEF

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*Normal Schools*—In view of sec. 37.31, Stats., board of regents of normal schools does not have power to establish compulsory retirement age.

March 2, 1934.

EDGAR G. DOUDNA, *Secretary,*  
*Board of Regents of Normal Schools.*

You ask the opinion of this department as to whether or not the board of regents of normal schools has the power to pass a binding resolution fixing and establishing a compulsory retirement of teachers when they have arrived at an age prescribed by the board.

"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, and 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." XXII Op. Atty. Gen. p. 245.

The board of normal school regents was established by ch. 37, Wis. Stats., and its powers are such as are enumerated in that chapter.

Sec. 37.11, subsec. (3), Stats., grants the board power

"To remove at pleasure any principal, assistant or other officer or person from any office or employment in connection with any such school, but discharges of teachers shall be governed by the provisions of section 37.31."

Sec. 37.31, reads in part:

"All teachers in any state teachers' college shall be employed on probation and after successful probation for three years, the employment shall be permanent during efficiency and good behavior, \* \* \*. No teacher who has become permanently employed as herein provided, by reason of three or more years of continuous service, shall be discharged except for cause upon written charges. \* \* \*"

The following comment on the position of a county in the governmental scheme applies equally well to the board of normal school regents:

"\* \* \* In governmental matters the county is simply the arm of the state; the state may direct its action as it deems best and the county cannot complain or refuse to obey. The arm is not to be heard to challenge the wisdom of the commands of the brain. \* \* \*" *McDougall v. Racine County*, (1914) 156 Wis. 663, 665-666, 146 N. W. 794.

"\* \* \* That the status of one permanently employed as a teacher under such a system [retirement] and with the rights so fixed cannot be impaired by subsequent legislation as held in *State ex rel. O'Neil v. Blued*, 188 Wis. 442, [446], 206 N. W. 213, manifestly requires a holding that such status or contract right cannot be destroyed or impaired by the school board, which is but the administrative arm of the state for carrying on the governmental function of education, except and unless such administrative body

*has the express power given it by statute to effect such change. \* \* \*.*" (Last italics ours.) *State ex rel. Nyberg v. School Directors*, 190 Wis. 570, 575, 209 N. W. 683.

In the present instance the legislature of the state has decreed that after a successful probationary period, tenure shall be permanent, depending only upon efficiency and good behavior. It is not within the power of the board of normal school regents, which was itself created by a similar enactment of the legislature, to limit the effectiveness of the statute (sec. 37.31) by imposing additional conditions upon which tenure shall be predicated. In other words, the board has no power to set up any age requirement as an arbitrary measure of efficiency. A teacher who has once passed through the probationary period is employed for the rest of his natural life and is subject to removal only for cause and upon written charges. The cause contemplated by the statute is a real cause and personal to the particular teacher sought to be discharged—not a cause beyond the control of the teacher which is created by an arbitrary standard set up by the board. You are therefore advised that the board of regents of normal schools does not have the power to establish compulsory retirement at a certain age, because that would be limiting the effect of a legislative act.

JEF

*Elections—Election Inspectors*—If presidential electors were chosen at next preceding general election party casting largest vote for candidate for that office should be given preference set out in sec. 6.32, Stats., in selection of election inspectors.

If presidential electors were not chosen at next preceding general election then party casting largest number of votes for its candidate for governor shall be afforded said privilege.

March 2, 1934.

EDMUND H. DRAGER,  
*District Attorney,*  
 Eagle River, Wisconsin.

Sec. 6.32, subsec. (1), Stats., provides for the selection of three election inspectors to officiate at each poll on every election day. It states, in part:

“\* \* \* Not more than two of such inspectors \* \* \* shall be members of the same political party, but each of said officers shall be a member of one of the two political parties which cast the largest vote in the district at the last preceding general election, the party which cast the largest vote being entitled to two inspectors, \* \* \*. The basis of such division shall be the vote of each party for its presidential elector receiving the largest vote, or for its candidate for governor, at the last preceding general election. \* \* \*”.

You set forth a situation in which the presidential elector of one party received the largest vote in the particular section while that party's candidate for governor received fewer votes than the corresponding candidate of the opposing party. You ask which of these two political parties should be given the preference in the selection of election inspectors under the provisions of the statute above quoted.

Subd. (d), subsec. (4), sec. 6.32 provides that those persons selected shall fill the offices here concerned for a period of two years. By the terms of art. XIII, sec. 1, Wisconsin constitution, a general election is to be held every two years. Art. V, sec. 1, Wis. Const., provides in effect that the governor shall be elected at each of these general elections. In that presidential electors are chosen only every four

years the above provision of sec. 6.32, Stats. is construed to require that where presidential electors were chosen at the next preceding general election the political party casting the largest vote for its presidential elector shall have preference in the selection of the election inspectors. Where no presidential electors were chosen at the next preceding general election the party casting the largest vote for its candidate for governor shall be afforded said preference.

JEF

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*Architects—Public Officers—State Architect—*State engineer's office has authority to supervise private architects for state work. State engineer's office has authority to perform all architectural and engineering work when requisition is made therefor.

March 2, 1934.

HONORABLE A. G. SCHMEDEMAN,  
*Governor.*

Attention James Ward Rector, *Executive Clerk.*

You inquire of this department concerning the authority of the state architect to supervise the preparation of plans by private architects. You refer us to sec. 15.77, Stats., to be construed.

Sec. 15.77, subsec. (1) specifically gives the state engineer's office the authority to "supervise all engineering or architectural service or construction work performed by, or for, the state, or any department, board, institution, commission or officer thereof \* \* \*." Subsec. (2), sec. 15.77, requires the state engineer's office to furnish engineering and architectural services whenever requisition is made therefor by any state department, board, institution, commission or officer.

We therefore hold that the state architect has the authority to supervise the preparation of plans by private architects and that he also has the authority to perform the work himself when requisition is made therefor.

JEF

*Appropriations and Expenditures—Tercentenary Celebration of White Man's Discovery of Wisconsin*—Emergency board has authority to supplement appropriation made by ch. 441, Laws 1933, to commission and committee of Tencenary Celebration of White Man's Discovery of Wisconsin.

March 2, 1934.

HONORABLE A. G. SCHMEDEMAN,  
*Governor.*

You have requested this department to give you an opinion on whether or not the emergency board has the authority and power to supplement the appropriation made by ch. 441, Laws 1933, to the commission and committee of the Tercentenary Celebration of the White Man's Discovery of Wisconsin.

We have previously written an opinion to Mr. James B. Borden, director of the state budget bureau, construing ch. 407, Laws 1933,\* as to the power of the emergency board to supplement the appropriation made to a legislative committee. Ch. 407, Laws 1933, applies only to those committees for which no other appropriation has been made. Ch. 441, Laws 1933, specifically makes an appropriation in the sum of five hundred dollars to the committee. We therefore hold that section 20.74, as amended by ch. 140, sec. 4, Laws 1933, gives the emergency board authority to supplement the appropriation to this committee as is provided by the terms of sec. 20.74, Stats., which reads in part as follows:

“There is appropriated from the general fund to the emergency board, annually, beginning July 1, 1933, two hundred thousand dollars, to be used to supplement appropriations which shall prove insufficient because of unforeseen emergencies, or to supplement appropriations which shall prove insufficient to accomplish the purposes for which made, and for the payment of actual and necessary expenses of members other than the governor in attending meetings of the board. \* \* \*.”

JEF

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\* Not published.

*Appropriations and Expenditures—Building and Loan Associations—Interim Committee on Building and Loan Associations—Emergency board has not authority to supplement appropriation provided in Joint Resolution No. 126, A. (Joint Resolution No. 100), 1933.*

March 2, 1934.

HONORABLE A. G. SCHMEDEMAN,  
*Governor.*

You have requested an opinion of this department as to whether the emergency board has the power to make an appropriation pursuant to sec. 20.74, Stats., to the interim committee created by Joint Resolution No. 126, A. (Jt. Resolution No. 100), of the regular session. You refer us to an opinion written to Mr. James B. Borden, director of the state budget bureau,\* relative to the construction of ch. 407, Laws 1933, and in that opinion we held that ch. 407 applied to that situation but that due to a provision in Joint Resolution No. 87, A., 1933 Special Session, the emergency board could appropriate any such sums as would be needed by that committee. Ch. 407 specifically applies to those committees for which no appropriation has been made, and it will be noted that the committees included have no mention of any appropriation other than by reference to ch. 407. The opinion to Mr. Borden, therefore, concerned a committee which was established with an appropriation not referable to or limited by ch. 407, Laws 1933.

Joint Resolution No. 82, A., Special Session 1933, does not speak of any added appropriation. There is therefore, no need to consider that.

We therefore hold that, since Joint Resolution No. 126, A., permits only such an appropriation as is noted in ch. 407, Laws 1933, sec. 20.74 of the statutes would not apply to this situation, and the emergency board has not, therefore the authority to supplement the appropriation so made.  
JEF

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\* Not published.

*Taxation*—Signs boards are taxable property. They must be taxed in name of owner.

March 5, 1934.

ROSCOE GRIMM,  
*District Attorney,*  
Janesville, Wisconsin.

The facts which prompt this request for an opinion are these: The P. Advertising Company, an Illinois concern, entered into an agreement with a person owning certain rural land in this state whereby the P. Company secured the right to maintain a sign board on said land for a certain period of time. This sign is of a substantial nature and valued at about one hundred dollars. The P. Company has rented the advertising space on said sign to the F. Hotel, also located in Illinois.

It is asked whether such a sign board as this constitutes taxable property in this state.

Sec. 70.01, Stats., provides:

“Taxes shall be levied, under the provisions of this chapter, upon all general property in this state except such as is exempted therefrom.”

Sec. 70.02 provides:

“General property is all the taxable real and personal property defined in sections 70.03 and 70.04 except that which is taxed under the provisions of chapters 76 and 77.”

Sec. 70.03 provides:

“The terms ‘real property,’ ‘real estate’ and ‘land,’ when used in this title, shall include not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto.”

Sec. 70.04 provides in part:

“The term ‘personal property,’ as used in this title, shall include all goods, wares, merchandise, chattels, and effects, of any nature or description, having any real or marketable value, and not included in the term ‘real property,’ as above defined.”

As is evident from the above quotations, the property here concerned is taxable property within this state.

It is further asked, if this property be taxable, whether it is taxable as real or personal property and in whose name it should be taxed. Sec. 70.17 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. \* \* \* Improvements on leased lands may be assessed either as real property or personal property.”

Sec. 70.18, provides in part:

“(1) 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 \* \* \*.”

It is concluded that, whether this property be assessed as real or personal property, it must be taxed in the name of its owner. Under the facts presented the sign board is owned by the P. Company. The hotel company advertised by the sign board is clearly not “in charge or possession” thereof so as to be liable for this tax. Hence this property must be taxed in the name of the P. Company.

JEF

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*Taxation—Tax Sales—Tax Deeds*—Where land is unoccupied and incumbered by recorded mortgage, notice of application for tax deed must be served on owner of said land.

March 5, 1934.

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

You state a situation in which a tax deed is sought for certain unoccupied land which is incumbered by an unsatisfied mortgage, and ask whether the service of notice of application for a tax deed, as set out by sec. 75.12, Stats., is required to be made on the owner of said land in this instance.

Phrasing sec. 75.12, subsec. (1), so as to include only the portions applicable here, it states:

“Whenever any lot or tract of land \* \* \* shall have been in actual occupancy or possession of any person \* \* \* or whenever the records in the office of the register of deeds show that any lot or tract of land is incumbered by an unsatisfied mortgage \* \* \* such deed shall not be issued unless a written notice shall have been served upon the *owner or upon such occupant and upon such mortgagee* \* \* \*. In counties having a population of five hundred thousand or more, in all cases where the lands sold for taxes have not been occupied as herein above provided, the notice herein above provided shall be served upon the owner or one of the owners of record of said lands \* \* \*.”

From the above quotation it is apparent that the notice here concerned must be served upon “the owner or upon such occupant and upon such mortgagee” in cases where the land is occupied or incumbered by a mortgage. The court in the case of *Potts v. Cooley*, 51 Wis. 353, has held that such a statute as this requires a strict interpretation. Hence it is concluded that under the facts presented, a notice of application for a tax deed must be served upon the owner of the land.

JEF

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*Counties—County Board of Commissioners*—Petition required by sec. 59.95, subsec. (2), Stats., need not be verified by affidavit.

It is not required that ten per cent of electors of each of five towns, cities or villages in county sign petition.

March 5, 1934.

FRED RISSER,  
*District Attorney,*  
Madison, Wisconsin.

You ask concerning the interpretation of several provisions contained in subsec. (2), sec. 59.95, Stats., pertaining to the reorganization of county government. This subsection provides:

"Upon petition therefor by electors equal in number to ten per cent of the votes cast by all parties in the county for governor at the last preceding election at which a governor was elected, and filed in the office of the county clerk at least forty days prior to the first Tuesday in April in any year, the county clerk shall call a special election to be held on the first Tuesday in April following receipt of said petition, for the purpose of submitting to the electors the question of reorganizing said county under section 59.95 of the statutes. Said petition shall be signed by qualified electors in at least five towns, cities or villages of said county."

The first inquiry is whether the petition referred to above must be verified by an affidavit of the person circulating same. The situation presented here is analogous to that considered in XX Op. Atty. Gen. 1169. The statute involved there is subsec. (6), par. (e), sec. 5.05, which provides in part:

"Any other political organization which shall file with the secretary of state, not less than ninety days prior to the holding of a September primary, a petition signed by not less than one-sixth of the electors in at least ten counties therein, or by one-sixth of the electors within any senatorial, assembly or congressional district, praying that said organization be given a party ticket at the said September primary, may have a separate party ticket as a political party in such district or in the state, as the case may be, at such primary; \* \* \*"

Concerning this provision, it is said, XX Op. Atty. Gen. 1169, 1770:

"A new party organization, in order to secure a separate primary ticket, must file petition therefor with the secretary of state not less than ninety days before the primary. The statute does not require the petition to be in any particular form, so long as the substance of the statute is complied with. The petition should state that it is a petition for a separate party ticket for state offices, or for the offices of a certain legislative or congressional district, as the case may be, and should, of course, give the name of the proposed party. It is not required to be verified, and as to signers need only state that they are electors of a certain county or district, that is, each signer so represents himself to be. The provision as to nomination papers applies only to candidates for nomination by the new party, not to the petition for a party ticket."

It is concluded that the sample petition submitted which states, "We, the undersigned qualified electors of \* \* \*, in the County of Dane, State of Wisconsin, do hereby petition \* \* \*" is in compliance with sec. 59.95, and need not be verified by an affidavit.

It is further asked concerning the proper interpretation of the following provisions contained in subsec. (2), sec. 59.95:

"Upon petition therefor by electors equal in number to ten per cent of the votes cast by all parties in the county for governor \* \* \* the county clerk shall call a special election \* \* \*. Said petition shall be signed by qualified electors in at least five towns, cities or villages of said county."

It is the opinion of this office that the above provisions require only that the petition be signed by ten per cent of the electors of the county and that included therein must be the signatures of qualified electors residing in at least five towns, cities or villages of the county.

From this it follows that there is no objection to the signatures of electors residing in different towns, cities and villages appearing on the same petition provided, of course, that the particular municipality of their residence be noted on the petition. This latter item is necessary in order to ascertain whether the required five towns, cities or villages are represented among the petitioners. As was stated in the former opinion of this office quoted above, it is sufficient verification that the signers of this petition represent themselves to be electors residing in a particular town, city or village; hence it is not deemed necessary that the street address of the petitioner be stated. Nor is it fatal to the validity of a signature that at the top of the petition there appears the words "We, the undersigned qualified electors of the town of Blooming Grove, in the county of Dane, State of Wisconsin, \* \* \*" and the address following said signature is of a municipality other than the one appearing in the heading. The signer in effect has represented himself as having two legal residences. This is an impossibility. Nevertheless, he has represented himself as being an elector of the county of Dane. In that no particular

number of signers from any one community is required, it is permissible to include such signatures as this in arriving at the necessary ten per cent of the county's electors, although not as representing petitioners from any particular town, city or village. So also on the same basis should signatures be included where the space left for the name of the municipality in the preface of the petition is blank.

In that the statute merely requires that said petitions be filed with the county clerk at least forty days prior to the first Tuesday in April in any year, it is not necessary that the dates of the individual signatures be given.

If the above interpretation of this statute in certain respects is considered broad, authority for such is to be found in the case of *Manning v. Young*, 210 Wis. 588, 247 N. W. 61. While it is true the question there concerned the right to vote for a person's nomination, the right to petition here involved is of equal importance, being guaranteed by sec. 4, art. I of the Wisconsin constitution.

JEF

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*Fish and Game—Navigable Waters*—Proposed agreement between conservation commissions of Minnesota and Wisconsin regarding boundary line between states in Lake Pepin and St. Croix Lake, if made for purpose of enforcing game laws, will not change legal boundary in that location so as to deprive defendant who is prosecuted of right to raise question of real boundary.

To establish real boundary it is necessary that two legislatures agree on boundary and that such boundary be approved by congress. This is preferable to litigating matter by expensive boundary suit in supreme court of United States, and supreme court has recommended that such settlements be made in preference to litigation.

March 6, 1934.

RALPH M. IMMELL, *Directing Commissioner.*  
*Conservation Department.*

You have enclosed a request for an opinion regarding a proposed agreement between the conservation commissions

of Minnesota and Wisconsin. Since it is proposed to submit this agreement to the Minnesota commission on March 7 you say it is necessary that you have immediate action. The agreement proposed reads as follows:

In accordance with an oral agreement made on February 12, 1934, it is agreed that for purposes of enforcement of fish and game laws, the boundary between Minnesota and Wisconsin in Lake Pepin and St. Croix Lake shall be a series of tangents which shall be approximately midway between the shores.

"These lines are as shown on the following maps:

"(1) For Lake Pepin; Sheets Nos. 14, 15, 16, 17, 18, 19 and 20 of a series entitled War Department Corps, State Engineer, U. S. Army, Hastings, Minnesota, to Grafton,

Illionis, Survey 1929-1930. Scale,  $\frac{1}{12000}$ .

"(2) For St. Croix Lake; Sheets A and B entitled Department of the Interior, U. S. Geological Survey, Plan of St. Croix River, Wisconsin and Minnesota from Mouth to a Point Eleven Miles above Danbury, Wisconsin.

Scale,  $\frac{1}{24000}$ .

"The description of these lines in each lake follows."

You state that for many years there has been controversy regarding the location of the boundary between Wisconsin and Minnesota in Lake Pepin at St. Croix Lake. The most persistent arguments have been regarding Lake Pepin, the Wisconsin fishermen contending that the boundary should follow the usual ship course, which in the majority of cases is well over to the Minnesota side of the lake.

You also say that at a recent conference between representatives of the Wisconsin conservation department and the Minnesota conservation department it was agreed that the two commissions should adopt for fish and game law enforcement purposes a line midway between the shores of each of the lakes. The aim is to eventually have the boundary question settled by action of both legislatures so that it can be approved by congress.

You state that you would like our opinion: "(1) as to the legality of the agreement attached which we propose to submit to the Minnesota conservation commission; (2) as to the legality of a boundary midway between the shores of these lakes; (3) there is some question regarding the proper location of the boundary at the upper end of the lake. \* \* \*"

Answering your inquiry, I will say that the agreement between the two conservation departments cannot in any way change the actual legal boundary of the state, for a defendant in an action, when he is prosecuted for illegal fishing in these two lakes, will not be bound by the agreement by the conservation department as to where the boundary is. He is raising the question as to the actual boundary and can appeal his case to the supreme court of the state and even to the supreme court of the United States and if he can establish a different boundary from that agreed to by the conservation commission, he will prevail in his contention.

The boundary agreed to, however, may aid the two departments in enforcing the law, as it may be considered an agreement between them not to start prosecutions except with reference to such boundary. If the boundary of the state runs through those two lakes, Lake Pepin and St. Croix Lake, as the agreement indicates, and the lakes are navigable throughout its extent from shore to shore, then undoubtedly the center of the lake as drawn in this agreement may be considered as the boundary and the courts will undoubtedly adopt that course. Any dispute as to where the boundary exists may be settled by the two legislatures of the state with the approval of congress, and the supreme court of the United States has recommended that such settlements be made instead of settling them by expensive litigations.

If the line as drawn in this agreement is the line that is believed by the conservation departments of the two states to be the correct line or the desirable boundary line, then it should be submitted to the two legislatures and congress for approval. This department is not in a position now to determine from the data we have before us whether

the boundary line as drawn in this agreement would be the one that would be adopted by the courts in a case litigated involving that question.

JEF

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*Prisons—Prisoners—Parole*—A, who is serving sentence of from three to five years in state prison as second offender and who is out on conditional pardon for part of his term, may be paroled after he has served one-half of his sentence, including that part when he was out on conditional pardon as part of such sentence.

March 9, 1934.

BOARD OF CONTROL.

You have submitted a communication from Oscar Lee, warden of the Wisconsin state prison, in which he states that one A was sentenced to the Wisconsin state prison by the circuit court of Trempealeau county on March 6, 1931, to an indeterminate sentence of from three to five years for the larceny of chickens. He was received at the institution on March 7, 1931. The governor gave a conditional pardon to him on May 9, 1933 and he was released by virtue of this pardon on May 12, 1933. On October, 19, 1933, the governor revoked that conditional pardon and ordered that he be remanded to the Wisconsin state prison and made to finish his sentence. The question has now arisen as to when this man is eligible for parole.

You direct our attention to the official opinion in VI Op. Atty. Gen. 238, where 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. Mr. Lee states that A is a second offender with a maximum of five years. He inquires when the prisoner is eligible for parole. He also inquires whether the board of control would be justified, for parole purposes, in assuming that he was eligible for parole after he had served two and one-half years from

the date of his first admission, or figuring from March 7, 1931.

Our answer is that the board would be justified in so ruling. It is true that in sec. 4863, Stats. 1917 as quoted in the above cited opinion, there was a provision which read as follows:

“\* \* \* and he shall thereupon be confined therein for the unexpired term of his sentence, *and the time between such conditional pardon and such subsequent arrest shall be computed as a part of such term.*”

This section was consolidated and amended by ch. 615, Laws 1919, and is now contained in sec. 57.11, Stats. You will notice that in subsec. (3), instead of the statute reading as above quoted, it has been amended to read as follows:

“\* \* \* he [the governor] may issue his warrant remanding such convict to the institution from which he was discharged, who shall thereupon be confined therein until the expiration of his sentence; otherwise he shall be discharged, subject to such conditional pardon.”

The question presents itself whether the omission of the above quoted sentence in sec. 4863, Stats. 1917, from sec. 57.11, Stats., will have the effect of changing the ruling in the opinion as above given in VI Op. Atty. Gen. 238. We do not believe it does. We have carefully examined the revisor's bill and it seems that there was no intention to change the statute on this question. The time the prisoner was out on the conditional pardon, we believe, is still to be deducted from the term of the sentence. The notes attached to the revisor's bill seem to indicate that this ruling is correct.

You are therefore advised that your question must be answered in the affirmative and that A is eligible for parole after he has served two and one-half years from the date of his first admission or from March 7, 1931.

JEF

*Criminal Law—Sentence*—Where defendant was convicted on four separate counts and judge sentenced him on said counts to imprisonment in state prison under sec. 359.07, Stats., sentences on various counts will run concurrently unless court states definitely that they shall run consecutively.

March 9, 1934.

BOARD OF CONTROL.

You have submitted a matter for an official opinion concerning the commitment of one A to the state prison. It appears from the commitment which you enclose that A was convicted by a jury on four counts and Judge Belden sentenced him from one to five years on the first three counts to run consecutively. The fourth count reads as follows:

“Upon your 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.”

Nothing is said whether this fourth count is to run consecutively or concurrently with the first three counts. Mr. Lee stated that when A was received at the institution he was in doubt as to the meaning of this commitment and, in order to clear his records, he sent the commitment back to the clerk of court and asked if the fourth term was to be consecutive or concurrent with the other three. He stated the clerk added after the fourth count the words “to run consecutively.” He says that he has had considerable questioning about this matter and he asks us if the original commitment is sufficiently worded to make the fourth term run consecutively. He assumed that that was the intention, as the first three terms were definitely stated to run concurrently.

Sec. 359.07, Stats., contains the following concerning state prison sentences:

“\* \* \* 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 wording of this statute it seems that all sentences are to begin on the day of the sentence as therein provided, but that the judge may provide that where there is more than one count and there are convictions on all, they shall run consecutively. In order to do this, it would seem that the sentence must so state. We do not believe that the sentence on the fourth count as it was stated originally is sufficient to make the punishment for that sentence run consecutively with the other three. We believe that unless the judge says so definitely, the sentence would run concurrently as the statute states. See XXI Op. Atty. Gen. 866.

JEF

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*Minors—Child Protection—State Public School—Wisconsin Statutes*—County may not be relieved of liability for maintenance of inmate of state public school incurred prior to amendment of sec. 48.20, subsec. (4), Stats., as enacted by ch. 439, Laws 1929.

March 9, 1934.

#### BOARD OF CONTROL.

You state that your board has received several applications on behalf of X county to be relieved of the chargeability of certain cases in the state public school pursuant to sec. 46.10, subsec. (4), Stats. You say that so far as the charges incurred after the passage of ch. 439, Laws 1929, there is no dispute that X county should be relieved of the chargeability. However, for the charges incurred prior to the passage of the above amendment, there is a

question because at that time the committing county was chargeable with the person's maintenance and X county was the committing county.

You inquire as to whether X county may now be relieved of the charges incurred prior to the passage of ch. 439, Laws 1929.

In ch. 439, Laws 1929, sec. 48.20 (4) was amended to read in part as follows:

“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. \* \* \*”

This statute went into effect at the time of its passage and made a change as to the liability for the maintenance of the inmates of the state public school. The liabilities therefore incurred under the former statute were not changed in view of sec. 370.04 and sec. 371.03, Stats. The legislature did not intend to interfere with rights that had vested prior to the enactment of the above quoted provision in sec. 48.20 (4) as amended by ch. 439, Laws 1929.

You are therefore advised that X county may not now be relieved of the charges that had accrued and had been incurred prior to the amendment in ch. 439, Laws 1929.

JEF

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*Courts — Garnishment — Quasi-garnishment — Marriage—Divorce—*Filing of certified copy of divorce judgment containing order for payment of support money together with statement of clerk of court as to delinquency in payments under said judgment may not be accepted by secretary of state as authority for paying out money under sec. 304.21, Stats.

March 9, 1934.

DEPARTMENT OF STATE.

Some time in 1929 an action for divorce was commenced by A against B. B counterclaimed for divorce. By the decision of the court the complaint of A was dismissed and B was granted a divorce on the counterclaim. The court

provided for a weekly payment of a certain sum of money "until the further order of the court" for the support and maintenance of a child which was awarded to A. It was provided that the weekly payments were to be made "to the clerk of ——— county, Wisconsin, as provided by law." Quite probably this was an error in the drafting of the judgment, which should have provided for the making of these payments to the clerk of the county court in and for the said ——— county. For some period of time the maintenance payments were made in accordance with the decision. It is claimed on behalf of B that thereafter, for a period of approximately a year, A returned and lived with B, who supported A and at least two children, one of whom was the child for whose maintenance the decision provided. It is also contended by B that during this time in which B supported A B also paid hospital bills for A. During the time that A and the two children were supported by B the latter made no payments to either the county clerk or the clerk of either the county or circuit court. Subsequently A again left B, taking the two children. Thereafter B continued to make payments for A to the clerk of the circuit court.

Recently A wrote to the clerk of the circuit court in and for the said ——— county asking how much B was behind in payments to A according to the record of the said clerk. A received in reply a statement from the clerk of the *county* court, who certified that according to the records as kept in his office there was due and payable from B to A for the support of the child up to a certain date the sum of \$628.15. This statement of the clerk of the county court and a certified copy of the divorce decree were filed with you and request was made that you accept these documents as a money judgment and make payments from the salary of B, who is a state employee, in accordance with sec. 304.21, Stats.

The latter section provides as follows:

"(1) Whenever any person, \* \* \* 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 state or any

city, \* \* \* or other municipal corporation, said judgment creditor may file a certified copy of such judgment with the secretary of state or with the clerk of such \* \* \* city, \* \* \* or other municipal corporation, as the case may be; provided that this section shall not apply to any moneys due a contractor engaged upon public work until all claims and expenses of performing such contract have been paid.

"(2) It shall thereupon become the duty of the proper officers of such state, \* \* \* city, \* \* \* or other municipal corporation, 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 state, or any such \* \* \* city, \* \* \* or other municipal corporation to such person, firm or corporation, and to deduct the sum or sums so paid as aforesaid from the amount due; \* \* \*

"(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."

The above statute was intended to provide a method of proceeding in aid of execution in those cases where it was impossible to garnish by virtue of the fact that municipal corporations were not subject to garnishment. The decision of the divorce court was not such that execution could be issued upon it against any of the property of B. In order for a judgment of divorce to be a lien upon property it must be so provided by the court in accordance with the provisions of sec. 247.30.

The decision of the court granted the divorce to B and not to A. To the extent that this decision was a judgment, therefore, it was a judgment in favor of B against A. The provision relating to payment of the weekly sum was, in fact, simply an order directing B to make certain specified contributions for the support of the child. This order does not constitute a money judgment which can be used as a basis for a garnishment action. It is possible that upon proof being made in another action as to the failure of B to make payment in accordance with this decision a money judgment would be rendered against B by A or the child

for whose support the money was intended. It is also possible, however, that in such an action if B could prove the statements which he has made as to the support of the former wife and two children after the entry of this judgment of divorce a money judgment would not be entered against him for the amount which the clerk of the county court states is due or for any amount whatsoever.

“\* \* \* ‘The measure of support of the wife, and the children committed to the care of the wife, depends largely on their need, age and other circumstances, and on the ability of the husband. These are all essentially changeable from time to time; and the support of the wife, and children in the wife’s care, comes within the wise policy of continuing authority after divorce, to be exercised from time to time in view of changes in the premises on which the measure of support rests.’ ‘And when courts, after divorce, enforce the husband’s duty, and provide for the wife’s need, by alimony, they hold the measure of it as essentially variable, and therefore subject from time to time to modification, suspension, renewal and revocation. Such were the view and practice of the English courts, followed and embodied in our statute of divorce.’ ‘And even the payment of arrears of it rests in the discretion of the court granting it.’ In all ordinary circumstances, therefore, the remedy to enforce the payment of alimony is exclusively in the court which grants it. The cases, with rare exceptions, recognize the exclusive jurisdiction of the court granting a divorce, to enforce its own judgment for alimony. *Campbell v. Campbell*, 37 Wis., 206; *Bacon v. Bacon*, 43 id., 197; *Barber v. Barber*, 2 Pin., 297; *Allen v. Allen*, 100 Mass., 373; *Fischli v. Fischli*, 1 Blackf., 360; *De Blaquiere v. De Blaquiere*, 3 Hagg., 322; *Vander-gucht v. De Blaquiere*, 8 Sim., 315. This doctrine is too well settled in this court to admit of question here.

“If, therefore, this were a proceeding at law or in equity upon the judgment of the county court decreeing alimony to the respondent, it is not to be doubted, indeed it does not appear to be questioned, that the action must fa.i.

\* \* \*

“\* \* \*

“If the respondent had desired to collect the arrears of alimony assigned her as breach of the appellant’s bond, living the husband, she could not have sued upon the bond without leave of the county court. Her course would have been by proper application to that court. And if she had so applied, it would have rested in the discretion of the court to have ordered or withheld the payment of the arrears,

in whole or in part; to grant or to refuse leave to enforce them by action at law upon the bond. \* \* \*” *Guenther v. Jacobs*, 44 Wis. 354, 355-357.

This case was cited in *Kempster v. Evans*, 81 Wis. 247. In *Kunze v. Kunze*, 94 Wis. 54, an action at law was permitted in Wisconsin to collect arrears of alimony provided for in a judgment of an Illinois court. This holding, however, does not overrule the decision in the case of *Guenther v. Jacobs*, *supra*, because in Illinois the effect of the alimony decree is that of a judgment at law for the payment of money. A decree for alimony or support money entered by an equity court of Wisconsin in a divorce action does not have that effect in this state.

It is our opinion that you are not authorized to accept the documents filed with you as authority for paying to A or anyone else for A's or the child's benefit any portion of the salary or wages due to B.

JEF

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*Municipal Corporations — Beer Licenses* — Electors in town may secure referendum under sec. 66.05, subsec. (10), par. (d), subd. 3, Stats., by petition by at least twelve qualified voters of town, such petition to be presented early enough to allow town clerk to post notices in accordance with provisions of sec. 60.13.

Electors in village cannot demand vote under sec. 66.05 (10) (d) 3 by petition but question must be submitted by village board.

March 9, 1934.

LEGISLATIVE REFERENCE LIBRARY.

Sec. 66.05, subsec. (10) par. (d), subd. 3, Wis. Stats., provides as follows:

“The electors of any city, village or town may, by ballot, at the spring election, determine that no license shall be issued. At such election a separate ballot box shall be provided for such ballots. Such ballots shall read:

“For the issuing of license

“Against the issuing of license

"Place an X or check mark in the square opposite the line indicating how you want to vote.

"Such ballots shall be counted and return made as other ballots and the clerk shall spread upon the minutes of the municipality such returns. The result of such election shall determine the policy of the municipality until changed by ballot."

There is no specific provision under sec. 66.05 regulating the traffic in fermented malt beverages as to the manner of placing the question of forbidding the issuance of licenses before the people. You desire an opinion as to the manner by which electors in villages and towns may have presented to them the question of making the village or town dry.

It is to be noted that sec. 66.05 (10) (d) 3 provides:

"\* \* \* The result of such *election* shall determine the policy of the municipality until changed by ballot."

It is evident that the legislature considered the vote upon this question as being an election in itself, although conducted at the time of the regular spring election and in conjunction therewith.

Sec. 10.54, Stats., provides:

"Special town elections may be called to enable the electors to vote upon any question lawfully submitted to them for determination, in the same manner that special town meetings are called."

Secs. 60.12 and 60.13 provide:

"Special town meetings may be held for the purpose of transacting any lawful business which might be done at the annual meeting, on a request being made to the town clerk in writing signed by twelve qualified voters of such town specifying in such request the purposes for which such meeting is to be held. No matter voted upon or decided at any such special town meeting shall be acted upon in any subsequent special town meeting held in such town prior to the time for holding the next annual town meeting."

"The town clerk with whom any such request shall be left shall record the same and immediately cause notices to be posted up in three of the most public places in the town, giving at least three weeks' and not more than four weeks' notice of such meeting. Such notices shall specify

particularly the purposes for which such meeting is to be held and if there be a newspaper printed in such town he shall publish a copy of such notice therein at least five days before the time appointed for such meeting."

It is our opinion that the referendum on the question of making a town dry is one of the questions which may lawfully be submitted to the electors for determination and that the special election by which this question would be decided should be called by the town clerk upon petition signed by at least twelve qualified voters of the town, asking for the submission of such question.

It is our further opinion that it is the duty of the town clerk to post notices of the referendum in the same manner that notices of a special town meeting should be given under sec. 60.13.

Sec. 10.51 provides in respect to villages:

"The provisions of section 10.40 respecting special and referendum elections, and the functions and duties of common councils of cities and city clerks, shall apply to the conduct of similar village elections and to the functions and duties of village boards and village clerks."

The said sec. 10.40, which is referred to in sec. 10.51, reads as follows:

"(1) Special elections authorized by law shall be held and conducted and the returns thereof made in the manner and within the time required in the case of regular municipal elections.

"(2) Whenever the common council of any city shall, by ordinance or resolution, submit any question, ordinance, or proposed recall from office to a vote of the electors, the city clerk shall issue a call for the election and prepare and distribute ballots as required by the ordinance or resolution or by the statute relating to or authorizing the submission. When no provision to the contrary is made the ballot shall conform to the provisions of section 6.23, except that it may be printed at the foot of the official ballot used at the same time for other purposes. In all other respects the election shall be conducted as other municipal elections are conducted."

There is no provision in the statutes, however, giving to electors in villages the right of initiating direct legislation such as is given to the electors of cities by virtue

of sec. 10.43. It is our opinion, therefore, that the statutes do not provide a method by which the electors of the village may force the submission of this question to a vote but that the submission must be made by the village board. It is true that sec. 66.05 (10) (d) 3 apparently contemplates that there shall be an absolute right in the electors to vote upon this question. If the village board refuses to submit this question to a vote the remedy of the electors is to elect a new board which will submit the question.

JEF

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*Indigent, Insane, etc. — Tuberculosis Sanatoriums —* Money paid to county by A for maintenance at state sanatorium should be paid over to state; failure by county to do so gives state cause of action for money had and received.

March 14, 1934.

BOARD OF CONTROL.

You state that under the provisions of secs. 50.02 and 50.03, Stats., one A was admitted to the state sanatorium as a charge of X county. In authorizing the admission the court ordered ten dollars a week to be paid by Mr. A to X county. It so happens that this is the identical amount the state bills X county under the provisions of 50.03, subsec. (3), and 46.10, and accordingly X county is not out a cent while the state is still short its share of the cost.

You inquire what recourse the state has, if any, against X county which accepts the money paid in by Mr. A. You state that, because of the fact that subsec. (3), sec. 50.03 indicates the state is chargeable for the full bill in the first instance, you are wondering whether you have an action for money had and received against X county.

Under the circumstances, it is our opinion that you have a cause of action against the county for money had and received. The ten dollars which A paid to the county should be forwarded by the county to the state on behalf of the institution to which the party was committed. The fail-

ure to do this gives you a cause of action against the county. See II Op. Atty. Gen. 410, II Op. Atty. Gen. 412, III Op. Atty. Gen. 423 and X Op. Atty. Gen. 994.

JEF

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*Automobiles — Law of Road — Common Carriers — Refunds*—Rulings of attorney general in XX Op. Atty. Gen. 451, on claim for refund of excessive bus license fee, and XXII Op. Atty. Gen. 884, on power of secretary of state to permit reduction in gross weight of motor vehicle during time for which it was registered, are considered and discussed.

March 14, 1934.

THEODORE DAMMANN,

*Secretary of State.*

Attention Don Farris, Motor Vehicle Division.

You request the opinion of this department upon the following statement of facts:

“On June 20th, 1931, in answer to an inquiry from this department, the attorney general held that claims of the Menominee and Marinette Light and Traction Company and the Wisconsin Public Service Corporation for refund of excessive bus license fees paid over a period of years should be allowed, and acting upon that advice, the claims were paid by the secretary of state.”

You submit a statement from the Wisconsin Public Service Corporation claiming a refund of the amounts in excess of that to which the state was entitled, covering the years 1925, 1927, 1929, 1930, 1931 and 1932, paid as fees for licenses on certain of their equipment.

You say:

“In an opinion of the attorney general under date of November 2d, 1933, the department was advised that, while the secretary of state is authorized to permit the owner of a vehicle to increase the licensed weight by paying the additional registration fee, there was no provision in the motor vehicle registration law to permit a reduction of the licensed weight during any period for which it was licensed.”

You say also you understand that our opinion in XX Op. Atty. Gen. 451 applies retrospectively and that, in such case, you contend that to allow such claims would, in effect, be a reduction of the licensed weight during the years covered in the claim.

We have made a careful examination of the two opinions referred to by you, to wit, the one dated June 20, 1931 (XX Op. Atty. Gen. 451), and the opinion dated November 2, 1933 (XXII Op. Atty. Gen. 884), and we are of the opinion that there is no conflict between the two. The question dealt with in the earlier opinion was vastly different from the question dealt with in the later opinion. In the earlier opinion we held that if the facts, as presented, disclosed that there had been an overpayment on account of any motor vehicle license fees paid to the state treasurer such overpayment should be refunded by the state treasurer, on the certificate and audit of the secretary of state, in conformity with the provisions of sec. 14.68, subsec. (5), Stats.

In the later opinion (XXII Op. Atty. Gen. 884) this department ruled that the secretary of state is not authorized to permit reductions in the gross weight of a motor vehicle during the time for which it was registered. No question of overpayment was presented and in the later opinion the earlier opinion was considered in arriving at the rule adopted therein.

See also the opinion rendered by this department to the Public Service Commission, dated February 16, 1934,\* in which it was held that the secretary of state has authority to correct errors in registration and that he is authorized to lower the registered gross weight of a motor vehicle to accord with the actual facts.

Inasmuch as you did not submit with your request a statement of the claims submitted by the Wisconsin Public Service Corporation, we do not pass on the question whether such claim is a valid one to be allowed by the state treasurer upon certificate and audit of the secretary of state.

JEF

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\* Page 114 of this volume.

*Automobiles—Law of Road—Suspension of Licenses—*  
When judgment is rendered under sec. 85.08, Stats., jointly against driver of motor vehicle and corporation owning vehicle, secretary of state may suspend driver's license and corporation's right to operate vehicles on Wisconsin highways.

If judgment is against corporation only and driver of motor vehicle is not named, right of corporation to operate motor vehicle on Wisconsin highways may be suspended.

Public utilities and their drivers are required to hold drivers' licenses and owners' licenses under ch. 85, Stats.; if corporation is public utility, secretary of state may require it to file financial proof in same manner as filing is required of persons.

March 14, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You submit the following questions for an official opinion:

1. "If a judgment is rendered under sec. 85.08 (11) jointly against the driver of a motor vehicle and the corporation owning the motor vehicle, have we the authority to suspend both the driver of the motor vehicle and the corporation's rights to operate motor vehicles on Wisconsin highways?"

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 of 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. \* \* \*

Both phases of question No. 1 should be answered in the affirmative. In the first part of your question the judgment is against the driver of the motor vehicle and the corporation owning the motor vehicle. They come strictly within the above quoted statute. It has been argued that because the word "his" is used in the second line where it says "in respect to his operation of a motor vehicle" it would indicate that the statute was intended to apply to the driver's license. When the word "person" is used in the statute, it includes corporation, sec. 370.01 (12) and (30), and the pronouns may also be changed by construction. When the word "his" is used, it may be construed to apply to feminine gender or to neuter gender. In the same way it can be used as if the statute had used the pronoun "her" or "its" respectively. We see no reason why we should give a different construction. Of course if the judgment is against the corporation only, then the driver's license will not have to be suspended by reason of such judgment under the wording of this statute, but the corporation's license may be so suspended.

Your second question reads:

"If a judgment is rendered against a corporation under section 85.08 (11) and that corporation happens to be a public utility, such as a bus line, have we the authority to require it to file financial proof with this department or does section 194.02 give the entire ruling and control of such companies to the public service commission, and does the proof they are required to file under section 194.14 exempt them from any application of the law requiring such proof under section 85.08 (10)?"

The wording of ch. 85 is broad enough to include motor vehicles used by public utilities and the practical construction that has been placed upon this by public utilities throughout the state and the public service commission is that all drivers of busses and all motor vehicles for public utilities must have a driver's license under ch. 85, and an operator's license to operate the motor vehicle must also be issued to the corporation.

We believe therefore that this question should also be answered in the affirmative. You have a right to require such public utilities to file financial proof with your department. The provisions of ch. 194 do not in any way militate against this ruling.

JEF

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*Corporations — Taxation — Public Utilities — Telephone Companies*—Word “income,” as used in ch. 276, Laws 1933, amending sec. 76.38, Stats., is construed to mean gross income.

March 14, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

You ask concerning the interpretation of subsecs. (1) and (5), sec. 76.38, Stats., and particularly those portions added by ch. 276, Laws 1933. These subsections, italics indicating the 1933 amendments, provide in part:

“(1) Any person, copartnership, association, company or corporation operating any telephone line in this state with appliances for the transmission of messages of speech or sound, and engaged in the business of furnishing telephone service for compensation as owner, lessee or otherwise, shall be deemed and held a telephone company, and *such companies, excepting companies having no income during the preceding calendar year*, shall on or before the first day of March, in each year make and return to the state treasurer, in such form and upon such blanks as he shall prescribe and furnish, a true statement of the gross receipts from the operation of the business during the preceding calendar year, which statement shall be verified by the president and the treasurer of such company so operating, or two of the principal officers thereof, of the person so operating the telephone business. \* \* \*

“(5) When the annual license fee upon the total gross receipts as computed at the rates specified in this section is less than five cents for each telephone instrument owned and operated, or operated within this state by any person, copartnership, association, company or corporation, a sum equal to five cents for each telephone instrument shall be

paid as an annual license fee by such company, *except that no license fee shall be paid by any telephone company having no income during the preceding calendar year.* Any amount paid under the provisions of this subsection shall be retained in the state treasury."

The present inquiry centers around the meaning of the word "income" as used by the legislature in the above amendment. It is conceded that in many instances, particularly those arising under the income tax statutes, the word "income" has been defined to mean net gain or profit. Nevertheless, it is said at page 161 in the case of *Jordan Land Co. v. Freeborn*, 149 Wis. 159:

"\* \* \* Instances without number exist where words in legislative acts must be interpreted as the legislature used them, though this may enlarge, restrict, or qualify their commonly accepted meanings. As instances, see *Reiche v. Smythe*, 13 Wall. 162, wherein, under a revenue act, singing birds were held not to be living animals, and *Silver v. Ladd*, 7 Wall. 219, where the words 'single man' were construed to include 'an unmarried woman.' The particular inquiry, therefore, is not what is the abstract or colloquial meaning of the word 'adult,' but in what sense was it used in the act before us. We must collect the meaning of the word from the context and the purpose of the act in dealing with the subject matter under consideration. \* \* \*"

See also *State ex rel. City Construction Co. v. Kotecki*, 156 Wis. 278. The statute in question imposes a tax on the gross receipts of telephone companies. To construe the word "income" to mean net gain or profit would require a result clearly without the contemplation of the legislature. So construed the tax on gross receipts would be imposed only in case the telephone company operated at a net profit during the preceding year. Such a conglomerate mixture of these two forms of taxation results in a near absurdity. Further, were it the intent of the legislature that the word "income" be construed to mean net gain or profit an elaborate definition of that term would have been necessary, setting out the basis for computing the gross income and the permissible deductions therefrom. There is no indication that the definition of that term as used in the income tax statutes is meant to be incorporated in

this statute. Therefore, it is concluded that the word "income" as used in subsecs. (1) and (5), sec. 76.38 refers to gross income.

Under this statute as it existed prior to the amendment in question all telephone companies operating in this state were subject to a tax on their gross receipts with the following exception: In the case of those companies whose gross receipts required a tax in an amount less than the sum of five cents for each telephone instrument in operation subsec. (5) provided that an amount be paid by such companies over and above the tax on their gross receipts which would equal a total tax of five cents per telephone. Hence, prior to this amendment a telephone company having no gross income during the preceding year was, nevertheless, charged a license fee of five cents for each instrument. In that the statute requires that the company be operating this equipment a paradoxical situation might be said to exist were it not for the fact that in legal contemplation the "operation" of a public utility has a particularly broad significance. Sec. 196.81, Stats., provides that a public utility may not discontinue or abandon its operations without consent of the public service commission. It is said at page 367 in the case of *Calumet Service Co. v. Chilton*, 148 Wis. 334:

"\* \* \* the words 'operating under an existing permit' do not suggest, necessarily, in continuous operation,—absence of momentary or reasonable cessation. Excusable, temporary suspensions, involving no purpose to abandon, the owner being willing and seasonably, under the circumstances, able to resume and doing so, as in this case, satisfies the calls for a 'public utility operating under,' etc.

"The law must be given a reasonable,—sensible,—construction, at all points, to the end that the legislative intent shall not fail, instead of looking with favor upon technical assaults upon it."

See *Wright v. Milwaukee Electric Railway and Light Company*, 95 Wis. 29, 36; also, cases cited under section (17), 51 Corpus Juris 7. Hence the effect of the amendment under consideration is to relieve from taxation those telephone companies operating in this state, in the above indicated sense, which have had during the preceding year

no gross income. In other words, those companies are exempted from this tax which retain their right to operate at any time but which have temporarily suspended their actual service.

It is further asked in what manner the state treasury department is to ascertain whether a given company has been the recipient of any gross income during the preceding year. Together with exempting these companies from the tax they are further exempted from the duty imposed by subsec. (1) of submitting their yearly financial report to the treasury department. It is concluded that the legislature intended to rely on the integrity of the officers of the particular companies for the submission of such a report in case the books of that company showed a gross income for the preceding year. Of course, should facts negating the existence of this integrity be brought to the attention of the treasury department by the examination of the accounts of said company as provided by subsec. (7) or from any other source, any further actual operation by the company may be forcibly suspended.

It must be understood that the effect of this amendment and the above stated construction thereof is in no way meant to impeach the validity of the present procedure in collecting the tax under this statute as formerly construed by this office except, of course, in the particular instances herein discussed.

JEF

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*Municipal Corporations — Beer Licenses — Intoxicating Liquors—*

1. Local governing body may issue liquor licenses, and persons holding same may lawfully sell liquor in towns, villages and cities in all instances where community has not voted "dry" within statutory period through local option referendum provided for by state liquor law.

2. Attorney general does not advise district attorneys on constitutionality or validity of local ordinances govern-

ing sale of intoxicating liquor, because prosecution under such ordinances is not duty of district attorney.

3. One person may have wholesale permit to sell intoxicating liquor and retail "Class A" license and carry on both businesses on same premises, subject to closing hour restrictions found in sec. 176.06, subsec. (1), Stats.

4. One person may carry on wholesale and retail "Class A" liquor businesses on same, or different premises, provided he holds permit and license.

5. One person may not carry on wholesale and "Class B" retail liquor businesses either on same or different premises.

6. Member of town board, village board, or common council may be owner and operator of tavern, selling intoxicating liquor, without violating sec. 176.05, subsec. (1).

7. Member of a town board, village board or common council may be the owner of a tavern which somebody else operates for him, provided license is issued to him, not to agent who operates it for him.

8. Member of local governing body who owns interest in property may not rent same to be used for tavern purposes without violating sec. 176.05, subsec. (1).

9. Member of local governing body who is stockholder in corporation violates sec. 176.05 (1) when corporation rents property to one who uses it for sale of intoxicating liquors. Such violation of law, however, does not require resignation or create vacancy in office.

10. Person holding permit or retail intoxicating liquor license and also conducting other business on premises may keep his premises open for conduct of other business, after closing premises for sale of intoxicating liquor at hour specified in sec. 176.06, even when such business is not that of conducting hotel or restaurant.

11. Sum charged for "Class A" license need not be same as that charged for "Class B" license.

12. One person may hold "Class A" license and "Class B" license for separate premises.

13. One holding "Class A" license may sell other merchandise on licensed premises.

14. One person may hold "Class A" intoxicating liquor license and "Class A" fermented malt beverage license for same premises.

15. Restaurant may obtain "Class A" intoxicating liquor license.

16. Pharmacist's permit may be issued to registered pharmacist in drug store for which "Class A" liquor license has been issued.

17. One having pharmacist's permit under sec. 176.18 may sell liquor to individual for medicinal purposes without doctor's prescription.

18. Hotel in town or village may not obtain both "Class A" and "Class B" liquor license.

19. Under sec. 176.05 (9) :

(1) Licenses or permits may be granted only to individuals who can comply with character and residence requirements and requirement concerning conviction for crime.

(2) No license or permit may be granted to foreign corporation even though all officers and directors of same could comply with requirements for individual desiring license or permit.

(3) Licenses or permits may be granted to Wisconsin corporation only when all officers and directors of such can satisfy requirements set forth for individual desiring license or permit.

20. Wholesale house and "Class B" tavern cannot exist on same premises even where wholesale permit and retail license are issued to separate persons.

21. Neither holder of "Class A" nor holder of "Class B" liquor license may peddle liquor from truck in municipality from which he does not hold license.

22. One holding operator's license under sec. 66.05 (10) (i) is not obliged to supply bond provided for in sec. 176.10.

23. Although bond under sec. 176.10 could probably be sued upon by city, town or village, even when running only to state, it is advisable to have said bond run both to state and local municipality which issues license.

24. Sellers of intoxicating liquor enclosed in chocolate covered containers must have license or permit.

25. When individual chocolate container holding intoxicating liquor is sold, it must bear tax stamp thereon. If amount of liquor therein is less than 1/16 of gallon, or eight ounces, it must bear 6¼ or 1½ cent stamp, depend-

ing upon whether intoxicating liquor has alcoholic content of 21%, or less than 21% by volume.

26. Under sec. 176.30, (3), prohibiting sale of intoxicating liquor within one mile of state hospital for insane, distance should be measured from hospital building, and by air line.

27. One holding wholesale liquor permit may not make sales of intoxicating liquor from truck, either in municipality where place of business is located or elsewhere.

28. Out-of-state concern may establish bonded warehouse in Wisconsin from which it can fill orders without coming under Wisconsin requirements for manufacturers, rectifiers or wholesalers.

Such out-of-state concern may not make sales in Wisconsin from such warehouse.

29. Wisconsin concern may sell unstamped intoxicating liquor:

(1) When out-of-state concern places order with it, and said out-of-state concern sends its own trucks to Wisconsin plant and accepts liquor at that point.

(2) When individual goes to Wisconsin plant and purchases shipments to be taken directly out of state.

Such sales of liquor are for shipment in interstate commerce.

Wisconsin concern making such sales of unstamped intoxicating liquor is liable if such liquor is not actually shipped in interstate commerce, regardless of representations of purchaser-proof of intent to violate law not being essential element for conviction.

30. Person holding fermented malt beverage wholesale license may furnish Neon sign costing more than \$25.00 in one year, which sign is to hang on the building of a retailer of intoxicating liquor.

31. One holding intoxicating liquor wholesale permit who is also wholesaler of groceries, tobacco and candy, may sell same to holders of "Class A" and "Class B" intoxicating liquor licenses.

32. Railroad company operating in Wisconsin must sell in its dining, buffet or cafe cars only liquor bearing Wisconsin tax stamp.

33. State treasurer may prescribe some regulations relative to printed matter on intoxicating liquor labels.

34. Employees of the state treasurer would not be protected by anything contained in sec. 176.37, while attempting to make arrests for violations of sec. 66.05 (10).

35. Under sec. 176.09 (1) complete application for license need not be published, but publication should include name and address of applicant, kind of license applied for and location of premises for which license is sought.

March 16, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

A number of requests have recently been received from you relative to an interpretation of the regulatory and taxation provisions of the Wisconsin statutes concerning intoxicating liquors. In addition to these requests a large number have been received from other state departments and from district attorneys throughout Wisconsin. Believing that it will materially assist in clarifying certain ambiguous features of these laws, which ambiguities no doubt resulted from the composite character of the legislative acts, this office deems it advisable to render to you an official opinion covering not only the points which were raised by your inquiries but also those which thus far have been presented by other interested persons, in order that one document may embrace at least a fairly comprehensive explanation of the interpretation given to the intoxicating liquor laws by this office.

*Question No. 1:*

Considerable dispute has arisen with respect to the status of territory in Wisconsin that was dry at the time of the adoption of the prohibition amendment. Definite advice is asked as to whether a municipality that had voted to issue no licenses at the time the prohibition amendment was adopted would have to vote on that question again before licenses could be granted. It is contended on the part of the dries that since sec. 176.38, subsec. (1) states, "The question *whether* or not" any person shall be licensed, it indicates that no license can be issued until the people

have voted one way or the other. The wet interests, on the other hand, claim that this language is applicable to the extent that, if a municipal governing body refuses to grant licenses, then the wets can force a vote on it and if the municipal governing body grants licenses, then the dries can bring it to a vote.

*Answer:*

The contention of the wets is correct. This department recently ruled:\*

“It is manifest that, under the express provisions of the statutes, towns boards, city councils, and village boards have authority to issue liquor licenses and persons holding such licenses may lawfully sell liquor in such towns, cities and villages in all instances, unless and until the community has voted ‘dry’ within the statutory period through the referendum provided by the local option provisions of the state liquor law.

“There would seem to be no doubt as to the intention of the legislature in the enactment of the Griswold bill (now ch. 13, Laws Special Session 1933), to provide that all communities should be ‘wet’ and that liquor may be lawfully sold by persons holding licenses from the proper authorities in all towns, cities and villages except where the electors of the particular community have voted ‘dry’ through the referendum provided by the act.”

The effect of this ruling and of the law is that the governing body in any town, city or village can, by refusing to pass an ordinance regulating and licensing the sale of liquor therein, prohibit the vending of liquor in such town, city or village without the popular vote provided for in sec. 176.38, unless petition for such vote was made by the electors.

*Question No. 2:*

Does the attorney general advise district attorneys on the constitutionality or validity of ordinances enacted by local governing bodies, regulating the licensing of the sale of intoxicating liquors?

*Answer:*

No. Under sec. 14.53, subsec. (3), Stats., the attorney general consults and advises with the district attorneys

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\* Pages 153-154 of this volume.

only in relation to matters pertaining to the duties of the district attorney's office. It was recently officially held that the district attorney is not obliged to prosecute for violations of town, village and city ordinances, adopted pursuant to ch. 13, Laws Special Session 1933, relating to the regulation and sale of intoxicating liquors.\*

*Question No. 3:*

Under the provisions of ch. 176, Stats., regulating the sale of intoxicating liquors, is it legal for any person who has a permit to sell liquor at wholesale to have a retail "Class A" license for the same premises and thereafter carry on both retail and wholesale liquor business on the same premises?

*Answer:*

Yes, subject to the limitation that, in accordance with the provisions of sec. 176.06, subsec. (1), wholesale sales of liquor must cease on those premises between 5 P. M. and 8 A. M. except on Saturday, when the closing hour shall be 9 P. M. Such sales of liquor as are authorized by the "Class A" license, which such person holds, may be continued, except between 9 P. M. and 8 A. M., every day of the week.

*Question No. 4:*

Is it lawful for any one person to carry on both wholesale and retail liquor business if he does so on different premises?

*Answer:*

It is lawful for one person to carry on wholesale and retail "Class A" liquor businesses on the same or different premises. One person may not carry on wholesale and "Class B" retail businesses even on different premises.

*Question No. 5:*

Do the provisions of sec. 176.05, subsec. (1), bar any member of a town board, village board or common council from being the owner and operator of a tavern selling intoxicating liquor without violating the law?

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*Answer:*

No.

*Question No. 6:*

Do the provisions of sec. 176.05, subsec. (1), bar any member of a town board, village board or common council from being the owner of a tavern business which somebody else operates for him?

*Answer:*

No, if the license is issued to the member of the governing body himself; he cannot be the owner of a tavern business which is operated by an agent to whom a license is issued, because sec. 176.05, subsec. (3), provides:

“\* \* \* No such license shall be issued to any person acting as agent for or in the employ of another. \* \* \*”

*Question No. 7:*

Can a member of a local governing body who owns a half interest in a building rent such building for tavern purposes?

*Answer:*

Sec. 176.05, subsec. (1), provides in part:

“\* \* \* No member of any such town board, village board or common council shall sell directly or indirectly or offer for sale, to any person, firm, or corporation that holds or applies for any such license any bond, material, product, or other matter, or thing that may be used by any such licensee or prospective licensee in the carrying on of his or its said business.”

The above language is extremely broad and comprehensive. It doubtless was intended to prevent the exercise of patronage and influence by members of local governing bodies on behalf of prospective licensees in return for profit or promise of profit from business transactions between such member and such licensee or prospective licensee. The leasing of a building for tavern purposes is virtually a sale of the use of such building for a period of time. It is a violation of the above quoted statute for a member of a local governing body who is owner or part owner of the building to lease the same for tavern purposes.

*Question No. 8:*

Under the provisions of sec. 176.05, subsec. (1), may a member of a town board, village board, or city council who is the owner of stock in a corporation hold his office when the corporation rents a piece of property which it (the corporation) uses in part for the sale of intoxicating liquor?

*Answer:*

See answer to question 7.

The purpose of this statute, as previously indicated, was to prevent a member of a town board, village board or city council from profiting, either directly or indirectly, from licenses which were issued by the town board, village board, or city council to which such member belonged. Similar language is found in sec. 348.28, known as the officers' malfeasance statute. In XXI Op. Atty. Gen. 626, it was held that the mayor of a city who was also a stockholder in a bank that purchased city bonds was liable to punishment under sec. 348.28 for being interested in a contract with the city. The position of the council member, in the present case, is similar to that of the mayor of the city in the opinion mentioned. A member of the town board, village board, or city council who is a stockholder in a corporation renting property on which intoxicating liquor is sold has an interest, although possibly very small and indirect, in such business and is liable to punishment under sec. 176.05 (1). The said section, however, does not provide that the offender cannot hold his office. Neither does art. XIII, sec. 3, Wis. Const., or sec. 17.03, (5), Stats., require his resignation or creates a vacancy.

*Question No. 9:*

Must premises for which a license or permit to deal in intoxicating liquors has been issued and upon which premises other business is conducted close the premises entirely at the closing hours specified in sec. 176.06, or must the premises be closed during those hours only for traffic in intoxicating liquor?

*Answer:*

The premises must close for the sale of intoxicating liquor during the hours specified in sec. 176.06, but may remain open for the transaction of other business. It is true that sec. 176.06 (5), specifically allowing hotels and restaurants to remain open for the conduct of other regular business after closing for the sale of intoxicating liquors, would indicate to the contrary. In our opinion, however, the stronger implication is found in the provision, "No premises \* \* \* shall be permitted to remain open for the sale of liquor \* \* \*," and indicates that it is only the traffic in liquor which cannot be carried on during the hours prohibited by sec. 176.06.

*Question No. 10:*

Under sec. 176.05 (4), must the license fee be the same for a "Class A" as for a "Class B" license?

*Answer:*

No. That section provides:

"The sum to be paid for such license shall be at all times the same for each class of licenses \* \* \*."

This statute is certainly susceptible to construction both ways. The construction of ambiguous statutes, however, should be directed toward a determination of the legislative intent. In small cities and villages and in towns, those desiring a "Class A" license would be unable to pay therefor a sum of money equal to that which the owner of a "Class B" license could pay for such license. In larger cities the opposite would be true. The legislature undoubtedly realized this in enacting the above provision and did not intend that the local municipalities should be obliged to equalize the sum to be charged for "Class A" and "Class B" licenses in order to, in one case, permit the establishment of a "Class A" retail liquor business, and in the other, permit the establishment of a "Class B" retail liquor business. The above provision allows a municipality to charge a different sum for a "Class A" license than for a "Class B" license, but does not permit that municipality to charge different amounts for licenses within each class.

*Question No. 11:*

Can the same person hold a "Class A" license and also a "Class B" license on separate premises?

*Answer:*

Yes.

*Question No. 12:*

Can one holding a "Class A" license sell anything besides liquor, such as cigars, candy, cigarettes, etc?

*Answer:*

Yes, provided the proper license for their sale is obtained, when one is necessary.

*Question No. 13:*

Can any one having a "Class A" intoxicating liquor license be permitted to sell beer not to be consumed on the premises provided he procures a beer license?

*Answer:*

Yes, if he secures a "Class A" fermented malt beverage license. It is assumed that the beer referred to has an alcoholic content of less than 5% by weight and thus is classed as a fermented malt beverage. If the beer has an alcoholic content of 5% or more by weight it is, of course, an intoxicating liquor, and a "Class A" intoxicating liquor license authorizes the sale of the same, not to be consumed on the premises.

*Question No. 14:*

May restaurants have, and operate under, a "Class A" license?

*Answer:*

Yes. Although sec. 176.05 (10) provides, "Intoxicating liquor shall be sold in restaurants only at tables and to seated customers," that provision is intended as a limitation only on holders of retail "Class B" licenses and was designed to prevent a restaurant from having a bar and selling liquor over the same.

*Question No. 15:*

May a drug store have a "Class A" liquor license instead of, or in addition to, the pharmacist's permit provided for in sec. 176.18?

*Answer:*

A drug store may have a "Class A" retail liquor license and, in addition, a pharmacist's permit may be issued to a registered pharmacist in the drug store which has a "Class A" license.

*Question No. 16:*

May a registered pharmacist having a pharmacist's permit under sec. 176.18 sell liquor to an individual for medicinal purposes solely upon the statement of the applicant, without first having a doctor's prescription for such liquor?

*Answer:*

A pharmacist's permit authorizes sales of intoxicating liquor for medicinal, mechanical or scientific purposes and not as intoxicating beverages. There is no specific requirement that the sales for medicinal purposes must be upon a doctor's prescription. There is no requirement, except the statement of the applicant, when he seeks to purchase for mechanical or scientific purposes. It would serve very little, in controlling liquor sales under pharmacists' permits, to require doctors' prescriptions for sales for medicinal purposes, when the applicant desiring the liquor for scientific or mechanical purposes can get it upon his own statement. Those desiring to circumvent the law would always make application for the liquor, claiming it to be for scientific or mechanical purposes. The language of sec. 176.18 (2) "\* \* \*" and also stating in case of a sale for medicinal purposes on a physician's prescription its date and number and the name of the physician issuing the same," indicates that there may be sales for medicinal purposes without a physician's prescription, but that when such sale is made, and the applicant has a physician's prescription therefor, the date and number of the same and the name of the physician should appear on the certificate.

*Question No. 17:*

May a hotel in a town or village obtain both a "Class A" and a "Class B" liquor license?

*Answer:*

No. Sec. 176.05, (3) provides, in part:

“\* \* \* A retail ‘Class A’ and ‘Class B’ license shall not both be issued for the same premises or connecting premises except in the case of hotels as defined in paragraph (e) of subsection (2) of section 176.20.”

Sec. 176.20, (2) (e), generally speaking, excepts from the no-license area of a residence district:

“Actual and bona fide hotels maintaining in cities of the first class fifty or more sleeping rooms for the accommodation of transient guests; in cities of the second class, twenty-five or more such rooms; in cities of the third class, eighteen or more such rooms; and in cities of the fourth class, ten or more such rooms.”

The words “actual” and “bona fide” modify hotels and describe them to the extent that they differentiate what is ordinarily considered as a hotel from apartment hotels. Had the legislature intended to provide that all actual and bona fide hotels could have both “Class A” and “Class B” liquor licenses, it would have said, in sec. 176.05, (3), “except in the case of actual and bona fide hotels.” The provisions of sec. 176.20 (2) (e) relating to hotels in first, second, third and fourth class cities and also the provision relating to the number of rooms do actually define certain hotels. Only those hotels mentioned in sec. 176.20 (2) (e) may have both “Class A” and “Class B” liquor licenses. This is a valid classification of hotels, which can legally be made by the legislature.

*Question No. 18:*

What is the effect of sec. 176.05 (9) ?

*Answer:*

Under this section, licenses or permits may be granted only to individuals who can comply with the character and residence requirements and the requirement as to conviction for offenses. No license or permit may be granted to a foreign corporation even though all the officers and directors of such foreign corporation could comply with the requirements for an individual obtaining a license or permit. Licenses or permits may be granted to a Wisconsin corporation only when all officers and directors of such Wisconsin corporation can satisfy the requirements set forth for an individual desiring a license or permit.

*Question No. 19:*

May a wholesale house and a "Class B" tavern exist on the same premises, provided a permit and license are issued to two separate persons?

*Answer:*

There is no specific statute which prevents this, but, in view of the limitations imposed on wholesalers by sec. 176.17, it is almost impossible to see how such an arrangement could exist without the wholesaler supplying some things which would be of benefit to the retailer, and the retailer receiving the benefit of some things through the wholesaler. By implication and by the broad interpretation of this statute, your question must be answered in the negative.

*Question No. 20:*

May a holder of a "Class A" or "Class B" liquor license peddle liquor from his truck in a municipality from which he does not hold a license?

*Answer:*

No. A "Class A" or "Class B" liquor license authorizes trafficking in intoxicating liquors only on the premises for which the license is issued. Moreover, a sale cannot be made in one municipality unless the seller holds a license from that municipality.

*Question No. 21:*

Is a holder of an operator's license obliged to supply the bond provided for in sec. 176.10?

*Answer:*

No. Sec. 176.10 (1) provides in part:

"Every applicant for license under section 176.05, shall, before delivery of the license, file with such town, village, or city clerk a bond to the state \* \* \*."

Only those persons who apply for a license under sec. 176.05 need supply the bond. An operator's license is not obtained under sec. 176.05, but under sec. 66.05 (10) (i).

*Question No. 22:*

Should the bond provided for by sec. 176.10 run to the state or to the local licensing body?

*Answer:*

Sec. 176.10 definitely provides that the state shall be an obligee of the bond. The conditions of the bond, particularly the one that the licensee "\* \* \*" will observe and obey all orders of such supervisors, trustees, or aldermen, or any of them, made pursuant to law "\* \* \*" indicates that the municipality would have the right to sue upon the bond although the bond ran only to the state. It is suggested, however, as being advisable that the bond run to the state and to the municipality which issues the license. Although the statute does not provide that the local municipality shall be one of the obligees, a bond in this form would not be invalid, and the municipality would have the right to sue upon it, at least as a common law obligation. *Lewis v. Stout, et al.*, 22 Wis. 234; *Dudley v. Rice*, 119 Wis. 97. There is no necessity for having two separate bonds.

*Question No. 23:*

May sellers of intoxicating liquor which is enclosed in chocolate covered containers having the appearance of chocolate candy sell the same without a license or permit?

*Answer:*

No. Sec. 176.04 (1) forbids the sale of intoxicating liquor "in any quantity whatever" without a license or permit. To this general requirement of a license for the sale of intoxicating liquors there are specific, statutory exemptions. Unless the seller of the intoxicating liquor in the chocolate container can show that it is sold for one of the purposes mentioned in the exemption statutes, he must obtain a license or permit. The seller is not exempt from the license requirement simply because the sale of intoxicating liquor is made in a chocolate container.

Some question has arisen as to whether the sale or possession of these chocolate containers having intoxicating liquor in them is legal because of sec. 352.01, prohibiting the sale or possession of "any candy containing intoxicating liquor." Most, if not all, of the chocolate containers are made of bitter chocolate, having in it no saccharin or sweetening substance whatsoever. Many decisions indicate that such a container having intoxicating liquor would not be considered a candy. This office, however, does not

here pass upon this question, which is not raised. Under this situation it is necessary that a seller of liquor in this form purchase a license for the same. If, subsequently, the sale of liquor in this form is held to be violative of sec. 352.01, and the same is suppressed, the question of licensing this sale or of taxing this sale will be automatically taken care of.

*Question No. 24:*

Must each chocolate container having intoxicating liquor in it bear a tax stamp when sold?

*Answer:*

Yes, unless the sale can be included under one of the intoxicating liquor tax exemption statutes.

Sec. 139.26, (1) provides, in part:

“An occupational tax to be collected as a stamp tax is assessed, imposed, and levied upon the sale, exchange, offering or exposing for sale or exchange, having in possession with intent to sell or exchange, or removal for consumption, exchange, or sale other than for shipment in interstate or foreign commerce or for shipment, sale, or exchange by a manufacturer to a rectifier, of intoxicating liquors, other than wine used for sacramental purposes and alcohol used for industrial, hospital, purposes. The rate of such tax shall be twenty-five cents per wine gallon on intoxicating liquors containing less than twenty-one per centum of alcohol by volume and one dollar per wine gallon on intoxicating liquors containing twenty-one per centum of alcohol by volume or more, and shall be computed in accordance with the following table:

| Quantity in Wine Gallons             | Quantity in Ounces    | Tax When Alcoholic Content is 21% or More by Volume | Tax When Alcoholic Content is Less Than 21% by Volume |
|--------------------------------------|-----------------------|---|---|
| Up to and including 1/16 of a gallon | Up to and including 8 | 6¼ cents  | 1½ cents  |

\* \* \*

If, as is usually the case, the chocolate contains less than 1/16th of a gallon, or less than eight ounces, the minimum tax stamp of 6¼ cents or 1½ cents should be placed there-

on, depending upon whether the intoxicating liquor has an alcoholic content of 21%, or less than 21% by volume.

*Question No. 25:*

Under sec. 176.30 (3), which prohibits the sale of intoxicating liquor “\* \* \* in any quantity whatsoever within one mile of any of the state hospitals for the insane, \* \* \*”:

(1) Do the words “within one mile” mean one mile from the limits of the property line or one mile from the main hospital building?

*Answer:*

This section prohibits the sale of intoxicating liquor within one mile of the main hospital building rather than one mile from the property limits.

(2) Should the one mile be measured by road or air line?

*Answer:*

The distance should be measured by air line. See *Jennings v. Russell*, (Ala.) 9 So. 421.

*Question No. 26:*

May one holding a wholesale liquor permit make sales of intoxicating liquor from a truck, either in the municipality where his place of business is located or in other municipalities?

*Answer:*

No. Although the statutes do not definitely provide that a wholesale permit shall cover specific premises, a reading of all of the intoxicating liquor laws indicates that the permit shall authorize sales of intoxicating liquor at a definite place of business. In various places in the statutes, the “premises” covered by the wholesale permit, are mentioned.

Sec. 176.06 provides:

“No premises for which a wholesale or retail liquor license has been issued shall be permitted to remain open for the sale of liquor:

“(1) If a wholesale license, between 5 P. M. and 8 A. M. except on Saturday when the closing hour shall be 9 P. M.”

It is quite evident that a sale from a truck is not contemplated under this statute, and it would be subversive of the statutes to permit a wholesaler to sell intoxicating liquor from a truck during the hours that he could not sell at his premises. Sec. 176.70 requires a special permit for soliciting orders for, or engaging in the sale for future delivery of, intoxicating liquors. The legislature could not have intended that a permit should be required for this type of transaction and no permit required for the sale and immediate delivery of intoxicating liquor from a truck. Nothing in this answer is intended as prohibiting the distribution of intoxicating liquor by the wholesaler where such liquor has previously been sold.

*Question No. 27:*

May an out-of-state concern establish a warehouse in Wisconsin from which it can, through an agent at the warehouse, fill orders taken by salesmen, without coming under the Wisconsin requirements for manufacturers, rectifiers, or wholesalers?

This type of transaction takes two forms:

In the first case, the out-of-state concern ships intoxicating liquor to its bonded warehouse in Wisconsin, consigned to itself. Salesmen for the out-of-state concern, operating in Wisconsin, solicit orders and send the orders to the main office out of the state for acceptance. Upon acceptance, instructions from the main office are sent to the agent at the Wisconsin warehouse to release the liquor when called for by the purchaser.

In the second case, intoxicating liquor which has already been sold to a Wisconsin purchaser is shipped to the Wisconsin bonded warehouse, with the out-of-state concern or the purchaser as consignee. The liquor is then stored at the warehouse and released to the purchaser as he needs it and calls for it.

*Answer:*

The out-of-state concern does not need to come under the Wisconsin requirements for manufacturers, rectifiers or wholesalers in order to carry on either, or both, of these transactions. It will be recalled in this connection that a foreign corporation, as such, could not in any event obtain

a \$250.00 wholesaler's permit in Wisconsin by virtue of sec. 176.05 (9). (See question No. 18, *supra*.) A \$250.00 wholesaler's permit authorizes selling, dealing, or trafficking in intoxicating liquors. Sec. 176.05 (1c). A wholesaler is defined as being one other than a manufacturer or rectifier, that "sells intoxicating liquors to retailers or others for the purpose of re-sale." Sec. 176.03 (11).

Under sec. 139.30 (1), however,

"No retailer shall purchase or have in his possession intoxicating liquor purchased from other than a Wisconsin manufacturer, rectifier, or wholesaler, \* \* \*."

An out-of-state concern, therefore, can sell intoxicating liquor only to Wisconsin manufacturers, rectifiers and wholesalers. Such sale, of course, must be made outside of Wisconsin. The result is that the sales are made through a solicitation of orders by salesmen in Wisconsin, which orders are accepted in the office outside of this state. Sec. 176.04 (1) provides punishment for "Any person who shall, without a license or permit, vend, sell, deal, or traffic in, \* \* \* intoxicating liquors \* \* \*." Vending and selling are practically identical, if not entirely so. To traffic in liquor means to pass it from one person to another for an equivalent in goods or money. *Fine v. Moran*, (Fla.) 77 So. 533; *The Robin Goodfellow*, (D. C. Wash.) 20 F. (2d) 924; *In re Cameron Town Mutual Fire, Lightning and Wind Storm Ins. Co.*, 96 Fed. 756; *Lavine v. State*, (Tex.) 34 S. W. 969. The words "traffic in" are synonymous with the word "deal." *Clifford v. State*, 29 Wis. 327.

The two types of transactions mentioned in this question do not involve a sale of intoxicating liquor in Wisconsin. No statute prohibits the storage of intoxicating liquor in Wisconsin by some one who does not hold a Wisconsin license or permit.

*Question No. 28:*

Must a Wisconsin concern sell only stamped merchandise:

(1) When an out-of-state concern places an order with it and the said out-of-state concern sends its own trucks to the Wisconsin plant and accepts the merchandise at that point?

(2) When an individual goes to the Wisconsin plant and desires to purchase a shipment which he states is to be taken directly out of the state?

*Answer:*

A Wisconsin concern may sell unstamped merchandise in both of these cases, because the tax, generally speaking, is levied on merchandise sold "other than for shipment in interstate \* \* \* commerce \* \* \*." The tax exemption statutes relating to sales for shipment in interstate commerce are applicable to intoxicating liquors under sec. 139.26 (1) and to fermented malt beverages under sec. 139.01. Some time ago this office held, in respect to sec. 139.01, XXII Op. Atty. Gen. 582, 583-584:

"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 discrimination 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."

A number of decisions have been found concerning the words "interstate commerce" as applied to the transportation of intoxicating liquor. In the case of *United States v. Hill*, 248 U. S. 420, the United States supreme court decided that the transportation of liquor upon the person and for the personal use of an interstate passenger is interstate commerce. It was held, pp. 423-424:

"The Constitution confers upon Congress the power to regulate commerce among the States. From an early day

such commerce has been held to include the transportation of persons and property no less than the purchase, sale and exchange of commodities. *Gibbons v. Ogden*, 9 Wheat. 1, 188; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203. 'Importation into one State from another is the indispensable element, the test, of interstate commerce. *International Textbook Co. v. Pigg*, 217 U. S. 91, 107; *Lottery Case*, 188 U. S. 321, 345. The transportation of one's own goods from State to State is interstate commerce, and, as such, subject to the regulatory power of Congress. *Pipe Line Cases*, 234 U. S. 548, 560. The transportation of liquor upon the person of one being carried in interstate commerce is within the well-established meaning of the words 'interstate commerce.' *United States v. Chavez*, 228 U. S. 525, 532."

In the case of the *United States v. Simpson*, 252 U. S. 465, pp. 466-467, it was held:

"We think the question should have been answered the other way. The evil against which the statute was directed was the introduction of intoxicating liquor into a prohibition State from another State for purposes other than those specially excepted,—a matter which Congress could and the States could not control. *Danciger v. Cooley*, 248 U. S. 319, 323. The introduction could be effected only through transportation, and whether this took one form or another it was transportation in interstate commerce. *Kelly v. Rhoads*, 188 U. S. 1; *United States v. Chavez*, 228 U. S. 525, 532-533; *United States v. Mesa*, 228 U. S. 533; *Pipe Line Cases*, 234 U. S. 548, 560; *United States v. Hill*, 248 U. S. 420. The statute makes no distinction between different modes of transportation and we think it was intended to include them all, that being the natural import of its words. Had Congress intended to confine it to transportation by railroads and other common carriers it well may be assumed that other words appropriate to the expression of that intention would have been used. And it also may be assumed that Congress foresaw that if the statute were thus confined it could be so readily and extensively evaded by the use of automobiles, auto-trucks and other private vehicles that it would not be of much practical benefit. See *Kirmeyer v. Kansas*, 236 U. S. 568. At all events, we perceive no reason for rejecting the natural import of its words and holding that it was confined to transportation for hire or by public carriers.

"The published decisions show that a number of the federal courts have regarded the statute as embracing transportation by automobile, and have applied it in cases

where the transportation was personal and private, as here. *Ex parte Westbrook*, 250 Fed. Rep. 636; *Malcolm v. United States*, 256 Fed. Rep. 363; *Jones v. United States*, 259 Fed. Rep. 104; *Berryman v. United States*, 259 Fed. Rep. 208.

"That the liquor was intended for the personal use of the person transporting it is not material, so long as it was not for any of the purposes specially excepted. This was settled in *United States v. Hill*, *supra*."

The following language is taken from a decision of the supreme court of Alabama, in the case of *Moragne v. State*, 78 So. 450, p. 451:

"We think that these facts, if believed by the jury, show that the shipment in question is an interstate one, notwithstanding it was by automobile and over the public highways of the state instead of by rail or boat (*Hannibal & St. J. R. Co. v. Husens*, 95 U. S. 465, 24 L. ed. 527; *Kelly v. Rhoads*, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359), just as much so as would be a shipment from Louisville, Ky., to New Orleans, La., over the Louisville & Nashville Railroad, which passes through the state of Alabama. Of course, if there was such a break or disconnection in the shipment by removing it from the vehicle and storing it in this state or by disposing of or attempting to dispose of the cargo, or any part thereof, in this state, it would no doubt cease to be protected as an interstate shipment, and the state statute as well as the Webb-Kenyon law would apply to same."

In the case of *Ex parte Westbrook*, 250 Fed. 636, it was also held that the transportation of intoxicants by private automobile from one state to another is interstate commerce. The fact that the word "shipment" is used does not change the conclusion that the movement of the liquor by the two methods above mentioned would be interstate commerce. Under the ordinary meaning of the word "shipment" which, by sec. 370.01, subsec. (1) should be taken, it is not confined to shipment by boat or common carrier. If sales of unstamped liquor are made with the expectation that they are for shipment in interstate commerce, and such liquor as a matter of fact is diverted to some use in this state, the seller could be held for a violation of the law, regardless of the representations which were made to him concerning the proposed disposition of the liquor,

because of the fact that intent to violate this particular law is not an essential element for conviction.

*Question No. 29:*

May a beer distributor furnish a Neon sign costing more than \$25.00 in one year, which sign is to hang on the building of a retailer of intoxicating liquor?

*Answer:*

Sec. 66.05, (10) (c) 1, forbids a brewer, bottler or wholesaler of fermented malt beverages to furnish such sign to a holder of a "Class B" fermented malt beverage license. This section does not forbid such wholesaler to furnish such sign to a holder of a "Class A" fermented malt beverage license. This section does not forbid a brewer, bottler, or wholesaler of fermented malt beverages to furnish such sign to a holder of either a "Class A" or "Class B" intoxicating liquor license.

If the beer distributor is handling beer having an alcoholic content of 5% or over by weight, he is of course handling intoxicating liquor. Sec. 176.17 forbids a manufacturer, rectifier or wholesaler of intoxicating liquor to furnish such sign to a holder of a "Class B" intoxicating liquor license. This latter section does not prohibit such a manufacturer, rectifier or wholesaler from furnishing such sign to a holder of a "Class A" intoxicating liquor license.

*Question No. 30:*

May a wholesaler of intoxicating liquors who is also a wholesaler of groceries, tobacco or candy sell same to holders of a "Class A" and "Class B" intoxicating liquor license?

*Answer:*

Yes. None of the restrictions on wholesalers of intoxicating liquors found in sec. 176.17, relate to selling, furnishing, giving, or lending articles or credit by such a wholesaler to a holder of a "Class A" intoxicating liquor license. Such restrictions as are found are directed solely to transactions between such wholesaler and the holder of a "Class B" intoxicating liquor license. The two provisions which might be construed to prohibit the wholesaler

of intoxicating liquor from selling tobacco or candy to a holder of a "Class B" intoxicating liquor license are found in sec. 176.17 (2), which prohibits a wholesaler from furnishing, giving, or lending "any money or other thing of value, directly or indirectly," to a holder of a "Class B" intoxicating liquor license, and sec. 176.17 (3), which prohibits such wholesaler from furnishing, giving, renting, lending or selling" any equipment, fixtures, or supplies, directly or indirectly, "to a holder of a "Class B" intoxicating liquor license.

In the case of *C. & N. W. R. R. Co. v. Railroad Commission*, 162 Wis. 91, it was stated, p. 93:

"\* \* \* It is no impeachment of the rule that all the words of a statute should be given effect whenever possible, to give such words effect according to recognized legal rules. These rules require us, when we find in a statute words relating to a particular person or specific subject followed by general words, to restrain these general words to persons or subjects of the same genus or family to which the particular person or subject belongs. *Jensen v. State*, 60 Wis. 577, 19 N. W. 374; *State v. Goodrich*, 84 Wis. 359, 54 N. W. 577; *State ex rel. Lederer v. Inter-National Inv. Co.* 88 Wis. 512, 60 N. W. 796; *O'Sullivan v. J. S. Stearns L. Co.* 154 Wis. 467, 143 N. W. 160; *Lusk v. Stoughton State Bank*, 135 Wis. 311, 317, 115 N. W. 813."

It was also stated in *Milwaukee v. Kassen*, 203 Wis. 383, 385:

"'General words in a statute which follow words relating to a particular class or specific subject should be restricted to persons or subjects of the same genus or family to which the particular person or subject belongs.'

"This is a restatement of the doctrine of *noscitur a sociis*. \* \* \*

Under this doctrine, "other thing of value" refers to a thing in the nature of money, and the word "supplies" refers to supplies in the nature of equipment or fixtures.

*Question No. 31:*

Must a railroad company sell on its trains operating in Wisconsin only liquors purchased in Wisconsin which bear the proper tax stamp?

*Answer:*

Sec. 139.03, subsec. (9), generally speaking, makes it a felony to sell liquor which does not bear the proper tax stamp. Sec. 139.03, (6) prohibits the state treasurer from selling or issuing stamps to one to whom has not been given a permit by the state treasurer. Under sec. 139.27 (1):

“\* \* \* All provisions of sections 139.03 to 139.10 shall be applicable to the occupational tax on intoxicating liquors, including all penalties therein prescribed, except that where the terms ‘fermented malt beverages’, ‘brewer’, ‘bottler’ are used in said sections the terms ‘intoxicating liquors’, ‘manufacturer’, and ‘rectifier’, respectively, shall be substituted \* \* \*.”

Under sec. 176.05, (7) no license is required for the sale of intoxicating liquors upon a dining, buffet, or café car operated upon any railroad in this state, provided such liquor is furnished only to bona fide passengers, and the liquor consumed in transit. No statute compels a railroad company to obtain a permit from the state treasurer and so become entitled to purchase stamps.

Under sec. 139.26 (1) it is provided:

“An occupational tax to be collected as a stamp tax is assessed, imposed, and levied upon the sale, exchange, offering or exposing for sale or exchange, having in possession with intent to sell or exchange or removal for consumption, exchange, or sale other than for shipment in interstate or foreign commerce or for shipment, sale, or exchange by a manufacturer to a rectifier, of intoxicating liquors, other than wine used for sacramental purposes and alcohol used for industrial, hospital, purposes. \* \* \*”

Neither this statute nor any other exempts from taxation intoxicating liquor sold in Wisconsin in dining, buffet, or café cars by railroad companies while such cars are in transit. The intoxicating liquor which is sold by railway companies on these dining, buffet and café cars when in transit, must bear the Wisconsin tax stamp. It is immaterial whether this liquor is purchased in Wisconsin or out of the state, but as a practical matter, most of it probably will be purchased in Wisconsin.

*Question No. 32:*

What is the right of a state treasurer to prescribe the type of label, and the printed matter on the label, which is to be affixed to the container?

*Answer:*

Sec. 176.42 provides:

“The state treasurer may by order prescribe the standard size, form, or character of bottles, kegs, barrels, packages, or other containers in which intoxicating liquor shall be sold in this state. \* \* \*”

Our attention has been called to certain provisions of ch. 352 of the statutes relating to adulteration and misbranding of foods and drugs, and the labeling thereof. Sec. 352.03 provides legal definitions and standards of certain types of food and drink, such definitions and standards to be used in prosecutions relative to the manufacture or sale of adulterated or misbranded articles. Only one intoxicating liquor, namely, wine, is mentioned in sec. 352.03, unless cider can be considered as such. Nothing is mentioned in this section about whiskeys, brandies, cognac, gin, beer, and so on. Although sec. 352.01 provides that, “The term, ‘food,’ as used herein shall include all articles used for food or drink or condiment by man,” it is very doubtful whether that definition of food would be applied to prosecutions for misbranding or adulterating of any products other than those specified in sec. 352.03, because of a lack of standard. A prosecution for the adulteration or misbranding of intoxicating liquor as a drug could be commenced under this chapter only when the intoxicating liquor was used as a medicine for internal or external use.

Although sec. 352.08 gives to the dairy and food commissioner certain control over the branding and labeling of foods, no statute grants to the dairy and food commissioner the exclusive right to designate the types of labels or the legend on labels placed on intoxicating liquor. Even though the word “food” be held to embrace any article used for drink by man, and thus includes intoxicating liquors, the dairy and food commissioner does not have complete jurisdiction over the labels.

Sec. 176.42 provides that the state treasurer may pre-

scribe the *character* of containers in which intoxicating liquor is to be sold within this state. The character of a container would be the distinctive or distinguishing features by which such container is identified. The state treasurer undoubtedly could prescribe that there should be imprinted on the container, as an integral part thereof, a certain legend as in the case of writing or figures which are molded into metal or glass containers. This molded writing is a part of the container itself and is one of the things which give it its distinguishing appearance or character. It is our opinion that the state treasurer also can prescribe certain things which will assist in administering some of the intoxicating liquor laws. That provision of the statutes found in ch. 7, Laws Special Session 1933, relating to the branding and labeling of intoxicating liquors, was placed in ch. 176 of the statutes and designated as sec. 176.60. By sec. 139.27 (3) employees of the state treasurer are given necessary police powers to enforce the provisions of ch. 176, of which section 176.60 is a part. Under sec. 139.03 (11), which relates to fermented malt beverages, and which, by sec. 139.27 (1), also relates to intoxicating liquors, the state treasurer "shall issue such rules and regulations as may be necessary to carry out the provisions of this chapter."

*Question No. 33:*

In the event that the employees of the state treasurer attempt to make an arrest for a violation of sec. 66.05 (10), would they be protected by anything contained in sec. 176.37?

*Answer:*

No. Sec. 139.27 provides:

"The duly authorized employees of the state treasurer shall have all necessary police powers to prevent violations of the provisions of sections 139.25 to 139.30 and the provisions of chapter 176. \* \* \*"

The authority of the employees of the state treasurer does not extend to making arrests for violations of sec. 66.05 (10) and they would not be protected by anything contained in sec. 176.37.

*Question No. 34:*

Under sec. 176.09 (1) is it necessary that the complete application for license be published?

*Answer:*

No. The form of application which you have drafted in accordance with the statute is quite an extensive one, and the cost of publishing the same in full would entail considerable expense. The purposes of providing for the publishing of the application was to give notice to anyone interested that a certain person was applying for a license for specific premises in order that anyone wishing to object to the issuance of a license to the applicant, or for particular premises, might have an opportunity to do so. That purpose will be sufficiently accomplished and the statutes satisfied if the publication includes nothing more than "the name and address of the applicant, the kind of license applied for, and the location of the premises to be licensed," in accordance with the provisions of sec. 176.09 (1).

The above analysis of the intoxicating liquor law must be construed solely as an interpretation of the state laws, and not as a definition of rights, powers, duties or liabilities, under or by virtue of local ordinances.

JEF

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*Education—Tuition*—Boy eighteen years of age who graduated from high school may return to same high school for another year of work in different subjects from those he has taken previously and his home township must pay his tuition for this additional year.

March 19, 1934.

JOHN CALLAHAN, *State Superintendent,*  
*Department of Public Instruction.*  
Attention J. F. Waddell.

You have submitted the following:

"\* \* \* When a boy eighteen years of age has graduated from the high school may he return to the same high school for another year of work in different subjects from

what he has taken previously and have his home township pay tuition for him for this additional year?"

This question must be answered in the affirmative. The question was substantially answered in an official opinion in XVI Op. Atty. Gen. 513. The statutes have not been changed to require a different conclusion. We therefore adhere to our opinion.

JEF

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*Counties—Public Officers—County Park Commission—*  
Members of county park commission are entitled to mileage and expenses incurred in carrying on work of commission.

Committee appointed by county park commission is entitled to mileage and expenses incurred in carrying on work of commission in supervising C. W. A. project.

Committee appointed by county park commission is not entitled to compensation for services but may receive only expenses incurred in carrying on work of commission.

March 21, 1934.

CHAS. K. BONG,  
*Assistant District Attorney,*  
Green Bay, Wisconsin.

You refer to me for an official opinion the following questions which will be considered seriatim.

1. Is a county park commission to be classed as a regular committee of the county board so far as mileage and per diem are concerned?

It is manifest from an examination of the statutes that a county park commission organized under sec. 27.02 is not to be classed as a regular committee of the county board in so far as mileage and per diem are concerned. See secs. 27.02, 59.15, subsec. (1), par. (e), Stats.

Under the provisions of sec. 27.06 the entire amount of the mill tax levied and collected and paid into the county treasury to carry out the purposes of the county park commission is to be paid out only upon the order of the county

park commission "for the purchase of land and the payment of expenses incurred in carrying on the work of the commission."

It is manifest that under the provisions of sec. 27.06 the members of the county park commission may receive their mileage and other expenses in carrying on the work of the commission and they are not limited in any way in so far as mileage and expenses are concerned but are entitled to receive their actual expenses and disbursements. See also secs. 27.02 and 27.03, Stats.

2. Are the members of a committee appointed by the county park commission, consisting of members of that commission and other members of the county board, to supervise projects of the United States C. W. A. program, entitled to their expenses and mileage incurred in supervising the projects? The supervising consists of visiting the location where work is being done, hiring teams and renting tools and other equipment.

Your second question must be answered in the affirmative. In view of the provisions of secs. 27.02, 27.03 and 27.06, the committee appointed by the county park commission is entitled to be paid the expenses and mileage incurred "in carrying on the work of the commission" in supervising the C. W. A. project.

3. Is the committee above referred to entitled to any pay other than that provided by sec. 59.06, Stats.?

Your third question must be answered in the negative. Secs. 27.02 to 27.06, incl., do not provide for any per diem. Sec. 27.06 provides only for "the payment of expenses incurred in carrying on the work of the commission." Thus, the committee appointed by the county park commission is entitled to receive only its expenses, because it is well settled that public officers take their office *cum onere* and are entitled to receive such compensation and expenses as are provided by statute. The statutes not having made provision for compensation but only for expenses, the committee appointed by the county park committee is entitled to receive only its expenses. *Outagamie Co. v. Zuelke*, 165 Wis. 32, 34.

JEF

*Indigent, Insane, etc.—Words and Phrases—Proceedings*  
—Under sec. 51.07, subsec. (3), Stats., county is primarily liable for cost of hospitalization of persons temporarily committed for observation under sec. 51.04.

March 21, 1934.

DR. R. C. BUERKI, *Superintendent,*  
*Wisconsin General Hospital.*  
Madison, Wisconsin.

In a recent letter to this department you state that one of the county judges has recently been sending you questionable mental cases for detention under sec. 51.04, Stats. Some of these cases can, and some apparently cannot meet their hospital bills. However, in almost all instances they feel that the court has sent them there and, therefore, they are not responsible for expenses incurred. You wish to have a ruling as to who is responsible for the cost of hospitalization of such cases.

Sec. 51.08 fixes responsibility for the cost of maintenance and clothing of insane people in governmental institutions for the insane. However, this section applies only after a person has been permanently committed, so it is necessary to look elsewhere to determine responsibility for the cost of temporary detention.

Sec. 51.07, subsec. (3), reads as follows:

“All expense of the proceedings, from the presentation of the application to the actual commitment or discharge of the alleged insane person, whether such person is a resident or nonresident of the county in which the proceedings are had, shall be allowed and paid by the county from which such person is committed or discharged, in the same manner as the expenses of a criminal prosecution in a justice’s court are allowed and paid.”

The question is, what is meant by “proceedings” in the section of the statutes quoted above.

In *Strom v. Montana Central Railway Co.*, 84 N. W. 46, 47, 81 Minn. 346, it was held that in its most comprehensive sense the term “proceeding” includes every step taken in a civil action except the pleadings.

“The word ‘proceeding’ applies to any step to be taken in a cause which is authorized by law in order to enforce the rights of the parties or effectuate the proper conduct of it while pending in court. \* \* \*” *State ex rel. Bruce v. District Court*, 83 Pac. 641, 642, 33 Mont. 359.

In *State v. Epstein*, 84 S. W. 1123, 1125, 186 Mo. 144, it was held that a preliminary examination pending in the court of criminal correction is a “proceeding” within the statute providing that such court, in proceedings before it, is empowered to establish rules in relation to continuances.

According to these definitions, “proceedings” in sec. 51.07 (3) would include maintenance and care during the period of temporary detention. Such temporary detention, making possible necessary or desirable observation and examination before permanent commitment, is a part of the “proceedings” from the presentation of the application to the actual commitment or discharge contemplated by the statute. Hence the county is primarily liable for the cost of hospitalization during the period of temporary detention and you are so advised. After the county has paid these charges it can collect from those of the patients who are able to pay for such care under the provisions of sec. 49.10.

JEF

*Courts—Oaths—Elections—Declaration—Registration—Wisconsin Statutes*—Deputy city clerk is not authorized to administer oaths under sec. 326.01, Stats.

Authority vested in employees of city clerk to take registrations under secs. 6.16, 6.17 and 6.18 is limited to executing affidavits to effect registration under those sections. Authorized deputy of clerk who may receive affidavits under sec. 6.44, subsec. (2), must be one who is authorized to administer oaths under sec. 326.01.

“Certificates” issued under sec. 6.44 (3) must be signed by clerk.

Name of candidate who fails to file declaration of intent to serve cannot be kept off ballot.

Amendments to election laws made in 1933 do not suspend or render inoperative secs. 10.17 (1) and 6.185 (6) (b).

March 21, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You request the opinion of this department on the following points bearing on election procedure:

1. Are deputy city clerks authorized to administer oaths under sec. 326.01, Stats.?

Answer: No.

Sec. 326.01 enumerates those who may administer oaths and provides:

“An oath \* \* \* may be taken before any judge, court commissioner, resident United States commissioner who has complied with section 235.19, clerk, deputy clerk, or calendar clerk of a court of record, notary public, town clerk, village clerk, city clerk, justice of the peace, police justice, county clerk or his deputy within the territory in which such officer is authorized to act; \* \* \*”

Only in the case of court clerks and county clerks does the statute authorize the deputy clerk to administer oaths. When a new power is given by an affirmative statute to a certain person or class of persons, all others are excluded from the exercise of that power. *Conroe v. Bull*, 7 Wis. 408. Here the deputy city clerk is excluded from the au-

thority to administer oaths by being omitted from a specific list.

2. Is the authority to take registrations under sec. 6.16, 6.17 and 6.18 limited to such affidavits as are required to effect registration under these sections?

Answer: Yes. The employees in the clerk's office may not execute the affidavits required of each nonregistered elector and his corroborating electors required under sec. 6.44 (2).

Sec. 6.15 provides:

"\* \* \* The clerk and all employes in his office are authorized to execute such affidavits as may be required by sections 6.16, 6.17 and 6.18."

The deputies or employees of the clerk are not elsewhere authorized by law (under sec. 326.01) to administer oaths—they have then only such power in this regard as is granted them in sec. 6.15, which section specifically grants power only on the occasions contemplated by secs. 6.16, 6.17 and 6.18. Again, we have exclusion by enumeration. Sec. 6.44 (2) reads in part:

"Every qualified elector who has failed to register as provided by law may at any time after the close of registration deliver to the clerk of the municipality, or *his authorized deputy*, his affidavit \* \* \*. All such affidavits shall be sworn to before some officer authorized by the laws of this state to administer oaths."

You asked whether this paragraph should be so construed as to require that the "authorized deputy" in the first sentence must be one also authorized under sec. 326.01. This is the construction that should be placed on this section.

The result of these interpretations is that in carrying out the requirements of secs. 6.16, 6.17 and 6.18 the clerk or any employee of his may act, but in carrying out the provisions of sec. 6.44 (2) only the clerk or some one in his office authorized to take oaths under sec. 326.01 may act.

3. If the intent of the legislature in ch. 433, Laws 1933, secs. 1, 3, 4 (sec. 6.44 (1) (b), (2), (3) ) was to prevent fraudulent voting and the issuing of certificates by the city clerks is a part of the preventive machinery, should

such "certificates" be signed by the city clerk in person, or may these official documents be signed by the employees of his office authorized to accept registrations?

Answer: These certificates may be signed only by the clerk.

4. If a city-wide candidate fails to file his declaration of acceptance ten days prior to the last day for filing nomination papers, as in sec. 5.10 (2), but files prior to the time when such names are certified by the city clerk, may the name of the delinquent candidate go on the ballot, sec. 5.01 (6)?

Answer: Yes. The filing of the declaration of intention to serve is mandatory, but there is no penalty provided for noncompliance with the requirement. A man's name cannot be kept off the ballot because he has not filed such a declaration.

5. Do the amendments to the election laws of 1933 suspend or render inoperative those portions of secs. 10.17 (1) and 6.185 (6) (b) relative to nonregistered electors in cities of the first class, and in counties of 350,000 population, under which such electors were formerly granted the privilege of voting by merely handing to the inspectors a completely executed registration card on the form used in Milwaukee county?

Answer: No. Sec. 6.185 (6) (b) applies only in counties having a population of 350,000 and hence only in Milwaukee county and sec. 10.17 (1) applies only in the city of Milwaukee. Sec. 6.185 is labeled "Registration in Milwaukee county, exception." In many instances the legislature has provided a different way of doing things in Milwaukee county from the method employed in the rest of the state, recognizing the fact that a larger population calls for different methods. This system of granting the privilege of voting upon the handing of a completely executed registration card in Milwaukee county has existed alongside the method used elsewhere in the state. That the legislature meant it should continue is evidenced by the fact that in the session of 1933 it merely amended secs. 10.17 (1) and 6.185 (6) (b), leaving intact the system of registration cards. It made the requirements more strin-

gent (as it did in the case of registrations elsewhere in the state) by requiring:

“\* \* \* All such registration cards and affidavits shall be sworn to in the office of the clerk before some official authorized by law of this state to administer oaths, or before the clerk.” Sec. 6.185 (6) (b), and

“\* \* \* All such registration cards and affidavits shall be sworn to, in the office of the board of election commissioners before some officer authorized by the law of this state to administer oaths.” Sec. 10.17 (1).

Secs. 10.17 (1) and 6.185 merely supplement for Milwaukee and Milwaukee county the general provisions of sec. 6.44, which apply to the whole state.

JEF

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*Taxation—Chain Store Tax—*Ch. 469, Laws 1933, by implication repealed authority vested in department of agriculture and markets for collection of chain store license taxes and put that power in tax commission.

Department of agriculture and markets can collect any chain store license taxes which have become due and owing prior to July 29, 1933.

March 21, 1934.

HARRY KLEUTER, *Chief Chemist,*  
*Department of Agriculture & Markets.*

You have requested an official opinion of this department interpreting sec. 5, ch. 29, Laws Special Session 1931, as affected by ch. 469, Laws 1933. Your question is whether the department of agriculture and markets is now authorized to collect chain store taxes levied under the provisions of sec. 76.75. Since sec. 76.75 is a later legislative declaration it, by implication, repeals any law on the same subject which has gone before. It is the opinion of this department, therefore, that the tax commission has the sole authority to levy and collect the chain store tax as set up in sec. 76.75. Your authority would extend only to the collection of taxes under the old chain store tax

act up to July 29, 1933 when ch. 469, Laws 1933, went into effect.

This is further evidenced by subsec. (10), sec. 76.75, providing for credit for chain store tax paid under ch. 29, Laws Special Session 1931.

JEF

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*Indigent, Insane, etc.—Deportation*—Alien, unless it appears that within five years after entry he became public charge from causes not affirmatively shown to have arisen subsequently to his landing, may be deported.

March 21, 1934.

WENDELL MCHENRY,  
*District Attorney,*  
Waupaca, Wisconsin.

You state that a man who is now living in the city of New London and who has no legal settlement for poor relief purposes as far as you are able to determine, and will therefore be a county charge, has applied for poor relief. From the investigation that you have made you have ascertained that he has never taken out any citizenship papers whatever and is a citizen of Czechoslovakia. Your information also discloses that this man is a habitual drunkard. You inquire whether, under these circumstances, this man could be deported, and if so, what steps should be taken in this regard.

You do not state in your letter how long this man has been in this country. Sec. 155, ch. 6, Title 8, U. S. C. A. (39 Stats. at L. 889) reads in part as follows:

“\* \* \* any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; \* \* \* shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. \* \* \*”

The question arises whether the cause for his poverty and necessity for poor relief was in existence at the time when he came to this country or whether such causes have

arisen since he came to this country. It is necessary to bring this matter within the above clause of the statute in order to have the couple deported. The funds for deportation are provided for by the federal government. See sec. 156, ch. 6, Title 8, U. S. C. A. (39 Stats. at L. 890). See also XX Op. Atty. Gen. 647.

JEF

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*Taxation — Chain Store Licenses — Refunds* — License money paid for two stores which were not at that time chain stores cannot be refunded as erroneously paid after licensee has right to operate them as chain stores.

March 22, 1934.

DEPARTMENT OF AGRICULTURE AND MARKETS.

You state that in licensing chain store operators under the provisions of sec. 5, ch. 29, Laws Special Session 1931, the operator of a chain of grocery stores consisting of nine stores erroneously applied for and received licenses for 11 stores in 1932. You say that proof has now been presented that two stores did not belong to the owners of the chain above mentioned but that they were individually owned and operated. You have been requested to make a refund of \$55.00 and you inquire whether under such circumstances the department is authorized to ask that a refund be made.

You do not state whether the payment of \$55.00 was made under protest. In sec. 5, subsec. (12), ch. 29, Laws Special Session 1931, it is provided:

“No order shall be issued by any court to restrain or delay the enforcement of this section at the suit of the person, firm, corporation or association required to procure a license hereunder, but such aggrieved person shall pay the license fee as and when due, and if paid under protest may at any time within two years from the date of such payment sue the state in an action at law to recover the fee so paid, with legal interest thereon, from the date of payment. \* \* \*”

I take it that no such payment has been made under protest. I see no reason for refunding the money. The party in question had a right to operate the store under the licenses issued to him in the places where the stores were operated under individual control. We believe that after the time has expired no money should be repaid simply because the one who received such license did not avail himself of the rights he had under it. We find no provision in the statute which would authorize the refunding of this money under the circumstances given.

JEF

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*Public Officers—Emergency Fire Warden—Town Chairman—Office of town chairman in township lying within forest protection district is not incompatible with position of emergency fire warden.*

March 22, 1934.

WALTER B. MURAT,  
*District Attorney,*  
Stevens Point, Wisconsin.

You request an opinion from this department as to whether or not the office of town chairman and the position of emergency fire warden under the conservation commission are incompatible.

Sec. 26.13, subsec. (1), Stats., reads as follows:

“The chairman of the town board of each town *outside* the limits of a forest protection district shall, by virtue of his office and the oath thereof, be town fire warden for such town. He shall assist and co-operate with the commission in all matters relating to the prevention, detection and suppression of forest fires. \* \* \*”

Where a town is outside the limits of a forest protection area, the town chairman is automatically town fire warden and hence can not be appointed emergency fire warden. If a town is within a forest protection district and, hence, the town chairman is not already a fire warden, there is no reason why he may not be appointed an emer-

gency fire warden. There is no conflict in the duties of the two capacities which would render them incompatible.

Most of Portage county is outside of a forest protection district; but there are a few townships within District No. 11. The chairmen of those townships within the district are eligible to appointment as emergency fire wardens.

Emergency fire wardens receive compensation from the state under sec. 26.14 (3), Stats. The town chairman who is town fire warden under sec. 26.13 is entitled only to reimbursement for actual expenses incurred (sec. 26.13 (2) ) and receives no additional compensation for performing duties as a fire warden.

Since in certain instances town chairmen are, according to statutory provision, automatically town fire wardens, we can see no reason why a town chairman in a town lying within a forest protection district should not also be an emergency fire warden.

Some question might arise as to the effect of the following statutory provision on the instant case, sec. 60.60:

“\* \* \* No town officer shall be entitled to pay for acting in more than one official capacity or office at the same time.”

This provision applies only to a person holding two town offices. It does not prohibit a person's holding both a town office and a state office or position, provided there is no incompatibility.

You are therefore advised that the office of town chairman in a town *within* a forest protection district is not incompatible with the position of emergency fire warden.

JEF

*Education — Community Centers — Insurance* — Community center building is not eligible for state insurance.

March 23, 1934.

J. C. DAVIS,  
*District Attorney,*  
Hayward, Wisconsin.

You ask the opinion of this department as to whether or not a community center building is eligible for state insurance.

The establishment of community centers is provided for in sec. 43.51, subsec. (1), par. (a), Stats.

“A community centre may be created in any tract of contiguous territory containing either an area of not less than sixteen square miles, or a population of at least five hundred inhabitants, and bounded by town, school district, section, quartersection or ward lines, or streams, lakes, swamps or similar natural boundaries, and no part of which is included in any other community centre.”

A community center may include parts of several towns, just as the center concerning which you inquire, which consists of portions of the towns of Radisson and Ojibwa. The community center is a unit unto itself, it has its own government, owns property in its name, and is authorized to levy a tax for its maintenance. It is a *quasi*-municipal corporation closely analogous to a school district. Since this is the nature of a community center it is not included under any provisions for towns, cities, etc. and therefore must be expressly or impliedly mentioned in the provisions for state insurance before such insurance can be granted it.

Secs. 210.03 and 210.04 contemplate the insuring (upon vote of the municipality) of buildings owned by counties, cities, villages, towns, school districts, and library boards. The community center is not owned by any one of the municipal or quasi-municipal corporations listed in these sections. There is no express provision made for buildings owned by community centers, neither is there any broad general clause as to public buildings under which the community center building might be included.

You are therefore advised that there is no statutory pro-

vision for state insurance for a community center building and hence such building must be insured with private insurance companies, if at all.

JEF

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*Fish and Game—Public Officers*—Conservation commission has no power to pass rules and regulations prohibiting importation of wolves, coyotes and wildcats into state without permit from commission.

March 26, 1934.

CONSERVATION COMMISSION.

You have submitted the question whether your commission has the power to pass an order or regulation prohibiting the importation into this state of any wolves, coyotes, wildcats, or similar bounty animals. You state that owing to the fact that there is no provision in the state laws at this time prohibiting the importation into this state of these animals, you believe it is very necessary that the conservation commission pass an order prohibiting their importation, either the live animal or the carcass, without a permit being first issued by the department for that purpose.

You further state that in the past you have found at different times wolves from other states being presented to the county clerks for bounties and that it is very difficult to catch anyone in the act of importing these animals. You also say that in checking over advertisements in various sporting magazines you find coyote pups are offered, in the spring of the year particularly, for as low as one dollar per animal and that grown wolves can be bought for from five dollars per animal up.

I have carefully examined the statute concerning the rules and regulations that the conservation commission may make. Sec. 23.09, subsec. (7), Stats., provides:

“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 regulation promulgated by the commission, shall constitute a misdemeanor and be punished as hereinafter provided. \* \* \*

I find no provision in the statute which is broad enough to grant to the commission the power to prohibit the importation of these wild animals without a permit. The power to make rules and regulations is such as is necessary to carry out the provisions and purposes of the act. A regulation such as here proposed would be legislation which is too broad to be enacted by an order or regulation of the conservation commission unless a specific statute authorizes it.

You are therefore advised that you have no such powers but that the matter should be submitted to the legislature if it is deemed necessary to have such a statute enacted.

JEF

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*Building and Loan Associations—Unemployment Compensation*—State treasurer has no duty under statutes to act as custodian of securities in which unemployment reserves of employers are invested under provisions of ch. 108, Stats., and which securities are not part of statutory deposit required of foreign investment companies.

March 26, 1934.

HONORABLE ROBERT K. HENRY,  
*State Treasurer.*

You request the opinion of this department upon the following statement of facts: You refer to the provisions of secs. 215.38 and 215.39, Wis. Stats., relating to deposits of approved securities required by said sections to be made with the state treasurer by a foreign investment association. You also refer to the provisions of ch. 108, Stats., relating to unemployment insurance. You then refer to the provisions of an agreement made between the F. I.

Association and the industrial commission of Wisconsin and particularly subsecs. (6) and (7) of said agreement which read as follows:

“(6) Such securities as are deposited in the additional trust deposit under this agreement shall be held in trust by the Treasurer of Wisconsin (or other custodian to be mutually agreed on and designated by the parties), for the account of:—

“(a) the Association, and

“(b) the holders of Association contracts written pursuant to such plans, and

“(c) the Commission, as their respective rights and interests may appear under this agreement.

“All earnings on such securities shall belong to and shall be paid to the Association by the said Treasurer of Wisconsin or other designated custodian as and when received, so long as the Association performs all its obligations under contracts written pursuant to such plans.

“(7) In the event that the Association, for any reason other than an emergency act or decree of the Federal Government of the United States making performance impossible, fails for a period of sixty days to observe any material provision of its contracts issued in connection with such plans, or of the fund clause of any such plans binding upon the Association, or of this separate agreement, the Commission shall have the right to require the cash surrender of all such contracts issued in connection with such plans, and may direct the Treasurer of Wisconsin or other designated custodian to release to the Association the securities deposited hereunder only as provided in paragraph (5) hereof, and shall have the right to apply to any Wisconsin state court of appropriate jurisdiction to give equitable relief in the premises by enjoining the Association to perform its obligations or to liquidate the additional trust deposit made by the Association hereunder, for the pro rata benefit of such plans.”

You then inquire whether, under the statutes, the state treasurer has a duty to act as custodian or trustee of securities of a foreign investment association which are not a part of its statutory deposit required by secs. 215.38 and 215.39 as a prerequisite to its doing business in Wisconsin.

Your question must be answered in the negative. A careful examination of the statutes discloses that the state treasurer is not permitted under the law to act as trustee

or custodian of securities of any kind for a private person, firm or corporation. The duties of the state treasurer as custodian or trustee of securities are limited to the custodianship of securities belonging to some other department or subdivision of the state government, or to cases where the statute as a qualification for doing business in this state requires the deposit with the state of securities approved by some department and such department is specifically invested with such power of approval by statute. See *State ex rel. Blied v. Levitan*, (1928) 195 Wis. 561, 219 N. W. 97. It is manifest, therefore, that the state treasurer has no authority to act as custodian or trustee of the securities of the F. I. Association which are not a part of such association's statutory deposit as a prerequisite to its doing business in Wisconsin under the provisions of secs. 215.38 and 215.39. Securities in which unemployment reserves of employers are invested under the provisions of the unemployment compensation act (ch. 108, Stats.) are not a part of the statutory deposit required by the provisions of secs. 215.38 and 215.39 and the state treasurer can not act as custodian thereof. It would seem that if the state treasurer were permitted to act as custodian of securities in which unemployment reserves of employers are invested under ch. 108, he would be entering the field of operations of trust companies and banks with trust powers. It is clear that the statutes never contemplated conferring upon the state treasurer any such duties.

In view of the foregoing I am constrained to hold and you are advised that the state treasurer has no duty under the statutes to act as custodian of securities of a foreign investment association which are not a part of its statutory deposit required under the provisions of secs. 215.38 and 215.39 as a prerequisite to its doing business in Wisconsin.

JEF

*Public Officers*—District attorney may represent person in his county in application to industrial commission for compensation for injuries received while working for state.

March 26, 1934.

L. A. KOENIG,  
*District Attorney,*  
Phillips, Wisconsin.

You state that a close personal friend of yours, while fighting fire for the state, having been hired by the district fire ranger, sustained an injury to his eye. He is now making claim for compensation and the hearing on his claim will be had at Park Falls, on March 29. You say that he desires to retain you as his attorney and to represent him at the hearing and otherwise. You state that you would like to represent this friend if it is proper to do so in view of your duties as district attorney.

Sec. 59.47, subsec. (1), Stats., provides:

“The district attorney shall:

“(1) 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; and when the place of trial is changed in any such action or proceeding to another county, prosecute or defend the same in such other county.”

The proceeding before the industrial commission is not an action, application or motion in the courts of your county and the matter, if it develops into an action, will be one brought under the statute in Dane county. We do not believe that it is improper for you to defend the party in question. It has been the general practice for district attorneys to do this. We do not believe that it is inconsistent with the duties of your office as district attorney.

JEF

*Counties — County Board Committee* — Committee appointed to investigate mothers' pensions is not entitled to mileage for more than thirty days as such committee.

March 27, 1934.

CHAS. K. BONG,  
*Assistant District Attorney,*  
Green Bay, Wisconsin.

You refer to a letter written to Honorable William J. Sweeney, Assemblyman, De Pere, Wisconsin, in which it was held, quoting sec. 59.06 (2), that it is plain that the county board was not authorized to allow more than thirty days' compensation to the members of the committee in question.

You state that the members of the committee appointed to investigate mothers' pensions are still in doubt as to what mileage they can charge and they requested you to ask me once more whether or not they are entitled to the mileage over and above thirty days, that is, if they are doing some work for the county, in addition to the thirty days, whether they are entitled to mileage for the extra days.

This question must be answered in the negative. It is our opinion that sec. 59.06 (2) requires a negative answer.  
JEF

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*Fish and Game*—Penalty for making false report on value of fur-bearing animals in violation of sec. 29.577, subsec. (9), Stats., is prescribed in sec. 29.63, subsec. (1), par. (d).

March 27, 1934.

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

You refer us to sec. 29.577, (9), Stats., which requires the owner or lessee of a fur farm to file a report verified by affidavit to the conservation commission covering a period of a year stating the total number and the value of mink,

otter, and so forth that have been killed, transported or sold from said fur farm, and such other information as the commission may require. You state that the penalty for making a false report under this statute seems to be par. (d), sec. (1), sec. 29.63, but that this seems to be a meager punishment where fur farm owners would be making a false report involving thousands of dollars, and you do not find any section in the Wisconsin statutes that covers the making of a false report outside of the above quoted section.

You inquire whether there is any other penalty that may be imposed in a case where the game warden and conservation commission is complainant.

This question must be answered in the negative. We have not found any other sections that provide a penalty. Sec. 29.63 (1) (d), to which you refer, provides:

“For any violation for which no other penalty is prescribed, by a fine of not less than fifty nor more than one hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment.”

It seems that the legislature has considered this sufficient penalty for that offense. If it is believed to be too mild, the matter should be submitted to the legislature.

JEF

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*Counties—County Board—Taxation—Tax Sales—County board has no power to enter into contract with private individual whereby he is to advertise county lands and receive commission from proceeds of land sold by county.*

March 28, 1934.

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

You ask the opinion of this department as to the legality of a contract entered into between Douglas county and a private individual for “conducting an intensive advertising campaign and selling campaign for the sale of real

estate owned" by Douglas county. You write that all sales are made by the clerk and the money paid to him. The party conducting the advertising campaign receives a commission—a certain percentage of the selling price.

It will not be necessary to go into the exact terms of the contract because the county had no power to enter into such contract, and therefore the contract is void.

1. Dillon Municipal Corporations 4th ed., sec. 25, writes concerning counties:

"\* \* \* 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. \* \* \*"

Quoted with approval in *Frederick v. Douglas County*, 96 Wis. 411, 417, 71 N. W. 798.

There must be statutory authorization, either express or implied, for every expenditure the county makes and for every contract it enters into. The question in the instant case, then, is whether or not there is any statutory provision authorizing a county to hire some one to conduct such an advertising campaign as is contemplated by the contract entered into by Douglas county.

There is no express statutory provision granting a county this power. Moreover, there are express provisions in the statutes the existence of which precludes the implication of such power from any broad general clauses such as secs. 59.01, 59.07, subsec. (6), etc.

Sec. 59.67, subsec. (2) reads as follows:

"\* \* \* The county board may, by resolution or ordinance, direct the *county clerk* to sell and convey any real estate of the county not donated and required to be held for a special purpose, \* \* \*"

This section makes it the duty of the county clerk to sell lands owned by the county.

In *Beal v. Supervisors of St. Croix County*, 13 Wis. 500, 503, the court said it was not competent for the board of supervisors, by any contract, to divest an officer of the county of authority to do that which the statute provided was to be done by him.

“\* \* \* 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. \* \* \*”

To sell lands belonging to the county is a duty of the county clerk. The county board has no power to divest him of that duty except in accordance with sec. 59.08 (19).

Sec. 59.08 (19) reads as follows:

“The county board may delegate its power to sell lands acquired by tax deed to a committee consisting of the county clerk, county treasurer and the chairman of the town wherein the particular lands are situated. The members of such committee shall receive no extra compensation for such services.”

The last sentence of the section just quoted indicates that the legislature intended that there be no extra expense incurred by the county in selling its lands. The land is to be sold and all incidents of the selling are to be taken care of by existing officers, either the clerk or the committee provided for by sec. 59.08 (19), as a part of their duties, and they are to receive no extra remuneration therefor.

The county board cannot assign the task of advertising to another. Advertising is a part of selling. It leads up to the actual sale and is a part of the sale made possible by it.

XXII Op. Atty. Gen. 484 and XXIII Op. Atty. Gen. 20 hold that the county board may not delegate its power to sell lands acquired by the county by tax deed to a private individual, firm, or corporation. It is not within the power of the county board to hire anyone to advertise for it (advertising being but a step in selling) lands it wishes to sell any more than it is to hire some one to do the actual selling. The board cannot say to a private individual, “Help us sell our land and we will give you part of the proceeds of the sale,” as it is doing in the contract you submit. The land belongs to the county and so do the proceeds of the land when sold. The county board cannot, without statutory authority, pay out a part of the money it receives from

the sale of this land any more than it can spend any other of the county's moneys without such authority. This authority we have demonstrated is lacking.

Therefore, it is the conclusion of this department that the contract made between Douglas county and a private individual to advertise Douglas county lands is void.

JEF

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*Corporations*—Legatees may form corporation under ch. 180, Stats., for purpose of keeping intact their inheritance until time when value of various stocks and bonds are again quoted at par. Such corporation should not be formed under sec. 180.03 unless executor or trustee is required to be part of corporation.

March 29, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You inquire whether legatees may form a corporation under sec. 180.03, Stats., conveying to said corporation their interest received from an estate. You state that no will was left by the deceased or trustee appointed, and the only matter under consideration is whether the legatees may form a corporation and keep intact their inheritance until such time when the value of the various stocks and bonds are again quoted at par.

I do not believe that they can form such corporation under sec. 180.03 because there it is contemplated that the executor or trustee shall be connected with the corporation.

I see no objections however to organizing corporations by such legatees, as in Wisconsin a domestic corporation may be formed for any lawful purpose and this is certainly a lawful purpose. See sec. 180.01, Stats.

JEF

*Public Health—Cemeteries*—Cemetery association may purchase land to enlarge its cemetery under ch. 157, Stats., although county trunk highway separates new land from original cemetery. Such land must be considered as adjoining within contemplation of statute.

March 29, 1934.

DR. G. W. HENIKA,  
*Assistant State Health Officer,*  
Board of Health.

You state that you have been requested to secure a ruling from this department in regard to the enlargement of a cemetery adjacent to the city limits of Hartford, Wisconsin. This cemetery, owned for many years by a religious organization, joins the city limits of the city of Hartford. This organization is now desirous of enlarging its cemetery. You say that running parallel to one side of the cemetery is County Trunk 83, leading into Union Street of Hartford, and directly across this highway is a tract of land lying parallel to the road and also adjacent to the city limits of Hartford.

You state that the question arises whether this tract of land separated from the old cemetery by a main traveled trunk highway can be purchased and become a part of the old cemetery without violation of the present statutes.

Under the statute, the enlargement of the cemetery must be by adjoining lands. See sec. 157.05, subsec. (3). In Wisconsin the fee to the property along a highway extends to the middle of the highway and if the fee on both sides of the highway is in the same person, the title of the person can be said to be adjoining or touching in the middle of the highway. The state or municipality in establishing a highway receives only an easement in the land and does not acquire the title. I believe that your question must be answered in the affirmative. I believe this land is adjoining the old cemetery as contemplated by the statute.

See *Northern Pacific R. Co. v. Douglas County*, 145 Wis. 288, 291, as to the meaning of the word "adjoining."

JEF

*Taxation—Inheritance Taxes*—Emergency inheritance tax authorized by sec. 3, ch. 363, Laws 1933, is subject to discount of five per cent if paid within one year from accruing thereof and is subject to interest at ten per cent per annum if not paid within eighteen months from accruing thereof.

Regular and emergency inheritance taxes must be paid at same time, under sec. 3, subsec. (2), ch. 363, Laws 1933. However, county treasurer may accept payment of regular tax without payment of emergency inheritance tax, but estate cannot be closed until all inheritance taxes have been paid.

March 29, 1934.

C. STANLEY PERRY, *Assistant Corporation Counsel,*  
*Office of District Attorney,*  
 Milwaukee, Wisconsin.

You request the opinion of this department upon the following questions:

“1. Is the emergency inheritance tax authorized by section 3 of chapter 363, laws of 1933, subject to a discount of five per centum if paid within one year from the accruing thereof, and likewise to interest at ten per centum per annum if not paid within eighteen months from the accruing thereof?”

Your first question must be answered in the affirmative. It is our opinion that the discount privilege on inheritance obligations attaches to the payment of the emergency inheritance tax by virtue of the express language contained in subsec. (2), sec. 3, ch. 363, Laws 1933. This provision reads as follows:

“The emergency tax upon transfers imposed in subsection (1) shall be administered, assessed, collected and paid in the same manner, at the same time and subject to the regulations as is provided for the administration, assessment, collection and payment of the taxes imposed in chapter 72 of the statutes [referring to the regular inheritance tax law].”

It is manifest that the words “collected and paid *in the same manner, at the same time and subject to the same regulations*” carry with them the rights and obligations im-

posed by sec. 72.06 of the Wisconsin statutes, which reads as follows:

"If such tax is paid within one year from the accruing thereof, a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from the accruing thereof, interest shall be charged and collected thereon at the rate of ten per centum per annum from the time the tax accrued; unless by reason of claims made upon the estate, necessary litigation or other unavoidable cause of delay, such tax shall not be determined and paid as herein provided, in which case interest at the rate of six per centum per annum shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which ten per centum shall be charged. In all cases when a bond shall be given under the provisions of section 72.09, interest shall be charged at the rate of six per centum from the accrual of the tax, until the date of payment thereof."

In view of the foregoing, you are advised that the emergency inheritance tax is subject to the discount of five per cent if paid within one year from the accruing thereof and is likewise subject to interest at ten per cent per annum if not paid within eighteen months from the accruing thereof.

"2. May payment of the regular inheritance tax be accepted without simultaneous payment of the emergency inheritance tax?"

It is the opinion of this department that the regular and emergency inheritance taxes must be paid at the same time by virtue of the express language contained in subsec. (2), section 3, ch. 363, Laws 1933, quoted above.

However, in case of a refusal to pay the emergency inheritance tax simultaneously with the regular inheritance tax the treasurer may accept the regular tax, inasmuch as the statute does not prohibit a partial payment of the inheritance taxes. It should be pointed out that if the treasurer does accept the payment of the regular inheritance tax without the payment of the emergency inheritance tax, the estate cannot be closed and the executor or administrator should not be discharged until all the transfer taxes have been paid.

JEF

*Courts—Witness Fees—Public Officers*—District attorney should not withhold his certificate required by sec. 59.77, subsec. (5), par. (a), Stats., for witness and juror fees in cases of common assault and battery before justice of peace, where he did not prosecute but such prosecution was conducted by private attorneys.

March 29, 1934.

R. W. PETERSON,  
*District Attorney,*  
Berlin, Wisconsin.

In your communication of March 16 you direct our attention to sec. 59.47, subsec. (2), Stats., as to the duties of the district attorney, which requires him to "prosecute all criminal actions except for common assault and battery \* \* \*." You also direct our attention to sec. 59.77 (5) (a), which provides as follows:

"The officer before whom such juror, witness or interpreter attended, shall furnish to such person a certificate setting forth the name of such person, the time served, the number of miles traveled by him and the amount of compensation to which he is entitled, together with the title of the action in which such person so served, the capacity in which he served and the date of service. Such certificate shall be dated and signed by such magistrate and examined and certified to by the district attorney of the county in which such persons or person so served."

You inquire whether it is your duty to endorse the certificates of the jurors and witnesses in cases of common assault and battery in which you have taken no part but which were conducted by private attorneys.

In an official opinion of this department in XXI Op. Atty. Gen. 361 it was held that the district attorney should not withhold his certificate of approval for witnesses' and jurors' fees in a coroner's inquest which was held and witnesses for which were subpoenaed and the jury summoned by the coroner, even though the district attorney believed there were no grounds for holding the inquest. In that opinion it was held, p. 363:

"\* \* \* The district attorney, in my opinion, would be abusing his discretion if he should refuse to give his

approval on certificates for witnesses and jurors that were actually subpoenaed and served in an inquest called by the coroner, even though the coroner had made a mistake in calling the inquest, especially if he had reasons to believe that a crime had been committed. It sometimes happens that in criminal cases fees are presented for a case brought before a justice of the peace which probably should never have been brought and was dismissed for that reason. Still this would not be any grounds for withholding the fees from the witnesses or jurors that had been called."

As the statute requires your certificate, I believe that you should not withhold it but should make a certificate such as you are able to make under the circumstances.

JEF

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*Automobiles—Law of Road—State Inspection Bureau—*  
State supervisor of inspectors cannot authorize inspectors to collect and receive money from violators of automobile registration laws.

March 30, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

Under sec. 109.03 Stats., which was created by ch. 461, Laws 1933

"The state supervisor of inspectors and the state inspection bureau shall succeed to all powers and duties imposed by law, immediately prior to the taking effect of this section, upon \* \* \* the automobile license inspectors of the office of the secretary of state \* \* \*."

The question arises whether the state supervisor of inspectors can authorize his inspectors to collect and receive money from the violators of the automobile registration laws. It was proposed to give the inspectors authority to receive money from violators and send the money in to pay the registration fee and obtain licenses, the violations consisting of operating without registering and obtaining plates.

This question must be answered in the negative.

Among the powers and duties to which the state supervisor of inspectors and the state inspection bureau succeeded under sec. 109.03, were the powers and duties imposed upon the oil inspectors under sec. 85.04, Stats. 1931, which provided in part as follows:

"It shall be the duty of oil inspectors \* \* \* to make such reasonable investigations as may be requested by the secretary of state to discover violations of the statutes relative to the registration of motor vehicles, and when any such inspector shall discover any violation of alleged violation thereof he shall report the same to the secretary of state. \* \* \* such inspectors shall be charged with the duty of assisting police officers in detecting and punishing violations of said statutes. \* \* \*"

Under this statute the inspectors quite obviously functioned as law enforcement agents. It was their duty not only to detect violations of the statutes and report the same to the secretary of state, but also to assist police officers in "*punishing* violations" of the statutes. An inspector who acted as the agent of a law violator in sending his money in as a registration fee without instituting criminal proceedings would be failing to do his plain duty under the law.

Such practice, moreover, would be offensive to public policy because of the tendency which it would have to stimulate persons to violate the law by running automobiles without registering them in the hope that they would not be caught and in the belief that if they were caught no penalty would attach for the violation.

Even though the inspectors asserted themselves to punish all violations of the automobile registration law there could still be no authority given to them by the state supervisor of inspectors to receive and collect money from the violators and send the money to the secretary of state. Under sec. 85.01, subsec. (2)

"Application for \* \* \* registration shall be made by the owner to the secretary of state in the form prescribed by him and the registration fee shall be paid to him \* \* \*"

Under sec. 85.01 (4) the fee must be paid to the secretary of state for the registration of each automobile. The in-

spectors of the state inspection bureau are not agents of the secretary of state and are not under his jurisdiction, as were at least some of the inspectors under sec. 85.04, Stats. 1931.

JEF

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*Education—Blind—Indigent, Insane, etc.*—County board may not discontinue paying blind pensions and have them handled through county relief organization as other claims for relief are paid.

After blind pension is once granted it can be paid only by warrant drawn by county clerk upon county treasurer in accordance with provisions of sec. 47.08, subsec. (6), Stats.

March 30, 1934.

JOHN W. KELLY,  
*District Attorney,*  
Rhineland, Wisconsin.

You have submitted a resolution passed by the board of supervisors of Oneida county in and by which it was resolved “\* \* \* that the payments of the blind pensions \* \* \* be handled by the county relief organization, as all other claims for the relief are paid in Oneida county, effective December 1, 1933.”

You make two inquiries:

1. “Is it within the power of the county board after they have granted pensions for the blind to discontinue paying these pensions and have them handled through the county relief organization as all other claims for the relief are paid in Oneida county?”

2. “After a blind pension is once granted by the county board can it be paid in any other way than by a county order drawn on the county treasurer by the county clerk and signed by the chairman and clerk of the county?”

It is our opinion that both of these questions must be answered in the negative. The county board has thus attempted to abandon completely payment of all blind pensions and has proposed to make provision for the relief

of those blind persons who previously received pensions by giving them relief under the provisions of ch. 49, Stats. This office has definitely held that the granting of blind pensions is mandatory but that the amount thereof is within the discretion of the county board, subject to limitations prescribed by statute. XVII Op. Atty. Gen. 221; XXI Op. Atty. Gen. 300.

In XIII Op. Atty. Gen. 65 at 66, in relation to sec. 47.08 Stats., providing for blind pensions, it was stated:

“Subsec. (2) of said section provides specific qualifications for the blind or blind and deaf [which are] required to give them a pension. You will note that the language used has a mandatory significance and it gives the pension to those who have the specific qualifications provided for in subsec. (2).

“The question is submitted to the county board to determine whether the qualifications exist. The county board has no power to deny anyone a pension who is qualified to receive it. This would be an abuse of discretion.  
\* \* \*”

In XXI Op. Atty. Gen. 498 the question was raised as to authority under the statute to centralize under the county children's board the administration of the various relief funds of the county, such as poor relief, aid to dependent children, soldiers' and sailors' relief, blind and deaf pensions, and old age assistance. It was there held, by implication at least, as to this centralization with respect to blind and deaf pensions, the statute authorized co-operation by the county children's board under the terms of sec. 48.30 “to the extent of making preliminary investigations prior to the action by the county board, which would mean that the examiner of the blind and deaf referred to in sec. 47.08, (4), Stats., would co-operate with the county children's board” (p. 499).

Beyond this, apparently, even the county children's board could not go. This co-operation on the part of the county children's board, moreover, is specifically provided for by statute.

The plan of the Oneida county board does not contemplate that there shall be an examination by the “examiner of the blind and deaf” to determine who shall be entitled

to blind pensions and who not entitled to the same. In XII Op. Atty. Gen. 505, it was held that the county board is required to appoint an examiner of the blind and deaf. Under the statute it is his duty “\* \* \* to examine all applicants for pensions \* \* \*” (sec. 47.08 (4) ).

Sec. 47.08 (6) provides that upon showing being made that an applicant for a blind pension is entitled to the same

“\* \* \* the county clerk shall immediately draw his warrant upon the county treasurer in favor of such blind \* \* \* person for a pension in the amount allowed and approved by the county board.”

There is no alternative method provided in the statute for paying the blind pension.

It may be well at this time also to call attention to some of the practical difficulties which might arise from this type of blind pension administration. Sec. 49.10 permits an action by a municipality against the estate of a person who has received relief for the purpose of recovering that relief in certain cases. In XXI Op. Atty. Gen. 791 it was held that a county is not authorized to bring an action to recover from the estate of the recipient of blind relief. Under the plan proposed by Oneida county whereby the blind pension was paid as relief under ch. 49, the estate of the recipient might be liable for repayment but it would not be liable for repayment if the sums paid were received as blind pension.

The plan proposed by Oneida county is, as indicated by the resolution, an economy measure. Quite probably there would be a financial saving but the blind person probably would not receive the amount which he would be entitled to receive under sec. 47.08. Moreover, there would be no basis upon which the state could reimburse the county in accordance with the provisions of sec. 47.08 (9).

JEF

*Intoxicating Liquors*—Action taken by electors at town meeting with reference to licensing sale of intoxicating liquors is not binding upon town board.

March 30, 1934.

ARNO J. MILLER,  
*District Attorney,*  
 Portage, Wisconsin.

A certain town board in your county has refused to grant licenses for the sale of intoxicating liquor. No petition was presented in accordance with the provisions of the state intoxicating liquor law, asking that the question of granting licenses be submitted to the voters in the referendum. The question now arises whether or not it would be proper to bring the question of granting licenses up before the annual town meeting and if this is done, whether the action taken by the voters at that time would be binding upon the town board.

It is our opinion that any action taken upon this matter at the annual town meeting would not be binding upon the town board. Sec. 176.38, subsec. (1), Stats., provides that whenever a certain number of the qualified electors shall present a regular petition to the clerk praying that the question of licensing the sale of intoxicating liquors shall be submitted to them “\* \* \* and shall file such petition with the clerk at least thirty days prior to the first Tuesday of April next succeeding, such clerk shall forthwith make an order providing that such question or questions shall be so submitted on the first Tuesday of April next succeeding the date of such order.”

In XXII Op. Atty. Gen. 757, an interpretation was given to sec. 66.05, subsec. (10) subd. (d), par. 3, Stats., which provides:

“The electors of any city, village or town may, by ballot, at the spring election, determine that no license shall be issued. \* \* \*”

This statute referred to the referendum on the granting of fermented malt beverage licenses. That opinion held, p. 758, in relation to the statute just quoted:

“\* \* \* 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.”

It is our opinion that this reasoning would be equally applicable under the referendum provision of the intoxicating liquor law found in sec. 176.38, subsec. (1), quoted in the first part of this opinion. The question of licensing the sale of intoxicating liquors can only be submitted by referendum to all of the electors on the first Tuesday of April and no action binding on the town board can be taken in this matter at the annual town meeting.

JEF

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*Indigent, Insane, etc.—School Districts*—Tuition for high school pupils which township must pay for its residents attending high school in another municipality may be charged against municipality that is liable for their support.

Township in which family has its legal settlement while it has school residence in another township must pay pro rata share of year's expense of maintaining school to township in which family resides.

March 30, 1934.

ALEX L. SIMPSON,  
*District Attorney,*  
Fond du Lac, Wisconsin.

You state that about two years ago a family moved into a township in your county from Manitowoc. They received aid soon after they came there and are still receiving aid from the town which, in turn, is charging back to the township in Manitowoc county. You say there are two or three children who are now of high school age. There is no high school in the township in which they are living

in your county so they come to the city of Fond du Lac to attend high school. There is a tuition charge for the attendance of these children at the city high school, and you inquire whether this tuition is a proper charge back to the town where they have their legal poor residence or whether it must be paid by the town where they are now living.

Sec. 40.21, subsec. (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 to 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.”

See XXII Op. Atty. Gen. 3. There is no question but that the tuition must be paid to the city of Fond du Lac by the township in which these indigent high school pupils have a school residence. While sec. 40.21 (2), above quoted, does not expressly provide that this tuition may be a charge against the township which is liable for the support of these pupils as indigent persons, still it would seem that where the cost of their education is specifically determined by the amount of tuition, as this is a support that they are entitled to, said tuition charge is a proper charge against the town where these parties have a legal settlement and from which they receive their support.

You also state that you have had cases where one town has, because of housing facilities, moved a family with several children into another township and supported them in the second township, and you inquire whether or not township number two, where they now reside, can charge tuition back to township number one, which moved the said family into the second township and is supplying them there.

If the family in question has a legal settlement in township number one, then I believe the cost that township number two is put to in educating these children is a charge against the town. That case would come directly under

the above quoted statute, subsec. (2), sec. 40.21, Stats. Township number two may charge the pro rata share of the year's expense of maintaining the school to township number one.

JEF

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*Municipal Corporations — Beer Licenses — Dance Hall Regulation*—Sale of beer and operation of dance hall in C. C. C. Camp located on property leased by federal government are subject to control of local authorities.

March 30, 1934.

EDWARD T. VINOPAL, JR.,  
*District Attorney,*  
Mauston, Wisconsin.

At a C. C. C. Camp in your county an organization of enlisted men sell beer and run dances without having obtained a local license for either. You inquire whether the fact that the property upon which the camp is located has been rented by the federal government absolves the men from complying with the local license requirements for the sale of beer and the operation of a dance hall.

It is our opinion that these men must obtain whatever local license is necessary to sell the beer and to operate a dance hall. Reference is made to the opinion rendered by this office in XVI Op. Atty. Gen. 671, wherein it was held that where the state has expressly granted, ceded, and confirmed to the United States exclusive jurisdiction over a particular tract for all purposes except the right of the state to serve legal process anywhere within such tract it virtually takes that tract out of the state for all purposes except for the things expressly reserved. This holding was based upon secs. 1.01, 1.02 and 1.03 of the Wisconsin statutes. Sec. 1.02, subsec. (2) refers specifically to land near Sparta to be used for military purposes, which property was the subject of the opinion. The state of Wisconsin has relinquished jurisdiction over property within its borders, except for the service of legal and military pro-

cess, only for specific purposes mentioned in sec. 1.02 and then only when the property is acquired by the United States "by gift, purchase or condemnation proceedings." It may seriously be doubted whether the acquisition of property for a C. C. C. Camp would be covered by anything mentioned in sec. 1.02. Whether it would or not, however, is immaterial for the reason that the United States has not acquired this property upon which the C. C. C. Camp is located either by gift, purchase, or condemnation proceedings. The reasoning in the opinion found in XVI Op. Atty. Gen. 671 is therefore not applicable and the sale of beer and the running of dances in the C. C. C. Camp are subject to the control of local authorities.

JEF

*Municipal Corporations — Public Officers — Water and light board organized under sec. 66.06, subsec. (10), Stats., may employ attorney to conduct legal business of board.*

April 2, 1934.

WILLIAM M. DINNEEN, *Secretary,*  
*Public Service Commission.*

Your letter of March 31 inquires:

May a water and light board organized under sec. 66.06, subsec. (10), Stats., employ an attorney to conduct the legal business of the board or must such board use the services of the city attorney?

My opinion is that such board may employ its own attorney. The board is set up, according to the statutes, to provide a "nonpartisan" management. Members of the city council, under sec. 66.11, subsec. (2) may not be members of such a board. XXII Op. Atty. Gen. 480, 482.

Sec. 66.06, subsec. (10) provides that such nonpartisan board shall "take entire charge and management of such utility." It seems to me that this authority is certainly broad enough to include the retaining of an attorney. In cases where dispute arises as to whether the city may appropriate utility funds it would be improper if the city attorney were called upon to represent both parties.

The provision of sec. 62.09, subsec. (12) (a) that the city attorney "shall conduct all the law business in which the city is interested" does not mean, in my judgment, that the city attorney is entitled to represent this nonpartisan utility board. This subsection contemplates that the city attorney shall represent *the city* as such.

I should think it would be necessary, in order to secure the independence of the local utility board against the encroachment of city officials, that the board in carrying out its nonpartisan management should be able to have its own attorney if the circumstances warrant. There appears to be nothing in the statutes to the contrary and, indeed, the general authorization cited above is sufficient to cover the matter.

JEF

*Trade Regulation—Conditional Sales*—Under sec. 122.13, Stats., when goods are merely removed, notice to seller is not necessary unless conditional sales contract has been filed.

When buyer wishes to dispose of his interest notice to seller is necessary even though contact is not filed.

April 2, 1934.

KENNETH C. HEALY,  
*District Attorney,*  
Manitowoc, Wisconsin.

You have asked this department for a construction of sec. 122.13, Stats. You wish to know the effect of filing or not filing the conditional sales contract on the restrictions placed on the buyer by that section.

Sec. 122.13 begins with the statement that, *unless the contract otherwise provides*, the buyer may, without the consent of the seller or his assignee, if any, remove the goods from any county, and sell, mortgage or otherwise dispose of his interest in them. *Consent* of the seller or his assignee is never necessary, *notice* is necessary under certain conditions set forth in the next sentences of the section.

The statute provides:

“\* \* \* but prior to the performance of the condition, no such buyer shall remove the goods from a county in which the contract or a copy thereof is filed, except for temporary uses for a period of not more than thirty days, unless the buyer not less than ten days before such removal shall give the seller, or his assignee if any, \* \* \* notice of the place to which the goods are to be removed and the approximate time of such intended removal; \* \* \*”

From a perusal of the rest of the chapter, especially, sec. 122.15, which imposes a penalty for removing the goods “to a county where the contract or a copy thereof is not filed, without having given the notice required by section 122.13,” it is our conclusion that notice of removal must be given by the buyer only where the contract has been filed. The offense is in removing from a county where such contract is filed to a county where it is not filed. The

provision for notice of removal is for the benefit of the seller, and the seller must come within the terms of the statute by filing the contract before he is entitled to such notice. Because the requirement of a notice in sec. 122.13 restricts the activities of the buyer, and sec. 122.15 is a penal statute, both sections must be strictly construed. Notice of removal where the buyer is to retain possession in the new locality is required only where the seller has filed the contract.

You have also inquired concerning the next clause of sec. 122.13:

“\* \* \* nor prior to the performance of the conditions shall the buyer sell, mortgage or otherwise dispose of his interest in the goods, unless he, or the person to whom he is about to sell, mortgage or dispose of the same, shall notify the seller, or his assignee, if any, in writing personally or by registered mail of the name and address of the person to whom his interest in the goods is about to be sold, mortgaged, or otherwise transferred, not less than ten days before such sale, mortgage or other disposal.  
\* \* \*”

It will be noticed that in this clause there is no mention of filing. Whenever a buyer wishes to dispose of his interest in goods which he has purchased on conditional sale, the seller must be notified, whether the conditional sales contract has been filed or not. The legislature evidently felt that the buyer's disposing of his interest entirely was so much more serious than merely taking the goods out of the county that it warranted requiring a notice to the seller even where the seller had not filed his contract. Where the buyer disposes of his interest in the goods, the seller has to deal with a new party and ought to be apprised of that fact.

JEF

*Building and Loan Associations* — Before dividend is earned by building and loan association cost of running association must be deducted from gross income together with amount placed in contingent fund, as provided in sec. 215.24, subsec. (1), Stats.

April 10, 1934.

BANKING DEPARTMENT,  
*Banking Commission.*

You have submitted to us for an official opinion the question whether a holder of stock which has matured between the dates for the apportionment of dividends is entitled to interest on his matured stock for those months intervening between the apportionment of the dividend. You quote us a typical by-law provision used by the building and loan associations, which reads as follows:

“When maturity is reached between the dates for the apportionment of dividends, the holder of stock maturing shall be entitled to a dividend, if earned, at the rate of 4% per annum for all full months since the last apportionment and until the payment is paid; or he may elect to continue the payment of dues until the time of the next apportionment, at which time he shall be entitled to receive all dues paid and dividends declared.”

You further state that it is your opinion that the question involved turns about the term “if earned.” In this you are correct. Sec. 215.24, Stats., provides that from the earnings of the building and loan association there shall first be deducted the cost of running the association and, secondly, that a certain amount shall be set aside in a contingent fund. This section reads in part as follows:

“(1) \* \* \* Before any dividend shall be declared, credited or paid, at least five per cent of the net profits shall be set aside as a fund for the payment of contingent losses, until such fund reaches at least five per cent of the outstanding loans. All losses shall be paid out of such fund until the same is exhausted, and whenever said fund falls below five per cent of the loans aforesaid it shall be replenished by regular appropriations of at least five per cent of the net earnings, as hereinbefore provided, until it again reaches said amount. \* \* \*”

Under this provision the earnings of the association may all properly be put into the contingent fund if the reserve kept there is below the five per cent of the contingent liability. In any event, five per cent of the earnings must be placed in this fund. However, if more than five per cent is placed in the contingent fund we hold that there is then no money held or money earned by the association and in such a situation the interest would not have to be paid upon the stock, for to pay interest upon the stock at this time would be to put the association into a position dangerous to its further continuing in the business.

JEF

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*Taxation—Tax Sales*—Town board has no voice in compromise of delinquent taxes of doubtful legality under sec. 75.60, Stats.

April 10, 1934.

F. W. HORNE,  
*District Attorney,*  
Crandon, Wisconsin.

You have asked this department for an opinion defining the rights of the town and county in the proceeds of delinquent taxes compromised under the provisions of sec. 75.60, Stats.

Sec. 74.19, subsec. (3), Stats., provides:

“All taxes so returned as delinquent *shall belong to the county* and be collected with the interest and the charges thereon, for its use; \* \* \* 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.”

This provision of the statutes has been construed to mean that the county is entitled to retain all collections of delinquent taxes up to the point where the county's claim for unpaid taxes for the year involved is satisfied, and that only the sums collected in excess of such amount belong to

the town, city, or village from which such taxes were returned as delinquent. In other words, nothing is due to the town, etc. until the county's claim for unpaid taxes is satisfied. *Spooner v. Washburn County*, 124 Wis. 24; *Town of Bell v. Bayfield Co.*, 206 Wis. 297.

Sec. 75.60, Wis. Stats., 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 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 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.*"

In compromising these taxes this committee is dealing solely with county property and is to accept such sum as it shall determine to be for the best interest of the county. The wishes and opinions of the towns, etc. are immaterial and not to be considered, for the taxes being compromised are not their property. The sum finally collected as the compromised tax is put into the fund with the rest of the taxes collected by the county. From this fund the county retains enough to pay the taxes due it, plus interest on such taxes, plus the cost of collection. The excess is paid over to the town treasurer in a lump sum. Because of the compromise of some of the taxes under sec. 75.60, the sum left to be paid to the town treasurers after the county's claims have been taken care of will be less than it would have been had the county not compromised, but the town must accept the amount that is left. In other words, the town has no voice in determining whether or not there shall be a compromise under sec. 75.60 or as to what the terms of any compromise shall be.

The court in *The Town of Crandon v. Forest County*, 91 Wis. 239, said that where a county board remitted as il-

legal a portion of town taxes returned as delinquent and the county treasurer did not collect such portion, the county is not liable therefor to the town as for money had and received. This was because the delinquent taxes belong to the county. For the same reasons the county does not have to account for the difference between the amount of taxes due and the sum collected under the compromise.

From these statutes and decisions it is apparent that once the town has returned the taxes to the county as delinquent it has no control over what is done with them and no interest in the proceeds beyond the right to any excess remaining after the county's claims have been satisfied.

You are therefore advised that the town board has nothing to do with the compromise of taxes of questionable legality, under sec. 75.60, although such compromise naturally diminishes any excess above the amount necessary to satisfy the county's claim which is payable to the town.  
JEF

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*Courts—Workmen's Compensation—Disbarred attorney may practice before industrial commission.*

April 10, 1934.

INDUSTRIAL COMMISSION.

Attention Harry A. Nelson, *Director*  
*Workmen's Compensation.*

The situation herein concerned presents the following facts:

A, a practicing attorney, has associated with him in his office B, a disbarred attorney who has not been reinstated to practice. B prepares cases and represents applicants in hearings before the industrial commission. Correspondence concerning cases is written upon A's stationery, sometimes signed by A and sometimes by B. Bills are rendered upon A's stationery. Requests are made that the commission fix attorneys' fees in such matters before the commission. Most of the work is actually performed by B.

In connection with this set of facts you ask eight ques-

tions which, for purposes of convenience, are set forth with the answers following each question.

"1. Whether A's charge for services, which are performed wholly or partially by B, is in accordance with law."

A. The status of a disbarred attorney is the same as that of one who has never been admitted to practice. 2 R. C. L. 1111. Applicants before the commission have the right to be represented by either attorney or any other agent. Sec. 102.17, subsec. (1), par. (a), Stats. Since this work may be performed by either an attorney or a layman this question should be answered in the affirmative.

"2. Whether B has the legal right to represent applicants before the commission, either as an associate or an employee of A, or in B's individual capacity."

A. This question is answered in the affirmative for the reasons stated above.

"3. Whether A, an attorney legally licensed to practice law, and who accepts workmen's compensation cases for clients, has the right to designate duties incidental to such service to a disbarred attorney."

A. This question is also answered in the affirmative, subject, however, to the qualification that the client who consults a licensed attorney to represent him in such matters has the right to insist upon the services of a licensed attorney throughout, and the delegating of the work to a disbarred attorney or layman should, of course, be only with the client's consent.

"4. Whether A and B have the legal right to divide between them the fee procured for services rendered as stated."

A. Since this work, according to the statutes, may be done by either an attorney or a layman, sec. 256.45, Stats., which prohibits attorneys from splitting fees for legal services with laymen, does not apply and this question is answered in the affirmative.

"5. Whether B may charge a fee directly to clients under such arrangement."

A. Since B is permitted by statute to do work of this sort there is no objection to his charging a fee directly to clients.

“6. Whether, if B should appear in his individual capacity, the commission is required to fix his fee (if contingent) under the provision of sec. 102.26 (2) or (3).”

A. This question is likewise answered in the affirmative, as the statute, sec. 102.26 (3), specifically says: “fix the fee of his attorney or *representative*.”

“7. Whether ethically the transactions cited are reprehensible under the provisions of general law or of the compensation act.”

A. Ethically the transactions stated are reprehensible under the provisions of general law in that by maintaining offices with a licensed attorney and by using his stationery, the disbarred attorney may be placed in the position of holding himself out to the public as a licensed attorney. Furthermore, the type of work he is doing is usually done by attorneys, and this further tends to mislead the public as to the true status of the disbarred attorney. It is considered contempt of court for a disbarred attorney to use and send through the mails stationery indicating that the sender is an attorney. *State v. Marron*, 22 N. M. 632, 167 Pac. 9. This would apparently also be true in the case of rendering bills upon an attorney's stationery, the implication being that the bill is for legal services performed.

“8. Whether B, as agent, is entitled legally to solicit business in representing clients before the commission, either for himself or for A, or for A and B jointly.”

Sec. 256.29 (2) provides in part:

“It is hereby declared to be unprofessional conduct and grounds of disbarment for any attorney to violate any of the provisions of the oath prescribed by this section; or to stir up strife and litigation; or to hunt up causes of action and inform thereof, in order to be employed to bring suit, or to breed litigation by seeking out those having claims for personal injuries or other grounds of action in order to secure them as clients; or to employ agents or runners for like purposes or to pay or reward, directly or

indirectly, those who bring or influence the bringing of such cases or business to his office, \* \* \*.”

The statute above quoted would clearly seem to preclude solicitation of business by B on behalf of A, or A and B jointly, but would not prohibit B from soliciting such business for himself.

JEF

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*Appropriations and Expenditures—School Aid—School Fund Income—Taxation—Tax Collection—Moneys appropriated under sec. 20.25, subsec. (3), Stats., belong to school fund income and are exempted from provisions of sec. 74.27, Stats. Other sums not so exempted may be withheld by secretary of state from counties.*

Statute is mandatory but does not include moneys belonging to school fund income.

April 14, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

In your communication of April 6 you state that in 1933 eighteen counties were delinquent in payments due the state on account of the state apportionment of charitable and penal charges, payments on trust fund loans and other special charges, the delinquencies being due in some cases to the fact that money belonging to the counties was tied up in closed banks. These delinquent items were included in the 1933 apportionment, with ten per cent interest as provided by law, in pursuance of an opinion from this department rendered last fall. XXII Op. Atty. Gen. 899. This year all but six counties have paid the entire charges levied against them, including delinquent items and interest.

You direct us to the provisions of sec. 74.27 and also to Op. Atty. Gen. for 1904, 158. You inquire:

“(1) Should the money appropriated under sec. 20.25 (3) be retained by the state treasurer and applied on the delinquent payments?”

“(2) If not, can any other sums due the counties, such as highway moneys and moneys due by reason of various tax apportionments, be retained and applied on the delinquent payments?”

“(3) Is the treasurer not obliged to make such application of money due the counties which are delinquent?”

You will note that in sec. 74.27 moneys belonging to the school fund income are expressly exempt from the provisions of this statute. We are confronted with the question of whether money appropriated under sec. 20.25 (3) is money belonging to the school fund income. The constitution in art. X, sec. 2 provides for the creation of a common school fund, the income of which is used for school purposes.

“\* \* \* all moneys and the clear proceeds of all property that may accrue to the state by forfeiture or escheat, and all moneys which may be paid as an equivalent for exemption from military duty; and the clear proceeds of all fines collected in the several counties for any breach of the penal laws, and all moneys arising from any grant to the state where the purposes of such grant are not specified, \* \* \*.”

The proceeds of other lands are set aside for this school fund. The money raised and appropriated under sec. 20.25 does not specifically refer to it as money belonging to the school fund income. It is a fact, however, that formerly the statute expressly provided that the common school fund income should include in sec. 20.24 (2), Stats. 1921, the following:

“The common school fund income is constituted of the following increments:

“(a) The interest derived from the common school fund and from unpaid balances of purchase money on sales of common school lands; and all other revenues derived from the common school lands.

“(b) All moneys accruing to the common school fund income pursuant to section 20.25 of the statutes.”

While the statute has been modified so that we do not expressly find within the statute the mill tax or money raised for the school fund by taxation is a part of the school fund income in contemplation of those terms used in sec.

74.27, still we believe that the statute requires such a construction. The words "money belonging to the school fund income" when inserted in sec. 74.27 clearly included, in addition to the income derived from the school fund as created in art. X, sec. 2, Wis. Const., the appropriations by the legislature of aid to the public school. The change in the statute, in our opinion, does not change the law. Your first question must, therefore, be answered in the negative. Moneys belonging to the school fund income are expressly exempted from sec. 74.27.

Your second question must be answered in the affirmative.

Your third question must be answered to the effect that the statutes are mandatory and the treasurer is required to follow its mandate, but cannot withhold moneys belonging to the school fund income.

JEF

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*Counties—County Board Committees—Public Officers—Supervisors—*Under sec. 59.06, subsec. (2), Stats., supervisor may receive per diem for committee work not in excess of thirty days in any one year.

April 16, 1934.

FRED RISSER,  
*District Attorney,*  
Madison, Wisconsin.

You request the opinion of this department upon the following statement of facts:

You state that a special committee of five members was appointed on May 22, 1933, to handle and supervise work in connection with outdoor relief problems. This committee, by reason of the work that they were compelled to do, proceeded to hold quite a number of meetings. Between June 1 and November 10, 1933, each member of the committee was paid for more than thirty days' time. By reason of the fact that some question was raised as to the legality of the amount of these payments the members of

this committee served without pay until March 1, 1934, at which time a resolution was adopted by the county board creating a special committee to which were appointed the same members as served on the former committee.

The question raised in this connection is whether the members of this special committee can be paid further mileage and per diem.

Sec. 59.06, subsec. (2), Stats., provides in part:

“The members of such committee shall receive such compensation for their services as the county board shall allow, not exceeding the per diem and mileage allowed to members of the county board. No supervisor shall be allowed pay for committee service while the board is in session, nor for mileage except in connection with services performed within the time herein limited. The number of days for which compensation and mileage may be paid a committee member in any one year, except members of committees appointed to have charge of the erection of any county buildings, and except as otherwise provided by law, are limited as follows:

“\* \* \*

“(b) In other counties, to thirty days in the aggregate for services on one or more committees.”

It is clear that under the foregoing section of the statutes the members on the special committee on outdoor relief may receive as compensation for attending meetings per diems not in excess of thirty days in any one year. See XXI Op. Atty. Gen. 237 and XXIII 237. Sec. 59.06 (2) is plain and unambiguous and prevents any supervisor from receiving per diems for committee work in excess of thirty days in any one year. The fact that this committee has been compelled to devote much additional time to relief problems occasioned by the recent world-wide economic depression does not authorize nor excuse a violation of the express language of the statutes. It is well settled that public officers take their office *cum onere*. *Outagamie Co. v. Zuehlke*, 165 Wis. 32, and cases cited there; *Henry v. Dolen*, 186 Wis. 622. As was well said in *State v. Cleveland*, 161 Wis. 457, 459:

“A public official’s right to compensation is purely statutory; what the statute gives he receives, but no more.  
\* \* \*”

The statute in the instant case gives to supervisors per diems for committee work not to exceed thirty days in any one year. You are therefore advised that the members of the special committee on outdoor relief may receive per diem for committee work not in excess of thirty days in any one year.

JEF

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*Taxation—Tax Collection—Delinquent Taxes*—No proceeds of taxes returned to county as delinquent are paid over to local taxing unit until all of county's claim has been satisfied except proceeds collected between March 22 and June 1, 1934, on taxes granted extension until June 1 under provisions of sec. 1, ch. 8, Laws 1933, Special Session.

Local taxing unit has no equity in property represented by tax deed which county has taken.

April 17, 1934.

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

You have written this department asking several questions in regard to delinquent taxes. You wish to know:

1. When does the county treasurer turn over to the local treasurers moneys collected by him on taxes which have been turned over to the county as delinquent?

You refer to XXII Op. Atty. Gen. 548, and ask whether or not the law as stated therein is still controlling.

That opinion holds that under the provisions of sec. 74.19 (3):

1. The county treasurer has no authority to advance any part of delinquent taxes to the town, village or city treasurer, no payment over to such local treasurer being authorized until collection has been made.

2. The county is given preference over the town, village or city in apportionment of collections made by the county treasurer after June 26, 1933, of delinquent taxes of 1932

until the county's claim for unpaid county taxes of that year is satisfied.

This is true as regards taxes that have finally become delinquent, i.e., taxes on which all extensions have expired.

Your attention is called to the provisions of ch. 8, Laws Special Session 1933.

Section 1 of that statute authorizes cities, villages, and towns to extend the time on the payment of real property taxes assessed in the year 1933 without penalty up to and including the first day of June, 1934. All of the taxes not paid before March 22, 1934, including those on which the extension was granted are to be returned delinquent to the county treasurer on that date. However, in cases where an extension was granted until June 1, the owner of the property could pay the taxes without penalty to the county treasurer at any time before that date.

“\* \* \* But if such taxes shall not have been paid before the first day of June, 1934, they shall be enforced by tax sale and shall be subject to the same interest, penalties, and charges as other delinquent taxes.”

Sec. 2 of the act provides:

“Any taxes on which affidavits for extension of time were filed pursuant to Section 1 of this act that are paid to any county treasurer up to and including June 1, 1934, shall be paid over to the town, city, or village wherein such taxes were assessed. The town, city, or village treasurer shall on June 15, 1934, 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.”

This means that taxes on which an extension until June 1, 1934 has been allowed are not really treated as delinquent until after that date although they were returned to the county with other delinquent taxes on March 22. In other words, unlike the other delinquent taxes, they do not belong to the county until after June 1, although the county treasurer holds the claims. Payment to the county treasurer of taxes on which an extension until June 1, 1934 has been allowed at any time before that date is in effect regarded as a payment to the local government which assessed the tax through a county agent. Between March 22

and June 1 all of the money collected on taxes granted an extension until June 1 is returned to the local treasurer, who returns the amount due the county on June 15. After June 1, 1934, these taxes are considered finally delinquent and so any money collected on them after that date is kept by the county, as are the proceeds of other delinquent taxes and the propositions set forth in XXII Op. Atty. Gen. 548 apply. Therefore XXII Op. Atty. Gen. 548 is still the law as to taxes finally treated as delinquent, i.e., those returned delinquent without any affidavit of extension after March 22, and those on which an extension has been granted after June 1.

You also ask:

2. Where taxes have become finally delinquent and the county takes a tax deed, has the local taxing unit an equity in the property represented thereby?

Answer, No. Once the taxes have become finally delinquent (after March 22 on taxes having no affidavit of extension and after June 1 on property taxes accompanied by an affidavit of extension) they are the absolute property of the county, and the local taxing unit has no right to the proceeds or a portion of the proceeds of any particular tax item. It is merely entitled to its share of the entire proceeds after the county's claim has been satisfied. XXII Op. Atty. Gen. 199 and sec. 74.19 (3), Stats.  
JEF

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*Elections*—Cross marked opposite blank line left for individual nomination on ticket cannot be counted as vote for name printed immediately above said line.

April 19, 1934.

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

You state that in one of the towns of Eau Claire county at the recent spring election one A received 118 votes for supervisor. B also received 118 votes, but two of B's votes

are in dispute for the reason that a cross placed on two ballots opposite the blank space which was immediately below the name of B were counted for B. You inquire whether the election board is justified in crediting B with the two votes so marked.

Sec. 6.42, Stats., gives provisions for ascertaining the intent of the voter. The case of *State ex rel. Crain v. Acker*, 142 Wis. 394 is in point. It was there held that where a mark upon the ballot is in the same space with the printed names of two candidates but opposite a blank line left for individual nominations, no intent to vote for either of the two candidates whose names are printed can be inferred, especially when knowledge of the proper method of voting is shown by other portions of the ballot.

Under this decision your question is answered to the effect that B is entitled to only 116 votes. The two votes cast for blank cannot be counted for him.

JEF

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*Public Health—Embalming*—Licensed funeral director or embalmer who fails to renew his license within three years after expiration of his last license can restore his license only as provided in secs. 156.04 and 156.05, Stats.

April 19, 1934.

BOARD OF HEALTH.

You refer us to sec. 156.07, Stats., and state that Mr. A, a licensed embalmer, made his last renewal payment in 1927. Therefore, he is in arrears for seven years of license fees. You inquire whether the three-year period mentioned in sec. 156.07 starts on July 1, 1933, or whether Mr. A has to restore his embalmer's license as provided in sec. 156.05.

Said sec. 156.07 provides:

“A licensed funeral director or embalmer who fails to renew his license may on application filed within three years after the expiration of his last license, secure a renewal license without examination by payment of a fee of five dollars for each year he was not licensed; provided, that

any licensed funeral director or embalmer whose license has lapsed three years or more shall make application for a new license in compliance with sections 156.04 and 156.05."

In answer to your question, we will say that the three-year period mentioned in sec. 156.07 does not start on July 1, 1933, when said section was enacted, but starts from the time the licensed embalmer ceased to pay his renewal payment. Mr. A is required to restore his embalmer's license as provided in sec. 156.05.

JEF

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*Courts—Bastardy—Criminal Law—Statutory Rape—*  
Acquittal in statutory rape action does not constitute good plea in bar in bastardy action.

April 19, 1934.

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

You ask whether an acquittal in a statutory rape action where there is only one act alleged constitutes a bar in a bastardy action founded upon the same single act. The answer is that such acquittal is not a bar to the subsequent action.

The case of *State v. Lewis*, 164 Wis. 363, to which you refer in your letter, points out the rule that the doctrine of former jeopardy applies only to criminal proceedings, and that a judgment in a criminal proceeding is not a bar to a civil proceeding on the same set of facts.

In this state a bastardy action is *not* a criminal proceeding. See *Baker v. State*, 65 Wis. 50, 26 N. W. 167; *State v. Musheid*, 12 Wis. 561; *Meyer v. Meyer*, 123 Wis. 538, 102 N. W. 52; *Smith v. State*, 146 Wis. 111, 130 N. W. 894; *State v. Jager*, 19 Wis. 235; *Van Tassel v. The State*, 59 Wis. 351, 18 N. W. 328; *Baker v. State*, 56 Wis. 568, 573, 14 N. W. 718; *Goyke v. State*, 136 Wis. 557, 559, 117 N. W. 1027, 1126. These cases hold that a bastardy action is a

statutory proceeding neither civil nor criminal but partaking of the nature of both. It is often referred to by the supreme court of this state as *quasi-criminal* because some of the procedure is the same as the procedure in strictly criminal actions. In *Baker v. State*, 56 Wis. 568, 573, the court says the proceedings are *sui generis*. The whole purpose of the action is to establish the paternity of the child and to fix liability for its support, and it is not to punish the father.

The answer to the holding in the case of *Dinke v. Commonwealth*, 55 Am. Dec. 542, is that both of the proceedings, the one there under consideration and the one pleaded in bar, were criminal proceedings and hence the doctrine of double jeopardy would apply. However, as pointed out above, in the case you present, the doctrine does not apply. *Smith v. State*, 146 Wis. 111, 112-113:

“\* \* \* A defendant may be adjudged guilty in a bastardy proceeding and also in a prosecution for fornication, or whatever statutory offense he may have been guilty of when the child was begotten, but they are two separate and distinct actions founded upon distinct grounds of liability. In the one the mother is primarily interested, the state only remotely, and both interests are wholly pecuniary. In the other the state alone is interested, but not in a pecuniary sense. It is enforcing its criminal laws on the ground of public policy.”

All of these authorities establish the fact that the doctrine of double jeopardy does not apply to a case in which a man having been acquitted in a statutory rape action is made the defendant in a bastardy proceeding.

JEF

*Indigent, Insane, etc.—Relief Funds—Municipal Corporations—Taxation—Town and City Orders—Towns and cities may not issue orders for county obligations.*

April 19, 1934.

INDUSTRIAL COMMISSION.

Attention Alfred W. Briggs,, *State Director of Unemployment Relief.*

In your letter of April 2, 1934, you state that Iron county has requested the industrial commission to advance to it ten per cent of its unemployment relief expenditures each month, which represents its share of unemployment relief costs. You further state that the county decided to give to the industrial commission town, village and city orders as security for these advances. You question the legality of towns and cities issuing orders for county obligations and ask for our opinion on this matter.

In answer to your inquiry you are advised that towns and cities may not legally issue orders for county obligations.

With respect to town orders sec. 60.35, Wis. Stats., among other things, provides as follows:

“(1) The amount of any account audited and allowed by the town board shall be paid by the town treasurer on the order of the board signed by the chairman and countersigned by the clerk, and all orders issued to any person or persons by the town board for any sum due from such town shall be receivable in payment of town taxes in said town. But no order shall be signed or issued for the disbursement of any money of such town until the tax for the payment of such order shall have been voted by the electors of such town or until the town board shall have authorized the issue of such order; and no town board shall authorize the issue of any order in a sum exceeding the amount which the town is authorized to appropriate for the purpose for which such order is issued. Any person whose claim has been allowed in part may receive the order drawn for the part so allowed without prejudice to his right of action against such town, as to the part disallowed.

“(2) Each order shall be numbered consecutively as drawn, and state the purpose for which said order was issued, the fund against which said order was drawn, the

amount appropriated to such fund, and the amount of said appropriation remaining in excess of the total sum drawn against such fund at the time of the issue of said order."

Sec. 60.29, which lists the powers of the town board and sec. 60.18, which lists the powers of a town meeting, do not authorize any provisions to be made for the payment of county obligations and consequently it would seem that no order could be signed or issued for the disbursement of such money, since the tax for the payment of such order could not have been previously voted by the electors of the town at a town meeting or by the town board under secs. 60.18 and 60.29.

With respect to city finance the statutes also provide, sec. 61.12, subsec. (6) :

"(a) City funds shall be drawn out only by authority of the council and upon order of the mayor and clerk, countersigned by the comptroller, if there be one. Each order shall specify the purpose for which it is drawn, and be negotiable.

"(b) The council shall not appropriate nor the treasurer pay out 1. Funds appropriated by law to a special purpose except for that purpose, 2. Funds for any purpose not authorized by the statutes, nor. 3. From any fund in excess of the moneys therein."

Nowhere do we find that the statutes appear to authorize the issuance of orders by towns and cities for county obligations and it has been held that orders issued without authority are void.

"\* \* \* Section 60.35 provides when town orders may be issued and what shall be incorporated therein. It has been held that compliance with the law relating to the issue of town orders is mandatory and that orders issued without authority are absolutely void. *Hubbard v. Town of Lyndon*, 28 Wis. 674; *Reeve v. City of Oshkosh*, 33 Wis. 477; *Indiana Road Machine Co. v. Lake*, 149 Wis. 541, 136 N. W. 178; *Town of Swiss v. United States National Bank*, 196 Wis. 171, 218 N. W. 842." *First National Bank of Neillsville v. Town of York et al.*, 249 N. W. 513, 514.

Furthermore, it has been held that a taxpayer may maintain an action in equity on behalf of himself and all other taxpayers to restrain public officers from paying out the public money for illegal purposes and may also, under the

proper circumstances, compel public officers and even third persons to repay into the public treasury money already paid out illegally. *Webster et al. v. Douglas County et al.*, 102 Wis. 181.

JEF

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*Elections*—Election inspectors in towns chosen by viva voce vote of electors need not be nominated from list submitted by precinct committeeman.

April 20, 1934.

EDMUND H. DRAGER,  
*District Attorney,*  
Eagle River, Wisconsin.

In your letter of April 9, 1934, you inquire as to the qualifications of election inspectors chosen by viva voce vote of the electors present at the polling place at the opening of the polls under sec. 6.32, Stats., in the case of towns and you inquire whether the electors pass on their qualifications or whether they must be nominated from a list submitted by the precinct committeeman.

The statutes do not appear to require that such inspectors must be nominated from a list submitted by the precinct committeeman, and it would seem that the electors pass on their qualifications, subject only to the statutory qualifications set forth in sec. 6.32, providing that the inspector must be able to read and write the English language understandingly and not be a candidate to be voted for at such election. Also not more than two of such inspectors shall be members of the same political party and each one of such officers shall be a member of one of the two political parties which cast the largest vote in the district at the last preceding general election. Furthermore, such officer must take and subscribe an oath of office similar in form to the one set forth in sec. 6.32, subsec. (4), par. (g), Stats. Other than this there appear to be no qualifications prescribed in the statutes.

JEF

*Public Officers—Malfeasance—Village Board—Village Fire Department*—Member of volunteer fire department whose wages are fixed by village board may not sit as member of such board.

April 20, 1934.

ROSCOE GRIMM,  
*District Attorney,*  
Janesville, Wisconsin.

In your letter of April 7 you say that the village of Clinton has a volunteer fire department whose firemen are paid according to wages fixed by the village board and that certain members of the village board are also members of the volunteer fire department. You inquire whether it is legal for these firemen to sit as members of the village board.

This question is answered in the negative in view of sec. 348.28, Wis. Stats., which, among other things, provides a penalty in the case of any member of a village board "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 or real property or thing in action; or in any contract, proposal or bid in relation to the same, *or in relation to any public service, \* \* \**"

The purpose of this section is to prohibit a public officer from placing himself in a position whereby his individual interest is in opposition to his official position. Op. Atty. Gen. for 1910, 608. The interests of these volunteer firemen as far as their wages are concerned are in conflict with their official duties as board members in fixing these wages.

Another section of the statutes which may also possibly apply in this case is sec. 66.11, subsec. (2), which, in part, provides that no member of a village board 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 of which is vested in, such board.

See also the following opinions of the attorney general:

II 775; VI 658; XI 408; XII 108, 353; XVII 244.

JEF

*Criminal Law—Labor—Picketing*—Pickets walking in streets in chain before all entrances of factory and close together so that no one can enter premises without breaking through such line are doing unlawful picketing under sec. 268.20, Stats.

Such picketing is obstruction of use of highway which may be removed by force.

Such action is also violative of secs. 343.683 and 347.02.

April 23, 1934.

CHARLES A. COPP,  
*District Attorney,*  
Sheboygan, Wisconsin.

You say that pickets walk in a close line past a local factory so that no one can enter the premises without breaking through the line and that the pickets are orderly in other respects. You inquire:

“(1) Is such action peaceful picketing under section 268.20?”

Lawful acts in labor disputes are enumerated in sec. 268.20, Stats. The material parts of said section read thus:

“(1) The following acts, whether performed singly or in concert, shall be legal:

“\* \* \*

“(1) Peaceful picketing or patrolling, whether engaged in singly or in numbers, shall be legal.”

In XXII Op. Atty. Gen. 340 it was held that peaceable picketing is the mere act of inviting attention to the existence of a strike, as by signs or banners, and seizure or destruction of property or the use of force or threats and calling of vile names is not peaceable picketing. Pedestrians on highways have the right to leave the highway to enter premises of business, factories or homes. A use of the highway by anyone to such an extent as to prevent parties from leaving the highway for private premises is unlawful and cannot be construed as peaceful picketing. Your first question is therefore answered in the negative.

“(2) Is such action obstruction of highway which may be removed by force although confined to entrances next

to factory buildings and not on part of street generally used by public as a sidewalk or roadway?"

In answering this question in the affirmative we take it that public officers will cause the dispersion of the parties using the highway in an unlawful manner. If the parties will not do this where asked to do it by the officer, the officer may use force to remove such obstruction.

"(3) Is such action a violation of sec. 343.683?"

Sec. 343.683, Stats., provides :

"Any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as a wage worker, or who shall attempt to so hinder or prevent shall be punished by fine not exceeding one hundred dollars or by imprisonment in the county jail not more than six months, or by both fine and imprisonment in the discretion of the court. Nothing herein contained shall be construed to prohibit any person or persons off of the premises of such lawful work or employment from recommending, advising or persuading others by peaceful means to refrain from working at a place where a strike or lockout is in progress."

So using the highway to prevent others from access to neighboring premises is a use of force or coercion which, in our opinion, is prohibited by this section of the statutes.

"(4) Does such action constitute an attempt or motion towards doing a lawful or unlawful act in a violent unlawful or tumultuous manner under sec. 347.02?"

Sec. 347.02, Stats., provides :

"Any three or more persons who shall assemble in a violent or tumultuous manner to do an unlawful act or, being together, shall make any attempt or motion towards doing a lawful or unlawful act in a violent, unlawful or tumultuous manner, to the terror or disturbance of others, shall be deemed an unlawful assembly; and if they commit such acts in the manner and with the effect aforesaid they shall be deemed guilty of a riot and shall be punished in either case by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars."

The actions described by you constitute an attempt or motion towards doing a lawful or an unlawful act in an unlawful manner within contemplation of said section. One of the definitions for the word "violent" in the Standard Dictionary is "characterized by intensity of any kind. Marked by unjust exercise of force; severe."

JEF

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*Criminal Law—Obtaining Money by False Pretenses—*  
Mere naked promise to do something in future or to pay for goods in future is not sufficient to allege false pretense under sec. 343.25, Stats.

April 23, 1934.

F. W. HORNE,  
*District Attorney,*  
Crandon, Wisconsin.

You have submitted a complaint for a criminal warrant issued by a circuit court commissioner in your county and you say that there is some question as to whether it constitutes a criminal cause of action. You ask to be advised.

The complaint is for obtaining money under false pretenses. The language in the said complaint which is here material states:

"\* \* \* did unlawfully, knowingly, and designedly, falsely pretend to one B, that within one hour, he, the said A, would pay to said B, two dollars (\$2.00), good and lawful money of the United States for four white leghorn chickens, he, the said A, got of the goods, and chattels of the said B, \* \* \*."

It is well settled that a mere naked promise to do something in the future or to pay for goods in the future is not sufficient to constitute a false pretense under sec. 343.25, Stats. *State ex rel. Labuwi v. Hathaway*, 168 Wis. 518.

Under this decision of our court it is apparent that the complaint does not allege sufficient facts to constitute a criminal cause of action. It is simply a naked promise

to pay for the chickens that were bought. You are therefore advised that the complaint is insufficient and does not charge a criminal offense.

JEF

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*Fish and Game*—If license is procured under sec. 29.33, Stats., subject to provisions of sec. 29.09, licensee is required to have license in his possession at time he is carrying on his fishing operations.

B cannot legally carry on fishing operations with net and hooks owned by A for A and under A's license without A's presence with such license in his possession.

A's license cannot be revoked if B is convicted for illegal fishing under sec. 29.63, subsec. (3).

April 23, 1934.

RALPH M. IMMELL,  
*Directing Commissioner,*  
*Conservation Department.*

You direct our attention to sec. 29.33, Stats., which authorizes the conservation commission to issue certain licenses subject to the provisions of sec. 29.09. You submit a number of questions.

1. "If a net or set hook license is procured by A under the provisions of these two sections of the statutes is it mandatory that A have such a license in his possession at the time he is carrying on his fishing operations?"

Sec. 29.09, subsec. (1), Stats., provides:

"Except as expressly provided, no person shall (a) hunt with a gun any wild animal, or (b) trap any game, or (c) take, catch or kill fish or fish for fish in inland water of this state unless a license therefor has been duly issued to him which shall be carried on his person at the time and shall be exhibited to the state conservation commission or its deputies on demand. \* \* \*"

Under this provision of the statute your question must be answered "yes," as he is required to have the license in his possession while fishing.

2. "Can B legally carry on fishing operations with the nets or hooks owned by A for A and under A's license without A being present with such license in his possession?"

You are advised that this question requires a negative answer, as A is required to have the license in his possession and able to show it at any time to the officer.

3. "If B is allowed to operate A's fishing rig under A's license without A being present and while operating such a fishing rig B commits a violation of the game laws with such rig, during A's absence, for which he is convicted in court, could A's license be revoked as provided under the provisions of subsec. (3), sec. 29.63 Stats.?"

Said sec. 29.63 subsec. (3), provides:

"(a) 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.

"(b) No license shall be issued to any person for a period of one year following a conviction of such person for a violation of this chapter."

This question must be answered in the negative. A is the owner of the license and the conviction is not against him. The wording of this statute does not require the revocation of the license unless A, who is the licensee, is convicted.

JEF

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*Courts—Estates—Indigent, Insane, etc—Debt for maintenance of insane person at asylum where assets of his estate are sufficient to make payment in full cannot be compromised so as to give brother greater share in estate.*

April 23, 1934.

FRANK F. WHEELER,  
*District Attorney,*  
Appleton, Wisconsin.

You state that one A was committed to the county asylum on July 25, 1922; she died September 29, 1933. A claim

against her estate on the part of Outagamie county was filed for the sum of \$3,015.91, and included in this sum was the sum of \$242.06 for clothing. The estate was appraised at \$4,441.32, the same consisting of approximately \$800 cash, and three \$1,000 bonds, appraised at approximately par, and other personal property. Two other claims were filed against the estate, amounting to approximately \$300. The sole heir at law is a brother, an elderly man who has no income or property except a small homestead with a mortgage equal to the value of the property.

You also state that the attorney for the administrator of the estate has written the trustees of the asylum suggesting that the claim of the county be reduced to \$2,015.91, his idea being that the heir at law should have something left out of the estate to take care of himself. The superintendent of the asylum feels it would be a very acceptable settlement. The offer as made by the attorney, however, is for the sum of \$2,015.91. You ask to be advised in regard to this settlement.

The statute of limitations does not run against the state or county in recovering expenses for maintaining a person at the public hospital for the insane in view of sec. 49.10, Stats. See XII Op. Atty. Gen. 532. Under sec. 49.11, Stats., the liabilities of relatives may be enforced in favor of the father, mother, husband, children and wife if they are poor. It does not include the brother.

In XXII Op. Atty. Gen. 55 it was held that the county board has no power to compromise a debt against the estate of a deceased person where the assets are sufficient to make payment in full.

Under the facts in this case, we do not see how a reduction could be made in the settling of this matter unless there is some doubt as to the recovery by reason of unsettled points of law which your statement of facts does not disclose.

You are advised therefore that it is our opinion that no compromise can be made under the facts stated.

JEF

*Fish and Game*—Close season for fish enumerated in subsec. (6), sec. 29.33, Stats., includes prohibition of taking fish by hook and line as well as by net.

April 25, 1934.

RALPH M. IMMELL,  
*Directing Commissioner,  
Conservation Department.*

You have inquired whether the closed season prescribed by subsec. (6), sec. 29.33, Stats., applies to hook and line fishing as well as net fishing in these waters for the fish specified in this subsection.

Subsec. (6), sec. 29.33, Stats., reads thus:

“(a) In Green Bay and Lake Michigan there shall be a close season on lake trout from October 15 to November 21, and on whitefish from October 15 to December 1. A close season for pike and pickerel from March 10 to May 1. A close season for all varieties of fish, except lake trout, whitefish, carp, suckers and herring from the fifteenth day of April to the twentieth day of May, inclusive.

“(c) In Lake Superior there shall be a close season for lake trout from September 10 to November 1; for whitefish from October 20 to December 1, and for pike and pickerel from March 10 to May 1.”

A close season can mean only a season where those fish that are specified cannot be taken. We see no reason why this would not apply to taking them by hook and line as well as in any other manner. You are therefore advised that subsec. (6), sec. 29.33, prohibits the taking of fish therein enumerated with hook and line as well as in any other manner.

JEF

*Constitutional Law — Legislature — Municipal Corporations*—Terminating existence of all existing school districts, towns, villages and cities and county of Milwaukee by legislative act would violate constitutional provisions as to uniformity.

Legislature cannot create new city of Greater Milwaukee, whose boundaries would be co-extensive with county of Milwaukee.

Under city-county consolidation new city would perform only functions of government of city and county of Milwaukee.

If new city could be created out of existing underlying municipality such new city could pay unpaid financial obligations of terminated underlying governments. Permitted city debt limit would be fixed by total of outstanding underlying debts. New city debt limit would be less than sum of debts which might have been legally incurred by individual governments consolidated.

Considerable consolidation of existing public services could be effected by increasing functions of county government under existing statutes.

April 25, 1934.

OTTO MUELLER, *Chairman,*  
*Interim Committee on Taxation,*  
Senate Chamber.

Your committee on taxation problems, through its official reporter, L. E. Packard, has requested an opinion of this department on the questions set forth below. Assemblyman John N. Kaiser sent in some references to texts and cases dealing with the questions submitted, which references as well as others we have considered in arriving at our conclusions.

“1. Can the legislature terminate the existence of all existing towns in the respective counties so as to make one town government co-extensive with a county?”

The answer is, No.

“2. Can the legislature terminate the existence of all of the existing school districts, towns, villages, cities, and the

county in Milwaukee county, as of a definite date as December 31, 1935?"

The answer is, No.

"The legislature has power to make all laws not in controvention of the state or federal constitutions. [Citing numerous cases.] Within such limits it may create municipal corporations, and alter them, at will." *In re Village of Chenequa*, 197 Wis. 163, 166.

This viewpoint is in accordance with the great weight of authority.

"\* \* \* Subject to constitutional limitations presently to be noticed, the power of the legislature over such corporations is supreme and transcendent; it may, where there is no constitutional inhibition, erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require." Dillon, *Municipal Corporations* (5th ed.) sec. 92. See, also, McQuillin, *Municipal Corporations* (2d ed.) sec. 320; *Chicago & N. W. Ry. Co. v. Langlade County*, 56 Wis. 614, 621.

Therefore, our inquiry should be directed to those provisions of the Wisconsin constitution, if any, which would tend to limit the powers of the legislature with respect to the above questions.

Sec. 23, art. IV, Wis. Const., provides:

"The legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable."

Sec. 31, art. IV, pars. 7th and 9th, provide:

"The legislature is prohibited from enacting any special or private laws in the following cases:

"\* \* \*

"7th. For granting corporate powers or privileges, except to cities.

"\* \* \*

"9th. For incorporating any city, town or village, or to amend the charter thereof."

Sec. 3, art. XI, provides:

"Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such

enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village. \* \* \*

The limitations as to uniformity set up in the constitutional provisions above quoted would seem to require that questions 1 and 2 be answered in the negative.

These problems were considered by a legislative committee on city and county consolidation in Milwaukee county in 1927. See Senate Journal for May 11, 1927. That committee was of the opinion that constitutional amendments would be required in order to properly provide for the consolidation contemplated.

You ask:

"3. Can the legislature create a new city of Greater Milwaukee whose boundaries would be co-extensive with the county of Milwaukee, to take effect as of a definite date as January 1, 1936?"

Answer, No. One of the results of such a procedure would be the consolidation of the governments of the city of Milwaukee and Milwaukee county. Aside from any practical difficulties in the way of such consolidation, there are numerous legal obstacles in the provisions of the statutes of Wisconsin.

In The Government of Metropolitan Areas, which was compiled by the Committee on Metropolitan Government of the National Municipal League, p. 178, chapter X, there is a brief summary of these constitutional provisions taken from a paper by Nathan Glicksman, on Legislative Phases of Consolidation given before the Merchants' and Manufacturers' Association and published in the Association's Bulletin for December, 1908:

(1) The so-called uniformity clause which reads:

"The legislature shall establish but one system of town and county government which shall be as nearly uniform as practicable" (art. IV, sec. 23).

(2) A specific provision for boards of supervisors in the counties empowering the legislature to confer upon these boards "such powers of a local, legislative and administrative character as they shall from time to time prescribe" (art. IV, sec 22).

This has been interpreted by the courts as proving "the importance of the county and county government in the estimation of the people who adopted the constitution."

(3) Prohibition upon the passage of special legislation for the incorporation of any city, town, or village or the amendment of the charter thereof (art. IV, sec. 31, par. 9th, and sec. 32).

(4) The provision forbidding the legislature to create a county of less than a certain area (in the Wisconsin constitution, 900 square miles).

(5) The requirement that each county must have a sheriff, coroner, register of deeds, district attorney and a clerk of the circuit court and fixing the time of their election (art. VI, sec. 4; art. VII, sec. 12) and providing that they be elected (art. XIII, sec. 1).

(6) The constitutional limit upon the amount of indebtedness of any county, city, town, village, or school district at five per cent of the value of the taxable property therein (art. XI, sec. 3). This provision permits the city and county together to incur a debt up to ten per cent, but would limit them under a scheme of consolidation or separation to five per cent.

Some of these constitutional objections are discussed in the report of the interim committee on city-county consolidation in Milwaukee county published in the Senate Journal of 1927, p. 982. This report, p. 983, also discusses the practical difficulties lying in the way of such consolidation.

You inquire also:

"4. Can the legislature vest in such new city all the governmental power now vested in the towns, villages, cities, and the county government in Milwaukee county?"

Answer, No.

It has been pointed out in the answer to the question immediately preceding (No. 3) that such a city formed by a consolidation of the city and county of Milwaukee cannot be established because of the constitutional difficulties there set forth. Conceding for the sake of this question that such a city of Greater Milwaukee had been formed, the mere fact that its boundaries were coextensive with the

county would not vest in it the powers now vested in the towns, villages and cities in Milwaukee county. Under a city-county consolidation the city would merely perform the functions of the government of both the city and the county of Milwaukee.

“5. Can such new city pay the unpaid financial obligations of the terminated underlying government?”

The answer is, Yes, assuming for purposes of this opinion that such a new city may be formed.

“\* \* \* If a municipal corporation goes out of existence by being annexed to or merged in another corporation, and if no legislative provision is made respecting the property and liabilities of the corporation which ceases to exist, the corporation to which it is annexed, or in which it is merged, is entitled to all its property and is answerable for all its liabilities.” Dillon, *Municipal Corporations* (5th ed.), sec. 357.

Although the precise question here presented appears not to have been directly passed upon by our supreme court, it has, nevertheless, from time to time had to pass upon analogous situations.

In *Scriber v. The Town of Langlade*, (1886) 66 Wis. 616, 629, our court said:

“\* \* \* When the whole territory of one town is annexed to another existing town, the annexed town is destroyed, and all the debts of the annexed town become the debts of the town to which it is annexed, and all the assets of the annexed town become the assets of such town, unless the act of the legislature or order of the board of supervisors makes some other provision in regard to such debts and assets. \* \* \*”

Our court also said in the case of *Washburn Water Works Co. v. Washburn*, (1906) 129 Wis. 73, 81-82:

“\* \* \* In municipal corporations it is the inhabitants and the territory which form the essential elements of the corporation, and where they are the same, or substantially the same, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer the affairs of the municipality. And, in the absence of express provision to the contrary,

it will be presumed that the legislature intended the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization. *Broughton v. Pensacola, supra; Higginson v. Turner*, 171 Mass. 586, 51 N. E. 172. \* \* \*."

From the foregoing it would appear that the new city not only could pay the unpaid financial obligations of the terminated underlying government, but that in the absence of some other provision by the legislature for the payment of such indebtedness, the new city must pay such obligations.

"6. Can such new city start from scratch as to the permitted city debt limit, or would it have to be limited by the total of the outstanding underlying debts previously contracted by the underlying governments?"

It would seem that the total of the outstanding underlying debts previously contracted by the underlying governments must be included in the debt limits of the new city in the absence of legislative provisions arranging for the payment of such debts in some method other than by making these previous debts liabilities of the new city.

"Both under constitutions and statutes expressly so providing and under statutes making no provision on the subject, where two or more municipal corporations are consolidated, or the entire territory of one municipal corporation is annexed to another, the contracts and indebtedness of the corporations which are consolidated or annexed become the contracts and indebtedness of the consolidated or annexing corporation. \* \* \*." 43 C. J., sec. 123, pp. 143-144.

This conclusion would appear to be borne out by the above citation, and also by the citations given in the answer to question 5.

It might be well to mention that the total debt which may legally be incurred after consolidation is less than the sum of the debts which may be legally incurred by the individual governments consolidated. Before consolidation the valuation of the city is used twice—once in determining the debt which may be incurred by the city and again in determining the amount of the indebtedness which may be

incurred by the county. After consolidation valuation of city is used but once.

"7. How far can the legislature go in reorganizing municipalities as sewerage districts, school districts, towns, villages, cities and counties other than by annexation, to provide for their consolidation in counties having a population in excess of 500,000?"

This problem was also considered by the above legislative committee in 1927 and the following suggestions made:

"In view of the constitutional and practical difficulties which stand in the way of the complete consolidation of all governmental units in Milwaukee county, we are forced to the conclusion that such consolidation is not feasible, at least at present. This does not mean that something cannot be done to bring about unification in the exercise of the governmental functions in which consolidation is most essential. In such matters as sewerage and other phases of public health, metropolitan planning and zoning, water systems, park development, and even fire protection, it is possible to secure unification throughout the metropolitan district of Milwaukee, although all existing separate governmental units are retained. This can be done either through the establishment of new governmental corporations charged with these special functions and these functions only, like the existing metropolitan sewerage commission, or by vesting these functions in the county government.

"To the establishment of additional special governmental corporations there seem to us to be valid objections, and such a proposal is not practical because it would not satisfy the city of Milwaukee. More feasible, we regard the suggestion that the county be vested with substantially all of the powers of cities, and that the county shall then be free to make contracts with the several cities, villages and towns to furnish them with water, fire protection, etc., and to take over the independent plants and systems they now operate. This, we believe, can be done without constitutional amendment, because Section 22 of Article IV empowers the legislature to 'confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe'. Such a plan, moreover, could be realized without provoking friction between the city of Milwaukee, its suburbs and the rural towns. because it would not involve any compulsion, but would rest entirely upon contractual arrangements."

JEF

*Counties — Abstract Department — Public Officers —*  
County must have tract index system in order to establish abstract department; chain of title system alone is not enough.

April 25, 1934.

FRANK F. WHEELER,  
*District Attorney,*  
Appleton, Wisconsin.

In your letter of April 11, 1934, you inquire whether Outagamie county, which has the Walton abstract of title system, may lawfully appoint a county abstractor under sec. 59.58, Stats., and whether the action of the county board adopting a report of the special salary committee was sufficient appointment of the register of deeds as county abstractor without a resolution or ordinance passed by the board.

Both questions are answered in the negative.

Sec. 59.58, subsec. (1), Stats., provides in part:

“Whenever any county adopts tract indices and a chain of title system, the county board thereof may create a department to be known as an abstract department, \* \* \*”

You state that the Walton abstract of title system is not a tract index system, although it is a chain of title system and you are of the opinion that the word “and” which connects the words “tract indices” and “a chain of title system” should not be construed to mean “or.”

We concur in your conclusion. The general rule of statutory construction is stated in sec. 370.01, subsec. (1), as follows:

“All words and phrases shall be construed and understood according to the common and approved usage of the language; \* \* \*”

The word “and” is generally used in a conjunctive sense, although not invariably so, and it is elementary that there is no room for construction where there is no ambiguity.

In ordinary contracts, wills, etc., the word “and” will not be construed as meaning “or” except for strong reasons and to carry out the manifest intention of the parties. *Capital City Bank v. Helson*, 59 Fla. 215, 51 So. 853.

In civil statutes, such as we are concerned with here, it has been repeatedly held that the word "and" will be construed "or" only where it appears from the context of the statute that the legislative intent can only be so given effect. *In re Steinruck's Insolvency*, 225 Pa. 461, 74 Atl. 360; *James v. United States Fidelity & Guaranty Co.*, 133 Ky. 299, 117 S. W. 406; *Ransom v. Rutherford Co.*, 123 Tenn. 1, 130 S. W. 1057.

The language of our statute is unambiguous and it appears, therefore, to be wholly unnecessary from the context of the statute to consider "and" to mean "or" so as to give effect to the legislative intent.

Since under the circumstances stated in your letter Outagamie county could not lawfully create an abstract department it follows that neither the register of deeds nor anyone else could be appointed county abstractor, whether by resolution or ordinance adopted by the county board or by adoption of a committee report.

JEF

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*Intoxicating Liquors — Municipal Corporations — Beer Licenses*—Procedures followed in referendums held under sec. 66.05, subsec. (10), par. (d), subd. 3, Stats., and sec. 176.38, Stats., as created by ch. 13, Laws 1933, Special Session, are not same.

April 26, 1934.

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

You have inquired whether the procedure of holding a referendum election under sec. 66.05, subsec. (10), par. (d), subd. 3, is the same as that provided for under sec. 176.38, Stats., created by ch. 13, Laws Special Session 1933.

The answer is: No; the procedure under the two statutes is not the same. The procedure to be followed in a referendum on the question of whether or not any person shall be licensed to deal or traffic in intoxicating liquors

as a beverage, or whether or not liquor stores as provided for in sec. 176.08 shall be established is set forth in secs. 176.38 and 176.39.

Sec. 66.05 (10) (d) 3 provides that there may be a referendum on the question of whether or not licenses shall be issued to persons, permitting them to sell fermented malt beverages, which are not included under the term intoxicating liquor used in sec. 176.38. The exact procedure to be followed in obtaining and conducting a referendum on issuance of licenses for the sale of malt beverages is not set forth in sec. 66.05 (10) (d) 3. The procedure in the case of towns is that set forth by secs. 10.54, 60.12 and 60.13; in the case of cities the statute to be followed is sec. 10.43. The statutes do not provide a method by which the electors of the village may force the submission of this question (sale of malt beverages under ch. 66 Stats.) to a vote, but the submission must be made by the village board. The procedure under sec. 66.05 (10) (d) 3 is fully set forth in XXIII Op. Atty. Gen. 180.

JEF

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*Agriculture—Drainage Districts—Bonds—Drainage District Bonds—Commissioners of drainage district may retire outstanding indebtedness prior to due date thereof if holders of bonds consent thereto.*

April 27, 1934.

ARNO J. MILLER,  
*District Attorney,*  
Portage, Wisconsin.

You have submitted to this department a question on the retirement of drainage district bonds before they become due. The owners of the lands liable for the payment of these bonds desire to retire the bonds before due, or at least to remove the encumbrance from their property in order to secure federal farm loans. You ask whether or not the commissioners of the drainage district can accept the payment from the farmers for these bonds prior to the

time the payment is due, and retire the bonds previous to the due date thereof.

Sec. 89.47, subsec. (6), Stats., would give to the commissioners authority sufficient to carry out the desires of the owners of the lands in question. That provision reads as follows:

“The court may on the petition of the commissioners or of the holder of any bond, interest coupon or other district obligation authorize the commissioners to refund any lawful indebtedness of the district by taking up and canceling any or all of its outstanding notes and bonds as fast as they become due (or before they are due if the holders thereof will surrender the same) and issue in lieu thereof new notes or bonds of such district payable in such longer time as the court shall deem proper, not to exceed in the aggregate the amount of all notes and bonds of the district then outstanding and the unpaid accrued interest thereon, and bearing interest not to exceed six per centum per annum.”

This section provides for the issuance of new notes or bonds after the taking up of the outstanding bonds. However, it is our opinion that the issuance of the new bonds is not a prerequisite to the taking up of the old bonds. It is merely an aid in taking up the old bonds in case there are not funds sufficient to retire them.

You will notice that it is necessary that the holders of the bonds consent to their retirement before this provision can become operative in the case which you have outlined to us. However, we hold that the commissioners have the authority if the consent of the bond holders can be obtained.

JEF

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*Taxation—Gift Tax*—Donee of gift is liable for tax imposed upon transfer by sec. 4, ch. 363, Laws 1933.

April 27, 1934.

TAX COMMISSION.

Attention Alvin M. Johnson

You have submitted to this department a question of procedure in the collection of the emergency gift tax im-

posed by sec. 4, ch. 363, Laws 1933. You would like to know whether your commission is to tax the donee, the donor or both.

Although the statute is not absolutely clear upon the subject and seems to conflict in certain respects, it must be noticed that there is but one provision made in the statute for the assessment of this tax. Without an assessment obviously there would be no tax due. Since this provision, sec. 4, subsec. (7), par. (c), provides for an assessment against the donee alone, any other provisions indicating that the donor might be taxed, must be disregarded. Sec. 4 (7) (c) reads as follows:

“The assessor of incomes of the assessment district in which the donee resides shall assess the tax due on such transfers under this chapter and the tax so assessed shall be paid to the same officer and at the same time as income taxes are paid.”

This section obviously requires the administrators of this law to assess the donee alone. It may be, and is quite likely, that in many instances the donor would reside outside of the assessment district there referred to. The assessor of incomes would not go outside of his district to assess the donor, but would assess the donee alone. That is the obvious intention of this section.

JEF

*Appropriations and Expenditures — Counties — County Board Committee—University—County Agricultural Agent*  
—University of Wisconsin is not compelled by statute to co-operate with agricultural committee of county board in carrying out terms of resolution of board for county agricultural representative's work in manner other than that provided for in sec. 59.87, Stats.

Committee of county board cannot delegate its powers and turn over its appropriation in whole to another body for purpose of having it perform committee's functions.

County board has power to withdraw appropriation made to any one of its committees in so far as such appropriation has not been expended.

April 27, 1934.

THEODORE A. WALLER,  
*District Attorney,*  
Ellsworth, Wisconsin.

You have submitted to this department three questions, requesting an opinion upon them.

1. The county board has discontinued the services of a county agricultural agent and has set up in place of that office an agricultural emergency relief committee composed of three members of the county board, granting that committee an appropriation of \$1,500. It appears that Professor Hatch of the university claims that his department cannot co-operate with this county agricultural committee, under the provisions of the statute. The co-operation between the university and the county agricultural agent is provided for in sec. 59.87, Stats. A rather definite procedure is there set up for the establishment of the office of county agricultural agent and for co-operation between the various governmental units and the county agent. Under the provisions of this section the university has a voice in the selection of the agricultural agent. Under the resolution adopted by the county board, the university does not have any voice in the selection of the agent with whom the university is to co-operate.

The contention of Professor Hatch is probably the correct interpretation of the statute. In *Supervisors of La*

*Pointe v. O'Malley, et al.*, 47 Wis. 332, 336, the court lays down the power of the county in these words:

“\* \* \* We are inclined to hold that when any subject of legislation is entrusted to said county boards, by general words, such boards acquire the right to pass any ordinance necessary or convenient for the purpose of disposing of the whole subject so committed to them; and that, for the purpose of disposing of such subject, they have all the powers which the legislature itself would have over the same subject, *unless the legislature, in conferring such power, has restricted the power of the boards, or directed that it should be done in a certain way.* \* \* \*” (Italics ours.)

It is apparent that the county board is not acting under and by virtue of the provisions of sec. 59.87 and that the university does not, therefore, have to co-operate with the emergency relief committee appointed by the county board in place of the agricultural representative.

2. You further ask whether the emergency relief committee could turn over to the old agricultural committee, without any action on the part of the county board, the sum of \$1,500 voted to the relief committee by the county board.

The relief committee has no power to delegate the powers which were delegated to it by the county board under the familiar rule of *delegatus non potest delegare*. If the relief committee were permitted to turn over the entire appropriation to the old agricultural committee, it would be clearly violating this rule. The relief committee might delegate some of its minor duties to this old committee, but to delegate away its entire powers would clearly be *ultra vires*.

3. You further state that a question has been raised as to whether or not the county board could withdraw the \$1,500 appropriated to the relief committee by the resolution referred to.

In XX Op. Atty. Gen. 276 this question was answered in the affirmative, citing secs. 59.08, subsec. (8) and 59.15, subsec. (1), par. (e), Stats. We there state, p. 279:

“The scope of the two sections created clearly includes the office of county agricultural representative. The county may, therefore, abolish the office at any annual meeting

which would include an adjourned annual meeting. The power to abolish the office necessarily carries with it the power to repeal the appropriation for the maintenance thereof."

See also XXI Op. Atty. Gen. 146.

That the county board has a greater power over one of its own committees than it has over the county agricultural agent provided for in sec. 59.87, is obvious. We conclude, therefore, that the university is no longer compelled by statute to co-operate with the relief committee substituted for the old county agricultural agent; that the relief committee cannot turn over its entire appropriation to the old county agricultural agent, and that the county board may withdraw the appropriation already made to the relief committee at any time it sees fit.

JEF

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*Bankruptcy — Taxation* — Bankruptcy laws of United States do not provide for discharge of personal property taxes levied prior to discharge in bankruptcy.

April 30, 1934.

EDWARD T. VINOPAL, Jr.,  
*District Attorney,*  
Mauston, Wisconsin.

You have submitted to us for answer a question of whether a discharge in bankruptcy would prevent the collection of a personal property tax levied prior to said discharge.

The United States bankruptcy law in ch. 3, sec. 35, Title 11, U. S. C. A., 42 Stats. at Large 354, reads as follows:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; \* \* \*."

That section adequately answers the question in the negative. Regardless of this statute, we might likewise answer the question in the negative under a constitutional rule that

the laws of one government cannot destroy another government. If the United States bankruptcy act were to be construed so as to permit of a discharge of state taxes by a bankrupt, a serious question would arise as to the violation of this constitutional rule.

We therefore rule that the county may collect the personal property taxes as provided by statute.

JEF

*Public Officers*—Sheriff is not entitled to fees for service of criminal warrant served by police officer or constable.

May 3, 1934.

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

You state that the question has arisen as to whether or not the sheriff of Eau Claire county, who is on a fee basis, has the right to collect fees for the service of state warrants issued at the request of members of the police department of the city of Eau Claire. You say that the members of the police force are all on a salary and receive nothing for such service.

You say that the chief of police is perfectly willing to have the sheriff endorse these warrants but questions the legality of such a procedure. The sheriff, on the other hand, receives his income solely upon the fee basis and claims that he should be entitled to these fees.

You inquire whether the sheriff is entitled to such fees on state warrants.

We find no authority for the sheriff to receive fees for the service of a warrant served by a police officer. The sheriff and district attorney should co-operate in the criminal prosecution of the county and it is only fair to the sheriff that he should be given the warrants to serve in the criminal cases that the district attorney is prosecuting. By turning these warrants over to the sheriff instead of the police officer for service you are able to protect your sheriff in his rights.

JEF

*Physicians and Surgeons—Basic Science Law*—Wisconsin state board of examiners in basic sciences cannot substitute for its examination result of examination made by National Board of Medical Examiners of Philadelphia.

May 3, 1934.

DR. ROBERT N. BAUER, *Secretary,*  
*Basic Science Board,*  
Milwaukee, Wisconsin.

On behalf of the Wisconsin state board of examiners in basic sciences (secs. 147.01 *et seq.* Stats.) you request an official opinion on the subject of whether the examination given by the National Board of Medical Examiners may be legally accepted by the Wisconsin state board of examiners in the basic sciences in lieu of their examinations for Wisconsin basic science certificates.

Sec. 147.06, Stats., provides:

“Examination shall be in the basic sciences only, shall be conducted not less than four times a year at such times and places as the board shall fix, and shall be both written and by demonstration or other practical test. No applicant shall be required to disclose the professional school he may have attended or what system of treating the sick he intends to pursue.”

Sec. 147.08 provides:

“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.”

We believe that this latter statute using the words “a legal examining board or officer of another state, or of a foreign country,” means one that is created by the statute as the Wisconsin board is created. That is, the statute must provide for its creation.

You do not state whether the National Board of Medical Examiners of Philadelphia, Pennsylvania, is created by the statutes of any state or of the United States. From the inquiries we have made, we have been unable to find

that this national board is created by any federal or state statute. In the absence of such condition, I am of the opinion that your question must be answered in the negative. The statute is not broad enough to permit the substitution of the examination of a board of the voluntary association which evidently this national board is. If it is believed that this national board is of sufficient reputation so as to warrant the substitution of its examination for that of the state board in this state, it will require additional legislation.

JEF

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*Appropriations and Expenditures—School Districts—State Aid*—Under secs. 20.28 and 40.225, Stats., special state aid may be granted only to rural school districts maintaining advanced courses which have single-room school.

May 3, 1934.

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

You request the opinion of this department upon the following statement of facts:

Township X contains one school district (a common school district) but three schools in that district. School No. 1 has two teachers, who instruct pupils in grades nine, ten and eleven only; school No. 2 has one teacher, who instructs pupils in grades one to eight, inclusive; school No. 3 has two teachers, instructing also in grades one to eight, inclusive.

You say that no action has been taken by the electors to form a district free high school.

Upon the foregoing you inquire whether school district No. 1 comes within the provisions of secs. 20.28 and 40.225, Stats., so as to entitle it to special state aid.

It is the opinion of this department that school district No. 1 does not come within the provisions of secs. 20.28 and 40.225 so as to entitle it to special state aid.

Sec. 20.28, Stats., provides as follows:

"On July 1, 1933, seven hundred fifty dollars, and on July 1, 1934, seven hundred fifty dollars, for the payment of state aid, pursuant to section 40.225, for advanced courses beyond the eighth grade in school districts which do not maintain a high school, a junior high school or a state graded school offering high school courses. If the total of the amounts certified by the state superintendent as payable to school districts under section 40.225, shall exceed the amount available hereunder, the secretary of state shall equitably prorate the amount available."

Sec. 40.225, Stats., provides in part as follows:

"(1) All school districts which do not maintain a high school or a junior high school and whose territory is outside of the limits of any high school district may offer two years of instruction beyond the eighth grade. Such course of instruction may include two years of English, one year of general science, one year of American history and civil government, and one year of agricultural economics, with special emphasis upon the cost of production of farm products and the problems of marketing and distribution, and may include semester or year courses in algebra, commercial arithmetic and bookkeeping, commercial geography, ancient and medieval history, and modern history. Instruction in such courses beyond the eighth grade shall conform to the requirements of the course of study for high schools outlined by the state superintendent of public instruction and shall be under the supervision of the county superintendent of schools. *Nothing in this section shall be construed as requiring the employment of an additional teacher.*"

In *Foth v. Macomber & Whyte Rope Co.*, 161 Wis. 549, 154 N. W. 369, it was said that there was no safer rule for a judicial construction of ambiguous legislative language than that it should be read in the light of the particular situation dealt with, the infirmities to be cured, and the objects sought to be attained.

Considered in the light of the situation dealt with and considering the purpose of the legislation, we are constrained to hold that sec. 40.225 was intended to apply only to the single-room rural school and was not intended to apply to a rural school district maintaining advanced courses wherein more than a single school room is maintained.

An examination of sec. 40.225, Stats., confirms this view. Under that section rural schools maintaining additional grades are not required to employ additional teachers in order to be entitled to state aid. This would indicate that sec. 40.225, Stats., was intended to apply only to one-room schools.

This construction is further fortified by the small appropriation contained in sec. 20.28.

It will be noted that sec. 20.28 appropriates only \$750 for a full year, beginning July 1, 1933, and the same amount for the school year beginning July 1, 1934, for the payment of state aid pursuant to sec. 40.225.

It appears that school district No. 1 has thirty pupils taking advanced courses and the state aid provided for by the foregoing sections is \$25 per pupil. Therefore, it is manifest that this district alone would take away the entire appropriation for special state aid under these sections if the total sum were not prorated. And, when one considers the large number of multiple-room rural schools which could otherwise qualify for the special state aid under sec. 40.225, we must hold that said section applies only to one-room schools. Any other construction would be unreasonable and fail to effectuate the purpose of this enactment.

Moreover, the department of public instruction, which is entrusted with enforcement of these sections, has uniformly construed the same to apply only to single-room schools. It is well settled that the practical construction placed upon a statute by state officers is of great weight and often decisive. *State v. Johnson*, 186 Wis. 59, 202 N. W. 319; *State ex rel. Hayden v. Arnold*, 151 Wis. 19, 138 N. W. 78; *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N. W. 331.

Since school district No. 1 maintains a two-room school, wherein advanced courses are given, it would seem that it is not entitled to the special state aid provided for by secs. 20.28 and 40.225, because such sections are applicable only to rural school districts maintaining advanced courses which have a single-room school.

JEF

*Charitable and Penal Institutions—Industrial Home for Women—Criminal Law*—In view of penalty provided by sec. 351.04 and sec. 54.03, subsec. (3), Stats., trial court may sentence woman eighteen years of age for general or indeterminate term of from one to five years to Wisconsin industrial home for women.

May 3, 1934.

CLARENCE J. DORSCHER,  
*District Attorney,*  
 Green Bay, Wisconsin.

You state that G, a young woman eighteen years of age, was convicted of lewd and lascivious behavior under sec. 351.04, Stats., which provides as a penalty a maximum sentence of one year in the county jail.

Sec. 54.03 subsec. (3), Stats., provides:

“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, subject to the power of release from actual confinement, by parole or absolute discharge by the board of control or by pardon, as provided by law.”

You inquire whether G can be given an indeterminate sentence to the Wisconsin industrial home for women of anywhere from one to five years, or whether the penalty provided by sec. 351.04 is a positive limitation establishing a maximum sentence permissible of not less than one year nor more than one year.

You are advised that it is our opinion that the sentence may be from one to five years. See XXII Op. Atty. Gen. 840.

JEF

*Public Health—Communicable Diseases*—Local board of health under sec. 143.13, Stats., is required to provide free vaccination only for school children of its own municipality.

May 3, 1934.

DR. H. M. GUILFORD, *Director,*  
*Bureau of Communicable Diseases,*  
Board of Health.

You refer us to sec. 143.13, Stats., relative to vaccination of school children. It frequently happens that schools maintained by joint school districts are located in various municipalities. Many of the children attending such a school are not residents of the municipality in which the school is located. You say that the question arises whether a local board of health shall provide for the free vaccination of all children of school age who attend school in a joint district or whether such local board of health is required to provide for free vaccination of the children of its own municipality.

Sec. 143.13, Stats., provides:

“(1) Each local board of health shall forthwith, upon the appearance of smallpox, prohibit the inhabitants of the municipality from attending school for a period of fourteen days, excepting persons who have been successfully vaccinated, or who show a doctor’s certificate of recent vaccination.

“(2) Should new cases of smallpox continue to develop in the municipality, the local board of health shall renew such order for so many days as the state board of health may deem necessary.

“(3) When exclusion from school is so ordered, the local board of health shall provide for the free vaccination of all children of school age during the outbreak of smallpox, the necessary expense thereof to be paid by the municipality, upon the order of the local board of health. The state board of health shall determine the method to be employed in such vaccination, shall designate the persons to do the work and may determine the maximum fee to be charged.”

You will note that the local board of health “shall \* \* \* prohibit the inhabitants of the municipality from attending school,” except those who have been vac-

minated. Under this law the local board of health is not authorized to prohibit all children attending the school if they live in a joint district and in another municipality from the one where the local board of health is located. The local board of health is, therefore, required to provide free vaccination only for the children of its own municipality, and the free vaccination which the board is required to provide under this section applies only to the children attending school in the municipality where the local board of health is located. The municipality in which the local board of health is located must pay for the free vaccination upon the order of the local board of health. The board, of course, has no power to order payment of anything in another municipality.

You are therefore advised that the local board of health under sec. 143.13 is not empowered to provide free vaccination of all children of school age who attend school in a joint district. Such local board of health is required to provide for free vaccination only of the children of its own municipality.

JEF

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*Hotels and Restaurants—Intoxicating Liquors—Ch. 13, Laws 1933, Special Session, by its enactment of sec. 176.01, subsec. (6), Stats., defining restaurants in connection with sale of intoxicating liquors, does not require separate kitchen and dining room as part of equipment.*

May 3, 1934.

DR. C. A. HARPER, *State Health Officer,*  
*Board of Health.*

In your communication of April 17 you direct our attention to sec. 160.01, subsec. (2), Stats., which provides:

“ ‘Restaurant’ means all places wherein meals or lunches are served transients without sleeping accommodations and all places used in connection.”

You also direct our attention to ch. 13, Laws 1933, Special Session, which enacts sec. 176.01, Stats., referring to

intoxicating liquors. Sec. 176.01, subsec. (6) defines a restaurant as follows:

“ ‘Restaurant’ means space, in and wholly within a suitable building, leased or rented or owned by a person or corporation, licensed as such, and provided with adequate and sanitary kitchen and dining room equipment and capacity and employing such number and kinds of servants and employes necessary for preparing, cooking, and serving suitable food for strangers, travelers, and other patrons and customers, and complying with all the requirements imposed upon restaurants under the laws of this state.”

You say there is some difference of opinion concerning sanitary kitchen and dining room equipment, that you have held that the words “kitchen” and “dining room” are adjectives modifying equipment, and that a few people claim a separate room for a kitchen is meant.

You state that last year there were 9312 restaurant licenses issued. A large majority of these restaurants have been in existence from fifteen to twenty years and have complied with the restaurant law as originally enacted and the rules and regulations of the state board of health. You also say that if the interpretation is given that there should be a separate dining room and a separate kitchen then many of these restaurants that have been running for these many years would not be able to comply and would be forced to discontinue.

You also state that it is common knowledge that in a great many homes the kitchen is frequently used as a dining room also and it would appear to be impossible to substantiate a claim that sanitary conditions cannot exist when a kitchen and dining room are combined. In order to clear up the contention you ask for an official opinion as to the interpretation and intent of the legislature in enacting this law.

We are satisfied that your interpretation of the statute is correct. If the lawmakers had intended to require a separate room for a kitchen and another one for dining purposes, it would have been an easy matter to say so. The statute only requires, by the language used, that the licensees have adequate and sanitary kitchen equipment and adequate dining room equipment. It is apparent that the

legislature did not intend to prohibit the preparation of the food in the same room where it is consumed by the public. It would seem that it would be an inducement for the licensee of the restaurant to have the food clean and sanitary when prepared in the presence of the consumers of such food.

You are therefore advised that it is not necessary to have a separate kitchen and a separate dining room under this statute.

JEF

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*Courts—Estates—Taxation*—Income taxes are not entitled to preference over other claims against decedent's estate.

Estate income taxes are entitled to preference over income taxes based on return filed by decedent.

There is no statutory requirement that claim for income taxes be filed against decedent's estate, although as matter of practice such claim should be filed.

May 3, 1934.

TAX COMMISSION.

Attention John M. Rooney.

You request the opinion of this department upon the following statement of facts:

"Section 313.16 of the Wisconsin statutes provides for the order of payment of debts against decedents' estates. Said section is silent in regard to the payment of taxes.

"Section 71.095 provides for the filing of income tax returns by fiduciaries, and section 71.095 (6) provides in substance that unless the administrator or executor present to the court a receipt for the income taxes assessed on the basis of the returns filed by such administrator or executor, he shall not be entitled to final discharge. It seems that this provision only applies to estate income taxes; that is, income taxes assessed on the basis of returns filed by the administrator or executor after the death of the decedent. There seems to be no similar provision in the statutes in regard to income taxes assessed against the deceased before his death and which were unpaid at the time of his death."

Upon the foregoing you submit three questions which will be answered seriatim.

"1. Are income taxes entitled to preference over any other claims against decedents' estates and if so, over what types of claims are income taxes preferred?"

The answer is, No. Sec. 313.16, Stats., provides in part as follows:

"(1) If, after the allowance provided for by section 313.15 has been made and after the amount of the claims against any estate shall have been ascertained by the court, it shall appear that the executor or administrator has in his possession sufficient to pay all the debts, he shall pay the same in full within the time limited for that purpose. If the assets received by the executor or administrator, and which can be appropriated to the payment of debts, shall not be sufficient he shall, after paying necessary expenses of administration, pay the debts against the estate in the following order:

"(a) The necessary funeral expenses;

"(b) The expenses of the last sickness.

"(c) Debts having a preference under the laws of the United States;

"(d) Wages due to workmen, clerks or servants which have been earned within three months before the date of the death of the testator or intestate, not to exceed three hundred dollars to each claimant;

"(e) Debts due to other creditors."

Sec. 71.095, subsec. (6), provides in part as follows:

"An executor, administrator, guardian or trustee applying to a court having jurisdiction for a discharge from his trust and a final settlement of his accounts, before his application shall be granted, shall file with the assessor of incomes of the county in which the trust or estate is being administered a return of all incomes received in his representative capacity during the time between the last preceding January first and the date of his application for discharge and also similar returns of income received by the deceased during each of the years open to audit under section 71.115 if such returns have not heretofore been filed. Upon the receipt of such returns, the assessor of incomes shall immediately determine the amount of taxes to become due and shall certify such amount to the court and the court shall thereupon enter an order directing the executor, administrator, trustee or guardian, as the case

may be, to pay to the tax commission the amount of tax, if any, found due by the assessor of incomes, and take his receipt therefor. \* \* \* The receipt of the tax commission shall be evidence of the payment of the tax and shall be filed with the court before a final distribution of the estate is ordered, and the executor, administrator, trustee or guardian is discharged. \* \* \*.”

Under the foregoing it is manifest that income taxes are not entitled to a preference over other claims against decedent's estate.

“2. Is there any distinction with reference to the right to preference between income taxes based on the returns of the administrator or executor; that is, estate income taxes, and income taxes based on the returns filed by decedent before his death and which were unpaid at the time of his death?”

The answer is, Yes. There is a distinction with reference to the right to preference between income taxes based on the returns of the administrator or executor, that is to say, estate income taxes, and income taxes based on the returns filed by the decedent before his death and which were unpaid at the time of the decedent's death. Under sec. 71.095 (6) this preference is in favor of the estate income tax.

“3. Is it necessary that claims for income taxes which are unpaid at the time of decedent's death be filed in the same manner as other claims against decedents' estates, or is it the duty of the administrator or executor or county judge to ascertain and pay such taxes before final discharge of the administrator or executor?”

A careful examination of the statutes discloses that there is no requirement that claims for income taxes which remain unpaid at the time of decedent's death be filed as a claim against the decedent's estate. However, it is suggested that, as a matter of practice, a claim for income taxes be filed in order to advise the court and administrator or executor of the amount of unpaid income taxes chargeable against decedent's estate.

JEF

*Indians—Indigent, Insane, etc.—Poor Relief*—Relief director of Shawano county is liable for relief of indigent families of white and mixed blood (not on Menominee Indian rolls) who reside on Menominee Indian reservation.

May 3, 1934.

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

You wish to know whether the relief director of Shawano county is liable for the relief of indigent families of white and mixed blood (not on the Menominee Indian rolls) who reside on the Menominee Indian reservation.

The answer is the relief director is liable for the relief of these families.

The Menominee Indian reservation is in Shawano county, which has adopted the county system of poor relief provided for by sec. 49.15, Stats.

Sec. 49.15 provides:

“The county board of any county may, at an annual meeting or at a special meeting called for that purpose, by a resolution adopted by an affirmative vote of a majority of all the supervisors entitled to a seat in such board, abolish all distinction between county poor and town, village and city poor in such county and have the expense of maintaining all the poor therein [i. e., county] a county charge; and thereupon the county shall relieve and support the poor in said county, and all the powers conferred and duties imposed by this chapter upon towns, villages, and cities shall be exercised and provided for pursuant to section 49.14.”

Although the Menominee Indian reservation is under the federal government it is recognized as an integral part of the county. By the provisions of secs. 6.07 and 6.08, Stats., the division of an Indian reservation into election districts and the organization of those districts is in the hands of the county government. Sec. 40.71, making attendance at reservation schools compulsory, is enforced by county agencies. The county has criminal jurisdiction over all white persons residing on the reservation. All of these provisions show that these people, although they dwell on

an Indian reservation, are still considered as living in the county. Therefore, the white people should be treated as are all other white people residing in the county.

XIV Op. Atty. Gen. 24, holding that Shawano county is not responsible for the relief of poor white persons living on the reservation reasons thus: All relief statutes are based on residence in a *town, village* or *city* and, hence, there being no such governmental subdivision on the reservation, these white people living thereon are not entitled to aid from the county. This would be true if relief in the county were administered through local units, for then there would be no local unit responsible for these people. However, in the instant case we have the county system of poor relief. The purpose of such a system is to furnish relief for all of the poor of the county. Sec. 49.15 reads: “\* \* \* abolish all distinction between county poor and town, village and city poor.” In most counties these classifications include identical people and are interchangeable, but when a part of the county is not organized into governmental subdivisions, as is the case in Shawano county, which includes the Menominee Indian reservation, there are county poor who are not included in the phrase “town, city or village poor.” The white people on the reservation are “county poor” since they live in the county, are not wards of any other government (as are the Indians on the reservation), and are indigent people. Legal settlements based on living in a town, village or city are determined merely for the purpose of accounting between various local units in counties where the local units administer relief and, hence, are not important or necessary in a system in which the county has undertaken the relief of all county poor regardless of the part of the county in which they reside. Sec. 49.15 does not limit relief extended under a county system to that relief based on settlements in towns, villages, or cities, but it expressly includes persons who have no settlement in a town, village or city and who are yet entitled to county aid under the expression “county poor.” The phrase, “and all the powers conferred and duties imposed by this chapter upon towns, villages, and cities shall be exercised and provided for pursuant to section 49.14,”

is not meant to limit the power and duties of the county, but merely to include among them by specific reference thereto, the powers enumerated.

It is the policy of the state that no one shall starve. If these people who may have been residing in the county for years are not taken care of by the county, they will be in a worse position than those who are mere transients in the towns, villages and cities of the county and who must be provided for.

Sec. 49.04 provides:

“(1) 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 the legal effect of secs. 49.02 (7) and 49.04 (1) is to cast upon counties the burden of supporting indigent strangers, which includes all persons within their limits not having a legal settlement.

Sec. 49.04 (1) is a strong manifestation of the will of the state that *all* poor persons within a county shall be taken care of, since even the transient is to be provided for. The legislature when it enacted its poor laws meant to provide for the relief of all poor persons in the state who are not the wards of another government.

Since these indigent families of white and mixed blood residing on the Menominee Indian reservation in Shawano county are county poor, they are entitled to relief from the relief director of Shawano county.

JEF

*Public Officers—County Highway Committee—Members* of county highway committee cannot lawfully charge items as “actual and necessary expenses” under sec. 82.05 which they have not disbursed.

May 3, 1934.

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

In your letter of April 13, 1934 you inquire what is meant under sec. 82.05, subsec. (1), by the words “the members of such committee shall be reimbursed for their *actual and necessary expenses* incurred in the performance of their official duties” and, in this connection, whether the members of the county highway committee organizing C. W. A. projects should have put in their bills at a per diem and mileage or whether they should have put in a bill at the same rate as would have been necessary to supply them with room and board during the time they were so working.

There is no basis for the second method of charging.

Sec. 370.01, subsec. (1), Stats., states the general rule of statutory construction as follows:

“All words and phrases shall be construed and understood according to the common and approved usage of the language; \* \* \*”

It is elementary that where there is no ambiguity there is no room for construction.

The words “actual and necessary expenses” mean just that, and if these men went back and forth from their homes every day, as you state, and actually made no disbursements for room and board, they could not lawfully put in a bill for what these items might have amounted to if they had not gone back and forth daily.

The section of the statutes above quoted reads on from the end of the above quotation as follows:

“and shall be paid the same per diem for time actually and necessarily spent in the performance of their duties as is paid to members of other county board committees,  
\* \* \*”

In construing that part of sec. 82.05 concerning which your question arises it was said in XVI Op. Atty. Gen. 164:

“Under the language of that section of the statute, the payment over and above the per diem is a reimbursement for the actual necessary expenses incurred.”

It seems to be plain that the legislature intended members of the county highway committee to receive any actual and necessary expenses they were put to in addition to their per diem for time actually and necessarily spent in the performance of their duties the same as paid to members of other county board committees.

While the committee members cannot be expected to stand actual and necessary expenses incurred in the performance of their duties out of their own pockets yet, on the other hand, they cannot put in a bill for expenses which have not actually or necessarily been disbursed.

A public officer takes his office *cum onere* and is entitled to no salary or fees except what the statute provides. *Outagamie County v. Zuehlke*, 165 Wis. 332.

JEF

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*Counties — County Ordinances — Courts — Forfeitures*  
—Action for violation of county ordinance is civil action, not criminal prosecution.

Ordinance by county board prohibiting walkathon is effective from time it goes into effect even though walkathon has been licensed by town.

May 8, 1934.

KENNETH C. HEALY,  
*District Attorney,*  
Manitowoc, Wisconsin.

You state that some time in February, 1934, a walkathon was started at Silver Lake, in the town of Manitowoc Rapids, Manitowoc county, which was licensed by the town of Manitowoc Rapids under authority granted to it by sec. 66.05, subsec. (8). On April 11 of this year an-

other walkathon was begun at the Tourist Inn, in the town of Centerville, Manitowoc county, which was likewise licensed by the officials of the town of Centerville.

You also say that on April 12 the county board of Manitowoc county passed an ordinance, by virtue of authority granted to it by sec. 59.08, subsec. (9), which authority makes, or attempts to make, the holding of or participation in any walkathons, dance marathons, skatathons or other similar exhibitions in Manitowoc county unlawful and provides for a penalty of one hundred dollars per day for any person convicted of it and further provides that every day of said holding shall be considered a separate offense.

You submit the question at the suggestion of the county board of Manitowoc county whether the promoters and participants in the two walkathons aforementioned can be subjected to criminal prosecution under the provisions of the ordinance passed by the Manitowoc county board on April 12.

Your question must be answered in the negative. A prosecution under a city ordinance is not a criminal prosecution. It is a civil action for the collection of a fine. See *Kuder v. State*, 172 Wis. 141. See also sec. 288.10, Stats.

You also ask whether the ordinance operates retroactively, so as to stop the walkathons now in progress.

I believe that this question must be answered in the affirmative. It makes the walkathon unlawful at the time when the ordinance was passed and published. While it does not act retroactively, it does act from the time when the ordinance became effective for any violations subsequent to that time. The fact that a license was given by the town cannot in any way militate against that proposition for the reason that a license is always subject to a regulation that may legally be passed thereafter even to the effect of prohibiting an act.

JEF

*Appropriations and Expenditures—School Districts—* Money appropriated for library purposes under subsec. (4), sec. 25.23, Stats, cannot be released by treasurer to be expended for current expenses other than for library purposes.

May 8, 1934.

FRED RISSER,  
*District Attorney,*  
Madison, Wisconsin.

You submit the following question :

“May the county treasurers release to local school districts which have no school buildings or transport their children to other schools, for current expenses, the twenty cents per child that is now held back from the Common School Fund pursuant to subsection (4) of section 25.23 for the purchase of library books?”

You state that according to information furnished by the office of public instruction in 1933 there were eighty-five school districts without school buildings and four hundred sixteen districts that transported all of their children to other schools. This money is now held by county treasurers for these school districts and in most cases will be so held indefinitely. Its release for current expenses would be of real benefit to all of these school districts and of no disadvantage to anyone.

Subsec. (4), sec. 25.23, Stats., reads as follows :

“Within ten days after receipt of the county’s share of such fund each county treasurer shall set apart and withhold therefrom an amount equal to twenty cents per capita for each person of school age residing in towns, villages and cities of the fourth class in such county, to which apportionment is made, to be expended for the purchase of library books, as provided in sections 43.17 to 43.21, inclusive; and shall thereupon give notice in writing of the amount of the common school fund income so apportioned and payable to each town, village, and city in his county, to the treasurer and clerk thereof respectively, and shall pay the same to each such treasurer on demand, who shall pay the same to the proper school treasurer as provided by law. If any such town, village or city treasurer shall not demand such money before the next receipt of school

money apportioned to such county, the county treasurer shall add such sum remaining in his hands to the money so next received and distribute the same therewith and in the same proportion among the several towns, villages and cities entitled thereto in such county."

I know of no method by which this money so set aside for library purposes could be released in any way to be expended for current expenses in the school district. In order to do that it would require additional legislation. The fact that some school districts have no schoolhouses is no reason why they cannot expend this money for library purposes and make provision to have the library kept in such places as they are able to arrange for. I understand that some of the school districts without schoolhouses keep their library in the schoolhouses to which the children are transported. I can see no objection to this arrangement.  
JEF

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*Indigent, Insane, etc.—Legal Settlement—County of Fond du Lac, where person has legal settlement, cannot be charged with hospitalization and doctor bill expense incurred during birth of illegitimate child in another county when no affidavit has been filed and no notice has been sent to Fond du Lac county until some six months after expense has been incurred.*

May 8, 1934.

ALEX L. SIMPSON,  
*District Attorney,*  
Fond du Lac, Wisconsin.

You submit the following statement of facts:

A family consisting of a man, his wife, and one daughter about three years ago moved from a township in Fond du Lac county to one in Sheboygan county. Some eight or ten months after they left Fond du Lac county the man was convicted of larceny and sentenced to the state penitentiary. He has, since that time, been declared insane and placed in the state central hospital, where he will probably remain for life.

For almost two years the mother and daughter lived in Sheboygan county and received no aid as paupers.

About a year ago the daughter gave birth to an illegitimate child. Shortly before the child's birth its mother lived at the Home of the Friendless in Sheboygan county; since that time the daughter and her child have been there continuously. Expenses were incurred for hospitalization and a doctor's bill amounting to approximately fifty dollars. No notice or affidavit for relief was sent to Fond du Lac county until last September, about six months after the bills were incurred.

You say you have agreed that Fond du Lac county should take care of all expenses since that county was notified by affidavit that it was necessary to give the girl and her child care in the Home of the Friendless and you inquire whether there is anything in this statement that indicates these people lost their legal settlement in Fond du Lac county.

This question must be answered in the negative. You have come to the correct legal conclusion which the facts warrant under sec. 49.02, Stats.

You inquire whether Fond du Lac county is responsible for the hospitalization and doctor's bill at the time of the birth of this child, no affidavit having been filed and no notice having been sent to Fond du Lac county or the township involved in this county until some six months after the expense had been incurred.

We believe this question requires a negative answer in view of the decision of our court in *St. Joseph's Hospital v. Withee*, 209 Wis. 424, 425. It must also be borne in mind what was said in *Patrick v. Baldwin*, 109 Wis. 342, and referred to in the above quoted case.

"The law, \* \* \*, does not permit a private party, at the expense of the town, to aid or relieve an indigent person without a contract to that effect existing between him and the town. \* \* \*"

We are of the opinion that Fond du Lac county under the circumstances is not liable for the hospitalization and doctor's bill.

JEF

*Criminal Law—Prisons—Prisoners—Parole—Sentence* imposed in Minnesota for repeater under prohibition law of ten months in state prison is not changed by repeal of prohibition law; same person now convicted in this state of bank robbery must be considered as second offender and becomes eligible for parole only after he has served one-half his sentence.

May 10, 1934.

BOARD OF CONTROL.

You ask for an official opinion on the facts submitted to you by Oscar Lee, Warden of the state prison. He states that one A was sentenced to this institution on February 4, 1929, by the circuit court of Jefferson county to serve from ten to sixteen years for the crime of bank robbery. A was received on February 4, 1929. After careful checking it is found that the only other criminal record he has is in Douglas county, Minnesota. Mr. Lee inquires whether the fact that the misdemeanors involve the prohibition law, which has since been repealed, would erase the habitual offender conviction that was and still is considered a felony in the states of Minnesota and Wisconsin.

Sec. 371.04, Stats., provides as follows:

“No offense committed and no penalty for forfeiture incurred previous to the time when any of the acts aforesaid shall be repealed shall be affected by such repeal, except that when any punishment, forfeiture or penalty shall have been mitigated by the provisions of these revised statutes, such provisions shall apply to and control any judgment to be pronounced after the said statutes shall take effect for any offense committed before that time.”

Sec. 371.05 reads thus:

“No prosecution for any offense or the recovery of any penalty or forfeiture pending at the time when any of the acts aforesaid shall be repealed shall be affected by such repeal; but the same shall proceed in all respects as if such acts had not been repealed, except that all such proceedings had after the time when these revised statutes shall take effect shall be conducted according to the provisions of these statutes and shall be in all respects subject to said provisions.”

This question must be answered in the negative. The fact that the prohibition law was repealed does not in any way affect the convictions that have been obtained prior to such repeal.

Mr. Lee also inquires whether A is a first or second offender and when he becomes eligible for parole under the parole law amended as of July 12, 1933.

This person is a second offender, for he has been convicted of a felony in another state prior to the present conviction. In view of that fact he can be paroled only after he has served one-half of his sentence, his maximum sentence being sixteen years, it is necessary for him to serve at least eight years before he is eligible for parole. See sec. 57.06 (1) as amended by ch. 384, Laws 1933.

JEF

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*Fish and Game*—Under sec. 29.174, subsec. (2), Stats., conservation commission has power to make regulation forbidding hunting more than two hundred or three hundred feet from shore of Lake Koshkonong.

May 10, 1934.

HAROLD M. DAKIN,  
*District Attorney,*  
Watertown, Wisconsin.

You have asked for an opinion as to whether the conservation commission has the power to issue and enforce an order forbidding hunting more than two hundred or three hundred feet from the shore on Lake Koshkonong, an extensive meandered lake in Jefferson county. The purpose of such regulation would be to make the main part of the lake a refuge for ducks.

The answer is: The conservation commission has the power to make and enforce such a regulation.

Sec. 29.174, subsec. (2), Wis. Stats. reads as follows:

“It shall be the duty of the conservation commission and it shall have power and authority to establish open and close seasons, bag limits, size limits, rest days and other

conditions governing the taking of fish or game, in accordance with the public policy declared in subsection (1). Such authority may be exercised either with reference to the state as a whole, or for any specified county or part of a county, or for any lake or stream or part thereof."

Subsec. (9) reads:

"The present statutes regulating open and close seasons, bag limits, size limits, rest days and other conditions governing the taking of fish or game shall continue in full force and effect until modified by orders of the conservation commission, as provided in this section, or by subsequent acts of the legislature."

Under this statute the conservation commission could establish a closed season on all of Lake Koshkonong which is more than two hundred or three hundred feet from the shore. This closed season could affect the hunting of all manner of fish and game or just the hunting of ducks. Thus the main part of the lake could be made a refuge for ducks.

JEF

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*Bridges and Highways—Damage*—State is not liable for alteration in surface water drainage under facts stated.

May 10, 1934.

HIGHWAY COMMISSION.

Attention Thos. J. Pattison, *Secretary*.

You have submitted a blue print marked—"Layout Showing Drainage in the Vicinity of Arena, Iowa County, before and after Construction of Federal Aid Project No. 410-B," and also a copy of the U. S. G. S. map of the Blue Mounds quadrangle, together with a statement of a surface water drainage problem that arose by virtue of the construction of the said project, which was done by the state. Request for an opinion is made as to what, if any, legal liability exists by virtue of the changes which were made and of the condition which was created as a result of the change.

The location of the improvement is on U. S. highway No. 14 shown on the 1933 highway maps as state trunk high-

way No. 11 at the village of Arena, Iowa county, Wisconsin. The location of the village is along what is marked on the blue print as "Main Street," which leaves U. S. highway No. 14 between stations 410 and 415 on the road plan. In 1932 U. S. highway No. 14 was improved by grading and paving with Portland cement concrete to the profile shown by the heavy white line at the bottom of the drawing. Prior to the improvement the grade of the road had been as shown by the light black line which is in general about two feet lower than the present grade line.

The portion of U. S. highway No. 14 between approximately stations 390 and 420 has been subject to overflows from surface water on the occasion of very heavy rain. This is by reason of concentration of surface water in what is known as Ray Hollow, shown on the U. S. G. S. map, a ravine penetrating back into the hills. Every time there is a heavy rain the accumulation of surface water in this ravine flows out of the Hollow and on the level country which extends for about one-half mile south of U. S. highway No. 14. The U. S. G. S. map shows this water course to be diagonally northwest across section 21 of township 8, range 5 east, to the west line of the said section, from which point the water turns and flows straight north on the section line to an intersection with the U. S. highway. Prior to the improvement of 1932 the road, at approximately station 397, 500 feet west of the section line, was higher than at the section line, with the result that the water entering the road along the old ditch on the section line tended to flow east along the south side of the highway to a point at approximately station 445, at which point the water crossed the road, partly by means of a culvert and partly by flowing over the road, and ran down through the village. At times of unusually heavy rains there was enough surface water to cover the road completely, with the result that some of the surface water flowed into the highway west of station 400 and ran west along the highway as far as to station 365, where it flowed to the north and northeast over some very sandy soil, a great portion of it soaking into the sand. The portion remaining passed out under the tracks of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, through a 36-inch culvert

at the point where the railroad company now has three 36 inches by 24 feet concrete pipes. The situation was very detrimental to highway travel and very disagreeable to the village, which was periodically flooded and where the cellars of the inhabitants were occasionally inundated.

When the plans for project No. 410-B were in the course of preparation it was deemed necessary to raise the grade of the road to a height such that surface water did not flow over it. This of course made it necessary to provide a culvert of sufficient capacity to carry the surface water under the road. The commission deemed it inadvisable to discharge this concentration of surface water on the village and decided to carry it away from the U. S. highway at approximately station 389, where a right of way three rods wide was purchased along the east side of A's property, from the north line of the U. S. highway right of way to the right of way of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, for the purpose of digging a ditch to carry the water away from the culvert. This decision was carried out. Additional right of way was procured on the south side of the U. S. highway between approximately stations 390 and 418 and a broad ditch was dug along the highway to intercept the surface water coming in from the south and carry it along the U. S. highway to the culvert at approximately station 389. The culvert placed at station 389 consists of two 9 feet by 4 feet openings with a total waterway of 72 square feet. This culvert discharges the water into a drainage ditch which was dug on the three-rod right of way purchased from A.

During the spring and early summer of 1933 there were several very heavy rains, with the result that this culvert ran practically full on one occasion, at least, and carried a good deal of water on several occasions. On the occasion of the heaviest flood sufficient damage was done to the railroad right of way of the Chicago, Milwaukee, St. Paul and Pacific to cause that company to place two additional 36-inch pipes under this railroad, in addition to the one 36-inch pipe.

The drainage ditch is dug in sandy soil, which is the type of land prevailing in that vicinity. The force of the surface water in the drainage ditch carried some sand from

the ditch and deposited it on the lands of A, B, and C, as shown on the blue print. It was also claimed by B and C that water remained standing on their land to a greater extent than had been the case prior to the construction of the culvert at station 389 and the digging of the drainage ditch, with the result that their crops were damaged. It also appears that D and E, persons living some distance away from the drainage ditch, claim to have been damaged by virtue of this change through flooding of their property by water alone.

It appears that under the system of drainage which prevailed prior to the road improvement of 1932 much of the water which now reaches the premises of A, B and C reached those premises but by a more circuitous route. It also appears that the water which now reaches these premises does so in increased quantity and with augmented force.

The right of disturbing the natural drainage and the right of disposing of surface waters have been fruitful subjects for litigation in Wisconsin and in other states for a long period of time. It would serve no useful purpose to here cite more than a few of the Wisconsin cases which relate to this question. An attempt has been made to select a few which appear to furnish a statement as to the law which obtains in Wisconsin at the present time.

In the case of *Shaw v. Ward*, 131 Wis. 646, it was held, p. 654:

“The following statement of the common-law rule early announced by the Massachusetts court in *Gannon v. Hargadon*, 10 Allen, 106, 109, has been quoted here with approval on many occasions:

“The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into

and over the same in greater quantities or in other directions than they were accustomed to flow.’”

In *Peck v. Baraboo*, 141 Wis. 48, it was held, pp. 51-52:

“\* \* \* Carelessly and negligently constructing streets lying to the north and west of certain land by reason of which large quantities of surface water which would otherwise have passed off in other directions were conducted through the drains or gutters of such streets and cast in a body on his land, and at the same time raising the grade of a street to the south or southwest of his land so as to retain on the land the waters thus cast upon it, was held to confer no right of action in favor of the owner of the land and against the city doing these acts. *Harp v. Baraboo*, 101 Wis. 368, 77 N. W. 744. It will be observed that this case confirms the right of the city by construction and grading of streets to change the flow of surface water so as to bring down upon a lot owner from new watersheds surface water which would not, but for such street grading, have taken that course or reached his lot. In *Clauson v. C. & N. W. R. Co.* 106 Wis. 308, 82 N. W. 146, the railroad company by a ditch on its right of way parallel with its track carried surface water, which would otherwise never have reached the plaintiff's land, out of its natural and usual course and direction, and cast it upon the land of the plaintiff. This ditch was necessary to the use and enjoyment of the defendant's property, and the act was held *damnum absque injuria*. In *Heth v. Fond du Lac*, 63 Wis. 228, 23 N. W. 495, the city in the construction and grading of streets so changed the course and flow of surface water as to bring an increased flow in the drain leading towards plaintiff's land and cast upon plaintiff's land large quantities of surface water, part of which but for this drain would never have reached plaintiff's land, but would have passed off in a different direction. It was held that the city was not liable. In *Champion v. Crandon*, 84 Wis. 405, 54 N. W. 775, it was ruled that in the construction and draining of streets the town might change the natural flow of surface water on the streets so as to bring to the plaintiff's land surface water which would not naturally flow there, and that neither a defective plan nor negligence in the doing of such work would support the liability of the town. \* \* \*”

In the case of *Clauson v. Chicago & Northwestern R. Company*, 106 Wis. 308, the railway company lowered the grade of the road bed so that surface water which came upon the right of way from adjoining low lands could no

longer be conducted on its natural source by a culvert under the tracks. The water was disposed of by conducting it in an ordinary ditch along the side of the road bed for about half a mile, and through a cut to a lower level on the railroad lands, where it spread out, some of it flowing upon plaintiff's land and carrying sand and gravel thereon. The situation in that case appears to be quite analogous to the one created by the improvement of U. S. highway No. 14, near Arena. It was held by the court in the *Clauson* case (pp. 311-312, 314) :

“\* \* \* [quotation from *Gannon v. Hargadon, supra.*] Quoted with approval in *Champion v. Crandon*, 84 Wis. 409. A municipal corporation, in the improvement of its streets by paving, grading, and guttering the same, has the same right to obstruct and divert the existing flow of mere surface water that an individual owner has in the improvement of his land. *Hoyt v. Hudson*, 27 Wis. 656; *Allen v. Chippewa Falls*, 52 Wis. 433; *Heth v. Fond du Lac*, 63 Wis. 228; *Waters v. Bay View*, 61 Wis. 642; *Harp v. Baraboo*, 101 Wis. 368. A railroad corporation, in the construction of its roadbed upon its right of way, may divert, obstruct, or alter the flow of surface water in the same way and under the same rules applicable to a private owner or a municipal corporation. *O'Connor v. F. du L., A. & P. R. Co.* 52 Wis. 526; *Hanlin v. C. & N. W. R. Co.* 61 Wis. 515; *Johnson v. C., St. P., M. & O. R. Co.* 80 Wis. 641. *Borchsenius v. S., St. P., M. & O. R. Co.* 96 Wis. 448.

“None of these principles would seem to be open to debate at this time in this state, and the only exception to them, if it may be called such, is the rule laid down in *Pettigrew v. Evansville*, 25 Wis. 223, and approved in *Wendlandt v. Cavanaugh*, 85 Wis. 256, and *Schuster v. Albrecht*, 98 Wis. 241, to the effect that the owner of land on which there is a pond or reservoir of surface water cannot lawfully discharge it by artificial channel directly upon or in close proximity to the land of another, materially to his injury. \* \* \*

“\* \* \* All that was done here was to construct an ordinary ditch by the side of the roadbed for a distance of about half a mile, conforming, of course, to the slope of the roadbed; the said ditch resulting in diverting the surface water which naturally reaches the southwest side of the right of way from its old-time course to the northeast, so that it now flows northwest through a cut to a lower level on the railroad lands. When it reaches this level, it spreads out, and some of it reaches the plaintiff's

land, bearing sand and gravel. The proper construction of the roadbed and ditch for railway purposes is not attacked. The right to change the grade of the roadbed must be conceded. The duty to protect the roadbed from inundation by surface water is apparent. If in the exercise of this undoubted right and the performance of this plain duty in a proper manner incidental injury happens to another, it must be regarded as one of the numerous curtailments of natural privileges resulting from the complex relations of civilized life, and not an injury for which the law can provide a remedy."

The above cases indicate that there would be no liability upon the part of the state in an ordinary action for damages as a result of the changes made in the drainage system near Arena.

Due to the fact that a portion of the land owned by A, B and C has been covered by a layer of sand, some doubt arose as to whether or not the situation did not present a proper case for the institution of condemnation proceedings. It is our opinion, however, that the situation does not present a proper case for this type of procedure.

In the case of *Waters v. The Village of Bay View*, 61 Wis. 642, the village of Bay View permitted a culvert to become obstructed and surface water was thereby caused to flow back and injured the lands of the plaintiff. The court held, pp. 643-645:

"The lands of the plaintiff are not adjoining Potter avenue, and were not directly affected by the improvement of that street, so as to entitle the plaintiff to compensation for lands taken for public use, but were so remote as to make the injury merely consequential from the back-flow of surface water so caused. It has been too often decided by this court that such an injury is *damnum absque injuria* to be an open question, and such are the decisions elsewhere, where the common law rule prevails. 'According to that rule, no natural easement or servitude exists in favor of the owner of the higher ground for the flow of mere surface water over the lower estate, but the owner of the latter may detain or divert the same without rendering himself liable in damages therefor.' \* \* \*.

"\* \* \* The injury is caused by the occasional rains and melting snows, which create temporary surface water, and the plaintiff's land is in no sense taken for public use. This is the vital and only question in this case, and, as we have seen, the injury by the back-flow of mere surface

water, however caused, by the reasonable improvement or use of the land below by the owner thereof, is without remedy. \* \* \*.”

In *Harvie v. Caledonia*, 161 Wis. 314, the court stated, pp. 319-320:

“The town, with certain limitations, had the right to discharge surface water on plaintiff’s land from its roadway. By virtue of such an act the plaintiffs suffered no legal wrong for which they could demand compensation in a condemnation proceeding. *Waters v. Bay View, supra*; *Champion v. Crandon, supra*. Railroad companies might exercise the same right without liability for compensation. *Hanlin v. C. & N. W. R. Co.* 61 Wis. 515, 21 N. W. 623; *Johnson v. C., St. P., M. & O. R. Co.* 80 Wis. 641, 644, 50 N. W. 771; *O’Connor v. F. du L., A. & P. R. Co.* 52 Wis. 526, 9 N. W. 287; *Clauson v. C. & N. W. R. Co.* 106 Wis. 308, 82 N. W. 146. \* \* \*

“Occasions may arise where it is essential that a town should permanently discharge surface water on adjacent land. The legislature at an early day provided for this situation by giving ample power to do this very thing on the reasonable conditions that the resulting damage be paid for.”

The deposit of the sand upon the property of A, B and C was incidental to the deposition of the surface water. If no liability results from the disposal of surface water which might have the effect of destroying the usefulness of the property, there would appear to be no reason why liability should exist if the usufruct is taken by virtue of sand instead of water.

The last paragraph of the quotation from *Harvie v. Caledonia* quoted above referred to secs. 1236 and 1237 of the statutes which now appear as secs. 81.06 and 81.07. These sections provide that the superintendent of highways may enter upon lands near any highway in his town and construct drains, and that the land owner may have compensation for the same. These sections are found in the chapter relating to the construction and repair of town highways, and the superintendent of highways therein referred to is the individual in the town who has charge of highway maintenance. This section would have no application to the state in the present case and would be inapplicable in any event due to the fact that the ditch was constructed on

property which was obtained by conveyance for highway purposes.

It is deemed advisable to call attention to sec. 88.38, Stats., which provides as follows:

“(1) Whenever any county, town, city, village or railway company shall have heretofore constructed and now maintains or hereafter shall construct and maintain any public highway or road grade through, over and across any marsh, lowland or other natural depression over or through which surface water naturally flows and percolates, and the stopping of the said flow and percolation of said water by said highway or road grade causes any crop or land to be flooded, watersoaked or otherwise damaged, such county, town, city, village or railway company shall construct, provide and at all times maintain a sufficient ditch or ditches, culverts or other outlets to allow the free and unobstructed flow and percolation of said water from said lands, and to prevent said lands from becoming flooded, watersoaked or otherwise damaged by said water. Provided, however, that the foregoing shall not apply to public highways or road grades now or hereafter used to hold and retain water for cranberry purposes.

“(2) Any county, town, city, village, or railway company which shall fail to provide such necessary ditches or culverts or other outlets shall be liable for all damages caused by reason of such failure or neglect.”

It is to be noted that the state is not included among those liable for damages where the construction or maintenance of a highway has caused the flooding of private land. The rule, of course, is that general statutes are not to be given such construction as will operate to the detriment of the state. It would appear further that the state was intentionally omitted from this section, inasmuch as the original statute referred to towns, cities, villages and railways. The legislature later included the counties but did not include the state. The improvement made on Project No. 410-B was undertaken and completed by the state. Under sec. 84.07 it is the state rather than any subdivision thereof which is responsible for the maintenance of the state trunk highway system. There would, therefore, be no liability upon the state under sec. 88.38.

JEF

*Taxation—Tax Sales—Tax Deeds*—In order to secure tax deed which will cut off interest of mortgagee of record and owner-occupant of land in question holder of tax certificates must give three months' notice to owner-occupant of land and mortgagee.

May 10, 1934.

F. W. HORNE,  
*District Attorney,*  
Crandon, Wisconsin.

You have submitted to this department a question of rights arising out of a tax deed. You ask whether the purchaser of a quit claim deed from a party holding a tax title can evict the owner-occupant without notice having been given to the mortgagee of the property.

Sec. 75.12, subsec. (1), Stats., provides:

"Whenever any lot or tract of land which has been or shall hereafter be sold for taxes shall have been in actual occupancy or possession of any person, other than the owner and holder of the certificate of such tax sale or some person holding under him, for the period of thirty days or more, at any time within the six months immediately preceding the time when the tax deed upon such sale shall be applied for, or whenever the records in the office of the register of deeds show that any lot or tract of land is incumbered by an unsatisfied mortgage and show the post-office address of the mortgagee or if the same has been assigned, the post-office address of the assignee, such deed shall not be issued unless a written notice shall have been served upon the owner or upon such occupant and upon such mortgagee or if said mortgage has been assigned then upon such assignee by the holder of such certificate at least three months prior thereto, stating that he is the owner of such certificate and setting forth the date thereof, and giving notice that after the expiration of three months from the service thereof such deed will be applied for. \* \* \*"

If the holder of the tax certificates gave the notice provided for in this section to the mortgagee and to the owner-occupant of the land he can convey by quitclaim deed title which will permit him to evict the owner-occupant and to cancel the interest of the mortgagee in the property so conveyed by the county. See also XXIII Op. Atty. Gen. 165.

*Education—Teachers' Certificates*—Second grade teachers' certificate may not be renewed second or subsequent time on same conditions as stated in sec. 39.07, subsec. (3), Stats.

May 10, 1934.

JOHN W. KELLEY,  
*District Attorney,*  
Rhineland, Wisconsin.

In your communication of May 1 you state that the county superintendent of schools of Oneida county has requested that you obtain from this office an official opinion with regard to the following matter:

Can a second grade teacher certificate be renewed a second or subsequent time on the same conditions as stated in sec. 39.07, subsec. (3), Stats.?

Sec. 39.07, subsec. (3), provides:

“A second grade certificate may be renewed (prior to one year after its expiration), provided the holder shall have taught successfully two years under it and shall have attended a school for teachers six weeks and there received credit in two subjects required for a first grade certificate or shall pass an examination in two of the additional subjects required for a first grade certificate and shall have completed, each year during the life of the certificate, the work of the state teachers' reading circle.”

Your question must be answered in the negative. The renewal contemplated is for a certificate that was originally granted and not a renewed certificate. There is no statutory authority, in my opinion, which would authorize a continuous renewal of the certificate. I am informed that such has been the practice in this state and the ruling of the state superintendent under this statute.

JEF

*Elections—Absent Voting*—Under sec. 11.57, Stats., clerk may not deliver ballot personally to home of sick voter.

Ballot delivered personally to home of sick voter is not void and may be counted at election.

May 10, 1934.

WENDELL MCHENRY,  
*District Attorney,*  
Waupaca, Wisconsin.

You refer to the provisions of sec. 11.57, Stats., which applies to absent and sick voters. You then ask the following questions:

“1. Is it permissible for the clerk to deliver the ballot personally at the home of the voter instead of mailing it?”

The answer is, No. This question was answered by the attorney general in an opinion dated June 6, 1931 (XX Op. Atty. Gen. 390), wherein it was ruled that the application for an absent voting ballot must be made at the office of the official and must not be taken by such official to the disabled voter but must be delivered to the applicant at the office of such official. The former opinion on this question is affirmed.

“2. If the first question is answered in the negative then would such a ballot if so obtained be void so that it could not be counted at the election?”

The answer to your second question is, No. The penalties for violation of secs. 11.54 to 11.67, inclusive are found in sec. 11.67, which makes such violations a misdemeanor punishable either by fine or imprisonment. There is no provision in the statutes that a ballot irregularly obtained shall be void so as not to be counted at the election.  
JEF

*Trade Regulation—Trading Stamps*—Merchant who gives stamps with sales equivalent to amount of purchase and redeemable at one-tenth of a mill on each dollar besides privilege of using same on bids for prizes given to highest bidder violates trading stamp law.

May 10, 1934.

WENDELL MCHENRY,  
*District Attorney,*  
Waupaca, Wisconsin.

You say that complaint has been made to you of the action of certain merchants in the county giving stamps with each purchase as being in violation of the trading stamp law or the lottery law. The facts are as follows:

“The merchant gives stamps with each purchase equivalent to the amount of the purchase and redeemable at one-tenth of a mill on each dollar. \* \* \* In addition to the right of the purchaser to have these stamps redeemed he may use them to bid upon prizes set up by the merchant each month and the highest bidder receiving the prize.  
\* \* \*”

These coupons are not redeemable only in cash. They are of value in securing the prizes which the merchant offers. They are therefore a thing of value within contemplation of sec. 134.01, Stats., and a violation of the trading stamp law.

JEF

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*Intoxicating Liquors*—Lessee of hotel bar room located in city may obtain both Class A and Class B liquor licenses for same premises.

May 10, 1934.

L. F. SCHMITT,  
*District Attorney,*  
Merrill, Wisconsin.

You desire to be informed as to “whether or not the holder of a Class B retail liquor license may also obtain

a Class A retail liquor license where it is the lessee of a hotel bar room.”

This office held in XXIII Op. Atty. Gen. 191, 201, that one person can hold both a Class A and Class B retail liquor license on separate premises. The law does not forbid one person to hold both licenses.

Sec. 176.05 subsec. (3), Wis. Stats., provides in part:

“\* \* \* A retail ‘Class A’ and ‘Class B’ license shall not both be issued for the same premises or connecting premises except in the case of hotels as defined in paragraph (e) of subsection (2) of section 176.20.”

A retail Class A and Class B liquor license cannot both be issued for the same premises except as indicated in the above quoted section. In XXIII Op. Atty. Gen. 191, 202–203, we held that a retail Class A and Class B liquor license can both be issued for hotel premises located in cities of the first, second, third or fourth class, but can not be issued for hotel premises located in towns or villages.

The fact that the individual here interested is the lessee of the premises rather than the owner of the same is not material. If the premises are located in a hotel in a city, both a Class A and Class B liquor license may be issued to him for the same premises.

JEF

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*Public Officers*—Deputy clerk performing duties of county clerk during vacancy in clerk’s office is entitled only to deputy’s salary.

May 10, 1934.

EDWARD T. VINOPAL, JR.,  
*District Attorney,*  
Mauston, Wisconsin.

The county clerk of your county has resigned and his resignation has been accepted. No one has been appointed to take his office. You wish to know whether the deputy clerk is entitled to receive the salary of the clerk.

The answer is, No. The deputy clerk, since he has not been appointed to fill the office of the county clerk, is entitled only to his salary as deputy clerk.

Sec. 59.16, Stats., provides:

“(1) 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.”

Since the above statute makes it the duty of the deputy clerk, in case of a vacancy in the clerk's office, to perform all the duties of the clerk, he is not entitled to any additional compensation nor to the clerk's salary for doing such work. Such services are a part of his work as a deputy and while performing them he is entitled only to a deputy's salary. However, were he definitely appointed under sec. 59.16, subsec. (3), to fill the clerk's office, he would cease to be a deputy and would be performing the clerk's duties as county clerk and would, of course, be entitled to the clerk's salary.

JEF

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*Indigent, Insane, etc.—Emergency Relief*—Under relief measures set up by ch. 363, secs. 5 and 6, Laws 1933, no duties are imposed upon town chairman or district attorney to administer relief to indigents, all other modes of relief being superseded by application of ch. 363.

May 10, 1934.

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

You have submitted to this department a question relative to the duties of the town chairman and the district

attorney under the federal relief system adopted by Shawano county in the situation where the industrial commission is charged with not furnishing sufficient food to meet the needs of indigent families.

Ch. 363, Laws 1933, sets up machinery for the administration of relief to be given municipalities or other local governmental units. This is provided by secs. 5 and 6 of said chapter.

By virtue of the provisions of sec. 5 the local relief agents are forced to comply with the provisions of sec. 6. If this is not done the industrial commission need not furnish relief to said local agencies. Under the provisions of sec. 6, the industrial commission has the power and the duty to set up the machinery necessary to carry into effect the relief which it shall administer, and unless the industrial commission delegates duties to the district attorney or the town chairman, by virtue of the powers conferred upon it by said sec. 6, neither the town chairman nor the district attorney has any duties or powers to take care of the poor.

JEF

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*Taxation—Extension of Time for Payment of Taxes—*  
County board does not have authority to waive payment of interest and penalties on taxes under either provisions of general law or provisions of ch. 8, Laws 1933, Special Session.

May 10, 1934.

ALLEN C. WITTKOPF,  
*District Attorney,*  
Florence, Wisconsin.

You have requested of this department an opinion concerning the power of a county board under ch. 8, Laws Special Session 1933. You desire to know whether or not the county board has the authority to waive the interest and penalties on all taxes payable this year up to June 1, whether affidavits have been made or not, in view of the

fact that certain towns have failed to provide for an extension of the time for payment of taxes. You also desire to know whether the county board, by resolution, may waive the interest and penalties on all taxes payable this year up to June 1, whether the affidavits have been made or not in those towns which did provide for an extension.

Ch. 8, Laws 1933, Special Session, gives authority to cities, villages, and towns to extend the time for the payment of taxes on real estate assessed in the year 1933 up to and including June 1, 1934. No authority is given by that chapter to the county boards to extend the time for payment of taxes so assessed.

We have previously held that the county board has no authority to waive the payment of interest and penalties provided for by statute in case of unpaid and delinquent taxes. XXI Op. Atty. Gen. 745. Chapter 8, Laws 1933, Special Session, obviously does not give to the county board the authority which we have heretofore denied to the county boards. We therefore hold that the county board has no authority to waive the interest and penalties on taxes payable this year up to June 1, regardless of whether the towns have or have not provided for an extension of the payment of taxes by resolution of the town board.

JEF

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*Taxation—Special Assessments*—Local treasurer may accept payment of general tax on property when special assessment is not paid; must return special assessment to county treasurer as delinquent.

May 12, 1934.

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

You wish to know whether, in case there is both a general and a special assessment tax levied against certain property, the local treasurer may accept payment of the general tax and return the special assessment tax to the county treasurer as delinquent.

The answer is that such procedure is permissible. The general tax and the special assessment tax are two distinct items. If the general tax on certain property is paid and the special assessment tax is not paid, the latter is returned to the county treasurer as delinquent; and the land may be sold just as it is for delinquency in general taxes. Tax certificates are issued when land is sold for special assessments as well as when it is sold for general taxes.

Sec. 62.21 subsec. (1), Stats., provides that special assessments in cities may be paid in annual instalments. Sec. 62.21, subsec. (1) (d) reads:

"If any instalment so entered in the tax roll shall not be paid to the city treasurer with the other taxes it [instalment of special assessment] 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."

The above statute shows that the legislature contemplated that the general property tax might be paid and the special assessment tax unpaid.

Under sec. 61.41, dealing with special assessments in villages, and sec. 60.29, subsec. (26), dealing with special assessments in towns, the same separability of the two kinds of taxes is contemplated.

Not only is there no statutory prohibition of the local treasurers receiving the general tax and returning the special assessment tax as delinquent but, as has been demonstrated, there is statutory direction as to what shall be done under such circumstances. It has long been the practice for local treasurers to accept payment of the general taxes in cases in which the special assessment tax is not paid and must be returned as delinquent.

JEF

*Appropriations and Expenditures—Claims—Public Officers—County Board Chairman—Federal C. W. A. Committee—County board has no authority to allow claim for services rendered on county administrative committee of C. W. A.*

County may recover money illegally paid on such claim in action for money had and received.

May 12, 1934.

ROSCOE GRIMM,  
*District Attorney,*  
Janesville, Wisconsin.

The Civil Works Administration committee of Rock county was composed of the chairman of the county board, the county director of outdoor poor relief and the city manager of Janesville. The chairman of the county board presented a claim to the county board for administrative work on this committee. You wish to know whether it was proper for the county board to allow this claim.

Counties 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." 1 Dillon Mun. Corp. sec. 25. This language is quoted with approval in *Frederick v. Douglas County*, 96 Wis. 411, 416, 71 N. W. 798. In *Balch v. Beach*, 119 Wis. 77, 84, 95 N. W. 132, it was held that a person dealing with a municipal corporation in a matter beyond its corporate power (as a contract or debt beyond the constitutional limitation) can have no relief in any way, even though his property was used for legitimate purposes.

There is no authorization in the statutes for the county board to allow such a claim as that preferred by the county chairman as a member of this administrative committee. Hence it was wrong for the county to allow and pay the claim.

The above reasoning would apply to the claim of any member of the committee; but in the case of the claim

preferred by the county chairman, there is an additional reason why it should be disallowed.

Sec. 66.11, subsec. (2), Wis. Stats., provides:

“No member of a town, village, or county board or city council shall, during the term for which he is elected, be eligible to any office or position which during such term has been created by, or the selection to which is vested in such board or council.”

You also wish to know: If the claim was improperly allowed (which it was), what steps may be taken to recover the amount illegally paid to the chairman of the county board?

An action may be brought by the county against the chairman for money had and received. *Douglas County v. Sommer*, 120 Wis. 424, 98 N. W. 249.

JEF

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*Taxation—Tax Collection*—Sec. 74.03, Stats., effective October 1, 1935, regarding payment of taxes in instalments, provides for collection of interest at rate of twelve per cent per annum.

Secs. 74.32 and 74.39 apply to usual payment of taxes in one lump sum and provide for interest on such delinquent taxes at rate of eight per cent per annum.

*Public Officers—County Park Commission*—Member of county park commission is entitled to expenses incurred in course of his duties by virtue of provisions of sec. 27.06, Stats.

May 15, 1934.

CHAS. K. BONG,  
Assistant District Attorney,  
Green Bay, Wisconsin.

You have submitted to this department a question concerning the interest that is payable on delinquent taxes, having in mind secs. 74.03, subsec. (4), 74.32 and 74.39, Stats.

Secs. 74.32 and 74.39, Stats., provide for an interest of 8% per annum, Sec. 74.03 (4), provides for an interest rate of 12% per annum. These sections would be in conflict were it not for the fact that sec. 74.03 applies only to the *semi*-annual payment of taxes, which is regulated solely by said section. Sec. 74.03, (1).

Secs. 74.32 and 74.39 apply to the regular collection of taxes in one instalment. There is, therefore, no conflict between these sections.

It is to be noted, however, that sec. 74.03 does not take effect until October 1, 1935.

You have also submitted a question as to the mileage or expense which a member of the county park commission, organized under sec. 27.02, Stats., is entitled to receive.

The answer to this question is to be found in sec. 27.06, Stats., which reads in part, as follows:

“\* \* \* The entire amount of such special tax shall be collected as other taxes are collected and paid into the county treasury as a separate and distinct fund, to be paid out only upon the order of the county park commission for the purchase of land and the payment of expenses incurred in carrying on the work of the commission.  
\* \* \*”

JEF

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*Trade Regulation—Grain and Warehouse Commission—* Standards, qualities, grades for grains, seed and other agricultural products set up by secretary of agriculture and adopted by state must, by virtue of secs. 126.38 and 126.05, subsec. (2), Stats., be published in accordance with sec. 126.38 by state grain and warehouse commission as well as standards, grades and qualities set up solely by action of commission.

May 15, 1934.

GRAIN & WAREHOUSE COMMISSION,  
Superior, Wisconsin.  
Attention C. W. Peacock, *Secretary*.

You have requested an opinion from this department relative to your duties under the provisions of ch. 126,

Stats., and particularly under sec. 126.38, providing for the publication in some daily newspaper in the city of Superior or in any other city in which a public warehouse is located, of the grades for all kinds of grain bought, sold or handled by public warehouses which shall be established by your commission.

Sec. 126.05, subsec. (2) Stats., contains a proviso which abrogates your duties in so far as the secretary of agriculture of the United States has previously established grades for various kinds of grain. That proviso further sets up that whenever the secretary of agriculture of the United States has established grades, weights and measures or standards of quality and conditions of any grain, seed and other agriculture products under the United States grain standards act, such grades, standards of quality and conditions, weights and measures shall become the grades, standards of quality and conditions, weights and measures of this state.

You desire to know whether you would have to publish the grades, standards of quality and conditions, etc., set up by the secretary of agriculture.

It is the opinion of this department that sec. 126.38 contemplates that the various grain dealers in the state of Wisconsin shall have one clearing house which shall apprise them of the standards of weights and measures, grades and qualities, etc., set up by your commission. Since the standards and grades set up by the secretary of agriculture become by virtue of law the standards of your commission, they should likewise be published by your commission in order that the trade may have full and complete information as to the standards and grades which your commission is to maintain in this state.

JEF

*Criminal Law—Prisons—Prison Farms*—State farm operated by state prison is included in term "prison \* \* \* or the dependencies thereof" in contemplation of sec. 346.43, Stats.

May 15, 1934.

JOHN W. KELLEY,  
*District Attorney,*  
Rhineland, Wisconsin.

You state that one A was arrested and charged with receiving from various convicts of Spudland State Farm, a farm operated by the Wisconsin state prison, various articles of merchandise, including coffee and tobacco, in violation of sec. 346.43, Stats.

The question has been raised whether this is part of the state prison so as to come under the said section of the statute. Sec. 346.43 provides:

"Any officer or other person who shall deliver or procure to be delivered or shall have in his possession with intent to deliver to any convict confined in the state prison or the Wisconsin state reformatory, or shall deposit or conceal in or about said prison or reformatory, or the dependencies thereof, or in any carriage or other vehicle going into the premises belonging to said prison or reformatory, any article or thing whatever, with intent that any convict confined therein shall obtain or receive the same, or who shall receive from any convict any article or thing whatever with intent to convey the same out of said prison or reformatory, contrary to the rules or regulations and without the knowledge or permission of the warden or superintendent thereof, shall be punished by imprisonment in said state prison or reformatory not more than two years or by fine not exceeding five hundred dollars."

Sec. 56.03 provides:

"The warden of the state prison may employ the convicts outside the prison yard in quarrying or getting stone from and cultivating the prison farm, or in doing any work necessary to be done in the prosecution of the regular business of the institution; and also away from the prison grounds in the construction of buildings being erected by the state. In all such cases the warden shall detail such force from the prison police as he shall deem necessary to watch and guard such convicts; and any such convict

who escapes shall be deemed as having escaped from the prison proper."

We are of the opinion that the charge may properly be brought under sec. 346.43. The prisoner from whom the goods was obtained was still under the custody of the officer and on the farm operated by the prison. In contemplation of law this comes within the term "prison \* \* \* or the dependencies thereof."

JEF

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*Public Officers—Soldiers' and Sailors' Relief Commission*  
—Pay of members of soldiers' and sailors' relief commission, other than its secretary, is limited to pay which members of county board of supervisors can receive.

Members of soldiers' and sailors' relief commission are paid out of funds appropriated for soldiers' and sailors' relief.

Members of soldiers' and sailors' relief commission should present itemized statements to county board of supervisors for their pay and expenses.

May 15, 1934.

R. C. LAUS,  
*District Attorney,*  
Oshkosh, Wisconsin.

You have submitted to this department several questions concerning the administration of the soldiers' and sailors' relief provided for in secs. 45.10 to 45.15, inclusive, Stats. Your questions will be answered *seriatim*.

The first and second questions concern the pay which the commissioners of the soldiers' and sailors' relief commission are entitled to receive.

Sec. 45.15 provides that the commissioners shall receive the same rate of compensation as is fixed by law for the compensation of the members of the county board. This provision, therefore, limits the pay of a commissioner, other than a secretary of the soldiers' and sailors' relief com-

mission, to the pay which a member of the county board can receive.

Your third question is: From what sources are the members of the soldiers' and sailors' relief commission to be paid?

Sec. 45.10 provides for the levying of a tax sufficient to carry out the purposes of this section. The establishment and payment of members of a commission being necessary to carry out the purposes of sec. 45.10 and being provided for in the statutes, the members are to be paid out of the funds raised for the soldiers' and sailors' relief. See also XXI Op. Atty. Gen. 1035.

Your fourth question is: Can the members of the soldiers' and sailors relief commission draw their pay monthly, or must they submit bills to be passed upon at a regular session of the county board of supervisors

The answer to this question is to be found in sec. 45.15 which reads as follows:

"The county board shall allow the members of the commission the same rate of compensation as is fixed by law for their own compensation and also the amount of their actual expenses incurred in the performance of their duties, on the presentation of an itemized statement thereof;  
\* \* \*"

It is, therefore, necessary for the members of the soldiers' and sailors' relief commission to submit itemized statements to the county board.

JEF

*Courts—Quo Warranto—Public Officers—Malfeasance—Town Attorney—Town Board—Town Supervisor—Defaulter* is ineligible to hold office but may be de facto officer.

Malfeasance in previous term is not ground for removal in present term.

Quo warranto proceeding should be instituted by taxpayer.

Town attorney is not public officer.

Town board should proceed to recover money paid out illegally.

May 17, 1934.

OLIVER L. O'BOYLE, *Corporation Counsel,*  
*Office of District Attorney,*  
Milwaukee, Wisconsin.

In your letter of April 20 you state that the salary of a town supervisor is set at one hundred dollars per month but that in addition to this he received during his term travel expense and incidentals for attending conventions at Madison and Washington in the sum of about seven hundred dollars in excess of his salary, plus four dollars per month telephone expense, which payments were made during a previous term of office.

You make the following inquiries, which are stated together with our answers *seriatim* for purposes of clarity and convenience.

1. Is he eligible now to hold office or is he a defaulter and therefore ineligible under art. XIII, sec. 3, Wis. Const.?

He is a defaulter and now ineligible to hold office under the above constitutional provision, which provides in part:

“\* \* \* no person being a defaulter to the United States or to this state, or to any county or town therein,  
\* \* \* shall be eligible to any office of trust, profit or honor in this state.”

See *State ex rel. Shea v. Evanson*, 159 Wis. 623.

“A public official's right to compensation is purely statutory; what the statute gives, he receives, and no more.  
\* \* \* Expenses are not allowed to town supervisors by any statute.” *State v. Cleveland*, 161 Wis. 457, 459.

See also *Outagamie County v. Zuehlke*, 165 Wis. 32; *Henry v. Dolen*, 186 Wis. 622.

See also XVI Op. Atty. Gen. 380 for ruling to the effect that one who is a defaulter in the office of county treasurer is ineligible to be elected to office of supervisor under art. XIII, sec. 3, Wis. Const.

2. Is he a de facto officer?

Yes.

"Persons having color of title may be regarded as de facto officers, even though legally they are not eligible for the position. \* \* \*" 46 Corpus Juris 1056.

3. Was he guilty of malfeasance or official misconduct?

Yes. Such offenses appear to have been considered by the legislature as grave. They constitute malfeasance in office. *Henry v. Dolen*, *supra*. *State v. Cleveland*, *supra*; *Ryan v. Olson*, 183 Wis. 290.

4. Does malfeasance in a previous term constitute grounds for removal during the present term under sec. 17.13, Stats.?

No.

"Offenses committed during a previous term are generally held not to furnish cause for removal, \* \* \*." 46 Corpus Juris 986. See also *State v. Watertown*, 9 Wis. 254.

5. If ineligible, may the town board or a member institute *quo warranto* proceedings or must a taxpayer do this?

It would seem, under ch. 294, Stats., that this action should be brought by a private party rather than by the town board, no provisions having been made for the institution of such a proceeding by an official body. See XX Op. Atty. Gen. 400 and XXI Op. Atty. Gen. 622 with reference to taxpayer's actions in such cases.

6. Is a town attorney, appointed under sec. 60.29 subsec. (3), Stats., a public officer within the meaning of the state constitution?

No. That section authorizes the town board to procure legal advice when needed in the conduct of town affairs and to employ counsel for that purpose. Such counsel does not take an oath of office, execute a bond, or usually

have a fixed tenure of office. See XIX Op. Atty. Gen. 241 for an extended discussion of the distinction between an officer and an employee. In the light of that discussion a town attorney should be considered an employee.

7. Is the town board or a member, knowing of moneys illegally paid out during a previous term, bound under sec. 60.29, subsec. (5), to proceed to recover such amounts?

Yes. Under the statute mentioned it appears to be the specific duty of the town board to proceed to collect outstanding claims in favor of the town. Such a duty would also seem to be apparent from the letter of the official oath.  
JEF

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*Taxation—Tax Collection—Tax Sales*—Under secs. 75.01 and 74.32, Stats., county treasurer is not authorized to determine and apportion taxes between purchasers of machinery (which is attached to realty) and purchasers of land.

May 22, 1934.

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

You request the opinion of this department upon the following statement of facts:

The tax certificates of a manufacturing plant assessed as an entirety have been sold for delinquent taxes. The court, on foreclosure of a mortgage covering the plant, has ordered the plant sold as a whole and the machinery (which is attached to the land and assessed as part of the realty) sold separately from the land and buildings.

The county treasurer has been asked to apportion the taxes between the purchasers of the machinery and the purchasers of the real estate and buildings under the provisions of secs. 75.01 and 74.32, Stats.

You ask:

"Is it proper \* \* \* [under 75.01 and 74.32] for the county treasurer to apportion the taxes for the benefit

of purchasers of the machinery and the purchasers of the land on foreclosure of the mortgage lien in view of the fact that the mortgage is a lien subsequent to the tax lien and in view of the fact that the plant, as a whole, with the machinery can be sold as an entirety for an amount in excess of the tax lien?"

It is the opinion of this department that, under the above stated facts, the county treasurer is not authorized under the provisions of secs. 75.01 and 74.32, Stats., to apportion the taxes between the purchasers of the machinery and the purchasers of the real estate.

It is manifest that secs. 75.01 and 74.32 provide only for a division of the land into parcels or parts and not for a division or separation of the machinery or other fixtures which have been assessed as real estate from the land itself. The opinion of the attorney general in October 13, 1933, XXII Op. Atty. Gen. 837, holding that the proportion of delinquent taxes chargeable to a part or parcel of land assessed as a whole and owned in severalty, may be ascertained and discharged in accordance with the method provided in sec. 74.32, has no application to the facts stated in your request. The situation referred to in that opinion contemplated a determination of taxes on different parcels or parts of real estate and did not contemplate a severance of machinery or other fixtures from land and the apportioning of taxes thereon.

You are therefore advised that, upon the foregoing facts, secs. 75.01 and 74.32 have no application and the county treasurer is not authorized to determine and apportion real estate taxes between the purchasers of machinery and the purchasers of lands.

JEF

*Public Officers—Justice of Peace*—Police justice in city of third class has exclusive jurisdiction of violations of city ordinance; justice of peace in said city is therefore without jurisdiction of such offenses.

May 23, 1934.

HAROLD M. DAKIN,  
*District Attorney,*  
Watertown, Wisconsin.

In your communication of May 10 you state that Watertown has no police justice. You inquire whether the justice of the peace of the city of Watertown, which is now a city of the third class, would have jurisdiction of offenses against ordinances of the city.

Sec. 62.24, subsec. (2), par. (a), Stats., provides:

“The police justice shall have the jurisdiction of a justice of the peace and exclusive jurisdiction of offenses against ordinances of the city.”

Under this provision the police justices have exclusive jurisdiction of offenses against the ordinances of the city and it necessarily follows that justices of the peace have no such jurisdiction. The jurisdiction of offenses arising out of city ordinances does not cover criminal offenses and any statute that provides for jurisdiction of criminal offenses does not include violations of city ordinances, as offenses against city ordinances are not classified as crimes. The opinion rendered to you in XXII Op. Atty. Gen. 1030 may be considered by you in connection with the answer given.

JEF

*Loans from Trust Funds*—Money borrowed from trust fund may be used only for purpose for which it was borrowed, under sec. 25.10, Stats., unless consent is obtained from commissioners of public lands.

May 23, 1934.

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

In your communication of May 4 you state that on December 1 the C. W. A. furnished labor and a local lumber dealer furnished the materials in the construction of what is known as a community building. The plans and specifications for this building indicate that it might be used for opera or theatre purposes as well as for a community building. It is now about half completed and the village of Wautoma desires to take this building over for a theatre and community building and voted to borrow \$20,000 from the state trust funds. The application was made and the money has been obtained. A part of the resolution follows:

“Now, Therefore Resolved, That we, the trustees of the village of Wautoma, duly assembled in meeting according to law, do hereby approve and authorize application to be made to said commissioners by the president and clerk of the village of Wautoma in Waushara county, for a loan of \$20,000 dollars to this village for the purpose of the payment of the purchase of site, materials and equipment for the completion of a community building, started by the C. W. A.”

You inquire whether a part of this money may be used for nonskilled labor in the completion of this building, and, if the resolution is not sufficiently complete for that purpose, whether the village board can authorize the use of some of this money for nonskilled labor.

Sec. 25.10, Stats., provides:

“No money obtained by any school district, school board, town, village, city or county by such loan shall be applied to or paid out for any purpose except that specified in the application therefor without the consent of said commissioners.”

This statute, for all practical purposes, answers your question. The money can be used under this statute only for the purpose for which it was borrowed but, by obtaining the consent of the commissioners of the public lands, you may be able to use it for hiring labor in the construction of the building for which the material is furnished.

JEF

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*Fish and Game—Muskrats*—Setting trap in middle of almost demolished muskrat house is violation of sec. 29.24, Stats.

May 23, 1934.

JAMES L. MCGINNIS,  
*District Attorney,*  
Amery, Wisconsin.

In your letter of May 7 you refer to sec. 29.24, Stats., and XVI Op. Atty. Gen. 35, where a definition was given as to what constituted muskrat houses within the meaning of the statutes. You state that your game warden recently arrested a man, charging him with violation of sec. 29.24, Stats., and it appears from the evidence that the defendant's traps had been found set in the middle of an area which had once been a muskrat house but at the time the traps were found the house had fallen down, or had been knocked down, and the material of which the house had been constructed was scattered around the point where the trap was set in a roughly circular manner. There was no evidence indicating that the defendant had destroyed or knocked down the house. The game warden contended that this was a violation of sec. 29.24 and it was your opinion that it was not such a violation and consequently the case was dismissed.

You state that the question now arises as to whether or not in order to constitute a violation of sec. 29.24 there must be over the resting place, or feeding place, of the muskrat an enclosure or covering into which the trap or

traps must be inserted. You inquire whether the individual who places his traps in the middle of the almost demolished muskrat house violates sec. 29.24.

Sec. 29.24, provides:

“(1) No person shall hunt any mink or muskrat with the aid of any spear, gun, or dog, disturb or molest any raccoon or skunk den or tree for the purpose of capturing the raccoons or skunks, or any muskrat house, beaver house or beaver dam; or set any trap or traps at any time within five hundred feet of any beaver house or beaver dam.”

“(1a) No person shall place on the ice of any of the waters of this state any artificial muskrat house for the purpose of taking, catching, or killing muskrat, or place or set therein any trap or traps of any kind which might take, catch, or kill muskrat or any other protected fur-bearing animal.”

Your question is one of fact rather than law. There is no specific provision in the statutes prohibiting the setting of a trap in a muskrat house. There is a specific provision against disturbing or molesting a muskrat house. To set a trap in a place where muskrats have erected their houses disturbs said muskrats' houses. I understand it is a fact that even after a muskrat house has fallen down or caved in the muskrats will still use it when eating their food, in that they stand upon the elevated places while eating. This certainly molests the muskrats in their houses. No traps should be set in a muskrat house during the year succeeding the building thereof, so long as the muskrats may use it for any purpose.

You are advised that it is our opinion that the person who places his traps in the middle of the almost demolished muskrat house still violates sec. 29.24.

JEF

*Education—Vocational Education—Public Officers—Vocational School Board*—Board of vocational education has no power to purchase site or building or erect building for vocational school purposes in excess of amount of money it can raise by taxation during year unless city council issues bonds to provide funds.

May 24, 1934.

GEO. P. HAMBRECHT, *Director,*  
*Board of Vocational Education.*

You have submitted to this department a request which came to the state board of vocational education from Marinette, involving the powers and duties of the Marinette vocational school board. The letter states:

“The past few weeks the Marinette vocational board has been contemplating some help from the C. W. A. in the remodeling of a building owned by the bank. It now appears that the C. W. A. help may not be forthcoming and the board may decide to see if they can weather the storm alone. \* \* \* We refer specifically to such questions relative to the power of the vocational school board to purchase property to be remodeled for school use as:

“1. Can the vocational board obligate itself for the purchase of this property, and

“2. For the repayment of same over a period of years?

“The property is valued at \$6500.00 and improvements will be made for possibly \$15,000 or \$16,000. The terms of the contract contemplate the repayment of \$2000.00 and interest annually out of funds placed by the vocational board in their annual levy under the one and one-half mill law.

“3. Does the board of vocational education have the authority to obligate future boards to this commitment?

“4. Would a legal action to compel future boards of vocational education to pay amounts due on the contract be successful?”

Sec. 41.15, subsec. (7), Stats, provides:

“The board may purchase machinery, tools and supplies, and purchase or lease suitable grounds or buildings for the use of such schools; rent to others any portion of such buildings and grounds not presently needed for school purposes; and erect, improve or enlarge buildings for the use of said schools. Existing school buildings and equipment

shall be used as far as practicable. All conveyances, leases and contracts shall be in the name of the municipality.”

Sec. 41.15 (10) (a) provides:

“Said local board shall have exclusive control of the schools established by it and over all property, acquired for the use of said schools, except as otherwise provided by the statutes. Said board may sue and be sued in the name of the municipality, and may prosecute or defend all suits brought under this section.”

Sec. 41.16 provides:

“(1) The local board of vocational education shall annually report to the municipal clerk before September the amount of money required for the next fiscal year for the support of all the vocational schools, and for necessary school sites, buildings, fixtures and supplies.

“(2) The municipality shall levy and collect and the clerk shall spread on the roll a tax, which together with the other funds provided for the same purpose, shall be equal to the amount so required by said local board, but such tax shall not exceed one and one-half mills on the dollar.”

Sec. 41.16 (3) provides that the board may inform the council of the amount of funds needed to build a building and request the issuance of vocational school funds. If such bonds are issued,

“\* \* \* The comptroller of such city shall annually set aside, out of any taxes collected in such city for a vocational education fund, a sufficient sum to pay the principal and interest which may become due on any of said bonds in the year for which such taxes are collected; \* \* \*”

The limitation which the statutes place upon the board of education in the erection of a building or the maintaining of a vocational school is that the tax shall not exceed one and one-half mills on the dollar in any one year.

In *State ex rel. Hathaway v. Mirlach*, 174 Wis. 11, the court held that the act creating the vocational school vested the board with the discretion to determine what amount should be contributed for that purpose by local taxpayers, within the limits of one and one-half mills provided by statute. The court also held that the board was not required to report anything to the council besides the amount of money required to carry on the schools. There is nothing

in the statute or in the decisions of the court that requires any form of budget to be submitted nor any explanation of any item excepting only the certification of the amount necessary for the support of all the vocational schools and for necessary school sites, buildings, fixtures and supplies.

There is no express authority given in the statute for the vocational board to bind future vocational boards by contracts for the erection of buildings. These school boards change and the members of a new school board may be of a different opinion than those preceding. We are of the opinion that the vocational board cannot bind future boards. The property here in question or the amount involved far exceeds the statutory limit of one and one-half mills that can be raised in one year. The only way which the statute permits the vocational board to erect such building within the law is to co-operate with the council and request it to issue bonds. If the council does issue said bonds at the request of the vocational board and provides the funds for the erection of said building as provided in sec. 41.16 (3), then the site may be purchased, or buildings erected by said board within the limits of said funds. If the board can pay for the building through the taxes collected in one year within the limits of one and one-half mill taxes the board, of course, has the power to erect the building or part of the building, without the consent of the council.

We are of the opinion that future boards cannot be obligated by present boards. Boards cannot make a valid contract for the repayment of the money over a period of years. While the board has the power to sue and may be sued in the name of the municipality, and may prosecute or defend all such suits, still we believe no legal action could be maintained to compel future boards of vocational education to pay the amount due on contracts made in excess of the statutory limit. If it were held that the vocational school board could obligate the city and future vocational school boards in the purchase of school sites or buildings or the erection of school buildings without limit, then the present board might make it impossible for future boards to maintain the school, as the payment of the principle and interest each year might exceed the tax limit of one and

one-half mills. No such power to cripple state boards in the maintaining of schools is possible under our statute. See *Nevil v. Clifford*, 63 Wis. 435.

JEF

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*Athletic Commission—Boxing Exhibitions*—Sec. 169.01, subsec. (15b), Stats., is mandatory. All referees at boxing exhibitions held by licensed professional clubs must be bona fide residents of state.

May 26, 1934.

A. G. GOETTER,  
*State Athletic Commission,*  
Milwaukee, Wisconsin.

You state that the state athletic commission has received several requests from licensed professional clubs to grant them permission to allow Jack Dempsey to act as referee at boxing exhibitions conducted by their organizations.

You call our attention to sec. 169.01, subsec. (15b), Stats.:

“All referees shall be bona fide residents of the state.  
\* \* \*”

You ask whether the commission may grant these requests to allow Jack Dempsey to act as referee.

The answer is that the commission may not grant these requests. The only question which might arise in construing this statute is as to whether the word “shall” be interpreted as directory or mandatory. The word “shall” in the statute is generally construed to be mandatory. In this instances it should also be construed as mandatory.

Throughout the chapter governing the athletic commission a legislative intent to provide for a strict supervision by the state and to keep the conducting of boxing exhibitions and contests strictly under the control of residents of the state, who are more readily amenable to the laws of this state, is manifest. This can be seen in such provisions as that providing that no license shall be issued to any organization unless it has been incorporated in this state

and that providing that membership in these organizations shall be limited to persons who have been continuous residents in the state at least one year.

Therefore the athletic commission may not grant requests to have nonresidents act as referees in boxing exhibitions held by licensed professional clubs.

JEF

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*Real Estate—Descriptions—Taxation—Tax Collection—Tax Rolls*—Where descriptions on tax roll of town do not state section, town and range and no ditto marks are used, incomplete descriptions are so inadequate that such lands should be withheld from sale under sec. 74.39, Stats.

May 28, 1934.

CHAS. K. BONG,  
*Assistant District Attorney,*  
Green Bay, Wisconsin.

You ask whether the county treasurer, in advertising parcels of land for sale, is authorized to complete the descriptions by adding the section number, town and range to an incomplete description on the tax roll.

It is the opinion of this department that the county treasurer cannot correct erroneous descriptions in delinquent tax lists, and the remedy to follow in such cases is for the county treasurer to refuse to offer the land for sale and to report the same to the county board at the next session thereof with his reasons for withholding the same, as he is authorized to do under sec. 74.39, Stats., and the county board may then act under the provisions of sec. 75.25.

It is manifest from an examination of the copy of the page taken from the tax roll of the town of H. which you have furnished that the incomplete descriptions shown on such tax roll are so inadequate that the county board should withhold such lands from sale. The tax should be charged back to the town. See IV Op. Atty. Gen. 230.

JEF

*Public Officers—Alderman—Fire Department Member—Mayor*—Mayor and alderman may be members of volunteer fire department provided they do not receive compensation for their work in fire department.

May 28, 1934.

R. V. BROWN,  
*District Attorney,*  
Elkhorn, Wisconsin.

You have asked for an opinion as to whether the mayor and two aldermen of a city may be members of a volunteer fire department providing they do not accept any compensation for their services in the fire department.

Sec. 62.09, subsec. (2), par. (c), Stats., reads as follows:

“No person shall be eligible to any city office who directly or indirectly has any pecuniary interest in any contract for furnishing heat, light, water, power, or *other public service* to or for such city, or who is a stockholder in any corporation which has any such contract. Any such office shall become vacant upon the acquiring of any such interest by the person holding such office.”

Sec. 348.28, Stats., provides a penalty in the case of any officer, agent, or clerk of any city “\* \* \* 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 or real property or thing in action, or in any contract, proposal or bid in relation to the same, or in relation to any public service. \* \* \*”

In *Henry v. Dolen*, 186 Wis. 622, 203 N. W. 369, it was held that sec. 348.28 applies as well to personal services as to other services.

In XX Op. Atty. Gen. 834 it was held that an alderman of a city may not accept the position of bandmaster for the city high school and receive compensation therefor without violating the two sections quoted above.

You will note that secs. 62.09 (2) (c) and 348.28 both forbid having, reserving or acquiring a pecuniary interest. Since you state that the mayor and aldermen are not to

receive any compensation for their services in the fire department, they may legally retain their membership in the fire department while retaining their respective city offices.  
JEF

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*Corporations—Foreign Corporations—Municipal Corporations—Beer Licenses*—Out-of-state corporation may transport fermented malt beverages across state line and distribute them to retail dealers without violating law.

Out-of-state corporation may establish warehouse in Wisconsin from which deliveries of fermented malt beverages previously sold out of state may be distributed without wholesaler's license.

May 28, 1934.

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

A Minnesota corporation licensed to do business in this state has applied for a local license as a wholesale dealer of fermented malt beverages from the city of Ashland. That city has an ordinance which provides as follows:

“No wholesaler's license shall be issued except to citizens of the United States of good moral character who are residents of the city of Ashland, or to a domestic corporation.”

Two questions arise: First, whether this out-of-state corporation can be prosecuted under the city ordinance if it attempted to transport beer across the state line and distribute it to retail dealers in the city.

You question the authority to restrain this type of activity because of the interstate commerce clause. It is our opinion that the out-of-state dealer may transport fermented malt beverages across the state line and distribute them to retail dealers in the city of Ashland without liability for prosecution under the above city ordinance. This nonliability, however, is not by virtue of the interstate commerce clause, inasmuch as the Twenty-First Amendment to the federal constitution, together with the Webb-Kenyon law have removed traffic in intoxicating liquor from the

protection which it formerly had by virtue of the interstate commerce clause. This traffic is now subject to the control of the state.

It is assumed that the activity of which you write consists entirely in distributing the fermented malt beverage which has already been sold outside of the state. No question therefore arises as to a sale made by the foreign corporation in the state of Wisconsin. The distribution of the fermented malt beverages without a license, which this foreign corporation could not obtain in Wisconsin, is not an offense against the Wisconsin law. See XXII Op. Atty. Gen. 576, where it was held that no wholesaler's license is required from municipalities wherein deliveries are made.

The second question is, whether or not this foreign corporation could be permitted to establish a warehouse in the city of Ashland and distribute beer from such warehouse. This question must be answered in the affirmative.

It is again assumed that this warehouse would be one from which distribution of beer is made but at which no sales are consummated, the sales being completed outside of this state.

Sec. 66.05, subsec. (10), par. (d), subd. 4, Stats., provides, in part, that a license "shall be required for each place of business."

A warehouse from which distribution only of fermented malt beverages is made cannot be held as a matter of law to be a "place of business" within the meaning of this statute. In XXII Op. Atty. Gen. 576, it was held to be a question of fact for the local governing board whether or not the activity of an individual or corporation in trafficking in fermented malt beverages at a particular place would constitute the same a "place of business." Some language in that opinion might be construed as holding that a wholesaler's license could be required where only a warehouse was maintained from which deliveries were made, but from which no sales were made. Upon further consideration, it is our opinion that if this warehouse is used solely as a distribution point it should not be considered as a place of business for which a wholesaler's license must be obtained.

A "place of business," within the prohibition law, is a

public place of business not in the sense that it belongs to a public nor that there is any great degree of publicity, but that it must be a place to which the public is invited, either expressly or by implication, to transact business; and by "public" is meant that the public is invited to come to it and has access to it for a purpose within the scope of the business that is carried on. *Brooks v. State*, (Ga.) 90 S. E. 989.

If a person should make a common practice of selling liquor at a fixed place, that place would become a "place of business." *Bashinski v. State*, (Ga.) 62 S. E. 577; *Lyons v. Atlanta*, (Ga.) 64 S. E. 713.

A "place of business" within the prohibition law of 1907 means a place devoted by the proprietor to the carrying on of some form of trade or commerce. *Jenkins v. State*, (Ga.) 62 S. E. 574. See also *Union & Mechanics' Club v. City of Atlanta*, (Ga.) 71 S. E. 1060.

The above authorities indicate that the mere distribution of fermented malt beverages from a particular place is not sufficient to constitute it a place of business within the liquor laws.

Attention is also directed to sec. 66.05 (10) (c) 3, which provides that a brewer or bottler may operate a warehouse "from which sales of fermented malt beverages \* \* \* may be made \* \* \*." Sec. 66.05 (10) (e) provides that wholesalers' licenses "shall authorize sales of fermented malt beverages \* \* \*." This would again indicate that it is the selling of fermented malt beverages rather than the distribution of the same which is intended to be licensed.

This holding is in line with a previous opinion rendered by this department in XXIII Op. Atty. Gen. 191, wherein it was held, with respect to intoxicating liquors, that an out-of-state concern could establish a warehouse in Wisconsin from which it could fill orders without coming under the Wisconsin requirements for manufacturers, rectifiers or wholesalers. Although the intoxicating liquor laws, of course, cannot control the traffic in fermented malt beverages, they to some extent indicate the legislative intent concerning traffic in alcoholic beverages.

JEF

*Counties—Real Estate—Mediation Board*—County board does not have authority to abolish mediation board.

County board has authority to change compensation of mediation board (with certain restrictions).

Mediation board cannot function with less than three members.

County board fills vacancy in mediation board caused by resignation of member of mediation board who is also member of county board.

May 28, 1934.

GILES V. MEGAN,  
*District Attorney,*  
Oconto, Wisconsin.

You have submitted several questions in regard to the county mediation board which will be answered seriatim.

1. Has the county board authority to abolish the mediation board?

Answer. No.

As you point out in your letter, sec. 281.21, Stats., provides that the provisions of secs. 281.20 to 281.23 "shall not be in effect longer than March 1, 1935, and may be sooner terminated by the legislature." Therefore, unless the legislature takes some further action in the matter, the provisions of these sections will be in force until March 1, 1935.

Sec. 281.23 reads:

"There is created in each county a local mediation board.  
\* \* \*"

The statute does not say there *may* be created, but there *is* created. Every county is to have such a board.

The board, except in counties having a population of more than 250,000 "shall consist of two members of the county board, and a third member selected by them. This language when considered in connection with sec. 281.21 means that every county shall have a mediation board until March 1, 1935, unless the legislature takes further action in the matter before then.

2. Has the county board the authority to change the compensation of the mediation board at any meeting of the board after it has been set at four dollars per day and five cents per mile travel when the board was originally organized?

Sec. 281.23 provides:

“\* \* \* 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. \* \* \*”

Your attention is invited to XXII Op. Atty. Gen. 257. This does not deal with your specific question, but does deal with the compensation of the mediation board.

The county board, having been given the power to fix the compensation to be paid the mediation board, may also change such compensation. However, this compensation can not be changed to take effect during the term of the present members of the board.

See sec. 59.15, which reads:

“(1) The county board at its annual meeting [XXI Op. Atty. Gen. 602 in construing this section holds that the county board may at adjourned annual meeting or special meeting held prior to fall election fix salaries to be paid to elective county officers to be elected during year in which such action is taken] shall fix the annual salary for each county officer \* \* \* 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, \* \* \*”

3. Can the mediation board function as such board with less than three members?

Answer. No.

The statute specifically provides that the members of the mediation board shall consist of two members of the county board and a third member “selected by such two members selected by the county board.” Sec. 281.23.

4. If one of the board, who is also a member of the county board, resigns, is the vacancy filled by the two remaining members of the board or by the county board?

Answer. By the county board.

Sec. 281.23 provides that two of the members of the mediation board shall be members of the county board, "selected by a majority vote of such board."

Sec. 17.22, subsecs. (1) and (2), reads:

"(1) Vacancies in any appointive county office shall be filled by appointment for the residue of the unexpired term by the appointing power and in the manner prescribed by law for making regular full term appointments thereto;  
\* \* \*

"(2) Vacancies in the offices of officers appointed by the county board, occurring when the board is not in session, shall be filled in the manner and for terms as follows:  
\*\* \* \*

"(d) In the office of any other officer appointed by the county board, by temporary appointment by the chairman of the county board. A person so appointed shall hold office until his successor is appointed and qualifies, and such successor shall be appointed by the county board for the residue of the unexpired term at its meeting next after such vacancy occurred."

JEF

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*Public Officers—Railroads—Passes*—State official who, when not occupied with affairs of state, is employed by railroad company may legally avail himself of free transportation extended by railroad company to its employees when such transportation is used in performance of his duties as such employee.

May 28, 1934.

THOMAS J. O'MALLEY,  
*Lieutenant Governor.*

The facts prompting this request for an opinion concern a state official who has been in the service of a railroad company as a conductor for forty-six years, although during the past year and a half this service has been on the basis of part time employment so as not to interfere with his duties as a state official. Under the rules of this company the state official here concerned is entitled to unlimited free transportation. The question arises whether, be-

cause of his status as a public officer, this person may avail himself of this free transportation from Milwaukee, Wisconsin, to Washington, D. C., for the purpose of representing the employees of this particular railroad company at a convention of the Railway Employees National Pension Association, to be held in the latter city.

Sec. 11, art. XIII, Wis. Const., and sec. 348.311, Stats., provide that no public officer shall avail himself of any free pass or free transportation extended by any railway company. Subsec. (4), sec. 348.311, Stats., provides:

"The term 'free pass' shall include any form of ticket or mileage entitling the holder to travel over any part of the line or lines of any railroad issued to the holder as a gift or in consideration or partial consideration of any service performed or to be performed by such holder, except where such ticket or mileage is used by such holder in the performance of his duties as an employe of the railroad issuing the same. But nothing in this section shall be construed as prohibiting policemen or firemen from accepting free transportation when on duty in uniform."

Under the terms of this above quoted subsection it is apparent that a public officer who is also an employee of a railroad company may avail himself of the annual pass extended to such employees where the same is used "in the performance of his duties as an employee of the railroad issuing the same." This construction of the statute has been consistently adhered to by this office since the matter was first the subject of an official opinion in 1902. It is said, p. 451, Op. Atty. Gen. for 1906, 448:

"The question still remains whether a railway employe who is also a public officer, municipal officer or member of a political committee can receive and use such transportation and whether railway corporations can give the same to such employe who also holds a position under the laws of this state. The statute does not distinguish in this exception between employes who are public officers and those who are not, and I am inclined to the opinion that it includes those who are public officers, members of political committees, etc., as well as those who are simple employes, but that the use of such transportation by public officers who are also railway employes, must be limited to the actual performance of duties as such. As illustration, I think and have held, that a physician who is a member

of a library board and also the physician for a railway company, and a notary public who is also a railway employe, may each use free transportation, but only in the actual performance of their duties as such employes and that railway companies may lawfully issue transportation to such persons for such purposes, and I regard this as but a reasonable interpretation of the intent of the legislature in passing these acts."

See also: Op. Atty. Gen. for 1902, 113; Op. Atty. Gen. for 1910, 569; Op. Atty. Gen. for 1912, 863; I Op. Atty. Gen. 468; II 704; V 779; VIII 202. XI 470; XIII 406.

In the present instance the purpose of the trip contemplated by this public official is to represent his fellow employees at a national convention. It is the opinion of this office that this is sufficiently within the duties of this person as an employee of the railroad company to legally warrant the use of his annual pass for this contemplated trip.  
JEF

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*Bridges and Highways—Taxation—Tax Collection—Delinquent Taxes*—Under sec. 83.14, Stats., town's share of money to be used for repair of highway should be raised by tax voted at town meeting not by levy of county board.

When taxes are returned delinquent to county, county tax is considered paid so far as local taxing unit is concerned, and county cannot use amount of county tax so returned as offset on amount it owes local taxing unit on transient poor relief bill.

May 28, 1934.

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

The town of Gurney, Iron county, at the annual meeting of the county board in November, 1927, petitioned the board to appropriate one thousand dollars to improve a town road under the provisions of sec. 83.14, Stats. The petition stated that the town would raise an additional one thousand dollars to be spent on the same road. The county

board voted the one thousand dollars requested and in 1928 spent two thousand dollars on a road in the town of Gurney. The amount to be raised by the town as its share was not paid to the county. Nothing further was done until 1932, when Iron county charged one thousand dollars to the town by placing that sum on the apportionment sheet. The sum was placed on the tax roll by the town and was not paid to the county but was returned in the form of delinquent certificates.

You also state that Iron county now owes the town of Gurney eight hundred dollars on a transient poor bill.

Under these circumstances you wish to know whether the county may use the one thousand dollars as a set-off on the town of Gurney's claim for eight hundred dollars or whether the one thousand dollars has been paid.

If this levy of one thousand dollars were a legitimate part of the county taxes, then it would have been paid when the town treasurer made his delinquent tax return. See: XI Op. Atty. Gen. 276, holding that the entire tax roll is the property of the county when returned, and credit must be given the local treasurer therefor.

XXII Op. Atty. Gen. 199, holding that all taxes returned as delinquent belong to the county and the county is entitled to retain from collections made by it the amount of unpaid county taxes due it. After the county has collected the amount thus due it, then any excess, when collected, must be returned to the proper town, city or village treasurer.

X Op. Atty. Gen. 762, holding that the delinquent real estate tax roll cannot be charged back to the local taxing districts but is the property of the county to the extent of county taxes for the same year.

Sec. 74.19, subsec. (3) Stats., provides that all taxes so returned as delinquent shall belong to the county. Since these delinquent taxes belong to the county and cannot be charged back to the local taxing districts, the county tax is considered as paid, as far as the local unit is concerned, when the delinquent return is made by the local unit. Therefore, if this one thousand dollars were a part of the county tax to be raised by the town of Gurney, it would

be considered as paid and the county could not use it as a set-off on its debt of eight hundred dollars to the town of Gurney.

This levy of one thousand dollars is, however, of doubtful legality.

Sec. 59.07 provides:

“The county board of each county is empowered at any legal meeting to:

\* \* \*

“(5) Apportion and order the levying of taxes as provided by law, and direct the raising of such sums of money as may be necessary to defray the county charges and expenses and all necessary charges incident to or arising from the execution of their lawful authority.”

There is no provision “by law” for the levying of the one thousand dollars by the county. In fact, sec. 83.14 provides a very definite procedure for the raising of the money used to repair highways under its provisions. The town’s share is to be raised in the following manner:

“(1) Any town meeting or village board may vote a tax of not less than five hundred dollars to improve a designated portion of the system of prospective state highways. The town or village board may accept cash donations for such purposes, and when accepted subsequent proceedings shall be the same as if a tax of like amount had been voted.  
\* \* \*”

Thus the town’s share is to be raised by a tax levied by the town meeting and not by the county board. Subsec. (6) of that section provides:

“Construction shall not begin until the funds to pay for the same are in the county treasury \* \* \*.”

XVIII Op. Atty. Gen. 333, 334, in construing sec. 83.14 says:

“\* \* \* It is \* \* \* evident that the statute contemplates the levy of a tax one year and the collection thereof in the tax roll, the expenditure of the money and making of the improvement the next year \* \* \*”

See also VIII Op. Atty. Gen. 652, 655.

Thus, the county in this instance has entirely disregarded the procedure prescribed by the statute. Therefore it prob-

ably had no right to levy the tax of one thousand dollars. However, since the tax was levied and a delinquent return made, as far as the town is concerned, this one thousand dollar tax assessment has been paid.

Therefore, in any event, the one thousand dollar tax levy may be considered as paid, and Iron county should pay the eight hundred dollars owed on the transient poor bill to the town of Gurney.

JEF

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*Appropriations and Expenditures—Courts—Witness Fees—Public Lands*—Expense of survey to determine corners and lines of land on which school fund timber stands may be charged to school fund.

Expense of survey to secure portion of land given state in original swamp land grant may be charged to normal school fund.

Land commission may not charge witness fees in trespass action to fund to be benefited.

May 29, 1934.

#### COMMISSIONERS OF PUBLIC LANDS.

You present three questions upon which you request the opinion of this department. The questions, together with the answers, follow in the order in which presented.

“1. If, in the judgment of this department, obscure corners and lines make it impossible to protect school fund timber from trespass, would the department be warranted in making a moderate expenditure in bettering them and charge the cost to the fund into which added trespass collections would go?

Sec. 24.05, Stats., provides as follows:

“Whenever it shall appear to said commissioners necessary that surveys should be made in order to ascertain the true boundaries of any tract or portion of the public lands, or to enable them to describe and dispose of the same in suitable and convenient lots, they may cause all such necessary surveys to be made.

The school fund timber is located upon public lands. Sec. 24.01, subsec. (1), provides:

“‘Public lands’ embraces all lands and all interests in lands owned by the state either as proprietor or as trustee which constitute any part of the lands defined or specified in either of the following paragraphs of this section.”

Subsec. (2) refers to “school lands” mentioned in art. X, sec. 2, Wis. Const. Consequently, sec. 24.05 authorizes your department to expend money for the purpose of making surveys to remove the obscurity surrounding the corners and lines of the property upon which this timber stands.

In determining whether or not the resulting expenditure can be charged “to the fund into which added trespass collections would go” it becomes necessary to determine into which fund such collections actually do go under the law.

Sec. 26.07, provides:

“All money received from the sale of logs, lumber, shingles, timber, minerals or other articles seized under the provisions of this chapter, or recovered in legal proceedings for damages done the public lands, shall be paid into the treasury to the credit of the respective funds to which the lands belong on which such trespasses were committed, and all other money collected as expenses, fees, penalties and damages for trespass on such lands shall be paid into the general fund.”

It would appear at first glance from a reading of this statute that all money received from the sale of logs, lumber, etc., seized under the provisions of chapter 26, and all money recovered in legal proceedings for damage done to public lands should be credited to the respective trust funds to which the land belonged from which the logs, lumber, etc., were taken and on which the trespasses were committed, but that there should be paid into the general fund all other money collected as expenses, fees and penalties, and all other money collected as damages for trespass on the public lands where such damages were collected without legal proceedings. This construction of the statute, however, reaches the rather absurd conclusion that where a trespass to trust fund lands has been committed damages for such trespass,

when collected in legal proceedings, shall be credited to the respective trust fund but that such damages, when voluntarily paid to the land commission, should be credited to the general fund. There apparently is no reason or logic to such a conclusion, and it is our opinion that such was not the legislative intent. It is quite probable, moreover, that a court would hold that the damages accruing to the land commission by virtue of trespass on trust fund lands, whether paid voluntarily or involuntarily, represent the proceeds of the trust res and consequently could not be diverted into the general fund but must be credited to the respective trust fund. See *State ex rel. Owen v. Donald*, 160 Wis. 21. All money, therefore, received from the sale of trust fund logs, lumber, etc., as well as all damages recovered either voluntarily or involuntarily for trespass to the trust fund lands should be credited to the respective trust fund. Your question, therefore, resolves itself into whether or not the survey made to protect school fund timber from trespass can be charged to the school fund.

It is our opinion that it can. Sec. 23.03 provides:

“Said commissioners may make investigations concerning the rights of the state to indemnity swamp lands, and select and secure all such lands as it is or may hereafter be entitled to. The accounts for expense incurred in so doing, on their approval, shall be payable out of the general fund, and charged to the appropriation for the commissioners of the public lands. In all other cases the expenses connected with securing and selecting public lands shall be paid from the fund to which the proceeds from the sale thereof will be added, and accounts for such expenses, when so approved, shall be audited by the secretary of state and paid from such fund.”

A survey made to remove the obscurity respecting corners and lines of the land upon which the school fund timber is located is not an investigation concerning the rights of the state to indemnity swamp lands, the latter constituting normal school lands. The cost of the survey of the lands upon which the school fund timber is located would be an expense connected with securing other public lands, this classification of course including the lands upon which the school fund timber stands. The expense of such survey, under sec. 23.03, should be paid “from the fund to which the

proceeds from the sale thereof will be added, \* \* \*." Proceeds from the sale of school fund timber would be credited to the school fund. Sec. 24.20. The expense of the survey, therefore, may be paid out of this same school fund.

"2. Where there is evidence that land was omitted from the original government survey that is unquestionably of the character granted by the swamp land grant (now normal school fund land) would such disbursement for investigation be warranted and chargeable to the normal school fund?"

This question must also be answered, Yes. Sections of the statute cited in the answer to the previous question evidenced the authority of the land commission to have surveys made for the purpose of ascertaining the true boundaries of any tract or portion of the public lands and to secure the same. The lands which the state acquired by virtue of the swamp land grant and which are now known as the normal school lands are public lands. See sec. 24.01, subsec. (1), and subsec. (4). The original swamp land grant was made in 1850. It must be differentiated from the indemnity swamp land grant which was made some time later, for the purpose of indemnifying the state for the lands in the original swamp land grant which the state was presumed to get but which it did not get by virtue of the fact that the property had been deeded by the federal government or by virtue of the fact that it was occupied by homesteaders or other claimants. Under sec. 23.03 it is only the expenses for investigating the rights of the state to the indemnity swamp lands and selecting and securing such lands which may be paid out of the general fund. In all other cases the expenses connected with securing the public lands, including the expense in securing the lands coming to the state by virtue of the original swamp land grant, should be paid from the fund to which the proceeds from the sale of such lands would be credited. In this case, therefore, the expense of the survey for the purpose of securing portions of the original swamp lands should be paid from the normal school fund.

"3. Would this department be warranted in paying witness fees in a suit to collect trespass damages and charging the cost to the fund to be benefited?"

This question must be answered, No. Sec. 325.07 provides:

“Every witness on behalf of the state in any civil action or proceeding may file with the clerk of the court where the same is pending his affidavit of attendance and travel, and his fees shall, upon the certificate of such clerk, countersigned by the attorney-general, district attorney, or acting state’s attorney, be paid out of the state treasury, and shall be charged to the legal expenses appropriation to the attorney-general.”

Sec. 26.09 provides, in part:

“The state, the county or the private owners upon whose lands any wilful trespass has been committed, may recover in a civil action double the amount of damages suffered.  
\* \* \*”

Under sec. 26.09 an action by the state to recover damages for trespass to lands would be a civil action. The expense for witnesses on behalf of the state in such a civil action must be paid as provided for in sec. 325.07, which results in an ultimate charge to the legal expense appropriation of the attorney-general.

JEF

*Taxation—Gift Tax*—Gifts of any value given for any purpose must be reported in individual income tax returns provided they are taxable under sec. 4, ch. 363, Laws 1933.

Gifts such as Christmas gifts between members of family must be reported.

Individual filing income tax return must pay gift tax levied by virtue of sec. 4, ch. 363, Laws 1933, at same time and in same manner as he pays his income tax.

June 1, 1934.

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

You have submitted to this department three questions relative to the interpretation of ch. 363, sec. 4, Laws 1933, known as the emergency gift tax law. The questions will be answered *seriatim*.

1. Does ch. 363 contemplate that any gift, no matter of what value or for what purpose given, must be reported in the individual income tax return of 1934?

The answer to this question is found in ch. 363, sec. 4, subsec. (1), and subsec. (7) (b), Laws 1933. That section requires that any gift coming within the terms of subsec. (1) or made exempt by the provisions of subsec. (5), must be reported.

2. Must such gifts as Christmas gifts or birthday presents between members of a family be reported in accordance with the provisions of this chapter?

The answer to this question is in the affirmative. As noted in our answer to the first question, any gift which is taxable by virtue of the provisions of ch. 363, sec. 4, is to be reported. The gifts mentioned in question 2 are such as are taxable under this chapter. This is expressly recognized by virtue of the fact that they may be exempt under the provisions of subsec. (5), sec. 4.

3. Must the individual filing an income tax return and having reported certain gifts compute the amount of tax he must pay and include that in his tax return for this year,

and is that payable at the time of the filing of the income tax return for this year the same as other income taxes?

The answer to this question is also in the affirmative. The assessor of incomes computes the amount of the tax after the report has been made and the amount of the tax is payable at the same time as the income tax in accordance with the provisions of subsec. (7) (c), ch. 363, sec. 4, Laws 1933.

JEF

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*Intoxicating Liquors—Public Health—Candy*—Product sold as cordial composed of intoxicating liquor enclosed in chocolate container having high percentage of sugar is candy under sec. 352.01, Stats.

June 1, 1934.

DEPARTMENT OF AGRICULTURE AND MARKETS.

Attention Harry Klueter, *Chief Chemist*.

You request an opinion as to whether a product sold as chocolate cordials comes within the prohibition of sec. 352.01, Stats., which prohibits selling, exchanging, offering for sale, or having in possession with intent to sell "any candy containing intoxicating liquor." The following statement is taken from your letter and indicates the composition of the product in question:

"The candy is composed of a sugar container coated with chocolate in which there has been placed a cordial. The cordial contains 18.28% of alcohol, the sugar in the cordial is 53.98%, the sugar in the container for the cordial, composed of a sugar container surrounded with chocolate, contains 44.42% of sugar. The weight of the container for the cordial is approximately 56½% of the total weight of the candy."

The Wisconsin statutes do not define candy.

Sec. 370.01, subsec. (1), provides that all words and phrases shall be construed and understood according to the common and approved usage of the language except tech-

nical words and phrases and those that have acquired a peculiar meaning in the law shall be understood to have such peculiar meaning. The word "candy" has not acquired a peculiar meaning in the law and therefore the word must be given the common meaning generally attributed to it.

Funk & Wagnalls New Standard Dictionary defines candy as "Sugar or molasses, or both, formed into a confection, usually by boiling." The Oxford Dictionary states that candy is "any confection made of, or incruited with this [sugar] \* \* \*." Webster's International Dictionary defines it: "A more or less solid preparation made by boiling sugar or molasses to the desired consistency, and then crystallizing \* \* \* it into the required shape. \* \* \* any sweetmeat made of or coated with a preparation of sugar or molasses; \* \* \*"

You have not submitted any sample but your description of the product states very definitely that the chocolate container is composed of 44.42% sugar. In 12 Corpus Juris page 414, it is stated that an article of confectionery is "something prepared or preserved with sugar or syrup." Inasmuch as the chocolate container has a large percentage of sugar in it, it is our opinion that the product you describe would be classified as a candy under the definitions which have been cited.

See also *McCaughn v. Hershey Chocolate Company*, 51 S. Ct. 510, which held that sweet milk chocolate containing sugar was candy.

JEF

*Indigent, Insane, etc.—Legal Settlement*—Indigent person who receives work from municipality other than one in which he lives and is paid in cash cannot be said to be supported as pauper and may acquire legal settlement in municipality in which he resides after one year's residence.

Municipality in which he resides cannot remove him before he gains legal settlement.

June 1, 1934.

HERBERT J. GERGEN,  
*District Attorney,*  
Beaver Dam, Wis.

You submit the following as a basis for an opinion:

A, having a legal settlement in the town of T, Dodge county, was moved, with his family, to the city of M, in the same county. For about a year the town of T has furnished him aid in the form of certain town work done in the town although A returns to M each night.

You inquire whether, under this statement of facts, A can gain a legal settlement in M and thus become a charge upon the city of M in the event that he stays there for one year.

In an official opinion in XXII Op. Atty. Gen. 145 this office held that an indigent person who receives work from a municipality and is paid therefor in cash cannot be said to be supported as a pauper solely as a result of receiving such work. Your question must be answered in the affirmative. It appears from the facts that this person has established his residence voluntarily in M. Under our statute after he has resided in M for one year, not having received aid as a pauper, he has a legal settlement in that place. I see no escape from this conclusion.

You also inquire whether, if he can obtain a legal settlement, there is any provision in the statutes to remove him from M before he becomes a charge on the city of M.

This question must be answered in the negative. I know of no statute which authorizes a municipality to remove a person under such condition.

JEF

*Intoxicating Liquors*—One who sells intoxicating liquor without license or permit provided for by ch. 176, Stats., is subject to prosecution even though holding federal special tax stamp.

June 1, 1934.

WM. M. GLEISS,  
*District Attorney,*  
Sparta, Wisconsin.

The village of A voted in April not to grant licenses of any kind. A number of individuals in the village continued to sell intoxicating liquor without a village license, claiming to do so by virtue of authority under a license from the collector of internal revenue. You inquire:

“Is the seller protected in any way and immune from state prosecution by virtue of the federal license held by him which expires July 1, 1934?”

Your question is answered in the negative. Sec. 176.04, subsec. (1), Stats., makes it a misdemeanor to sell intoxicating liquor without a license or permit. The sales of which you speak are made at retail and consequently a “Class B” intoxicating liquor license from the village is necessary before such sales are legal. The individuals who are selling without the village license are violating the state law and are subject to prosecution. The federal “license” is, in fact, not a license and does not purport to authorize the sale of intoxicating liquor. It is merely a “special tax stamp”—a receipt indicating that the person to whom it is issued has paid the federal tax necessary to his selling intoxicating liquor. It does not recite that the person to whom it is issued is *licensed* to sell. The fact that the stamp contains a provision against transferring the same from place to place does not make it a license. This writing appears upon the stamp for the reason that it is issued to cover a particular place of business.

Even if this stamp were held to be a license, it would not authorize the holder of the same to sell intoxicating liquor without a license provided for by the state law. Under the present state of the law the control of the liquor traffic is subject to state as well as federal statutes. The

federal tax stamp does not grant, or purport to grant, exclusive property rights or privileges in disregard of the state law. See *Attorney General ex rel. Becker v. Bay Boom W. R. & F. Company*, 172 Wis. 363; *Cummings v. Chicago*, 188 U. S. 410.

JEF

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*Appropriations and Expenditures—Public Officers—Governor may ratify appointment of attorney by state department after services have been performed.*

June 1, 1934.

THEODORE G. LEWIS,  
*Executive Secretary.*

In your letter of May 25 you state that one Fred Arnold, now deceased, rendered valuable and very beneficial legal services to the Wisconsin conservation department in certain litigation, which services were rendered at the request of the Wisconsin conservation department, although no formal request for Mr. Arnold's appointment as attorney was made to the governor's office pursuant to sec. 20.81, Stats., prior to the time the services were rendered. You state further that the conservation department recognizes its obligation to compensate Mr. Arnold's estate and has requested that the governor approve his appointment as attorney.

You inquire whether, under the circumstances, the appointment may now be made and you state that you believe an appointment that can be made as an original proposition can be ratified after services thereunder are performed without the formality of the appointment having been approved by the governor's office in the first instance.

We concur in your opinion.

Sec. 20.81, Stats., provides:

"No department, board, commission, institution or officer of the state shall employ any attorney or attorneys, until such employment has been approved by the governor; and the compensation of such attorney or attorneys so employed

shall be charged to the appropriation for operation or administration of such department, board, commission, institution, or officer."

The governor, of course, is now under no obligation to approve the employment and without such approval the employment would be invalid.

However, it would seem that the governor may now ratify the employment, since he might have properly approved of it prior to the performance of the services. There is a general rule of law to the effect that ratification is equivalent to a previous authorization and relates back to the time when the act ratified was done, except where intervening rights of third persons are concerned. *Petray v. First National Bank*, 92 Cal. App. 86, 267 Pac. 711, 713.

Here there are no intervening rights of third persons, and in equity and in justice the state should pay for such services rendered the same as a private individual, especially where the department making the employment and the executive office are both convinced of the decided value of the services rendered and are desirous of recognizing the obligation, both morally and legally.

JEF

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*Fish and Game*—Spears in possession near enough to shore line to be used for spearing fish come within prohibition of sec. 29.27, subsec. (1a), Stats.

June 1, 1934.

CHAS. M. PORS,  
*District Attorney,*  
Marshfield, Wisconsin.

In your letter of May 7 you refer to sec. 29.27, subsec. (1a), Stats., which provides:

"No person shall have in his possession or under his control on any of the inland waters or shores of inland waters of the state in the nighttime any spear that might be used for the purpose of taking, catching or killing fish."

You state that a few days ago the game warden of your county came upon several parties on the site of an old dam which had been washed out. They had with them a car battery and some spears. The spears, at the time the parties were discovered, were lying on the logs and planking which formed a part of the dam and cribbing. They were lying about six feet from the edge of the end of the old dam, from which point it was practically a direct drop to the water's edge. You state that the question has been raised whether this would be a part of the shore. You say that shore has been defined in 7 Words and Phrases, page 6496, as that ground between the ordinary high water and low water mark. You would like our opinion on this question.

We believe you have arrived at the correct conclusion. Under the facts stated by you, we have no doubt that the parties have violated this statute. For the purpose of describing real estate when it is described to the shore line, it can mean nothing else than the line where the water touches the land, but this is not the interpretation or meaning that should be given to shore as used in this statute.

"In the commonly accepted use of the word, the shore of a river is the land adjacent to the water line, and is applied in the same general sense in which the same term is popularly applied to the land adjacent to the water of an inland sea or to one of the Great American Lakes. *Lacy v. Green*, 84 Pa. 514, 519." 7 Words & Phrases (First Series) 6496.

"As used in the certificate of a tunnel company providing that the westerly terminus of the tunnel should be on the western 'shore' of the Hudson river, and within or near Jersey City or Hoboken, 'shore' is not to be construed in its strictest sense as meaning the land between the limits of ordinary high and low water, but in its more extended and popular sense. In the latter signification of the word a city is built on the 'shore' of a river, etc. *Morris & E. R. Co. v. Hudson Tunnel R. Co.*, 38 N. J. Law (9 Vroom) 548, 563." 7 Words & Phrases (First series) 6496.

Spears that are adjacent to the water's edge near enough to be used by the parties in spearing fish out of the water must be considered on the shore in contemplation of the above statute.

JEF

*Municipal Corporations—Public Utilities*—City of fourth class may not manage its public utility by city council or committee thereof.

June 1, 1934.

PUBLIC SERVICE COMMISSION.

Attention William M. Dinneen, *Secretary*.

You request an opinion upon the following question, viz.:

May a city of the fourth class abolish its utility commission, created pursuant to sec. 66.06 (10) (a), Stats., and manage its utility through the council itself or a committee of the council?

A study of the statutes involved manifests that a city of the fourth class may not manage a public utility owned by such municipality through its council or a committee thereof as above suggested.

The management of municipally owned public utilities is regulated by subsec. (10), sec. 66.06.

It is provided in par. (a) of the above cited subsection that such utilities be operated by nonpartisan management. This provision is mandatory upon cities, although optional with towns and villages. Such nonpartisan management shall be vested in a board of commissioners elected by the council or, in lieu of such commission, the management may be vested in the board of public works. Sec. 66.06 (10) (a) and (g).

The board of public works is described in sec. 62.14 (1). In interpreting said section, this office has held, in XXII Op. Atty. Gen. 480, that members of the city council may not be appointed to the board of public works. The disability of members of the council to serve upon such board is based upon the provision of sec. 66.11 (2).

Although a city may abolish its board of public works and place the duties of such board upon the council or a committee thereof, according to the provisions of sec. 62.14 (1), yet it is evident that the city may not, in such case transfer the management of its public utility to the council or committee.

A city by abolishing its board of public works and exercising the duties thereof, does not *ipso facto* become such

board. As set forth in the opinion found in XXII Op. Atty. Gen. 480, above referred to, the council in such case is still acting as a council and not as the board of public works, which it has abolished.

The provisions of subsec. (10) 66.06 specifically govern the management of municipally-owned public utilities and, hence, by the well recognized rule of statutory construction, the provisions contained therein must supersede the general provisions in regard to the board of public works. *Fox v. Milwaukee Mechanics Ins. Co.*, 210 Wis. 213, 246 N. W. 511 (1933).

To carry out the legislative intent as expressed in sec. 66.06 (10) (a), it must be held that a city of the fourth class may manage its public utility either by the commission, as set forth in par. (a), or by the board of public works, as provided in par. (g) of said subsection. In no event, however, may such a city substitute its council for the utility commission, or board of public works, since to do so would clearly violate the legislative intent that the operation of a municipal utility be carried on divorced from the direct supervision of the council.

JEF

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*Recovery Act—Barbers' Code*—Village situated four and one-half miles across country from city of five thousand inhabitants is subject to first class rules under state barbers' code.

June 2, 1934.

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

You request the opinion of this department upon the following statement of facts:

“An incorporated village \* \* \* of three hundred population is situated four and one-half miles across country from a city of over five thousand. The shortest highway between the city and the village is over five miles.

Under pars. 22, 23 and 24 of the Barbers' Code, would this small village be subject to first class or second class rules?"

It is the opinion of this department that under the facts stated above the village in question is subject to first class rules under the barbers' code.

Pars. 22, 23 and 24 of art. II of the code for the intra-state barber industry of Wisconsin provide as follows:

"22. The term 'First Class' as used in this code is defined to mean and apply to cities, villages and towns of 2,500 population or over and their trade area.

"23. The term 'Second Class' as used in this code is defined to mean and apply to any other area within the state.

"24. The term 'Trade Area' as used in this code is defined to mean the area within a five mile radius of the corporate limits of any town, city or village of the first class."

It is manifest that under the plain language of sec. 24, defining "Trade Area," the village here in question is within the trade area of a city of five thousand and hence is subject to the rules and regulations applicable to cities of the first class as defined in the state barbers' code. The distance should be measured by air line rather than by highway. See *Jennings v. Russell*, (Ala.) 9 So. 421.

JEF

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*School Districts—State Aid*—State superintendent of schools may apportion special state aid to second class school districts which qualify for such aid under sec. 40.37, Stats., and deny common school equalization aid to such districts under sec. 40.87, subsec. (1), par. (b), where such districts fail to meet requirements for aid under latter section.

June 4, 1934.

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

In your letter of May 9, 1934, you inquire whether special state aid may be apportioned under sec. 40.37, Stats., to second class state graded school districts which do not

have a total average daily attendance of twenty-five, so as to qualify for common school equalization aid under sec. 40.87, subsec. (1), par. (b).

Your question is answered in the affirmative. Assuming that all requirements of sec. 40.37 have been met, then the special aid therein provided may be rightfully apportioned to such second class state graded school districts even though they cannot qualify for the common school equalization aid provided for under sec. 40.87 Stats.

Sec. 40.37, Stats., provides for special state aid and sec. 40.87 provides for common school equalization aid. The two sections are separate and distinct, and it may be that some districts meet the requirements of one and do not meet the requirements of the other. It is quite clear in the present case that the districts in question cannot qualify on the basis of the attendance necessary for two teachers under sec. 40.87 (1) (b), in that there is not an average daily attendance of twenty-five. On the other hand the requirements for special state aid under sec. 40.37 being fully met, the districts may rightfully receive the aid therein provided, since an average daily attendance is not required under this section.

JEF

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*School Districts—State Aid*—Where state graded school district fails to file required reports on time for participation in annual distribution of special state aid, state superintendent of schools is not authorized to give such district double apportionment next year.

June 4, 1934.

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

In your letter of May 9, 1934, you state that state aid for state graded schools is apportioned under sec. 40.37, Stats., annually on August 1 and that two school boards, whose districts complied with said section in all other particu-

lars, failed to file the annual reports due prior to August 1, 1933, until in January, 1934, at which time there was no money available. You inquire whether you have the right, as state superintendent of schools, to make a duplicate apportionment to these two districts on August 1, 1934, provided they comply with sec. 40.37, Stats., during the present year.

We can find no authority for such procedure.

Sec. 40.37, subsec. (9), Stats., provides in part:

“\* \* \* The refusal or neglect of the school board or any of its officers to file these reports with the state superintendent when called for, shall be deemed sufficient ground for refusing special state aid, as provided for in this act.”

While the language of the statute provides that refusal or neglect to file the reports shall be deemed sufficient ground for refusing special state aid, it does not make the refusal to grant such aid mandatory but merely furnishes grounds for refusing to do so, should the state superintendent so desire.

However, although it might be that the state superintendent could overlook the failure to file the report on time and could make the apportionment later in the same year if funds were available, yet the statutes provide that state aid shall be paid annually to state graded schools. Sec. 40.39, subsec. (1). There does not appear to be any authorization for making no payment in one year and a double payment the next in cases such as you have mentioned.

The only provision for anything in the nature of a double payment the next year in the case of failure to file reports is in connection with free high schools, sec. 40.39 (2) (d) providing as follows:

“Whenever, owing to any failure to make the required reports, any free high school shall fail to have apportioned to it its share of such state aid the state superintendent may, at the time of making the next annual distribution, fix an amount ten per centum less than the amount which said school district would have been entitled to had such report been made, and certify the same to the secretary of state, who shall thereupon draw his warrant for such amount or amounts in favor of such district.”

Since the statute governing the manner of payment of state aid, sec. 40.39, has made express provision for a pay-

ment in the nature of a double apportionment in one case but has not done so in another, it would seem, under familiar rules of statutory construction, that the expression of the one shows a legislative intent to exclude the other. "*Expressio unius est exclusio alterius.*" *State ex rel. Owen v. Reisen*, 164 Wis. 123, *Chain Belt Co. v. City of Milwaukee*, 151 Wis. 188.

JEF

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*Public Officers—Register of Deeds—Public Records—*  
Register of deeds is entitled to fee of ten cents for each folio for copies of records or papers whether copies are prepared by him or not.

June 4, 1934.

OLIVER L. O'BOYLE, *Corporation Counsel,*  
*Office of District Attorney,*  
Milwaukee, Wisconsin.

In your letter of May 10, 1934, you state that local attorneys requiring certified copies of lengthy trust deeds frequently have these drafted in their own offices, after which they are submitted to the register of deeds for comparison with the originals on record in his office and for his certificate. The statute making provision for the fees of the register of deeds, sec. 59.57, subsec. (4), provides for a fee of ten cents for each folio for copies of any records or papers and twenty-five cents for the certificate of the register of deeds.

You state that objection is made that the register of deeds is not entitled to ten cents for each folio of these copies, since the copies are not prepared by him, and that some attorneys contend that he is entitled only to a reasonable fee, plus the twenty-five cents for his certificate. You request an opinion from this office on the matter.

We feel that the register of deeds may charge ten cents per folio on these copies. Obviously the legislature has made no provision as to fees covering the practice you mention. The register of deeds is under no statutory duty

to compare copy prepared by somebody else with the original records. It is contemplated that he shall make the copies. Sec. 59.51, Stats., lists, among the duties of a register of deeds, the following:

“(8) Make and deliver to any person, on demand and payment of the legal fees therefor, a copy duly certified, with his official seal affixed, of any record, paper, file, map or plat in his office.”

There is no provision for a “reasonable” fee for comparing the copy, and since the register of deeds could, undoubtedly, refuse to certify a copy prepared by some one else, he is in a position to insist upon a fee of ten cents per folio, whether the copy is prepared by himself or somebody else. Of course, he could charge less if he wanted to under the circumstances stated, in view of the fact that the copy was not prepared by him.

JEF

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*School Districts—High Schools*—Statutory requirements concerning establishment of high school by common school district cannot be avoided by adoption of twelve-grade course of study.

June 6, 1934.

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

In your letter of May 18 you state that in a certain school district the electors propose to instruct the school board to adopt a course of study consisting of twelve grades of work. You state that the district has an assessed valuation of approximately \$800,000.00 and you call attention to sec. 40.62, subsec. (1), Stats., which provides that any common school district having an assessed valuation of \$1,250,000.00 or more may establish a high school. In view of this statute you inquire, in effect, as to the right of the school district in question to avoid the requirements of this statute by having the graded school adopt a twelve-grade course of study.

The proposed procedure is a mere subterfuge, and a high school in fact, although not in name, cannot be set up without meeting the statutory requirements provided for high schools. We assume that the last four grades of the twelve-grade course would be an attempted duplication of high school work. If not this, it would be difficult to imagine what the work of the last four grades might be. Certainly, it would not be a duplication of the customary common school course of eight grades, as there is nothing in our school law or educational practice which would justify stretching an eighth grade course over twelve grades.

The statutory requirement of a \$1,250,000.00 valuation in the district before establishing a high school was doubtless dictated by the experience and knowledge that a modern high school with proper standards of instruction and equipment cannot be adequately maintained by a district having less valuation than this.

It is a general rule of law that statutes should be so construed as to give effect to the legislative intent, rather than to defeat this intent and the will of the people as expressed by the legislature in any statute. Obviously the statutory requirements should not be avoided, either in form or in substance.

We take it from your letter that the electors propose to instruct the school board to adopt the twelve-grade course of study under sec. 40.62. This section applies only to high schools. Subsec. (4) provides that the vote on such a proposal shall be taken by ballot and that "The ballots shall be 'For high school' and 'Against high school.'" Note that the statute does not say that the ballots shall be marked "For twelve grades" and "Against twelve grades." In other words, no valid vote on the subject could be had without submitting the proposition as a vote for or against a high school.

It is further provided by subsec. (4), sec. 40.62 that if the resolution be adopted, the school shall report the resolution and the action thereon to the state superintendent for his approval, and "If he approve it, he shall issue a certificate of establishment of a high school, *otherwise he shall veto the proposal.*" Without a full compliance with the statute the superintendent should not issue a certificate of

establishment of a high school. The only other alternative is to "*veto the proposal*," whether it is called a twelve-grade course, high school, or whatever its name may be.  
JEF

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*Criminal Law — Embezzlement—Prisons—Prisoners — Parole*—First offender sentenced from five to ten years on eleven counts running concurrently under sec. 221.39, Stats., may be paroled after serving five years.

June 11, 1934.

BOARD OF CONTROL.

In your communication of May 22, you state that sec. 221.39, Stats., carries a penalty of imprisonment in the Wisconsin state prison of not more than twenty years. One A was committed to the Wisconsin state prison to serve eleven concurrent terms of from five to ten years for each violation of this section of the statutes. According to the records he is a first offender and you state you would like to be advised when, under the above stated section, he will be eligible to parole consideration.

The answer to your question is that the person so sentenced may be paroled after serving the minimum of the sentence, which is five years. See XXI Op. Atty. Gen. 322.  
JEF

*Criminal Law—Lotteries*—Corporation that sells membership tickets and then draws therefrom twenty-three names as directors at salary of \$500 each and twenty-fourth at salary of \$10,000 is lottery, in violation of secs. 348.01, 348.02 and 348.03, Stats.

June 11, 1934.

A. J. CONNORS,  
*District Attorney,*  
Barron, Wisconsin.

You outline a plan whereby a nonprofit organization proposes to raise funds for conservation by a method of choosing associate directors at different salaries and you desire an opinion as to whether the facts set forth constitute a violation of secs. 348.01, 348.02 and 348.03, Stats., relating to lotteries.

Your question must be answered in the affirmative. This is a scheme to sell about 100,000 tickets out of which twenty-three will be drawn to receive \$500 each and the twenty-fourth to receive \$10,000. Forty cents is given to the one who sells the ticket and the other sixty cents is to be used for conservation after paying salaries and expenses. It has all the essential features of a lottery. The person who buys a membership ticket pays for a chance to recover \$500 or \$10,000.

JEF

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*Elections—Nominations*—Provisions of sec. 5.05, subsec. (6), pars. (a), (b) and (c), Stats., are not applicable to third party so far as number of signers of nomination papers are concerned but are applicable in so far as they require nomination papers to be filed from certain number of counties or precincts.

June 11, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You refer to the decision of the supreme court on May 1, 1934, relative to the third party, in which it was held

that "all the provisions [of sec. 5.05] except those regulating the number of signers are clearly applicable and apply," but that the provisions of sec. 5.05, subsec. (6), pars. (a), (b) and (c), dealing with the required number of signers, cannot and do not apply. You state that there are certain provisions, however, of sec. 5.05 (6) (a), (b) and (c) which do not deal with the number of signatures, but with the number of counties and precincts from which nomination papers must be offered, to wit: State candidates are to file from not less than six counties, congressional candidates from not less than half the counties of the district, and legislative and county candidates from not less than one-sixth of all precincts within the district or county. These requirements appear to be independent of and separate from the question of the number of signatures required. You ask to be advised if you are correct in your understanding that the decision in question still leaves such provisions in force.

After carefully considering the language used by the court, we have come to the conclusion that you are correct in your interpretation. The court further said:

"\* \* \* Why the legislature chose to leave this situation unprovided for is not clear. It might have been inadvertence; it might have been the consideration that the contest for nomination in new parties is not ordinarily keen nor is the number of candidates large. However that may be, we think the result of the section is that there is no requirement with respect to nomination papers as to the number of signers, and that a nomination paper, otherwise correct in form and satisfying the applicable provisions of section 5.05, must be received and the name of the candidate placed upon the primary ballot." *State ex rel. Ekern v. Dammann*, 254 N. W. 759, 765.

It appears that the court only intended to declare inapplicable those provisions of sec. 5.05 (6) (a), (b) and (c) which it is impossible to comply with. It is easy to comply with the provision to have nomination papers from six counties for state candidates, from half the counties of the district for congressional candidates, and from not less than one-sixth of all the precincts within the district or county for the legislative and county candidates. These requirements may easily be complied with and they are sep-

arate from the question of the number of signatures required as you suggested.

You are therefore advised that the requirements for the number of signatures are only declared inapplicable to candidates on the third party ticket, but that the provisions as to the number of nomination papers from the counties and precincts are still applicable and must be complied with.

JEF

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*Public Health—Basic Science Law*—Finding of Illinois board of medical examiners that certain medical school is reputable under Illinois statute is not binding upon Wisconsin medical board as to whether that school is reputable in Wisconsin in view of Wisconsin standards.

June 11, 1934.

DR. ROBERT E. FLYNN, *Secretary,*  
*Board of Medical Examiners,*  
La Crosse, Wisconsin.

In your letter of May 21 you request an opinion as to whether the board is obliged, under the medical practice act, to grant a license by reciprocity, or otherwise, to a graduate of a medical school which you do not recognize at present as being reputable, or at least meeting the standards of your own medical schools in the state. You state that the Chicago Medical School is recognized in but one state in the union, i. e. Illinois. Wisconsin is rather reluctant to accept their graduates simply because the Illinois laws are more elastic.

We have carefully examined the briefs which were presented by representatives of both sides. It seems that the person in question has been licensed in Illinois and has practiced there, but is now asking to be permanently located in Wisconsin and therefore requires a license for Wisconsin. It appears that all requirements are complied with except the requirement that he present a diploma from a reputable professional college. The Illinois board of med-

ical examiners has accepted and found the Chicago Medical School as reputable within the meaning of the medical practice act of that state. It has been seriously contended that this finding makes it obligatory on the Wisconsin board to accept such finding.

The Wisconsin statutes have provided a standard by which the medical board is to ascertain whether a college is reputable or not. In sec. 147.16, Stats., it is provided in part as follows:

“\* \* \* A college maintaining the standard of preliminary education designated in section 147.15, and requiring at least four courses of eight months each shall be deemed reputable under this chapter.”

Sec. 147.17, has the following provisions as to reciprocity with other states:

“\* \* \* 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, \* \* \*.”

What a reputable professional college is within contemplation of this statute must be ascertained by the Wisconsin board under the standards established in sec. 147.16, above quoted. It is not the standard prescribed by the statutes of other states or found by the boards of other states. For Wisconsin, the medical board of this state must determine what is a reputable professional college, not what it is in Illinois or some other state, but what it is so far as Wisconsin is concerned. The finding of the medical board of Illinois is not at all binding upon the Wisconsin board. We do not believe that the clause in the federal constitution under art. IV, sec. 1 that full faith and credit be given in each state to the public acts, records and judicial proceedings of every other state, is applicable here so as to make it necessary for the Wisconsin medical board to accept the finding of the Illinois medical board as to the reputability of a medical college.

I may suggest, however, that in view of the decision of our court in the case of *State ex rel. Coffey v. Chittenden*.

112 Wis. 569 and the case of *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468, the Chicago Medical School be given an opportunity to be heard before a permanent and final decision is made as to the reputation of said school. Notice should be given and an opportunity to present its side of the case be afforded said school.

You are therefore advised that the finding by the Illinois medical board that the Chicago Medical School is a reputable school is not binding upon your board under the standards prescribed by the statutes of this state.

JEF

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*Public Health—Barbers—Beauty Parlors*—One who has both barber's license and beauty parlor license and is authorized to bob hair under either license is not required to comply with state barbers' code and discontinue work one-half day per week, so long as he complies with beauty parlor code.

Supervision and direction of manager may extend to room where work is done although room is not immediately adjacent to balance of beauty parlor.

June 11, 1934.

DR. C. A. HARPER, *Health Officer,*  
*Board of Health.*

In your letter of June 2 you set forth the following facts:  
In a certain beauty parlor employing persons licensed under both chs. 158 and 159, Stats., the equipment is leased by a foreign corporation and employees in this parlor are paid by that corporation. You are informed that it is customary for the manager of the parlor to inform those bobbing hair how it should be done so that the beauty parlor operators may later give the kind of curl the patrons desire. You ask with reference to compliance with the barbers' code, whether those doing the bobbing should be considered as working under the supervision and direction of a

licensed manager even though the booth where the bobbing is done is not adjacent to the beauty parlor.

You call attention to sec. 159.12, Stats., which provides in part as follows:

“\* \* \* No apprentice or operator shall practice cosmetic art unless under the supervision and direction of a licensed manager, and cannot be the owner, manager, director or lessee of a beauty parlor in which she is employed. \* \* \*”

Persons who hold a license for a beauty parlor and also for a barber shop may bob hair under either license. If they bob hair under their license for a beauty parlor they do not violate any beauty parlor code and they are not violating the barbers' code although if they had no beauty parlor license they would come under the prohibition of the state barbers' code.

I am also of the opinion that these persons who are bobbing hair may be considered as working under the supervision and direction of a manager even though the location of the booth where the work is done is not immediately adjacent to the balance of the beauty parlor. A person may be working under the supervision and direction of a manager although the manager is not always in the same room where the work is being performed, so long as he is near enough to efficiently supervise and direct the work.

JEF

*Criminal Law—Extradition*—Only agent appointed by governor to return fugitive from justice under extradition papers can collect fees and per diem provided for in sec. 364.24, Stats. If more than one fugitive is returned and it is unreasonable to expect agent to return them alone, his assistant may collect railroad fare and other actual expenses.

June 11, 1934.

KENNETH C. HEALY,  
*District Attorney,*  
Manitowoc, Wisconsin.

You state that under sec. 364.24, Stats., there is a provision as to compensation for the agent of the demanding state in extradition matters. You also refer to XIX Op. Atty. Gen. 377, which seems to hold that under that section a sheriff, if he is the demanding agent, would not be permitted to charge for the per diem or necessary expenses for his assistant or assistants. You state that you are writing in the light of that decision to find out if there is any valid reason why the assistant to an agent from this state who went to Kansas for the purpose of bringing back two alleged murderers, should not be entitled to per diem and expenses just as much as the agent himself. You inquire whether the agent is entitled to per diem and, if so, how much under that statute.

Sec. 364.24 provides:

“The compensation of the agent of the demanding state shall be eight dollars per day for the time necessarily devoted to the performance of his duties, and his actual and necessary expenses, which compensation and expenses shall be allowed by the county board of the county in which the crime was committed, upon presentation to said board of a verified account, stating the number of days he was engaged and the items of expense incurred while acting as such agent.”

The agent for whom compensation is provided under this section must be appointed by the governor. In making out extradition papers for two fugitives from justice the governor is authorized to appoint two agents, for in the construction of a statute, a “word importing the singular

number only may extend and be applied to several persons or things as well as to one person or thing" (sec. 370.01 (2) ), or one extradition paper may be made out for each fugitive from justice and an agent appointed for each fugitive named.

We do not believe that if one agent is named such agent may take one or more assistants with him and collect for them the per diem the agent is authorized to collect. We do believe, however, that where there are two fugitives from justice it would be unreasonable to expect him to take care of and return both of them alone and that the expenses of the assistant incurred for railroad fare and board and lodging would be a proper charge as actual and necessary expenses of the agent. Under the opinion referred to there was only one person who was returned under the extradition papers and the officers were using their own car. There seems to have been no necessity for an assistant in that case.

JEF

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*Intoxicating Liquors*—It is not necessary, in case involving unlawful sale of intoxicating liquor as that term is defined in statute, to prove that it was in fact intoxicating.

June 12, 1934.

A. C. BARRETT,  
*District Attorney,*  
Shell Lake, Wisconsin.

You have submitted a letter from the mayor of Spooner and ask for an official opinion on the questions submitted by him. He directs your attention to sec. 176.37 as enacted under ch. 13, Laws of 1933, Special Session, and especially to the last sentence which reads:

"(2) \* \* \* In all cases proofs of the sale or giving away of any such liquor of any name or nature whatsoever shall be deemed proof of the sale or giving away of intoxicating liquors without proof that the intoxicating liquor so sold or given away was in fact intoxicating."

He also directs your attention to the definition of "intoxicating liquors" as given in sec. 176.01 (2), reading thus:

"'Intoxicating liquors' means all ardent, spirituous, distilled, or vinous liquors, liquids, or compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per cent or more of alcohol by volume, which are fit for use for beverage purposes, but shall not include 'fermented malt beverages' as defined in subsection (10) of section 66.05, which contain less than five per centum of alcohol by weight."

"Fermented liquor" is defined as follows in sec. 66.05 subsec. (10), par. (a), subd. 10:

"'Fermented malt beverages' shall mean any liquor or liquid capable of being used for beverage purposes, made by the alcoholic fermentation of an infusion in potable water of barley malt and hops, with or without unmalted grains or decorticated and degerminated grains or sugar containing one-half of one per centum or more of alcohol by volume and not more than three and two-tenths per centum of alcohol by weight. No fermented malt beverages shall be sold in this state after September 1, 1933, unless sixty-two and two-thirds per cent or more of the grain used in its manufacture consists of barley malt."

He submits the following question:

"In the prosecution for sale of intoxicating liquors, in addition to the facts showing that the sale was unlawful, must I have evidence showing that the liquor exhibited in court, which is purported to have been sold, contains one-half of one per cent of alcohol by volume, or more, that it is not a fermented malt beverage, and if so, that it contains more than five per cent of alcohol by weight?"

This question must be answered in the affirmative. The statute referred to simply means that when liquor defined as intoxicating liquor in this statute is proved to have been given away or sold, a prima facie case will be made out without proving that it was in fact intoxicating.

JEF

*Counties—Education—County Normal Schools—State Aid*—If county normal school incurs expense for university extension courses as part of its course of study, such expense may be included under expenditures upon which state aid is granted.

In view of foregoing and in absence of statute, county normal school board may not charge twenty-five dollar tuition fee for such extension courses.

June 12, 1934.

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

In your letter of June 4 you inquire whether state aid can be given to a county normal school on the basis of the cost of courses given by the university extension department, such courses being a part of proposed two-year courses in county normal schools and, secondly, whether normal school boards can legally charge pupils enrolled a twenty-five dollar fee for such extension courses.

The first question is answered in the affirmative.

Sec. 41.44, subsec. (2), Stats. provides:

“If it shall appear that such training school has been maintained, pursuant to law, for a period of not less than nine months during the preceding school year, in a manner satisfactory to the state superintendent, he shall certify to the secretary of state in favor of each such training school, *an amount equal to the sum expended for instruction, school supplies and operation* during the school year; but not to exceed six thousand dollars to any school employing two teachers, and not to exceed eight thousand dollars to any school employing three teachers, and not to exceed ten thousand dollars to any school employing four or more teachers. \* \* \*”

If the cost of the extension courses is taken care of by the county normal school, then there would appear to be no reason for treating this item any differently than any other money “expended for instruction, school supplies and operation.”

The second question is answered in the negative. In view of the answer to the first question, the county normal school would be compensated twice for the expense of

the extension courses if the board could charge pupils a twenty-five dollar fee for such courses in addition to receiving payment in the form of state aid as above provided.

Furthermore, the only tuition charge authorized by statute in the case of county normal school students is to be found in sec. 41.46, Stats., which makes the following provisions for tuition charges against nonresident pupils:

"The board may charge nonresident students a tuition to be fixed by said board, which tuition shall not exceed two dollars per week, and which shall be a charge against the county in which such students reside, and shall be by it paid to the treasurer of the normal school enrolling such students."

JEF

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*Bridges and Highways—Discontinuance of Highways—*  
Sec. 80.02, Stats., does not prohibit discontinuance of road where property owner is deprived of most convenient route to and from his estate; statute intended merely to prevent closing of only access to property.

June 12, 1934.

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

A petition has been made to close a portion of a town road in your county. A, who is the owner of land directly north, objects to such discontinuance on the ground that it deprives her of the *nearest* access to the improved highway over which she hauls milk each day. If this portion of the road is discontinued, she will have to travel three quarters of a mile farther to reach the main highway by another route.

Under these circumstances, you wish to know whether the town board can legally close such portion of the road if A objects.

Answer, Yes.

Sec. 80.02, Stats., reads in part:

“\* \* \* No town board shall discontinue \* \* \* any highway when such discontinuance would deprive the owner of lands of access therefrom to the public highway.”

See *Tilly, et al. v. Mitchell & Lewis Co.*, 121 Wis. 1, 5-6:

“\* \* \* It is very well settled that the mere fact that a property owner is compelled to pursue a longer route in going to or coming from his real estate constitutes no peculiar or different injury. This is an injury which is shared by the general public, though not in the same degree. \* \* \* So the unlawful closing of a street or public place, forming the *only* access to plaintiff's premises, is always held to be such an injury. *Williams v. Smith*, 22 Wis. 594.”

*State ex rel. Wollner v. Schloemer*, 200 Wis. 350, 352:

“The motion to quash admits for the purposes of the motion that the town board has attempted to discontinue the only highway that gives relator access to her lands. It follows that the town board had no power to discontinue the highway and that they should be commanded to remove the barriers, unless the protection of the public traveling upon this highway requires that the barriers be maintained. \* \* \*”

What the statute means to guard against is the closing of the only access to a party's premises. The mere fact that after this portion of the road is closed the owner will have to pursue a longer and more circuitous route in going to and from her land is immaterial and does not constitute a legal objection to its discontinuance.

Therefore, the town board can legally close such portion of the road despite A's objection.

JEF

*Counties—Public Printing—County Board Proceedings—Words and Phrases—General Circulation*—Publication of proceedings of county board in supplement to weekly newspaper distributed with regular edition of such paper to all paid subscribers thereof is legal publication within purview of sec. 59.09, Stats.

Newspaper of general circulation is one published for dissemination of local or telegraphic news of general character having bona fide subscription list and distributed among all classes.

June 12, 1934.

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

You request the opinion of this department on the following statement of facts:

Competitive bids for the publication of a certified copy of the proceedings of a special meeting of the county board were received by the county clerk from four newspapers. The special meeting authorized by resolution a bond issue for relief measures. The newspaper submitting the lowest bid printed a supplement to its regular publication called "Supplement to -----[the name of the paper]" and sent such supplements to the other three weekly papers published in the county to be included with their official publication for distribution among their subscribers.

You ask whether such publication is a regular publication.

It is the opinion of this department that the publication of the proceedings of the county board in a supplement to a weekly newspaper, which supplement is distributed with a regular edition of such newspaper to all paid subscribers thereof, is a legal publication pursuant to the provisions of ch. 59, Stats. In order to make a legal publication of proceedings of the county board it is only necessary to include the printing of such official proceedings within the pages of such weekly newspaper, and the printing thereof in supplement form does not destroy the validity of such

publication. The purpose of sec. 59.09 is to give notice to the people of the county of the proceedings of the county board and the publication thereof in a weekly newspaper of general distribution is a full compliance with the statute.

You also inquire as to what constitutes "general circulation" within the county within the meaning of sec. 59.09.

A newspaper of general circulation is one published for the dissemination of local or telegraphic news or intelligence of a general character, having a bona fide circulation list of paying subscribers, and which is distributed among all classes.

"\* \* \* The word 'general' is derived from 'genus,' and technically relates to a whole genus or kind, or to a whole class or order. But its more usual meaning is, 'common to many; widely spread; prevalent; extensive, though not universal; as, a general opinion; a general custom.'" *Puget Sound Pub. Co. v. Times Printing Co.*, 33 Wash. 551, 74 Pac. 802, 805 (quoting Webster's International Dictionary).

In *State v. Wood County Commissioners*, 33 Ohio Cir. Ct. Rep. 93, judgment affirmed, *State v. Sockman*, 84 Ohio St. 447, 95 N. E. 1157, it was held that a newspaper having a circulation of about 800 subscribers in a county of about 50,000 inhabitants, in 15 of the 20 townships of which it had a circulation of 36 subscribers out of 35,000 or more, and the remainder of its circulation being in a part of the county containing the other five townships, was one of general circulation within the meaning of General Code sec. 2508.

In the case of *In re Green*, 21 Cal. App. 138, 131 Pac. 91, 92, it was said that the test of whether a newspaper is one of general circulation depends on the diversity of its subscribers rather than upon mere numbers.

In *Ambos v. Campbell*, 40 Ohio App. 346, 178 N. E. 320, 322, it was held that a newspaper with a partly unpaid circulation of over 10,000 extending throughout nearly every section of the county was a newspaper of "general circulation" in the county, within the purview of a statute requiring publication of notice concerning annexation petition.

For other definitions of the term "general circulation," see *Burak v. Ditson*, 209 Ia. 926, 229 N. W. 227, 229, 68 A. L. R. 568, and *Koen v. State*, 35 Neb. 676, 678, 53 N. W. 595, 596, 17 L. R. A. 821.

JEF

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*Intoxicating Liquors*—State treasurer may not grant rectifier's permit to individual who cannot satisfy requirements of sec. 176.05, subsec. (9), Stats., even though such individual established rectifying plant prior to passage of said section.

June 12, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

Shortly after the 18th Amendment was repealed an individual established a rectifying concern at Racine. Before establishing this business the individual was informed that there was no state law at that time which would prohibit such an action. A federal permit was granted to him on the assumption that the rectifying plant was not in operation contrary to any state law. The state law regulating intoxicating liquor traffic became effective in the early part of February, 1933, subsequent to the establishment of the rectifying business above mentioned. The individual establishing this concern is unable to qualify for a Wisconsin rectifier's permit. You inquire whether, assuming that the business was entirely legal between the date of its establishment and the passage of the Wisconsin liquor laws, you are warranted in refusing a permit, "knowing that it will mean the destruction of a legitimate enterprise."

Sec. 176.04, subsec. (1), Stats., provides:

"Any person who shall, without a license or permit, vend, sell, deal, or traffic in, or, for the purpose of evading any law of this state, give away any intoxicating liquors in any quantity whatever, shall be guilty of a misdemeanor and be punished \* \* \*."

Sec. 176.05 (1a) provides, in part:

“No \* \* \* rectifier shall sell any intoxicating liquor within the state without first obtaining a permit from the state treasurer. \* \* \*”

Sec. 176.05 (9) provides, in part:

“No \* \* \* permit shall be granted to any person or persons for the sale of any such intoxicating liquors, who is not of good moral character and a full citizen of the United States and of this state and who has not resided in this state continuously for at least one year prior to the date of filing the application; \* \* \*”

Sec. 176.05, (1b) provides, in part:

“The restrictions and limitations imposed in paragraphs \* \* \* (9), \* \* \* of this section shall apply to \* \* \* rectifiers and the permits issued by the state treasurer.”

In XXIII Op. Atty. Gen. 191, at 203, it was held that under sec. 176.05, subsec. (9):

“\* \* \* permits may be granted only to individuals who can comply with the character and residence requirements and the requirement as to conviction for offenses”

It appears that the individual who has established this rectifying concern has not resided in Wisconsin continuously for at least one year prior to the date of filing application for a permit. Under the law, therefore, you have no right to issue a permit to this individual, and he has no right to sell liquor in this state as a rectifying concern without a permit. The fact that this business was established before passage of the state liquor legislation is not material. Any business which is established in Wisconsin, or any other state for that matter, is established subject to the right of the state to control the same under its police power. The liquor control legislation is passed by virtue of such power in an effort to promote the general welfare. The rectifying concern in question acquired no vested right to immunity from this police power control by virtue of its having been established prior to the enactment of the legislation. It may also be stated that liquor control legis-

lation was contemplated, and plans for the same were made, prior to the repeal of the 18th Amendment and that any one contemplating traffic in intoxicating liquors should reasonably have anticipated some control, not only by Wisconsin, but by every state in the Union. It does not follow, moreover, that the present refusal of a permit to this rectifying concern will permanently destroy a legitimate enterprise.

It has frequently happened that what the courts consider a reasonable exercise of the police power has resulted in a destruction or diminution of property values. Perhaps the leading case on this question is that of *Hadacheck v. Sebastian*, 239 U. S. 394. In that case the plaintiff owned a clay mine for brick making purposes. As originally situated it was located outside the city limits of Los Angeles. By virtue of an ordinance of the city of Los Angeles the property upon which the clay mine was located was annexed to the city and thus came in conflict with one of the city's zoning ordinances. The destruction of the plaintiff's property was great and relatively complete. The zoning ordinance was enacted by virtue of police power and regulated the use of property long existing as well as in being. The United States supreme court unanimously upheld the decision of the supreme court of California, holding that the zoning ordinance was a valid exercise of the police power of the state. It was stated in the decision, pp. 410-411.

"The police power and to what extent it may be exerted we have recently illustrated in *Reinman v. Little Rock*, 237 U. S. 171, [35 Sup. Ct. 511]. The circumstances of the case were very much like those of the case at bar and give reply to the contentions of petitioner, especially that which asserts that a necessary and lawful occupation that is not a nuisance *per se* cannot be made so by legislative declaration. There was a like investment in property, encouraged by the then conditions; a like reduction of value and deprivation of property was asserted against the validity of the ordinance there considered; a like assertion of an arbitrary exercise of the power of prohibition. Against all of these contentions, and causing the rejection of them all, was adduced the police power. There was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brick yard here. They differ in particulars,

but they are alike in that which cause and justify prohibition in defined localities—that is, the effect upon the health and comfort of the community.”

JEF

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*Mortgages, Deeds, etc.—Abstracts—Public Officers—* Register of deeds is not required to make abstracts of sale or mortgage of personal property. He is entitled to receive ten cents per folio and twenty-five cents for certificate in furnishing copies.

June 12, 1934.

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

You have submitted a question as to whether the register of deeds is required to certify as to all chattel mortgages filed in the office of the register of deeds.

There is no provision in the law which requires the register of deeds to make an abstract of the chattel mortgages filed on certain property. The provision for abstracting in regard to property is not broad enough to cover personal property and chattel mortgages. The chattel mortgages are indexed and filed and any one may use said index and the records to make an abstract for himself. The register of deeds is, however, authorized under sec. 59.57 (4) to charge ten cents per folio for copies of any records or papers and twenty-five cents for his certificate. Under this section any one may obtain a copy of a bill of sale or chattel mortgage by paying the statutory fee as above provided.

The question has been raised whether the register of deeds could charge ten cents per folio even though copies of the papers are furnished and he makes only the certificate.

This question has not been passed upon by our supreme court, but our court did pass upon a similar statute pertaining to fees for sheriffs. In *Bound v. Beach and others*, 44 Wis. 600, it was held that where delivery of a copy of

any writ or other paper in an action is a necessary part of the service thereof, the fact that plaintiff voluntarily furnishes such copy does not affect the sheriff's right to demand the statutory fee for making it. The court said; p. 601:

“\* \* \* It is quite immaterial where or how he obtains the copy which he serves. If he writes it himself, he *makes* it. So also if he employs a clerk to write it, or a printer to print it. And if some other person writes or prints it for him voluntarily (as in this case), if the sheriff uses the copy thus furnished, we think he *makes* the copy within the meaning of the statute, and may lawfully demand and receive the prescribed statutory fees therefor. If the party requiring the service would avoid the payment of such fees by furnishing the necessary copies, he should specially contract with the sheriff to that effect. \* \* \*”

In view of this decision, in the absence of a ruling on a similar statute pertaining to the fees of the register of deeds, we believe the register of deeds, unless there is a contract with him on the matter, may charge ten cents per folio, although furnished by the party applying for it. If it is necessary to have abstracts of the sales and mortgages on personal property from the register of deeds, additional legislation is necessary.

JEF

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*Counties—County Seat*—Where county seat is established in one place for fifteen years and permanent buildings of value of ten thousand dollars have been erected there, sufficiency of petition for removal of county seat can be determined only as provided for in sec. 59.11, subsec. (4), Stats.

June 12, 1934.

EDWARD T. VINOPAL,  
*District Attorney,*  
Mauston, Wisconsin.

A petition has been presented to the county board of Juneau county signed by freeholders, requesting the county

board to change the county seat from Mauston to New Lisbon and asking the board to submit the question of the removal of the county seat to a referendum. The county seat has been located at Mauston for a period of over fifteen years, and permanent buildings exceeding ten thousand dollars in value have been erected there. In such a situation, sec. 59.11, subsec. (4), Stats., provides:

“\* \* \* nor shall any application for its removal be submitted to a vote of the electors of the county unless a petition signed by at least one-half of the resident freeholders of the county as evidenced by the recorded deeds in the office of the register of deeds of the county, in favor of such removal, shall first be presented to the county board  
\* \* \*”

It becomes a question under this subsection whether or not the requisite number of freeholders have signed the petition. A committee has been appointed by the county board to check the records in the office of the register of deeds of the county, to determine whether or not the required fifty per cent of the freeholders have signed the petition. Although the persons appointed are familiar with this type of work, they report that it will be a very cumbersome and expensive process and one that will take a long period of time. You inquire whether the determination as to the required number of freeholders upon the petition may be made in any manner other than that specified in sec. 59.11, (4).

This question must be answered No. Although this particular subsection of the Wisconsin statutes has never received any construction by the supreme court, other analogous statutes have received a construction from which some conclusions may be drawn. Sec. 59.11 (2), relates to the removal of the county seat in certain situations and provides for a petition by two-fifths of the legal voters of a county to be determined by the poll lists of the last previous general election. In the case of *La Londe v. The Board of Supervisors of Barron County, et al.*, 80 Wis. 380, 384, it was said:

“\* \* \* as we have said, the names of two-fifths of the legal voters, *as shown by the poll-lists*, must appear on the petition when the board takes final action. *This is a*

*jurisdictional fact*, and must exist before the board is clothed with authority to submit the question of the removal of the county seat to a vote of the electors of the county. \* \* \*." (Italics ours.)

In *State ex rel. Hawley v. County Board of Supervisors of Polk County, et al.*, 88 Wis. 355, 364, it was held:

"\* \* \* The signatures of two-fifths of the electors who voted at the last general election were essential to the jurisdiction of the board. \* \* \*."

Again, in *State ex rel. Tate v. Wolf*, 163 Wis. 390, 393:

"\* \* \* A petition signed by two-fifths of the legal voters of the county, *to be determined in a particular way*, is requisite to give the county board jurisdiction to submit such a matter to the voters of the county. \* \* \*." (Italics ours.)

In *State ex rel. Hanlon v. Russell*, 124 Wis. 548, the court construed the statute providing for a petition signed by at least twenty per cent of the electors as appeared by the poll list of the last general election. It was stated, p. 550:

"\* \* \* The legislative idea evidently was to provide a definite and certain means of ascertaining whether the required number of petitioners had signed. By providing that the petition should be signed by twenty per cent of the persons whose names appeared on the poll list all difficulty was removed. \* \* \*."

In *Pape v. Carlton*, 130 Wis. 123, it was held, p. 131:

"\* \* \* The only requisite is that at the time the chairman of the town board is 'petitioned' the petitioner shall be a taxpayer therein, as appears by the last previous assessment roll. It has two features as to which certainty should be looked for: First, the time when the chairman is to be regarded as 'petitioned' within the meaning of the act; second, the status of the signers of the petition as to their being taxpayers at that time as appears by the last previous assessment roll of the town."

It is our opinion that the requirement of fifty per cent of the resident freeholders of the county on the petition provided for in sec. 59.11 (4) must be determined by the recorded deeds in the office of the register of deeds of the county, and that determination in this manner is jurisdictional.

It is to be noted that the language of sec. 59.11 (4) is negative in prohibiting a referendum except upon the type of petition therein mentioned. Negatively worded statutes are generally construed as being imperative. *State ex rel. Doerflinger v. Hilmantel*, 21 Wis. 566. Moreover, by the maxim "expressio unius est exclusio alterius," where a statute designates a method by which a certain fact is to be determined or ascertained, such method is exclusive. *State ex rel. Owen v. McIntosh*, 165 Wis. 596. See also *Conroe v. Bull*, 7 Wis. 408; *State ex rel. City of West Allis v. Milwaukee L. H. & T. Co.*, 166 Wis. 178; *State ex rel. Owen v. Reisen*, 164 Wis. 123.

A county is only a quasi-municipal corporation. *State ex rel. Bare v. Schinz*, 194 Wis. 397. A county board, therefore, or a properly appointed committee thereof, has only such power as is expressly delegated by statute or necessarily implied from specific delegations thereof. *Frederic v. Douglas County*, 96 Wis. 411.

In connection with this movement to change the county seat from Mauston to New Lisbon, we wish to call attention to the provisions of art. XIII, sec. 8, Wis. Const., which provides:

"No county seat shall be removed until the point to which it is proposed to be removed shall be fixed by law, and a majority of the voters of the county voting on the question shall have voted in favor of its removal to such point.

The removal of a county seat must, of course, comply with this constitutional provision as well as statutory requirements.

JEF

*Corporations—Co-operative Associations*—Corporation organized under statute of Wisconsin may not charter subsidiary corporation. If it is intended to form only unincorporated clubs, then such clubs have not right to use as part of their name word "co-operative." Such use is violation of sec. 185.22, subsec. (4), Stats., and may be prosecuted criminally as misdemeanor.

Sec. 185.05 requires president and vice-president to be directors. Persons elected to such offices who are not directors are *de facto* officers and may act with like effect as *de jure* officers if there are no *de jure* officers.

June 14, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You state that on July 20, 1933, you filed articles of incorporation for the United Taxpayers Co-operative Association and have since had considerable correspondence and a number of interviews with them in regard to whether or not this corporation was empowered to issue charters to municipal subdivisions in Wisconsin as local or county taxpayers clubs or associations as provided by article ten of their articles of incorporation. You enclose printed matter and you state that they show that these local clubs use the word "co-operative" in the application for membership and the membership card, the same reading, "The ----- Ward Taxpayers Co-operative Club." You state that you have held that under sec. 185.22, Stats., only associations incorporated under ch. 185 are permitted to use the word "co-operative." You have enclosed a copy of the articles of incorporation and also a copy covering elections held August 7, 1933. You inquire whether or not this co-operative has the power to issue charters under article ten of its articles of incorporation in which the word "co-operative" is used.

This question must be answered in the negative. Article ten of the articles of incorporation provides:

"This association shall be empowered to issue charters to ward, city, township, village and county taxpayers clubs or associations within the state of Wisconsin, and shall be

known as Local or County Taxpayers Club or Association, composed of twenty-five (25) or more members in the local."

The word "charter" generally means the instrument evidencing the act of a legislature, governor, court or other authorized department or person by which a corporation is created. I find no provision in the statute which authorizes this corporation to issue charters creating private corporations or distinct entities. It may be, however, that the word "charter" is not used in its ordinary sense, but that it simply means a contract or instrument by which a local unincorporated club is authorized to be formed with the powers enumerated in the articles of incorporation of the United Taxpayers Co-operative Association. In the latter sense, there will probably be no legal objection to the forming of such subsidiary club, especially in view of the fact that the members of such clubs have a right to vote as other members of the United Taxpayers Co-operative Association. The said corporation not having the power to create a subsidiary corporation, these so-called subsidiary corporations or clubs are not authorized to use the word "co-operative" in their name. See sec. 185.22.

You also ask to be advised whether the fact that the president and vice-president are not directors nullifies the election held August 7 and also the one held later covered by the annual report.

This question must be answered in the negative. While these persons elected president and vice-president are not eligible to the office, still, having been elected to the office, they are *de facto* officers of the corporation, and the acts while acting as such are valid and binding to the same extent as they would be if they were *de jure* officers. 8 Am. & Eng. Encyc. of Law (2d) 775; 7 R. C. L. 455; *Chandler v. Hart*, 161 Cal. 405. See note in 15 L. R. A. 418. I assume that there are no *de jure* officers elected for the offices for which the said president and vice-president were elected.

You also ask whether this association, if it had been incorporated under ch. 180, Stats., the general corporation

law, would have the power to issue charters to municipal or political subdivisions.

This question must be answered the same as it has been answered heretofore. They have no such power. I may add that the remedy in each of these cases where they have violated the statute, is to prosecute them for the misdemeanor described in sec. 185.22 (4).

JEF

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*Intoxicating Liquors—Prisons—Jails*—Portion of sec. 176.43, Stats., imposing liability upon municipality for board of one committed to jail for violating ordinance refers only to ordinance regulating intoxicating liquor.

June 14, 1934.

ROSCOE GRIMM,  
*District Attorney,*  
Janesville, Wisconsin.

You call our attention to the latter portion of sec. 176.43, Stats., which reads as follows:

“\* \* \* Whenever any person shall be committed to the county jail or house of correction for the violation of a municipal ordinance, his board shall be paid by the municipality where such violation was committed.”

You inquire our opinion as to whether or not this provision was intended to cover violations of all municipal ordinances or only those enacted pursuant to powers granted by ch. 176, Stats.

It is our opinion that this provision applies only to local ordinances relating to intoxicating liquors enacted by virtue of authority delegated in ch. 176. It was enacted by ch. 13, Laws Special Session 1933, which dealt exclusively with the regulation of the sale of intoxicating liquors. It was placed in ch. 176, Stats., which also was confined exclusively to this one subject. It is, moreover, simply a portion of sec. 176.43, which deals with municipal regulations in or upon the sale of intoxicating liquor. It is our opinion

that had this section been intended to apply generally, it would have been placed in another chapter of the statutes and would have been so differentiated from the intoxicating liquor laws as to leave no question of its general application.

JEF

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*Fish and Game—Public Lands—United States government, through department of agriculture, may not establish seasons, bag limits, etc., on fish and game other than migratory game, or create regulations for hunting and fishing in designated national forests within state.*

June 14, 1934.

RALPH M. IMMELL, *Directing Commissioner,*  
*Conservation Department.*

You ask to be advised if the United States government, through the department of agriculture or others, has the power and authority to establish seasons, bag limits, etc., on fish and game other than migratory game and create regulations for hunting and fishing on designated national forests, or portions thereof, within this state, taking into consideration the fact that sec. 29.02, Wis. Stats., provides that the lawful title to and the custody and protection of all wild animals within this state is vested in the state for the purpose of regulating the enjoyment, use, disposition and conservation thereof.

Amendment X, U. S. Const., provides:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people”

In *LaCoste v. Department of Conservation*, 263 U. S. 545, 549, the supreme court of the United States announced the general rule:

“The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Be-

cause of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use, and property rights that may be acquired therein. \* \* \*

In the case of *Missouri v. Holland*, 252 U. S. 416, the supreme court held that in view of a treaty with Great Britain the regulations of the secretary of agriculture regulating the killing of migratory birds are valid and constitutional and do not infringe the property rights or sovereign powers respecting such birds reserved to the states by the Tenth Amendment. Justice Holmes, writing the opinion used the following significant language. After discussing the question of the statute giving the state the title to the wild animals, he points out that the claim of the state upon title is to lean upon a slender reed, and that the migratory birds are there only temporarily. On page 435 he concludes:

“Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. *Carey v. South Dakota*, 250 U. S. 118.”

It is true that sec. 1.055, Stats., giving consent of the state to the acquisition by the United States of title to land for national purposes, contains the following:

“\* \* \* provided, that the state of Wisconsin shall retain concurrent jurisdiction with the United States in and over such areas so far that civil process, in all cases, and such criminal process as may issue under the authority of the state of Wisconsin against any persons charged with the commission of any crime within or without said areas, may be executed thereon in like manner as if this consent had not been given. \* \* \*”

You will note that there is no granting of any jurisdiction to the federal government of any criminal matter that the federal government did not have and claimed to have. Under the above authorities cited, the federal government has claimed criminal jurisdiction only over migratory birds and has conceded that the regulation of other game is reserved in the state.

You are therefore advised that it is our opinion that the federal government through the department of agriculture has not the power and authority to establish seasons, bag limits, etc., on fish and game other than migratory game, and create regulations for hunting and fishing in the designated national forests within this state.

JEF

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*Corporations—Security Law—Unemployment Insurance*  
—Bank deposit fund plan set forth will constitute valid trust fund and will not be subject to attack by general creditors of employer making such deposit.

Private business corporation may be trustee of fund deposited by such corporation employer with bank under so-called bank deposit fund plan for benefit of such corporation's employees.

No particular words or phrases are needed to express intent to create trust except that language used must express intent of settlor that trust shall arise.

June 14, 1934.

INDUSTRIAL COMMISSION.

Attention Voyta Wrabetz, *Chairman*.

You request the opinion of this department upon the following questions, which will be answered *seriatim*.

"1. Is the fund deposited by an employer with a bank under the bank deposit fund plan (as set forth in the enclosed bank deposit fund plan) and maintained in the form of a demand deposit account, free from attack by general creditors of the employer making such deposit?"

It is the opinion of this department that a fund deposited by an employer with a bank under the proposed bank deposit fund plan, as set forth in your communications, and maintained in the form of a demand deposit account, is free from attack by general creditors of the employer making such deposit.

The plan for unemployment benefit trust funds for use in connection with employers who voluntarily come under the so-called employer's deposit fund act (ch. 108, Wis. Stats.), is operated through the medium of bank deposits. The bank deposit fund is declared a specific trust by the employer for the benefit of his employees and is to be deposited in an account or accounts entitled "Unemployment Benefit Trust Fund of (employer), Trustee." Withdrawals can be made from the fund only for the purposes specified in the plan.

Pars. (d) and (e), sec. 1 of the bank deposit fund plan provide as follows:

"(d) Except as may be otherwise provided in this plan, the fund shall be subject to withdrawals therefrom only for the purpose of making such payments of benefits to employes as are provided for under this plan. Payments of benefits to employes under this plan shall be made by drafts, vouchers or orders on the Bank expressed to be payable from the fund. Such drafts, vouchers or orders shall be in such form as from time to time shall be approved by the commission (approved samples of which shall be filed with the Bank), and shall state the purpose of the payment, and shall be accompanied by a receipt in writing signed by the employe, in form to be prescribed by the commission. No single draft, voucher or order for more than \$100 shall be drawn against or honored out of the fund.

"(e) The Bank shall honor out of the fund all such drafts, vouchers or orders, and all orders of the commission and court decrees expressed to be payable from the fund (a certified copy of the order or decree being left with the Bank.) There shall be no obligation on the Bank to defend any court action involving the fund, but the Bank shall forthwith notify both the Employer and the commission of all legal papers served on it in this connection."

The plan further provides that the employer shall be trustee of the fund for the benefit of the employee described and for the uses provided therein.

After a careful examination of the bank deposit fund plan we are of the opinion that if a fund is deposited in a bank pursuant to such plan it is legally constituted a trust fund and will be treated as a separate deposit and will not be subject to attack by general creditors of the employer making such deposit.

A trust has been defined as follows:

"In its simplest elements a trust is a confidence reposed in one person, called the trustee, for the benefit of another, called the cestui que trust, with respect to property held by the former for the benefit of the latter. The term implies the separate existence of two estates or interests, one equitable and one legal. It is fundamentally essential to the existence of any trust that there be a trust res or subject-matter and that there be a separation of the legal estate from the beneficial enjoyment." 65 Corpus Juris 218.

In *H. B. Cartwright & Bro. et al. v. U. S. Bank & Trust Co.*, 23 N. Mex. 82, 167 Pac. 436, 437, it was said:

"A trust, in the modern and confined sense of the word, is a confidence reposed in a person with respect to property of which he has possession or over which he can exercise a power to the extent that he may hold the property or exercise the power for the benefit of some other person or object." (Syllabus 5.)

It is well settled that a lawful trust, validly established and not made in contemplation of bankruptcy or insolvency, is immune from attack by general creditors of the person establishing such trust. *In re Creech Bros. Lbr. Co.*, (Wash. 1917) 240 F. 815, 3 C. C. A. 44; *In re Mayer*, (C. C. A. N. Y. 1907) 157 F. 836; *Root Mfg. Co. v. Johnson*, (Ind. 1914) 219 F. 397, 135 C. C. A. 139, affirmed *Johnson v. Root, etc.*, (1916) 36 S. Ct. 521, 241 U. S. 160, 60 L. ed. 934.

A careful reading of ch. 108, Stats., discloses that it was the clear intention of the legislature that the unemployment benefit fund to be established under the law for the benefit of employees was to be a trust fund. The only right of the contributing employer in the fund so established is the right to receive the balance, if any, remaining in the fund after the beneficiaries (i. e., the employees)

have received payment in full of their beneficial interests when the employer goes out of business. It would seem that while the employer is in the business he would have no present interest in such fund. The beneficial interest in this trust fund is in the employees of the contributing employer. In view of this situation it seems clear that a fund deposited by an employer with the bank under the bank deposit plan, pursuant to the provisions of ch. 108, Stats., and maintained in the form of a demand deposit account is free from attack by general creditors of the employer making such deposit.

"2. May a corporation under its charter issued by virtue of ch. 180, Stats., be a trustee of the fund for the benefit of the employees described and for the uses provided in this plan?"

It is the opinion of this department that a corporation under its charter issued by virtue of ch. 180 may be a trustee of the fund deposited by an employer with the bank under the so-called bank deposit fund plan for the benefit of his employees and for the uses provided in such plan.

Sec. 180.01, Stats., provides as follows:

"Three or more adult residents of this state may form a corporation in the manner provided in this chapter for any lawful business or purpose whatever, except banking, insurance and building or operating public railroads, but subject always to provisions elsewhere in the statutes relating to the organization of specified kinds or classes of corporations."

By the express exclusion of the business of banking, insurance and building or operating public railroads from the purposes of domestic corporations organized under ch. 180, it would seem that all other lawful purposes are allowed to such corporations.

In 6 Fletcher on Corporations (Permanent Ed.), sec. 2601, pp. 400-401, it is pointed out that the old authorities to the effect that a corporation could not act as trustee have long since been abandoned and that today it is unquestioned but that corporations may take property in trust for the use of others for all purposes within the corporate power. Fletcher states:

“\* \* \* it is now settled beyond any question that corporations aggregate have the same capacity and power as a natural person to act as trustee, and to hold property in trust, provided the purpose is not foreign to the objects of its creation, and provided there are no charter or statutory prohibitions, and a corporation, like an individual, may become a trustee by operation of law. \* \* \*”

In 3 Thompson on Corporations, sec. 2232, pp. 917-918 it is said:

“It seems clear from the cases that a corporation has power to act as trustee for any purpose within the scope of its charter or where it has an interest in the trust fund or property. ‘The general rule now is,’ said one court, ‘that all persons capable of confidence, and holding real or personal property, may hold as trustees, although they could not be seized to a use before the statute.’ This power is now universally conceded to corporations. But corporations unless specially authorized can not be seized of land to the use of another. And it may well be doubted whether the ordinary corporation can act as such trustee where it has no interest, and where the purpose of the trust is entirely foreign to the corporate purpose. While a corporation, as a general rule, can not be a trustee in a matter in which it has no interest, yet, where property was devised to a corporation partly for its own use and partly in trust for others, it was held that the power to take the property carried with it the power to execute the trust in favor of others. This rule applies especially to eleemosynary or charitable corporations, including hospitals and colleges, and to religious corporations. Manufacturing corporations, banks, insurance companies and modern business corporations generally may take property in trust either to secure debts due them or for other purposes not foreign to the purposes of their incorporation. It is necessary that a foreign trust corporation have a certificate before it is qualified to act as trustee in a domestic state making the holding of a certificate a condition to doing business therein.”

And Cook, in Principles of Corporation Law (1925), in considering the power of corporations to act as court officers in the capacity of executors and administrators, discusses the power of corporations with respect to trusts as follows, at p. 448:

“As to trusts the rule is not so rigid. The old rule that corporations could not take property in trust for the use

of others is now obsolete, and a corporation may be a trustee to hold property in trust for purposes within the corporate power. \* \* \*.”

In *State v. Higby Company* (1906), 130 Iowa 69, 106 N. W. 382, 383, the court points out:

“\* \* \* At common law, originally, a corporation could not hold land or other property as trustee. 1 Black, Com. 477; *Minnesota Co. v. Beeber*, 40 Minn. 7, 41 N. W. 232, 2 L. R. A. 418. The reasons for this were technical in the extreme, and since the statute of uses (St. 27 Hen. VIII, c. 10) corporations may hold as trustees. *Sinking Fund v. Walker*, 6 How. (Miss.) 143-185, 38 Am. Dec. 433. The general rule in this country now is that a corporation may hold real or personal property in trust for any purpose that is not foreign to the business for which it was created; and a court of equity will enforce such trusts. See cases cited in 7 Am. and Eng. Ency. (2d Ed.) 732. *Vidal v. Girard's Ex'rs.*, 2 How. (U. S.) 127, 11 L. Ed. 205; *Phillips v. King*, 12 Mass. 546; *Matter of Howe*, 1 Paige (N. Y.) 214; *Trustee v. Peaslee*, 15 N. H. 317; *Protestant Co. v. Churchman*, 80 Va. 718; *DeCamp v. Dobbins*, 29 N. J. Eq. 36; *Ex parte Trustees of Greenville Academies*, 7 Rich Eq. (S. C.) 471; *Bell Co. v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268. \* \* \*.”

See also: 65 *Corpus Juris* 570; 26 R. C. L. 1273.

It would seem by the weight of authority in this country that a corporation may hold real or personal property in trust for any purpose that is not foreign to the business for which such corporation was created. Inasmuch as the Wisconsin legislature has made it not only a proper purpose of a private domestic corporation but also a duty to provide an unemployment plan under ch. 108 and to maintain proper reserves for carrying it out, it can not be said that a private corporation is without power to make contributions to an unemployment fund and to declare the trust benefits of its employees therein. A careful reading of ch. 108 discloses that the unemployment compensation plan is designed for the creation of trusts for the benefit of employees who might become unemployed. Two alternative plans are provided therein, one of which is known as the compulsory plan and which requires the employer to deposit contributions with the industrial commission in a

trust account. The other plans which are exemptions under the provisions of sec. 108.15 eliminate the necessity of depositing contributions with the industrial commission, but such deposits must, nevertheless, be segregated and supported by such security as the commission may require. It would seem, then, that under the exemption plan an employer corporation could validly assume trusteeship over an unemployment trust fund and that such trusteeship would be within the scope of its authority under its charter.

However, it has been urged that, because of the provisions of ch. 223, Stats., and particularly sec. 223.03, (7), relating to the corporate power of a so-called trust company bank, only the corporations authorized thereunder would have power to act as trustee.

It should be pointed out that the twelve subsections of sec. 223.03 constitute a detailed declaration of the powers for such trust company banks. Subsec. (7), sec. 223.03 provides as follows:

“And any such corporation may act generally as agent or attorney for the transaction of business, the management of estates, the collection of rents, interests, dividends, mortgages, bonds, bills, notes, and other securities, or moneys, and also as agent for the purpose of issuing, negotiating, registering, transferring, or countersigning certificates of stock, bonds, or other obligations of any corporation, association, or municipality, and manage any sinking fund therefor, on such terms as may be agreed upon; and may also accept and execute the offices of executor, administrator, trustee, receiver, assignee, or guardian of any minor or insane or incompetent person, lunatic, or any person subject to guardianship; and in all cases in which application shall be made to any court for the appointment of any person in any such capacity, it shall be lawful to appoint such corporation, with its consent, to hold such office or offices”

It seems clear that the authority thus conferred upon trust companies to act generally as agent or attorney for the transaction of business does not preclude other corporations from so acting inasmuch as many other powers conferred by sec. 223.03 are such as are commonly exercised by ordinary private corporations.

The first clause of subsec. (6), sec. 223.03 provides that a trust company

“\* \* \* shall have power, in and by its corporate name, to take, receive, hold, pay for, reconvey, and dispose of any effects and property, real or personal, which may be granted, committed, transferred, or conveyed to it with its consent, upon any terms, \* \* \* by any person or persons, \* \* \*.”

Manifestly, the foregoing powers are such as are commonly exercised by private corporations and the express statutory grant of such power to a trust company in no way negatives the power of an ordinary private corporation to perform the same acts. The additional grant to trust companies that they may take and deal with property upon a trust cannot be a denial of the power of a domestic corporation to act as trustee of a voluntary trust pertaining to its ordinary business and purposes. Subsec. (7), sec. 223.03, Stats., provides in part that a trust company

“\* \* \* may also accept and execute the offices of executor, administrator, trustee, receiver, assignee, or guardian of any minor or insane or incompetent person, lunatic, or any person subject to guardianship; \* \* \*.”

The legislative grant to trust companies to accept the foregoing offices by appointment by court is merely an extension to such corporations of a right which formerly could only be exercised by natural persons. The acceptance of such offices implies the taking of an oath, of which an ordinary corporation is incapable. However, this does not militate against the view that an ordinary private corporation may accept the trusteeship of a trust for the benefit of its employees.

It has also been urged that sec. 189.07 (2), which relates to the regulation of securities to be sold in this state, requires a trustee other than the employer to have title and control of such an unemployment benefit fund. This provision of the statutes provides in part as follows:

“No evidences of debt secured by or issued pursuant to any deed of trust, trust mortgage, or other form of trust agreement shall be registered unless it is established that the trustee has authority so to act under the laws of jurisdiction of its domicile; \* \* \*.”

Manifestly, since the unemployment benefit plan does not contemplate that any *evidences of debt* are to be issued, there will be no securities to register under the provisions of ch. 189, Stats., and hence that law is clearly inapplicable.

In view of the foregoing we are constrained to hold that an ordinary private corporation may be the trustee of the unemployment benefit trust fund plan outlined in your communication, since the carrying out of that trust is within the powers granted to the corporation by the Wisconsin statutes and by the corporate charter.

It should also be noted that if a valid trust was established by an employer for the benefit of his employees pursuant to the provisions of ch. 108 through the medium of bank deposits under the so-called "unemployment benefit trust fund plan," such a trust would not fail, even though it should be held that an ordinary private business corporation was not qualified under the laws of Wisconsin to act as trustee. It is well settled that equity will not allow a trust to fail for want of a trustee. If no trustee is named, or the trustee named is incompetent under the laws of the state to accept the trust, equity will supply a trustee in case of need and thus carry out the intent of the settlor who caused the trust to come into existence. This principle is generally expressed in the axiom, "Equity will not allow a trust to fail for want of a trustee." *Handley v. Palmer*, (1896) 91 Fed. 948; *Hitchcock v. Board of Home Missions*, (1913) 259 Ill. 288, 102 N. E. 741, Ann. Cas. 1915B 1; *Attorney General v Goodell*, (1902) 180 Mass. 538, 62 N. E. 962.

Thus, it has been held that where the settlor describes the trust completely and the trustee named by the settlor is a corporation which has passed out of existence, or a body which has no legal existence (*In Re Estate of Crawford*, (1910) 148 Iowa 60, 126 N. W. 774, Ann. Cas. 1912B 992; *Darcy v. Kelley*, (1891) 153 Mass. 433, 26 N. E. 1110), or if the trustee is incompetent to act (*Gould v. Board of Home Missions*, (1918) 102 Neb. 526, 167 N. W. 776), equity will provide a trustee and the trust will be carried out.

"3. Would your answer to our first question (on possible attack by general creditors of the employer) be ma-

terially affected in case the following changes were made in the proposed bank deposit fund clause:

“(a) If the following language were substituted for paragraph (a) of said clause: ‘The employer hereby declares the fund to be deposited solely for the benefit of the employees described, and for the uses provided, in this plan.’

“(b) Change the title designation set forth in paragraph (b) of said clause, to read: ‘Unemployment Benefit Trust Fund, under chapter 108, of -----’

-----  
 (Employer)

(You will note that the above title designation would omit the word ‘Trustee’.)”

The answer to your third question is, No. If the proposed changes were made in the bank deposit fund plan as outlined in your third question, the answer to your first question would not be materially affected thereby. Your third question is directed toward the language necessary to the creation of an express trust. It is well settled that the language relied upon for the creation of an express trust must manifest an intent that an express trust shall arise and must describe with certainty and completeness the trust essentials, except the trustee. However, it is not necessary that the settlor use any particular words or phrases to express his intention to create a trust and embody the description of the trust, and if the words used do convey the intent to establish a trust, they will have that effect. No formal or technical expressions are required by law. Thus it is not necessary that the settlor use the words “trust” or “trustee,” and the designation of one as a “trustee” does not conclusively show the creation of a trust. *Carr v. Carr*, (1911) 15 Cal. App. 480, 115 Pac. 261; *Morse v. Morse*, (1881) 85 N. Y. 53; *Hughes v. Fitzgerald*, (1905) 78 Conn. 4, 60 Atl. 694.

In view of the foregoing it would seem that the substitution of the language indicated in your third question for that contained in par. (a) of the bank deposit clause would not materially affect our answer to your first question. The elimination of the word “trustee” is immaterial, inasmuch as the bank deposit plan indicates the intent to establish a trust. This being so, the intention of the settlor will be given that effect.

It should also be pointed out that the courts will undoubtedly construe the unemployment act, ch. 108 and cases arising thereunder, liberally, with a view of effectuating the intention of the legislature. *Ronning v. Industrial Comm.*, (1925) 185 Wis. 384, 200 N. W. 652; *B. F. Sturtevant Co. v. Industrial Comm.*, (1925) 186 Wis. 10, 202 N. W. 324.

JEF

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*Intoxicating Liquors—Words and Phrases—Person—*  
State liquor control law does not authorize cities, towns or villages to create special class of licenses for clubs or discriminate in favor of club in matter of license fees.

Word "person" in sec. 176.05, subsec. (10), par. (b), Stats., includes club.

June 14, 1934.

JOHN P. MCEVOY,  
*Assistant District Attorney,*  
Kenosha, Wisconsin.

You state that there has been considerable local agitation concerning the interpretation of the state liquor law relative to the licensing of bona fide clubs which operate bars in connection with their club houses. Inquiry is made as to whether or not a distinction can be drawn "between the license fee for such a bar catering as it does to members and guests of members only, and the ordinary tavern which caters to the general public." It appears that the fee fixed by the local governing bodies for Class "B" intoxicating liquor licenses in many cases is so high as to prohibit clubs from obtaining them, if the clubs are obliged to pay the regular "Class B" license fee.

It is our opinion that no distinction whatsoever can be drawn between these two under the state law. Under sec. 176.05, subsec. (2), Stats., intoxicating liquor licenses "shall be designated either 'Retail Class A' or 'Retail Class B'." No other class of intoxicating liquor license is provided for.

Sec. 176.05, subsec. (4), provides:

"The sum to be paid for such license shall be at all times the same for each class of licenses \* \* \*."

In XXIII Op. Atty. Gen. 191, at 200, it was held that this provision does not permit a municipality to charge different amounts for licenses within each class but does permit the municipality to fix a different sum for Class "A" and Class "B" licenses. It has been suggested that the local municipality subdivide the "Class B" licenses into "Class B Retailers' licenses" and "Class B Club Retailers' licenses," and fix different fees for these classes, by virtue of sec. 176.43, which delegates to the cities, towns and villages power to prescribe additional regulations in or upon the sale of intoxicating liquor not in conflict with the provisions of the state law. This quite obviously would be a circumvention of the law which limits intoxicating liquor licenses to two classes. Such subdivision would be virtually creating three classes although still retaining only two alphabetical designations for the classes. There would be no good reason why the municipality could not as well create a number of other subdivisions under the "Class B" and so completely destroy the uniformity which the legislature desired when it provided, in sec. 176.44, to the effect that the state liquor law "shall be construed as an enactment of state-wide concern for the purpose of providing a uniform regulation of the sale of liquors." Although bona fide clubs are given special treatment in so far as the fermented malt beverage license fee is concerned, there is no indication under the state liquor controlling law that clubs should be in any way differentiated from other premises requiring a Class "B" license. Clubs desiring a retail liquor license must pay the same fee as other tavern keepers.

You also inquire whether "the provisions of sec. 176.05, subsec. (10), par. (b) which provides that no retail 'Class B' license to sell liquor shall be issued to any person who does not also have a 'Class B' retailer's license to sell fermented malt beverages under subsection (10) of section 66.05, apply to bona fide clubs \* \* \*."

It is our opinion that this question must be answered in the affirmative. At least two provisions of ch. 176 indicate that the legislature intended that clubs should be able to obtain intoxicating liquor licenses. Sec. 176.05, subsec.

(3), allows a club more than two licenses. Sec. 176.01, subsec. (8), defining a club, also provides that "it may be licensed." Later on in this definition the following language is found:

"\* \* \* The trafficking in intoxicating liquors shall be incidental only and shall not be the object of its existence or operation. A club making application for a license shall have occupied the premises upon which it is then located for a period of six months prior to the time of filing such application."

These provisions set up additional qualifications which must be met by clubs before they can obtain a license, instead of indicating a legislative intent to make a separate license class for clubs. The license issued to a club must be upon application and subject to other general restrictions as to the issuance of licenses for taverns.

Although sec. 176.01, subsec. (8), indicates that a club may be licensed, it is under sec. 176.05, subsec. (1), that a town board, village board or common council may grant it a license. A club obtains its license under this section from the town board, village board or common council, which is authorized to grant licenses under the conditions and restrictions imposed by the state law "to such *persons* entitled to a license \* \* \* as they deem proper to keep places within their respective towns, villages or cities for the sale of intoxicating liquors." Later in sec. 176.05 language indicates that the *persons* previously mentioned are intended to include not only an individual, but a firm or corporation. In XXIII Op. Atty. Gen. 130 it was held that the term, "person", used in sec. 176.04 (1), includes corporations, firms, partnerships, associations, etc. Inasmuch as a club must have been considered by the legislature to be a "person" to whom the town board, village board or common council could grant a license, it is our opinion that the word "person," where it appears in sec. 176.05 (10) (b), includes a club and that this latter section prevents the issuance of a retail "Class B" intoxicating liquor license to a club which does not have, or to whom is not issued, a "Class B" retailer's license to sell fermented malt beverages under subsec. (10), sec. 66.05, Stats.

JEF

*Legislature — Senator — Public Officers — Principal of County Normal School*—State senator who is also principal of county normal school may collect salary of both positions.

June 14, 1934.

JAMES L. MCGINNIS,  
*District Attorney,*  
Amery, Wisconsin.

You wish to know whether a principal of a county normal school who is elected to the state senate is entitled to collect the salary of both positions.

The answer is, he may collect both salaries.

You call our attention to the fact that the state pays a certain sum as aid to the county normal school under sec. 41.44, Stats. You also cite sec. 20.01, subsec. (1), par. (d):

“Members of the legislature elected, appointed or employed in or to any other office or employment under the state government not incompatible with their membership in the legislature shall be paid only such part of the salary fixed for such office or employment as is in excess of the salary paid them as members of the legislature.”

As you point out in your letter, the principal of the county normal school is an employee of the county. His status as a county employee is not changed by the fact that the county receives state aid for its normal school. Sec. 20.01 (1) (d), cited above, applies only where the legislator has some other office or employment under the *state government*; therefore, it would not apply in the instant case. We agree in your conclusion that a man who is both a state legislator and the principal of a county normal school may collect the salary of both positions.

JEF

*Elections—Corrupt Practices—Nominations*—Temporary committee of Progressive Party now in existence by virtue of election or appointment by conference of representatives from several counties throughout state cannot be considered to be same as state central committee recognized in sec. 5.20, subsec. (1), and sec. 12.21, Stats.

Temporary state central committee of Progressive Party organized by conference of representatives should, if it is to engage in political activities, organize as voluntary committee under provisions of sec. 12.09 (5) (b).

Any expenditures made or incurred by temporary committee must be charged to temporary committee and not to state central committee of Progressive Party when such latter committee has been selected and organized as provided in sec. 5.20 (1).

June 18, 1934.

PHILIP F. LAFOLLETTE, *Attorney at Law*,  
Madison, Wisconsin.

You have requested an opinion from this department concerning three different questions in the organization of the Progressive Party. It seems that the Progressive Party has a temporary committee in charge of work for that party.

In your first question you desire to know if the temporary committee comes within the meaning of the state central committee as provided in sec. 12.21, Stats. Sec. 5.20, subsec. (1), provides for the election of a state central committee. This election takes place only on the second Tuesday after the September primary, the electors being the successful candidates of the party for the various state offices, etc. Since the Progressive Party has not had a state central committee heretofore and there being no such committee at the present time by the designation of state central committee, as that term is used in the statute, we hold that the temporary committee cannot come within the purview of sec. 12.21 as a state central committee.

Your second question is:

“If the first question is answered in the negative, then, should the Temporary State Central Committee of the

Progressive Party organize under the provisions of subsection (5) (b) of section 12.09 as a voluntary committee?"

Under the provisions of sec. 12.09 (5) it would be incumbent upon the temporary state committee of the Progressive Party to organize in order to come within the purview of the corrupt practices act. That section requires that any faction or group advocating, endorsing or opposing any party faction, group or candidate, before making any expenditures or receiving contributions for the making of any expenditures, shall file a verified statement, the name and address of each of its officers and in general terms the nature of its organization, the sources of its income, and the purposes for which it expects to make expenditures or receive contributions. Obviously, it is contemplated that the temporary committee of the party shall advocate the election of candidates and will endorse and oppose candidates, factions, and groups. In order that it may do this successfully it will be necessary that money shall be disbursed. The statutes, therefore, require that this group have an organization in order that it may comply with the provisions of the statute. See *State v. Pierce*, 163 Wis. 615, 158 N. W. 696; *In re Woodbury*, 160 N. Y. S. 902; *In re Anti Saloon League of New York*, 238 N. Y. 457.

Your third question reads as follows:

"If question two is answered in the affirmative, then, may any expenditures made or incurred by the Temporary Committee be charged, under the provisions of chapter 12, to the State Central Committee of the Progressive Party when such latter committee shall have been selected and organized as provided in section 5.20?"

Sec. 12.08 provides that any bills or expenses incurred by any campaign committee shall be charged and billed to such committee within ten days after the day of the election or primary in connection with which such bill, charge, or claim was incurred.

Sec. 5.20 (1) provides that the state central committee shall be created on the second Tuesday after the primary. Since the bill incurred by a committee is to be presented within ten days and since the state central committee will not be organized until about two weeks after the primary

it would be impossible for the creditor to make a claim against the state central committee within the time provided by law unless there were already in existence a state central committee for the Progressive Party. Since that does not obtain in this case we hold that the expenditures made or incurred by the temporary committee cannot be charged to the state central committee of the Progressive Party when such latter committee shall have been selected and organized as provided in sec. 5.20. See *Jackson v. Walker*, 5 Hill (N. Y.) 27.

JEF

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*Indigent, Insane, etc. — Public Health — Wisconsin General Hospital*—Where application for hospitalization of indigent person is made under ch. 142, Stats., expense thereof is not chargeable to town of such person's legal residence but, under sec. 142.08, subsec. (1), Stats., is paid one half by state and one half by county.

June 18, 1934.

R. W. PETERSON,  
*District Attorney,*  
Berlin, Wisconsin.

In your letter of May 19 you state that sec. 49.01, Stats., as construed by this office in XX Op. Atty. Gen. 140 and 162, requires that the township of the legal residence of a poor and indigent person must furnish the poor person relief and support, including medical attention.

You further call attention to ch. 142, Stats., which provides that the county shall be chargeable with the expense of poor persons in need of hospitalization. You state that the statutes are apparently in conflict, and that some doubt has arisen as to whether these persons should be aided at the expense of the county. Inquiry is made as to which municipality is responsible for this expense.

You are advised that if application is made to the county judge for hospitalization pursuant to ch. 142 and in the manner and form therein provided, the provisions of that

chapter, relative to expense shall govern. Sec. 142.08, subsec. (1), provides that the cost shall be paid, one-half by the state and one-half by the county of the indigent persons legal settlement within the quota fixed by sec. 142.04.

While at first glance there might appear to be a conflict such as you suggest, we believe there is no real conflict if the statutes and opinions in question are properly construed. The opinions to which you refer, XX Op. Atty. Gen. 140 and 162, were not rendered on questions involving hospitalization, but refer to the furnishing of insulin for an indigent person suffering from diabetes in the instance of the first opinion and the furnishing of liver extract to a person afflicted with pernicious anemia in the case of the second opinion.

It is true that in a later opinion, XXI Op. Atty. Gen. 1067, it was pointed out that if the indigent person, who, in that case, had been injured in an automobile accident, was placed in a hospital by the authorities of the town in which the accident occurred, the expense would have been chargeable to the county and could have been recovered by the county from the town in which the person had his residence. You will note, however, with reference to the facts considered in that opinion, no application was made to the county judge for hospitalization under ch. 142.

While it is true that, in the absence of any proceedings under ch. 142, it is the duty of a town under the town system of poor relief to provide medical care for indigent persons, as pointed out in the opinions to which you refer and other opinions, we can see no escape from the plain language of ch. 142 where those provisions are properly invoked.

We also refer you to XXI Op. Atty. Gen. 240 for a further discussion of the problem and in support of the conclusion reached in this opinion.

JEF

*Municipal Corporations—Public Health—Cemeteries*—  
Money received by municipality from cemetery association under sec. 157.11, subsec. (9), par. (b), Stats. 1931, is trust fund and when it is tied up or lost in bank through no fault of municipality interest on it need not be paid.

June 19, 1934.

JAMES L. MCGINNIS,  
*District Attorney,*  
Amery, Wisconsin.

You wish the opinion of this department as to whether or not a municipality that received money from a cemetery association for the perpetual care of graves under sec. 157.11, subsec. (9), par. (b), Stats. 1931, and either lost the money in a bank failure or had the money tied up by the bank holiday must pay interest to the cemetery association as required by that statute.

The answer is No. The real question involved in a solution of the problem you present is that of the relationship of the municipality and the cemetery association, and the nature of the fund paid over to the municipality by the cemetery association. Is the relationship that of trustee and *cestui que trust* and the fund a trust fund? Or is the relationship that of debtor and creditor and the fund a demand loan to the municipality?

If the fund is a trust fund, the problem is solved by the application of the rule that the trustee is not responsible for moneys lost or "tied up" through no fault of his own and the municipality would not have to pay interest. If the fund is a loan to the municipality, interest on it would have to be paid even though the principal was drawing no interest, and even if the principal was entirely lost, since these circumstances are not a defense in a debtor-creditor relationship.

It is the opinion of this department that the fund in question is a trust fund. XVIII Op. Atty. Gen. 387, 390-391:

"\* \* \* it seems plain that moneys received for the perpetual care of graves, whether received in the first instance by a municipality or whether received in the first instance by a cemetery association and then deposited with

a municipality, partake of the nature of trust funds and are to be kept in a special account."

That the money involved is a trust fund is further supported by the fact that it was mandatory for the municipality to accept it, under sec. 157.11 (9) (b), Stats. 1931: XXI Op. Atty. Gen. 821:

"\* \* \* While the statute merely says that the money 'may be' deposited with the municipality, in view of the other alternative methods of investment of money by cemetery associations fixed by statute, it must be held that a municipality is bound to accept the moneys so tendered.  
\* \* \*"

It is very doubtful whether a loan could be forced upon a municipality, especially in view of its debt limitations.

Other arguments pointing to the fact that the money is a trust fund are the following excerpts from the statute:

Sec. 157.11 (9) (b), Stats. 1931:

"\* \* \* If such association is dissolved or becomes inoperative such municipality shall use the interest on such fund for the care and upkeep of such cemetery. Deposit shall be made and the income paid over from time to time, not less frequently than once each year, \* \* \*."

(If this were a loan the interest would not necessarily come from any particular fund and would be paid at definite intervals.)

Sec. 157.11 (9) (c), Stats. 1931:

"In municipalities, the executive and the governing body may appoint a trustee of the gift or trust property and require bond approved by them and which may be increased."

Sec. 157.11 (9) (g):

"Gifts and trusts hereunder shall be exempt from taxation and the law against perpetuities, accumulations and mortmain."

All of the above arguments tend to establish this money as a trust fund, a conclusion upholding the opinion of this department in XVIII Op. Atty. Gen. 387 cited above.

Since the money involved is trust money a municipality need not pay interest on it while the money is tied up in a bank or after it is lost through no fault of the municipality.

JEF

*Public Officers—Malfeasance—Village President—Sale of supplies to village high school board by village president does not constitute violation of sec. 348.28, Stats.*

June 19, 1934.

WENDELL MCHENRY,  
*District Attorney,*  
Waupaca, Wisconsin.

You state that the high school board in a certain village has been purchasing supplies in large amounts from the village president. The village president is not a member of the school board. You wish to know whether the contracts for these supplies are valid; in other words, whether or not there has been a violation of sec. 348.28, Stats.

The answer is that the contracts are valid. Sec. 348.28, was enacted to protect public funds from unscrupulous public officials who might seek to profit through their office at the expense of public interests.

In the instant case, the village president is not a member of the school board; consequently, he has no voice in determining how and where the school funds shall be spent. The school district is independent of the village government. Therefore it is entirely legal for the village president to sell supplies to the village high school board.

JEF

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*School Districts—Board and Lodging—Transportation of School Children—School district furnishing board and lodging to child under sec. 40.34, subsec. (4), Stats., is not required to pay for his transportation between his home and school week-ends.*

June 21, 1934.

THOMAS E. MCDUGAL,  
*District Attorney,*  
Antigo, Wisconsin.

You wish to know whether a school district furnishing board and lodging to a child under sec. 40.34, subsec. (4),

Stats., must also pay for his transportation between his home and school week-ends.

The answer is No. Your conclusion that the furnishing of board and lodging is the alternative of paying daily transportation and that, since the parents and the school district elected to board the child, the father is not entitled to any money for transporting the child to and from school, is entirely correct.

Sec. 40.34, Stats., reads in part:

“(4) If, in the judgment of the board, and the parent or guardian, it is to the advantage of the district and also to the advantage of the child to provide board and lodging *in lieu* of transportation for all or part of the time for children of the district, residing more than two miles from the school, the board and parent or guardian shall enter into a written contract under which such children shall be properly boarded and lodged not more than one mile from the school, and the board shall pay for such board and lodging from the general fund not to exceed two dollars per week. \* \* \* If the parent or guardian *prefers to transport* his child or children he shall be compensated and the district reimbursed as provided by subsection (1) of this section. The board may, if in its judgment it is to the interest of the district, in lieu of furnishing transportation *or* board and lodging, pay the tuition of such children in a school in another district \* \* \*.”

The italicized words in the statute set forth above show that the legislature intended that either transportation *or* board and lodging be furnished. This is the conclusion reached in XXI Op. Atty. Gen. 965, 966.

JEF

*Elections—Corrupt Practices—Nominations*—State central committee may not lawfully make disbursements for printing, mailing, clerical help or other expense in connection with circulation of nomination papers.

June 21, 1934.

JOSEPH MARTIN, *Chairman,*  
*Democratic State Central Committee,*  
Green Bay, Wisconsin.

You request the opinion of this department on the question whether the state central committee can legally disburse any moneys for the printing, mailing, clerical help, or other expense in connection with the circulation of nomination papers in behalf of any candidates for any of the various state offices, members of congress, and candidates for the United States senate.

It is the opinion of this department that the state central committee may not lawfully make disbursements for the printing, mailing, clerical help, or other expense in connection with the circulation of nomination papers in behalf of any candidates for the various state offices, members of congress and candidates for the United States senate.

Sec. 12.07, Stats., specifies in detail what disbursements may lawfully be made by party committees, and none of the disbursements therein permitted include disbursements for the circulation of nomination papers. The state central committee must be chosen in conformity with the statutes (sec. 5.20) and may make only such legal disbursements as are permitted under the statutes (sec. 12.07). Inasmuch as the permitted disbursements do not include the expenditure of moneys for the printing, mailing, clerical help or other expense in connection with the circulation of nomination papers, we are constrained to hold that the state central committee may not lawfully make disbursements in payment for the circulation of nomination papers.

JEF

*Constitutional Law—Taxation—Tax Sales—Provisions* of ch. 146, Laws 1933, amending subsec. (3), sec. 75.01, Stats., are of doubtful validity; county should follow regular procedure if possible rather than rely upon provisions of ch. 146, Laws 1933.

June 25, 1934.

FULTON COLLIPP,  
*District Attorney,*  
Friendship, Wisconsin.

You request an opinion of this department upon the following statement of facts:

“Chapter 146 of the Laws of 1933 provides that when a county owns and holds a tax certificate on any land the county treasurer may attach such certificate to subsequent delinquent taxes without publication and sale. Last year we did not follow this optional provision in the law because we were doubtful of its legality and practical working affect. This year we \* \* \* desire to take advantage of this law if it seems expedient and legal. \* \* \* If you have written an opinion on this matter will you please advise me or if you know any county that has worked under this provision I would like to be advised so I can get in touch with them and see how they made out. A year ago we received the enclosed memoranda from the tax commission raising objections to this new law.”

Ch. 146, Laws 1933, amended subsec. (3), sec. 75.01, Stats., relating to the issuance of tax certificates to read in part as follows:

“\* \* \* Provided that when a county owns and holds a tax certificate on any land, the county treasurer may attach to such certificate subsequent delinquent taxes without publication and sale as otherwise provided by law.”

It is well settled that a presumption exists in favor of the constitutionality of a statute. *Bonnett v. Vallier*, (1908) 136 Wis. 193, 116 N. W. 885.

Thus, in *Brodhead and others v. City of Milwaukee and others*, (1865) 19 Wis. 624, 652, 88 Am. Dec. 711, the Wisconsin supreme court pointed out that a statute will not be declared unconstitutional unless its unconstitutionality is “so clear and palpable as to be perceptible to every mind at the first blush.”

By reason of the presumption in favor of the constitutionality of acts of the legislature, it is the duty of the courts to uphold any statute in the ordinary exercise of the legislative power if it is possible to do so without disregarding the plain command or implication of the fundamental law. *Connolly v. Union Sewer Pipe Co.*, (1901) 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431.

However, whatever presumption may exist in favor of the constitutionality of a statute, such presumption should not close the eyes of the court to any inherent defects in a statute.

Thus Mr. Justice Paine in the case of *In re Oliver*, (1864) 17 Wis. 681, 682, said:

“\* \* \* The rule asserted by the courts is, that the judicial department should never declare an act void as unconstitutional, unless the conflict between it and the constitution is so clear as to admit of no doubt whatever. Yet I have never felt permitted under this rule to assume doubts, merely because an effort of the mind was required to discover the truth; and, closing my eyes, say that the case was not clear, and thus suffer the constitution to be frittered away, as I think has been done too often.  
\* \* \*”

It is the supreme duty of the courts to declare an act invalid whenever it transgresses the mandates of the constitution, no matter what reluctance may press upon them. *State ex rel. Donald v. Owen*, (1915) 160 Wis. 21, 58, 151 N. W. 331.

Thus whatever rules of construction may weigh the balance in favor of the act in question, equally weighty are the rules which lie upon the scales in support of the constitution as the supreme law. With these fundamental rules in mind we proceed to examine the act in question.

This statute provides that when a county owns a tax certificate on any land the county treasurer may attach to such certificate subsequent delinquent taxes without publication and sale. It should seem that there is some doubt whether the procedure provided in subsec. (3), sec. 75.01, Stats., as amended by ch. 146, Laws 1933, conforms to the requirements of the due process clause of the federal and state constitutions.

In general the essential elements of the due process of law, as applied to taxation proceedings are, (1) notice; (2) opportunity to be heard; (3) opportunity to defend, (4) in an orderly proceeding adapted to the nature of the case. See 6 R. C. L. 442, 446; *Lacher v. Venus*, (1922) 177 Wis. 558, 571-572, 188 N. W. 613; *Ekern v. McGovern*, (1913) 154 Wis. 157, 240, 142 N. W. 595; *State ex rel. Milwaukee Med. College v. Chittenden*, (1906) 127 Wis. 468, 506-507, 107 N. W. 500.

Examined in the light of the principles to be applied as hereinbefore stated, it would seem that there might be some doubt as to whether the act in question complies with the requirements of due process of law under the federal and state constitutions.

However, there are also a great many practical difficulties to be encountered in applying ch. 146, Laws 1933.

Some of the questions and difficulties which might arise are set forth in a memorandum of the Wisconsin tax commission. We quote in part from that memorandum:

“\* \* \*

“In the first place, what is implied by the provision that the county treasurer attach subsequent delinquent taxes to the certificate? \* \* \*

“What is the rate of interest carried by subsequent delinquent taxes attached to a certificate? Under existing statutes delinquent taxes carry interest at the rate of 12% per annum up to the tax sale; and after sale may carry interest of from 10% to 15% per annum.

“In the case of an assignment of the tax certificate under section 75.34 (1), statutes, must the purchaser also take the attached delinquent taxes? If he does so and it is later discovered that the certificate is illegal, but the attached taxes are valid, what is his recourse? Is he entitled to a refund of the amount paid for the valid delinquent taxes as well as the illegal certificate? If not, what is his position with respect to the amount invested in the delinquent taxes? \* \* \* How can the county enforce collection of the subsequent delinquent taxes which are not in certificate form? There is no authority in the statutes for the subsequent sale and issuance of certificates on these taxes.

“Section 75.34 (2), statutes, authorizes the county board, by resolution, to dispose of *tax certificates* at less than face. In some instances the amount realized from such proceeding is less than the tax included in the certificate. Can the county board dispose of delinquent taxes not in certificate

form at a reduced figure under this section? If not, how can the compromise of such tax be effected?

"\* \* \* Does the term 'subsequent delinquent taxes' include special assessments? If the answer is 'yes' and the treasurer does not advertise or sell the same, but merely attaches them to a prior certificate, can the same be charged back? \* \* \*

"Abstractors rely on the record of tax sales in determining liens for unpaid taxes. Since there will be no sale of subsequent delinquent taxes, what will be the effect on abstracts of title?"

In view of the foregoing it is suggested that the counties follow the regular procedure, if possible, rather than rely upon the provisions of ch. 146, Laws 1933.

JEF

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*Taxation—Tax Collection—Refunds*—County board has no authority to authorize refund of payments made prior to adoption of resolution waiving payment of interest and penalties on delinquent 1931 and 1932 taxes which are paid after adoption of such resolution, except that under sec. 1, ch. 288, Laws 1933, penalties, interest and other charges (with exception of advertising fee) on delinquent taxes paid prior to June 22, 1933, may be refunded.

June 25, 1934.

OSCAR M. EDWARDS,  
*Assistant District Attorney,*  
Racine, Wisconsin.

You request the opinion of this department upon the following statement of facts:

"On May 10, 1934, the county board of Racine county passed a resolution waiving the payment of all interest and penalties on delinquent taxes on real estate for the years 1931 and 1932 for which Racine county held the tax certificates, provided such taxes are paid before July 1, 1934. This resolution was based upon section 3, chapter 288, laws of 1933. After the passage of the resolution this office was asked for an opinion on whether or not the county might refund the interest and penalties on taxes for such

years that had been paid prior to the passage of the resolution. Relying upon your opinion dated December 15, 1933 and found in XXII Op. Atty. Gen. 1028, we advised the county treasurer that no refund could be granted to taxpayers who had paid their taxes for such years prior to the passage of the resolution.

"There are a number of people who have made partial payments of their taxes for such years under the provisions of section 74.325 and as the statute provides, the first instalments paid were applied by the county treasurer to discharge the interest and other lawful charges accrued to the date of payment. Since the resolution was passed, these taxpayers who have paid a portion of their taxes now claim that provided they pay their taxes prior to July 1, 1934, they should be allowed to pay such taxes without paying any interest or penalties.

"The precise question that I beg leave to submit to your office is as follows: Assuming a county board has passed a resolution based upon section 3, chapter 288, laws of 1933, waiving the payment of all interest and penalties on taxes on real estate for the years 1931 and 1932 for which the county holds a tax certificate, provided such taxes be paid prior to July 1, 1934, may a taxpayer who has prior to the passage of such resolution paid a portion of such taxes in instalments, which money was in whole or in part used to discharge the interest and penalties accrued to the date of payment, successfully demand a refund of such money as was so applied for the payment of penalties and interest, provided he pays the whole of his tax prior to July 1, 1934?"

It is the opinion of this department that, under the facts stated above, the taxpayer who has paid a portion of the real estate taxes prior to the passage of a resolution waiving the payment of interest and penalties on taxes on real estate for the years 1931 and 1932, for which the county holds tax certificates, is not entitled to a refund of so much of that money as was applied for the payment of penalties and interest.

It is well settled that the right to a refund of money, under the circumstances set forth, is purely statutory and, inasmuch as the legislature did not authorize the county to refund money that had been applied to the payment of penalties and interest on delinquent real estate taxes, the county is not authorized to make such a refund.

It appears that sec. 74.325 Stats., which permits pay-

ments in instalments, was created by ch. 244, sec. 1, Laws 1933. The statute authorizing the county board to pass a resolution waiving penalties and interest on real estate taxes, was authorized by ch. 288, sec. 3, Laws 1933. Inasmuch as ch. 288, Laws 1933 was passed subsequent to the passage of ch. 244, Laws 1933, the legislature undoubtedly was aware of the fact that many people may have made payments on delinquent real estate taxes in instalments and that the question of their right to refund of that portion of the payments which had been applied to interest and penalties would be raised. Moreover, it appears that under the provisions of ch. 288, sec. 1, Laws 1933, it is provided that taxpayers who had paid their taxes on real estate for the year 1932 prior to the effective date of ch. 288, Laws 1933, should be entitled to refund of payments paid as penalties, interest, or other charges except the fee for advertising. Inasmuch as ch. 288, sec. 3, Laws 1933, is strictly a waiver provision, this department is constrained to hold that there should be no refund permitted under the circumstances set forth in your letter. Sec. 1, ch. 288, Laws 1933, contains a provision for refund but it relates only to delinquent 1932 real estate taxes paid prior to the effective date of that act, which was June 22, 1933.

You are therefore advised that under ch. 288, Laws 1933, the county board has no power to authorize a refund of payments made prior to the adoption of a resolution waiving payment of interest and penalties on delinquent 1931 and 1932 real estate taxes which are paid after the adoption of such resolution and provided such taxes are paid before July 1, 1934, except that under sec. 1, ch. 288, Laws 1933, penalties, interest and other charges (excepting advertising fee) on delinquent real estate taxes paid prior to June 22, 1933, may be refunded.

JEF

*Mothers' Pensions*—Wife of man who has been sentenced to one year or more in prison is not entitled to mother's pension after his release, under sec. 48.33, subsec. (5), par. (d), Stats., unless there is showing of other facts entitling her to pension under that statute.

June 25, 1934.

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

In your letter of June 1, 1934, you ask for an opinion concerning the granting of a mother's pension upon the following facts:

A man with a wife and several children was sentenced to the state prison for a period of not less than one year or more than eighteen months, and a pension was granted at that time. At the expiration of one year the man was released, but has been unable to find employment, although able-bodied. The parties are not living together and a divorce action is now pending. You ask further whether the fact that the man can not be found since his release from prison would make any difference.

You are advised that upon the facts stated, the statutory requirements for a mother's pension have not been met.

Sec. 48.33 (5) (d), Stats., provides:

"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."

The words "or the wife of a husband who has been sentenced to a penal institution for a period of at least one year" obviously refer to the time that the husband is in-

carcerated, as during that period he is not likely to be able to contribute very much to the family support. After he has been released he is in the same position as any other able-bodied man, and to rule that his wife is thereafter entitled to a mother's pension is to do violence to the plain intent of the statute and to result in an unreasonable construction.

The fact that the husband cannot now be found is immaterial, unless it can be shown that the husband has continuously deserted the wife for one or more years and has been legally charged with abandonment for a period of one year, as provided by the statute above quoted. On this point, see the last paragraph of the opinion in XX Op. Atty. Gen. 237.

JEF

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*Bridges and Highways—Snow Removal*—Wisconsin highway commission may legally reimburse city for cost of snow removal on connecting streets and on swing and lift bridges under sec. 84.10, subsec. (1), pars. (b) and (c), Stats.

June 25, 1934.

HIGHWAY COMMISSION.

Attention Thos. J. Pattison, *Secretary*.

In your letter of June 1, 1934, you ask the following questions:

"1. Can the Wisconsin highway commission legally reimburse a city for the cost of snow removal on connecting streets from the allotment made for the maintenance of connecting streets under section 84.10 (1) (b)?"

"2. Can the Wisconsin highway commission legally reimburse a city for the cost of snow removal on swing and lift bridges from the allotment made to the city under section 84.10 (1) (c) for the maintenance of such bridges?"

Both questions are answered in the affirmative. The sections of the statutes referred to in your letter both make provisions for allotments of funds to cities for "mainte-

nance," sec. 84.10, subsec. (1), par. (b), in the case of connecting streets, and sec. 84.10 (1) (c) in the case of free, swing or lift bridges.

Snow removal constitutes maintenance. See XIX Op. Atty. Gen. 530. See also XXII Op. Atty. Gen. 22.

JEF

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*Public Officers.—City Council—Malfeasance—*Member of sewer committee of city council who is employee of sewer contractor to whom sewer contract is let by council probably has such interest in contract as would constitute violation of sec. 348.28, Stats.

June 28, 1934.

CLIFFORD M. LAMAR,  
*District Attorney,*  
Baraboo, Wisconsin.

You wish the opinion of this department as to whether or not under the following circumstances B would be violating sec. 348.28, Wis. Stats.

A is a sewer contractor in the city of Baraboo. B is an employee of A, not owning any part of the business. B is a member of the city council and a member of the sewer committee of the council. The sewer committee passes on bids for sewer work and makes its recommendation to the council. The city now proposes to let a sewer contract.

The question is: Would B be violating sec. 348.28 if the contract is awarded to his employer?

You state that it is your opinion that he would be violating this section, and I am inclined to agree with you.

A contract entered into in violation of sec. 348.28 is "absolutely null and void." It is a bit hard to determine just what constitutes a violation of sec. 348.28. There is no hard and set rule to follow nor can it be determined with any degree of certainty just which way the courts would decide in any given case. However, the statute is very inclusive and the courts have been very critical of contracts by and with public officers. Therefore, since this contract

is yet to be awarded, the safe thing is to avoid any questionable action in awarding it by making a thorough study of the situation and adopting a strict interpretation of the statute.

Sec. 348.28, Stats., was enacted to protect the public from loss occasioned by unscrupulous officers who would seek to profit from their office by letting contracts, etc. not on their merits, but in a manner best suited to enrich themselves.

The case of *Edward E. Gillen Company v. City of Milwaukee et al.*, 174 Wis. 362, 183 N. W. 679, is very much in point. In that case the court held that a member of the Milwaukee sewerage commission who, at the time a contract was awarded by the commission and for some time prior thereto, was in the employ of the successful bidder as a superintendent had such an interest as would tend to affect his judgment in determining on the work involved, in determining to let the work by contract, in framing the contract, etc. The court said, p. 368:

"A statute which the commission was bound to obey provides: 'No commissioner or person holding appointment under said commission shall be interested directly or indirectly in any contract entered into under the provisions of this act.' Sec. 2, ch. 608, Laws 1913. But the statute is only declaratory of the general rule which long prevailed forbidding members of boards and common councils from making contracts with themselves or in which they are interested." (The same rule is embodied in sec. 348.28 Wis. Stats.)

In further discussion, p. 371, the court said:

"The word 'indirectly' in the statute [sec. 2, ch. 608, Laws 1913; also used in sec. 348.28] is not without meaning. If William Gillen had been a stockholder in the company there would have been such direct financial interest in the contract under the rule declared in many decisions as would come clearly within the prohibition of the statute. With a salary of \$4,500 per year, his interest in the success of the company may have been much greater than if he had owned a small amount of stock."

You do not state the nature of B's work as A's employee. The character of his employment must be considered in determining whether or not sec. 348.28 would be violated

should the contract be awarded to A. However, I do not think that the mere fact that he might be a common laborer rather than a superintendent as in the *Gillen* case would rid the situation of its evils. A common laborer would probably be less independent economically and hence in a worse position for making an honest decision in awarding the contract than would a salaried employee. The fact that A's is probably a small concern in a small town should also be considered, as it would influence B's independence in making the decision.

The amount of compensation and the permanence of his employment are important factors to be considered. The court in the *Gillen* case, cited above, said, pp. 371-372:

“\* \* \* We do not hold that under all circumstances a contract between a municipality and a corporation having an employee who is also a public officer of the municipality would be invalid. The compensation of the employee might be so slight or his employment so transient that there would arise no conflict of interest. \* \* \*”

In the final analysis you will have to decide the question as you have access to all of the facts pertaining to the questions set forth above. However, unless the employment is very transient or his compensation so slight as to negative a conflict of interests, I would hold that if the contract should be awarded to A in the instant case there would be a violation of sec. 348.28, Stats.

Permit me to express my appreciation of your research in this problem before submitting it to this department.

JEF

*Intoxicating Liquors—Municipal Corporations—Beer Licenses—Words and Phrases—Calendar Year*—Words “calendar year” in both fermented malt beverage and intoxicating liquor laws mean period from January 1 to December 31, inclusive.

Under both fermented malt beverage and intoxicating liquor laws six-month licenses may be issued for any consecutive six months in calendar year, but cannot be renewed until following year.

June 29, 1934.

WENDELL MCHENRY,  
*District Attorney,*  
Waupaca, Wisconsin.

You wish to be advised

“\* \* \* whether or not the calendar year referring to both the sale of malt beverages and intoxicating liquors commences with July 1 and ends with June 30, and second, whether or not any six months’ licenses can start on, say April 1 and run beyond the 30th day of June.”

In XXII Op. Atty. Gen. 551 it was held that the words “calendar year,” as used in reference to the sale of fermented malt beverages, meant the period from January 1 to December 31, inclusive. Our reasons and citations of authority were therein given. The words “calendar year” are used in the intoxicating liquor statutes in practically identical language. There is nothing in the liquor law to indicate that a different meaning or construction should be given to these words as used therein. The calendar year, therefore, in both the fermented malt beverage and intoxicating liquor laws covers the period from January 1 to December 31, inclusive, and does not mean the license year July 1 to June 30.

Sec. 66.05, subsec. (10), par. (g), subd. 2, provides:

“\* \* \* 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. \* \* \*”

Practically identical language is found in the intoxicating liquor laws under sec. 176.05 (6). Under these sec-

tions a six months' license could be issued on the 1st of April which would run beyond the 30th day of June and up to and including the 30th of September. Such a six months' license, however, could not be renewed until the following January. A six months' license, moreover, can authorize sales only for a period of six months in any one calendar year. It cannot authorize sales for some months in one year and some in the following year.

JEF

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*Bridges and Highways—Drainage Districts*—Resident of drainage district who applies to Federal Land Bank for loan may become liable for future assessments where assessment for construction purposes already paid by him does not total assessment for benefits apportioned to his land.

June 29, 1934.

HONORABLE A. G. SCHMEDEMAN,  
*Governor.*

Certain farmers residing in a drainage district organized under ch. 89, Stats., have applied to the Federal Land Bank for refinancing of their mortgage obligations. At the present time none of the bonds issued by the drainage district for construction purposes are in default and all land contained in the district has paid the various assessments which have thus far been imposed. If the loans to the aforesaid applicants are granted by the Federal Land Bank a portion of the funds so derived from the commitment will be used for the purpose of paying in advance such instalments of the construction assessment already levied as will become due in the future and which will be assessed against the land of the person obtaining the commitment. The assessments for construction purposes are, of course, computed on the theory that all property in the district will pay its proportionate share and are also computed in proportion to the original assessment for benefits which was made when the district was created.

The question arises as to whether or not the lands of the applicants will, if there be a default in the payment of the instalments of the construction assessment upon the part of other property holders in the drainage district, be subject to further assessment in satisfaction of the claims of persons holding drainage district bonds. In other words, does a property holder in a drainage district who has paid all instalments of a construction assessment which has been levied discharge his obligation to the district in full or may his property later become subject to the claims of bondholders by virtue of defaults on the part of other property holders in the district?

It does not appear from the question whether or not the construction assessment which has been levied brings the total amount of the construction assessments up to the original assessment for benefits. A categorical answer to your question cannot be furnished, therefore. At the time of the creation of the drainage district what is known as an assessment of benefits is made against all of the property in the district. If the property owner wishes to object to this assessment he has an opportunity to do so. After proper hearing on the matter an assessment of benefits is confirmed by the court. An estimate of construction costs is made and bonds are issued by the district for the purpose of financing the construction. It frequently happens that the original assessment for construction purposes does not equal or even closely approximate the assessment of benefits that was originally made. The construction bonds which were issued are retired by virtue of what is known as assessments for construction, which are levied against the property of the individuals situated within the boundaries of the district. This assessment for construction purposes may be paid in a lump sum or in instalments to become due over a period of years. It is these instalments of construction assessment to which you have referred in your letter. The answer to your question is found in the decision filed with the supreme court in the case of *In re Dancy Drainage District*, 190 Wis. 327. The court referred to sec. 89.44 (1) and (2), sec. 89.37 (4) (d), and sec. 89.04 (1) and (2) as being the pertinent provisions of the Wisconsin statutes relating to this ques-

tion. In that case assessments for construction had been levied in the Dancy Drainage District in amount sufficient, if paid in full, to discharge the principal and interest of the bonds held by the petitioners. Owing to the fact, however, that the assessments against many of the lands in the district were unpaid and the county had taken tax certificates on such lands and held the same in trust for the benefit of the district, the funds collected were not sufficient to satisfy the demands of the bondholders. The court held that the landowners in the drainage district are jointly interested in the project and are jointly bound.

It further held that the assessment of benefits was conceived by the legislature as the security fund for assessments for construction, repairs, or maintenance. Upon this theory it was decided that where a portion of the landowners had defaulted in the payment of the assessment for construction purposes the remaining landowners in the district could be assessed to make up this deficiency up to the total amount of the assessment of benefits.

In answer to the contention that was there raised as to the inequitableness of this procedure, the court had this to say, p. 336:

"It is also urged that it is inequitable to levy further assessments because those who pay will have to pay more than their share—some not having paid at all. This is true, but it is a species of inequity that exists whenever there is a joint liability and one that exists as to the levy of general taxes. Whenever there is a failure to collect all general taxes there is a loss that must be borne by those who pay, but that does not release them from the burden of meeting the obligations jointly due. *State ex rel. Soutter v. Madison*, 15 Wis. 30. In that case the court said:

"The duty of the common council is continuing, and does not cease with the levying of one tax which is in part unsuccessful. It ends only when the whole money is collected and the debt actually paid.' See, also, *Norris v. Montezuma Valley I. Dist.* 248 Fed. 369."

In the case of *In re Dancy Drainage District*, 199 Wis. 85, certain holders of bonds of the drainage district made application to the circuit court for an order directing county treasurers to sell at public auction some lands of the district in accordance with the provisions of sec. 89.37 (4)

(d). The court made an additional assessment for construction against all of the lands equal to the total assessed benefits and ordered the sale.

The case of *In re Wood County Drainage District*, 201 Wis. 368, disclosed a situation similar to that found in *In re Dancy Drainage District*, 199 Wis. 85, where neither the general taxes nor the drainage assessments had been paid on a considerable portion of the lands in the district. In that case, also, the court made a further assessment up to the total amount of the assessment for benefits and ordered the sale. Objection was made to this type of procedure. On page 371 the court stated:

“\* \* \* This exact procedure was followed and sanctioned in the Dancy Drainage District (*In re Dancy Drainage District*, 199 Wis. 85, 227 N. W. 873), and its propriety need not be further discussed.”

If the person applying to the Federal Land Bank for a loan has paid assessments up to the total assessment for benefits apportioned against his land he will no longer be liable to holders of the drainage district bonds. He cannot escape liability, however, simply by paying up all of the instalments of the assessment for construction where the latter does not equal the assessment for benefits apportioned against his property.

JEF

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*Municipal Corporations—Beer Licenses—Town board may not issue fermented malt beverage license without charge to holder of Class “B” liquor license.*

June 29, 1934.

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

You inquire whether it is in the power of the town board to grant a fermented malt beverage license without charge to a holder of a Class “B” liquor license, or whether a

fee must be set covering such fermented malt beverage license.

It is our opinion that a fee must be fixed covering this license and that it cannot be issued without charge. Sec. 66.05, subsec. (10) subd. (g), par. 2, provides in respect to fermented malt beverages:

"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* \* \* \*."

Sec. 66.05 (10) (d) 4 provides for issuing licenses which shall expire on the 30th day of June, 1933 "upon *payment* of one-fourth of the annual license fee." A similar provision in respect to operators' licenses is found in sec. 66.05 (10) (i) 3, where the word "payment" is again found. It is our opinion that this indicates quite strongly a legislative intent that some amount of money must be charged by the municipality issuing the license. In the case of *Angelo v. Railroad Commission*, 194 Wis. 543, it was held that a statute which authorized the railroad commission to determine the "compensation to be paid" for marl required the railroad commission to make a monetary charge and that it was illegal for the commission to permit the removal of the marl free of charge. Emphasis in that opinion was placed upon the use of the word "paid." It was there stated, pp. 547-548:

"\* \* \* The word 'pay' primarily and ordinarily means the use of money (*Krahn v. Goodrich*, 164 Wis. 600, 610, 160 N. W. 1072), and especially so when used in connection with an obligation owing to the government, as is pointed out in *Oneida County v. Tibbits*, 125 Wis. 9, 12, 102 N. W. 897, 899. \* \* \*"

The fact that an individual has already obtained an intoxicating liquor license for which he has paid a minimum fee of fifty dollars would not justify the board in granting him a fermented malt beverage license free of charge. Separate and distinct privileges are granted under each type of license. The statutes do not contemplate that payment

of the minimum fee of fifty dollars for an intoxicating liquor license shall carry with it the right to sell fermented malt beverages, which right must be obtained under a different license. In XXII Op. Atty. Gen. 566, it was held that a town board had no authority to pass an ordinance providing for different amounts for class "B" fermented malt beverage licenses issued by the town.

This office cannot attempt to state what the minimum fee should be. Even where a municipality does not wish to issue licenses for the purpose of obtaining revenue but does so strictly as a regulatory measure, the amount of the fee usually bears some relationship to the cost of administration and supervision. It is also suggested that, under sec. 66.05 (10) (g) 3, a person holding a class "B" fermented malt beverage license may also sell nonintoxicating beverages without any further license. A person, however, who wishes to sell nonintoxicating beverages only must obtain a license from the town board, village board or common council for which a license fee of not less than five dollars or more than fifty dollars shall be paid. If a town board were to provide for issuing fermented malt beverage licenses gratis, persons who desire to sell nonintoxicating beverages would take out a fermented malt beverage license and so obtain the right to sell nonintoxicating beverages without paying the minimum fee of five dollars provided for in sec. 66.05 subsec. (9), Stats.

JEF

*Criminal Law—Sentences*—Under sec. 359.07, Stats., sentences on more than one count in one case run concurrently unless otherwise ordered by court.

July 3, 1934.

BOARD OF CONTROL.

An interpretation of sec. 359.07, Stats., is requested in view of the discrepancy in the construction given in the opinion dated March 9, 1934, XXIII Op. Atty. Gen. 174, as compared with the opinion dated May 3, 1933, XXII Op. Atty. Gen. 310.

In the latter it was held that if the judge sentences for more than one count, said sentences will run consecutively unless the judge states otherwise. In the former opinion it was held that they run concurrently unless otherwise stated by the court.

Sec. 359.07, Stats., reads as follows:

“\* \* \* 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; \* \* \*.”

The wording of the statute is not as clear as it might be. A cursory reading of it might lead to the conclusion that sentences on more than one count necessarily run consecutively, but a more careful reading of the statute convinces us that the correct interpretation of it is that all sentences begin at 12 o'clock noon on the day of such sentence, but if the judge sentences for more than one count in one case, he may order the sentences to run consecutively.

In view of the fact that the judge did not so state in the sentencing of Michael J. Becker, the opinion in XXIII Op.

Atty. Gen. 174, is adhered to and the ruling in the opinion in XXII 310 is reversed.

JEF

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*Bridges and Highways—Intrastate Bridges*—Bridge reconstructed under sec. 87.02, Stats., will require cost of operation to be paid by villages in which it is located, under sec. 87.05, subsec. (1). Maintenance under sec. 87.05 (2) must be paid by state.

If bridge is not constructed under sec. 87.02 on county highway through village, maintenance of said bridge must be paid by village.

July 3, 1934.

FRANK F. WHEELER,  
*District Attorney,*  
Appleton, Wisconsin.

You have submitted the following as a basis for an official opinion.

A bridge originally erected in 1882 across the Fox River, paid for jointly by Outagamie county and the town of Kaukauna, must undergo extensive repairs or must be replaced by a new bridge, because the condition of that portion lying within the village of Little Chute is unsafe for travel.

In 1882 the north end of the bridge was in the town of Kaukauna and the south end in the town of Buchanan. The north end is now located in the incorporated village of Little Chute and the south end in the village of Combined Locks.

County Trunk N connects the villages of Little Chute and Combined Locks and the bridge is part of that county trunk highway.

You inquire: (1) Upon which of the municipalities will fall the cost of maintaining the bridge? (2) Who is legally responsible for the payment of the wages of the bridge tenders?

If this bridge is reconstructed at the present time it will come within the purview of ch. 87.

Sec. 87.05, subsec. (1), Stats., provides:

“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 operation of the bridge will necessarily include the payment of the wages of the bridge tender. This section also answers your second question.

The municipalities in which the bridge is located are required to pay for the operation of said bridge.

Sec. 87.05 (2) provides in part:

“All matters relating to the maintenance of bridges constructed, reconstructed or purchased under provisions of section 87.02 shall be under the jurisdiction and complete control of the state highway commission and the cost of such maintenance shall be the direct obligation of the state. Such portion of the approaches as may be determined by the state highway commission shall be considered a part of such bridge for maintenance purposes. \* \* \*”

The cost of such maintenance would be an obligation of the state. If this bridge, however, is not reconstructed within contemplation of ch. 87, then I do not believe that sec. 87.05 will apply to this bridge. This bridge, under your statement of facts, was constructed prior to the enactment of ch. 87, and sec. 87.06 (4) apparently does not intend to include such bridges within the purview of ch. 87.

If the bridge is not reconstructed, it would seem that it would come under the provisions of ch. 83.

Sec. 83.06 (1) provides:

“All city and village streets and highways improved with state or county aid under the provisions of this chapter shall be maintained by the cities and villages in which they lie. \* \* \*”

It has been held by my predecessors, in three opinions, that this includes the maintenance of state and county highways in such villages. XIV Op. Atty. Gen. 287, XX

Op. Atty. Gen. 471, XXI Op. Atty. Gen. 165. It is true that in sec. 83.01 (6) it is provided:

“Each county board shall, on or before the annual meeting of November, 1925, select a system of county trunk highways, exclusive of the state trunk highway system, which shall be marked, signed and maintained by the county. \* \* \*.”

It is believed that the above provision is a more general statute and applies to the county trunk highways in the county that are not included in cities or villages, while sec. 83.06, above quoted, being a more special statute, is controlling and takes precedence over the provisions of sec. 83.01 (6).

The bridges are, of course, a part of the highway that must be maintained, unless there is a special provision on the subject. It follows that the maintenance of the bridge which is a part of the highway is to be borne by the villages in which the same is located.

I recognize that there are reasons for coming to a different conclusion, but in view of the fact that three opinions of my predecessors have construed these statutes, the first one as far back as 1925, and that the legislature since that time has not seen fit to clarify the statute so as to require a different construction, I am loath to change the ruling as adopted by this department. In fact, I have given an unofficial opinion under date of August 22, 1933, to your assistant in which I came to the same conclusion as these former opinions.

You state in your letter that Judge Geiger in a suit held that the construction of the bridge in question was to be paid by the county and that since that ruling the county has paid for the construction of the bridge and for the maintenance and operation of the bridge. I do not believe that this ruling of Judge Geiger would be controlling as to the maintenance and operation of said bridges, as I understand that he did not specifically cover those points.

JEF

*School Districts—Tuition*—Sec. 40.34, Stats., authorizes payment of tuition if child is sent to public high school but not if he is sent to private high school.

Resolution passed by annual meeting of union free high school district that said high school district will relieve union free high school board of all responsibility in paying tuition to private high school is invalid.

July 6, 1934.

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

You state that the question has arisen whether the official opinion published in XXII Op. Atty. Gen. 613 applies to private high schools, that is, whether pupils who live farther than four miles from a union free high school may attend a private high school and obligate the free high school district of their residence to pay for the tuition.

In said opinion the question arose whether sec. 40.34, Stats., applied to union free high school districts as well as to other district schools, and it was held that it applied to free high school districts. Inadvertently the language used was broad enough to cover any other high school and it was not pointed out to the author of that opinion that the Edgewood high school is a private high school. You are informed, therefore, that it is our opinion that sec. 40.34, as to the payment of tuition, applies only if the child is sent to a public high school and not to a private high school. In so far as said opinion in XXII Op. Atty. Gen. 613 is in conflict with this ruling, it is modified to the extent that it was not intended to authorize the payment of tuition when the child is sent to a private high school.

You state that a certain high school district has passed a resolution that it would relieve the union free high school board of all responsibility in paying tuition to private high schools when said tuition is not more than that of a public high school, and you inquire whether the high school annual meeting has a right to pass that kind of a resolution, in other words, whether said resolution is valid.

It is our opinion that said resolution is invalid. The paying of such tuition would be unlawful and the district

cannot authorize the board to do anything which is unlawful. You are therefore advised that said resolution is invalid.

JEF

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*Criminal Law—Informers*—Under sec. 353.24, Stats., it is not necessary for informer to actually sign complaint as long as he is willing and ready to sign it and to testify, in order to be entitled to consideration for reward.

July 6, 1934.

SIDNEY J. HANSON,  
*District Attorney,*  
Richland Center, Wisconsin.

You state that A, an informer, gave the conservation warden information leading to the arrest of a game law violator on the signed complaint of the warden, who was also the arresting officer. A was ready and willing to testify at the trial but the defendant entered a plea of guilty. A fine was assessed which was paid by the defendant. You say that the warden felt that the informer was entitled to a part of the fine as provided in sec. 353.24, Stats. The justice ruled that unless the informer actually signed the complaint he was not entitled to consideration for a part of the fine under the section quoted.

Sec. 353.24 provides:

“On conviction of any person for any offense in respect to bribery, forgery, counterfeiting, gambling, houses of ill fame, obscene literature, game and fish, in case the whole or any part of the sentence shall be a fine, a part of such fine when paid may be awarded to the person or persons who informed against and prosecuted any such offender to conviction, in the discretion of the court, but no part of such fine shall be paid to any public officer whose duty it is to inform against or prosecute such offender.”

We do not believe that the informer is obligated to sign the complaint before he can receive a reward as long as he is willing to sign it and willing to testify. Under the

facts stated, the informer was entitled to consideration by the presiding judge for a reward. Of course the statute leaves it to the discretion of the judge to grant the reward.  
JEF

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*School Districts — Taxation — Taxation of Utilities — Words and Phrases—Operating and Maintaining—*Cost of operating and maintaining schools includes current expenses but does not cover capital expenditures nor payments on interest or principal of loans.

July 6, 1934.

J. F. WADDELL,  
*Assistant State Superintendent,  
Department of Public Instruction.*

In your letter of June 21, 1934, you state that questions have arisen concerning the phrase "cost of operating and maintaining its school" as used in ch. 415, Laws 1933.

You state that it is generally conceded that school expenditures fall into three major groups: Current expenses, such as general control, instruction, operation, maintenance, auxiliary agencies, etc.; capital outlay, such as for equipment of a permanent nature, plant, buildings, etc.; and debt service, which includes interest on loans and payments on the latter.

You inquire whether the last two groups fall within the scope and meaning of the words "operating and maintaining" as used in ch. 415, Laws 1933.

Your question is answered in the negative. The words "operate" and "maintain" have been frequently construed by the courts and have come to have a rather definite meaning as used in the statutes.

"Operate" is to put into or continue in operation or activity. *State v. Canadian Pacific Railway Co.*, 125 Me. 350, 134 Atl. 59. It means to have or produce a desired result or effect; to act effectively; to effect any result; act. *Union Tank Line Co. v. Richardson*, 183 Cal. 409, 191 Pac. 697.

The word "maintain" is defined in Webster's New International Dictionary:

"To hold or keep in any particular state or condition, esp. in a state of efficiency or validity; to support, sustain, or uphold; to keep up; not to suffer to fail or decline; "To bear the expense of; to support; \* \* \*."

This definition has been frequently quoted by the courts.

The word "maintain" does not mean to provide or construct, but means to keep up; to keep from change, to preserve, to hold or keep in any particular state or condition. It signifies to support what is already brought into existence. *Moon v. Durden*, 2 Exch. 21; *Kendrick & Roberts v. Warren Bros. Co.*, 110 Md. 47, 72 Atl. 461. Also, it has been held that, the word "maintain" being equivalent to "repair," in connection with streets the maintenance and reconstruction of a street are separate and distinct things. *Verdin v. City of St. Louis* (Mo.), 27 S. W. 447. Also to build or construct a railroad is one thing, to maintain the structure after it is erected or built is another. *Moorhead v. Little Miami Railway Co.*, 17 Ohio 340. In the case of *Green River Asphalt Co. v. St. Louis*, 188 Mo. 576, 87 S. W. 985, it was held that where a contract provided that one party was to "maintain and keep in repair" a pavement and after the pavement was completed it was torn up and damaged by the bursting of a water main, there was no duty imposed to repair a damage of that kind but that the contract merely contemplated such repairs as use and wear might render necessary.

It has been held that maintenance means the upkeep or preserving the condition of the property to be operated, and does not mean additions to the equipment or property or improvements of the former condition of the property. *Grand Rapids and I. Ry. Co. v. Doyle*, (D. C. Mich.) 245 Fed. 792.

Also, it has been held that a vote of the taxpayers of an enlarged district authorizing a tax for the support and maintenance of schools therein does not authorize the levy of a tax on the property of the enlarged district for the interest and sinking funds of bonds of an included district, since "support" and "maintenance" are synonymous and

mean to hold in an existing state or condition. *Love v. Rockwall Ind. School District* (Tex.), 194 S. W. 659.

In view of the foregoing it would seem that current expenses but not capital outlay nor debt service are included within the meaning of the words "operation and maintenance" as used in ch. 415, Laws 1933.

JEF

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*Public Health—Optometry*—Applicant for license to practice optometry must be at least twenty-one years of age before he may be permitted to take examination.

July 9, 1934.

BOARD OF EXAMINERS IN OPTOMETRY,  
Milwaukee, Wisconsin.

Attention Dr. Wm. Leisering, *President*.

You have asked this office whether your board may examine an applicant for a license to practice optometry before such applicant has reached the age of twenty-one years.

You are advised that such an applicant must be at least twenty-one years of age before he may be permitted to take such an examination.

Sec. 153.03 provides, among other things:

"Applicants shall be examined at time and place fixed by the board, must pay twenty-five dollars in advance and be at least twenty-one years of age, \* \* \*."

Your board would have no authority to adopt any rule or resolution which would change the above statute. See also XXI Op. Atty. Gen. 1111 to this effect.

JEF

*Fish and Game—Wild Life Refuges*—Establishment of closed season for taking of fish or game is exercise of police power of state and not exercise of power of eminent domain within meaning of art. I, sec. 13, Wis. Const.

July 9, 1934.

CONSERVATION DEPARTMENT.

Attention Ralph M. Immell, *Directing Commissioner*.

You request an opinion as to the authority of the conservation commission to declare a closed season in certain counties or parts of counties on certain species of wild life, in view of the recent decision of the Wisconsin supreme court in the case of *State v. Becker*, 255 N. W. 144.

The authority of the conservation commission to regulate the taking of game by closed seasons, etc., is conferred by sec. 29.174, subsec. (2), Stats. Such power may be exercised either upon the motion of the commission itself or upon petition by a group of citizens, as set forth in sec. 29.174 (3).

The *Becker* case, *supra*, held sec. 29.579, whereby the legislature attempted to establish a wild life and fish refuge in Trempealeau county, unconstitutional as a taking of property without compensation in violation of art. I, sec. 13, Wis. Const. as applied to privately owned land not connected with any navigable waters. Justice Nelson, in giving the decision of the court, recites specifically that the opinion does not relate to any question as to the authority of the legislature or the conservation commission to establish closed seasons for fish and game.

Thus it is apparent that our court has recognized and drawn a line of distinction between laws regulating the hunting and taking of game and laws establishing wild life and fish refuges. The former laws are regarded as an exercise of the police power of the state. *Krenz v. Nichols*, 197 Wis. 394, 222 N. W. 300, 62 A. L. R. 466 (1928); Note (1917) Ann. Cas. 1917B 952.

As the state holds title to its wild life as trustee for its people, *State ex rel. Meyer v. Keeler*, 205 Wis. 175, 236 N. W. 561 (1931); *State v. Lipinske*, 212 Wis. 421, 249 N. W. 289 (1933); Note (1917) Ann. Cas. 1917B 949, it

is the duty of the state as well as its power to conserve wild life. *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793 (1895); *Ex parte Fritz*, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700 (1905); 12 R. C. L. 692, sec. 9.

The killing of game, moreover, has come to be considered as a privilege, not a right of the individual. *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793; 12 R. C. L. 692, sec. 9.

For the reasons discussed above, game laws do not come within the field of eminent domain. 20 C. J. 523, sec. 8.

The attitude of the Wisconsin supreme court regarding game laws is portrayed by the opinion of Justice Crownhart in the *Krenz* case, *supra*, in the following language (pp. 400-401) :

“There is quite a common belief prevalent that wild animals are of common right open to capture and possession by the public, and restrictions thereto must be limited and reasonable. This belief, no doubt, comes as a heritage of pioneer days, when no necessity existed for such restrictions, and when the people were largely dependent upon hunting and fishing, but that time has long since passed. It is now generally recognized that valuable wild animal life would soon be exterminated if the state should fail to conserve it and aid in its reproduction. Whenever the state has done so without trenching on private rights protected by the constitution, such acts have been almost uniformly upheld. \* \* \*.”

The establishment of a game preserve, however, is considered similar to the establishment of a public park. *State ex rel. Hammann v. Levitan*, 200 Wis. 271, 227 N. W. 140 (1929); 10 R. C. L. 36, sec. 33.

The establishment of a game preserve, therefore, is an exercise of the power of eminent domain falling within the provisions of art. 1, sec. 13, Wis. Const., prohibiting the taking of property without due compensation therefor.

Hence, unless the regulations imposed are arbitrary and unreasonable and violate some constitutional right of the individual, such closed seasons are valid measures to fulfill the state's duty to conserve its wild life.

JEF

*Marriage—Minors—Legal Settlement*—In case of void marriage woman does not acquire legal settlement of man but child born to couple is legitimate under sec. 245.36, Stats., and its legal settlement is that of its father under sec. 49.02, subsec. (2).

July 9, 1934.

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

In your letter of June 25 you state that A was a resident of Milwaukee county. His wife B sued him for divorce while he was such a resident and obtained the custody of the minor child, which A was to continue to support. Shortly thereafter A kept company with C, a girl who resided in X. She became pregnant. A admitted parentage and took her to Waukegan, Illinois, where they were married within a year from the date of the divorce. Shortly after the marriage B caused A's arrest on nonsupport charges, and he was sentenced to the house of correction at Milwaukee, where he is now serving time. C returned to X with her minor child, and they are now public charges. C made application for relief in X, giving her legal residence as Milwaukee county because of her marriage to A.

You inquire whether C has a legal residence in Milwaukee county in view of the fact that a divorce does not become absolute until one year after it is granted. You also inquire what is the legal settlement of the child and who is responsible for its support.

You are advised that on the facts stated C has a legal settlement at X, Wisconsin, but that the child of A and C has a legal settlement in Milwaukee county.

The effect of sec. 247.37, Stats., is to prohibit a divorced person from contracting a second marriage within one year from the date of the granting of the divorce.

Sec. 245.04, subsec. (1), provides:

"If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such

marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state."

Therefore the marriage between A and C was void, assuming they intended to continue to reside in this state, and C did not acquire a legal settlement in Milwaukee county under sec. 49.02 (1), which she would have done had the marriage not been void.

While the marriage of A and C is null and void, their child is, nevertheless, legitimate under sec. 245.36, which provides in part:

"\* \* \* The issue of all marriages declared null in law shall, nevertheless, be legitimate."

Sec. 49.02 (2) provides that legitimate children shall follow and have the settlement of their father, which in this case we understand is Milwaukee county.

JEF

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*Banks and Banking—Bonds—Trust Company Banks—*  
Bank seeking release of its securities under sec. 223.02, subsec. (2), Stats., must file bond with banking commissioner even though it never exercised its fiduciary powers.

July 9, 1934.

H. F. IBACH, *Commissioner,*  
*Banking Department.*

A national bank which is now in receivership has on deposit with the state treasurer certain securities for the purpose of permitting the bank to exercise trust powers as provided in sec. 223.02, subsec. (1), Stats.

This bank never exercised the trust powers granted it and in view of this fact the trustee questions the necessity of the bond "conditioned upon the faithful execution of all trusts lawfully imposed and accepted by said bank" required in subsec. (2), sec. 223.02 as a condition precedent to the release of the securities.

You wish to know whether, under the circumstances set forth above, it is necessary that the bank or the receiver of the bank furnish the bond required in sec. 223.02 (2) or whether the securities may be released as soon as the banking commission is satisfied that the bank never exercised these trust powers.

Unless released by order of a court of competent jurisdiction, these securities can be released only in accordance with the provisions of sec. 223.02 (2).

Sec. 223.02 (2) reads as follows:

“The securities and cash deposited pursuant to subsection (1) by any bank shall be released by the state treasurer and returned to the bank, whenever the commissioner of banking shall certify to the state treasurer that said bank no longer exercises fiduciary powers and that he is satisfied, after examination, that there are no outstanding trust liabilities, and that said bank has filed with the said commissioner a bond to the people of the state, in amount and form as demanded by him, conditioned upon the faithful execution of all trusts lawfully imposed and accepted by said bank.”

According to this statute, the state treasurer cannot release the funds until the bank commissioner has certified, among other facts, that the bank has filed a bond with said commissioner. Unless this is alleged in the commissioner's certificate, no funds can be released by the state treasurer. If the commissioner should certify to the treasurer that such bond had been filed, when in fact no bond had been filed, he would be guilty of a violation of sec. 348.33, Stats., which reads:

“Any public officer whatever, in this state, whose duty it shall be by law to make any official certificate in respect to any matter or thing, who shall state in such certificate, in respect to anything material, that which he knows to be false or that which he has not good reason to believe is true, shall be punished by imprisonment in the county jail not more than six months or by fine not exceeding one hundred dollars.”

The bond is given to cover any possible claims of “cestuis qui trustent” which may be overlooked in the settling of the bank's affairs. Since the commissioner must certify also that he is satisfied that there are no such outstanding

trust liabilities, this bond would seem at first glance to be superfluous even in those instances in which a bank once exercised trust powers. However, the commissioner might overlook some claim or certain transactions might be concealed from his knowledge, and this bond is to cover claims of this sort which might conceivably arise. In other words the bond seems to be, to "make assurance doubly sure." If a mistake or oversight might occur and some claims go unpaid in case the affairs of a bank which has exercised trust powers are wound up, such mistake or oversight might also occur in instances in which the bank claims (and to all intents and purposes that claim is honest) that it has never transacted any trust business. The procedure in sec. 223.02 (2) was, then, provided for as a safeguard for the interests of such of the public as had dealt with the particular bank whose securities it is sought to have released.

For the above reasons it is our conclusion that when securities are released according to the provisions of sec. 223.02 (2), a bank must file a bond with the commissioner even though it has never exercised its trust powers.

JEF

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*Counties—Dance Halls*—Public dance within meaning of sec. 351.57, Stats., is one to which public generally is admitted without discrimination and admission to which is not based upon personal selection or invitation.

Rural tavern having small room where music is played for entertainment of tavern patrons and some dancing is occasionally permitted does not constitute public dance requiring license so long as dancing is mere incident of general tavern business.

July 9, 1934.

CHAS. M. PORS,  
*District Attorney,*  
Marshfield, Wisconsin.

In your letter of June 20 you state that considerable confusion has arisen as to what constitutes a public dance within the meaning of sec. 351.57, Stats., and also as to

what is meant in that statute by "the premises on which such dance hall is situated." You mention several different types of situations on which you desire our interpretation.

At the outset we would call your attention to the following opinions from this office bearing on the problem. XII 377; XIII 49; XIV 500.

In XII Op. Atty. Gen. 377 the opinion was expressed that public dances are dances where the public generally is admitted without discrimination on payment of a fixed charge or admission fee, whether such dance is operated by or in charge of an organization or private individual. It was also said in that opinion that where bona fide selection exists, such as confining admission to a dance to members of a particular organization only or to an honestly selected list of invited guests, such dances are not public.

While there are apparently no Wisconsin cases on the precise question the term "public" has been defined when applied to places of amusement, use of property, etc., in accordance with the definitions mentioned in XII Op. Atty. Gen. 377 and cases therein cited. That opinion is borne out by cases from other jurisdictions. In the case of *State v. Rosenfield*, 111 Minn. 301, 126 N. W. 1068, the court in the absence of a definition construing the term "dance house," as used in a statute, said the term must be construed in accordance with its ordinary usage, and

"\* \* \* So construing it, a dance house is a place maintained for promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation \* \* \*" (p. 1069).

The same test was applied in *State v. Loomis*, 75 Mont. 88, 242 Pac. 344, and in a 1934 New Hampshire case, *Chung Mee Restaurant Co. v. Healy*, 171 Atl. 263.

In your letter you mention three particular situations which have arisen.

1. A local organization sends out invitations to practically everybody in the rural community. Those holding the invitations are admitted upon paying twenty-five cents admission. Only those holding invitations are admitted. It is your opinion that this does not constitute a public dance.

2. The same situation as above, except that anyone who comes to the dance is admitted, whether an invitation has been received or not. It is not necessary to show the invitation to gain admittance. It is your opinion that this does constitute a public dance.

3. A rural tavern has a small room which is used for dancing two or three nights a week. The tavern keeper has an orchestra which plays for the entertainment of the tavern patrons and while the orchestra is playing a few of the patrons dance, although the orchestra plays whether any one dances or not. There are probably not more than four or five couples dancing at any one time. It is your opinion that this is not a public dance.

We are inclined to concur with your conclusions. It should be kept clearly in mind, however, as was pointed out in XII Op. Atty. Gen. 377, that any selection of invited guests must be honestly made and not made for the purpose of evading the law.

On the third situation we have heretofore expressed the opinion that a hotel furnishing music and permitting its guests to dance after dinner comes within the statute requiring a license for a public dance. XIV Op. Atty. Gen. 500. However, it may be that a rural tavern which has a small room where occasional dancing takes place should be placed in a different category than a hotel where the dancing is often quite as important a part of the business as the serving of meals, if not more so. It is a matter of common knowledge that in the hotel advertising, the matter of dancing is emphasized more than the dinners served in connection therewith, that is, the dinner is really incident to the dance.

In the case of *People v. Dever*, 237 Ill. App. 65, it was held that premises intended to be used as a restaurant having a total area of 16,000 square feet but in which dancing was to be permitted as incident to the restaurant business, the space to be used for dancing in the central portion of the main floor being only 1,500 square feet, were not a "dance hall" within the meaning of a Chicago ordinance requiring dance halls to be licensed. The court pointed out that a dance hall is a public hall, specifically devoted to

dancing, not necessarily used exclusively for dancing, but primarily so.

In New York the test of applicability is made to depend upon whether the activity carried on is subsidiary or incident to the conduct of another business, either licensed or not. There moving pictures may not be shown without a license, but such shows need not be licensed if shown in an ice cream parlor for the entertainment of patrons. *People v. Wacke*, 137 N. Y. S. 652. The court said that the test is whether such entertainment is a mere incident to the general business carried on in the premises in question and that it does not come within the licensing statute if it is merely an attraction that might secure increased patronage. The same principle has been applied in New York to cabaret shows in hotels. *People v. Martin*, 137 N. Y. S. 677; *People v. Keller*, 161 N. Y. S. 132. See also *People v. Royal*, 48 N. Y. S. 142, and *People v. Campbell*, 65 N. Y. S. 114.

A different view, however, was expressed in the *Chung Mee Restaurant Company* case *supra*. There a Chinese restaurant, having part of the main dining room converted into an open space suitable for dancing during meal hours, was held to be a "hall for dancing," within an ordinance requiring a license for keeping a dance hall. The court said, p. 264:

"\* \* \* The fact that other forms of entertainment or accommodations are combined with the dancing, and that the only direct charge is made for food, the purchase of which is the condition upon which the privilege of dancing is extended, is wholly immaterial. A public dance is rendered no less public because the ticket of admission is edible."

It would appear, however, that the majority view expressed in the Illinois and New York decisions is supported by the better reasoning.

With reference to that part of the same statute which prohibits the use of intoxicating liquor in any dance hall or on any premises on which a dance hall is situated, you mention two situations which, in your opinion do not fall within the statutory prohibition. One is where an individual owns about ten acres of land and has a tavern on the

road. He also has a dance pavilion about one hundred fifty feet from the tavern and back from the road. The other situation is that of a two-story building, the upstairs of which is leased to an organization holding dances and the downstairs of which is leased to another person as a tavern. In your opinion neither of these situations comes within the statutory prohibition.

We agree with your conclusions. The word "premises" when used in connection with a particular business has been held to mean strictly the property on which the particular business is carried on. *Short v. Hughes Coal Co.*, 96 Pa. Super. Ct. 237, and it has been held that different floors of the same building constitute different "premises" where the floors are leased to different tenants. *Cohen v. Simon Strauss*, 139 N. Y. S. 929.

However, the question of what constitutes the premises on which the dance hall is situated in the connections you mention is no longer one of importance, as subsec. (2), sec. 351.57 was amended by ch. 4, Laws Special Session 1933, so as to eliminate the restriction as to the use of intoxicating liquor on such premises.

JEF

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*Municipal Corporations — Village Ordinances — Public Officers—Village Assessor—Ordinance of village board allowing village assessor three dollars per day for not more than twenty days in any one year is invalid.*

July 9, 1934.

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

Sec. 61.27, Stats., provides that the salary of a village assessor shall be fixed by the village board at a sum not less than three dollars per day.

A certain village passed an ordinance which reads as follows:

"The compensation of the village assessor shall be \$3.00 per day for a period not to exceed twenty days in any one year."

You wish to know whether the above ordinance is valid. The answer is that the ordinance is not valid.

Sec. 61.27, referred to above, also provides:

"\* \* \* He [the assessor] shall begin on the first day of May, or as soon thereafter as practicable, to make an assessment of all property in his village liable to taxation on that day, in the manner prescribed by law. He shall return his assessment roll to the village clerk at the same time and in the same manner in which town assessors are required to do \* \* \*."

Sec. 70.50 provides:

"Except in cities of the first class the assessor shall, on or before the first Monday in August annually, deliver the assessment roll so completed and all the sworn statements and valuations of personal property to the clerk of the town, city or village, who shall file and preserve the same in his office."

Sec. 70.50 was formerly sec. 1064, of which the court in *State v. Zillman*, 121 Wis. 472, 477 said:

"\* \* \* To hold that assessing officers and members of boards of review shall be held strictly to the time specified for the performance of their duties under the statutes would result, practically, in a failure to administer the law for the assessment of taxes, under the varying difficulties and obstacles inhering in such a course. These provisions of the statutes pertaining to the assessment of taxes must have been intended by the legislature as directory in their execution, and a departure from the letter should not invalidate the action of such officers, unless it be shown that the rights of persons interested were thereby materially affected, to their prejudice. *Cooley, Taxation*, note on p. 774; *Faribault W. Co. v. Rice Co.*, 44 Minn. 12, 46 N. W. 143."

By the statutes the assessor is given until the first Monday in August to send in his assessment roll. The court in the *Zillman* case, cited above, states that there may be instances when he may not be able to make his returns by that date and says that the statute setting the time limit is directory only. Since the legislature has allowed the

assessor a certain length of time in which to complete his duties and the courts have said that in some instances he might have a longer time and not violate any legislative intent, the village board does not have the power to shorten the time allowed him. To limit the period for which he may receive compensation to twenty days as the ordinance in question attempts to do, is, in effect, to give the assessor twenty days in which to complete a task for which he is allowed at least three months by the legislature.

Therefore you are advised that the ordinance you submit is invalid.

JEF

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*Courts—Writ of Habeas Corpus ad Testificandum—Prisons—Prisoners—Prisoner out of prison under writ of habeas corpus ad testificandum is still within contemplation of law in prison and jurisdiction of court extends so far only as is necessary to properly receive testimony of witness; court may give any orders to segregate witness from others.*

Safe-keeping of prisoner is for agent of warden.

Attorney general cannot pass upon orders of court in general way unless he has specific case before him.

July 12, 1934.

BOARD OF CONTROL.

You have attached to your communication of June 13 a letter from Oscar Lee, warden of the Wisconsin state prison, in which he states that under date of May 25, 1934, he was served with a writ of habeas corpus ad testificandum in the matter of the grand jury for the April 1934 term of the municipal court of Milwaukee county, Wisconsin. This writ called for the presence of I. J. Rosenberg before the grand jury in the city of Milwaukee on May 28, 1934. Rosenberg was produced in accordance with the terms of the writ.

He also states that on May 28, 1934, a writ of habeas corpus ad testificandum was issued on them through their

agent, Dan Corts, who was then in Milwaukee with Rosenberg, commanding the presence of Rosenberg before the circuit court of Milwaukee county on the 28th day of May, 1934, at two o'clock P. M. Rosenberg was produced in accordance with the terms of that writ. He says that Rosenberg, in custody of Mr. Dan Corts, their agent, left the institution on the morning of May 28, 1934, and was returned to the prison on June 6, 1934.

You inquire:

1. When a prisoner is produced in court in consequence of a writ of habeas corpus ad testificandum, is he, after being delivered to the court and during the balance of his absence from the prison, under the jurisdiction of the court or of the prison?

2. Is the court or the agent of the prison responsible for the safekeeping of the prisoner?

3. Is the agent of the prison under obligation to obey orders of the court relative to the place of detention of the prisoner or shall he obey the orders of the warden of the prison?

We find very little discussion of the question raised by you in the books. It seems that the prisoner is in prison during the time when the warden takes him to the court for the purpose of testifying. The only jurisdiction that the court has over the prisoner is in so far as the matter affects the giving of testimony. He may give orders to segregate a prisoner from other witnesses. He may give orders that the prisoner be kept out of court while other witnesses are testifying and any reasonable order that the court may give in regard to that matter would be authorized and valid. In the case of *People ex rel. Backus v. Stone*, 10 Paige's Chancery Rep. (N. Y.) 606, 614, the court said:

“\* \* \* Upon such a writ the prisoner is to be taken by the most direct and convenient way, and at the proper time, to the court or place where he is to give his evidence; and after that purpose is accomplished the sheriff must return with him directly to the prison. And if the sheriff voluntarily suffers the prisoner to go at large out of his custody in the mean time, or if he goes with him out of the way to accommodate the prisoner, or to answer his individual purposes, and not in the exercise of the legitimate purposes

of the writ, it is an escape for which the sheriff is liable.  
\* \* \*

It would seem that the court and the warden are to cooperate. It is the warden's duty to keep the prisoner in custody. He should stay in the court and stay with the prisoner so that he may not escape. The judge has no jurisdiction over the prisoner except in so far as it may be pertinent to the giving of testimony. After the testimony is given the warden should take the prisoner back to the institution.

In answer to your second question, I will say that the warden is primarily liable for the safe-keeping of the prisoner. The court should not make any order that will in any way interfere with the proper safeguarding of the prisoner and prevent his escape.

It is difficult to answer the third question in a general way. As a general rule it is safe to obey the orders of a court, especially during the trial of a case when the orders are given in the interests of justice. Whether the court in a specific instance has gone beyond his powers is a question that cannot be answered in a general way.

JEF

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*Public Health—Optometry*—Optometrist who advertises his professional services over name of deceased optometrist without indicating that he is successor of former optometrist is probably guilty of unprofessional conduct under sec. 153.06, subsec. (4), Stats.

Services of optometrist should not be advertised by optometrist describing himself as optician.

July 12, 1934.

BOARD OF EXAMINERS IN OPTOMETRY,  
Milwaukee, Wisconsin.

Attention Dr. Wm. Leisering, *President*.

You have asked for an opinion upon the following situation:

X, an optometrist, is the successor of Y, a deceased optometrist, and advertises in the newspapers in substantially the following form:

**PROTECT YOUR EYES**

An early check-up on your eyes is vitally important—call at Y's and have them examined. A change will only be made if needed.

**PRICES TO FIT EVERY PURSE**  
**OPTICIAN Y**  
Established 1872

You inquire whether such advertising constitutes "unprofessional conduct" under sec. 153.06, subsec. (4), Stats.

You are advised that such advertisement constitutes "unprofessional conduct" within the meaning of said statute, which provides that unprofessional conduct shall include, among other things, any conduct of a character likely to deceive or defraud the public and advertising of any character in which untruthful or misleading statements are made.

Unless the words "successor to" are used in connection with the name of the former optometrist it is quite apparent that people knowing of the reputation and skill of the deceased might be deceived and misled into thinking that their eyes were being examined by such former optometrist. It is to be noted also that the advertisement advertises professional services, namely the examination of the eyes, by an optician, which is also objectionable in that an optician is one who makes, or who deals in, optical glasses and instruments as distinguished from an optometrist who examines the eyes, or to put in it more technical language, measures the powers of vision by mechanical means.

The advertisement in question tends to mislead the public as to the distinction between the different functions of an optician and an optometrist. Under ch. 153, Stats., an optician could not practice optometry without being a licensed optometrist, and people are entitled to know whether their eyes are being lawfully examined by such a licensed optometrist or not.

JEF

*Taxation—Tax Sales—Sec. 74.33, Stats., as amended by ch. 8, Laws 1933, Special Session, is in conflict with provisions of sec. 75.01, subsec. (3), Stats., as amended by ch. 146, Laws 1933.*

It is suggested that county follow regular procedure rather than rely upon provisions of sec. 75.01 (3) as amended.

July 13, 1934.

CHARLES K. BONG,  
*Assistant District Attorney,*  
Green Bay, Wisconsin.

You cite the last sentence of sec. 75.01, subsec. (3), Stats., and call attention to the fact that ch. 8, Laws 1933, Special Session, in sec. 3, approved January 31, 1934, provides for the sale of delinquent taxes and for notice but "in no way exempts the notice of sale of lands upon which the county holds a tax certificate."

You say there is an apparent conflict between these statutes and ask:

"If the county does not have to advertise and offer for sale delinquent taxes upon which it already has a prior certificate, how is that reconciled with section 74.33 as amended by chapter 8 of the Special Session Laws of 1933-1934?"

This department in XXIII Op. Atty. Gen. 446 ruled that the provisions of ch. 146, Laws 1933, amending subsec. (3), sec. 75.01, Stats., are of doubtful validity, and that the county should follow the regular procedure, if possible, rather than rely upon the provisions of ch. 146, Laws 1933.

In the opinion above referred to we pointed out the practical difficulties in attempting to utilize the provisions of subsec. (3), sec. 75.01 as amended by ch. 146, Laws 1933.

Sec. 74.33, Stats., as affected by ch. 8, Laws 1933, Special Session, seems to provide another conflict in the application of the provisions of subsec. (3), sec. 75.01.

Without discussing at length the several statutes and acts involved, and in view of the manifest difficulties of attempting to apply the provisions of subsec. (3), sec. 75.01, we again advise that the counties follow the regular

procedure in these matters rather than the special procedure provided in sec. 75.01 (3) as amended by ch. 146, Laws 1933.

JEF

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*Education—Vocational Schools—School Districts—Taxation—Tax Collection—Effect ch. 426, Laws 1933, will have upon preference afforded schools in tax moneys is discussed.*

July 13, 1934.

GEORGE P. HAMBRECHT, *Director,*  
*Board of Vocational Education.*

You wish to know what effect the provisions of ch. 426, Laws 1933, will have upon the collection of taxes levied for a local board of vocational education.

First of all, I wish to point out the fact that ch. 426 does not go into effect until October 1, 1935. Therefore the budget which is being made out now will not be affected at all. The first payment to be made under the provisions of ch. 426 will be those taxes a return on which is made by the local treasurer on or before the first Monday in March, 1936.

The following statutory provisions will go into effect October 1, 1935 and will apply to taxes collected in 1936. (ch. 426, Laws 1933, sec. 2, creating sec. 74.03, Stats.)

“(5) Out of the general property taxes collected the town, city or village treasurer shall on or before the first Monday in March, first set aside and pay over to the county treasurer the full amount due on state trust fund loans of every character levied on the property in such town, city or village. The town, city or village treasurer shall then pay to each school district treasurer such proportions of the school levy of such district as the balance of the general property taxes collected in such town, city or village bears to the total general property tax levy therein for all purposes included in the tax roll, exclusive of levies for state trust fund loans, and shall pay to the county treasurer a like proportion of the state taxes, state special charges, county school tax, other county taxes and county special

charges and shall retain in his hands a similar proportion for the town, city, or village. \* \* \*.”

“(8) On or before August fifteenth, the county treasurer shall settle with the state and local treasurers for all collections on delinquent and postponed taxes and special assessments made by him up to and including the last day of July. Out of the proceeds of the taxes and special assessments collected for each town, city or village, the county treasurer shall first set aside and pay to the state treasurer the balance due on state taxes and state special charges levied on such town, city or village. Out of the collections as aforesaid, the county treasurer shall next set aside and pay over the balance due on the county school tax levied on each town, city or village. The county treasurer shall then apportion and pay the remainder of such collections as follows: First, the balance due on school and on town, city or village taxes on the tax roll and, last, the balance due on county taxes and charges on the tax roll. \* \* \*.”

“(9) Out of the money received from the county treasurer in August, the town, city or village treasurer shall first set aside and pay over to the school district treasurers the balance due on school district levies.”

Section 74.15, Stats. 1931, which is now in effect, provides:

“(2) 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, \* \* \*.”

These statutory provisions apply to moneys collected for vocational schools as well as money collected for other school districts. Under the statute now in effect (sec. 74.15, Stats. 1931), school districts were given a preference in tax moneys collected second only to state taxes and county equalization taxes. Under the statute to go into effect on October 1, 1935, this preference is affected as follows:

1. When the local treasurer settles with the county treasurer in March, vocational schools as well as other schools will share on a pro rata basis with all other tax units, whatever funds remain in the hands of the local treasurer after paying over in full to the county treasurer the amount due on state trust fund loans.

2. When the county treasurer settles with the state and local treasurers in August, after paying the balance due on state taxes, state special charges and county school taxes, he shall first pay the balance due on school and town, city or village taxes on the tax roll. Out of the money he receives from the county treasurer, the local treasurer must, first of all, pay over to the school district treasurers the balance due on school district levies.

Thus it will be seen that while in March the school districts will not have their customary preference in tax moneys but must share pro rata with all other taxing units the money left after payment of state trust fund loans, they regain that preference in the August settlements. The effect then of subsecs. (5), (8) and (9) of 74.03, as created by ch. 426 will be to defer the preference afforded school districts in the apportionment of tax moneys for about six months.

From your letter I gather that you had the idea that a certain percentage of the budget of the board would be "charged off." Nothing is "charged off"; preference is merely deferred. If enough money is collected in taxes, the board of vocational education will eventually get all of the money for its budget (the total amount of taxes levied for the vocational school district). Since in the August settlement the school districts have the preference set forth above, they should in all probability get all of their money. Whether a particular local board of vocational education gets all of the money due it from taxes will depend, of course, upon the amount of tax moneys collected in that particular county.

**JEF**

*Municipal Corporations — Beer Licenses* — Municipality cannot require brewer to obtain intoxicating liquor license before selling fermented malt beverages on brewery premises in view of sec. 66.05, subsec. (10), par. (c), Stats.

July 13, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

Sec. 66.05, subsec. (10), par. (c), subd. 2, Stats., provides as follows:

“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. Said license shall be issued to the brewer, if an individual, or to any one of the officers or a member of a copartnership, if such brewer be a corporation or a copartnership. A brewer may own the furniture, fixtures, fittings, furnishings and equipment used therein and shall pay any license fee or tax required for the operation of the same.”

You inquire whether or not a municipality has the right in view of this specific provision to require a brewer, as a condition for obtaining a license for the sale of fermented malt beverages manufactured by it and dispensed upon its brewery premises, to obtain a retail intoxicating liquor license.

It is our opinion that your question must be answered, No. A municipality which sought to enforce such a requirement would be attempting to impose an additional prerequisite upon the right of the brewer to serve or sell fermented malt beverages upon the brewery premises. It is our opinion that such a requirement could not be justified under sec. 66.05 (10) (k) as an additional regulation upon the sale of fermented malt beverages. Sec. 66.05 (10) (c) 2 authorizes a brewer to maintain a place for the sale of fermented malt beverages upon the brewery premises, provided he obtains and pays for the Class “B” fermented malt beverage license required by the municipality wherein the premises are situated. A municipality cannot abridge

this right by also requiring the brewer to obtain a Class "B" intoxicating liquor license before permitting him to sell fermented malt beverages.

JEF

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*Bridges and Highways—Bids*—Under sec. 84.06, Stats., requiring jobs to be let by highway commission to lowest competent and responsible bidder, patented article is not subject of competitive bidding unless owner agrees beforehand to furnish it to any contractor at certain specified price.

July 13, 1934.

#### HIGHWAY COMMISSION.

You have asked for an official opinion as to the legality of your action in rejecting all bids in the United States Public Works project No. NRS 520-A, being the Howell Road in Milwaukee county. This work was advertised and bids were received on the same on March 28, 1934. Objection was then raised to the method of advertising. On the advertising of this job bids called for Colprovia, Amesite, Warrenite, Kyrock and Crownrock, all of said types of pavement being patented processes. In addition thereto the advertisement called for bids of an open type, or what you call C A specifications, which is an unpatented type of pavement. No filing agreement was filed by the owners of the patents with the highway commission wherein the owner or licensee agrees he will furnish the patented material to any contractor desiring to bid on either of the types of patented pavements mentioned above at a certain specified price. The Howell Avenue project is a federal aid project. Bids were advertised for and received, and the Colprovia was low with only one bid submitted.

The question has arisen whether sec. 84.06, Stats., which relates to the letting of contracts under federal aid, was complied with. It provides:

"When the necessary funds are available for any highway improvement, and the project statement, plans, and

specifications have been prepared by the commission and approved by the secretary of agriculture, bids to do the work contemplated shall be advertised for in the manner determined by the commission, and the job shall be let by the commission to the lowest competent and responsible bidder, unless such bid shall be deemed to be unreasonable or shall be beyond the estimate approved by the secretary of agriculture. \* \* \*”

Our attention has been directed to a number of cases in our supreme court which it was claimed ruled against the validity of these bids. The case of *Allen v. Milwaukee*, 128 Wis. 678, was referred to and also the case of *Neacy v. Milwaukee*, 171 Wis. 311. In the latter case, the court, after referring to the statute in Wisconsin, said, pp. 323-324:

“But, independent of this charter provision, the same conclusion is necessarily reached by the application of a rule of law well established in this state to the effect that, where a city charter requires public work to be let upon competitive bids, material which does not constitute the subject of competitive bidding cannot be used. \* \* \* The underlying consideration is that any article which is not a subject of competitive bidding is obnoxious to the provisions of city charters requiring that all contracts should be let pursuant to competitive bidding. As a rule, a patented article is not the subject of competitive bidding. If, however, the article, for any other reason, is not the subject of competitive bidding, its use is just as obnoxious to charter provisions requiring competitive bidding. \* \* \*”

The owner or licensee of none of the patented pavement offered to furnish the material in question to any contractor desiring to bid on this type of pavement at certain specific prices per ton or per square yard. Colprovia can become a subject of competitive bidding only when the owner thereof agrees with the state authorities that he will sell to any contractor desiring to bid on the Colprovia type of pavement the material in question at a certain price per square yard or ton.

We are of the opinion that the commission was justified in rejecting the bids, as it had reserved that right in asking for any bids in this matter. You are advised that you were justified in rejecting the Howell bids and should

proceed in a legal way to advertise for new bids. In doing so, we would advise that you require the owner or licensee of these patented articles to file a statement with the commission as to the price he will charge and furnish his patented processes to the contractor who may secure the contract.

JEF

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*Public Officers—County Abstractor—Public Records—* Abstract books kept by county are part of public records and county abstractor has no authority to refuse any person privilege of making copies from such records under reasonable rules and regulations.

July 13, 1934.

R. C. LAUS,  
*District Attorney,*  
Oshkosh, Wisconsin.

A new abstract company, which is planning to open an office in Oshkosh, desires to use the Winnebago county tract index. You ask whether the new company has the right to examine the tract indexes and whether the county abstractor is obliged to allow that company to search the records, including the tract index, for use in making abstracts.

The question propounded by you must be answered in the affirmative. In II Op. Atty. Gen. 787 it was held that a register of deeds has no authority to refuse the representative of an abstract company the privilege of taking minutes and making copies from the records in his office, under reasonable rules and regulations.

In *Rock County v. Weirick*, 143 Wis. 500, 128 N. W. 94, it was held that abstract books kept by a county are part of the public records and that any person has a right to copy them.

In *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N. W. 30, it was held that any person may enter the office of the register of deeds during the usual business hours and under his reasonable supervision and control may examine and take minutes, notes and copies of books, records and in-

struments, for use in making private abstract books for private purposes. See also *Outagamie County v. Zuehlke*, 165 Wis. 32, 161 N. W. 6, 80 A. L. R. 764.

In view of the foregoing it is our opinion that abstract books kept by the county are part of the public records and that the county abstractor has no authority to refuse any person the right to copy them for use in making private abstracts.

JEF

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*Education—County Superintendent of Schools—Taxation—County Tax Rate*—Tax levied for maintenance of county superintendent's office is regular county tax and as such is payable either in cash or in delinquent tax certificates.

July 13, 1934.

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

You wish to know whether taxes levied for the upkeep of the county superintendent's office must be accounted for by the local treasurer in cash, or whether they may be returned as delinquent and thus be paid for with delinquent tax certificates.

Sec. 70.62, Stats., provides in part:

“(1) The county board shall also, at such meeting, determine by resolution the amount of taxes to be levied in their county for county purposes for the year, \* \* \* and by separate resolution adopted by majority of the members of the board not prohibited from voting thereon by section 39.01, determine the amount of tax to be levied to pay the compensation and allowances of the county superintendents of schools and designate therein the cities exempt from taxation therefor.”

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."

This tax levied for the maintenance of the county superintendent's office is not a special tax in any way. It is adopted by special resolution, because, according to sec. 39.01 (5), certain members of the board are prohibited from voting on it. It is levied and collected just as any other county tax except that cities maintaining a city superintendent of schools are not charged with any part of it. Since this tax is a regular county tax it is payable, as are other county taxes, in cash or in delinquent tax certificates.  
JEF

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*Public Officers—Alderman—Board of Public Works—Mayor—Mayor and alderman are not eligible to membership on local governing board of municipal utility.*

July 16, 1934.

WILLIAM M. DINNEEN, *Secretary,*  
*Public Service Commission.*

You ask for an official opinion on the following point:

"May the local governing body of a municipal utility be comprised of the mayor, one alderman and three persons who are not members of the council?"

Under sec. 62.11, Stats., the common council of cities is composed of the mayor and alderman. In XXIII Op. Atty. Gen. 67, it was held that an alderman may not lawfully be employed as the operator of a public utility which is owned and operated by the city. See sec. 66.11, subsec. (2), and sec. 62.09 (7) (d), Stats. In XXII Op. Atty. Gen. 480 it was held that members of a city council of a third or fourth class city may not be appointed to the board of public works under sec. 62.14. The mayor, being a member of the city council, comes under the same rule as an alderman. Your question is therefore answered in the negative.

JEF

*Appropriations and Expenditures—Education—Student Loans*—Moneys repaid on loans made pursuant to par. (c), subsec. (4), sec. 7, ch. 363, Laws 1933, should be credited to appropriation made by that section.

Payments on loans made pursuant to ch. 10, Laws 1933, Special Session, should be paid into general fund for credit only as emergency relief money.

July 18, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

Par. (c), subsec. (4), sec. 7, ch. 363, Laws of 1933, appropriates \$170,000 from the money raised by the emergency relief taxes to be used in making loans to needy students at various educational institutions. At the present time payments are being made on these loans and you ask whether such money, when it is received, should be credited to the appropriation made by this section, thereby making a revolving appropriation, or whether it is to be paid into the general fund for credit only as emergency relief money, or simply paid into the general fund. You state further that payments of loans made under ch. 10, Laws Special Session 1933, are now being made, and you ask what disposition of these funds should be made.

The money which is now being received as payment of loans which were made under ch. 10, Laws Special Session 1933, should be paid into the general fund for credit only as emergency relief money.

Ch. 10, Laws Special Session 1933, specifically provides that appropriation therein made is for loans to needy and qualified residents of the state desirous of attending certain educational institutions *during the second semester of the current school year*. This express language in the statute limiting the time for which funds are to be available as loans to needy students necessarily eliminates the possibility of a continuing appropriation. Since funds designated in ch. 10, Laws Special Session 1933, were appropriated out of the balance of the receipts from emergency taxes for relief purposes, moneys representing repayments of loans made should be paid into the general fund for credit only as emergency relief money.

Payments on those loans which were made pursuant to par. (c), subsec. (4), sec. 7, ch. 363, Laws 1933, should be credited to the appropriation made by that section, thereby making a revolving appropriation available for the making of loans at any time.

Subsec. (4), sec. 7, ch. 363, Laws 1933, provides in part:

“There is appropriated from the unemployment relief fund to the industrial commission, on the effective date of this act, all moneys in said fund in excess of the amount appropriated in subsection (2) and (3) or which may be allotted under subsection (5), for the following purposes:

“(a) \* \* \*

“(b) \* \* \*

“(c) Not to exceed one hundred seventy thousand dollars for loans to needy and qualified residents of the state attending or desirous of attending the university, the state teachers’ colleges, Stout institute or other educational institutions of this state of like rank, in cases where the student-applicants are either unemployed or would otherwise be unable to continue their education and thus add to the number of the unemployed. Such loans shall be made only for tuition, incidental, and other fees and shall not exceed one hundred fifty dollars to any one student. Such loans shall be made by the industrial commission on the student’s application endorsed by the authorities of the institution which the applicant desires to attend or is attending. The terms and other provisions of such loans shall be prescribed by the industrial commission, which shall have authority to adopt and enforce all necessary rules to carry out the intent of this paragraph. Such rules shall provide that the loans shall be distributed among the several counties as nearly as possible in proportion to their population.”

The act appropriates a definite sum which shall be available for loans to students. To appropriate is to set apart or assign to a particular use or person in exclusion of all others; to provide something for a special use or purpose. The particular use to which the money mentioned in par. (c), subsec. (4), sec. 7, ch. 363, Laws 1933, is to be put is that of loaning to needy students. The earmarked nature of the funds mentioned in par. (c) is not erased by a mere payment of loans. The money is still to be considered a part of the original appropriation and it therefore follows that such money may be reloaned, thereby

creating a revolving appropriation so that loans may be made at any time.

JEF

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*Intoxicating Liquors—Public Printing—Newspapers—*  
Publication of applications for liquor licenses under sec. 176.09, subsec. (2), Stats., may be made in paper printed in another state if it has greatest circulation of any newspaper in locality.

July 18, 1934.

JOHN P. MCEVOY,  
*Assistant District Attorney,*  
Kenosha, Wisconsin.

You refer us to sec. 176.09 subsec. (2), Stats., relating to publication of applications for liquor licenses, which reads as follows:

“No publication of such applications shall be made in any newspaper, unless such newspaper making such publication shall have been regularly and continuously published daily or weekly, as the case may be, in such town, village, or city for a period of at least two years before the date of publication of such applications. If there be no paper published in the town, village, or city in which the premises are situated, then in the paper having the most circulation in such town, village or city, as the local authorities may determine.”

You state that some of the town boards in the western end of the county, where there is no daily or weekly newspaper published within that township, are causing such notices to be published in newspapers printed in Illinois and in newspapers printed without Kenosha county, presumably under authority of the last sentence of the subsection above quoted.

You say there is but one daily newspaper published in your county and that in the city of Kenosha and you do not know of any weekly newspaper published throughout the county except also one in the city of Kenosha. You refer to sec. 331.20, relating to legal notices, which might be inferentially construed to mean that such notices shall

be published in a Wisconsin newspaper but it does not seem to be definite upon the subject.

You inquire:

1. Whether such notices may be published in a newspaper printed outside the state if no paper, either daily or weekly, is published within the township in which the premises for which license application is made are located but a newspaper is published within the county.

2. Whether such notices may be published in a newspaper in an adjoining county under the above circumstances.

I believe that both of your questions should be answered in the affirmative. Sec. 176.09 is a special statute pertaining to the publication of the notices in question and it of course is controlling rather than a general statute as contained in sec. 331.20. The local authorities are to determine what paper has the most circulation in such village or city. Towns, villages and cities near the border line of the state may well have papers published in a neighboring state with more circulation in them than any paper published in our state. The local authorities are within the letter of this law and I believe within the spirit of it when in such cases they decide to have publication made in the paper which has the greatest circulation in the town, village or city, although published in another state, as the object of the publication is to inform the people of such locality.

JEF

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*Contracts—Indigent, Insane, etc.—Poor Relief*—County officer authorized to relieve poor who makes valid contract with landowner for renting of house to be occupied by poor person must give notice to terminate tenancy in same manner as private individual.

July 18, 1934.

FRED RISSER,  
*District Attorney,*  
Madison, Wisconsin.

You state that A, a pauper whose rent has been paid for several months by the county, occupied a house owned by

B. The rent for the month of May was paid on June 10. At that time the case worker advised B that the county will no longer pay the rent. You ask:

1. Whether the county is liable to B for June rent because it has failed to give notice.

2. Whether the county is liable for rent up to June 10, assuming that A has been occupying the place until June 10 and continues to stay there.

It appears by the letter accompanying your request that this pauper was placed as a tenant at an agreed monthly rental made by a case worker directly with the landlord. The contract in this case, being made by an agent of the county, is binding upon the county. Whether this is a governmental function or not does not make any difference, as the contract was made on a matter within the jurisdiction of the county for the relief of paupers, which relief it was its duty to furnish.

“Where the mode and manner of contracting are not prescribed, nor the persons or agents by and with whom contracts are to be made, counties may make contracts in all matters necessarily appertaining to them in the same manner as individuals or other corporations.” 15 C. J. 552.

Certain contracts may also be implied. 15 C. J. 559.

It is a general rule that where relief is furnished to a pauper at the request of the poor officers authorized to contract therefor an implied contractual obligation on the part of the town or poor district to pay therefor arises; an express promise to pay is not necessary. 22 Am. & Eng. Encyc. of Law (2d) 1009. *McCaffrey v. Shields*, 54 Wis. 645; *Beach v. Neenah*, 90 Wis. 623.

I am of the opinion that the county is liable in the same manner that an individual would be liable and in making its contract the laws pertaining to contracts and leasing of premises are applicable. If the county has made a contract renting a place for a pauper in such a manner that notice is required in order to terminate the tenancy, the county is obligated to give that notice. This is not a case where the principle may be applicable that the general laws are not applicable to the sovereign state and in some cases not to the counties as an arm of the state. Where the county is authorized to grant relief and make contracts

with reference thereto the contracts that are expressly made or necessarily implied are valid and the county is bound as other individuals.

JEF

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*Intoxicating Liquors—Municipal Corporations—Beer Licenses*—Sale of carbon dioxide gas in drums by liquor manufacturer to tavern keepers also buying liquor from him is prohibited by sec. 176.17, subsec. (3), or sec. 66.05 (10) (c), Stats.

July 18, 1934.

FRED RISSER,  
*District Attorney,*  
Madison, Wisconsin.

Sec. 176.17, subsec. (3), Stats., provides:

“No manufacturer, rectifier or wholesaler shall furnish, give, rent, lend or sell any equipment, fixtures, or supplies, directly or indirectly, to \* \* \* any person engaged in selling products of the industry for consumption on premises where sold. \* \* \*.”

Sec. 66.05 (10) (c) provides:

“No brewer, bottler, wholesaler, or corporation a majority of whose stock is owned by any brewer, bottler, or wholesaler shall supply, furnish, lease, give, pay for or take any chattel mortgage on any furniture, fixtures, fittings or equipment used in or about any place which shall require a class ‘B’ license \* \* \*.”

This last statute has been construed to forbid a “selling” also, although the word “sell” is not expressly included.

“\* \* \* The statute [ 66.05 (10) (c) ] 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.” XXII Op. Atty. Gen. 814, 819.

In view of these statutory provisions you wish to know whether or not it is legal to sell carbon dioxide gas in drums to retailers who sell liquor for consumption on the premises where sold in the following instances:

(1) Brewer, bottler or wholesaler, to a tavern operator having only a beer license.

(2) By a person coming within the description of brewer, bottler or wholesaler *and* manufacturer, rectifier or wholesaler to a tavern operator having both a beer license and a "hard liquor" license, such first party also furnishing the tavern keeper with beer and "hard liquor."

(3) By a person coming within the description of brewer, bottler or wholesaler and manufacturer, rectifier or wholesaler to a tavern keeper having a beer license, such first person also selling beer to the tavern keeper.

(4) By a manufacturer, rectifier, or wholesaler to a tavern keeper having only a "hard liquor" license.

The answer in all of these instances is that the sale of the carbon dioxide gas in drums is illegal. This gas is clearly part of the equipment of a barroom. As such, the furnishing of it by a "manufacturer, rectifier or wholesaler" or "a brewer, bottler or wholesaler" to a tavern keeper is forbidden.

JEF

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*Indigent, Insane, etc.—Poor Relief*—Municipality within county which has adopted county system of administering relief may make voluntary payments of sums representing percentage of cost of administering relief within boundaries of municipality to county.

July 19, 1934.

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

You inform us that Iron county, by a resolution duly passed by the board of supervisors, has adopted the county system of poor relief. Subsequent to the adoption of the county system of poor relief the city of Hurley, by a reso-

lution duly passed in May, 1933, voluntarily agreed to pay Iron county ten per cent of the amount which such county might expend for relief within the city of Hurley. Payments by the city, pursuant to the resolution, were then made. You ask whether, in these circumstances, it was permissible for the city of Hurley to have made such payments, and further, assuming that such payments were not permissible, you ask whether the city of Hurley may now recover the sums representing those payments.

It was permissible for the city of Hurley to make voluntary payments, representing ten per cent of the amount which was expended by the county for relief within the city, to Iron county.

Your second question, which assumes that payments were not permissible, becomes purely academic and is not answered at this time.

The enabling legislation permitting counties to adopt a county relief system is sec. 49.15, Stats., which provides:

"The county board of any county may, at an annual meeting or at a special meeting called for that purpose, by a resolution adopted by an affirmative vote of a majority of all the supervisors entitled to a seat in such board, abolish all distinction between county poor and town, village and city poor in such county and have the expense of maintaining all the poor therein a county charge; and thereupon the county shall relieve and support the poor in said county, and all the powers conferred and duties imposed by this chapter upon towns, villages, and cities shall be exercised and provided for pursuant to section 49.14."

Under this statute, when a county system for relief is adopted it becomes the duty of the county to relieve and support the poor within its boundaries. There is no expression in this section of the statutes or elsewhere which prohibits a city from making voluntary payments for relief purposes, within the city, to the county.

In *State ex rel. Madison v. Industrial Comm.*, 207 Wis. 652, the court considered the following question: Does subsec. (2), sec. 2, ch. 29, Laws Special Session 1931, authorize the payment of any money to a municipality situated in a county administering outdoor poor relief under the county system?

The court in answering the question in the affirmative

sanctioned the practice of a city (within a county using the county system of poor relief) spending money for relief. There apparently was no question as to the city's right to expend money for relief or aid within its boundaries as the court necessarily had to accept that practice as being permissible before it could hold that the statute under consideration authorized payment of money to a municipality situated within a county administering relief under the county system. Certainly a city could receive no payments if the very practice of expending money for relief by such a city were not permissible under the statutes. In the present case the only altering fact is that the city of Hurley, instead of expending the money directly for relief, as did the city of Madison in the above case, voluntarily paid certain sums to the county. The immateriality of the altering fact is apparent and does not change the result reached. JEF

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*Banks and Banking—Checks—Bridges and Highways—Relocations*—Fact that check was drawn on bank as award under sec. 83.08, subsec. (2), Stats., which was not accepted by one to whom award was given will not impose loss caused by failure of bank upon person to whom award was given.

July 20, 1934.

L. A. BUCKLEY,  
*District Attorney,*  
Hartford, Wisconsin.

You state that on one of the relocation projects on the state trunk highway in your county the following situation arose:

An award of damages was made July 29, 1932, by the Washington county highway department to a property owner affected by the relocation of a highway, in the amount of twelve hundred dollars, approved by the state division engineer. On August 15 the county highway department wrote the property owner to whom the award was made informing her of the award and requesting her to call for

her check at the office of the clerk of the circuit court. The check remained uncalled for in that office. March 15, 1933, the bank on which the check was drawn closed and went on a restricted basis.

You say the question has arisen in your mind as to who should shoulder the loss by reason of the failure of the person to call for the check and present it for payment within a reasonable time. You inquire whether the county may legally issue a new check under this award, or whether the loss should be borne by the person to whom the award was made.

Under sec. 83.08, subsec. (2), Stats. when the award is made, the landowner may receive the same without prejudice to his right to claim and to contest for a greater sum. In this case the landowner refused to accept the check and is not in any way in default and is not required to accept this check after it is known that she cannot receive full payment on it.

We believe that the county may legally issue a new check under this award, as the person to whom the check was made out to should not lose part of the award.

JEF

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*Corporations—Credit Unions*—Articles of incorporation of credit union organized under ch. 186, Stats., may be amended by two-thirds vote of all members of corporation provided statutory requirements as to filing and recording are followed.

July 20, 1934.

C. P. DIGGLES, *Supervisor,*  
*Building and Loan Division,*  
Banking Department.

You state that a credit union, organized under ch. 186, Wis. Stats., wishes to amend its articles of incorporation. Since there is some doubt on your mind as to the legal procedure in such action, you ask for an opinion.

The legal procedure to be followed by a credit union organized under ch. 186 in amending its articles of incor-

poration is to secure an adoption of a proposed amendment *by a vote of two-thirds of all the members of the corporation* and then following the statutory requirements as to filing and recording.

Sec. 186.02, Stats., provides in part:

“\* \* \* Amendments to the articles, adopted by a vote of two-thirds of all the members of the corporation, may be filed with the commissioner upon payment of a fee of five dollars, \* \* \*.”

JEF

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*Banks and Banking*—Banking commission may, as receiver of bank in liquidation, exchange properties of bank for other property with approval of circuit court.

July 20, 1934.

H. F. IBACH,

*Banking Commissioner.*

You state that when the Wisconsin State Bank of Stevens Point was placed in liquidation it owned certain property in the city of Chicago and subsequently, through your special deputy in charge, it exchanged some of this property for a farm located near Stevens Point. This exchange was made pursuant to an order issued by the circuit court. You ask the following question:

“Under the Wisconsin statutes, has the banking commission, as receiver of a bank in liquidation, the right to exchange properties, which exchange was made in the interest of the depositors of the bank in order to secure property located near the bank, which could be more easily administered and sold?”

The banking commission may, as receiver of a bank in liquidation, exchange properties of the bank for other property with the approval of the circuit court.

Subsec. (3), sec. 220.08, Stats., provides as follows:

“Upon taking possession of the property and business of such bank or banking corporation, the commissioner is authorized to collect moneys due to such bank or banking corporation, and do such other acts as are necessary to con-

serve its assets and business, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The commissioner shall collect all debts due and claims belonging to it, and upon the order of the circuit court may sell or compound all bad or doubtful debts, and on like order may sell all the real and personal property of such bank or banking corporation on such terms as the court shall direct; and may, if necessary to pay the debts of such corporation, enforce individual liability of the stockholders."

This subsection gives to the banking commission authority to do all things necessary to conserve the assets of a bank in the process of liquidation. Where it appears to the banking commission that the assets of a bank will be conserved by exchanging property in another state for property in the state of Wisconsin which is more readily salable and the circuit court has approved of such exchange, there is no legal reason why the commission cannot effect such exchange.

JEF

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*Automobiles—Law of Road—Farm Trucks—Transferee of truck licensed as "farm truck" in accordance with sec. 85.01, subsec. (4), par. (c) or sec. 85.01 (4) (cm), Stats., who is not farmer must get new license for truck.*

July 24, 1934.

MOTOR VEHICLE DIVISION,  
*Department of State.*

You wish to know whether a transferee of a truck licensed as a "farm truck" under sec. 85.01, subsec. (4), par. (c), or sec. 85.01 (4) (cm), Stats., is lawfully entitled to use the farm truck license if he is not a farmer and the vehicle is not operated for farm purposes.

The answer is, No.

Sec. 85.01 (4) (c), reads in part:

"\* \* \* 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) (cm) reads:

“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 owned and operated by a farmer exclusively for farm use and not for commercial purposes, a fee of five dollars. Application for such registration shall be accompanied by an affidavit certifying that such requirements are met. Trucks so registered shall bear a special number plate bearing the words ‘Farm Truck.’”

Sec. 85.01 (8) (a):

“\* \* \* License plates issued for the vehicle being transferred, must remain on the same notwithstanding such transfer or transfers.”

The provisions of secs. 85.01 (4) (c) and 85.01 (4) (cm) are for the benefit of a certain class of people engaged in a certain occupation and licenses issued thereunder are not based on the type or weight of the vehicle used. It has been the policy of the legislature, in an effort to foster prosperity among the agricultural group which forms a substantial part of the citizenry of this state, to grant certain exemptions and privileges to farmers. Examples of this are the rebate on gasoline taxes allowed the farmer and his exemption from the payment of the ton mile tax.

Of the exemption from ton mile tax the court in *State ex rel. Wisconsin Truck Owners' Association v. Public Serv. Comm.*, (1932) 207 Wis. 664, 673-674, 242 N. W. 668, says:

“\* \* \* This is obviously an exemption prompted by the state's consideration of one of its most basic industries and one upon which the prosperity of the state greatly depends. Not only this state, but the nation as well, has become solicitous concerning the stern realities facing the agricultural and agrarian population of the country. The economic pressure upon the farmers has given concern to all who realize that a well balanced economic condition cannot lay out of consideration the welfare and the prosperity of the farmer. This fact finds ample illustration in the governmental favors extended to the farming classes which have recently been sustained by the courts, many of which

were reviewed and pointed out in *Northern Wis. Co-Op. Tobacco Pool v. Bekkedal*, 182 Wis. 571, 197 N. W. 936.  
\* \* \*"

If the owner of the truck is not a farmer the reason for allowing the low license fee is no longer existent. The granting of a license for five dollars is based upon the fact that the vehicle is owned and operated by a farmer, for farm use, and sec. 85.01 (4) (cm) requires an affidavit to that effect. Hence if the transferee is not a farmer he is not one of the class whom it is sought to benefit in the provisions of secs. 85.01 (4) (c) and 85.01 (4) (cm), and is not entitled to operate a truck for which only a five dollar license fee has been paid. The license issued to farmers for five dollars is labeled "Farm Truck." If the transferee does not use the vehicle for farm purposes this would be an improper designation.

Sec. 85.01 (8) (a), providing that a license must remain on a car when it is transferred, was passed merely to prevent transferring license plates from one car to another and is no obstacle to demanding a new license in the instant case. A license is issued for a particular vehicle; it is not issued for whatever vehicle a particular person may run.

As you point out, when the registered weight of a vehicle is increased a new license to run that vehicle is issued upon the payment of an additional fee. When a truck licensed as a farm truck is sold to one who is not a farmer the exact weight of the truck becomes material and a new license must be issued on the proper classification. You could follow the same procedure you use when the registered weight of a vehicle is increased, i. e., have the license turned in, give credit for the five dollars paid for the "farm truck" license, charge the difference between five dollars and the license fee regularly required for a vehicle of that weight, and issue a new license.

JEF

*Courts—Fish and Game*—Conviction under sec. 29.63, subsec. (3), Stats., for violation of fish and game law ipso facto revokes any license theretofore issued pursuant to ch. 29. This does not include any conviction obtained in justice court from which appeal has been taken entitling applicant to trial de novo in circuit court. In that case license is not revoked until conviction is obtained in circuit court.

*Contracts—Indigent, Insane, etc.*—County has no power to enter into contracts to support paupers for rest of their natural lives.

July 27, 1934.

R. J. ELMER,  
*District Attorney,*  
Monroe, Wisconsin.

You state that a party has been convicted by a justice court jury of catching undersize black bass out of season. Under sec. 29.63, Stats., his fishing license is automatically revoked. However, this party appealed the decision to circuit court. The case will not be decided until October, 1934. The question is whether or not the appeal suspends the revoking provided for in sec. 29.63.

In XVII Op. Atty. Gen. 494 it was held by this department that under sec. 29.63, subsec. (3), conviction for violation of the fish and game law ipso facto revokes any license theretofore issued pursuant to ch. 29. This does not include conviction obtained in justice court from which an appeal has been taken entitling applicant to a trial *de novo* in circuit court. In that case the license is not revoked until conviction is obtained in circuit court.

Under this ruling and for the reasons therein given, you are advised that the revocation of the license does not take effect until the conviction has been obtained in the circuit court.

You also inquire whether a county can accept real estate of paupers by deed for a consideration that the said county will support the said paupers for the rest of their natural lives.

I do not find any authority in the statute either express or implied giving the county the power to make a contract to support paupers for the rest of their natural lives. They may change their residence and remove to another county. In such case the county may not be obligated to support them. I am of the opinion that the consideration in the deed is of doubtful validity.

You also inquire what the effect of conveyances already made is if they cannot accept such lands, and what disposition can or should the county make of such real property.

This question cannot be definitely passed upon without having the specific case more definitely stated in order to be able to advise as to the disposition of the real property.  
JEF

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*Taxation—Exemption from Taxation*—Growing trees upon orchard lands are to be assessed as improvements thereon for taxation purposes and no exemption is to be granted to fruit trees under sec. 70.11, Stats., on theory that they merely constitute growing crops.

July 30, 1934.

L. W. BRUEMMER,  
*District Attorney,*  
Kewaunee, Wisconsin.

You wish to be advised whether or not growing trees upon orchard lands are to be taxed as improvements or whether there is any exemption to be granted to fruit trees under a possible theory that they constitute merely growing crops, which are not otherwise assessed.

It is elementary that growing trees form a part of the realty to which they are attached and unless there has been a severance of them from the land, they follow the title thereon. Hence in assessing orchard lands upon which growing trees are located, such trees should be considered as an element of the value of the land for purposes of assessment and taxation. Exemption may not be granted to fruit trees under the provisions of sec. 70.11, subsec.

(11), Stats., on the theory that they constitute growing crops. *Kuehn v. Antigo*, 139 Wis. 132, 120 N. W. 823; *Schmidt v. Almon*, 181 Wis. 244, 194 N. W. 168.

JEF

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*Elections—Nominations*—Elector may circulate nomination papers of more than one candidate even though they are members of different political parties, if he can sign affidavit that he expects to support candidate as statute requires.

No elector is permitted to sign more than one nomination paper for same office.

County clerk should follow rule that elector who has circulated nomination papers has stated truth as to his intentions.

July 30, 1934.

A. W. GALVIN,  
*District Attorney,*  
Menomonie, Wisconsin.

You submit the following for an opinion from this department:

Can a qualified elector legally circulate the nomination papers for a candidate running for a county office on a Republican ticket and sign the affidavit that he intends to support the candidate named therein, and later circulate the nomination papers for another candidate running for a county office on the Democratic or Progressive ticket and also sign the affidavit that he intends to support the candidate named therein? The above does not refer to a nomination paper for the same office.

Sec. 5.05, subsec. (5), par. (b), Stats., with respect to the affidavit of the qualified elector to be attached to the nomination papers, provides, in part, as follows:

“The affidavit of a qualified elector shall be appended to each such nomination paper, stating that he is personally acquainted with all persons who have signed the same, and that he knows them to be electors of that precinct, ward, town, village or county, as the nomination papers shall re-

quire; that he knows that they signed the same with full knowledge of the contents thereof and that their respective residences are stated therein and that each signer signed the same on the date stated opposite his name, and that he, the affiant, intends to support the candidate named therein:  
\* \* \*

Subsec. (3), sec. 5.05, provides:

“Each signer of a nomination paper shall sign but one such paper for the same office, and shall declare that he intends to support the candidate named therein; \* \* \*.”

There is no provision in the statutes prohibiting a person who circulates the nomination papers of one candidate from circulating the nomination papers of another candidate. The person circulating the nomination papers is required to swear that he intends to support the candidate named in the nomination papers. However, this does not prevent the person who circulates such nomination papers and appends thereto the required affidavit, from thereafter changing his mind, and if, thereafter, it becomes his intention to support another candidate, there is nothing in the law which would prevent him from circulating the nomination papers of another candidate, and stating in his affidavit that he intends to support such candidate, if, in fact, it is his intention so to do.

The fact that the person who circulated the nomination papers has changed his mind and thereafter circulated the nomination papers of another candidate for office cannot be construed to invalidate the first nomination papers that were filed. Your first question must, therefore, be answered in the affirmative. Of course it may be said that it is impossible for a person at the primary election to vote for a candidate of one political party, and at the same time vote for a candidate of another office of another political party, as an elector is required to select his party ticket. Nevertheless, there is a time at the general election when the elector who has circulated the nomination papers may support the candidate by his vote and, in the meantime, he can do so by words and acts.

You also submit the following:

Can a qualified elector sign nomination papers for a candidate running on the Republican ticket for the office of

assemblyman and later sign the nomination papers for another candidate running for the office of county clerk on the Progressive ticket? Which signature, if any, would count?

This question is answered in the affirmative. The statutes expressly provide that each signer of the nomination papers shall sign but one such paper for the same office, but there is no provision against an elector's signing nomination papers for persons of different parties who are not candidates for the same office.

You also inquire what rule the county clerk is to follow in checking over the nomination papers of various candidates wherein the same elector circulates the nomination papers for different candidates on different tickets and signs the affidavit that he intends to support the candidate named therein, bearing in mind that the nomination papers are not for the same office.

We can answer this question only by stating that the county clerk should take the elector's statement as true, unless it appears clearly to the contrary that it was not true. In that case, the first signature should be given preference.

JEF

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*Elections—Nominations*—Nomination papers filed with only initials of candidates may be corrected by pasters or certificates.

All given names should be written in full unless they are too numerous; in such case initials may be used.

Abbreviations of given names that are certain may be used.

Nomination papers may be refused registration if given name and surname are not given, unless corrected.

July 31, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You have directed our attention to ch. 284, Laws 1933, amending certain sections of the statutes so as to provide

that the "given" as well as the "surname" of candidates appear on nomination papers, and on the official ballots.

Sec. 5.01, subsec. (6), Stats., concerning the definition of terms and construction, reads as follows:

"This title shall be construed so as to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to comply with some of its provisions."

You inquire:

(1) Must this provision as to nomination papers be strictly construed? Or (2) in event a candidate, in ignorance, files only with initials, may such omission be corrected by pasters or certificate as to the "given" name? (3) Must all the "given" names of a candidate be written in full, or will it be sufficient to give the name by which he is best known? (4) Will abbreviations, such as Thos., Geo., Wm., etc., be permissible? (5) Will a filing officer be justified in refusing to certify the name of a candidate for a place on the ballot for the sole reason that his nomination papers did not at the time they were signed by the electors, show the given name.

The provision as to the names, both "given" name and "surname," applies to candidates, but not to the electors who sign the nomination papers. It is very important that the ballot upon which the candidate's name appears should have both the "given" name and the "surname." For that reason ch. 284, Laws 1933, not only amends the second paragraph of sec. 5.05, subsec. (1), by adding the words "include both given and surname," but also amends subsec. (1), sec. 5.08 by adding the words "given and surname," and the same words are also added after the word "name" in subsec. (4), sec. 5.08, and subsecs. (1) and (2), sec. 5.10 and subsec. (1) and (4) in sec. 6.23, Stats.

Answering your first question, I will say that while the provisions as to nomination papers should be somewhat strictly construed, yet an affirmative answer is necessary for your second question. It is my opinion that where only initials of the candidate's given name are used, such error may be corrected by pasters or certificate.

In answer to your third question, will say that the best practice is to give all the given names of the candidates,

unless the names are too numerous, when, in such case, initials may be used for those given names by which the candidate is not generally known.

Answering your fourth question, abbreviations such as Thos., Geo., Wm., etc., are permissible, where the abbreviations are such that there is no doubt as to what name is meant, but the better practice is to advise that the given names be written in full, without abbreviation.

Your fifth question must be answered in the negative. The lawmakers evidently intended to have the name sufficiently definite so that the elector could tell whether the person for whom he is voting is a male or a female, and can positively identify the candidate by name.

JEF

*Counties—County Board—County Borrowing*—Delegation of power by county board to committee to borrow money for current expenses is legal delegation of authority.

August 1, 1934.

N. H. RODEN,

*District Attorney,*

Port Washington, Wisconsin.

Sec. 67.155, subsec. (1), Stats., reads as follows:

“Any county, if its board shall so determine, may for the purpose of paying its current and ordinary expenses, and for the purpose of paying off valid obligations theretofore issued by such county under section 67.12 for the payment of current and ordinary expenses, borrow money 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 said county.” (Enacted by ch. 124, Laws 1933.)

The county board of your county has enacted the following resolution:

“Resolved, by the county board of supervisors of Ozaukee county, Wisconsin, that the chairman and the county clerk be and they are hereby authorized and empowered to borrow money for current expenses during the ensuing year.”

Sec. 67.155 (1) gives the county board power to borrow money for current expenses. The question is: Can they delegate this authority in the manner attempted in the county resolution just quoted?

15 C. J. 465 states these general rules in regard to delegation of its powers by a county board:

“The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee, or a servant. In some cases the legislature has expressly authorized the board to delegate its power under certain circumstances, \* \* \*.”

In *Duluth South Shore & Atlantic R. Co. v. Douglas County*, 103 Wis. 75, 79, the court said:

“\* \* \* It follows that the proof presented here on the motion to dismiss the appeal, showing that the county board considered the subject and acted in the matter, amply establishes that it was determined that an appeal should be taken if desired by the officers of the city of Superior, and that it was referred to the finance committee of the board with power to consult with the city officers and to further act. The power with which the committee were clothed was purely ministerial and executive, so we need not spend time to vindicate the authority of the board to delegate it. Municipal boards commonly act through committees in such matters, and without judicial condemnation that we are aware of. The committee, under the circumstances, was the mere instrument of the board to carry out or execute its will, not to pass upon and determine a matter resting in its discretion.”

While the delegation of power to create a debt of indefinite amount may be illegal, still where a standard is adopted by which the ministerial officer is ruled it would seem that the delegation of power is authorized. In the resolution passed by the county board the chairman and clerk are authorized and empowered to borrow money for current expenses during the ensuing year. This is an amount that can be ascertained by the committee but could not be ascertained beforehand by the board. The expenses that will be incurred will be a limitation to this committee and the members have no authority to go beyond it. The county board could not make its resolution any more definite, for it cannot ascertain beforehand what expenses the county will necessarily have to incur.

We are of the opinion that the resolution of the county board is a legal delegation of authority. This is a delegation of mere ministerial duties and is permissible.

JEF

*Public Health*—Pharmacy permits may be issued to concerns which have headquarters in this state and registered pharmacists in charge although drugs are sold on orders solicited by agents and thereafter filled under supervision of registered pharmacist in place of business.

August 2, 1934.

BOARD OF PHARMACY,  
Milwaukee, Wisconsin.

You state that in Milwaukee there are several concerns who send men out to take orders for household remedies and drugs. These orders are filled in an office building and under the supervision of a registered pharmacist and then delivered. In one concern a registered pharmacist is in charge all day, being also the manager of the company. In another concern a druggist is employed for an hour a day to be present when the orders are filled. These companies have no equipment such as is found usually in a drug store.

You desire an opinion on whether, under these circumstances, the board of pharmacy can issue pharmacy permits to these companies. You state that you must be careful in issuing permits at this time for this allows them to purchase local liquor permits for much less than a nonpharmacy concern would have to pay, and many concerns would take advantage of this rather than conduct regularly licensed liquor stores. The statement which you enclose in your letter also states:

“\* \* \* Liquor licenses are issued in the name of the registered pharmacist in charge of the drug store and not in the name of the owner. In case an owner of a drug store who is not a druggist changes clerks he will have to take out a new liquor license in the name of his new clerk.

“A pharmacy without a license can use alcohol or whiskey in compounding prescriptions only when the finished preparation is unfit to be used as a beverage. Pharmacies with licenses can sell whiskey and alcohol only on a liquor certificate, stating that it is to be used for medicinal, mechanical or scientific purposes. These have to be signed by the buyer and witnessed by a registered pharmacist.”

It has been held in XIX Op. Atty. Gen. 337 that a registered pharmacist who is in charge of a drug store need not

be present at all times when such store is open, but during his absence no drugs may be sold.

In sec. 151.02, subsec. (9), Stats., it is provided:

“No drug store, pharmacy, apothecary shop, or any similar place of business, shall be kept open for the transaction of business until it has been registered with and a permit therefor has been issued by the state board of pharmacy; provided, however, that this section shall not be construed to apply to any store or stores opened for the sale of proprietary or so-called patent medicines. \* \* \*”

We see no objection to the method of sales as described by you in your letter. A registered pharmacist may sell his drugs at any place or in any manner he sees fit. In this case the drugs are really sold in the place where the drug store is located, although prescriptions are taken by agents and the orders thereafter filled at the place where the drug store is located. As long as these sales are made under the supervision of a registered pharmacist I believe they are legal and your board is authorized to grant a permit to such concerns.

JEF

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*Courts — Minors — Illegitimacy* — Provisions of sec. 166.13, Stats., refer only to judgment entered against father of illegitimate child who has been adjudged to be father of such child and do not include one who has denied in settlement paternity of child.

August 2, 1934.

CHAS. A. COPP,  
*District Attorney,*  
Sheboygan, Wisconsin.

You state that the questions propounded herewith arise under an illegitimacy settlement made pursuant to ch. 166, Stats., in which the defendant entered into such settlement agreement denying paternity. The agreement was filed as provided in sec. 166.07 and the defendant has denied paternity and has now defaulted in the payments.

You say that in sec. 166.07 it is provided that the agreement shall be filed where paternity is denied, "but judgment shall not be rendered until there is a default in the payments agreed upon, when, upon motion of the district attorney, judgment shall be rendered and entered forthwith."

Sec. 166.13 reads as follows:

"If the person so adjudged to be the father of such child shall cause to be paid the cost of the prosecution, and any lump or total sum adjudged to be paid, he shall be discharged and the judgment satisfied of record; or if he shall give a bond to the proper town or county in such sum and with such surety as shall be approved by the court, conditioned for the performance of such judgment and the payment of all sums ordered thereby to be paid as therein directed, he shall be discharged; otherwise he shall be committed to the county jail until he shall comply with and perform such judgment or shall be otherwise discharged according to law, unless the court shall stay execution of such commitment. Any execution of commitment so stayed shall issue at any time when it shall appear to the court that the defendant has defaulted on any of the provisions of the judgment."

You state that the question arises as to whether the word "he" in sec. 166.13 refers only and exclusively to one who has admitted or after trial been found to be the father of such child, or whether it refers to any defendant against whom judgment in such proceeding is entered.

You say that your interpretation is that it does not refer to the defendant who enters into a settlement denying paternity and later defaults. You believe that judgment may be entered against him as a money judgment, but he cannot be committed or required as an election to furnish a bond.

I believe that your interpretation of the statute is correct. In sec. 166.11, where it provides for the entering of judgment in the last part of subsec. (2), it expressly provides that where the parties are unable to agree as to the paternity of the child, then such adjudication may be omitted in the judgment. You will note that sec. 166.13 refers only to the person so adjudged to be the father of such child. The person who has denied paternity but made

a settlement is never adjudged to be the father of the child by the judgment, and for that reason sec. 166.13 does not include him in its provision.

JEF

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*Fish and Game*—Order and regulation of state conservation commission made under sec. 29.085, Stats., requiring seine fishing under supervision in certain boundary waters, is valid.

August 2, 1934.

MARTIN GULBRANDSEN,  
*District Attorney,*  
Viroqua, Wisconsin.

You refer to an order adopted by the conservation commission at La Crosse on the 13th of April, providing that all commercial fishermen from the Iowa line on the Wisconsin side of the Mississippi River up to the Lake Pepin line must have a deputy conservation warden with them during their fishing operations. The commercial fishermen on the Mississippi River in Vernon county feel that this rule is very unjust, unfair and discriminatory and desire an opinion as to the legality of such order by the conservation commission.

You say that you are informed by people who are well acquainted with commercial fishing that there are a number of poor families on the river in your county who make their living by commercial fishing but that if they are required to abide by this order which requires them to carry with them on their fishing expeditions a game warden and pay him four dollars a day for his services, they will be absolutely unable to carry on their fishing operations, which is their means of earning a living.

The said order of the commission is directly authorized by sec. 29.085, Stats., which gives the commission the power to regulate hunting and fishing in interstate waters which are described in the said section and includes those referred to by you. The order of the commission is very comprehensive and includes the regulation of hook and line fish-

ing and set lines and the use of spears and the taking of rough fish as well as the use of nets. The provision which you object to reads as follows:

"No net or nets may be used or operated in any manner in the waters described or mentioned in this order except under the direct supervision of the State Conservation Commission of Wisconsin, its agents or deputy conservation wardens. Said commission may require the operators of such nets to pay for supervision individually or in groups in the manner they deem advisable and said commission shall fix the amount to be paid each supervising warden but it shall not exceed three dollars per day and actual and necessary expenses in any instance.

"The State Conservation Commission may allow at any time one supervising warden for as many seine, gill or pound net operations as it deems advisable. Such commission may also require at any time any operator of any seine, pound or gill net to cease the fishing operations of such net or nets when said commission believes these operations are proving destructive to game fish or for any other good or valid reason."

The order spoken of is made in conjunction with the proper authorities of Minnesota for the purpose of effecting a similarity of rules and regulations pertaining to the fish and game of the boundary waters. You will note that the commercial fishermen are permitted to operate in groups and that the commission may allow at any time one supervising warden for as many seine, gill or pound net operations as it deems advisable. We cannot see that the regulation which was adopted by the commission of this state as well as the state of Minnesota is unreasonable. It applies to all people and we cannot see that it is discriminatory. To us it seems a very reasonable regulation in order to protect the game fish in said waters.

It would seem that the criticism you are presenting may be obviated by the parties in question taking the matter up with the conservation commission and it may make such arrangements as will reduce to a minimum the cost of supervision.

JEF

*Railroads — Taxation — Taxation of Utilities* — House owned by railroad company used and built for sole purpose of domicile by section foreman should be assessed by tax commission under sec. 76.01, Stats., if such property is necessary to operation of railroad by reason of fact that it would be difficult for section foreman to secure living quarters near by; otherwise, property should be assessed by local assessor and taxes thereon collected locally.

August 2, 1934.

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

You ask whether a house owned by a railroad company and adjacent to a railroad company's right of way, used and built for the sole purpose of a domicile for a section foreman, should be assessed by the Wisconsin tax commission as provided in sec. 76.01, Stats., or whether the property should be assessed by the local assessor and the taxes thereon collected locally.

It is the opinion of this department that a building located adjacent to a railroad company's right of way, used and built for the sole purpose of a domicile for a railroad section foreman, should be assessed by the Wisconsin tax commission as provided by sec. 76.01 and should not be assessed by the local taxing authorities in a case where such building is located some distance from a city or village and where it would be difficult for such foreman to secure a domicile within a reasonable distance. If, however, such building is located in a city or village or close by and where it would be easy for such foreman to secure living quarters it is manifest that such building is not necessary to the operation of the railroad and hence such property should be assessed locally.

The above rule is one which has been adopted by the Wisconsin tax commission and followed for some years, and such construction of the statutes should be given great weight.

You are therefore advised that if the building mentioned in your communication is necessary to the operation of the

railroad by reason of the fact that the location is some distance from a city or village or other place where the section foreman could easily secure living quarters, then such house should be assessed by the Wisconsin tax commission; otherwise, the property should be assessed by the local assessor and the taxes collected locally.

JEF

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*Indigent, Insane, etc.—Legal Settlement*—Adult person who makes his home in city with his parents and temporarily worked on farm but considers his legal residence with his parents may acquire legal settlement after one year in place where his parents reside.

August 2, 1934.

JOHN P. MCEVOY,  
*Assistant District Attorney,*  
Kenosha, Wisconsin.

You ask for an opinion as to the legal settlement of a person under the following facts:

An unmarried adult came to Kenosha in June, 1933, from another state and resided with his parents in that city until August 18, when he was employed on a farm in Paris township, Kenosha county. In June of this year he returned to Kenosha to reside with his parents and is now in Kenosha although not with his parents.

He has now made application for relief, and the question is raised whether he has gained a legal settlement, so as to be entitled to relief. He says he regarded Kenosha as his residence while on the farm in 1933, intended to return to Kenosha, left most of his clothing at Kenosha, received his mail there and spent his week ends there.

From the facts given, it appears that this adult person established a legal residence with his parents in Kenosha and for temporary purposes went to work on a farm and considered his residence with his parents. This he has a right to do and it is our opinion that under sec. 49.02 (4), Stats., he has resided within Kenosha for over one year and has a legal settlement therein.

JEF

*Appropriations and Expenditures*—Centennial of Progress committee may purchase pamphlets to be used in advertising Wisconsin at Century of Progress.

August 2, 1934.

HONORABLE A. G. SCHMEDEMAN,  
*Governor.*

You have asked for an opinion on the following question:

May the Century of Progress committee purchase out of its appropriations 10,000 copies of the "Northward Trails" pamphlets to be used in connection with advertising Wisconsin at the Century of Progress?

The pamphlet in question is a guide to the many beautiful lakes in Northern Wisconsin. These pamphlets enumerate scenic tours throughout the state, give a list of hotels throughout Wisconsin, and contain much useful information which advertises the advantages of visiting this state.

The Wisconsin Chicago Centennial of Progress committee was created by ch. 8, Laws 1931. Amendments thereto were made by ch. 33, Laws 1933. Ch. 33, sec. 2, fixes the powers of the committee as follows:

"\* \* \* it shall have authority to do all things necessary for an adequate presentation of the progress of the state agriculturally, educationally, industrially, and recreationally; \* \* \*"

In addition sec. 9, ch. 33, Laws 1933 provides:

"The purpose of this act is to stimulate Wisconsin trade and to bring new capital into the state, it being the view of the legislature that an adequate presentation of Wisconsin's agricultural, educational, industrial, and recreational advantages at the 'A Century of Progress Exposition' will aid materially in bringing about this much desired result.

The disbursements from the centennial funds may be made by the committee pursuant to sec. 7, ch. 33, Laws 1933, which provides:

"\* \* \* Disbursements from these appropriations shall be made as determined by the committee. \* \* \*"

As the "Northward Trails" pamphlet does advertise Wisconsin recreationally and would tend to draw trade and pos-

sibly capital into this state, the committee would have power to purchase copies of this pamphlet under the power granted by ch. 33, Laws 1933.

JEF

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*Taxation—Tax Collection—Refunds*—County board may, under ch. 334, Laws 1933, by proper resolution waive most of redemption interest on any tax certificates held by it but county cannot accept less than face value of tax certificate plus redemption fee. Some redemption interest must be charged but rate thereof may be fixed very low, i. e., one-half of one per cent.

County board has no power to refund interest and penalties paid prior to July 1, 1934, under provisions of ch. 288, Laws 1933.

August 2, 1934.

FRANK F. WHEELER,  
*District Attorney,*  
Appleton, Wisconsin.

You have submitted two questions to this department for an official opinion. The first question is:

May Outagamie county, by resolution of the county board, extend the period beyond July 1, 1934, when 1931 and 1932 taxes may be redeemed with a waiver by the county of interest and penalty charges?

1. In order to interpret the provisions of chs. 288 and 334, Laws 1933, it is necessary to understand that interest on delinquent taxes consists of two different types of interest; (1) interest before sale, and (2) interest after sale (redemption interest).

The interest before sale is that charged or collected by the county treasurer prior to the sale of the lands for unpaid taxes or included in the amount for which the lands were sold if the same was not paid prior to tax sale. Before the enactment of ch. 244, Laws 1933, interest before sale was at the rate of twelve per cent per annum from January 1 preceding the return of the unpaid taxes to the

county by the local treasurers at tax settlement. Ch. 244, Laws 1933, reduced the rate of interest before sale from twelve per cent per annum to eight per cent per annum.

If taxes are not paid prior to the sale they are sold for the following: Original tax as returned, two per cent on above; interest at eight per cent per annum from January 1 preceding to date of sale; advertising fee; certificate fee.

The total of the foregoing items makes up the face of the tax certificate issued at the sale.

After the sale of lands for taxes as above indicated, the same may be redeemed at any time by paying to or posting with the county treasurer an amount consisting of the following items: Amount of certificate; interest on amount of certificate at the rate specified in the certificate in the absence of any action by the county board pursuant to ch. 334; redemption fee.

It will be noted that the redemption interest is computed on the face of the tax certificate issued rather than the amount of the original tax as returned at settlement. Redemption interest, therefore, includes a certain amount of compounding, i. e., figuring interest on interest.

The attorney general, in an opinion in XXII Op. Atty. Gen. 606, in construing ch. 288, Laws 1933, held that the interest waivers therein authorized reverted back to and were figured on the tax as originally returned. This opinion was predicated upon the intent of the legislature inasmuch as ch. 288 applied only to taxes of 1931 and 1932 and was effective June 22, 1933, prior to the sale of 1932 taxes. The provisions of ch. 288 expired on July 1, 1934 and we do not believe that the county board may now take any action under ch. 288 in the way of waiving interest and penalties as therein authorized.

In view of the expiration of ch. 288 the legislature apparently attempted to give the county boards substantially similar powers by the enactment of ch. 334, Laws 1933. The powers conferred by ch. 334 are, however, considerably more restricted than the provisions of ch. 288 since the former applies to certificates on all years' sales held by the county. It will be noted, however, that ch. 334 relates only to interest after sale or redemption interest.

"The county board may fix the interest rate to be paid upon *redemption* of tax certificates held by the county, but such interest shall not be more than fifteen per cent per annum."

The position that ch. 334 applies only to interest after sale or redemption interest is supported by the following:

1. The maximum rate of fifteen per cent fixed by ch. 334 agrees with the maximum rate of interest after sale or redemption interest as previously established and permitted for a long succession of years prior to the 1933 legislative enactments.

2. Ch. 334 is an addition to sec. 75.01, i. e., subsec. (1m) of the statutes, which deals exclusively with interest after sale or redemption interest.

We believe, therefore, that under legislation now in effect, namely, ch. 334, the county board may by a proper resolution waive most of the redemption interest on any tax certificates held by the county but that it cannot accept less than the face of the certificate plus the redemption fee. It is also probably true that some redemption interest must be charged. The rate thereof, however, may be fixed so low, namely, one-half of one per cent, for example, as to be of no practical effect so far as the taxpayer is concerned.

We do not believe, however, that any inferences may be drawn from the now expired provisions of ch. 288 which would permit the county board to accept less on redemptions than the face of the certificate and redemption fee. The context of ch. 334 together with its position in the 1933 statutes seems to definitely establish that the county board's power now extends only to the redemption interest. Counties are creatures of the legislature and as such have only those powers expressly conferred upon them by statute. In the absence of any such powers the county board may not give away or remit the assets of the county. To do so might subject the members of the board to a taxpayers' suit for recovery.

Aside from the foregoing, a condition exists in the counties throughout the state which should be considered from a practical standpoint. Many of the sales books show only the amount for which the land was sold, namely, the face of the certificate. To infer that the county board has

the power to remit or waive interest before sale as distinguished from redemption interest will necessitate looking up the original return upon each piece of land for which a redemption is contemplated. Such procedure would entail a tremendous amount of labor and tend toward confusion in the offices of the various county treasurers. This situation occurred with respect to the 1931 taxes under the provisions of ch. 288 as interpreted by the attorney general on July 31, 1933. In a majority of instances the county treasurers throughout the state refused to go back to the original return on taxes of 1931 and worked only from the face of the certificate.

2. You also ask if the county board now has the power to refund interest and penalties paid prior to July 1, 1934, under the provisions of ch. 288, Laws 1933.

Under the construction of this chapter adopted by this office in XXII Op. Atty. Gen. 1028 a county board is without power to make refunds of the character indicated. See also XXIII Op. Atty. Gen. 449. The answer to your second question is, No.

JEF

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*Prisons—Prisoners—Parole*—Man sentenced to state prison for term of from one to three years, during which term he is tried on another charge for which he is sentenced to from one to five years, second sentence to run concurrently with first, must be classified as second offender for purposes of parole under sec. 57.06, Stats.

August 3, 1934.

A. W. BAYLEY, *Secretary,*  
*Board of Control.*

On July 12, 1932, a certain man was sentenced to from one to five years in the state prison for violation of sec. 348.19, Stats., which covers fraudulently receiving deposits. He was received at the prison on June 13, 1933. In September, 1933, he was brought before the same court to stand trial for violation of sec. 221.17, Stats., which covers making

false statements or false entries in bank matters. For violation of said section 221.17 he was sentenced to from one to three years in the state prison. The second sentence is to run concurrently with the first sentence.

You wish to know what effect his second sentence will have upon the date of his eligibility for parole; in other words, whether this man is to be classified as a first or second offender for purposes of parole.

Sec. 359.12 reads:

“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.”

In determining whether a person is a first or second offender under sec. 57.06, the parole statute, he must be classified with reference to the provisions of the so-called repeater statutes. XVI Op. Atty. Gen. 80, XIX Op. Atty. Gen. 382, XXII Op. Atty. Gen. 1009. The section quoted above, sec. 359.12, is the one to be applied in this case.

The question then resolves itself into whether this man is a first or second offender under sec. 359.12.

At the time of his conviction for violation of sec. 221.17, this man could have been given additional punishment under sec. 359.12 because of his previous conviction under sec. 348.19, and hence he must be regarded as a second offender.

It does not matter that the violation of sec. 221.17 was committed before conviction under sec. 348.19. All that is necessary is that he shall have been convicted before his indictment under the second statute (sec. 221.17). In *State v. Dale*, 110 Iowa 215, 81 N. W. 453, where a statute provided, “Any person \* \* \* who has been three times convicted of larceny \* \* \* upon being convicted the fourth time” could be given an increased penalty, there were three

convictions in June and November, 1898. The indictment in question was returned on July 14, 1899 for a crime committed May 15, 1898. The court held it was not necessary that the fourth offense be committed after prior convictions, but it was enough that there had been three convictions prior to the last indictment.

Neither need there be an interval of liberty between the first and second terms. *Commonwealth v. Richardson*, 55 N. E. 988, 175 Mass. 202, construing a statute comparable to ours.

In the light of the above discussion, this man must be considered a second offender under sec. 359.12 and so is also a second offender for purposes of parole under sec. 57.06. This would make him eligible for parole two and one-half years after the date of his first commitment.

JEF

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*Taxation—Tax Sales—Ch. 68, Laws 1933, amending sec. 75.21, Stats. 1931, provides for extension of limitation to fifteen years on tax certificates issued to county, owned by county or held in trust by county for account of town, village or city.*

August 3, 1934.

J. E. USHER, *Secretary,*  
*Tax Commission.*

You have requested of this department an opinion as to the effect of the amendment to sec. 75.21 of the 1931 statutes by ch. 68, Laws 1933. You desire to know whether the limitation on tax certificates issued to the county on special assessments is fifteen years, regardless of whether or not the certificate is owned by the county or held in trust for the town's, village's or city's account.

Your question is answered in the affirmative.

Sec. 75.21 was amended by the addition of the following words:

“but certificates of sale of lands for nonpayment of such special taxes or assessments shall not be limited by this

section but the limitations provided by section 75.20 shall be applicable thereto.”

Sec. 75.20 referred to in the amended portion of sec. 75.21 provides for limitation of actions only on certificates issued to and owned by counties on municipal corporations to fifteen years from the day of sale. If the certificate is owned by the county in accordance with action taken by it under sec. 62.21 the fifteen-year limitation applies. If the certificate is held by it in trust for the town's, village's, or city's account in accordance with action taken by the town, village or city or by the county under the provisions of sec. 62.21, then the certificate is, in effect, owned by the town, village or city, although the legal title may be in the county. *United States National Bank v. Lake Superior, T. & T. R. R. Co.*, 170 Wis. 539.

A history of the law on special assessment shows that since 1925 counties and other municipalities have become guarantors of the money represented by certificates issued for special assessments. The obvious intent of sec. 75.21 is to protect by giving greater immunity to counties and municipalities by an extension of the limitation period. As was said in the *United States National Bank* case, *supra* p. 542:

“\* \* \* The object sought in exempting counties from the six-year statute as to all certificates held and owned by them undoubtedly was to protect the public revenues and treasury from danger of depletion by the early running of the statute. \* \* \*”

Since municipalities other than counties have been made guarantors of the certificates by the later statutes it would seem that it was the legislative intent to protect the treasurers of municipalities other than counties from the early depletion referred to in the *United States National Bank* case.

JEF

*Counties—Dance Halls—Intoxicating Liquors—Municipal Corporations—Beer Licenses—*State law does not prohibit issuance of fermented malt beverage or intoxicating liquor license for dance hall premises.

County board may not refuse to issue dance hall license or revoke such license solely for reason that fermented malt beverage or intoxicating liquor license has been issued for dance hall premises.

August 7, 1934.

R. V. BROWN,  
*District Attorney,*  
Elkhorn, Wisconsin.

You inquire whether or not it was the intent of the legislature to open the door for licensing of dance halls to sell fermented malt beverages and intoxicating liquor on the premises. If this question is answered in the affirmative you also wish to know whether the county board could, by ordinance, refuse to license such dance hall or revoke the licenses of dance halls that took out liquor licenses.

It is our opinion that your first question must be answered, Yes. Sec. 351.57, subsec. (2), Wis. Stats. provides as follows:

“No person who is the proprietor of any dance hall or who conducts, manages or is in charge of any dance hall or pavilion in this state, whether such dance hall or pavilion be licensed or not under the provisions of any local or county regulation, shall permit during any public dance held in such hall or pavilion the use of any intoxicating liquor or the presence of intoxicated persons in such dance hall or on the premises on which such dance hall is situated, or the presence of any child of sixteen years of age or less who is not accompanied by his parent or lawful guardian.”

Ch. 4, Laws Special Session 1933 amended the above subsection so that the words “the use of any intoxicating liquor or” were eliminated from this subsection and the age limit of children was increased from sixteen years to seventeen years. The inference to be drawn from this change in the statute is that the legislature no longer intended that a proprietor of a dance hall should be *required* to prohibit the

use of intoxicating liquor during a public dance. This change consequently was a liberalization of the law relating to the use of intoxicating liquor at dances.

Sec. 59.08 (9), Stats., provided in part:

“\* \* \* The county board shall immediately revoke the license of any dance hall proprietor or manager if the use of intoxicating liquors is permitted in such dance hall or pavilion or on the premises during the holding of a public dance, or if there is allowed at any such dance presence of intoxicated persons, or of children of sixteen years of age or unaccompanied by their parent or lawful guardian, or if any of the ordinances, rules, or regulations prescribed by the county board are violated. \* \* \*”

By ch. 4, Laws Special Session 1933 the legislature amended the above quoted portion of the statute to read as follows:

“\* \* \* The county board shall immediately revoke the license of any dance hall proprietor or manager if there is allowed at any such dance presence of intoxicated persons, or of children of seventeen years of age or unaccompanied by their parent or lawful guardian, or if any of the ordinances, rules, or regulations prescribed by the county board are violated, and the county board may, in its discretion, enact an ordinance expressly requiring the revocation of such dance hall license if the use of intoxicating liquor is permitted in such dance hall or pavilion or on the premises during the holding of the public dance.”

Both before and after this amendment of sec. 59.08 (9) made by the legislature at the special session, the law referred to the *use* of intoxicating liquor during the holding of a public dance. The essential change which was made in the law was to give the county board discretion in the matter of revoking a license when the use of intoxicating liquor was permitted rather than requiring the board to revoke the license in such a case. This change is also a liberalization of the statutes relating to the use of intoxicating liquors in a dance hall.

Neither the change in sec. 351.57 (2) nor in sec. 59.08 (9) purports to require revocation of a dance hall license in all cases where the proprietor has an intoxicating liquor license. It is our opinion that the legislature did not mean to prohibit proprietors of dance halls from obtaining licenses before the sale of intoxicating liquors.

Neither in ch. 13, Laws Special Session 1933, relating to the regulation of intoxicating liquors, nor in ch. 207, Laws 1933 and its amendments relating to regulation of fermented malt beverages was there any prohibition on issuance of licenses for intoxicating liquor or fermented malt beverages to dance halls. The law relating to fermented malt beverages, moreover, indicates that a license may be issued for recreation premises. This office issued an opinion holding that under ch. 207, Laws 1933, a building used only as a dance hall would be included in the term "recreation premises." A city, town, or village may thus grant either a fermented malt beverage license or an intoxicating liquor license, or both, covering premises used as a dance hall.

As to your second question it is our opinion that the county board may not refuse to license a dance hall or revoke the license of a dance hall solely for the reason that a fermented malt beverage or intoxicating liquor license was taken out covering the dance hall premises, but that the county board is limited to a discretion in revoking the license because the use of intoxicating liquors is permitted during a public dance.

JEF

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*Intoxicating Liquors—Refunds*—Money voluntarily paid into treasury for license cannot be recovered by licensee.

August 7, 1934.

HAROLD M. DAKIN,  
*District Attorney,*  
Watertown, Wisconsin.

You state that a tavern keeper of the city of Watertown, Wisconsin made application to the city council for a liquor license on April 2, 1934, and paid the required license fee. His application was approved by the common council on March 1, 1934; he was required to post a bond by May 15, 1934. On May 9, 1934, he received notice to vacate the building he was occupying as a tenant and he did quit business on May 20, 1934. The bond was not posted and no license was ever issued to the tavern keeper. While the

license matter was pending, said tavern keeper operated as is the custom with all other tavern keepers in the city.

You inquire whether this tavern keeper under the circumstances is entitled to return of his license fee from the common council.

In an official opinion rendered by this department in VI Op. Atty. Gen. 326, it was held that a town board had no right to refund to a saloon keeper part of the license money paid into the town treasury, after the saloon has been abated as a nuisance. This was under the old liquor law, but the same principle applies at the present time.

In *Custin v. The City of Viroqua*, 67 Wis. 314, our supreme court held that where, in good faith but under a misapprehension of the law, a village board demanded an excessive sum for a liquor license, one who paid such sum cannot recover back the excess. The court held that the payment was clearly a voluntary payment and cannot be recovered back. The court cites a great many cases on page 320.

Under these rules of our court and this department, you are advised that this party is not entitled to recover his license fee. This is especially true because he has not only paid the money into the treasury but he has also sold liquor in anticipation of his license.

JEF

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*Counties—Municipal Corporations—Dance Hall Ordinances*—Town board has no authority to license and regulate dance halls unless town meeting has granted it powers of village board under sec. 60.29, subsec. (13), Stats., and then only when county has enacted no ordinance on subject.

August 7, 1934.

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

You wish to know how dance halls in towns are regulated when the county has not adopted rules or ordinances regulating them.

All dance halls, in towns, as well as in villages and cities, are governed by certain state statutes. The following apply in this particular instance:

Sec. 351.57, Stats., as amended by ch. 4, Laws 1933, Special Session:

"(2) No person who is the proprietor of any dance hall or who conducts, manages or is in charge of any dance hall or pavilion in this state, whether such dance hall or pavilion be licensed or not under the provisions of any local or county regulation, shall permit during any public dance held in such hall or pavilion the presence of intoxicated persons in such dance hall or on the premises on which such dance hall is situated, or the presence of any child of seventeen years of age or less who is not accompanied by his parent or lawful guardian.

"(3) Any person who shall violate any of the provisions of this section shall be punished by a fine of not less than twenty-five dollars and not more than one thousand dollars, or by imprisonment for not less than thirty days in the county jail and not more than one year in the state prison, or by both such fine and imprisonment, \* \* \*"

As you point out, sec. 59.08 (9), Stats., also amended by ch. 4, Laws 1933, Special Session, gives the county board power to regulate dance halls in the county, and provides:

"Ordinances, by-laws or rules and regulations enacted by a county board under this subsection shall not apply to any city or village in such county which by ordinance regulates dance halls or other places of amusement."

Sec. 59.08 (15) provides that the county board may

"Exercise all the powers conferred by law on cities to regulate by ordinance, dance halls \* \* \* outside the limits of incorporated cities and villages."

A town board has no power to license and regulate dance halls unless the town meeting has voted to confer upon it the powers of a village board.

Sec. 60.29 (13) gives the town board power

"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."

If the town meeting adopted a resolution granting this power to the town board, such board would be vested with

the powers of a village board including those enumerated in sec. 61.34 (1). Under these circumstances a town board could license and regulate dance halls. Its ordinances in regard to dance halls, however, would be effective only so long as the county board took no action in regard to dance halls. Any county ordinances would of necessity supersede all town ordinances governing dance halls since sec. 59.08 (9) does not except towns from the operation of such ordinances under any circumstances.

JEF

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*Indigent, Insane, etc.—Legal Settlement*—Person voluntarily and uninterruptedly absent from town, village or city loses his legal settlement unless he is supported as pauper.

August 10, 1934.

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

You submit the question as to the legal settlement of a family which is now taken care of by the county of Eau Claire under facts which are as follows:

A certain family lived in St. Croix county seven years prior to May 5, 1932. May 5, 1932, they moved to Wheeler, Dunn county and lived there from May 5, 1932, to March 27, 1933. On March 27, 1933, they moved to Cedar Falls, Dunn county, town of Red Cedar and lived there from March 27, 1933, to April 2, 1934. On April 2, 1934, the chairman of the town of Red Cedar sent this indigent family into the city of Eau Claire, without notification. He gave them a check for ten dollars, together with groceries and wood to take along. Since that time the family has been taken care of by the city of Eau Claire.

You state that from the dates above it appears that this family never lived in any one township one whole year.

Your conclusion is erroneous as it appears that this family lived from March 27, 1933, to April 2, 1934, in the town of Red Cedar, Dunn county. This is more than a year.

Under the above facts, this family has acquired a legal settlement in the town of Red Cedar.

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.  
\* \* \*

Under your statement of facts it appears that this family lived in St. Croix county seven years and as they were not supported in said county as paupers they would have had a legal settlement in St. Croix county at the time they moved out of the county, but the family moved out of the county on May 5, 1932.

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.”

You do not state in your letter whether the members of this family were supported as paupers ever since they moved out of St. Croix county on May 5, 1932, and until they moved to the city of Eau Claire. The words “by voluntary and uninterrupted absence” in the above quoted subsec. (7) were held by our supreme court to be construed to mean an absence during which the party is not a pauper needing and receiving support. *Town of Scott v. The Town of Clayton*, 51 Wis. 185, 191; XXII Op. Atty. Gen. 222. If the members of this family were not paupers while they were living in Dunn county, they acquired a legal settlement in Dunn county as they lived there longer than one year. The time during which they were paupers, if at all, from the time they moved out of St. Croix county to the time when they moved into the city of Eau Claire will determine whether they have lost their legal settlement in St. Croix county. They will still have their legal settlement in St. Croix county

if they were paupers continuously since the time they lived there. But if during the year they were in Dunn county they were not paupers, the legal settlement now is in Dunn county.

I believe these various observations will give you the answer to your question. Owing to the fact that you did not state sufficient facts, we could not be as definite in our answers as we otherwise could have been.

JEF

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*Prisons—Prisoners*—Neither warden of state prison nor board of control has power to order prisoner in state prison to open his safety deposit box.

August 10, 1934.

A. W. BAYLEY, *Secretary,*  
*Board of Control.*

The officials concerned in the arrest of a man now a prisoner at Waupun believe that his safety deposit box contains stolen goods and have asked the warden of the state prison to order him to open it. You wish to know whether the warden or the board of control has any authority to order this man to open the safety deposit box.

The answer is, No.

The warden and the state board of control are vested with authority over a convict and his actions only as a prisoner. They may make and enforce rules and regulations governing his conduct in prison. This authority does not extend over his private and personal affairs which in no way affect his life in prison. Neither the warden nor the board of control has the authority to compel this man to any action in regard to his property which is outside the prison or in any way to interfere with his private property or business.

As was said by the court in *Thompson v. Niles, et al.*, 115 Iowa 67, 87 N. W. 732:

“\* \* \* The fact of plaintiff’s conviction and imprisonment did not disqualify him from transacting business touching his own property. He could give and receive con-

veyances, notes, or other obligations, and make and draw deposits. True, the fact of his imprisonment might render it necessary at times that he act through others; but that does not disqualify him from receiving, holding, or disposing of property in the usual manner. \* \* \*"

To order the opening of this safety deposit box would be beyond the authority of either the warden or the board of control because it would be interfering in a prisoner's private affairs which in no way concern his life as a prisoner.

JEF

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*Elections—Residence—Inmate of National Home has legal residence in town, city or village in which Home is located unless he decides to retain his home at his residence prior to his entrance into institution.*

August 10, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You state that a man who has recently moved into the National Home now seeks the nomination and election in the district in which the National Home is located. You inquire whether he is legally entitled to be a candidate in the district of the National Home. You also have informed me that you understand he has a family living outside of the district, which family has not moved with him to the National Home.

Under art. IV, sec. 6, Wis. Const., the qualification for a member of the legislature is that he be a qualified elector in the district which he may be chosen to represent. The question then is: Where can this man cast his ballot?

In sec. 6.51, Stats., several rules are given for determining qualifications of electors. It is provided:

"In determining the question of residence as a qualification to vote, the following rules, so far as applicable, shall govern, and if a person offering to vote be challenged as unqualified on the ground of residence, the inspectors shall admonish him of such rules, and put to him such further

questions as shall be proper to elicit the facts in respect thereto, namely:

“\* \* \*

“(7) The place where a married man’s family resides shall generally be considered and held to be his residence; but if it is a place of temporary establishment for his family, or for transient objects, it shall be otherwise.

“(8) If a married man has his family fixed in one place and does his business in another, the former shall be considered and held to be his residence.

“(9) The mere intention to acquire a new residence, without removal, shall avail nothing; neither shall removal without intention.

“\* \* \*

“(14) Each inmate of any national or state home for soldiers in this state shall be deemed to reside in the town, city or village, in which said home shall be located, and in the election district in which he shall sleep, unless such inmate shall elect to treat his fixed place of residence prior to his becoming an inmate of such home, as his place of residence.”

This last provision under subsec. (14) seems to be decisive in this man’s case. He evidently intends to make that his home for voting purposes and this rule gives him that right.

You are therefore advised that he is legally entitled to be a candidate in the district of the National Home.

JEF

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*Peddlers*—Method of doing business on part of bakery located outside state which establishes regular route for sale of its goods in Wisconsin comes within peddlers’ law, and license is required.

August 10, 1934.

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

You state that the officers have brought in a driver of the X Bakery of Winona, Minnesota, for peddling without a license. The facts are as follows:

The X Bakery Company furnishes an automobile delivery wagon which is stocked with the company's goods. A driver is sent into Wisconsin to dispose of the goods and is hired on the basis of a certain sum a week or a commission. A customer's order card is used on which charges are recorded. A customer picks out the articles she wants and pays for them as they are taken from the wagon. Both the driver and the company contend that they may do this because they have regular customers and call only on them and do not solicit from any others than those who have delivered customers' order cards.

You state that there are opinions rendered by Milwaukee lawyers to the effect that this statement of facts is not covered by the peddlers' law, but you refer to an opinion of this department in XXI Op. Atty. Gen. 158 in which this matter is discussed and you indicate that a business carried on in that way may constitute peddling and is subject to a peddler's license.

I have carefully examined the said opinion of my predecessor and while it is not in full harmony with other opinions rendered by the attorney general prior to that time, still, after a careful consideration of the matter, I believe that the ruling made in said opinion will be sustained, at least in a case where the company from which the goods are sold is located outside of the state of Wisconsin. I therefore advise you to bring action against these parties and have the court pass upon the question involved.

JEF

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*Banks and Banking—Public Depositories—School Districts—School District Treasurer—School district in which school treasurer is cashier of bank may designate said bank as public depository without violating any statute.*

August 10, 1934.

THOMAS E. McDOUGAL,  
*District Attorney,*  
Antigo, Wisconsin.

You state that the treasurer of the school board of the town of Elcho appears to be cashier in the Elcho State

Bank, in which bank the funds of the school district are deposited. There is some doubt in the minds of the people of the district as to whether or not it is proper for him to be the treasurer and also head of the bank in which the district funds are being kept. The question you would like to submit is: Whether the office which he holds as treasurer of the district is incompatible with that of head of the bank.

In answer to your question, I will say that the position of cashier in the bank is not a public office, so the question of incompatibility would really not apply. The question is whether it is proper for the district to have the bank as a depository in which their treasurer is cashier. I have found nothing in the statute which prohibits a depository of that kind. In sec. 348.28, Stats., which is the malfeasance statute, prohibiting officers to be interested in contracts, etc., I find the following:

“\* \* \* but the provisions of this section shall not apply to the designation of public depositories for public funds, \* \* \*.”

Under this provision and in view of the fact that there is no statutory provision which would make this illegal, I will say that the school treasurer is doing nothing, under the facts stated, which is in violation of law.  
JEF

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*Appropriations and Expenditures—Courts—Public Officers—Sheriff—County board may reimburse sheriff for expenses incurred in defending civil action brought against him for damages alleged to have resulted from act of deputy sheriff.*

August 10, 1934.

FRANK F. WHEELER,  
*District Attorney,*  
Appleton, Wisconsin.

The sheriff of your county was sued in a civil action for damages alleged to have resulted by reason of an act of a deputy sheriff. Judgment in favor of all defendants was

entered, dismissing the complaint upon the merits. The sheriff has requested the county board to appropriate a sufficient sum of money to pay all of the expense to which he was put in defending that suit. You wish to know whether the county can legally pay such expenses.

The answer is, Yes. The county board may legally reimburse the sheriff for moneys expended by him in defense of this action. Authority is given to the county board to vote such reimbursement in sec. 331.35, Stats., which reads:

“(1) Whenever in any city, town, village, or county charges of any kind shall be filed or an action be brought against any officer thereof in his official capacity, or to subject any such officer, who is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action shall be discontinued or dismissed or such matter shall be determined favorably to such officer, \* \* \* or in case such officer, without fault on his part, shall be subjected to a personal liability as aforesaid, such city, town, village, or county may pay all reasonable expenses which such officer necessarily expended by reason thereof. \* \* \*.”

“You will note that this statute says that the ‘county may pay all reasonable expenses’ using the word ‘may’ instead of the word ‘shall’ or ‘must.’ The word ‘may’ has not a mandatory significance, but simply a permissive significance. The statute as it is worded authorizes the county to pay the expenses. It does not obligate the county to pay them. It is an enabling act which makes it possible for the county board to allow and pay the reasonable expenses when in its discretion it desires that the county should pay them.” XVI Op. Atty. Gen. 343-344.

The action was brought against the sheriff for damages alleged to have resulted by reason of an act of a deputy sheriff.

Sec. 59.22, subsec. (1), Stats., provides:

“Except as provided otherwise in subsection (3), the sheriff shall be responsible for every default or misconduct in office of his undersheriff, jailer and deputies during the term of his office, and after the death, resignation or removal from office of such sheriff as well as before; and an action for any such default or misconduct may be prosecuted against such sheriff and his sureties on his official bond or against the executors and administrators of such sheriff.”

This statute makes the sheriff personally liable for the acts of a deputy sheriff. Hence the county board may reimburse him for any expenses incurred by him in an action brought against him for damages alleged to have resulted from an act of the deputy sheriff.

JEF

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*Hotels and Restaurants—Intoxicating Liquors*—Place described can probably be classified as restaurant within meaning of sec. 176.05, subsec. (10), par. (a), Stats.

August 11, 1934.

EDMUND H. DRAGER,  
*District Attorney,*  
 Eagle River, Wisconsin.

A certain place has been licensed as a restaurant. The proprietor serves light lunches, maintains a soda fountain and also sells newspapers and candies. He has now obtained a liquor license. His principal source of income is from the soda fountain and the sale of candies and tobaccos. The lunches are served occasionally. You wish to know whether drinks sold in this place must be served at the tables and consumed by customers at tables or whether they can be served at the soda fountain counter.

Sec. 176.05, subsec. (10), par. (a), Stats., provides:

“Intoxicating liquor shall be sold in restaurants only at tables and to seated customers.”

Sec. 176.01 (6) reads:

“‘Restaurant’ means space, in and wholly within a suitable building, leased or rented or owned by a person or corporation, licensed as such, and provided with adequate and sanitary kitchen and dining room equipment and capacity and employing such number and kinds of servants and employes necessary for preparing, cooking, and serving suitable food for strangers, travelers, and other patrons and customers, and complying with all the requirements imposed upon restaurants under the laws of this state.”

It is virtually impossible to lay down a fixed rule whereby all establishments could be arbitrarily classified as restaurants or not restaurants. Whether or not a given place is a restaurant must be determined by the facts in that particular case. Certain tests to be applied in classifying places to determine whether or not they are restaurants within the meaning of the liquor law are laid down in sec. 176.01, subsec. (6), cited above.

XXIII Op. Atty. Gen. 309 holds that in order to make a place a restaurant under sec. 176.01, subsec. (6), it is not necessary that there be a separate kitchen and a separate dining room:

“\* \* \* The statute only requires, by the language used, that the licensees have adequate and sanitary kitchen equipment and adequate dining room equipment. \* \* \*”  
(p. 310.)

According to the letter of the law, the place you describe could probably be classified as a restaurant so as to be governed by sec. 176.05 (10) (a). Whether or not it comes within the spirit of the law as to what is a restaurant and thus should unquestionably be classified as a restaurant can best be determined by you who are more familiar with the place in question. The fact that the place is licensed as a restaurant and thus, presumably, complies with restaurant requirements would be rather strong indication that the place should be held to be a restaurant within the meaning of the liquor law.

JEF

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*Contracts—Public Printing—Bids*—In case none of bids for state printing are low enough to be advantageous to state, director of purchases may reject all and advertise for new bids.

August 11, 1934.

E. F. GIBBS, *Supervisor Printing Division,*  
*Bureau of Purchases.*

Bids for state printing for the term from January 1, 1935, to December 31, 1936, were received, opened and read

July 23, 1934, as set forth in notice published during June and July. The advertisement for bids contained the proviso:

"The Bureau reserves the right to reject any and all bids."

The discounts from the maximum prices offered range from one-tenth of one per cent to one per cent. The director of purchases does not feel that any of the bids offer a sufficiently high discount from the maximum prices provided for in sec. 35.43, Stats. In other words, he does not feel that any of the bids are sufficiently low to be of advantage to the state. He wishes to know whether all of the bids opened and read on July 23 may be rejected and new bids advertised for.

The answer is, Yes.

Sec. 35.47 reads:

"\* \* \* Within ten days thereafter such bid or bids of those opened and read shall be accepted as he [director of purchases] shall determine is or are a proposal or proposals to do any one or all of the first four classes of printing for the greatest per centum of discount off from the maximum prices established by section 35.43; provided, that whenever he shall be satisfied that any of said bids has been presented pursuant to an agreement, understanding or combination to prevent free competition, he shall reject all of them and readvertise for bids as in the first instance.  
\* \* \*"

The provision of the statute for the acceptance of such bid or bids as offer the greatest per centum discount off from the maximum prices established by sec. 35.43 is in effect a provision that the contract be let to the lowest bidder.

*State ex rel. Phelan v. Board of Education*, 24 Wis. 683, 684-685:

"\* \* \* The statutory provision requiring the contract in such cases to be let to the lowest bidder is designed for the benefit and protection of the public, and not of the bidders. And whatever remedy the public may have, the lowest bidder, whose bid has been rejected, has no absolute right to a writ compelling the execution of a contract with him, after one has in fact been let to another. \* \* \*"

*The People v. The Contracting Board*, 33 N. Y. 382, holds that where a statute provides for a letting to the lowest bidder, discretion is vested in the awarding officer or board to decline bids which are excessive or disadvantageous to the state.

In *Walsh v. Mayor*, 113 N. Y. 142, the statute provided that all contracts "shall be awarded to the lowest bidder for the same with adequate security and every such contract shall be deemed confirmed in and to such lowest bidder at the time of the opening of the bids \* \* \*." The advertisement for bids contained a reservation of "the right to decline all estimates \* \* \* if deemed for the interest of the corporation." At page 146, the court said:

"\* \* \* If by combination or other cause all of the bids were greatly in excess of such cost [real cost of work], and it so appeared to the commissioners, and that the true interests of the city demanded that none of such bids should be accepted, we think that the commissioners, acting in good faith, would have the right to reject them all, and advertise over again. \* \* \*"

The court tacitly permitted the reservation in the advertisement. See also *Hanlin v. Ind. Dist.*, 66 Iowa 69, 70; *Douglass v. Commonwealth*, 108 Pa. St. 559, 563.

In *People v. Supervisors*, 42 Hun. 456, the statute provided that the contract be awarded to the "lowest responsible bidder or bidders." The board reserved the right to reject any and all bids. Concerning the board's right to annex such a condition to its advertisement, the court said, p. 457-458:

"\* \* \* It is not necessary to decide whether the respondents had that power or not. The fact is that they did it, and the relator having made his bids under such advertisement, he cannot complain that they exercised the right he so conceded to them. \* \* \* The plain object of the statute was to prevent the supervisors from arbitrarily awarding a contract to any one except the lowest responsible bidder. There is no restriction as to the form or the number of times of advertising; but the statute contemplated that there should be competition, and that the contract should in the end be awarded to the lowest bidder. \* \* \*"

From the above citation it will be seen that even though a statute requires that a contract be let to the lowest bid-

der, discretion is vested in the awarding officer or board to reject the lowest bid because of unreliability, etc. If none of the bids are low enough, all of them may be rejected and new bids called for, even when there was no reservation of the right to reject any and all bids in the advertisement. When there is a reservation in the advertisement for bids of the right to reject any and all bids there is no doubt but that all of the bids sent in under it may be rejected and new bids advertised for. (In all of these instances it is understood that the awarding officer or board acts in good faith.)

You are therefore advised that the director of purchases may reject all of the bids opened and read on July 23 and advertise for new bids.

JEF

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*Taxation—Tax Collection—Delinquent Taxes—Town* cannot compel county to exchange town delinquent real estate tax credit existing with county for county-owned lands concerning which no excess delinquent tax roll is involved.

August 11, 1934.

F. W. HORNE,  
*District Attorney,*  
Crandon, Wisconsin.

You state that the town of Hiles in your county has demanded, under sec. 60.29, subsec. (32), Stats., that the county turn over county-owned lands to it in a sum equal to its delinquent real estate tax credit existing with the county. You further state that this town had no excess delinquent real estate tax credit prior to 1932; that the county has tax deeds on lands in the town on tax certificates for the years 1925, 1926, 1927, 1928 and 1929, and that the town in question requests the county to turn over to it lands upon which the county has taken tax deeds for delinquent taxes represented by the above mentioned tax certificates.

You inquire whether the county can be compelled to deed such lands to the town under sec. 60.29, (32).

The answer is, No.

Sec. 60.29 (32) provides:

“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.”

There is nothing mandatory in this language. The town board is merely empowered to authorize the town treasurer to make the exchange. The statute does not give the town board, nor the town treasurer, the power to compel the county to make the exchange.

Attention is also called to sec. 59.07 (21), a companion statute, 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. Here again there is nothing mandatory in the statute. Both of the sections above mentioned were created by ch. 292, Laws 1933, which became effective June 23, 1933.

It should be kept in mind that the lands in question were acquired by the county for nonpayment of taxes in which the town had no interest, as the town had no delinquent real estate tax credit prior to 1932. Hence the town has no claim, lien, equity or interest of any sort to these particular lands which the county is bound to recognize under sec. 60.29, (32).

In XXII Op. Atty. Gen. 994, this office ruled that the county is sole proprietor as to lands concerning which no excess delinquent tax roll is involved, and may dispose of the same in the same manner that any private owner could. This would seem clearly to apply in the present instance, as no excess delinquent tax roll is involved as to these lands, according to the statement of facts presented.

Also, see XXIII Op. Atty. Gen. 269, to the effect that where taxes have become finally delinquent and the county takes a tax deed, the lands are the absolute property of the county and the local taxing unit has no right to the proceeds or a portion of the proceeds of any particular tax item, but is merely entitled to its share of the entire proceeds after the county's claim has been satisfied. Thus it

would logically follow that if the local taxing unit has no right to the proceeds from any particular lands, it would have no right to the land itself merely because of the above mentioned statutes authorizing an exchange of county-owned lands for town delinquent real estate tax credit.

JEF

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*Automobiles—Law of Road—*Sec. 85.06, subsec. (2), par. (b), Stats., regulating tail lights on motor vehicles and substitution of reflective signals, in certain cases repealed by implication exception to order of industrial commission 2160 covering same subject but not identical.

August 11, 1934.

INDUSTRIAL COMMISSION.

You direct us to sec. 85.06, subsec. (2), par. (b), Stats., which provides:

“Every motor vehicle, when in use or parked upon, or immediately adjacent to, the traveled portion of the highway, shall display on the rear at least one lamp so constructed and placed as to show a red light from the rear plainly visible under normal atmospheric conditions from a distance of five hundred feet to the rear of such vehicle. Reflective signals approved by the industrial commission may be used in lieu of tail lights on trucks, trailers, and semitrailers not electrically equipped, and on parked vehicles, except as provided in paragraph (d) of this subsection.”

Par. (d) covers only motor trucks, truck tractors, trailers or semitrailers outside of incorporated cities or villages.

You state that several years ago the commission issued its standards for motor vehicle lighting and order 2160 was enacted, which reads:

“Tail Lights: Motor vehicles and trailers parked upon or occupying the highway shall be subject to the same requirements for tail lights as when in motion upon the highway.”

There was an exception to this order which provided:

“Exception: (1) In place of a tail light, motor vehicles parked upon or occupying the highway, may display to the rear, a red marker light, attached to the side of the vehicle.

“(2) Motor vehicles parked upon or occupying highway, illuminated to such an intensity as to make the motor vehicle discernible for a distance of at least 500 feet, need not display a tail light.”

You state that you assume that this exception to order 2160 is voided by sec. 85.06 (2) (b), as above quoted.

In this you are correct. It is a general rule of statutory construction that a statute intended as a substitute for one revised operates to repeal the latter without any express words to that effect, and therefore any distinct provision of the old law not incorporated into the later one is to be deemed intentionally annulled. *City of Madison v. Southern Wis. R. Co.*, 156 Wis. 352, affirmed 240 U. S. 457. Here the law was enacted by the commission for making a lawful order, but this does not change the rule. The legislature has the right to repeal the order of the commission as well as repeal a statute enacted by the legislature. It is apparent that the statute covers the same subject as the order of the commission and must be considered as taking its place.

You also refer us to sec. 85.85, Stats., which reads as follows:

“Local authorities, except as expressly authorized by the provisions of this chapter, shall have no power or authority to enact or enforce any rule, ordinance, or regulation contrary to the provisions of this chapter.”

You state that several cities have definite ordinances that between certain hours every vehicle parked upon the city streets shall be equipped with an electrically operated tail light or other light. They do not wish to accept the approved reflective signal. You inquire whether such ordinances are valid since the passage of said sec. 85.85.

It is apparent that such ordinance is contrary to the provisions of sec. 85.06 (2) (b). You are therefore advised that it is our opinion that such provisions in the ordinance are void.

JEF

*Public Officers—Neglect of Duty—School Districts—Tuition*—Nonresident who is qualified to enter high school in another municipality under sec. 40.47, subsec. (3), Stats., may not be deprived of such privilege by high school board on grounds that board has been unable to collect similar tuition fees from municipality in which student is located.

Such tuition must be entered upon tax roll by town or village clerk and collected.

These officers may be compelled by mandamus to perform such duties, as they are mandatory.

Officers wilfully neglecting their duty may be prosecuted under sec. 348.29, Stats.

August 11, 1934.

THOMAS E. MCDUGAL,  
*District Attorney,*  
Antigo, Wisconsin.

The Antigo board of education by resolution excluded from Antigo High School graduates from the eighth grade of various towns of Langlade county that have not paid the high school tuition for the last year and for several years previous. The board has issued notices to the several town clerks of the effect of this resolution. You direct our attention to sec. 40.47, subsec. (3), Stats., which reads:

“The board shall admit to the high school, when facilities will warrant, any person of school age who resides in the state, but not within any high school district, and who shall have complied with the entrance requirements of subsection (2). Nonresidents so admitted shall be entitled to the same privileges and be subject to the same rules and regulations as resident pupils.”

You state that the parents of these pupils have been arguing with the county superintendent that they have paid their taxes in the several towns and that it is no fault of theirs that the town is unable to pay this back tuition and the towns in turn argue that they are unable to pay because they have not received all of their money for taxes. You inquire whether the Antigo board of education has a legal right to pass a resolution excluding these different pupils from the high school due to the fact that the towns have not paid their tuition, regardless of the fact that the

parents have paid their taxes and that the school children are always eligible to attend the high school.

You state that in your opinion the tuition is incidental to the requisites of entering the high school; that the children could not be barred from an education in the Antigo High School simply because the town in which they live is unable to pay their tuition. You state that you are under the impression that the high school could be compelled to take these students in unless the school board could show that it had inadequate facilities.

We agree with your conclusion. Subsecs. (5) and (6), sec. 40.47 read as follows:

“(5) Before July in each year the school clerk shall file with the clerk of each municipality from which any tuition pupil was admitted, a verified claim against the municipality setting forth the residence, name, age, date of entrance and the number of months attendance, during the preceding school year, of each person admitted from such municipality, the amount of tuition which the district is entitled to for each pupil, and the aggregate sum for tuition due the district from the municipality.

“(6) The municipal clerk shall enter upon the next tax roll such sums as may be due for such tuition from his municipality and the amount so entered shall be collected when and as other taxes are collected, and shall be paid to the treasurer of the high school district. If a portion of such municipality forms a part of a high school district, the taxable property in that portion shall be exempt from such tuition tax.”

You will note that in all these statutory provisions as to nonresidents and the tuition, the statute has a mandatory significance. The word “shall” is used. “The board *shall* admit to the high school when facilities will warrant”, and “the clerk *shall* file with the clerk of the municipality from which any tuition pupil was admitted,” and “the municipal clerk *shall* enter upon the next tax roll,” etc. Under these various provisions the school board could be compelled by mandamus to admit such persons of school age if the facilities will warrant their admission and the municipal clerk of the town from which these persons came may be mandamus-ed to enter the tuition, say as a tax upon the tax roll to be collected.

I will also direct your attention to sec. 348.29 which provides in part as follows:

“Any person mentioned in section 348.28 \* \* \* who shall wilfully violate any provision of law authorizing or requiring anything to be done or prohibiting anything from being done by him in his official capacity or employment, or who shall refuse or wilfully neglect to perform any duty in his office required by law, or shall be guilty of any wilful extortion, wrong or oppression therein shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars.”

See sec. 348.28. The provisions of sec. 348.28 are broad enough to include the high school board and if the members wilfully deprive persons of attendance in the high school when they have the facilities to accept them under the above quoted statutes, it is our opinion that they may be prosecuted for neglect of duty under sec. 348.29, quoted above.

JEF

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*Appropriations and Expenditures — Damage by Forest Fires*—Conservation commission has no power to assign forester to make appraisal of damage done to property by fire as basis for civil suit for private parties to collect such damages.

August 16, 1934.

H. W. MACKENZIE, *Director,*  
*Conservation Department.*

In your communication of August 3 you state that the records of your department pertaining to forest fires have from time to time been made available to individuals who have suffered damage from such fires. You say you are now in receipt of a letter from an individual who has suffered loss in a forest fire requesting that you assign a forester to make an appraisal of the damage done to his property as the basis for a civil suit to collect such damages. You inquire whether the assignment of an employee of your department to make such an appraisal is a legal and proper procedure.

The appraisal of the damages would inure to the benefit of a private party in which neither the conservation department nor the state is in any way interested. I find no provision in the statute which requires your department to make appraisals of damages in such cases for private parties nor for any public parties. You are therefore advised that it is our opinion that such procedure would be improper and is not legal nor authorized by statute.

JEF

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*Counties — Municipal Corporations — Sewage Disposal Plants*—Walworth county has not power to purchase part interest in sewage disposal plant owned by city of Elkhorn and city cannot sell part interest to county.

Neither has county right to enter into long-term agreement with disposal plant to pay city proportionate expense of plant operation determined by ratio of their respective sewage volumes.

City pipe easements outside city limits are undoubtedly limited to city sewage.

August 17, 1934.

R. V. BROWN,  
*District Attorney,*  
Elkhorn, Wisconsin.

In your recent letter you have submitted a number of questions. The first two questions may be considered together and are as follows:

1. Can Walworth county purchase a part interest in the sewage disposal plant owned by the city of Elkhorn and can the city sell a part interest to the county?

2. Can Walworth county and the city of Elkhorn enter into a long-time agreement whereby the county agrees to pay the city a proportion of the expense of the plant operation determined by the ratio of their respective sewage volumes?"

It is well established that counties and county boards have only such powers as are expressly or impliedly given to them by statute.

Sec. 59.08, subsec. (13), Stats., provides:

"In counties having a population of two hundred fifty thousand or over, provide for the transmission and disposal of sewage from any of the county buildings, and for such purpose may pay to the city, town or village in which said county buildings are situated for the transmission and disposal of sewage, such proportion of the expense thereof, as certified under the provisions of section 59.96, to any such city, town or village; such proportionate expense to be determined by the ratio which the amount of sewage contributed by any such county buildings may bear to the total amount of sewage contributed by any such city, town or village to such system, and such counties may provide and furnish meters to determine the amount of sewage so contributed."

You will note that this applies, however, to counties having a population of 250,000 and over and does not apply to your county. I find no provision in the statute giving these same powers to counties such as Walworth. I believe your first question must be answered in the negative. Whether the city of Elkhorn would have the power to sell a part interest to the county if the county had the right to purchase it need not be here considered. I find no authority for a long-time contract between the county and city such as your second question implies. This question must also be answered in the negative.

3. Can the city of Elkhorn be prohibited from adding the extra volume to the ditch and stream which are outside the city's limits and which furnish the city an outlet?

4. Are the city's pipe easements from the sewage disposal plant to the drainage ditch, which is outside the city's limits, effective as to the extra volume acquired by a lease with the rural county institutions?

The third question must be answered in the affirmative. The city, having acquired the right to dispose of the city sewage in certain streams and ditches which are outside of the city's limits, cannot add any other sewage that is not city sewage.

The fourth question must necessarily be answered in the negative. I find no authority for the county and city to join in the disposal of sewage in a method such as is suggested by your questions.

JEF

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*Public Officers—School Board*—Member of city board of education is city officer.

August 17, 1934.

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

In your letter of August 16 you ask for an opinion on the question of whether a member of a city board of education is legally classified as a city officer.

It is our opinion that a member of a city board of education is a city officer.

Sec. 62.09, subsec. (1), par. (a), Stats., enumerates city officers as follows:

“The officers shall be a mayor, treasurer, clerk, comptroller, attorney, engineer, one or more assessors, except that no assessor shall be elected in any city to which a county system of assessment as provided in section 70.87 is applicable, one or more justices of the peace, one or more constables, a health commissioner or board of health, street commissioner, a board of police and fire commissioners, except in cities where not applicable, chief of police, chief of the fire department, a board of public works, a *board of education* or of school commissioners, except in cities where not applicable, two aldermen and one supervisor from each ward, and such other officers or boards as are created by law or by the council.”

This statute is unambiguous and would seem to leave no room for any other construction.

While not directly concerned with this point, previous opinions from our office, to be found in XX Op. Atty. Gen. 462 and XXI Op. Atty. Gen. 930, support this view.

JEF

*Mortgages, Deeds, etc.—Public Records*—Correction of errors in recorded papers in office of register of deeds should be done by recording affidavit as authorized under sec. 235.46, Stats., or again executing papers with errors corrected, stating that new execution is made for correcting errors only.

August 17, 1934.

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

In your communication of August 3 you enclose a form of authority to correct executed papers which has been used by the federal land banks of St. Paul and others recently in connection with the correction of papers recorded in the office of the register of deeds. You state that the register of deeds records papers on the day they are received, and exactly as they are written. Your register of deeds has raised the question as to whether or not he has the authority to correct the original records in his office, even with the consent of all parties to the instrument after they have once been recorded.

I find no authority in the statute authorizing the correction of executed papers legally recorded with the register of deeds. While such correction may be authorized and recognized in some states under their statute I doubt whether it is permissible in Wisconsin without express authority in the statute for it. The same objection may be overcome by following the provisions of sec. 235.46, Stats., which reads as follows:

“Affidavits, witnessed by two subscribing witnesses, stating facts as to possession of any premises, descent, heirship, date of birth, death or marriage, or as to the identity of a party to any conveyance of record, or that any such party was or is single or married, or as to the identification of any plats or subdivisions of any city or village, may be recorded in the office of the register of deeds in any county where such conveyance is recorded, or within which such premises or city or village is situated, and the record of any such affidavit, or a certified copy thereof, shall be prima facie evidence of the facts touching any such matter, which are therein stated.”

It has been the practice in the state to file such affidavits for the purpose of correcting errors such as described in the statute. If there is a serious error in the instrument the proper way is to re-execute the instrument if possible and state that it is executed again for the purpose of correcting certain errors which are referred to.

JEF

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*Unemployment Insurance*—Employees of refrigerator car company whose stock is owned indirectly by railroad are not in employ of railroad engaged in interstate transportation so as to be exempt from provisions of Wisconsin unemployment reserve and compensation act.

August 17, 1934.

INDUSTRIAL COMMISSION.

Attention Harry R. McLogan.

You inquire whether the Northern Refrigerator Line, Inc., whose common stock is held by the Merchants Dispatch, Inc., whose stock in turn is held by the New York Central Railroad, is subject to the Wisconsin unemployment compensation act which excepts "employment by railroads engaged in interstate transportation" from the provisions of the act.

It is our opinion that the Northern Refrigerator Line is subject to the act.

As we understand it, the employees of the Northern Refrigerator Line are engaged chiefly in the repair of refrigerator cars. We fail to see how this can be construed as constituting employment by railroads engaged in interstate transportation, even though the stock of such company is indirectly owned by a railroad.

We understand that other refrigerator companies such as the Union Refrigerator and Rapid Transit Company have not questioned the applicability of the act to refrigerator companies, but counsel for the Northern Refrigerator Line contend that it is not subject to the act because of the stock ownership by the New York Central Railroad, and because the act would be unconstitutional as constitut-

ing a burden upon the interstate commerce if the act is held to apply to the Northern Refrigerator Line.

It is true that the act provides in sec. 108.02, subsec. (d), that "where any employer, either directly or through a holding company or otherwise, has a majority control or ownership of otherwise separate business enterprises employing persons in Wisconsin, all such enterprises shall be treated as a single 'employer' for the purposes of this chapter."

We do not believe that by this language the legislature intended to extend the exemption of employment by railroads engaged in interstate transportation to wholly unrelated activities of a company whose stock happens to belong to a holding company which in turn is owned by a railroad. It seems apparent that the legislature was by the language above quoted merely seeking to get at and include employers who might otherwise avoid the provisions of the act through the device of a holding company.

We do not consider that the employees of the Northern Refrigerator Line are engaged in interstate commerce merely because they repair refrigerator cars which are used in interstate transportation. It has been held that an employee engaged in making repairs on a boiler constituting part of the equipment of a wrecking train so as to make such equipment ready for either interstate or intrastate use as occasion might require, was not employed in interstate commerce. *Ruck v. Chicago, M. & St. P. R. Co.*, 153 Wis. 158. Even if the employees of the Northern Refrigerator Line were engaged in interstate transportation, the state is nevertheless free to legislate in this field in the absence of federal legislation (see our opinion rendered today in the case of *Railway Express Agency, Inc.*)\* and there being no federal legislation on the question of unemployment insurance as applied to interstate commerce, our statute on that subject would seem to be valid.

JEF

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\* Page 566 of this volume.

*Railroads—Unemployment Insurance*—Subsidiary company of railroad companies organized to handle express business of railroads is not subject to unemployment compensation act.

August 17, 1934.

INDUSTRIAL COMMISSION.

Attention Harry R. McLogan.

In your letter of August 8, 1934, you inquire whether or not the employees of the Railway Express Agency, Inc., which is an agency jointly owned by various railroads, are engaged in an employment excluded under sec. 108.02, subsec. (e), par. 8, Wis. Stats., which exempts employment by railroads engaged in interstate transportation from the operation of the Wisconsin unemployment compensation act.

We understand from a memorandum submitted to us that the Railway Express Agency, Inc., is an agency of several railroad companies organized for the purpose of conducting express business for the participating lines, and that these railroad companies by an agreement with this company have made it their exclusive agent to conduct and transact express business over the lines of such railroads. This company is required to account to the railroad companies for all moneys received by it as revenue, and retains only such revenue as is necessary to defray the expenses incident to the express operations, the balance being distributed to the railroads in the proportion of amount of express business transacted on their respective lines. All of the stock is owned by the railroads and can pay no dividends. Fourteen of the fifteen directors are active operating officials of the railroads, so that the management is controlled and directed by the railroads.

The question, therefore, arises as to whether the employees of this company are in "employment by railroads engaged in interstate transportation," and the question also arises whether, in view of the fact that the company is engaged in the operation of transportation facilities employed in interstate commerce, the statute in question would be valid if intended to apply thereto.

It is our opinion that the Railway Express Agency, Inc., is not subject to the unemployment compensation act.

A state statute enacted for admissible purposes and which affects interstate commerce only incidentally and remotely is not a prohibited state regulation; but a state statute which by its necessary operation directly interferes with or burdens interstate commerce is a prohibited regulation and invalid.

However, it has been held that where congress has not legislated in some particular field of interstate commerce state legislation in that field is valid. For example, the Minnesota workmen's compensation act as applied to interstate commerce by water (*Lindstrom v. Mutual S. S. Co.*, 132 Minn. 328, 156 N. W. 669), and the Georgia law governing locomotive head lights (*Atlantic Coast Line v. Georgia*, 234 U. S. 280), were upheld in the absence of federal legislation on these subjects.

It has been intimated by counsel for the Railway Express Agency that the federal government has gone into the subject of unemployment within the field of interstate commerce by the provisions of the railway labor act, U. S. C. A. Title 45, ch. 8, 48 Stats. at Large — —, June 21, 1934, and the railroad retirement act, U. S. C. A. Title 45, ch. 10, 48 Stats. at Large — —, June 27, 1934. As we read it, the railway labor act merely sets up machinery and provides methods for settling labor disputes. The railroad retirement act provides a pension system for railway employees, although one of the expressed purposes of the act is "to make possible greater employment opportunity." We do not believe that either of these acts can reasonably be said to have invaded the field of unemployment insurance.

Consequently, we conclude that the Wisconsin statute would not be invalid even though it were intended to apply to the Railway Express Agency. We understand that the 1933 session of the legislature had before it, in Bill 595 A., which failed to pass, the question of extending the exemption of "railroads" engaged in interstate commerce to any common carrier engaged in interstate commerce. The rejection of this bill would seem to indicate that the legislature intended to make the act applicable to corporations other than railroads engaged in interstate commerce.

However, it would seem that the Railway Express Agency is but an arm of the railroad companies organized, so that

as far as express is concerned, the railroads interested in the company should operate as a unit. The situation is not unlike that which would arise if the railroad companies were to combine their passenger departments into a single incorporated department for purposes of economy and operation, centralization of management, etc., and then, by agreement, authorize and require the separately incorporated passenger department to collect all revenues for passenger transportation, deduct its expenses of operation, and pay the balance to the parent railroad companies. The operation of such a separately incorporated passenger department of the railroads could properly be considered a part of the operations of the railroads and hence not subject to the provisions of the unemployment compensation act. Likewise, express business is a franchise obligation of the railroads, and they are obliged to provide the public with such service. *Express Cases*, 117 U. S. 1. Consequently, their handling of express, though it be through the medium of an incorporated agency, really amounts to interstate transportation by railroads.

JEF

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*Recovery Act—Federal Emergency Relief Administration—Workmen's Compensation—State of Wisconsin, through its governor acting under provisions of sec. 20.02, subsec. (9), Stats., may set up insurance plan to protect workers on F. E. R. A. projects from disabilities and fatalities suffered on such projects.*

August 17, 1934.

H. A. NELSON,  
*Industrial Commission.*

You have requested from this department an opinion on the following set-up: You state that our supreme court has held that F. E. R. A. workers were not employees so as to come under the provisions of the compensation act. The F. E. R. A. has insisted that the state and/or its political subdivisions provide benefits for workers who sustain in-

jury while in the course of their employment. It has suggested that a self-insurance plan will probably be the most practical method of anticipating the liability incurred through long-term disabilities and fatalities taken separately from other accidents and that such plan might be financed by setting aside an amount equal to a small percentage of the weekly pay roll, the fund to be obtained from the proceeds of liquor or gasoline tax or other source and made available by order of the governor or local officials.

The question which is presented to us by you is whether the state has authority to divert various tax incomes to insurance for these workers.

We direct your attention to sec. 20.02, subsec. (9), Stats., which reads as follows:

"To the executive department, such sums as may be necessary to enable the state to receive the benefits to which it may be entitled under any act of the seventy-third congress designed to promote economic recovery, which is accepted by the governor for the state pursuant to section 101.34."

Sec. 101.34 reads as follows:

"The governor is authorized to accept for the state the provisions of any act of the seventy-third congress whereby funds or other benefits are made available to the state, its political subdivisions, or its citizens, so far as the governor may deem such provisions to be in the public interest; and to this end the governor may take or cause to be taken all necessary acts including (without limitation because of enumeration) the making of leases or other contracts with the federal government; the preparation, adoption and execution of plans, methods, and agreements, and the designation of state, municipal or other agencies to perform specific duties."

By virtue of the provisions of the federal emergency relief administration law, the governors of the various states are the parties who are to request aid from the federal government. This state has, through its governor, requested and received such aid, so the provisions above quoted clearly apply to the situation in hand. The finances necessary to carry out the self-insurance plan or any other plan approved by you for the purpose of giving compensation to workers on the F. E. R. A. projects could, therefore, be put

into effect upon the approval of the governor or the securing of moneys by the governor in accordance with the provisions of sec. 20.02 (9).

JEF

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*Appropriations and Expenditures—Claims—Bridges and Highways—Damages—*State is not liable in tort while acting in governmental capacity but may grant redress through special enabling act in discretion of legislature.

August 21, 1934.

RALPH M. IMMELL,  
*Adjutant General.*

You have forwarded the report of an injury sustained by a visitor at the Grand Army Home for Veterans, at Waupaca. This person was injured in falling on a defective sidewalk out at the Home. You wish to have an opinion as to whether the state can be held liable for this injury.

It is a long-established and undisputed rule of law that a state cannot be held liable in tort while acting in a governmental capacity. When engaged in private business, i. e., acting in its proprietary capacity, it is subject to the same liabilities as are private individuals engaged in a similar pursuit and hence may be held liable in tort.

*Hayes v. City of Oshkosh*, 33 Wis. 314, sets forth the theory behind the exemption of the state or a municipal corporation from liability in tort while acting in a governmental capacity:

“The grounds of exemption from liability \* \* \* are that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community. \* \* \*

“\* \* \* Individual hardship or loss must sometimes be endured in order that still greater hardship or loss to the public at large or the community may be averted. \* \* \*.” (Pp. 318-319.)

See also *Bernstein v. Milwaukee*, 158 Wis. 576, 578; *Evans v. Sheboygan*, 153 Wis. 287, 141 N. W. 265; *Apfelbacher v. State*, 160 Wis. 565; *Moody v. State's Prison*, 38 S. E. 131 (N. C.); *Chicago Milw. & St. P. R. R. Co. v. State*, 53 Wis. 509.

To the effect that the state or a municipal corporation may be liable in tort when acting in a proprietary capacity, see *State Journal Printing Co. v. Madison*, 148 Wis. 396; *Apfelbacher v. State*, *supra*.

However, a state may extend its liability in tort through legislative enactment.

“\* \* \* The power of the legislature to make the state or one of its subdivisions liable for injuries inflicted by it upon an individual is unquestioned, even if there was no liability at common law. \* \* \*” 26 R. C. L. 66-67.

See *Mills v. Stuart*, 247 P. 332 (Mont.).

The legislature in Wisconsin has from time to time made exceptions to the general rule of nonliability of municipal corporations in tort while acting in their governmental capacity, e. g., liability of towns, cities, villages, and counties for injuries caused by defective highways. Sec. 81.15, Stats. However, it has not made any exceptions to the general rule as far as the state's liability is concerned. There is, then, in this case you present, no liability on the part of the state either according to the common law or by special statutory provision.

Where there is no liability at common law or by statutory provision the legislature may pass a special enabling act whereby an injured individual may recover for a tort by the state. In other words, a claim may also be predicated upon a statute enacted after the injury.

“The power of the legislature to extend the liability of the state or of municipal corporations to pay for injuries caused to private individuals is not limited to the establishment of a general rule for the future, \* \* \*.” 26 R. C. L. 64-65.

In *Tiggerman v. State*, 228 N. Y. S. 576, damages were allowed under a special enabling act passed by the legislature when the state had been negligent in not inspecting and keeping in safe condition the bleachers on a state fair ground.

Therefore, in cases in which injuries have been received through a tort of the state while acting in its governmental capacity, the injured party may petition the legislature for redress and that body, if it sees fit, may pass a special enabling act under which recovery may be allowed in an amount to be fixed by a court of competent jurisdiction.

The Grand Army Home for Veterans at Waupaca is a state institution, established to care for Wisconsin veterans of American wars, and their wives and widows. In furnishing such care the state is acting in its governmental capacity. Therefore, the maintenance of sidewalks at the Wisconsin Veteran's Home is a governmental function of the state. At common law the state cannot be held liable for the injury you set forth. There is no statutory provision making the state liable for injuries caused by defective sidewalks.

Hence, the only way in which this woman might be able to recover is by petitioning the legislature. The legislature could, in its discretion, pass an enabling act allowing her to bring suit in court and granting damages if she establishes her claim.

In conclusion, then, the state is not liable for this injury, but could through its legislative department grant redress to the injured party.

JEF

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*Taxation—Tax Collection—Refunds*—Governmental subdivision cannot repay illegal tax not paid under protest and for which no claim has been filed nor suit commenced within one year from date of payment.

August 21, 1934.

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

You have submitted to this department a request for an opinion on the following set-up: Mr. A has been illegally assessed in the particular school district for a period of twenty years and has paid the tax. The school district

at a special meeting voted a repayment of the taxes paid and the board is now wondering whether or not it can legally repay Mr. A the amount of taxes paid and whether or not the resolution passed at this special meeting is valid.

In the absence of a showing that Mr. A had paid the tax under protest, he can not recover the tax in an action started for that purpose.

“\* \* \* Under sec. 74.73 of the Statutes it is the duty of the taxpayer questioning the tax to pay the same under protest and then file a claim for a refund with the municipality to which the tax was paid.” *State ex rel. Sheboygan v. Sheboygan Co.*, 194 Wis. 456, 461; *Welch v. Oconomowoc*, 197 Wis. 173, 179.

It is to be noted, also, that even if the tax was paid under protest it would be necessary under sec. 74.73, Stats., to file a claim and commence action within one year after payment of the tax and not thereafter. This would clearly preclude recovery of tax payments over a year old. IX Op. Atty. Gen. 132.

Furthermore, it has been held that a municipality is without power to appropriate money for the payment of a debt barred by the statute of limitations. 44 C. J. 1110. Since a governmental subdivision is without power to pay out moneys which it is under no obligation to pay, it would follow that no tax could be legally levied to repay Mr. A.  
JEF

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*Elections—Nominations*—Stickers may be used for voting for party committeemen at primary election.

August 24, 1934.

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

Under date of August 15 you submitted the following question for an official opinion:

“Can stickers be used for voting for party committeemen at the primary election?”

Sec. 6.23, subsec. (11), Stats., provides:

“No pasting names over a ticket or over any names thereon shall be allowed and no name so pasted shall be counted except as provided in section 5.28.”

In 1907, after the enactment of sec. 6.23, subsec. (11), the legislature amended sec. 6.22, subsec. (1), par. (b) (then sec. 37, Stats.) so as to read:

“\* \* \* If the voter does not wish to vote for all the candidates nominated by one party, he shall mark his ballot by making a cross or mark in the square at the right of the name of the candidate for whom he intends to vote or by *inserting* or writing in the name of the candidate.”

In the case of *State ex rel. Tank v. Anderson*, 191 Wis. 538, the court held (synopsis 5):

“Notwithstanding, sub. (11), sec. 6.23, Stats., prohibits the pasting of names on the printed ballot, sub. (1) (b), sec. 6.22, subsequently enacted, provides that an *elector* may *insert* or write in the name of a candidate not appearing on the ballot; and \* \* \* the prohibition against the use of stickers is construed to apply only to *election officials* charged with the preparation and distribution of ballots, *and not to prevent a voter from using a sticker to vote for a candidate whose name is not on the ballot.*” (Italics ours.)

Under this ruling pasters or stickers may be used by the voters in accordance with sec. 6.22 (1) (b) for the purpose of inserting the name of the candidate not appearing on the ballot whom the candidate desires to vote for. There seem to be no exceptions to this, and we are of the opinion that the court would make the same ruling so far as the voting for party committeemen is concerned.

It is true the sec. 6.23 (11) applies to the elections but, under sec. 5.29, the general election laws are also applicable to the primary election. It is also true that sec. 5.19 (1), (a) provides:

“At the September primary each voter, except in counties containing a city of the first class, may write in the space left on his ticket for that purpose the name of not to exceed one qualified elector of the precinct for his party precinct committeeman. The person having the highest number of votes shall constitute such committeeman.”

It may be argued that, because this provision does not use the word "insert" but only uses the word "write," stickers may not be used in voting for committeeman. While the question is not entirely free from doubt, we believe that, in view of the decision in the *Tank* case, above referred to, our court will hold that the same rule applied to the election of public officers will also apply to the election of committeemen. See also XVIII Op. Atty. Gen. 619.

JEF

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*Automobiles—Fish and Game—Confiscation—Mortgages, Deeds, etc.*—Mortgagee of automobile forfeited for unlawful use in violation of game laws under sec. 29.05, subsec. (7), Stats., is not entitled to payment.

August 24, 1934.

CONSERVATION COMMISSION.

You state that last fall the conservation department confiscated an automobile under the statute, the same having been used in violation of the game laws, it being engaged in the transportation of illegal furs and venison at the time it was seized; that in due course the same was sold and the commission realized one hundred sixty dollars on the sale. You say that claim is now made by the Portage Boat and Engine Company, mortgagee, claiming that it is entitled to the payment of one hundred dollars, balance on its chattel mortgage. You ask for an opinion as to whether you must make the payment to the mortgagee.

There is nothing in the game laws providing for forfeiture that expressly protects the interests of a mortgagee. The mortgagee of a chattel has the right to take possession of the same at any time when he deems himself insecure. Our court held, in the case of *Gemert v. Pooler*, 171 Wis. 271, that it was not the legislative intent in subsec. (7), sec. 29.05, Stats., in connection with other provisions of ch. 29, that personal property unlawfully used in violation of that chapter by one who is a trespasser or thief as to such property shall be subject to forfeiture as against the innocent owner.

It seems to be well settled that the question of the guilt or innocence of the person who permits another to use his property, his knowledge of, consent to or connivance at the doing of the particular thing that brings about the forfeiture is wholly immaterial. The instrumentality is in all cases subject to confiscation except where found in the possession of a thief or an actual trespasser.

Forfeiture follows if the use is

“made with his consent or connivance, or with that of some person employed or trusted by him.” *Peisch v. Ware*, 4 Cranch 347, 364.

“\* \* \* Persons who entrust their personal property to the custody and control of another at his place of business shall take the risk of its being subject to forfeiture if he conducts, or consents to the conducting of, any business there in violation of the revenue laws, without regard to the question whether the owner of any particular article of such property is proved to have participated in or connived at any violation of those laws.” *U. S. v. Stowell*, 133 U. S. 1, 14.

“\* \* \* When property becomes liable to forfeiture under the positive provisions of a statute, owners who have in no way participated in the frauds which caused the forfeiture, must seek redress from the wrong-doers who unlawfully used the property with *which they were intrusted*.” *U. S. v. Two Bay Mules*, 36 Fed. 84, 85.

“Liability attaches when the owner ‘is in some way justly chargeable with blame or negligence.’ \* \* \*.” Brief as friends of the court, *Gemert v. Pooler*, p. 24.

See also 12 R. C. L., page 125, paragraph 4.

Under the above authorities it is clear that, in the absence of anything in the statute protecting the rights of the true owner or a mortgagee of the chattel, the forfeiture will be effective as against him so long as the property was not stolen from him or taken by a trespasser. You are therefore advised that you are not required to make contribution to the mortgagee under the facts above stated.

JEF

*Public Lands*—State cannot convey clear title to lands granted to it by federal government on condition that it shall be part of state forest reserve and if abandoned as such shall revert to federal government.

August 24, 1934.

CONSERVATION DEPARTMENT.

Attention H. W. MacKenzie, *Conservation Director*.

In your letter of August 8, 1934, you state that, under the terms of the act of congress dated August 22, 1912, (ch. 328, 37 Stats. at Large 324) the state of Wisconsin was granted for forestry purposes all the unsurveyed and unattached islands in inland lakes north of the township line between townships 33 and 34, north, in the state of Wisconsin. The terms of the grant provided among other things as follows:

“\* \* \*. The islands hereby granted shall be used as additions to the forest reserves only, and should the State of Wisconsin abandon the use of said islands for such purpose the same shall revert to the use of the United States.”

You further state that the conservation department is now anxious to exchange one of these islands for a strip of forested land now owned by a certain individual who is also desirous of making the trade. The land which you propose to acquire will be added to the state forest reserve and is far more valuable for forestry purposes than the island you propose to relinquish.

You inquire whether it is possible to make such an exchange.

We are unable to see how you can furnish a merchantable title to the island in view of the conditions of the federal grant.

There is a rule of law expressed as follows:

“Large quantities of the public domain have been granted by congress to the individual states either generally or for some particular purpose and the rule is that lands granted for a particular objection are held in trust for the fulfillment of the purpose of the grant and cannot be diverted to other purposes.” 50 C. J. 960.

However, since any conveyance of one of the islands mentioned by the state would result in the land reverting

to the use of the United States by virtue of the language used in the grant, it might be that the prospective purchaser could make arrangements in advance with the federal government for perfecting his title at slight or nominal cost, in which case the state could quitclaim its interest to him; but it is clear that he must deal both with the federal government and the state, as the state alone is in no position to convey a clear title because of the reservation in the federal grant to the state.

Otherwise, we see no objection to the exchange as the exchange of forest land for other lands adapted to forestry purposes appears to be contemplated and authorized by sec. 23.09, subsec. (7), par. (e), and sec. 28.15, Stats.

JEF

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*Criminal Law—Inquests*—Coroner's jury must reach unanimous verdict and can render only such verdict as members can agree upon.

August 24, 1934.

CHARLES A. COPP,  
*District Attorney,*  
Sheboygan, Wisconsin.

You inquire whether it is necessary for a coroner's jury, in arriving at their verdict, to reach a unanimous decision. Sec. 366.09, Stats., reads in part as follows:

"The jury \* \* \* shall draw up and deliver to the coroner their inquisition under their hands, in which they shall find and certify when, and in what manner and by what means the deceased came to his death, and his name, if known; and if it shall appear that he came to his death by unlawful means the jurors shall further state who was guilty, either as principal or accessory or were in any manner the cause of his death, if known."

Sec. 366.10 reads in part as follows:

"Such inquisition may be in substance in the following form:

"An inquisition taken, \* \* \* before \_\_\_\_\_, the coroner of the said county, upon the view of the body

of -----, there dead, by the jurors whose names are hereunto subscribed, \* \* \*."

There is no indication in our statutes anywhere else which would throw any light on the question submitted.

In 13 C. J. 1253, sec. 23, the following language is used:

"The inquisition should be signed by the coroner and all the jurors; \* \* \*."

In 5 Encycl. of P. and P. 50, we find these words:

"The inquisition should be signed by both the jurors and the coroner. \* \* \*"

In 5 Standard Encycl. Proc. 533, it is said:

"The verdict must be signed by the jurors as well as by the coroner by writing their names in full, \* \* \*"

I have examined some of the authorities cited in these books, but I find nothing more specific. It seems to be taken for granted that where jurors are spoken of it means all the jurors. It is our opinion that it is necessary to reach a unanimous decision.

You also inquire what action is to be taken in case the coroner's jury cannot agree upon a verdict. The only answer that can be given to this is that the coroner's jury is to find such verdict only as they can agree upon. If the cause of death is unknown, they can so find. If their belief is that death was accidental, they can so find. It seems they cannot render a verdict unless they are unanimous. I have been unable to find anything to the contrary in the books.

JEF

*Indigent, Insane, etc.—Minors—Legal Settlement—*Person with legal settlement in Green Lake county who was committed to state public school and thereafter was committed to northern colony for feeble-minded has not lost her legal settlement by her absence, as she was not voluntarily absent.

Illegitimate child's legal settlement is same as mother's.

August 27, 1934.

BOARD OF CONTROL.

You state that in 1923, one P. was committed from Green Lake county to the guardianship of the state public school at Sparta. In 1928 she was placed by the state public school at Sparta in a foster home in Dane county. While in Dane county she became a problem and the superintendent of the state public school realized that she was feeble-minded and unable to take care of herself. She was therefore returned to Green Lake county and committed to the northern colony and training school as feeble-minded. After her arrival at the northern colony she was found to be two months pregnant, conception having occurred while she was living in Dane county.

You say her baby was born in November, 1930, and has remained at the northern colony and training school since that time without a commitment. The child has an intelligence quotient of 48, and should therefore be committed as feeble-minded to the northern colony.

You state that the county court of Green Lake county has refused to make the commitment, claiming that the responsibility for the child's future and support does not rest on Green Lake county. The mother of the child had her legal settlement in Green Lake county at the time of her commitment. You inquire whether this child should be committed from Green Lake county or from Dane county, where the mother was living at the time of conception. You also would like to know which county should bear the expense of support of the child at the northern colony.

From the facts above stated, it is apparent that the legal settlement of the mother of the baby is in Green Lake county. She could not have lost her legal settlement there by reason of the fact that she was absent.

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 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 person here was committed to a state institution by order of the court and she did not reside in any place voluntarily. She could not, therefore, acquire a legal settlement anywhere else and she could not lose her legal settlement in Green Lake county. You are therefore advised that Green Lake county should commit the baby to the institution and should bear the expense for the support of said child at the northern colony. An illegitimate child has the same legal settlement as the mother under sec. 49.02 (3), Stats.

JEF

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*Contracts—Public Officers—City Treasurer—Malfeasance—Purchase of insurance agency in city by city treasurer, which includes contracts of insurance with city upon which all premiums are paid and in which treasurer has no interest, is not covered by sec. 62.09, subsec. (7), par. (d), Stats., nor sec. 348.28, but contracts remain valid.*

August 27, 1934.

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

You direct us to sec. 62.09, subsec. (7), par. (d), Stats., which reads as follows:

"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. No city officer shall be accepted as surety on any bond, contract or other obligation made to the city."

You state that you are wondering just how far reaching this section is and whether or not it would include the following:

"Mr. A is the city treasurer of X. Mr. A is also the owner of an insurance agency in the city of X, which he purchased some months ago. I am convinced that he cannot write any insurance for the city, but does the above provision also affect contracts of insurance that were in effect before he bought out the agency? He had nothing whatever to do with these contracts and in fact has never, nor will he in the future, derive any benefits from them in the form of premiums. The insurance in effect was all paid for before Mr. A took over the agency. A considerable amount of property in the city of X is included under these policies and of course the city is interested in knowing whether or not they also are null and void in order to properly protect themselves if such is the case."

I find no decision in our court which is directly in point. The language of the section above quoted and also of sec. 348.28 covering malfeasance in office is far-reaching. In 44 C. J. 95, sec. 2179, it is said concerning such a contract:

"The interest must exist at the time the contract is made. If at the time a contract is executed no officer of the city has a pecuniary interest in it, it is valid, and it will not be invalidated merely because an officer subsequently acquires an interest therein, provided there is no evidence of any conspiracy or criminal understanding between the contractor and the city officer at the time the principal contract was entered into; but a subsequent assignment of an interest in the contract to a city officer will itself be void where the latter's private interests under the assignment conflict with his duties as a public officer. Nor will a contract be invalidated because made with a person who became a city officer after it was executed, unless his appointment as city officer was contemplated by the parties at the time the contract was made and was so related to the subject matter thereof as to bring it within the reason of the rule. \* \* \*"

Under the facts stated by you, I am of the opinion that the contracts are valid and are not covered by the above quoted statute nor by sec. 348.28. It would seem there

would be no purpose, considering the intention and reason for the enactment of these statutes, to give them such a broad construction as to invalidate contracts under such circumstances.

JEF

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*Public Lands—Public Officers—Fire Warden*—Town chairman is not authorized to charge fee for issuing burning permit.

August 28, 1934.

CONSERVATION COMMISSION.

Sec. 26.13, subsec. (3), Stats., provides as follows:

“Whenever the town board of any town located outside of a forest protection district deems it imprudent to set fires upon any land within the town, they shall post or cause to be posted in five or more public places in each township in such town, notices, which shall be prepared by the commission, forbidding the setting of fires therein, and after the posting of such notices no person shall set any fire upon any land in said town except for warming the person or cooking food, until written permission has been received from one of the fire wardens of said town.”

Pursuant to this section your department prepared fire warning notices for use by towns located outside of the forest protection districts. Burning permit blanks were also supplied to towns when requested.

Sec. 26.13 (1) provides:

“The chairman of the town board of each town outside the limits of a forest protection district shall, by virtue of his office and the oath thereof, be town fire warden for such town. \* \* \*”

It appears that, in at least one instance, a town chairman has been charging a sum of money for each burning permit which he has issued. You request our opinion as to whether a town chairman may legally exact a fee for issuing a burning permit.

Your question must be answered, No. Under the statute the chairman of a town board in a town outside the limits

of a fire protection district, is, by virtue of his office, town fire warden. It is his statutory duty, in a proper case, to issue a burning permit. Whether or not the case is proper does not depend upon his receiving money, but upon his determination that no harm will result.

The Wisconsin statutes do not specify that a town chairman may make a charge for such service, even though it involves some amount of work or trouble upon his part. In the case of *State v. Cleveland*, 161 Wis. 457, it was stated, p. 459:

“A public official’s right to compensation is purely statutory; what the statute gives he receives, but no more. Mechem, Pub. Off. sections 855, 856. \* \* \*”

A holding to the same effect was made in *Outagamie County v. Zuehlke*, 165 Wis. 32, 40, where it was said:

“\* \* \* A public officer takes his office *cum onere*. He is entitled to no salary or fees except what the statute provides. *State v. Cleveland*, 161 Wis. 457, 152 N. W. 819, 154 N. W. 980; *Quaw v. Paff*, 98 Wis. 586, 74 N. W. 369; *Burgess v. Dane Co.* 148 Wis. 427, 134 N. W. 841; *Kewaunee Co. v. Knipfer*, 37 Wis. 496; *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211, 94 N. W. 74; *Madison v. American S. E. Co.* 118 Wis. 480, 485, 95 N. W. 1097.”

To this list of citations the case of *Henry v. Dolen*, 186 Wis. 622, might be added.

JEF

*Appropriations and Expenditures—Recovery Act—Federal Emergency Relief Administration—Workmen's Compensation*—Money appropriated for relief may be used by industrial commission upon direction of governor to pay indemnity to persons injured on work relief projects and in administering payment of such indemnities under provisions of sec. 101.34 and sec. 20.02, subsec. (9), Stats., where such program is necessary to acquire benefit of federal funds.

August 31, 1934.

INDUSTRIAL COMMISSION.

Attention Voyta Wrabetz, *Chairman*.

In your letter of August 27 you state that there is over \$800,000 in the general fund which was appropriated for relief, and you inquire whether or not this money could, upon direction of the governor, be used for purposes of paying indemnity to men who are injured on work relief projects over and above that which is paid to them in direct relief and whether, if such money is definitely set up for such purpose by the governor, your commission might use some for the purpose of administering the payment of such indemnities.

Your inquiries are answered in the affirmative.

On August 17 an opinion, to which you refer in your letter, was rendered by this office\* to the effect that the state of Wisconsin, through its governor, acting under the provisions of sec. 20.02, subsec. (9), statutes, might set up an insurance plan to protect workers on F. E. R. A. projects.

We again refer to sec. 101.34, Stats., quoted in our previous opinion, which section we believe is broad enough to authorize the program you now have in mind. This section authorizes the governor to take or cause to be taken all necessary acts to the end that the state may accept the provisions of any act of the seventy-third congress whereby funds or other benefits are made available to the state, its political subdivisions, or its citizens so far as the governor may deem such provisions to be in the public interest.

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\* Page 568 of this volume.

We understand from your letter that the Federal Emergency Relief Administration is urging you to set up a plan for the payment of indemnity benefits as a requirement of their expending federal funds in this state.

Therefore, it would seem that, in order to obtain the benefit of these federal funds, the governor would be justified in taking or causing to be taken the steps you mention under sec. 101.34, Stats., and sec. 20.02, subsec. (9), Stats., which appropriate to the executive department such sums as may be necessary to enable the state to receive the benefits of federal funds.

It would also seem clear that the administration of such a program and the handling of such funds should be taken care of by the industrial commission in accordance with the workmen's compensation statutes so far as applicable or in such other ways as may be deemed expedient, as sec. 20.57 (4) provides that there is appropriated to the industrial commission, from the general fund, all moneys made available to the state and accepted by the legislature or governor, pursuant to sec. 101.33, which is the section providing for the acceptance of federal emergency relief.

JEF

*Contracts—Public Officers—City Council—Malfeasance*  
—Member of city council who obtains contract for printing proceedings of council on bid less than one hundred dollars does not violate sec. 348.28, Stats., but contract is void under sec. 62.09, subsec. (7), par. (d).

September 1, 1934.

WENDELL MCHENRY,  
*District Attorney,*  
Waupaca, Wisconsin.

You state that complaint has been made to you of the fact that a member of the city council in one of the cities located in your county operates a newspaper and has submitted a bid for advertising the official proceedings of said council, of which he is a member, and that the council has given him the contract. The bid happens to be under one hundred dollars. You state that under sec. 348.28, Stats., there is no criminal liability by reason of the fact that the bid was less than one hundred dollars, as said section expressly exempts the sale of printed matter or any other commodity not exceeding one hundred dollars in any one year, but you direct my attention to sec. 62.09, subsec. (7), par. (d), which reads thus:

“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. No city officer shall be accepted as surety on any bond, contract or other obligation made to the city.”

You state that you are of the opinion that the contract is absolutely void under this section.

We agree with you in your interpretation. Under the express wording of the last quoted section the contract is absolutely void.

JEF

*Courts—Forfeitures—Public Health—Pharmacy—*Forfeiture incurred under sec. 151.04, subsec. (2), and sec. 151.05, subsec. (1), Stats., must be collected by civil action instead of criminal prosecution.

September 1, 1934.

HENRY G. RUENZEL, *Secretary,*  
*Board of Pharmacy,*  
Milwaukee, Wisconsin.

You inquire whether, in enforcing the provisions of ch. 151, Stats., especially sec. 151.04, subsec. (2), and sec. 151.05, the action is to be civil or criminal.

Sec. 151.04 (2) provides:

“No person shall retail, compound or dispense drugs, medicines or poisons, except paris green, in packages labeled ‘paris green, poison,’ nor permit it, in a town, village or city of five hundred or more inhabitants, unless he be a registered pharmacist, nor institute nor conduct a place therefor without a registered pharmacist in charge, except that a registered assistant pharmacist may do so under the personal supervision of a registered pharmacist, and may have charge during the pharmacist’s necessary absence, not to exceed ten days. If the inhabitants are less than five hundred, only a registered assistant pharmacist is required.”

Sec. 151.05 (1) reads:

“Anyone who violates subsection (1) of section 151.04 shall forfeit ten dollars for each failure, and anyone who wilfully makes a false representation to procure registration or permit for himself or another, or who violates this chapter, shall forfeit fifty dollars for each offense.”

You will note that in each case the offense incurs a forfeiture.

Sec. 288.01 reads:

“In all cases, not otherwise specially provided for by law, where a forfeiture shall be incurred by any person and the act or omission for which the same is imposed shall not also be a misdemeanor, such forfeiture may be sued for and recovered in a civil action. When such act or omission is punishable by fine and imprisonment or by fine or imprisonment or is specially declared by law to be a

misdeemeanor it shall be deemed a misdemeanor within the meaning of this chapter. The word forfeiture, as used in this chapter, shall include any penalty, in money or goods, other than a fine."

It is evident that the "forfeiture" alluded to in the above-quoted sec. 151.04 (2) and sec. 151.05 (1) is not intended to be a fine, which would make the offense a misdemeanor. We are of the opinion that no criminal prosecutions can be brought under these sections but that the action is a civil action for the recovery of the forfeiture.

JEF

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*Taxation—Tax Sales—Waste—Sec. 75.37, Stats., applies to lumber or timber that is contained in buildings on real estate as well as to standing timber.*

September 1, 1934.

CLIVE J. STRANG,  
*District Attorney,*  
Grantsburg, Wisconsin.

In your letter of August 20 you state that a company has been in the wire grass business in your county for some time and has built some large buildings for storage of their hay; that it is delinquent in the payment of its taxes and the county is the purchaser of the tax certificates; that this company now threatens to remove these buildings and sell the lumber. You have advised them that when the members start such action the county will attach the lumber under sec. 75.37 of the statutes. You state upon close study of this section you are in doubt whether the intention of this statute is to apply to a case such as you have or only to standing timber. You ask for an opinion whether the county could proceed under this section, and if not, what would be the remedy, if any, of the county.

Sec. 75.37 reads in part as follows:

"(1) It shall be unlawful for any person or corporation to cut or remove any logs, wood or timber from any land

sold for the nonpayment of taxes while such taxes remain unpaid; \* \* \*”

The section then proceeds to show what procedure to take.

After carefully considering this statute I find there is no aid given by any opinion of this department or any decision of the supreme court. The statute is quite broad and I see no reason why the same should be limited to standing timber. I take it that the buildings were placed on the real estate which was owned by the company. If that is the case the buildings would be part of the realty as much as standing timber.

I am of the opinion that this statute will cover a case such as you present. I see no reason for limiting the statute to cases such as you suggest.

JEF

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*Elections—Residence*—Resident of Barron county who is appointed to state office and moves to Madison may retain his legal residence in his home in Barron county.

September 5, 1934.

A. J. CONNORS,  
*District Attorney,*  
Barron, Wisconsin.

You desire an opinion on the following:

A resident of Barron county is appointed to state office, his commission being for six years. He and his family occupy a residence in Madison and have moved some furniture and household effects to Madison but still retain their farm home in Barron county. At the expiration of his commission it is his intention to return to Barron county as his permanent residence. In which precinct or county should he exercise his right of franchise?

Art. III, sec. 4, Wis. Const., provides:

“No person shall be deemed to have lost his residence in this state by reason of his absence on business of the United States or of this state.”

See also sec. 6.51, subsec. (1), Stats.

The party in question has the right to retain his residence in Barron county and if his residence is on a farm in Barron county he may continue to vote in the town where the farm is located.

JEF

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*Criminal Law—Conspiracy—Elections—Suffrage—Person convicted of conspiracy against United States under sec. 61, United States Criminal Code, does not lose his civil rights.*

September 5, 1934.

WILLIAM J. MCCAULEY,  
*Assistant District Attorney,*  
Milwaukee, Wisconsin.

You inquire whether a conviction in the federal court in Milwaukee, Wisconsin, of conspiracy to commit an offense against the United States, that is, conspiracy to violate sec. 117 U. S. C. A., sec. 61, U. S. C. C., deprives a person of his civil rights. Said section provides as follows:

“Whoever shall knowingly issue or publish any counterfeit weather forecast or warning of weather conditions falsely representing such forecast or warning to have been issued or published by the Weather Bureau, United States Signal Service, or other branch of the Government service, shall be fined not more than \$500, or imprisoned not more than ninety days, or both.” 35 U. S. Stats. at Large 1088.

Art. III, sec. 2, Wis. Const., provides:

“No person under guardianship, non compos mentis or insane shall be qualified to vote at any election; nor shall any person convicted of treason or *felony* be qualified to vote at any election unless restored to civil rights.”

In an official opinion, XV Op. Atty. Gen. 364, this office held that one convicted in federal court of conspiracy to violate the Volstead act has not lost his civil rights in this state. In an official opinion by this department, XIII Op. Atty. Gen. 141, it was held that the term “felony” as used

in sec. 2, art. III should be given the same meaning that our court gave to sec. 15, art. IV of the Wisconsin constitution.

In *State ex rel. Isenring v. Polacheck*, 101 Wis. 427, it was said the word "felony" in the provision of the constitution quoted must be limited to such offenses as were felonies at the time the constitution was adopted. *Jackson v. State*, 81 Wis. 133; *Klein v. Valerius*, 87 Wis. 60, 61.

It appears that this offense was not an offense at common law, for a felony at common law was an offense which occasioned a total forfeiture of lands or goods, or both, and to which might be superadded capital or other punishment according to the degree of guilt. 16 C. J. 55; 2 Bouvier's Law Dictionary 1202.

The punishment for this crime is not even imprisonment but only a fine. You are therefore advised that no one will lose his civil rights by a conviction of said offense.  
JEF

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*Elections—Corrupt Practices—Statutory limitation on disbursements for political purposes by candidate for United States senate after primary, sec. 12.06, subsec. (2), Stats., does not apply to disbursements by personal campaign committee under sec. 12.07.*

September 7, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You inquire whether sec. 12.06, subsec. (2), Stats., which limits expenditures of a candidate for election to the United States senate after the primary to certain specified purposes, applies also to his personal campaign committee or whether such committee, under sec. 12.07, Stats., may continue to disburse funds for all classes of campaign expenses listed in that section up to the amount specified in sec. 12.20, subsec. (1), par. (a), which in the case of a candidate for United States senator would be twenty-five hundred dollars.

Sec. 12.06, subsec. (2), limits political disbursements as follows:

“After the primary, no candidate for election to the United States senate shall make any disbursement in behalf of his candidacy, except contributions to his party committees, for his own actual necessary personal traveling expenses, and for postage, telephone and telegraph expenses, and for payments which he may make to the state pursuant to law.”

Sec. 12.07 provides:

“No party committee nor personal campaign committee shall make any disbursement except:

“(1) For maintenance of headquarters and for hall rentals, incident to the holding of public meetings.

“(2) For necessary stationery, postage and clerical assistance to be employed for the candidate at his headquarters or at the headquarters of the personal campaign committee, incident to the writing, addressing and mailing of letters and campaign literature.

“(3) For necessary expenses, incident to the furnishing and printing of badges, banners and other insignia, to the printing and posting of handbills, posters, lithographs and other campaign literature, and the distribution thereof through the mails or otherwise.

“(4) For campaign advertising in newspapers, periodicals or magazines, as provided in this chapter.

“(5) For wages and actual necessary personal expenses of public speakers.

“(6) For traveling expenses of members of party committees or personal campaign committees.”

These statutes are plain and unambiguous. Under familiar rules there is, therefore, no room for construction. *In re Reeseville Drainage Dist.*, 156 Wis. 238; *State v. Chicago & N. W. Ry. Co.*, 205 Wis. 252.

The legislature has seen fit to treat disbursements by a candidate and disbursements by a party or personal committee differently and under separate sections of the statutes. The purposes for which expenditures may be made in the two cases are not the same, and the legislature has seen fit to limit the expenses of a candidate for the United States senate after the primary to certain enumerated items, where it has not apparently deemed it expedient to make any similar restrictions after the primary in the case

of a party or personal committee. Before the primary, however, under sec. 12.06 (1) (e), the candidate himself might make disbursements for the same purposes as a party or personal committee could in those cases where the candidate has no personal campaign committee, but not otherwise.

Where the legislature has expressed a limitation in the one instance and not in the other, the maxim of "*expressio unius est exclusio alterius*" applies, that is, a particular specification in certain cases by a statute excludes the idea that the legislature intended to make a like specification or limitation in other cases. *State ex rel. Owen v. Reisen*, 164 Wis. 123.

While, as pointed out in your letter, the effect in this instance may be that a candidate who does not have a personal campaign committee is deprived at the general election of the right to make certain classes of disbursements enumerated in sec. 12.07, we do not feel that it is our function to express any opinion as to the wisdom of the legislative policy involved in making distinctions between expenditures by a candidate for the United States senate and expenditures by a personal campaign committee after the primary.

JEF

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*Appropriations and Expenditures — Public Records — Taxation—Motor Fuel Tax—Expense of personal delivery, out of state, of information requested under sec. 78.29, Stats., is proper charge against state.*

September 7, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

A request has been received by you from officials administering the gasoline tax law of another state for considerable data and information relative to the operations of gasoline wholesalers in Wisconsin, which information you have in your possession by virtue of administering the Wis-

consin motor fuel tax law, under the provisions of ch. 78, Wis. Stats. The request comes from officials of a state which has previously co-operated with your department in promoting and perfecting a workable and efficient system of gasoline tax administration. You desire to supply this information and to reciprocate for information and assistance which you have previously had from such other state. The information requested, however, is of such nature as to necessitate a large amount of work in making copies or the supplying of information by personal delivery. The information is taken from records which are available and necessary to your office in the administration of the Wisconsin gasoline tax law. In the event of loss of these records, the information contained therein could not be found elsewhere. You inquire whether or not the expenses resulting from personal delivery of this information would be a proper charge against the state.

It is our opinion that this charge could legally be paid by the state.

Sec. 78.29, Stats., provides as follows:

“The state treasurer shall, upon request duly received from the officials to whom are entrusted the enforcement of the motor fuel tax laws of any other state, forward to such officials any information which he may have in his possession relative to the manufacture, receipt, sale, use, transportation or shipment by any person of motor fuel or kerosene, provided such other state or states provide for the furnishing of like information.”

This special reciprocity provision of the motor fuel tax law was passed by the legislature by ch. 312, Laws 1933. This law is one of the chief sources of governmental revenue. The legislature probably felt the advisability of the closest co-operation between this and other states having similar laws, for the purpose of devising a highly efficient method of administering such an important and comparatively new type of revenue measure. Co-operation in the past has produced extremely fruitful suggestions, but the long distance communications have not permitted a realization of all the benefits possible from reciprocity.

The provisions of sec. 14.32 have not been overlooked, particularly that portion which prohibits the secretary of

state from auditing “\* \* \* items of expenditure incurred while traveling outside the state by any officer or employe of the state or of any department or institution thereof unless in the discharge of his duties required by the public service and after authorization by the director of the budget, unless specific statutory authority exists therefor; \* \* \*.”

It is our opinion that sec. 78.29 is a special statute and furnishes the authority for paying the expenses necessary for the personal delivery of the information requested.

JEF

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*Elections—Nominations—Affidavit to nomination paper which does not recite that affiant knows that elector lives in precinct stated may be amended to conform to fact if such be fact.*

September 7, 1934.

WENDELL MCHENRY,  
*District Attorney,*  
Waupaca, Wisconsin.

You state some nomination papers have been filed by county candidates in your county which contain in the affidavit attached thereto all the elements specified or required in sec. 5.05, subsec. (5), Stats., with the exception that they fail to state “and that he knows them to be electors of that precinct” (par. (b)) named therein and merely recites that they are electors of said county and state.

You inquire whether the said nomination papers may be amended so as to show the actual facts.

Election laws are very liberally construed. This is exemplified by the recent decision of our court in which the statutes were construed so liberally as to permit a third party to have a place on the ballot. If it is a fact that the person who made the affidavit knows in what election precinct electors who signed the nomination papers are located he may, we believe, amend the nomination papers to that

effect. Of course, it would be necessary for the person to make the change in the presence of the notary before whom the affidavit is signed.

We have recently held, in XXIII Op. Atty. Gen. 516, that the name of the candidate, where initials are given, may be corrected so as to give his full name.

JEF

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*Appropriations and Expenditures—Fish and Game—Expense of trip to Canada in interests of fish propagation is not proper charge against state.*

September 8, 1934.

CONSERVATION DEPARTMENT.

The superintendent of fisheries for your department has been directed to contact officials from the Canadian government for the purpose of exchanging Nipigon river or Nipigon lake trout eggs for Wisconsin trout eggs to stimulate a better strain of trout for Wisconsin waters, and to investigate methods and plans of the Canadian government in the propagation of muskellunge in order that propagation of this fish may be carried on in Wisconsin to better advantage. This trip is to be made to Montreal from September 10 to September 15. Inasmuch as it necessitates out-of-state travel, you inquire as to the legality of making the expense a charge against the state.

It is our opinion that this expense cannot properly be made a charge against the state.

Sec. 14.32, Wis. Stats., provides:

“The secretary of state shall not audit items of expenditure for tips, portorage, parlor car seats other than sleeping car berths, or for expenses not necessarily incurred in the performance of duties required by the public service; nor shall he audit items of expenditure incurred while traveling outside the state by any officer or employe of the state or of any department or institution thereof unless in the discharge of his duties required by the public service and after authorization by the director of the budget, unless specific statutory authority exists therefor; 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."

Under the above section the secretary of state is not authorized to audit this expense in the absence of specific statutory authority, or unless the trip was made by an individual in the discharge of his duties required by the public service and after authorization by the director of the budget. The only statute which could be construed as authorizing such a trip would be sec. 29.51. Subsec. (1), par. (e), of that section provides:

"(1) The state conservation commission shall have general charge of the following matters, and all necessary powers therefor, namely:

"\* \* \*

"(e) The receiving from the commissioners of fisheries of the United States, and from the commissioners of fisheries of other states, or other persons, of all spawn, fry or fish donated to the state or purchased, and in the most practical ways, by exchange or otherwise, to procure, receive, distribute, and dispose of spawn and fish; to make contracts and carry on the same for the transportation of fish cars, cans, commissioners and employes by land or water as may be most advantageous to the state; and to take such other measures as in their judgment shall best promote the abundant supply of food fishes in the waters of the state."

This paragraph deals specifically with the power of the conservation commission to make arrangements for the exchange of spawn and fish. Although the commissioners of fisheries of the United States and of other states are referred to, no mention is made of officials of foreign countries, and it is our opinion that the "other persons" mentioned in the above paragraph would not include the officials of Canada or other foreign countries so that the expense of negotiations with them could be a proper charge against this state. While the making of this trip would probably result in great benefits to the state, it would not be considered one of the "*duties required* by the public service." The investigation of the methods and plans of the Canadian government in the propagation of muskellunge would be a

meeting outside the state with foreign officials, and no statute is found which would authorize the secretary of state to audit the expenses of such a trip.

This office does not question the wisdom of your department in its decision that this trip would be for the best interests of the state. As previously held by this office, in XXII Op. Atty. Gen. 856, 857, "Your argument is sound and rather persuasive but should be addressed to the legislature."

JEF

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*Public Health—Nuisances*—District attorney is under no obligation to take proceedings toward abating private nuisance.

September 10, 1934.

OLE J. EGGUM,

*District Attorney,*

Whitehall, Wisconsin.

You state that A has requested you to issue a warrant or take proper steps to abate an alleged nuisance, consisting of a certain fox farm operated by B within one-half mile of a village and within thirty rods of A's residence. A half dozen property owners in the vicinity of the fox farm also complain that the odor is strong and annoying at times. The complainant has become ill from the odor and at times is prevented by the odor from working in his garden. However, he admits that the fox farm is kept in as clean a condition as is reasonably possible considering the nature of the business. This is also the opinion of the local health department, which refuses to take the position that the situation is in any way detrimental to the public health.

You take the position that the district attorney has nothing to do with the matter unless it is detrimental to the general public health and that it is your opinion, under the circumstances, that you are under no obligation to prosecute or start an action to abate the alleged nuisance.

We concur in your opinion.

Sec. 146.14, subsec. (1), Stats., defines nuisances as follows:

"A 'nuisance,' under this section, is any source of filth or cause of sickness. \* \* \*"

This statute further provides:

"\* \* \* The state board of health may order the abatement or removal of a nuisance on private premises, and if the owner or occupant fails to comply, the board, or its agent, may enter upon the premises and abate or remove the nuisance.

"(2) If a nuisance be found on private property the local board of health shall order its abatement or removal within twenty-four hours, and if the owner or occupant fails to comply he shall forfeit not less than five nor more than fifty dollars, and the board may abate or remove the nuisance."

These sections of the statutes would seem to indicate that, in the case of public nuisances, the initiative should be taken by either the state or local board of health. Further, if an action to enjoin a public nuisance should be commenced, it is provided by sec. 280.02, Stats., that such action may be commenced in the name of the state, either by the attorney general upon his own information, or upon the relation of a private individual having first obtained leave from the circuit court to commence and prosecute the same.

The practice has been for the district attorney to start the action on leave of the circuit court, and to prosecute the same. See XI Op. Atty. Gen. 914. But in the present instance, the situation would seem to fall short of being a public nuisance under sec. 146.14, Stats. Your judgment on this point seems to be fortified by the attitude of the local health board, which is apparently disinclined to exercise the powers granted it by sec. 146.14 (2) and is unwilling to concede that the situation is detrimental to the general public health.

The situation is not unlike that which existed in the case of *Clark v. Wambold*, 165 Wis. 70, mentioned in your letter, where the court refused to enjoin the maintenance of pig pens adjoining the plaintiff's premises, which pens were kept as clean and sanitary as could be reasonably expected,

although there may be some difference as to the degree of unpleasantness of odors involved in the two situations. See also *Stadler v. Grieben*, 61 Wis. 500; *Pennoyer v. Allen*, 56 Wis. 502; *Dolan v. Chicago, M. & St. P. Ry. Co.*, 118 Wis. 362, and *Holman v. Mineral Point Zinc Co.*, 135 Wis. 132.

Whether or not A could successfully maintain an action against B to enjoin the maintenance of the fox farm as a private nuisance is a point upon which we do not feel called upon to express an opinion, but at any rate we do not see that it is your duty to institute any proceedings upon the facts as you have stated them.

For additional opinions of this office on the subject of nuisances which you might be interested in reading we refer you to the following: Op. Atty. Gen. for 1912, 742; III Op. Atty. Gen. 636, VI 141 and 589, XIII 17, XVIII 85, XX 561.

JEF

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*Bridges and Highways—Town Highways—Damages—Public Officers—Neglect of Duty*—Town board has power to fix amount necessary to repair bridge.

Town officers are not criminally liable for nonfeasance in failing to repair bridge where town has refused to vote necessary funds for repairs.

Civil remedies of parties claiming injury are limited to relief afforded under secs. 81.14 and 81.15, Stats.

September 12, 1934.

SIDNEY J. HANSON,  
*District Attorney,*  
Richland Center, Wisconsin.

You state that you have been requested to file an information against a certain township in your county for failure to repair a bridge on a town highway which was washed out over two years ago, making the highway impassable beyond that point. We might add that additional information concerning this situation has reached this office through complaints we have received. Among other things, it seems

that certain residence property is rendered highly inaccessible by reason of the nonrepair of the bridge and that school children are unable to go to school during times of high water. You state that the county highway committee estimated the cost of repair would be \$4,000.00 and that a private contractor estimated the cost at \$1,200.00 or \$1,300.00. A bank failure has tied up all available assets of the town except about \$1,200.00, and the assessed valuation of the township is \$830,000.00. It also appears that a petition was presented to the town board to discontinue the highway; that the board granted the petition, but on appeal from the decision of the board, the county court appointed three commissioners, who reversed the decision of the town board; so that there is apparently no question concerning the status of the highway as a town highway.

The question of raising money for repairing the bridge was submitted to the town meeting on April 4, 1933, and voted down 119 to 3. The vote was taken because sec. 87.01, subsec. (3), Stats., provides that if the town's share of the cost shall exceed the amount produced by a tax of two mills on the dollar, the action of a town meeting shall be required. Sec. 87.01, subsec. (2), provides that if the town has an assessed valuation of four hundred thousand dollars or over, the county shall pay the cost of constructing or repairing the bridge in excess of two hundred dollars up to four hundred dollars and that the town and county shall each pay one-half of the cost over four hundred dollars.

You ask whose judgment shall govern in an estimate of the cost of construction, there being such a wide variance here between the figures of the county highway committee and the private contractor.

It has been held that the town board has the power to determine the general character of the repairs or of a bridge to be built, and to fix the amount necessary to be expended for such purpose. *State ex rel. Star Prairie v. St. Croix County*, 83 Wis. 340. Therefore, the town board would seem to be free to accept whichever estimate it pleases, or make one of its own.

You ask further: If the town meeting votes down such tax levy, as in the instant case, are the township officers

responsible in any manner, and are they subject to prosecution for nonfeasance?

This question is answered in the negative. The situation differs from that discussed in X Op. Atty. Gen. 877. There abundant funds were available for repairs, and it was ruled that the willful neglect of town officers to keep highways in repair could be punished under sec. 4550, Stats. (now sec. 348.29, Stats.). The law, however, does not require an impossible thing. Mandamus will not lie to compel repairs without proving that there are sufficient funds in the treasury properly applicable thereto. *State ex rel. Gericke v. City of Ahnapee*, 99 Wis. 322; *State ex rel. Van Lysel v. Scheuring*, 154 Wis. 93. As a matter of fact, mandamus does not lie to compel the town board to repair a town highway even if funds are available. *State ex rel. Wisniewski v. Rossier*, 205 Wis. 634. Here the real offender is the town, which has failed to provide the necessary funds for the repairs. Under the doctrine of *Town of Saukville v. State*, 69 Wis. 178, and *Town of Byron v. State*, 35 Wis. 313, this would appear to be a proper case for filing an information against the town. See also, X Op. Atty. Gen. 877; 6 L. R. A. 695 n, 39 L. R. A. (n. s.) 412 n, and *Wheeler v. Town of Westport*, 30 Wis. 392.

However, the remedy of indictment against a town does not appear to be available in the absence of an express statutory duty on the part of the town to repair. 39 L. R. A. (n. s.) 412 n. It is also intimated in that note that the remedy of indictment is not available unless the statute expressly provides such remedy, although this point is not discussed in the Wisconsin cases. The statutes with reference to such duty are no longer the same as they were when the Wisconsin cases above cited were decided. The *Byron* case was decided in 1874, when the statute listed among the duties of the town supervisors the duty,

“To cause bridges which are or may be erected over streams intersecting highways to be kept in repair.” Taylor, Stats. of Wis. 1871, Title VI, ch. XIX, sec. 1, subsec. 4.

This statute was also in effect at the time *Wheeler v. Town of Westport* was decided. Although that case is not directly in point, as it was a civil action against the town by a party injured through insufficiency or want of repairs

in a highway, and the court merely intimated that had an information or indictment been presented against the town, conviction must have followed, for the road was at the place in question really a public nuisance. The statute was substantially the same at the time of the *Saukville* case, *supra.*, R. S. 1878, sec. 1223, subsec. 3.

In view of the language of the *Wisniewski* case, *supra.*, holding, in the absence of a clear statutory duty and where an adequate statutory remedy existed, mandamus would not lie to compel a town board to repair a town highway, it might be that our supreme court would no longer hold that a town could be proceeded against criminally, although the Wisconsin cases herein cited do not appear to have been specifically overruled or modified.

You also ask: What recourse, if any, have the parties claiming injury if the cost of construction exceeds the authority of the town board and the town meeting refuses to appropriate money for repairs?

From the discussion of the court in the case of *State ex rel. Wisniewski v. Rossier*, *supra.*, it would seem that the remedies would be limited to those provided by secs. 81.14 and 81.15, Stats.

Sec. 81.15, however, appears to be designed primarily for the purpose of affording relief to one who has sustained damages in an accident resulting from defects in a highway or bridge. It may or may not be broad enough to cover damages to the property of a land owner which has been made more or less inaccessible by reason of the bridge being out. Assuming that this statute is broad enough to cover such a case, it is further provided that no action shall be maintained unless notice is given within thirty days after the happening of the event causing the damage. Here the bridge has been out over two years and the thirty-day period has long since expired, unless the event can be considered a continuing one.

Sec. 81.14 provides for an appeal to the county board by any fifteen freeholders, where the town shall refuse, fail or neglect to open up a highway and put the same in reasonable condition for travel. Since the legislature has provided this specific remedy applicable to situations similar

to the one herein, it would seem that parties claiming injury should first endeavor to avail themselves of the relief afforded by this statute.

JEF

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*Public Officers—School District Treasurer—Town Clerk*  
—Offices of town clerk and treasurer of graded school district are not incompatible.

September 12, 1934.

L. F. SCHMITT,  
*District Attorney,*  
Merrill, Wisconsin.

You inquire whether the offices of town clerk and treasurer of a graded school district are compatible.

It is our opinion that these offices are compatible, notwithstanding certain possible objections pointed out in your letter. You suggest that under sec. 40.10, subsec. (2), (a), Stats., it is the duty of the treasurer of the school district to apply for, and if necessary sue for, all money appropriated to or collected for the district; that while the town clerk is not a member of the town board, he would be in an embarrassing position were he to be forced in his capacity as district treasurer to sue the town board on which he acts as clerk. This strikes us as being a rather weak ground upon which to hold that the offices are incompatible. The test of incompatibility is whether the officer is placed in a position whereby his interest in one office is in opposition to his official position in the other. The inconsistency which makes the offices incompatible lies in conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. 46 C. J. 942.

The duties of the town clerk are clerical, and since he is not a member of the board, his connections are not such as to place his interests as clerk in opposition to his duties as treasurer of the school district. Embarrassment is not

the test of incompatibility. If it were, public officials would almost every day find themselves disqualified from discharging their duties.

You further point out that under sec. 17.26, subsec. (1), Stats., the clerk of the town is required to appoint some one to fill a vacancy on the school board in the event the remaining two members cannot agree upon an appointment; that in the event of the death or resignation of a director, it would leave the treasurer and clerk to agree upon a third party to fill the vacancy, and that the treasurer, being also the town clerk, could refuse to agree and obviously thereby bring himself to fill the vacancy on the school board. You disagree with V Op. Atty. Gen. 852, in which it was stated that in such instances there is a presumption that public officers will perform their duties in a proper manner. We are unable to see that this presumption is any more remote or speculative than is the presumption or possibility that the town clerk will refuse to agree on an appointment with the other director of the school board in case of a vacancy. In fact, we feel that the presumption stated in this opinion is much the stronger of the two. We have again carefully reviewed the opinion of V Op. Atty. Gen. 852, and believe it to be a scholarly, sound and well written opinion. We are therefore constrained to reaffirm the position there taken.

You also point out that under sec. 60.45, subsecs. (15), (16), (17) and (18), Stats., the town clerk has several further duties pertaining to school affairs which you concede to be mostly ministerial, although you feel they would be more efficiently and impartially performed by a town clerk who would not also occupy the position of school director.

Sec. 60.45, subsecs. (15), (16), (17) and (18), provides:

“(15) To record such description of school districts, and such orders concerning the organization, alteration or dissolution thereof as shall be made by the town board.

“(16) To make and keep in his office a map of the town, showing the exact boundaries of all the school districts therein as appear from the records on file, and when a new district is formed to make and furnish a map thereof to the district clerk.

“(17) To apportion the school money collected by the town and that received from the state for the several school districts of the town on the third Monday of March each year, or as soon as the same shall be collected or received by the town treasurer, to the several districts and parts of districts within the town as provided in these statutes.

“(18) To make and transmit on or before the first day of August in each year, to the county or district superintendent of the county or district in which his town is situated two copies of a report, stating the whole number of school districts separately set off within the town, and the number of parts of joint districts in which the schoolhouses belonging thereto are located in his town.”

We believe these duties are not merely *mostly* ministerial, but are *wholly* ministerial, and do not consider that there is any legal conflict between their performance and the performance of the duties of treasurer of a graded school district.

JEF

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*Public Health—Cemeteries*—Provision of sec. 157.11, subsec. (9), par. (b), Stats., that county pay cemetery association three per cent per annum on sums turned over to county treasurer by association is mandatory.

September 13, 1934.

CLIFFORD M. LAMAR,  
*District Attorney,*  
Baraboo, Wisconsin.

A cemetery association has deposited a certain sum of money with the treasurer of Sauk county under the provisions of sec. 157.11, subsec. (9), par. (b), Stats. That section provides that the county shall pay the association not less than three per cent per annum on money so deposited. The county receives only two and one-half per cent interest from the bank on this money and must pay the state two per cent for protection. Thus, the county is netting but one-half per cent on this money. You wish to know whether, under these circumstances, the county must

pay three per cent on the sum turned over to the county treasurer by the cemetery association.

The answer is: The statute is mandatory, specifying that "such county *shall* pay \* \* \* interest \* \* \* of not less than three per cent per annum, \* \* \*," and therefore Sauk county must pay at least three per cent per annum to the cemetery association.

Ch. 448, Laws 1923, sec. 111, consolidated and revised certain of the laws in regard to cemeteries to read.

Sec. 157.11 (9) (b).

"Money given an association for perpetual care may be deposited with the treasurer of the municipality nearest the cemetery. The treasurer shall invest it under section 2100b [now sec. 231.32] *or* deposit it with a bank or trust company of this state and shall keep a record thereof. *If not invested it shall bear four per cent interest.* Deposit shall be made and the income paid over in the first week of June each year and duplicate receipts shall be given, one filed with the municipal clerk and one with the association \* \* \*."

Ch. 227, Laws 1927, amended this section to read:

"Money received by an association for perpetual care shall be invested as provided in section 231.32 or in such other manner as may be approved by the county judge of the county wherein the cemetery is located *or* it may be deposited with the treasurer of the municipality nearest such cemetery and such municipality shall pay said association annually interest on sums so deposited of not less than four per cent per annum. Deposit shall be made and the income paid over in the first week of June each year \* \* \*."

Chs. 65 and 196, Laws 1929, amended this section, but the amendments then made are not material to the present problem.

Ch. 326, Laws 1931, added the proviso:

"\* \* \* If such association is dissolved or becomes inoperative, such municipality shall use the interest on such fund for the care and upkeep of such cemetery."

Chs. 134 and 246, Laws 1933, amended the section so that it read:

"Except as hereinafter provided in respect of funds for the perpetual care of public mausoleums and columbariums

money received by an association for perpetual care shall be invested as provided in section 231.32, or in such other manner as may be approved by the county judge of the county or adjoining counties where the cemetery is located, or it may be deposited with the *treasurer of the county* in which such cemetery is located, and such county shall pay said association annually interest on sums so deposited of not less than *three per cent per annum*. \* \* \*

This is the form of the statute at the present time.

A study of that portion of the legislative history of sec. 157.11, subsec. (9), par. (b), Stats., set forth above, reveals the following interesting facts:

1. By the laws of 1923, if the funds were handed over to the treasurer of the nearest municipality, the treasurer had two alternatives. He was (a) to invest it under sec. 2100b (now sec. 231.32) or (b) deposit it with a bank or trust company of this state. If not invested it was to bear four per cent interest. Some banks and trust companies at that time were paying interest on deposits at the rate of four per cent per annum on accounts similar to these so-called dormant accounts.

2. According to ch. 227, Laws 1927, such money could be invested by the association under sec. 231.32, Stats., or it could be turned over to the treasurer of a municipality and such municipality was obliged to pay the association not less than four per cent per annum. From this it would seem that the legislature now wanted the investing to be done by the association itself; and, if the money was turned over to a municipal treasurer, such treasurer could only deposit it and turn the interest over to the association. This argument is substantiated in part by the fact that the municipality was still to pay four per cent, which was what was, according to ch. 448, Laws 1923, to be paid if the fund was *not invested*.

As shown by the quotations above, sec. 157.11, subsec. (9), par. (b), was later amended to read that the association could turn the fund over to the county treasurer instead of the "treasurer of the municipality nearest" and it was provided that the county pay three per cent per annum interest. The provision of interest at three per cent, a reduction of one per cent, is an adjustment made in recognition of the decrease in interest rates on investments gen-

erally, and hence on those offered by bank and trust companies, and is entirely consistent with the theory that the county treasurer is to deposit the money in a bank or trust company.

As you point out in your letter, the county now receives only two and one-half per cent from its deposits. Unfortunately, no further reduction in the rate of interest the county is to pay the association has been made to allow for this latest decrease in interest rates of banks, and the county is still obliged to pay three per cent, although it is now receiving only two and one-half per cent from the banks, and because of the two per cent which must be paid for protection, netting only one-half per cent. The disposition of moneys received by a cemetery association for perpetual care is governed by specific statutory provisions. These statutory provisions must be strictly adhered to in administering such moneys and are controlling until changed by the legislature. The statute is plain and unambiguous as to the amount of interest the county treasurer must pay on such moneys which are turned over to him. Therefore, while sec. 157.11, (9) (b) remains in its present form the county is obliged to pay at least three per cent per annum interest to the cemetery association. Therefore, the county will have to provide the difference between the one-half per cent it nets on the association's moneys which it has deposited in the bank and the three per cent it is required to pay to the association. See sec. 34.06 (2), Stats.

JEF

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*Elections—Residence—Recovery Act—Civilian Conservation Corps—Members of Civilian Conservation Corps camp do not acquire residence for voting purposes in town where such camp is located.*

September 13, 1934.

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

You inquired by telephone September 12, 1934, whether members of a Civilian Conservation Corps camp are en-

titled to vote in the town where such camp is located. The men in question have all been Wisconsin residents for some time and have been in the camp for several months.

The answer is, No.

The constitution grants the right to vote to citizens of the age of twenty-one years or upwards who shall have resided in the state for one year next preceding any election, and in the election district where the person offers to vote such time as may be prescribed by the legislature, not exceeding thirty days. Art. III, sec. 1, Wis. Const. Only ten days' residence within the election district is required under sec. 6.01, subsec. (2), Stats.

However, residence for voting purposes is described in the statutes as follows:

Sec. 6.51, subsec. (2) :

"That place shall be considered and held to be 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."

Subsec. (4), sec. 6.51, also provides:

"A person shall not be considered to have gained a residence in any town, ward or village of this state into which he shall have come for temporary purposes merely."

In construing this section it has been held that a person who is temporarily in the election district and who means to leave when certain work is finished, is not a resident of the district. *State ex rel. Hallam v. Lally*, 134 Wis. 253.

In *State ex rel. Small v. Bosacki*, 154 Wis. 475, it was held that members of a logging crew who had no intention of remaining in the town in which their camp was located longer than the logging job lasted did not gain a residence in such town and hence were not entitled to vote in a town election, even though they were citizens of the state, were unmarried, had no other place which they claimed as a home, and ate, slept, and kept their clothing in the logging camp.

The court pointed out in this case that the statutes above quoted had for their purpose the preserving of the right of self-government in local matters to the permanent residents of the locality and that in view of the great number

of transient workmen in many parts of the state there was urgent necessity for such legislation.

“\* \* \* Sound public policy dictates that such mere transient sojourners in a town, who usually have no interest in an economical local government, or any adequate knowledge of local conditions and candidates for office, should not be permitted to control the result of an election therein, or to override the will of a great majority of the permanent residents who have to pay the taxes for the support of their government.” *State ex rel. Small v. Bosacki*, 154 Wis. 475, 478.

We believe that the facts in the *Small* case, *supra*, are quite similar to those in the question you ask. Civilian Conservation Corps camps, as we understand it, are presumably temporary emergency relief projects, a considerable part of the earnings of these workers being sent back to their homes from which they are temporarily absent, and to which it is doubtless their intention to return when the camps close or when their term of enlistment expires. It would seem that the presence of such workers in a camp should be considered for temporary purposes merely, and hence under the statutes and authorities cited would not result in the gaining of a residence for voting purposes in the town where the camp is located.

JEF

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*Bridges and Highways—State Highways*—When city or village street which has been improved with local moneys is made part of county highway system without being improved city or village merely continues its maintenance of it.

Authority for expenditure of moneys for maintenance of county roads not in cities or villages is found in sec. 83.01, subsec. (6); Stats.

September 13, 1934.

ARNO J. MILLER,  
*District Attorney,*  
Portage, Wisconsin.

You wish to know what governmental unit is responsible for the maintenance of streets in cities and villages im-

proved with local money only which were made a part of the county system. You point out two statutory provisions:

Sec. 83.06, subsec. (1):

"All city and village streets improved with state or county aid \* \* \* shall be maintained by the cities and villages in which they lie. \* \* \*."

Sec. 83.01, subsec. (6):

"Each county board shall, \* \* \* select a system of county trunk highways, exclusive of the state trunk highway system; which shall be marked, signed and maintained by the county. \* \* \*."

You wish to know which of them governs in the case you present. The answer is that sec. 83.06, subsec. (1) prevails. In an opinion in XXIII Op. Atty. Gen. July 3, 1934, this department held that sec. 83.01, subsec. (6) "\* \* \* is a more general statute and applies to the county trunk highways in the county that are not included in cities or villages while sec. 83.06 \* \* \*, being a more special statute, \* \* \* takes precedence over the provisions of sec. 83.01 (6)." In other words, the specific provision for certain portions of the highway (i.e., city and village streets) would prevail over the general provision for county highways.

The statutes governing county trunk highways which are also city or village streets are secs. 83.03 (6) and 83.06 (1). These statutes are construed in the following opinions of this department: XIV Op. Atty. Gen. 287, XVI 337, XVII 581, XVIII 581, XX 471, XXI 165.

When a county first determines that a given county trunk highway shall run along a city street and the county improves the street for this purpose, the county bears the greater share of the expense, the statute, sec. 83.03, (6), providing:

"\* \* \* It may assess not more than forty per cent of the cost of such improvement against the town, village, or city in which the improvement is located as a special tax, provided the amount of such tax shall not exceed one thousand dollars in any one year; \* \* \*."

However, once the highway has been laid or improved and has become a part of the county trunk highway system,

the maintenance and current upkeep of such portion of the highway as is also a city or village street is for the city or village. If, as in the case you present, a city or village street which has been improved with local moneys is made a part of the county highway system without being improved, the city or village merely continues its maintenance of it.

You wish also to know whether the county board has authority to appropriate money for the maintenance of county roads not state highways within the definition of sec. 83.01, (5), under 83.06, (1). The answer is, No. Sec. 83.06 (1) merely provides:

“\* \* \* All other [those not city or village streets] state highways shall be maintained at the expense of the county in which situated.”

You have said these are not state highways.

You wish to know whether the county board would have authority to so appropriate money under sec. 83.03 (6). This section gives it authority to construct or improve or aid in constructing or improving any road in the county. This, however, does not cover ordinary maintenance charges. Authority for expenditure of moneys for maintenance of county roads not in cities or villages would be found in that provision of sec. 83.01 (6) to which you referred, namely, that county trunk highways shall be “marked, signed and maintained by the county.”

JEF

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*Trade Regulation—Collection Agencies—Elements to be considered in determining whether given corporation is to be classified as collection agency under sec. 127.01, Stats., are discussed.*

September 13, 1934.

FRED G. SILBERSCHMIDT,  
*District Attorney,*  
 LaCrosse, Wisconsin.

You wish to know whether a certain firm must file a bond as provided for in sec. 127.01, Stats. I quote from your letter a description of the firm:

"A Wisconsin corporation \* \* \* engaged principally in the business of furnishing credit information to a clientele, also engages in the collection of accounts for such clientele. This clientele consists of members subscribing to the credit reporting service, paying a fixed sum, depending upon the size of the particular client's business. For that payment, the client receives a certain number of credit reports and pay for any additional reports received, over and above that number. The members subscribing to the credit reporting service, and only those members, can place their accounts for collection with the collection department of this corporation. \*\* \* \*\*"

Whether or not a given corporation is a collection agency, and hence must file a bond in accordance with sec. 127.01 must be determined from the organization and business of that particular business. You have not given enough facts about the organization of this corporation for me to be able to give a categorical answer to your question.

I shall, however, point out certain elements which must be considered in determining whether or not a corporation is to be classified as a collection agency.

Subsec. (1), sec. 127.01 says there must be a bond filed where the collection is for others, i. e., some one outside of the corporation. Thus XIII Op. Atty. Gen. 51, points out:

"The obligations imposed under the bond \* \* \* clearly indicate that the principal purpose of the section is to secure creditors against possible losses by insolvent collection agencies. \* \* \* a bond is required only where the collections are undertaken *for others*. This section does not apply to a firm that does its own collecting.  
\* \* \*

"\* \* \*

"If this so-called 'collection agency' should hold itself out as a collection agency, that is, advertise or solicit collections for others, then it would be within the contemplation of the statute and required to furnish a bond."

That opinion holds, in brief, that a firm which does only its own collecting, though under a name different from its own, designated as a collection agency, is not required to furnish a bond under sec. 127.01.

XII Op. Atty. Gen. 464, also points out that the collections, to bring a corporation within the purview of sec.

127.01, must be for others. That opinion holds that where an association of business and professional men employs a secretary who sends out notices of delinquencies to debtors of members of the association and publishes monthly for the benefit of such members a list of those delinquents who do not pay after such notices, neither association nor secretary is required to give a bond under sec. 1747-150, Stats. 1921 (now sec. 127.01, Stats.).

Whether the corporation you describe is collecting *for others* depends upon whether or not the people whose accounts are collected are actually bona fide members of the corporation doing the collecting. This must be determined by yourself as you have access to all the facts concerning organization, business, etc., to which I do not have access. Your use of the word "clientele" in designating those for whom accounts are collected would seem to indicate that they are merely customers of the corporation and not members of it. The fact that the clientele "subscribes" for the credit information also gives the impression of a corporation and customer relationship.

If you decide that this corporation is in fact collecting *for others* and hence would seem to be required to furnish a bond under sec. 127.01, you will then have to decide whether it comes within any of the exceptions set forth in subsec. (6) of this section, which reads as follows:

"This section shall not apply to any attorney at law \* \* \* to a national bank, to any bank or trust company \* \* \* or to professional men's associations, \* \* \* or to any person, firm, or corporation not conducting or maintaining an office for the purpose of engaging principally in the business of collecting or receiving payment for another of any account, bill or other indebtedness."

The facts you set forth do not intimate in any way that this corporation is a professional men's association, so it would probably not come within that exception. You say the corporation is engaged "principally in the business of furnishing credit information." If the collecting of accounts is actually a minor function as compared with the giving of the information, the corporation might come within the letter of this exception, although to my mind it is doubtful whether the legislature contemplated making

such a corporation—giving credit information and collecting accounts—an exception even if the collecting is actually a secondary function. Whether or not such collecting is truly a secondary function is again more easily determined by one familiar with the functioning of the corporation. A mere statement by the corporation that the collecting is of secondary importance does not make it so. Also, the chief inducement for subscribing for the credit information may be the acquiring of collection services.

JEF

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*Indigent, Insane, etc.—Legal Settlement—Recovery Act Civilian Conservation Corps—Prerequisites to obtaining legal settlement are discussed.*

Mother living on twenty-five dollars per month paid to her by government as part of remuneration of her son working in Civilian Conservation Corps camp is not being supported as pauper so as to prevent her gaining legal settlement where she is residing.

September 15, 1934.

CHARLES A. COPP,  
*District Attorney,*  
Sheboygan, Wisconsin.

You state that one A, prior to May 28, 1933, had a settlement in the city of West Allis, Milwaukee county, and from there received poor relief on March 15, 1932, and again from April 19 to June 8, 1933; that some time prior to May 28, 1933, her son B was sent to a Civilian Conservation Corps camp, where he remained until July 3, 1934, during which time twenty-five dollars was paid by the government to A in accordance with government regulations; that on May 28, 1933 A came to the city of Sheboygan and then went to live with certain residents of the town of Sheboygan in the spring of 1934; that on October 7, 1933, she caused her furniture to be moved from West Allis into storage in the city of Sheboygan and has been rooming all of the time that she has been in Sheboygan county, living

on the money from the Civilian Conservation Corps camp pay to her son B. The son B having been returned from the Civilian Conservation Corps camp on July 3, 1934, her income ceased and A applied for aid in the city of Sheboygan on August 10, 1934.

You inquire:

1. Is the moving of the furniture to the city of Sheboygan on October 7, 1933, significant in determining a change of residence for settlement purposes?

Answer, No. There are several types of residence established by law, and these differ in their prerequisites. For instance, the requirements for a voting residence differ from those here in question, i. e., requirements for a legal settlement. The moving of the furniture and abandonment of the home in West Allis would be of significance if a voting residence were here in question. Residence for voting purposes depends in large measure upon intention to have one's home in a certain municipality; and, moving of furniture from one city to another is evidence of intention to change one's "home city." However, all that is necessary in establishing a legal settlement in a given community is a year's residing in the place; it is enough merely to be physically present in a community for a year or more, provided one is not supported as a pauper during that period.

Sec. 49.02, subsec. (4), Stats., 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. \* \* \*"

Thus, the moving of the furniture is not significant in a solution of the problem you present.

2. Would the money received by A from the pay of her son B at the Civilian Conservation Corps camp prevent her from gaining a legal settlement, i. e., has she received relief within the meaning of sec. 49.02 (4), quoted above?

Answer, No.

Section 49.02 (4) contemplates the furnishing of relief as a charity measure and does not contemplate that this

aid should be furnished upon a contract basis. XXII Op. Atty. Gen. 145, 146. When a person is supported as a pauper within the meaning of sec. 49.02 (4) so as to prevent his gaining a legal settlement, he is supported by charity, either municipal or private. There is no return from the pauper to the organization granting aid. The people working under C.C.C. are not objects of charity—they are not being supported as paupers so as to be brought within the restriction on legal settlement set forth in sec. 49.02 (4), and neither are their families who are subsisting on the twenty-five dollars per month, which is part of their remuneration for working in the C.C.C. camps. The people in the C.C.C. camps are supporting themselves by working for the government. They have jobs and are giving the government their labor in return for the supplying of their wants plus a small cash salary. They are supporting themselves and their families in much the same way as a farm laborer who works for his keep and a small cash wage.

16 U.S.C.A. sec. 585, 48 Stats. at Large 22, reads in part as follows:

“\* \* \* the President is authorized, under such rules and regulations as he may prescribe and by utilizing such existing departments or agencies as he may designate, to provide for *employing* citizens of the United States who are unemployed, in the construction, maintenance and carrying on of works of a public nature in connection with the for-  
estation of lands \* \* \*.”

The purpose of the C.C.C. camps is to provide employment for the young men of the country who are out of work, so that they may be self-supporting, instead of having to obtain relief from poor relief agencies.

The title of sec. 587 of 16 U.S.C.A., 48 Stats. at Large 23, reads:

“Benefits of compensation act extended to employes under this chapter.”

This shows also that members of the C.C.C. camps are considered employees and not charges of the government. Therefore, their families are not receiving poor relief when they receive the sum of twenty-five dollars monthly. See

*Monroe County v. Jackson County*, 72 Wis. 449, 40 N. W. 224, holding that a mother who is supported by her daughter is not supported as a pauper.

There is another phase to your problem which you did not touch on in your letter. This woman may not have any legal settlement. There is no doubt but that she lost her legal settlement in West Allis by her "voluntary and uninterrupted absence" from that city for over a year during which time she did not receive support as a pauper. See sec. 49.02 (7). The next question is: Did she acquire a legal settlement in either the town or the city of Sheboygan?

From your letter I gather that she has resided in both places since she moved from West Allis. In order to gain a legal settlement under sec. 49.02 (4) she must have resided in either the city or the town of Sheboygan one whole year. The time spent in the two places cannot be tacked together to make up a year. If she has no legal settlement in either the town or the city, the county of Sheboygan will have to care for her under the provisions of sec. 49.04 (1).  
JEF

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*Appropriations and Expenditures—Constitutional Law—Survey of Inland Water Levels—Sec. 10, art. VIII, Wis. Const., does not prohibit survey of inland lake water levels by conservation department if such undertaking is necessary in preserving forests.*

September 19, 1934.

CONSERVATION DEPARTMENT.

Attention Mr. H. W. MacKenzie, *Conservation Director*.

In your letter of September 12, 1934, you state that the alarming low water levels in our inland lakes are seriously affecting our forests in the vicinity thereof, and that there is an insistent public demand that something constructive be done to preserve and continue the development of these forests.

In this connection you ask whether sec. 10, art. VIII, Wis. Const., prevents the conservation department from se-

curing and paying for the necessary services of engineers and others to determine water elevations of our inland lakes for the purpose of providing information to the conservation department that will enable it to take steps to maintain necessary water elevations in such lakes, thereby preserving and aiding in the development of the forests of the state.

Upon the facts stated we believe the constitutional provision referred to does not prohibit the program suggested.

Sec. 10, art. VIII, Wis. Const., provides:

“The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works; but whenever grants of land or other property shall have been made to the state, especially dedicated by the grant to particular works of internal improvement, the state may carry on such particular works, and shall devote thereto the avails of such grants, and may pledge or appropriate the revenues derived from such works in aid of their completion. Provided, that the state may appropriate money in the treasury or to be thereafter raised by taxation for the construction or improvement of public highways. *Provided, that the state may appropriate moneys for the purpose of acquiring, preserving and developing the forests of the state;* but there shall not be appropriated under the authority of this section in any one year an amount to exceed two-tenths of one mill of the taxable property of the state as determined by the last preceding state assessment.”

Note that it is specifically provided that the state may appropriate moneys for the purpose of acquiring, *preserving* and developing the forests of the state.

If the forests are being seriously affected by the low water levels, then the right of the state to appropriate moneys for the taking of steps to correct the low water levels and thus preserve the forests would seem to be clear.

In *State ex rel. Owen v. Donald*, 160 Wis. 21, it was held that creation of a forest reserve, permanent improvement thereof for the production of forest products, conservation and equalization of the flow of natural waters for effect on climatic conditions, development of water power on the reserve, and business operations to make such reserve a source of gain for increase thereof or replenishment of the public treasury are, taken as a whole, a “work of internal improvement.”

Here, however, there are a number of elements lacking which were present in the *Owen* case, and which, when considered as a whole, doubtless influenced the court to classify the undertaking in that case under the head of "internal improvements" and hence prohibited by the constitution, rather than under the head of acquiring, preserving and developing forests which the constitution permits.

"Works of internal improvement" include those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promoters, as distinguished from those other things which primarily and preponderantly merely facilitate the essential functions of government. *State ex rel. Jones v. Froehlich*, 115 Wis. 32.

We do not think that the undertaking you have in mind fits under this definition, but rather that it should be classified under the forestry clause and therefore we are of the opinion that such program is permissible under the constitutional provisions to which you refer.

JEF

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*School Districts—Transportation of School Children—*  
Statutes providing compensation for transportation of school children do not apply to parochial schools.

September 19, 1934.

N. H. RODEN,

*District Attorney,*

Port Washington, Wisconsin.

You state that A resides one and three-fourths miles from a district school, but that he prefers to send his children two and three-fourths miles to a parochial school and you inquire whether he is entitled to the statutory compensation for transportation of his children to such private school.

The answer is, No.

This question was answered by our supreme court in the case of *State ex rel. Van Straten v. Milquet*, 180 Wis. 109,

115-116, where our chief justice, in writing the opinion, said:

“\* \* \* The whole scope and purpose of the statute is to comply with the provisions of the constitutional mandate and that requires that free, non-sectarian instruction be provided for all persons of school age. The board is not authorized to expend public funds for any other purpose. The contract made by the district board whereby it attempted to provide transportation of pupils to a private school was an act beyond its authority and therefore invalid. The fact that two pupils transported were within the statutory class for whom the district board was authorized to provide transportation does not save the contract. The school board is by the statute authorized to provide transportation for such children of school age as desire to attend a public school and no others. \* \* \*”

JEF

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*Appropriations and Expenditures—Recovery Act—Federal Emergency Relief Administration—Workmen's Compensation—Compensation paid to injured relief worker may properly be considered as additional relief made necessary by injuries and hence is payable out of appropriations made for relief by ch. 363, Laws 1933.*

Method of insuring that additional relief granted injured relief worker will be paid out of relief appropriation is discussed.

Administrative expense entailed by paying compensation or additional relief to injured relief worker should be treated as any other direct relief administrative expense and can be paid for out of money appropriated for relief.

September 20, 1934.

INDUSTRIAL COMMISSION.

Attention H. A. Nelson.

In connection with our opinion of August 31, 1934 (XXIII Op. Atty. Gen. 585), concerning the possibility of the industrial commission's setting up a plan upon direction of the governor for the payment of indemnity benefits to relief workers in accordance with the requirements of the Federal Emergency Relief Administration, which is

insisting that this be done as a condition precedent to the granting of further federal funds for relief in this state, the additional question has been raised as to whether compensation for injured relief workers may properly be considered as relief within the meaning of ch. 363, Laws 1933, which provided for the relief appropriation in question.

We are of the opinion that such compensation may properly be classified as relief.

Ch. 363, Laws 1933, sec. 6, subsec. (1), provides, among other things:

“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. It shall also include *wages* paid in cash or in kind for public work provided to dependent persons where the amounts paid are determined upon the basis of actual need \* \* \*.”

This definition is a very broad one. There is nothing in the act which would prohibit furnishing relief to any particular recipient according to his own particular needs. In the opinion of the industrial commission the needs of an injured recipient might very well be different than in the case of one who is sound and healthy. Rather wide control over the subject of relief is granted to the industrial commission under sec. 6, subsecs. (3), (5) and (6), ch. 363, which provides as follows:

“(3) Relief shall be administered in accordance with rules and regulations to be adopted by the industrial commission, to insure adequate home investigations of the needs of applicants, the keeping of proper case records, and the purchase and distribution of aid in an economical manner calculated to preserve the self-respect of the recipients.

“\* \* \*

“(5) The industrial commission may make such investigations and adopt such rules and regulations as are necessary to insure the observance of the conditions prescribed in this section, and the proper accounting and reporting of relief receipts and disbursements by public relief agencies. Such rules and regulations shall conform with the requirements of the federal government in allotting moneys appropriated by congress for relief purposes to this state.

“(6) The industrial commission, when so authorized by the emergency board, shall have power to administer relief

directly through such agencies other than those specified in section 5, as the commission may deem necessary."

For purposes of record, however, additional relief granted to injured workers should perhaps be called relief rather than compensation, so that there may be no question about such expenditures having been intended for relief, although, of course, it is the facts rather than the terminology employed that is important.

The further inquiry is made as to how the industrial commission, having awarded compensation in the form of additional relief to an injured worker, may make sure that such compensation will continue to be forthcoming during the period of disability. Assume, for instance, that part of this relief appropriation was on hand and a subsequent legislature should decide to devote this money to other purposes, regardless of the use which the industrial commission expected to make of such funds in taking care of injured relief recipients to whom compensation or additional relief had been awarded, but which had not yet been fully paid out over the disability period.

It would seem that some device could readily be established to take care of this situation. A lump sum equivalent to that which the injured worker would receive in instalments over the disability period could be awarded to such worker upon condition that it be placed in a bank or trust company and then be released in instalments to such person from time to time during the disability period. In that way the entire sum required by the worker would at once be taken out of the relief appropriation and would not be affected by subsequent happenings to this relief fund.

The question is also asked whether this money appropriated for relief may be used in part to administer the program of providing compensation or additional relief to injured relief workers.

This question is answered in the affirmative.

As we have already pointed out in the first part of this opinion, additional relief may be granted to injured relief workers, and if further administrative expense is entailed by the granting of such additional relief, it should stand on exactly the same footing as any other administrative

relief expense incurred by the commission in direct relief activities.

Attention is called to sec. 7, ch. 363, Laws 1933, subsec. (4), par. (a), which appropriates from the unemployment relief fund to the industrial commission,

“Not to exceed fifty thousand dollars for the performance of the duties of the commission under this act other than the expenses of the direct relief activities specified in subsection (6) of section 6.”

We understand that heretofore the industrial commission has not engaged in direct relief activities but has worked through the local relief units and has been using the \$50,000 in administering relief through these local agencies. Now, however, the commission will engage in direct relief activities, at least as far as administering additional relief or compensation to injured relief workers is concerned. The \$50,000 above mentioned cannot be used in administering direct relief, as it is to be used for the performance of the duties of the commission under ch. 363 other than expenses of direct relief activities.

Therefore, by implication, the expenses of administering direct relief by the commission must come out of the relief fund itself. We find no limitation in ch. 363 as to the amount that the commission may use for administering relief except the \$50,000 limitation as to expenses other than those incurred in direct relief activities. We believe that, in accord with general principles of statutory construction, this statute should be so construed as to carry out and give effect to the legislative intent rather than to defeat the purpose of the legislature. To hold that money appropriated for relief under ch. 363 could not be used for administering relief would render the appropriation ineffective, at least as far as any direct relief activities by the industrial commission are concerned, and it is apparent from reading the act that the legislature not only intended, but specifically provided, that the industrial commission might administer relief directly when so authorized by the emergency board.

JEF

*School Districts—Transportation of School Children—Tuition*—Under sec. 40.34, subsec. (1), Stats., pupil living more than four miles away from district may select any other school in state, irrespective of distance.

September 24, 1934.

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

You refer us to sec. 40.34, Stats., the transportation law, and to that provision therein 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. You state that you have an opinion from this department which holds that the above provision applies to children who are residents of union high school districts. You also submit that two additional questions have arisen in connection with the administration of this provision:

1. Is there any legal restriction in reference to the relative distances of the schools from the pupil's home? In other words, may a pupil choose any school of his own selection, provided he lives more than four miles from the school of his home district?

There is no express provision in the law which limits the pupil to any particular school. Neither do I see any reason for giving a construction to this law as carrying such implication. I believe this is left to the choice of the pupil or his parent.

It is to be noted under the statute that no transportation is provided for in this case, and that it is tuition only which is paid by the home district. This being true, it would make no difference to the home district what distance the school which he attends is from the pupil's home.

2. Does this provision permit a resident of a union high school district to attend school in an adjoining state if he prefers to do so and still have the tuition paid by his home district?

The answer is, No. To hold otherwise would be to give extra-territorial effect to Wisconsin laws.

The relevant portion of sec. 40.34, subsec. (1), Stats., reads as follows:

"\* \* \* 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."

While no words of limitation are used in connection with the words "another district," we are constrained to believe that the legislature must have meant and intended to mean "another district" in the state of Wisconsin and not another district in some other state.

"It is obvious that no law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived." 12 C. J. 434.

JEF

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*Fish and Game*—Enforcement of federal migratory bird conservation act by Wisconsin conservation wardens is limited to reporting violations.

Refusal to exhibit federal hunting stamp to Wisconsin conservation warden is violation of federal law.

September 24, 1934.

#### CONSERVATION DEPARTMENT.

The bureau of Biological Survey of the United States Department of Agriculture has issued a notice relative to the federal hunting stamp which must be purchased for the hunting of migratory waterfowl. Among the other statements on the notice the following is found in reference to the hunting stamp:

"It must be exhibited for inspection on request of any officer or employee of the U. S. Department of Agriculture or of any officer of a State or local government authorized to enforce the game laws."

You inquire as to the authority of the Wisconsin conservation wardens to enforce the federal law requiring a hunting stamp for the hunting of migratory waterfowl.

The federal hunting stamp tax is imposed by virtue of ch. 7a, Title 16 of the United States Code (48 Stats. at Large \_\_, March 16, 1934). It is known as the "migratory bird conservation act" and contains secs. 718 to 718h, inclusive. That portion of the notice above quoted is based upon sec. 718a of the United States Code, which provides in part as follows:

"\* \* \* Any person to whom a stamp has been issued under sections 718 to 718h, inclusive, of this title shall upon request exhibit such stamp for inspection to any officer or employee of the Department of Agriculture authorized to enforce the provisions of sections 718 to 718h, inclusive, of this title or to any officer of any State or any political subdivision thereof authorized to enforce game laws."

The migratory bird conservation act, however, does not purport to depute game wardens of Wisconsin or any other state to enforce the provisions of this federal law. The power and authority of conservation wardens is found in ch. 29, Wis. Stats., and more specifically in sec. 29.05. A number of powers and duties of conservation wardens are therein specified, but it is to be noted that the legislature has in each case, except the execution and service of warrants, confined the jurisdiction of the conservation warden to acts committed either "contrary to the provisions of this chapter" or "in violation of the provisions of this chapter." The chapter referred to is, of course, ch. 29 of the Wisconsin statutes.

The Wisconsin conservation wardens, therefore, do not have authority to enforce the federal migratory bird conservation act except to the extent of reporting violations or supposed violations to the agents of the federal government who are authorized to enforce the same.

The federal statute, however, clearly specifies that the federal hunting stamp must be exhibited to state officers authorized to enforce game laws, which would include Wisconsin conservation wardens. If an individual refuses to exhibit the stamp to a Wisconsin conservation warden upon the latter's request, such refusal constitutes a violation of the federal law. By virtue of the provisions of secs. 718g (48 Stats. at Large —, March 16, 1934) and 707, (40 Stats. at Large 756), Title 16, of the United States Code,

the person so refusing to exhibit the hunting stamp would be deemed guilty of a misdemeanor and upon conviction would be liable to a fine of not to exceed five hundred dollars or six months' imprisonment, or both.

JEF

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*Criminal Law—Arrest—Fish and Game—Public Officers—Conservation Warden—*Conservation warden's power to arrest without warrant is limited to persons detected in actual violations. In all other cases warrants must first be obtained.

September 24, 1934.

CONSERVATION DEPARTMENT.

Attention H. W. MacKenzie, *Conservation Director*.

You ask to be advised as to the extent of the powers of conservation wardens to arrest offenders, with or without warrant.

Sec. 23.10, subsec. (1), Stats., provides:

"The state conservation commission shall secure the enforcement of all laws which it is required to administer and bring, or cause to be brought, actions and proceedings in the name of the state for that purpose. The persons appointed by said commission to exercise and perform the powers and duties heretofore conferred and imposed upon deputy fish and game wardens, shall be known as conservation wardens and shall be subject to the provisions of chapter 16 of the statutes."

The police powers of such officers are set forth rather fully in sec. 29.05, which should be thoroughly studied by all conservation wardens. As to arrests, sec. 29.05 (1) provides:

"The state conservation commission and its deputies are hereby authorized to execute and serve all warrants and processes issued by any justice of the peace or police magistrate or by any court having jurisdiction under any law relating to wild animals, in the same manner as any constable may serve and execute such process; and 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."

You will note that an arrest may be made with or without a warrant in the case of a person detected in an actual violation. It would seem clear, however, that in the absence of detecting the person in an actual violation, the arrest should be made only on a warrant issued, executed and served as in the manner provided by sec. 29.05, subsec. (1), and sec. 361.02, Stats.

The general rule as to arrests without warrant has been stated as follows:

"\* \* \* However, it has always been the rule that, except in cases where the public security has demanded it, arrest without a warrant has been deemed to be unlawful. Well established exceptions to this rule have been long recognized in cases of felony, and of breaches of the peace committed in the presence of the party making the arrest. The right to make arrests without a warrant is usually regulated by express statute, and, except as authorized by such statutes, an arrest without a warrant is illegal." 5 C. J. 395-396.

It is also true generally that an officer has no authority whatever to arrest for a misdemeanor without a warrant, unless the offense is committed in his presence. 5 C. J. 401. Violations of fish and game laws (ch. 29, Stats.), and violations of sec. 343.45, Stats., mentioned in your letter, constitute misdemeanors as distinguished from felonies, which are punishable by imprisonment in the state prison. A different rule as to arrests exists in the case of felonies, which rule it is not necessary to discuss here.

JEF

*Fish and Game—Wild Life Refuges—Public Lands—*  
 Game refuges but not wild life refuges may be established by conservation department on forest crop lands whether such lands are owned privately or by counties.

September 24, 1934.

CONSERVATION DEPARTMENT.

Attention Matt Patterson, *Deputy Director.*

You have submitted the following inquiries for our opinion. For purposes of convenience we are stating the questions with the answers immediately following each question.

Q. 1. Can the conservation department establish a wild life refuge, as provided by sec. 29.57, Stats., upon forest crop lands?

A. 1. The answer is, No. Attention is called to sec. 29.57, subsec. (1), Stats., which provides:

“The owner or owners of any tract, or contiguous tracts, of land comprising in the aggregate not less than one hundred and sixty acres located outside the limits of any city or village, may apply to the state conservation commission for the establishment of said lands as a wild life refuge.  
 \* \* \*”

Sec. 77.03, Stats., provides among other things:

“\* \* \* The owners, excepting the owners of farm wood lots, by such contract consent that the public may hunt and fish on said lands, subject to such regulations as the conservation commission may from time to time prescribe.”

This section covers forest crop lands and since the owners of such lands by the provisions just quoted have already consented that the public may hunt and fish on said lands subject to regulations by the conservation commission, they are no longer in a position to ask that such rights be restricted by the establishment of a wild life refuge.

Q. 2. If so, is the written consent of the owners necessary?

A. 2. Our answer to question No. 1 makes an answer to this question unnecessary.

Q. 3. Can the conservation department establish game refuges, as provided in sec. 23.09, subsec. (7), par. (b), Stats., upon forest crop lands?

A. 3. The answer is, Yes. Game refuges, under sec. 23.09, subsec. (7) (b), Stats., may be designated by the conservation commission. Proceedings to establish a game refuge are not instituted by the owners of property affected, and hence the objection to the establishment of a wild life refuge pointed out above does not apply, and we see no reason why a game refuge might not be established on forest crop lands, the same as on any other land, by following the statutory procedure. See also XVII Op. Atty. Gen. 204, on procedure.

Q. 4. If so, is it necessary to obtain the written consent of the owner?

A. 4. The written consent of the owner is unnecessary, since under sec. 77.03, Stats., above mentioned, he has relinquished his rights to control the matter of hunting and fishing in the case of forest crop lands.

Q. 5. Can the conservation department establish wild life refuges upon county-owned lands which have been entered under the forest crop law?

A. 5. The answer is, No, for the same reasons set forth in our answer to question No. 1.

Q. 6. If so, is it necessary to obtain the written consent of the proper county authorities?

A. 6. Our answer to the preceding question makes an answer to this question unnecessary.

Q. 7. Who would these proper county authorities be?

A. 7. In view of the foregoing, an answer to this question is unnecessary.

Q. 8. Can the conservation department establish game refuges upon county-owned lands which have been entered under the forest crop law?

A. 8. This question is answered the same as question No. 3, and for the same reasons.

Q. 9. If so, is it necessary to obtain the written consent of the proper county authorities?

A. 9. The answer is the same as that to question No. 4 for the same reasons.

Q. 10. Who would these proper county authorities be?

A. 10. In view of the answers to the other questions, an answer to this question is not necessary.

JEF

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*Fish and Game—Muskrat Farms*—Holder of muskrat farm license for 1932 who does not renew same must pay for rats on farm when applying for new license.

September 24, 1934.

CONSERVATION DEPARTMENT.

During the year 1932 a party obtained a muskrat fur farm license as required by law, paying fifty cents each for the muskrats which were estimated to be on the farm at that time. This license was not renewed in 1933 or in 1934 to date. The party would now like to obtain a muskrat fur farm license covering the same area as was covered in 1932. The question arises as to whether or not you must again estimate the number of rats on the area and require the party to pay fifty cents each for them.

It is our opinion that this question must be answered, Yes.

The establishment of muskrat fur farms and the issuance of licenses for them are provided for in sec. 29.575, Stats. Under this section, the owner or licensee of suitable Wisconsin lands may acquire the right, upon compliance with the provisions of that section, to operate a muskrat farm "for the purpose of breeding, propagating, trapping and dealing in muskrats." An application is filed with your commission containing a description of the land and the interest of the applicant therein. Upon filing of the application, your commission makes an investigation and, if satisfied of the good faith of the applicant, a license is issued. A commission is then selected to determine the number of muskrats upon the land at the time of the granting of the license and the applicant is required to pay for the estimated number of rats at the rate of fifty cents each.

Subsec. (4), sec. 29.575 then provides:

“\* \* \* When such payment has been made the licensee shall become the owner of all of the muskrats upon said lands and of all of their offspring remaining thereon. He shall have the right to manage and control said lands and the rate thereon, to take and trap the same at any time or in any manner which he sees fit and deems to the best advantage of his business, and to sell and transport at any time said muskrats or the pelts taken from them.  
\* \* \*”

Sec. 29.575, subssecs. (5) and (7) provide:

“(5) The holder of any such license shall pay an annual license fee of two dollars and fifty cents for any such farm of ten acres or under, and an additional fee for any additional land actually devoted to muskrat farming as follows: Fifteen cents per acre for the next thirty acres; ten cents per acre for the next forty acres and five cents per acre for any additional land so used.”

“(7) Such license shall be prima facie evidence in all courts and proceedings of the lawful right of the licensee therein named, his or its successors or assigns, for the term of the license, to establish and operate a muskrat farm upon said premises, and shall entitle the licensee therein named or his successors or assigns, to the exclusive right for and during said term to breed and propagate muskrats thereon, and to the exclusive and sole ownership of any property in all muskrats caught or taken therefrom. Such licenses shall expire on the thirty-first of December of each year, but may be renewed from year to year upon payment by the licensee of the annual license fee.”

Subsec. (5), above quoted, provides that the licensee “\* \* \* shall pay an annual license fee,” and subsec. (7) provides that “\* \* \* licenses \* \* \* may be renewed from year to year upon payment by the licensee of the annual license fee.”

In the present case, the original license was issued in the year 1932. The licensee did not pay the annual license fee for the year 1933 or the year 1934 and consequently was not entitled to a renewal of the original license. A distinct difference exists between a renewal of a license and the issuance of a new license. Under the former, the licensee's rights are extended. In the present case, the rights

of the licensee have been interrupted by his failure to pay the annual license fee. A part of the good faith establishment and operation of a muskrat fur farm by a licensee in order that he may retain the benefit acquired by paying fifty cents a piece for the rats, includes payment of the annual license fee and renewal of the license from year to year.

In XVIII Op. Atty. Gen. 707, it was held that under subsecs. (4) and (7), sec. 29.575 “\* \* \* it is apparent that the licensee obtains all his rights by virtue of the license issued to him” (p. 708). The opinion further held that when a muskrat fur farm license is revoked, all the rights which the licensee acquired thereby vanished and the licensee “then stands in the same position with respect to said muskrats as though no license had ever been issued to him.”

In XVII Op. Atty. Gen. 467 a situation akin to the present one arose, in which application was made for a fur farm license covering property previously licensed, such application being made about seven months after the expiration of the first license. It was held, p. 469:

“I believe the only safe course to pursue is to consider the license a new license and to require payment for all rats on the entire area. \* \* \*”

It is true that in that case the application for the second license was not made by the parties who obtained the original license, but the holding of the opinion is based upon the lapse of time and not upon the difference in parties.

In opposition to the views above expressed, that portion of sec. 29.575, subsec. (4) which provides that “the licensee shall become the owner of all of the rats on said lands and of all of their offspring remaining thereon,” will probably be urged. It is our opinion that the ownership herein referred to does not mean the legal title to those muskrats which are running wild on the farm. By reading other portions of sec. 29.575, it will be seen that this ownership refers to the exclusive right to take muskrats and exclusive right to dispose of them after they have been reduced to possession.

Sec. 29.02 (1) provides:

"The legal title to, and the custody and protection of, all wild animals within this state is vested in the state for the purposes of regulating the enjoyment, use, disposition, and conservation thereof."

In the case of *Krenz v. Nichols*, 197 Wis. 394, a case which dealt specifically with the muskrat fur farm, it was held that the state holds title to wild animals in trust for the people, and no individual has any title to any such animal until he reduces it to lawful possession. This right to reduce wild muskrats to possession is dependent upon the holding of a license.

JEF

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*Intoxicating Liquors—Trade Regulation*—Warehouse receipts covering intoxicating liquor can be sold by Wisconsin manufacturers, rectifiers and wholesalers to other Wisconsin manufacturers, rectifiers, wholesalers and retailers but not to general public.

Warehouse receipts covering intoxicating liquor can be sold by out-of-state manufacturer or rectifier only to Wisconsin manufacturers, rectifiers and wholesalers but not to Wisconsin retailers or general public.

September 25, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

Certain manufacturers and rectifiers outside of the state are purchasing whiskey, which they store in bonded warehouses. Against the liquor so stored warehouse receipts are issued. These receipts have been sold to the general public under the theory that they are an investment rather than a sale of liquor. The theory of investment is that the liquor is purchased at a comparatively low price at the present time and that if stored for some time it will become a bonded liquor of a higher price, the holder of the warehouse receipt profiting by this difference in the two prices. The liquor represented by the warehouse receipt,

however, is subject to release at the request of the holder of the receipt upon surrender of the latter. It further appears that these warehouse receipts are also issued by some Wisconsin manufacturers, rectifiers and wholesalers. You inquire whether or not the sale of these warehouse receipts to the general public by the above mentioned concerns is legal.

It is our opinion that these warehouse receipts may not be sold to the Wisconsin public either by out-of-state or Wisconsin concerns, but that out-of-state manufacturers and rectifiers may sell these warehouse receipts only to Wisconsin manufacturers, rectifiers and wholesalers, and that Wisconsin manufacturers, wholesalers and rectifiers may sell them to other Wisconsin manufacturers, rectifiers, wholesalers and retailers.

The above question as applicable to Wisconsin concerns will be discussed first.

Under sec. 176.01, subsec. (11), Stats.,

“A ‘wholesaler’ is any person, firm, or corporation, other than a manufacturer or rectifier, that sells intoxicating liquors to retailers or others *for the purpose of re-sale.*”

Under sec. 176.01, subsec. (9), “manufacturer” is authorized to sell at wholesale; and under sec. 176.01 (10) a “rectifier” is also permitted to sell at wholesale. The privilege of wholesale selling which is given to the manufacturer and rectifier is not greater than the privilege of selling at wholesale which is given to a “wholesaler,” that is, selling “to retailers or others for the purpose of re-sale.” Inasmuch as Wisconsin manufacturers, rectifiers, wholesalers and retailers are the only ones authorized to resell liquor, they are the only ones to whom liquor can be sold by Wisconsin manufacturers and wholesalers. Our belief that a Wisconsin manufacturer, rectifier or wholesaler cannot sell liquor to the general public is strengthened by the provisions of sec. 176.05, subsec. (1c), which provides:

“A permit issued to a manufacturer, rectifier, or wholesaler shall entitle the holder of such permit to sell, deal, or traffic in such liquors *at wholesale* in quantities of not less than one wine gallon at any one time, no part of which shall be sold for consumption upon the premises of the permittee.”

The question remains whether or not the sale of a warehouse receipt is considered a sale of liquor under the Wisconsin law.

Sec. 176.01 (4) provides:

*"The term 'sell' or 'sold' or 'sale' includes the transfer, gift, barter, trade, or exchange, or any shift, device, scheme, or transaction whatever whereby intoxicating liquors may be obtained."*

As previously stated, the holder of the warehouse receipt is entitled to have the liquor represented thereby released to him upon presentation of such receipt. Quite obviously, therefore, a transaction whereby an individual obtains a warehouse receipt upon the strength of which he can acquire intoxicating liquor would be classified as a sale of liquor under this statute.

As to the out-of-state manufacturer or rectifier, the case is perhaps even stronger. Under sec. 176.70 an out-of-state concern or individual, desiring to solicit orders for, or engage in the sale for future delivery, of intoxicating liquor in Wisconsin, must obtain a permit to do so from the Wisconsin state treasurer. Sec. 139.30, subsec. (1), which is found in the chapter relating to the occupational tax on liquor, provides in part:

*"No retailer shall purchase or have in his possession intoxicating liquor purchased from other than a Wisconsin manufacturer, rectifier, or wholesaler, \* \* \*."*

This section prohibits an out-of-state concern from selling liquor to a Wisconsin retailer.

Sec. 139.30, subsec. (2) provides:

*"No intoxicating liquor shall be shipped into this state unless the same shall be consigned to individuals, firms, partnerships, corporations, or associations having a permit from the state treasurer to engage in the sale of such liquor under the provisions of chapter 176."*

A similar prohibition is placed upon common carriers by sec. 139.30 (3). These subsections restrict the shipment of intoxicating liquor into this state to shipments to Wisconsin manufacturers, rectifiers and wholesalers, because they are the only ones holding permits from the state treasurer contemplated in these subsections. These restrictions

were placed in the statute to enable the officers in this state administering the liquor laws to check closely upon liquor transactions, both for the purpose of regulation and securing the tax due. Nowhere do the statutes give an out-of-state manufacturer or rectifier greater rights in selling intoxicating liquor than are possessed by the Wisconsin manufacturers, rectifiers or wholesalers, and the legislature did not intend to permit out-of-state manufacturers or rectifiers to sell liquor to members of the general public in this state and at the same time forbid the shipment of liquor to such members as they have done under sec. 139.30 above mentioned. The definition of 'sell,' found in sec. 176.01, subsec. (4), previously quoted, would be equally applicable to the transactions of an out-of-state concern. Thus, an out-of-state manufacturer or rectifier cannot sell warehouse receipts to Wisconsin retailers or members of the public in this state but is confined to selling them to Wisconsin manufacturers, rectifiers and wholesalers.

JEF

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*Elections—Nominations—Stickers*—Candidate may distribute and voters may paste on ballot in proper place sticker containing name of candidate and office for which he is running.

Where voter pastes on ballot in proper place sticker containing name of candidate and office for which he is running such ballot should be counted as vote for such candidate and office.

September 25, 1934.

OLIVER L. O'BOYLE, *Corporation Counsel,*  
*Office of District Attorney,*  
Milwaukee, Wisconsin.

At the coming general election to be held in November an individual contemplates running for office on the Democratic ticket. The candidate proposes to distribute certain stickers to those who desire to vote for him, such stickers containing the name of the candidate and the office for

which he is running, including the number of the district. It is proposed that the voter to whom this sticker has been distributed will paste the same in the proper place on the ballot for the purpose of voting for the candidate. Some question has arisen as to whether or not this practice would be in violation of the election laws and as to whether or not this vote could properly be counted for the individual.

It is our opinion that the distribution and use of stickers as above indicated would not violate any election law and that where the sticker is properly marked and placed upon the ballot it could be counted as a vote for the candidate whose name appears on the sticker and for the office designated on the sticker.

In the case of *State ex rel. Tank v. Anderson*, 191 Wis. 538, the court held, as it has previously done many times, that in considering the statutes regulating elections the courts recognize that the object of elections is to ascertain the popular will, and that the object of election laws is to secure the rights of duly qualified electors and not to defeat them. It further held that, in the counting of ballots, the intention of the voter as gathered from the ballot itself or from surrounding circumstances of a public character should control. Reference was made to the provisions of sec. 6.42, Stats., which provides, in part:

“All ballots cast at any election shall be counted for the persons for whom they were intended, so far as such intent can be ascertained therefrom. \* \* \*.”

In the *Tank* case, *supra*, specific reference was made to sec. 6.23, subsection (11), Stats., which provides:

“No pasting names over a ticket or over any names thereon shall be allowed and no name so pasted shall be counted except as provided in section 5.28.”

The court held, however, that this statute constituted a prohibition against the use of stickers by election officials only, and that it did not prevent a voter from using a sticker to vote for a candidate whose name did not appear on the ballot. It does not appear in that case that the sticker which was used contained anything more than the name of the candidate. There does not seem to be any reason, however, why the addition of the name of the office

for which the candidate is running would result in a different holding or prevent the use of the sticker.

In the case of *State ex rel. Graves v. Wiegand*, 212 Wis. 286, it was held that the ballot is the best evidence of the intention of the voter. Under the *Tank* case, *supra*, and sec. 6.42, Stats., a ballot which fairly and reasonably indicates the real intention of the elector is to be counted unless to do so runs counter to some law. A ballot upon which appeared a sticker containing the name of a candidate and the office for which he was running, together with a cross thereafter, would certainly indicate the intention of the voter to vote for the individual whose name appeared upon the sticker for the office which also appeared upon the sticker. It is our opinion, therefore, that under the Wisconsin statutes and the decisions above referred to, it would be the duty of election officials to count this ballot as a vote for the candidate and office which appear on the sticker.

JEF

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*Trade Regulation—Trade-marks—Prosecution for unauthorized use of registered milk bottles may be brought under secs. 132.05 and 132.07, Stats.*

September 27, 1934.

HARRY KLUETER, *Chief Chemist,*  
*Department of Agriculture & Markets.*

Concerning the prosecution of the parties who are using without authority the bottles belonging to the Superior Milk Dealers Association, I will say that a prosecution may be instituted under sec. 132.05, Stats. The penalty provided for said offense is contained in sec. 132.07.

There seems to be no reason why a conviction may not be obtained where the use of these bottles is without the authorization or consent of the owner.

JEF

*Public Officers—County Judge*—Vacancy in county judgeship is not created by illness of occupant but may be created by decision of competent tribunal adjudging occupant insane.

September 28, 1934.

KENNETH C. HEALY,  
*District Attorney,*  
Manitowoc, Wisconsin.

You state that the county judge of your county has been ill since May, 1934. Since that time he has been confined to a hospital at Green Bay, unable to transact any business or to resign from his position, to which it is practically certain he will never be able to return. You inquire whether there is any provision that we know of (short of a declaration of insanity by the circuit judge) by which this office could be declared vacant and a successor appointed.

You undoubtedly refer to the provision in sec. 17.03, subsec. (6), Stats., with reference to the causes of vacancies, which provides:

“The decision of a competent tribunal \* \* \* adjudging him insane.”

This is the only provision in our statutes which we know of by which a vacancy may be created in the case referred to. Ill health does not cause a vacancy.

JEF

*Elections—Nominations*—Man who was unsuccessful candidate for nomination for district attorney on Democratic ticket and who had his name written on ticket of “new party” for same office and received all of votes cast on that party’s ticket for office may have his name printed on ballots of general election as “new party” candidate for that office.

October 1, 1934.

L. W. BRUEMMER,  
*District Attorney,*  
Kewaunee, Wisconsin.

In the recent primary election one, Mr. Blank, was the unsuccessful candidate on the Democratic ticket for the office of district attorney in Kewaunee county. This same Mr. Blank had his name written on the Progressive ballot for the office of district attorney about thirteen times in a total of four precincts. There was no candidate for the office of district attorney on the Progressive ticket.

You wish to know whether Mr. Blank, the unsuccessful candidate on the Democratic ticket for the office of district attorney, may have his name printed on the ballots at the general election in November as a candidate on the Progressive ticket in view of the fact that his name was written on the Progressive ticket as set forth above.

Sec. 5.13, subsec. (2), Wis. Stats., provides:

“If any elector write upon his ticket the name of any person who is a candidate for the same office upon some other ticket than that upon which his name is so written, this ballot shall be counted for such person only as a candidate of the party upon whose ticket his name is written, and shall in no case be counted for such person as a candidate upon any other ticket.”

According to the provision of the statutes just quoted, the thirteen ballots cast for Mr. Blank on the Progressive ticket can be counted for him only as a candidate for the Progressive party and can not be counted for him as a candidate on the Democratic ticket.

Sec. 5.13 (3) provides:

“In case the person is nominated upon more than one ticket he shall forthwith file with the proper officer, or of-

fficers in charge of the preparation of the ballots, a written declaration indicating the party designation under which his name is to be printed on the official ballot; provided, that in case a candidate is nominated on a ticket on which his name is printed and also on some other ticket by having his name written thereon, he shall not have the right of choice but shall be held to be the nominee of the party on which his name is printed."

This subsection does not apply in the instant case because Mr. Blank was not *nominated* on both tickets. Nevertheless, it shows that the statutes recognize a nomination of a man by having his name written in on the ticket of a party even when his name is printed on the list of candidates of another party for the same office.

Sec. 5.17, (1) and (2), which would ordinarily be applicable in determining whether Mr. Blank had a sufficient number of votes to entitle his name to be placed on the ballot for the general election as a candidate for the party upon whose ticket his name was written, does not apply in the instant case because the party upon whose ticket his name was written is a new party (Progressive) and hence had no nominee for governor at the two last general elections. Of this section the court, in *State ex rel. Ekern et al. v. Dammann*, 254 N. W. 759, 762, said:

"\* \* \* It can never be applied to a new party. Until a party succeeds in getting a party column on the general election ballot, it does not have a nominee for Governor in the statutory sense, and it never could qualify under section 5.17. In other words, such a party can never pass the test prescribed by section 5.17 for securing a place on the general ballot until it has had such a place upon the ballot for two successive elections for Governor. The mere statement of this indicates the impossibility of ascribing such an intent to the Legislature. The conclusion is that section 5.17 has no application to new political groups. \* \* \*"

Although the court in its opinion said simply that sec. 5.17 does not apply to the new party, it appears from a study of the entire opinion that only subsecs. (1) and (2) of that section were involved. There is no reason why subsecs. (3) and (4) should not apply to the new party.

Since sec. 5.17 [(1) and (2)?], Stats., was held by the supreme court not to apply to a new party, there is no ques-

tion in the instant case as to whether Mr. Blank's name may be printed on the ballot for the coming election as a Progressive candidate or must be listed as an "independent" candidate.

Since he received all of the votes cast on the Progressive ticket for district attorney and sec. 5.17 (2) cannot apply because the Progressive party is a new party, Mr. Blank has secured the Progressive nomination for the office of district attorney.

You are therefore advised that Mr. Blank may have his name printed on the ballots at the general election this November as a candidate for the office of district attorney on the Progressive ticket. However, he must comply with sec. 5.17 (3).

JEF

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*Elections—Nominations—Platform Conventions—*State senator elected as Republican must have his name certified as member of Republican party platform convention under sec. 5.20, Stats., although he may have classified himself as Progressive Republican in response to unofficial questionnaire some two years ago.

October 1, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

In your letter of September 25 you state that in certifying names of members to the several platform conventions which meet under the provisions of sec. 5.20, Stats., it is the practice to also certify the names of hold-over state senators.

In this connection you state that some of the hold-over senators, who were elected as Republicans, in response to an unofficial questionnaire, declared themselves for listing in the Legislative Manual and Directory as *Progressive Republicans*. We are informed that the date of this questionnaire was nearly two years ago.

You now inquire to which of the platform conventions these names should now be certified.

These names should be certified to the Republican party platform convention.

Sec. 5.20, subsec. (1), Stats., provides in part:

“The candidates for the various state offices, and for the senate and assembly nominated by each political party at such primary, and senators of such political party, whose term of office extends beyond the first Monday in January of the year next ensuing, shall meet at the capitol at twelve o'clock noon on the second Tuesday after the September primary. They shall forthwith formulate the state platform of their party. \* \* \*”

The persons mentioned in your letter were elected as Republicans and must be considered as such for the purposes of sec. 5.20, subsec. (1), Stats., above quoted in part. The unofficial questionnaire you mention was answered some two years ago, and long before any third party was started. Such questionnaire would afford no basis for deciding that a person who unofficially classified himself as Progressive Republican two years ago must be now treated as a member of the Progressive party rather than a member of the Republican party. We cannot assume that all Progressive Republicans have necessarily become Progressives. Furthermore, the statute specifically mentions “and senators of such political party.” It is obvious that until after this year's election the newly formed Progressive party can have no senators, and that senators now holding office must therefore be treated, for the present at least, as Republican senators if they were elected as such.

JEF

*Taxation—Tax Sales*—County may at its discretion and at any time sell delinquent real estate, title to which has been obtained by county through tax deeds.

Sec. 75.01, Stats., does not require county to wait five years before selling such lands.

October 1, 1934.

F. W. HORNE,  
*District Attorney,*  
Crandon, Wisconsin.

You inquire whether, pursuant to the provisions of sec. 75.01, Stats., as amended by ch. 244, Laws 1933, the county must wait five years before selling delinquent real estate, title to which has been obtained by the county through tax deeds. You state that the county has always waited three years before issuing a tax deed, and you now inquire if, under the five year redemption period (sec. 75.01, Stats. 1933), the county is prevented from conveying lands if it has already obtained tax deeds for the same.

You are advised that the county has, under the statutes, full authority to sell at its discretion and at any time delinquent real estate, title to which has been obtained by the county through tax deeds. Under the provisions of sec. 75.01 it was formerly necessary for the holder of a tax certificate to wait three years before obtaining a tax deed to the real estate on which he held such certificate. This situation was changed by the 1933 legislature and under the law as it now exists (sec. 75.01), the holder of a tax certificate must wait five years before he can obtain a tax deed to delinquent real estate in cases where the tax certificate was issued after June 14, 1933 (the day after the passage of ch. 244, Laws 1933). However, it is manifest that the requirements of the statutes, as above stated, do not prohibit a county from selling delinquent real estate, title to which has already been obtained by the county through tax deeds.  
JEF

*Elections — Municipal Corporations — Villages* — People living in village whose land is partly in adjacent town may not vote in town but must vote in village.

Right of detachment from village under sec. 62.07, subsec. (2), Stats., is not absolute.

October 1, 1934.

CHARLTON H. JAMES,  
*District Attorney,*  
Dodgeville, Wisconsin.

The village of Livingston embraces land in both Grant and Iowa counties. By far the greater portion of the village lies in Grant county; but there are two farms and one other acre of land within the incorporated village which are in the town of Mifflin in Iowa county.

You wish to know whether those residents of the village of Livingston whose land lies within the town of Mifflin have a right to vote in the town of Mifflin.

The answer is, No. If their homes are within the limits of the village of Livingston and they reside in Livingston, they must vote in the village. Voting rights are based on living in a district, not on owning land there. Sec. 6.02, subsec. (1), Stats. The mere fact that these people own land in the town of Mifflin does not give them the right to a vote in that town, since they actually live in the village of Livingston. However, since they live in Iowa county and not Grant county, as far as county elections are concerned, they must vote for Iowa county officers and not Grant county officers. Their vote, however, is cast in the village.

You also wish to know whether the people living on land in the village of Livingston which is in Iowa county have an absolute right to be detached from this village.

The answer is, No. Sec. 62.07 deals with annexation and detachment of territory to and from cities, and, by virtue of sec. 61.355, annexation and detachment of land to and from villages.

Sec. 62.07 (2), provides:

“Territory may be detached from any city and be attached to the town or towns to which it shall be adjacent and be made taxable therein in the manner following:

“(a) A petition therefor describing the territory to be detached and naming the town or towns to which it shall be annexed shall be presented to the council signed by a majority of the owners of three-fourths of the taxable real estate in a section adjacent to the boundary lines of said city and which it is proposed to detach.

“(b) An ordinance detaching such territory and annexing the same to such town or towns shall be adopted by three-fourths of all the members of the council.

“(c) The council may, or if a petition signed by five per cent of the electors of the city demanding a referendum thereon be presented to the council within ninety days after the passage of the ordinance, the council shall cause the question to be submitted to the electors of the city at the next ensuing city election, and the ordinance shall not take effect nor be in force unless a majority of the electors voting thereon shall approve the same.”

The village council may submit the question of detachment to the electors of the city and such referendum determines whether or not the territory is to be detached. Or, the village council may pass an ordinance granting or denying the detachment; and such ordinance settles the matter unless a referendum is asked for by the electors under sec. 62.07 (2) (c).

From this it can be seen that the people of whom you speak have no absolute right to have their property detached from the village.

JEF

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*Counties—County Board—County Board Committee—*  
Resolution of county board authorizing public property committee to sell real estate not acquired by tax deed is valid. Provision for “time payments” is legal.

October 1, 1934.

JOHN W. KELLEY,  
*District Attorney,*  
Rhineland, Wisconsin.

The county board of supervisors of Oneida county has passed a resolution authorizing the public property committee to sell certain real estate owned by the county to a

certain man and wife for the sum of four hundred dollars, the amount to be paid in monthly payments of ten dollars.

You wish to know whether this resolution is valid.

You do not tell how this land was acquired by the county. If it was acquired by tax deed, it should be sold under the provisions of sec. 75.35 or sec. 59.08, subsec. (19), Stats., and, hence, power to sell it could not legally be delegated to the public property committee. However, if this land was acquired by purchase or gift, the county board could legally delegate its power to sell the real estate to the public property committee.

Under subsecs. (1) and (2), sec. 59.07, Stats., the county board may:

“(1) Make such orders concerning the corporate property of the county as they may deem expedient.

“(2) Make such leases, contracts or other conveyances in relation to lands acquired for public purposes as in their discretion are in the interest of the public welfare.”

Since there is no other statutory provision for the sale of county lands not acquired by tax deed and the provisions of the resolution definitely set forth the terms of sale, the county board may delegate the ministerial act of completing the sale of this land to the public property committee. This is a proper delegation of authority since no discretion as to the terms of the sale is placed in the committee. A county board may freely delegate duties of a purely administrative nature. III Op. Atty. Gen. 448.

There remains the question of whether or not the county may sell land owned by it upon other than a strictly cash basis. There is nothing in the statutes which would indicate that the county is any more restricted in its disposition of real estate owned by it than is a private individual. XIX Op. Atty. Gen. 334, XVIII Op. Atty. Gen. 704. Therefore, if it sees fit to do so, the board may authorize the selling of county owned real estate on a land contract as Oneida county has done in the instant case.

You are advised that the resolution you submitted for our consideration is valid.

JEF

*School Districts—Tuition—Taxation—Tax Collection—*  
 Money owed high school district by municipality is not part of school taxes of that municipality and bill of high school district is not entitled to share preference given local school districts under sec. 74.15, subsec. (2), Stats.

October 1, 1934.

L. A. KOENIG,  
*District Attorney,*  
 Phillips, Wisconsin.

The town of X, in Price county, after having paid the equalization tax levied by the county for school purposes, has a balance of \$799.09 left with which to pay remaining levies and obligations. The town of Y owes the city of Z \$2000.00 for high school tuition for the year 1932. Added to high school tuition due for the year 1933, the total amount due the city of Z is \$5954.00. You want an opinion as to whether the town treasurer should pay the town school tax levy or whether the \$799.09 left in the treasury should be divided between the town school and the high school to which the tuition is owed.

The answer is: The town school tax levy should be paid first.

Sec. 74.15, subsec. (2), Wis. Stats. (printed in the 1931 statutes and omitted in the 1933 statutes, but to remain in effect until October 1, 1935, as provided by ch. 426, Laws 1933.) provides:

“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. \* \* \*”

The treasurer of the town of Y, having paid the county equalization tax, must next, according to the above statute, pay “all sums of money levied for school taxes.” The problem in the instant case, then, narrows itself down to the

question of whether or not the amount due the city of Z for high school tuition is included in the phrase "all sums \* \* \* levied for school taxes." It is our opinion that it is not included therein.

Sec. 40.47, (5) and (6), Stats., provides as follows:

"(5) Before July in each year the school clerk shall file with the clerk of each municipality from which any tuition pupil was admitted, a verified claim against the municipality setting forth the residence, name, age, date of entrance and the number of months attendance, during the preceding school year, of each person admitted from such municipality, the amount of tuition which the district is entitled to for each pupil, and the aggregate sum for tuition due the district from the municipality."

"(6) The municipal clerk shall enter upon the next tax roll such sums as may be due for such tuition from his municipality and the amount so entered shall be collected when and as other taxes are collected, and shall be paid to the treasurer of the high school district. If a portion of such municipality forms a part of a high school district, the taxable property in that portion shall be exempt from such tuition tax."

According to the definition found in sec. 40.01, "Municipality" includes town, city and village." It will be noted that the tuition for nonresident high school pupils is to be a charge against the municipality from which such pupils are sent. The term "municipality" does not include school district. Hence, the charge for high school tuition is a charge against the town of X and not the town school district or districts. The money for the tuition is to be paid directly to the treasurer of the high school district to which it is owed; it is never a part of the levy for the local school district.

School taxes are levied by the school district meeting and are to cover the expenses of running the school or schools of that particular district. They are levied only on property within the district. Sec. 40.04, (5) and (6). The sum of money placed on the tax roll of the municipality to pay the claim for high school tuition is levied upon all the property within the municipality, except such portion of it as may be included in a high school district. Sec. 40.47, (6). It is levied not as a part of any school taxes, but is

entered on the tax roll as a separate sum and collected as are all other taxes levied by the municipality. The claim is made by the school clerk of the high school district directly to the treasurer of the municipality in which the high school pupils reside. It is not a claim made through and as a part of the taxes voted by any school district within the town sending the pupils.

In *First Nat. Bank of Neillsville v. Town of York, et al.*, 249 N. W. 513, 514, the court points out that the town treasurer in collecting tuition money is acting as the agent of the district to which it is owed.

The municipal accounting division of the state tax commission and the local treasurers have not regarded this sum raised to pay high school tuition as a school tax or a part of a school tax for accounting purposes. The construction given to a statute by the officer or officers who are charged with its administration is always entitled to weight, and should not be overruled 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.

It has been demonstrated in the argument set forth above that not only is the practice followed by the officers dealing with this tuition money of regarding it as a separate item and no part of the school taxes not contrary to the clearly expressed meaning of the law, but it is entirely consonant with a reasonable interpretation of it.

Since the tuition money owed the city of Z is not included in the phrase "all sums of moneys levied for school taxes" and the school taxes are, according to sec. 74.15, subsec. (2), the next item to be paid by the town treasurer after having paid the county equalization tax, the treasurer of the town of X is not to divide the \$799.09 which he has in hand between the town school and high school to which the town owes tuition, but is to apply it in payment of the tax levied for the town school.

JEF

*Public Officers—County Board—Relief Director*—Offices of member of county board and local director of relief are incompatible.

October 1, 1934.

THOMAS E. MCDUGAL,  
*District Attorney,*  
Antigo, Wisconsin.

You state that through the efforts of your county relief committee the local director of relief was forced to resign and now one of the members on the relief committee has been appointed as director of poor relief. He is also a member of the county board. You inquire whether these two offices are incompatible.

Sec. 66.11, subsec. (2), Stats., provides:

“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.”

I understand that the county relief committee is a committee of the county board. Since the member in question was one of the committee who created the vacancy in the relief director's office, he is not eligible to serve in the capacity of member of the county board and also director of relief. This comes within the express prohibition of sec. 66.11 (2).

JEF

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*Education—Military Service—Normal Schools—Soldiers' Educational Bonus*—Sum of one thousand eighty dollars is total amount that may be paid as bonus for service of any one veteran under sec. 37.25, Stats.

October 1, 1934.

JOHN F. MULLEN,  
*Pension, Bonus and Rehabilitation Division,*  
*Adjutant General's Office.*

You refer us to the provisions of sec. 37.25, Stats., and wish to know whether, in a case in which a world war vet-

eran 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, is survived by two or more children, each child is entitled to one thousand eighty dollars, or whether that sum is the maximum payment of educational bonus which can be made under the law for the service of a veteran regardless of the number of children surviving.

The sum of one thousand eighty dollars is all that can be paid as a bonus for the service of one veteran regardless of the number of children who survive him.

Sec. 37.25, subsec. (1), reads as follows:

“Any person discharged or released, or furloughed subsequent to April 7, 1917, upon honorable conditions, from any branch of the military or naval service of the United States, \* \* \* or 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, \* \* \*”

Either the veteran himself may have the bonus, or, in the event he died from the causes and during the time set forth, his child is entitled to the bonus. The veteran himself can have only one thousand eighty dollars for the statute provides “but not to exceed a total of one thousand and eighty dollars in lieu of the soldier bonus provided for in chapter 667 of the laws of 1919” and when he is dead and the alternative payment is to be made, no more than the \$1080.00 can be paid, for it is merely a payment of the sum which would have belonged to the veteran were he living.

If the legislature had meant that each child of a deceased veteran who could qualify under sec. 37.25 was entitled to one thousand and eighty dollars, it would have used more explicit language to that effect, e. g., “each child” or “the child or children.”

If the statute were interpreted as meaning that each child was entitled to one thousand eighty dollars, then, in the instance of a family in which several children could qualify under the statute, the legislature would be paying a great deal more as a bonus for the service of a veteran than it would in the case of a family in which only one child could qualify. This would be showing unfair discrimination.

The \$1080.00 total is to be in lieu of the bonus provided for by ch. 667, laws of 1919. Sec. 2 of that act provided:

“\* \* \* If any person entitled to the benefits under this act be deceased before receiving such payment, then the payment accruing to said deceased shall be paid to the surviving widow, child or children, mother or dependent father, in the order herein stated, \* \* \*.”

The educational bonus is, therefore, in lieu of one sum paid to the veteran or one or more relatives. In place of the sum due under the law of 1919 there may be paid a sum not to exceed one thousand eighty dollars.

Therefore, \$1080.00 is the total that can be paid as a bonus for the services of one veteran under sec. 37.25.

JEF

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*School Districts*—Tuition for high school pupils as non-residents of town where high school is located may be collected under sec. 40.47, Stats. Such claim for tuition is not assignable.

October 2, 1934.

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

You have handed us a letter from the president of the Wisconsin Home and Farm School Association and you say he wishes you to furnish him an opinion as to whether the town in which the Farm and Home School is located is responsible for paying the tuition to a high school when the school's students attend such high school. He also wishes to know whether, if said association pays the tuition, the claim against the town can be transferred to the association so that it may enter suit for it.

It appears from the letter accompanying your request that the boys in question are resident members of the Wisconsin Home and Farm School and sent to the farm school primarily for support and not for education, although the farm school does provide educational facilities up to the eighth grade in its own private school. Under the statutes, sec. 40.47, the school board of Oconomowoc, where the

boys attend high school, has a direct legal claim against the town of Ottawa for the tuition and you are so advised. See also XXII Op. Atty. Gen. 191.

On the question of whether the claim for tuition of the Oconomowoc high school may be assigned, I will say that this is, in our opinion, doubtful. The procedure for collecting this tuition is given in the statute and there is no provision made for assigning such claim. Payment of the tuition might be construed as a voluntary payment, which may not be recoverable. We would advise against the assignment of such a claim. We see no objection, however, to the Farm and Home School paying expenses to the high school, such as attorneys' fees, in collecting the tuition.

JEF

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*Elections—Nominations*—Person who receives greatest number of votes for certain office in party primary by having his name written in is candidate for that party for such office regardless of fact that he filed nomination papers for different office, for which he was defeated in primary; but he must file declaration that he will qualify.

October 5, 1934.

ARNO J. MILLER,  
*District Attorney,*  
Portage, Wisconsin.

You state that a candidate who filed nomination papers for a certain office on the Progressive ticket in your county received the highest number of votes for another office on the same ticket by having his name written in. At the same time he was defeated for the office for which he filed nomination papers.

You inquire whether he can legally be a candidate for the office for which he received the highest number of votes.

The answer is, Yes.

Ch. 5 of the statutes, which governs the nomination of candidates for office, has the following provision in sec. 5.01, subsec. (6):

"This title shall be construed so as to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to comply with some of its provisions."

There can be no question as to the will of the electors in this instance. It is clear that it was not their will that he should be nominated for the position for which he filed nomination papers, but that it was their will that he should be nominated for the position for which his name was written in.

Attention should be called, however, to sec. 5.17, subsec. (3), Stats., concerning the determination of nominations made at the primaries, and whose names shall be placed on the official ballot at the general election following. This section provides:

"No person, however, shall be entitled to have his name placed on such ballot who has not filed a nomination paper as provided in sections 5.05 and 5.07 of the statutes, unless he shall file within five days after receiving official notice of his nomination, a declaration that he will qualify as such officer if elected."

Since this candidate has filed no nomination papers for the office to which he was nominated, he should file the declaration called for in the section of the statutes quoted above.

It is pointed out in VII Op. Atty. Gen. 553, 555, that a person may be voted for although his name does not appear upon the official primary ballot, and that it is possible for such a person to be declared the nominee although no nomination papers have been filed.

It would seem, at first glance, that sec. 5.17 (1), Stats., might occasion some difficulty here since it is there provided that if all candidates for nomination for any one office on any party ballot receive five per cent of the average vote cast for such party's nominees for governor at the two last general elections, the person receiving the most votes shall be such party's candidate. Of course, it would be an impossibility for the Progressive party to strictly comply with this section of the statutes. However, in the case of *State ex rel. Ekern, et al. v. Dammann*, --- Wis. ---, 254

N. W. 759, it was held that this section of the statutes is inapplicable to newly formed political groups.

JEF

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*Elections—Absent Voting—Public Officers—Election Inspectors—Qualified election inspector may administer and subscribe to oath on back of envelope containing absent voter's ballot.*

October 5, 1934.

ALEX L. SIMPSON,  
*District Attorney,*  
Fond du Lac, Wisconsin.

You wish to know whether or not an election inspector after having filed his oath may administer and subscribe to the oath set forth on the back of the envelope containing an absent voter's ballot.

Answer, Yes.

Sec. 6.32, subsec. (4), par. (g), Stats., provides:

“\* \* \*. Any inspector having taken and filed the oath of office as above prescribed may administer any oath required by law in conducting registrations or elections.”

Sec. 11.59, Stats., provides:

“Such absent or sick or disabled voter shall make and subscribe to the affidavit provided for in section 11.58 of the statutes [the affidavit on the back of the envelope] before the clerk to whom the ballot is returned or before any other officer authorized by law to administer oaths, \* \* \*.”

The law, by sec. 6.32 (4) (g), quoted above, authorizes the election inspector to “administer any oath required by law in conducting registrations or elections.” The preparation of the ballot of an absent voter is a part of an election; therefore, the election inspector may administer the oath required by sec. 11.58, Stats., which is found on the back of the envelope containing the ballot.

JEF

*Indigent, Insane, etc.—Public Health—Communicable Diseases—Quarantine—Public Officers—City quarantine officer of city of Janesville may receive compensation from Rock county as private doctor for care of indigent who are quarantined.*

Medical attention and medicine furnished for sole purpose and benefit of individual should be furnished by county under subsec. (10), sec. 143.05, Stats., whereas quarantine expense, maintenance and determination of necessity of quarantine and inoculation to prevent spread of disease are charge on municipality.

October 8, 1934.

W. T. CLARK, M. D., *Medical Advisor,*  
*Wisconsin Emergency Relief Administration.*

You have submitted an opinion prepared by the district attorney of Rock county and given to Ada W. Rogers, director of outdoor relief. You inquire whether this opinion meets with our approval.

We have carefully examined said opinion and have adopted said opinion as an opinion of this department. The opinion is as follows:

You present two questions for legal opinion:

No. 1. Whether or not a city quarantine officer, employed by the city of Janesville, may also receive compensation from Rock county as a private doctor for the care of indigent people who are quarantined.

Under the city manager plan of government, pursuant to sec. 64.02, subsec. (1), Stats.,

“Any law applicable to any city before its reorganization and not inconsistent with the provisions of this chapter shall apply to and govern such reorganized city.”

The city manager, pursuant to sec. 64.11 (3), has the power to appoint the heads of departments, and at any time to remove appointees if their services or conduct in office becomes unsatisfactory. The city health officer or quarantine officer is a city officer and under the law is appointed by and serves at the will of the city manager of the city of Janesville. I do not find in the statutes any express lim-

itation relative to a city health officer practising as a private doctor. In the absence of any such limitation under the usual construction of law there would be no such limitation. In fact, sec. 141.01 (11) expressly provides that city health officers in all cities and villages may also hold office as city physicians except in cities with a population of 25,000 or more. Where there are no restrictions, none will be read in the statutes.

I find in the Janesville city ordinance, ch. 7.01 (b) the following restriction, however:

“Whenever the City shall attain a population of 25,000 or more, the said Health Commissioner or Health Officer shall thereafter be a full-time officer and he shall not engage in the private practice of medicine or in any other conflicting occupation.”

At the last census, as revealed by the Wisconsin Blue Book, the city of Janesville is given a population 21,628. Consequently, the health officer would not fall within the restriction mentioned in the ordinance at this time. It would seem that the fact that the people given professional attention by the city health officer, acting under the direction of the county, were under quarantine is immaterial except in so far as the county may choose its doctors if it wishes for this particular class of work.

My conclusion, therefore, is that the answer to your first question would be that the Janesville city quarantine officer, employed by the city, may also receive money from Rock county as a private physician for taking care of indigent people who are under quarantine, providing the county authorities designate that they desire him to do so.

Question No. 2. You ask whether the county or the city is responsible for medical expenses other than that of the original quarantine.

Sec. 143.05 (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.”

Subsec. (10), sec. 143.05 provides:

"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, \* \* \*."

In XXI Op. Atty. Gen. 303 the question is discussed as to the manner of procedure and liability if the county system of poor relief prevailed. In that opinion the attorney general held, p. 304:

"Under these statutes the city pays for the expense of the maintenance of the quarantine including examinations and tests of the disease carriers. We believe that the Shick test and serum that is injected into a patient for the purpose of immunizing such patient is given primarily for the protection of the public rather than as a medicine to the patient, and must be paid for by the town, village or city; but a serum that is given to a patient for other purposes than those stated, which are for the purpose and benefit of the individual, could be classed as coming within the medicine to be furnished by the county or the municipality which pays for the support of the indigent patient."

It will be noted that subsec. (10), sec. 143.05 provides that medical attention required by indigent patients is to be paid for by the municipality. It does not designate which municipality, but in the light of the following statement in that section it would appear that where the county system of relief is adopted, as in the case of Rock county, it was the intent that the county and not the city, town or village should bear the expense of medical attention, and not merely in those cases where the indigent is the resident of another municipality in the state. In my opinion, there is a distinct difference made in the statutes between maintaining quarantine and providing medical attention in the case of indigent patients and this has been the construction apparently placed by the attorney general in his opinion above cited.

In other words, medical attention and medicine furnished for the sole purpose and benefit of the individual should, in the case you present, be furnished by Rock county pursuant to subsec. (10), sec. 143.05, Stats., whereas, quarantine ex-

pense, maintenance and determination of the necessity of quarantine and inoculation which prevent the spread of the disease are a charge on the city of Janesville.

JEF

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*Criminal Law—Confidence Game—Extradition—Person in Illinois who, through agent, commits crime of confidence game in Wisconsin, while he himself is not in this state, may be extradited from Illinois if uniform extradition statute has been adopted by state of Illinois or law similar to it which authorizes governor to act in such case.*

October 8, 1934.

HAROLD M. DAKIN,  
*District Attorney,*  
Watertown, Wisconsin.

You state that about a year ago one A came to the city of Fort Atkinson and established himself as an egg buyer and chicken dealer. He became acquainted with various chicken and egg dealers in Fort Atkinson and Jefferson, made himself agreeable to them, established business connections with them and bought their produce. He then moved down to one of the suburbs of Chicago and sent his trucks up to call on these people in Fort Atkinson and Jefferson for the purpose of purchasing their produce. He gave his truck driver checks that were signed by him in blank. The driver contacted these people with whom A had established business connections, filled in the checks for the various amounts that were required to settle for the eggs purchased at the various times the truck driver contacted them.

You state that you had a warrant issued against A on the confidence game charge. You have located A in Chicago, who is going under an assumed name, and you inquire whether under the facts as given he may be extradited.

Under the uniform extradition statute as enacted by the legislature of Wisconsin in ch. 40 Laws 1933, (see sec. 364.06) the governor of this state may requisition for the extradition of one in another state who has committed a

crime in this state although such person is not a fugitive from justice. The man in question committed the offense in Wisconsin when he was in Illinois. I am not informed whether Illinois has also adopted the uniform extradition act. If it has, this man may be extradited. If Illinois has no such law, the governor of that state is not authorized to or may refuse to extradite A.  
JEF

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*Criminal Law—Embezzlement*—Crime of embezzlement must be prosecuted in county in which crime was committed.

October 8, 1934.

EDMUND H. DRAGER,  
*District Attorney,*  
Eagle River, Wisconsin.

You state that a trustee was appointed in the county court of Sheboygan county, holding in trust \$20,000. He moved to Vilas county and while there and prior to that time had invested this money in stocks and bonds. While living in Vilas county the stocks were put up as collateral in New York City and intermingled with his own, and the stocks were sold out because the trustee was playing the stock exchange on margin with the result that at the present time the fund is \$12,000 short. You state that this trustee has been requested and ordered by the court in Sheboygan county to replace the funds short and to make a report within thirty days. A period of eight months has expired since that order but to date the trustee has not replaced the funds or rendered a report. A demand has been made for criminal action for embezzlement under the statutes. You inquire whether this action should be brought in Vilas county or Sheboygan county.

Under sec. 356.01, Stats., it is provided:

“All criminal cases shall be tried in the county where the offense was committed, except where otherwise provided by law”

unless the case is sworn away for cause. I know of no other statutory provision as to venue which would be applicable in this case. Embezzlement is therefore to be tried in the county in which the offense was committed. The funds were misappropriated while the trustee was in Vilas county. The fact that there was an order given to replace the fund does not effect the embezzlement charge as the misappropriation was already committed when the money was used unlawfully by the trustee, and this was in Vilas county.

JEF

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*Elections—Corrupt Practices*—Elements involved in determining whether distribution of book matches bearing campaign advertising material by candidate for office is violation of corrupt practices act are discussed.

October 8, 1934.

R. C. LAUS,  
*District Attorney,*  
Oshkosh, Wisconsin.

You wish to know whether the distribution of book matches bearing campaign advertising material by candidates for public office is a violation of ch. 12, Stats., the corrupt practices act.

Secs. 12.06 and 12.07, Stats., provide that no candidate or party committee or personal campaign committee shall make any disbursement for political purposes except such expenditures as are specifically authorized by those sections. None of the authorized expenditures covers book matches bearing campaign advertising material.

According to sec. 12.01 (3), a

“disbursement” shall mean and include every act by or through which any money, property, office or position or other thing of value passes or is directly or indirectly conveyed, given, provided, paid, expended, promised, pledged, contributed or lent, and also any money, property, office or position or other thing of value so given, provided, paid, expended, promised, pledged, contributed or lent.”

Sec. 12.01 (1) provides:

“Any act shall be deemed to have been done for ‘political purposes’ when the act is of a nature, is done with the intent, or is done in such a way, as to influence directly or indirectly, voting at any election or primary, or on account of any person having voted, or refrained from voting, or being about to vote or refrain from voting at any election or primary.”

The purpose for which these book matches bearing campaign advertising material are distributed is a political purpose as it is sought thereby to influence voters to vote for the candidate whose name is printed on them. The next question to be determined is whether these books of matches are “things of value” so that, there being no express authority for their being passed or “directly or indirectly conveyed, given, [or] provided,” their distribution is illegal.

The reason this campaign advertising matter is printed on a package of matches instead of on a handbill or card, as allowed under sec. 12.07 (3), Stats., is because this will result in keeping the advertising matter about and therefore increase its value as advertising. The advertising is kept before the attention of the voter who receives it because it is on an article which is of use and therefore of value to him. If the package of matches was not of value to the recipient, he would throw it away and pay as little attention to it as he would to a card or handbill on which campaign material is printed. While the package of matches is a thing of value to the recipient because it is useful and provides him with that which he might otherwise have to purchase, it is a thing of slight value. However, the statute makes no exception for that which is of slight value, but forbids the distribution of anything of value not listed under secs. 12.06 and 12.07, Stats. The distribution of these book matches bearing campaign material is at least an infraction of the letter of the law, i.e., a technical violation. Whether their distribution is such an infraction of the law as should subject the distributor to a penalty would be a question for a jury. The legislature merely meant to forbid the distribution of articles which would tend to interfere with a voter’s choice of candidate

through intelligent appraisal and honest and independent thought on his part.

In the final analysis this office cannot determine for you whether you should interfere with the distribution of these book matches. In determining whether or not this infraction of the law is of sufficient magnitude to warrant action on your part you should consider the question of whether these book matches are of such value that the receipt of them would tend to exert an undue or illegal influence on a voter. The above discussion should be of value to you in making your decision.

JEF

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*Fish and Game—Public Lands—Conservation Commission may use conservation warden to guard and protect property under its jurisdiction and administration.*

October 8, 1934.

H. W. MACKENZIE, *Conservation Director,*  
*Conservation Department.*

You have inquired whether a conservation warden may guard and protect state property over which the conservation commission has jurisdiction and administration and whether he would have authority to personally arrest any persons that he saw destroying such state property in any manner, the specific property which you have in mind being the Horicon dam maintained by your commission.

Your question is answered in the affirmative.

The police powers of conservation wardens are set forth in sec. 29.05, Stats., and were discussed generally in XXIII Op. Atty. Gen. 630.

You will note, under sec. 29.05, subsec. (1), that arrests may be made with or without warrants where any person is detected in the actual violation, or where the person is one whom a conservation officer has reasonable cause to believe guilty of the violation of any of the provisions of ch. 29, Stats.

Sec. 29.571, subsec. (4), authorizes the conservation com-

mission to construct and maintain the dam in question at Horicon.

Also, under sec. 23.11, subsec. (1), the conservation commission is given very broad general powers. This section provides in part as follows:

*"In addition to the powers and duties heretofore conferred and imposed upon said commission by this chapter it is empowered and required to have and take the general care, protection and supervision of all state parks, of all state fish hatcheries and lands used therewith, of all state forests, and of all lands owned by the state or in which it has any interests, except lands the care and supervision of which are vested in some other officer, body or board; and said commission is granted such further powers as may be necessary or convenient to enable it to exercise the functions and perform the duties required of it by this chapter and by other provisions of law. \* \* \*"*

Again, in sec. 23.12, it is provided:

*"Said commission may make and establish such rules and by-laws, not inconsistent with law, as it may deem useful to itself and its subordinates in the conduct of the business entrusted to it."*

Furthermore, and having in mind the specific property you suggest, it would appear that if an attempt should be made to destroy such dam by explosives, for instance, it would result in a violation of sec. 29.29, Stats., in which it is provided:

*"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; \* \* \*"*

In such case there would appear to be no question as to the authority of a conservation warden to arrest, without warrant, if a person was detected in such a violation. We feel that when the sections of the statutes above referred to in this opinion are taken together, and considered as a whole, they provide your commission with the necessary power by which it might arrange to use a conservation warden to guard and protect a dam maintained by it for conservation purposes.

JEF

*Public Lands—Taxation—Exemptions—Time at which sufficient title in property purchased passes to federal government to make property exempt under sec. 70.11, subsec. (1), Stats., is discussed.*

October 10, 1934.

TAX COMMISSION.

Attention Alvin M. Johnson, *Commissioner*.

Land to be used for forestry purposes is acquired by the federal government under the provisions of Title 16 U. S. C. A. secs. 513 to 519 and 521. According to your letter, the following procedure is followed in acquiring it:

“A proposal is made by the owner to the United States government proposing to sell certain lands at a stipulated figure. This proposal is acted upon by the federal government by cruising the lands and finding if they are worth the price stipulated in the proposal. After a value has been found by the government an offer is made to the owner at a certain stipulated figure for these lands. If this offer is accepted, the government then requires that the title be perfected and passed upon by them before the deeds are drawn. If the title is satisfactory to the government’s attorney he then advises the owner the form of deed required and directs him to include in the deed the lands accepted by the government, and directs that the deed be recorded and forwarded to the government’s attorney, who in turn, forwards it to Washington for payment.”

You present for our consideration a situation in which in the acquiring of land by the federal government all of the above procedure has been carried out. However, the government has not yet paid for the land.

You wish to know whether title to the land has vested in the United States so that the land is nontaxable for the year 1934 under the provisions of sec. 70.11, subsec. (1), Wis. Stats. In other words, you wish to know whether nonpayment of the purchase price leaves this land still subject to state taxes.

The answer is that the title to the land in question has vested in the United States and, therefore, the land is no longer subject to state taxes.

A deed to this property was executed and recorded on April 11, 1934. All that remained to be done in order to give the deed validity and transfer title was for the tax-

payer to deliver it and the government to accept it. The delivery of a deed and its acceptance by the grantee are essential to its validity. *Cooper v. Jackson*, 4 Wis. 537; *Falbe v. Caves*, 151 Wis. 54, 138 N. W. 87; *Chaudoir v. Witt*, 170 Wis. 556, 170 N. W. 932, 174 N. W. 925; *Darling v. Williams*, 189 Wis. 487, 207 N. W. 255.

Delivery of a deed need not be made in any special manner. All that is necessary is that the grantor part with the control of the deed with the intention presently to pass the title. *Butts v. Richards*, 152 Wis. 318, 140 N. W. 1, 44 L. R. A. (N. S.) 528; *Chaudoir v. Witt*, *supra*.

In the instant case there has been a delivery and acceptance of the deed in the manner prescribed by the attorney acting as agent for the government. The taxpayer executed the deed, recorded it and surrendered control over it with the intention of presently passing title by mailing it to the government's attorney. The receipt of the deed by the attorney was an acceptance of the deed by the government through its duly authorized agent.

The fact that the government did not pay the purchase price did not keep the title from passing because, as stated above, legal title to property passes as soon as the deed is delivered and accepted. (In the case of a gift of real property no money is ever paid by the grantee to the grantor and yet the title passes upon delivery and acceptance of the deed.)

Title 16 U. S. C. A. sec. 517, 36 Stats. at Large 962, specifically provides that the consideration for the land purchased shall *not* be paid before title has vested in the United States:

"The Secretary of Agriculture may do all things necessary to secure the safe title in the United States to the lands to be acquired under sections 513 to 519 and 521 of this title, but no payment shall be made until the title shall be satisfactory to the Attorney General and shall be vested in the United States."

You also wish to know whether the acceptance of the option by the federal government should be deemed to have conveyed such an interest to the United States as to render the land nontaxable by the state.

Answer, No.

Sec. 70.11 (1), Stats., exempts from taxation property owned exclusively by the United States. "To own property within the meaning of the exemption statute means to have the legal title to it." *Aberg v. Moe*, 198 Wis. 349, 358, 359. The acceptance of the option by the federal government created a contract whereby the taxpayer agreed to sell and the government to buy the land in question. In other words, the acceptance of the option gave the government merely an equitable interest. The legal title upon which exemption is based did not pass from the taxpayer to the federal government until after the delivery and acceptance of the deed.

JEF

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*Taxation—Tax Collection*—County is authorized under statutes to issue so-called master certificates for delinquent parcels sold to county at tax sale and is not obliged to issue separate certificate for each such description.

October 13, 1934.

OLIVER L. O'BOYLE, *Corporation Counsel*,  
*Office of District Attorney*,  
Milwaukee, Wisconsin.

In your recent letter you say that the county treasurer has requested you to obtain an opinion from the attorney general's office as to the legality of a tentative plan which the county treasurer proposes to adopt.

Under the present system, which has been in force for some time, the county treasurer prepares a separate tax certificate for each parcel of land sold to the county for delinquent taxes. Formerly this did not entail a great deal of work but during the past few years the total number of delinquent parcels has become so large that this method requires a great deal of additional bookkeeping and clerk work.

You say:

"Under the plan proposed by the county treasurer the writing up of tax certificates to cover each parcel sold to

the county for delinquent taxes would be eliminated and one master certificate would be issued to the county referring to the description and tax items shown in the tax records and by reference to the record books only. The record books would, of course, be made a part of the master certificate. Thus, under the new proposed plan when taxes on a particular description are subsequently paid up by an individual and an assignment of the tax certificate is then sought, the county treasurer would make out a separate tax certificate to the county covering the particular description and then assign it and show the assignment of the particular description by endorsement on the master tax certificate. One objection, among others, which has been raised to this plan, is the objection that succeeding county treasurers have no authority to sign such certificates."

I am of the opinion that the tentative plan which the county treasurer of Milwaukee county proposes to adopt is valid and in conformity with the statutes.

Sec. 74.46 of the Wisconsin statutes provides, in part, as follows:

"(1) The county treasurer shall give to each purchaser on the payment of his bid, and if the same be struck off to the county, then to the county, a certificate dated the day of the sale, describing the lands purchased, the amount paid therefor, the rate of interest thereon and the time when the purchaser will be entitled to a deed; \* \* \*"

The above quoted section of the statutes then goes on to state the form of certificate which shall be substantially followed. The form of certificate as shown by the statute does provide for the setting up opposite each description of the amount of taxes. However, it will be noted that the language of the statute, hereinbefore quoted, nowhere requires that a separate certificate be executed for each description, nor does sec. 74.46, require that the tax certificate shall be executed at any particular time following the sale. It merely provides that the certificate shall bear the date of the sale.

The sole purpose of executing tax certificates is to show the ownership of the taxes, i.e., to whom they have been sold. The tax certificate itself does not constitute sale but is merely evidence of the sale. If the old practice, now in existence, is continued it is manifest that a needless amount

of clerical work will be required, inasmuch as hundreds of thousands of parcels are bid in by the county annually.

The objection that succeeding county treasurers would have no authority to sign certificates appears to me to be wholly without merit. The county treasurer does not sign the certificate as an individual but as a county officer; that is, it is immaterial who the particular individual may be that is holding the office of county treasurer, because the signing is the act of the officer rather than of the individual and because that act is a ministerial one. *State ex rel. Carel v. Nelson*, 56 Wis. 290; *Dreutzer v. Smith*, 56 Wis. 292.

As I have indicated hereinbefore, I am of the opinion that the plan as outlined in your communication is legal. However, I would suggest that at the next session of the legislature the statutes be amended to specifically provide for the issuance of a master certificate to the county in the situation described above, for the reason that in some future time hypercritical criticism may be made that such titles are not merchantable, and legislation of this character would set at rest all doubts on that score.

JEF

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*Public Officers—City Sealer of Weights and Measures—*  
Salary of city sealer of weights and measures may be raised or diminished at any time, but change can be made only by board or body authorized to fix salaries of city officials.

October 15, 1934.

DEPARTMENT OF AGRICULTURE AND MARKETS.

Attention Mr. Geo. Warner, *Chief Inspector of Weights and Measures.*

You state that in a certain city a city sealer of weights and measures has been acting as such for a number of years, under sec. 125.04, Stats., and that his salary has been fixed by the common council each two years. In February, 1932, the council fixed his salary at one hundred twenty dollars per month for the years 1933–1934. He has also

acted as health officer, but received no additional salary for his service in that capacity. In May, 1933, the mayor recommended to the common council that the work performed by the city sealer as health officer be performed by another person appointed by the mayor. This recommendation was adopted, and the city sealer's salary was reduced to sixty dollars per month, the new health officer being also paid sixty dollars per month. You further state that there appears to be nothing in the council proceedings to indicate that the city sealer's salary has been reduced or that any salary had been fixed by the council for the new health officer.

You inquire whether this procedure was legal and whether a city sealer's salary could be increased or diminished during the period for which it had been originally set.

We are of the opinion that a city sealer's salary may be increased or diminished at any time. However, we do not believe that this can be done except by the council or other board or body authorized to fix the salaries of city officials. Since you report that there is nothing in the council proceedings to indicate such action by the council, it may be that the attempted reduction was ineffective in the case you mention.

Sec. 125.04, subsec. (1), Stats., provides in part:

"There shall be a city sealer of weights and measures \* \* \* who shall be appointed by the mayor from a list to be furnished by the state or local civil service board and under the rules of said board. He shall be paid a salary to be fixed by the board or body authorized to fix the salaries of city officials, \* \* \*."

This office rendered an opinion on March 8, 1916, V Op. Atty. Gen. 216, to the effect that the salary of a city sealer of weights and measures may be raised at any time, he having no term of office and being appointed under civil service rules. There has been no substantial change in the statute since that time, and we invite your attention to that opinion as we believe it to be applicable to the question you raise. It was there pointed out that the rule to the effect that a salary shall not be increased or diminished during a term of office does not apply to offices under civil service rules for the reason that there is no term of office in such instances.

However, you will note the statute is quite clear in providing that the salary shall be fixed by the board or body authorized to fix the salaries of city officials. Also sec. 62.09, subsec. (6), (a), Stats., among other things provides:

“\* \* \* Salaries heretofore established shall so remain until changed by ordinance.”

JEF

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*Intoxicating Liquors—Public Printing—Newspapers—*  
Under sec. 176.09, Stats., duty of publishing application for license falls upon local authorities.

Where publication of application for license is made in newspaper published outside municipality publication should be made three times, whether in daily or weekly newspaper.

October 15, 1934.

KENNETH C. HEALY,  
*District Attorney,*  
Manitowoc, Wisconsin.

You refer to the provisions of sec. 176.09, Stats., relating to publication of applications for liquor license, and inquire whether the duty of publication rests with the local authorities or with the applicant. You also inquire as to how many times it is necessary to publish an application made in a village which has neither a daily nor a weekly newspaper.

It is our opinion that the duty of publishing this application falls upon the local authorities. In XXIII Op. Atty. Gen. 500, at 501, it was held:

“\* \* \* Sec. 176.09 is a special statute pertaining to the publication of the notices in question and it of course is controlling rather than a general statute as contained in sec. 331.20. The local authorities are to determine what paper has the most circulation in such village or city. Towns, villages and cities near the border line of the state may well have papers published in a neighboring state with more circulation in them than any paper published in our state. The local authorities are within the letter of this law and I believe within the spirit of it when in such cases

they decide to have publication made in the paper which has the greatest circulation in the town, village or city, although published in another state, as the object of the publication is to inform the people of such locality."

By implication, it was held in this opinion that the duty of taking care of publication fell upon the local authorities. Sec. 176.09, subsec. (3), provides:

"At the time of filing such application the applicant shall pay to the town, village, or city clerk such a sum as, computed by the rate per folio for legal notices or publications as created, established, and applied in the counties of this state by the statutes of Wisconsin, would be required to pay for such publication."

The fact that the applicant is required to pay to the town, village or city clerk whatever sum of money is necessary to defray the cost of publishing would indicate that the duty of making the publication falls upon the local authorities. Inasmuch as the applicant must pay the cost of publication to the clerk when making his application, he could not be expected to be held responsible for the cost of publication again, but this cost should be defrayed by the local authorities, who have already received from the applicant sufficient money to pay for it.

In regard to your second question, sec. 176.09, subsecs. (1) and (2) provide:

"(1) All applications for licenses to sell intoxicating liquors shall be filed with the clerk of the town, village, or city in which such premises are situated at least fifteen days prior to the granting of any such license; and the same shall, prior to the granting of such license, be published in a daily paper printed in such town, city, or village at least three times successively, and where there is no such daily paper published, at least once in a weekly paper published in such town, city, or village. Such publication shall include the name and address of the applicant, the kind of license applied for, and the location of the premises to be licensed.

"(2) No publication of such applications shall be made in any newspaper, unless such newspaper making such publication shall have been regularly and continuously published daily or weekly, as the case may be, in such town, village, or city for a period of at least two years before the date of publication of such applications. If there be no

paper published in the town, village, or city in which the premises are situated, then in the paper having the most circulation in such town, village or city, as the local authorities may determine.”

The statute, of course, does not specify how many times it is necessary to publish the application where the newspaper in which publication is made is not published in the municipality in which the premises of the applicant are located.

It is possible that a court would hold that, where the newspaper is published outside of the town, village or city in which the premises are situated, publication three times in a daily paper or once in a weekly paper would be sufficient. You are advised, however, to observe the maximum requirement and that whether the newspaper so published outside is a daily or weekly, publication should be made three times.

Under sec. 176.09 (1) the application must be filed at least fifteen days prior to the granting of any license. Where publication is made in a daily no difficulty would be experienced in securing the three publications within the period of fifteen days; even in the case of three publications in a weekly, under some circumstances, the three publications can be effected in the fifteen days. The statute, however, provides that the application must be filed *at least* fifteen days before the granting of the license. If observance of the maximum requirement for publication three days in a weekly newspaper necessitates the lapse of more than fifteen days between the date of application and the granting of license it, of course, would not be in violation of the statute.

JEF

*Words and Phrases—In Session*—School is not in session until it has been called to order and work has begun.

October 16, 1934.

HAROLD M. DAKIN,  
*District Attorney,*  
Watertown, Wisconsin.

You state that in a certain school district some dissension has arisen among the patrons of the school. Recently a woman living in the school district called at the school at 8:30 in the morning, after the teacher and pupils were there but before they had assembled as a school and taken up their morning's work, and used abusive language toward the teacher in the presence of the pupils, which seriously disturbed the school work for the day. The language was not profane but was very disturbing. The question arises as to whether this woman could be prosecuted under sec. 348.44, Stats.

Sec. 348.44 reads thus:

"Any person who shall wilfully, maliciously or wantonly interrupt or in any way molest or disturb any private or public school while in session shall be punished by imprisonment in the county jail not more than thirty days or by fine not exceeding fifty dollars."

The question is whether this school was in session before it was called to order. The word "session" does not have a single, fixed and definite meaning but is variously used in the statutes and constitution. As applied to legislative sessions or court sessions, it is often used to signify a term of court or a meeting of the legislature. Sometimes a word is used as meaning an actual sitting of the court for transaction of business and not in the sense of "term." *United States v. Dietrich*, 126 Fed. 659, 660, 4 Words & Phrases (2 series) 544. This, being a criminal statute under the general rule, must be strictly construed against the state. I find no decision of our supreme court on this question. I believe the words "school in session" would mean a school

that is called to order and proceeding with its work. I do not believe that a prosecution will lie under said sec. 348.44, Stats.

JEF

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*Indians—Indigent, Insane, etc.—Minors—Juvenile Court*  
—Principles involved in determination of whether Indian children on Bad River reservation are subject to jurisdiction of juvenile court of Ashland county are discussed.

Either town of Sanborn under sec. 49.01, Stats., or Ashland county under sec. 49.15 must furnish poor relief to Indians on reservation.

October 17, 1934.

A. W. BAYLEY, *Secretary,*  
*Board of Control.*

You have requested this department to answer two questions:

1. Does the juvenile court of Ashland county have jurisdiction over dependent, neglected and delinquent Indian children living on the Bad River Indian reservation?
2. Must Ashland county furnish poor relief to the Indians on the reservation?

The Bad River Indian reservation lies wholly within Ashland county.

The early policy of the state of Wisconsin was to claim that the Indians on reservations in this state, regardless of their status, whether having received an allotment and a certificate of competency and thus becoming citizens of the United States and this state or whether maintaining full tribal relations and living on land held in common by the tribe or "restricted allotments," were subject to state laws. This policy was expressed in the case of *State v. Doxtater*, 47 Wis. 278, in which the court ruled:

"The jurisdiction of a state, when not restricted by existing treaties with Indian tribes, or by the act admitting such state into the Union, and except so far as it is restricted

by the authority of congress under the federal constitution to 'regulate commerce with the Indian tribes,' extends to all members of such tribes within the territorial limits of the state." (Syllabus 1.)

At p. 297 the court said decisively,

"We have no doubt that the criminal laws of the state apply to the Indians on their reservations within this state."

This policy was upheld in *State v. Harris*, 47 Wis. 298; *Stacey v. LaBelle*, 99 Wis. 520, 524; *Deragon v. Sero*, 137 Wis. 276.

However, the supreme court of the United States did not agree with these decisions, holding that tribal Indians are wards of the United States, and while on the reservation are not subject to the criminal laws of the state wherein they reside. *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109; *In re Blackbird*, 109 Fed. 139. (The latter reversed a Wisconsin decision.)

Because of this confusion, and probably to clarify its policy, the federal government passed sec. 328 of the Criminal Code, sec. 548, U. S. C. A., which became a law on March 3, 1885 (23 Stats. at Large 385), and was amended March 4, 1909 (35 Stats. at Large 1151), and provided:

"All Indians committing against the person or property of another Indian or other person any of the following crimes, namely—murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary and larceny, within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, \* \* \* And all such Indians committing any of the above-named crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States \* \* \*."

The federal cases recognized, however, that once an Indian was no longer a ward of the federal government he would be amenable to the jurisdiction of the state courts although he still lived on a reservation. Many Indians have

received allotments of land from the federal government, some of them under treaties and others under the general allotment act of 1887 (24 Stats. at Large 388). The act of 1887 provided that allottees under it be "subject to the laws, both civil and criminal, of the State or Territory in which they may reside" (sec. 6). This act was interpreted by the federal court in *Matter of Heff*, 197 U. S. 488. *United States v. Celestine*, 215 U. S. 278, involved an Indian who had received an allotment under a treaty with the Omahas, dated March 16, 1854. Indians receiving their allotments under such treaties are "restricted allottee Indians" and although granted citizenship are not (as under the general allotment act) made amenable to the laws of the state or territory within which lies the reservation and thus remain wards of the federal government and subject only to the courts of the United States. From the *Celestine* case it appears that an Indian allottee under a treaty, who still maintains his tribal relations, notwithstanding he be a citizen is not amenable to state laws while on the reservation.

In the light of decisions of the United States supreme court and in view of sec. 328 of the criminal code quoted above, the supreme court of this state overruled *State v. Doxtater*, *supra*, in *State v. Rufus*, 205 Wis. 317. In the latter case, the court held:

"Under the federal statutes, the state courts are without jurisdiction to entertain the prosecution of an Indian, having tribal relations and residing on a reservation, for the crime of statutory rape committed within the limits of the reservation on an Indian woman having tribal relations and residing on the reservation." (Syllabus.)

In this case the court has an elaborate and helpful discussion of state and federal cases dealing with the question of the jurisdiction of state courts over Indians.

In *State v. Johnson*, 212 Wis. 301, the court held:

"State courts have jurisdiction to try tribal Indians for criminal offenses \* \* \* committed upon fully patented lands, even though such lands are located within the exterior boundaries of an Indian reservation, \* \* \* under sec. 328 of the federal Criminal Code." (Syllabus 1.)

From these recent cases it appears that:

(1) State courts have criminal jurisdiction over Indians, (a) Whether wards of the federal government or not when the crime is committed without the reservation or on fully patented lands on the reservation.

(b) If the crime is committed on the reservation, when the Indian is one who is no longer a ward of the federal government, i.e., no longer maintains tribal relations and lives (1) on an allotment made pursuant to the general allotment act or (2) on land allotted under a treaty if he has acquired a certificate of competency.

(2) The state courts have no jurisdiction over Indians who are still wards of the federal government, i.e., who maintain tribal relations and live on (a) land held in common by the tribe or (b) "restricted allotment" land when the crime is committed on the reservation.

Whether or not an Indian on the Bad River Reservation is amendable to the jurisdiction of the state courts will have to be decided in the light of the facts of each particular case and the principles set forth above. No general statement can be made to include all the Indians on the reservation. Whether or not the juvenile court has jurisdiction over dependent, neglected and delinquent Indian children on the reservation depends upon whether their parents are under the jurisdiction of state courts.

As to your second question:

Sec. 49.01, Stats., reads as follows:

"Every town, village and city shall relieve and support all poor and indigent persons lawfully settled therein whenever they shall stand in need thereof, except as hereinafter provided. \* \* \*."

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; \* \* \*."

The Bad River Indian reservation is in the town of Sanborn. Therefore, the town of Sanborn or Ashland county (if you have the county system of relief under sec. 49.15) must furnish poor relief to the Indians on the reservation. See XX Op. Atty. Gen. 498.

JEF

*Indigent, Insane, etc.—Minors*—Legal settlement of minor legitimate child follows that of its parents and, where such child is inmate of southern Wisconsin colony and training school for feeble-minded, change of legal settlement of parents changes that of child; county to which legal settlement has been changed is required to maintain child at institution.

October 18, 1934.

BOARD OF CONTROL.

You have requested an opinion concerning the legal settlement of one X under the following statement of facts:

“X, a legitimate child, was born January 31, 1917. She was committed to the southern Wisconsin colony and training school as feeble-minded on October 7, 1929. Her parents had lived in Milwaukee from December 3, 1928, and prior to this time had lived in Racine for a period of more than ten years.”

In support of the opinion that Racine county is chargeable with all of the maintenance, you cite VII Op. Atty. Gen. 350, and Kennan on Residence and Domicile, secs. 326 and 328 and cases cited therein. You say that Racine county contends that the opinion rendered in XXII Op. Atty. Gen. 225 is the latest word covering the question.

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.”

Under the facts stated, X had a legal settlement in Racine county on December 3, 1928, when she was committed, but her legal settlement was changed by reason of the fact that her parents moved to Milwaukee county, and as soon as they acquired a legal settlement in Milwaukee county their legal settlement in Racine county stopped. Under the above quoted subsec. (2) the legal settlement follows that of the parents.

You are advised that it is our opinion that Milwaukee county will be chargeable for its maintenance after the par-

ents acquired a legal settlement in Milwaukee county. There are opinions rendered by this department to the effect that when a person who has a legal settlement in a certain county is committed to an institution, the legal settlement will continue in the place from which he was committed although he does not continue to reside in such county. That is based upon the fact that a person either insane or feeble-minded cannot voluntarily change his residence and the legal settlement consequently remains in the place from which he was committed. Here, however, the change of residence is caused by the parents, who are able to change their residence and consequently their legal settlement.

JEF

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*Fish and Game—Muskrat Farms*—Holder of muskrat fur farm license may prevent public from trapping muskrats on farm covered by license whether same be submerged by waters of navigable stream or not.

October 18, 1934.

CONSERVATION DEPARTMENT.

Attention H. W. MacKenzie, *Conservation Director*.

A party has made application for a muskrat fur farm license under the provisions of sec. 29.575, Stats. The area for which license is desired, and of which you have submitted a map, is located near Lake Poygan, and includes land which was formerly the bed of a navigable river. The water, however, has receded from the land, for which the applicant has a deed and upon which he has paid taxes. The question arises as to whether or not the applicant can keep the general public from coming upon the land and trapping muskrats from it after a license has been obtained under the provisions of sec. 29.575, Stats.

It is our opinion that this question must be answered, Yes. Some years ago a number of opinions were written by this office relative to the provisions of sec. 29.575 and the rights which licensees might acquire thereunder. In view of a comparatively recent decision by our supreme

court concerning this statute, it is deemed advisable to review the previous opinions in connection with this recent decision.

In XV Op. Atty. Gen. 531 it was held that an exclusive right cannot be granted to trap muskrats in navigable waters, but that such a right could be given to owners of land submerged under nonnavigable waters. In XV Op. Atty. Gen. 162 it was held that the licensee of a muskrat farm under sec. 29.575 has exclusive control of the trapping of muskrats within the territory described in his license. It was further held in that opinion that the general public might in open season trap upon any navigable waters within such area. The opinion did not definitely state whether the public could or could not trap muskrats in navigable waters within the area during open season. In XVI Op. Atty. Gen. 728 it was held, among other things, that the public has a right to trap muskrats in navigable waters when such trapping is confined strictly to such waters while in navigable stage and between the boundaries of ordinary high-water mark. The inference could be drawn from that opinion that had the fur farm license therein discussed covered lands submerged by navigable waters, the public would still have the right to trap muskrats on such portion of the farm as was actually covered by navigable water. In XVII Op. Atty. Gen. 467 it was held that the license for a muskrat fur farm may be issued for land covering the former bed of a river. XVII Op. Atty. Gen. 52 held, among other things, that a license for a muskrat fur farm may not be issued covering any land submerged by a navigable lake or pond, but may issue covering land submerged by a navigable stream. The holdings and inferences from these opinions are in conflict, and in view of the recent decision, an effort will here be made to furnish a correct statement of the law.

In the case of *Krenz v. Nichols*, 197 Wis. 394, a muskrat fur farm license had been issued to the plaintiff, who was the owner of one hundred acres of land near the Fox River, and a portion of which land was submerged by navigable water of the said river. A fur farm license had been issued to the plaintiff covering this one hundred acres. The defendant admittedly trapped muskrat in the area covered by

the license but submerged by navigable water. Plaintiff contended that the act of the defendant in catching the muskrat constituted a trespass and prayed for an injunction to restrain further trespasses of this nature. The trial court held that neither the legislature of the state of Wisconsin nor the conservation commission had any power or right to exclude the general public from navigation, hunting, or fishing in the waters above the land owned by the plaintiff, and that neither the state nor the conservation commission had the right or power to grant an exclusive right to any individual to trap in any of the navigable waters of the state. The trial court further held that sec. 29.575 was void and that the plaintiff could not bar the defendant from trapping muskrats in the area covered by the license issued under the provisions of sec. 29.575. The supreme court, however, reversed the conclusions of law made by the trial court to the extent of holding that sec. 29.575 was a valid, constitutional enactment, that the legislature had the power to provide for the granting of an exclusive right to an individual to trap muskrats in an area partially covered by navigable waters, as well as unsubmerged land, and that the plaintiff was entitled to the injunctive relief prayed for to exclude the defendant from again trapping muskrats on any of the land covered by his license, whether such land was submerged or unsubmerged. The previous opinions of this office which held or implied that a valid license under sec. 29.575 could not be issued for land submerged by a navigable stream are thus in conflict with this decision of the supreme court and are consequently overruled. In view of this decision in the case of *Krenz v. Nichols, supra*, you are advised that the party who is applying for a muskrat fur farm license under the provisions of sec. 29.575 may, upon obtaining such license, keep the general public from trapping muskrats upon his land, whether the same be submerged by the waters of a navigable stream or not.

JEF

*Appropriations and Expenditures—Constitutional Law—Forests*—Words “forests of state” as used in sec. 10, art. VIII, Wis. Const., include privately owned forests.

Constitutional limitation as to amount of annual appropriation for forestry purposes applies also to prevention and suppression of forest fires.

October 18, 1934.

CONSERVATION DEPARTMENT.

Attention Mr. H. W. MacKenzie, *Conservation Director*.

You call our attention to that part of sec. 10, art. VIII, Wis. Const., which provides as follows:

“\* \* \* Provided, that the state may appropriate moneys for the purpose of acquiring, preserving and developing the forests of the state; but there shall not be appropriated under the authority of this section in any one year an amount to exceed two-tenths of one mill of the taxable property of the state as determined by the last preceding state assessment.”

In this connection you inquire whether the words “forests of the state” refer to state owned forests only, or to all forests of the state which would include privately owned forests. You also inquire whether the annual tax limit of two-tenths of one mill, above specified, would prevent the legislature from appropriating money to the conservation department in addition to the two-tenths of one mill limit, for the prevention and suppression of forest fires.

We are of the opinion that the words “forests of the state” as used in the forestry amendment to sec. 10, art. VIII, Const., above quoted, are not limited to state owned forests.

The forestry clause amendment above mentioned was originally adopted in 1910, and provided that the state might appropriate moneys for the purpose of acquiring, preserving and developing the water power as well as the forests of the state. This amendment was held invalid in 1915 in the case of *State ex rel. Owen v. Donald*, 160 Wis. 21, for the reason that the constitutional requirements for an amendment had not been complied with by the legislature. The present forestry amendment was adopted by the people of the state at the general election of 1924, after

having been approved by the 1921 and 1923 sessions of the legislature.

In construing the constitution we are governed by the same rules of interpretation which prevail in relation to statutes. *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180. The general rule of statutory construction is:

“All words and phrases shall be construed and understood according to the common and approved usage of the language; \* \* \*.” Sec. 370.01, subsec. (1), Stats.

It is obvious that the words “forests of the state” must have been intended to include privately owned forests. There would be no sense in providing that the state could appropriate moneys for the purpose of “acquiring” what it already owned, which would be the case if the words “forests of the state” were limited to state owned forests. Furthermore, amendments to our state constitution are to be construed so as to promote the objects for which they were framed and adopted. *State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 8 Cyc. 730. At the time the Wisconsin constitution was adopted, the state was largely covered with a primeval growth of timber of such vast and enormous proportions that the ultimate exhaustion of this great natural resource was not contemplated. In fact, it was considered a hindrance to agricultural developments, and was regarded as something to be cleared off and destroyed. The denuding process went rapidly on until it became apparent that this great natural resource would soon almost entirely disappear, and about 1903, the movement for forest restoration really began in Wisconsin with the establishment of the state board of forestry. It was soon recognized that direct state participation in forest replacement was a work of internal improvement and consequently was prohibited by the state constitution. This led to the forestry amendments above mentioned. It seems apparent from contemporary discussion and news articles that the people of the state had before them the idea, in voting on this amendment, that the very nature of the timber crop was such that the state would have to participate in its restoration, whether on privately or publicly owned lands.

The words “acquiring, preserving *and* developing” may be construed to mean “acquiring, preserving *or* developing.”

It has been frequently held that the words "and" and "or" may be convertible, and the one will be substituted for the other whenever necessary to arrive at the evident intent of a statute or to render the statute a harmonious whole. *People v. Trustees of Northwestern College*, 322 Ill. 120. If "and" is construed as "or" in the above connection it would be clear that forests could be "developed" without the state first acquiring them. We believe this construction fits in with our previous discussion here to the effect that "forests of the state" should be held to include privately owned forests.

There is, of course, the general rule that the legislature is without power to appropriate the public revenues for anything but public purposes. *State ex rel. Atwood v. Johnson*, 170 Wis. 218. However, as was pointed out in that case, the legislature is not limited by necessity alone, and in determining the question, is vested with large discretion. See also XX Op. Atty. Gen. 959. In connection with forest restoration it is generally recognized that forests are a necessity to hold moisture for agricultural lands, to hold flood waters in control, to increase water power, to control stream flow, and in other ways affect the public generally whether the forests are on public or on privately owned land. Also it has been held that the acquisition, preservation and scientific care of forests and forest areas by the state as well as the sale of timber therefrom for gain in accordance with the canons of forest culture is a "public purpose." *Perkins v. Board of Commissioners of Cook County*, 271 Ill. 449.

We are of the further opinion that the two-tenths of one mill annual tax levy limitation in the forestry amendment does prevent the legislature from appropriating money to the conservation department in addition to the above for the prevention and suppression of forest fires. When the forestry amendment is read as a whole the natural conclusion is that, in adopting this amendment, the people of the state clearly intended that the amount to be spent on forestry in all its phases during any one year should be limited to two-tenths of one mill of the taxable property in the state. Fire prevention and suppression would logically fall under the constitutional provision for "preserving" for-

ests. "Preserve" means "To keep or save from injury or destruction." Webster's New International Dictionary. It would seem that any other construction would do violence to the intent of the people as expressed in the forestry clause in the constitution.

JEF

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*Agriculture—Appropriations and Expenditures—Department of Agriculture and Markets—Authorization by budget director under sec. 14.32, Stats., is necessary to authorize department of agriculture and markets to expend money under sec. 96.61, subsec. (2), Stats., for purpose of conducting airplane tour outside state to advertise Wisconsin cheese.*

October 18, 1934.

DEPARTMENT OF AGRICULTURE AND MARKETS.

Attention Charles L. Hill, *Chairman.*

You state that your department is considering the project of an airplane tour to advertise cheese, and that the plan is to have the governor of Wisconsin send to the governor of every other state an American cheese as a gift from the state of Wisconsin. Appropriate publicity would be given to the plan and a special advertising campaign in each capital city and each state would accompany the delivery of the cheese.

You inquire whether your department has authority to expend money for such a program.

At first glance it would seem that your department has such authority under sec. 96.61, subsec. (2), Stats., which provides:

"The department of agriculture and markets shall study the possibilities for increasing the markets for Wisconsin dairy and farm products and shall through publications, advertising and other appropriate methods endeavor to extend and improve these markets."

However, we would also call attention to sec. 14.32, Stats., which provides as follows:

"The secretary of state shall not audit items of expenditure for tips, portorage, parlor car seats other than sleeping car berths, or for expenses not necessarily incurred in the performance of duties required by the public service; nor shall he audit items of expenditure incurred while traveling outside the state by any officer or employe of the state or of any department or institution thereof unless in the discharge of his duties required by the public service and after authorization by the director of the budget, unless specific statutory authority exists therefor; 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."

While in a general way sec. 96.61 (2) provides that your department shall study the possibilities for increasing the markets for Wisconsin dairy and farm products and is authorized to use publications, advertising and other appropriate methods to extend and improve these markets, yet it cannot be said that this section of the statutes provides specific statutory authority for the program you suggest. In the absence of such specific statutory authority, the prohibition contained in sec. 14.32 would apply, unless those engaged in the activities you suggest may be considered in the discharge of duties required by the public service, and unless authorization should first be obtained from the director of the budget.

It may be that officers of your department engaged in the contemplated program could be properly considered in the discharge of duties required by the public service under sec. 96.61 (2), and that the director of the budget would, therefore, be justified in granting the necessary authorization for incurring traveling expenses outside the state, although the subject is by no means free from doubt on this point.

JEF

*Constitutional Law—Insurance—Town Mutuals—Mortgages, Deeds, etc.*—Ch. 392, Laws 1933, is constitutional but mortgagee is liable for proportionate share of assessments only on policies to which mortgage rider was attached subsequent to effective date of act.

October 18, 1934.

DEPARTMENT OF INSURANCE.

Attention H. J. Mortensen, *Commissioner of Insurance*.

On November 27, 1933, the commissioner of insurance was appointed by the circuit court as receiver for a mutual town insurance company in this state, pursuant to and under the provisions of sec. 200.08, Wis. Stats. On May 23, 1934, the court ordered the receiver to levy an assessment against the members of the said insurance company for the purpose of liquidating the outstanding claims. In accordance with the order, the receiver levied the assessment, notice of which was mailed to the respective policy holders on May 28, 1934, and designating that the assessment was due and payable on or before June 30, 1934. Certain of these assessments were unpaid. On July 30, 1934, pursuant to sec. 202.11, subsec. (2), Wis. Stats. 1933, which was amended by ch. 392, Laws 1933, various mortgagees mentioned under the policies issued by the company were notified of the assessment and demand was made upon them for payment of the proportionate share of the assessment which corresponded to the mortgagee's interest in the policy. A mortgage rider was attached to the majority of these policies prior to the passage of ch. 392, Laws 1933 which, according to sec. 2 of the act, took effect upon passage and publication. It was published July 13, 1933. The mortgagees object to paying these assessments which have been levied against them on these policies to which the mortgage rider was attached prior to the passage of ch. 392, Laws 1933. You request our opinion as to the validity of ch. 392, Laws 1933, which amended sec. 202.11 (2) to read in part, as follows:

“\* \* \* If the insurance is payable to a mortgagee or assigns, and the mortgagee or his assignee shall be chargeable with knowledge of such fact, and the assessment there-

on is not paid within the time specified, the secretary shall within thirty days after the expiration of such time give like notice to the mortgagee. Such mortgagee shall pay such assessment within twenty days from the date of such notice but the mortgagee's liability for such assessment shall not exceed his interest in the policy of insurance. \* \* \*."

It is our opinion that ch. 392, Laws 1933, is constitutional and valid but that it operates only upon contracts between the insurance company and the mortgagee entered into subsequent to the effective date of the act. The case of *Prudential Insurance Company v. Paris Mutual Fire Insurance Company*, 213 Wis. 63, dealt with a mortgage rider which was attached to a policy and provided for payment of insurance to the mortgagee as his interest might appear. In speaking of this rider, the court stated, p. 69:

"\* \* \* The defendant had power to enter into the contract made with the plaintiff mortgagee. The rider effecting the mortgagee's insurance in the instant case is in almost the precise terms and is to the precise effect of the standard form of rider authorized by the statute to be signed by the secretary and attached to policies of registered town mutual companies. The secretary of the company, under the standard form of rider prescribed for registered town mutuals, thus has authority to sign a rider constituting a contract with a mortgagee, and the secretary of the defendant company, by the company's uniform practice and practical construction of its by-law, has like authority. That a rider such as is here involved is a separate and distinct contract is recognized by *Keith v. Royal Ins. Co.* 117 Wis. 531, 538, 94 N. W. 295. The opinion in that case states three methods by which insurance for the protection of a mortgagee is effected, and after stating the first two methods states: . . . 'and thirdly, but seldom, a direct contract with the mortgagee, insuring him against loss by fire. To the last of these the owner is no party.' The rider here involved is within this third class and is a distinct contract of insurance in and of itself."

The court here specifically held that the attachment of the mortgage rider in proper form constituted a contract between the mortgagee and the insurance company.

"Contracts of insurance are presumed to have been made with reference to the law of the land, including the statutory laws which are in force and are applicable and such laws enter into and form a part of the contract, as much as

if actually incorporated therein. \* \* \*” 1 Couch, on Insurance, sec. 150.

Among the numerous cases cited for this proposition are: *Oshkosh Gaslight Co. v. Germania F. Ins. Co.*, 71 Wis. 454, 5 Am. St. Rep. 233, 37 N. W. 819; *Breakstone v. Appleton M. F. Ins. Co.*, 149 Wis. 303, 135 N. W. 853. See also *Tomashek v. Hartland Farmers Mutual Fire Insurance Company*, 212 Wis. 622.

As to the mortgage riders which were properly attached subsequent to July 13, 1933, and which constituted contracts between the mortgagee and the insurance company, the above quoted portion of sec. 202.11 (2) became a part of such contract, and the mortgagee is liable for his proportionate share of the assessment in accordance with said section.

Art. I, sec. 10, U. S. Const., provides:

“No State shall \* \* \* pass any \* \* \* Law impairing the Obligation of Contracts, \* \* \*.”

Art. I, sec. 12, Wis. Const., provides:

“No \* \* \* law impairing the obligation of contracts, shall ever be passed, \* \* \*.”

“\* \* \* The obligation of a contract is impaired by a statute which alters its terms, by imposing new conditions or dispensing with conditions, or which adds new duties or releases or lessens any part of the contract obligation or substantially defeats its ends. \* \* \*” *Fidelity State Bank v. North Fork H. Dist.*, 35 Idaho 797, 813, 209 Pac. 449.

“\* \* \* The obligation of a contract is impaired by a statute which \* \* \* adds new duties \* \* \*.” 6 R. C. L., sec. 318.

See also *Northern Pacific R. Co., v. Minn.*, 208 U. S. 583; *Smith v. Northern Neck Mutual Fire Assn.*, 112 Va. 192, 70 S. E. 482; *O'Connor v. Hartford Accident & Indemnity Company*, 97 Conn. 8, 115 A. 484.

Ch. 392, Laws 1933, imposed a new duty upon the mortgagee, that is, to pay his proportionate share of an assessment in default of payment by the mortgagor. Were this act to be held applicable to contracts between the insurance

company and the mortgagee entered into prior to the effective date of the act, it would be unconstitutional as an impairment of the obligation of contract in violation of both the federal and the state constitutions. An act can be invalid as to contracts existing at the time of its passage and valid as to future contracts. *Schewe v. Glenn*, 302 Ill. 462, 134 N. E. 809. Were ch. 392, Laws 1933, to be held applicable to contracts entered into prior to the passage of the act, it would mean that such act was given a retroactive operation. There is no indication that the legislature had such an intent. Statutes will not be construed as retroactive unless that purpose on the part of the legislature plainly appears. *In re Dancy Drainage District*, 199 Wis. 85; *Town of Bell v. Bayfield County*, 206 Wis. 297.

The general rule is that a statute conferring a new right will not be given retroactive effect unless the intention that it be given such effect is clearly expressed. *Chicago, M. & St. P. Railway Co. v. Railroad Commission*, 187 Wis. 380. See also *Read v. City of Madison*, 162 Wis. 94.

Retrospective laws cannot impair the obligation of contracts. *Norris v. Tax Commission*, 205 Wis. 626; and the court will so construe as not to void a legislative enactment whenever, by any fair interpretation, its words may be so construed as to serve a constitutional purpose. *State ex rel. Reynolds v. Sande*, 205 Wis. 495.

It is our opinion that ch. 392, Laws 1933, while valid and constitutional, does not apply to contracts entered into prior to the effective date of the act, and that a mortgagee is not liable for his proportionate share of assessments under sec. 202.11 (2) under policies to which the mortgage rider was attached prior to the effective date of the said ch. 392.

JEF

*Hotels and Restaurants—Intoxicating Liquors*—Whether tavern selling sausage, fish, bread and butter is restaurant within meaning of sec. 176.05, subsec. (10), par. (a), Stats., depends upon facts and circumstances in each case.

October 18, 1934.

DR. G. W. HENIKA,  
*Assistant State Health Officer,  
Board of Health.*

You wish to know whether a tavern operating under a "Class B" intoxicating liquor license in which solid foods consisting of sausage, fish, bread, and butter are sold and which, under the present rule of the state board of health, must have a restaurant permit must sell liquor only at tables and to seated customers.

Sec. 176.05, subsec. (10), par. (a), Wis. Stats., provides:

"Intoxicating liquor shall be sold in restaurants only at tables and to seated customers."

Sec. 176.01 (6) provides:

"'Restaurant' [within the meaning of ch. 176 of the statutes] means space, in and wholly within a suitable building, leased or rented or owned by a person or corporation, licensed as such, and provided with adequate and sanitary kitchen and dining room equipment and capacity and employing such number and kinds of servants and employes necessary for preparing, cooking, and serving suitable food for strangers, travelers, and other patrons and customers, and complying with all the requirements imposed upon restaurants under the laws of this state."

In XXIII Op. Atty. Gen. 309, 310, it was held, in interpreting sec. 176.01 (6), quoted above, that in order to constitute a place a restaurant is was not necessary that there be a separate kitchen and a separate dining room, but merely that the kitchen equipment and dining room equipment be adequate and sanitary.

In XXIII Op. Atty. Gen. 549, 550, it was held:

"It is virtually impossible to lay down a fixed rule whereby all establishments could be classified as restaurants or not restaurants. Whether or not a given place is a restaurant [within the meaning of sec. 176.01 (6)] must be determined by the facts in that particular case. \* \* \*"

Reference has been made to the provisions of sec. 176.50 as indicating a legislative intent that taverns selling sausage, fish, bread, and butter should not be classified as restaurants within the meaning of sec. 176.05 (10) (a).

Sec. 176.50 (1), enacted by ch. 11, Laws Special Session 1933, reads as follows:

“No person licensed to sell any fermented malt beverage or intoxicating liquors shall, either directly or indirectly, give away or furnish free of charge or permit the giving away or furnishing free of charge any lunch or meals, excepting pop corn, cheese, crackers, pretzels, sausage, fish, bread, and butter on his licensed premises. No person holding a permit to operate a restaurant shall, directly or indirectly, give away or furnish free of charge or permit the giving away or furnishing free of charge any fermented malt beverage or intoxicating liquor on his restaurant premises.”

No inference should be drawn from this section, however, to the effect that a tavern selling sausage, fish, bread, and butter should not be considered a restaurant within the meaning of sec. 176.05 (10) (a). In speaking of the said ch. 11 it was held in XXIII Op. Atty. Gen. p. 95, 97:

“\* \* \* It quite probably was enacted to prevent such competition between restaurateur and tavern keepers as would be financially ruinous to the business of either or both.”

Neither does the fact that the tavern in question needs and has a restaurant permit under sec. 160.01 (2) mean that it should be classified as a restaurant within the meaning of sec. 176.05 (10) (a).

The sale of intoxicating liquor in the tavern in question is limited to sales at tables and to seated customers only if such tavern is considered a “restaurant,” as that term is used in ch. 176. As stated in XXIII Op. Atty. Gen. 549 this determination must be made upon the facts in each particular case. A categorical answer to your question cannot be given as a matter of law.

JEF

*Criminal Law—Injury to Public Property—Normal Schools — Public Officers — Deputy Sheriff — Sec. 343.45, Stats., provides penalty for destruction of state property.*

Member of faculty of state teachers' college may be appointed deputy sheriff under sec. 59.21, subsec. (2), so as to be invested with authority to protect school property.

October 18, 1934.

CHARLES A. HORNBACK, *Director,*  
*Rural Department, State Teachers College,*  
Eau Claire, Wisconsin.

The fence around the athletic field at the Eau Claire state teachers' college has been injured on numerous occasions by boys and young men climbing over it in order to gain free admittance to view athletic contests. Your efforts to prevent further injury to the fence by keeping these people off it have hitherto been unsuccessful. You wish to know (1) what the law is relative to the destruction of state property and, (2) whether there is any way in which authority to protect school property can be vested in some member of the faculty.

The general statute dealing with destruction of public property is sec. 343.45, Stats., which provides in part:

"Any person who shall \* \* \* mutilate, deface, injure or destroy any building or other structure belonging to the state or to any county, town, city, village, school district, or school board, board of trustees, corporation, company or association and used for religious, education, penal, correctional, charitable, or other public purposes \* \* \* shall be punished by imprisonment in the county jail not more than six months or by fine not exceeding one hundred dollars."

Persons injuring the fence in question can be prosecuted under the above section because they are injuring a "structure" belonging to the state.

As to your second question, some member of the faculty of your school could be appointed a deputy sheriff under the provisions of sec. 59.21, subsec. (2), Stats., which gives the sheriff power to appoint "\* \* \*" as many other deputies

as he may deem proper" in addition to those which he is required to appoint under the provisions of sec. 59.21, (1), (a), (b) and (c).

JEF

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*Counties—Public Officers—County Highway Committee*  
—Under rule that first one elected shall be chairman of highway committee, it follows that when chairman resigns one appointed in his place will not be chairman of committee but one first elected will take that position.

October 18, 1934.

GILES V. MEGAN,  
*District Attorney,*  
Oconto, Wisconsin.

You state that at a meeting of your county board on May 2, 1934, the chairman of the highway committee resigned; that the vacancy was filled by an appointment made by the chairman of the county board under sec. 82.05, Stats.; that at the next meeting of the county board in June the board elected the person previously appointed to fill the vacancy. You state that it is the rule of this committee that the first one elected shall be chairman of such committee. You inquire whether the appointee to fill the vacancy would be chairman of such committee or whether such chairmanship would go to the next in line on such committee.

We believe that the person elected to fill the vacancy under that rule would not be chairman by virtue of such election but that the chairmanship under the rule would go to the one first elected of those holding now.

JEF

*Elections—Absent Voting*—Ballot having been mailed to disabled voter, town, city or village clerk may go to home of such voter and administer oath provided for in sec. 11.58, Stats.

October 19, 1934.

THEODORE DAMMANN,

*Secretary of State.*

Attention Geo. Brown, *Division of Records and Elections.*

You wish to know whether a town, city or village clerk, after having sent a ballot by mail to an absentee voter, may later call at the home of such absentee voter to administer the necessary affidavit provided for in sec. 11.58, Stats.

Answer, Yes. Sec. 11.57, Stats., which provides for the delivery of ballot blanks to absentee voters, provides that they shall be (1) mailed to the applicant, or (2) delivered to the applicant personally at the office of the clerk. In XX Op. Atty. Gen. 390, to which you refer in your letter, it was held that in view of this statutory provision, an absent voter's ballot must not be taken by the clerk to the home of a disabled voter. The provision of the statute was clear and unambiguous and the enumeration of two methods of delivery excluded the use of a third method—"*expressio unius est exclusio alterius.*"

However, there is no provision in the statutes governing the "place where" the affidavit required by sec. 11.58 is to be administered. The statute simply enumerates the conditions under which and the persons by whom the affidavit may be administered, and the manner of returning the ballot.

Sec. 11.59 provides in part:

"Such absent or sick or disabled voter shall make and subscribe to the affidavit provided for in section 11.58 of the statutes, before the clerk to whom the ballot is returned or before any other officer authorized by law to administer oaths, \* \* \*."

Sec. 326.01 lists those who are competent to administer oaths:

"(1) An oath or affidavit required or authorized by law (except oaths to jurors and witnesses on a trial and such other oaths as are required by law to be taken before par-

ticular officers), may be taken before any \* \* \* town clerk, village clerk, city clerk, \* \* \* within the territory in which such officer is authorized to act; \* \* \*.”

Thus, it will be seen that quite aside from any authority he may have as an election official, the town, city, or village clerk by virtue of the power given him in sec. 326.01, quoted above, may administer the affidavit provided for in sec. 11.58. He may administer such affidavit “within the territory in which \* \* \* [he] is authorized to act” and such territory would of necessity include the home of a disabled voter of his town, village, or city.

You are therefore informed that having properly sent a ballot by mail to a disabled voter, a town, village, or city clerk may later call at the home of such disabled voter and administer the affidavit provided for in sec. 11.58.

JEF

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*Indigent, Insane, etc.—Legal Settlement*—Mere application for aid without receiving same does not prevent person from acquiring legal settlement under sec. 49.02, subsec. (4), Stats.

October 19, 1934.

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

You point out that an opinion of this office, XX Op. Atty. Gen. 1103, apparently has given rise to some misunderstanding of the relief law by reason of certain language used in the caption or scope note, which reads in part as follows:

“Under provisions of sec. 49.02, subsec. (7), Stats., person loses his legal settlement when he voluntarily absents himself from municipality for more than one year and does not ask or receive aid during such period. \* \* \*.”

You state that various relief departments have received copies of this and are of the opinion that the mere application for relief prevents a person from obtaining a legal

settlement. You stated that neither the opinion nor the statute referred to bears out this interpretation.

We agree with your conclusion. It would seem that this error came into the scope note by inadvertently using some of the language contained in the request for that opinion.

The language of the statute is quite specific:

“\* \* \* 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, subsec. (4), Stats.

The statute is silent as to the element of requesting aid and nowhere, as far as we know, has that been considered one of the essential factors in the matter.

This office has on numerous occasions expressed opinions on this statute and in all cases it was the receiving of aid rather than the asking for it which operated to prevent the requirement of a legal settlement. See the following opinions:

XIV Op. Atty. Gen. 604, XVIII 317, XX 1109, XXI 983, XXII 222 (and Wis. cases therein cited, placing emphasis on the receiving of support, especially *Sheboygan County v. Sheboygan Falls*, 130 Wis. 93, and *Town of Scott v. Town of Clayton*, 51 Wis. 185), 771, 944, 1041, XXIII 541, 617.

JEF

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*Courts — Guardianship — Marriage — Minors — Guardianship of state board of control over minor committed to state public school terminates upon marriage of minor.*

October 22, 1934.

A. W. BAYLEY, *Secretary,*  
*Board of Control.*

You wish to know whether the guardianship of the state board of control over a minor committed to the state public school is terminated by the marriage of such minor, or whether the guardianship continues until the minor attains the age of twenty-one years, regardless of such marriage.

In *Guardianship of Knoll*, 167 Wis. 461, the court pointed

out that on the commitment of a child to the state public school the board of control becomes the legal guardian of the child, not by court appointment, but by force of sec. 48.22, subsec. (2), Stats., which provides:

“The state board of control is the legal guardian of all children permanently committed to the state public school.  
\* \* \*”

The statutes do not define the extent and nature of this guardianship. XVII Op. Atty. Gen. 75, 76, holds:

“It cannot be said that the state board of control is simply the guardian of the person of the child committed to the state public school. The statute does not make such distinction. It uses the term ‘legal guardian,’ which covers both the guardianship of the person and the estate of the child.”

Sec. 48.19 reads:

“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.”

Thus the state board of control is to carry out the duties ordinarily performed by parents, i.e., it is to stand *in loco parentis*. Therefore, the guardianship of the state board of control over children in the state public school also partakes of the nature of the natural guardianship of parents over their children.

That it is no greater, in so far as control over the person of the child is concerned, than the natural guardianship of a parent and, indeed, not as great because not entirely exclusive of parental guardianship except where the child has been abandoned, was established in *Lacher v. Venus*, 177 Wis. 558, in which the court declared that the written consent of the state board of control to the adoption of a child which had been committed to the state public school cannot be declared to be a legal and sufficient substitute for the written consent of the living natural parents where required in adoption proceedings. This decision declared invalid sec. 48.22 (3) in so far as it made the consent of the

board of control instead of the consent of the natural parents a sufficient basis for adoption in cases where the commitment of the child to the state public school is due to mere misfortune or poverty of parents. See XI Op. Atty. Gen. 570 on the effect of *Lacher v. Venus, supra*.

Sec. 319.10 reads:

“The marriage of a ward shall terminate the right of the guardian to the custody and education of the ward; and the county court may, upon the application of such ward, discharge such guardian and order him to account to said court and deliver to his ward all the property in his hands or due from him on such settlement. \* \* \*.”

From this statute it would appear that the marriage of the minor would terminate any guardianship over the estate of the child which the board of control might have. The question then is: Does marriage also terminate that guardianship which the board of control has in its capacity as a person *in loco parentis*?

When a minor child marries he assumes a relationship, i.e., marital relationship, which is inconsistent with that of parent and child and hence the parent loses all authority over him and his natural guardianship is terminated. *Town of Sherburne v. Town of Hartland*, 37 Vt. 528, 529:

“But all the authorities agree that marriage emancipates the child. It is a new relation inconsistent with subjection to the control and care of the parent. The husband becomes the head of a new family. His new relations to his wife and children create obligations and duties which require him to be the master of himself, his time, his labor, earnings and conduct. He can no longer be subject to the control of his parents.”

*State ex rel. Scott v. Lowell*, 78 Minn. 166, 80 N. W. 877, 878:

“\* \* \* The marriage of a minor, even without the parent's consent, emancipates the child from the custody of the parent; for the marriage creates relations inconsistent with subjection to the control of the parent. Parental rights must yield to the necessities of the new status of the child. 1 Bish. Mar. & Div. sec. 275; Schuler, Dom. Rel. sec. 267. \* \* \*.”

In the case of a minor girl the termination of the natural guardianship of the parent by her marriage is further

shown by the statutory provision for her support by her husband. Sec. 351.30.

The above authorities establish the fact that marriage of a minor terminates the guardianship of a parent and since the state board of control stands *in loco parentis* to the children in the state public school, marriage of a minor committed to that institution terminates the guardianship of the board of control, especially since it has been shown that the latter guardianship is a more limited guardianship than that of a parent.

You are therefore advised that marriage of a minor committed to the state public school terminates the guardianship of the state board of control.

JEF

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*Counties—Municipal Borrowing—Military Service—Taxation—Tax Certificates—County may borrow money under sec. 67.12 subsec. (9), Stats., to be used in repairing town, county and state roads, using tax certificates as collateral.*

In hiring men to do work preference may be given to soldiers, sailors and marines.

October 22, 1934.

R. C. LAUS,

*District Attorney,*

Oshkosh, Wisconsin.

There is a movement on foot in your county to appropriate a new work fund to provide for the employment of needy soldiers, sailors and marines, the work to consist of repairing the town, county and state highways in Winnebago county.

You say that the only money which the county has on hand at this time "consists of what might be termed a trust fund, amounting to approximately two hundred thousand dollars, which has been set aside for some years past for the building of a courthouse and which is the accumulation of interest paid by the banks on the daily deposits of county funds." You also state that the county has delinquent taxes outstanding of approximately six hundred thousand dollars.

It is the desire of some of the members of the county board to borrow money by putting up these tax certificates as collateral, thereby leaving the courthouse fund intact.

You wish to know:

1. May money be borrowed by the county board using tax certificates as collateral to be issued for the improvement of town, county, and state roads in Winnebago county?

Answer, Yes. Sec. 67.12, subsec. (9), Stats., provides:

"For the purpose of meeting its current expenses, any county or other municipality authorized to sell land for nonpayment of taxes may borrow money on \* \* \* its tax sale certificates, not exceeding the face amount thereof, and pledge the same for the payment thereof. \* \* \*"

It must be determined whether or not the purpose for which the county board proposes to borrow the money is a "current expense."

*Stone v. Bonaparte*, 297 P. 228, 232, 148 Okl. 70, held that the cost of *permanent* improvements of streets is no part of "current expense," but must be paid from bond issue or by assessments.

However, in *Murray v. Ryan*, 257 P. 285, 286, 125 Okl. 17, the court held that a levy for street repair and maintenance is within the maximum limitation allowed for "current expenses" of the city. A levy for library purposes is within the maximum limitation allowed for current expenses of the city.

From this it may be inferred that the ordinary upkeep and repair necessary to keep established roads in good condition for safe use by the public may be termed a "current expense," whereas the laying of a new road or making such a permanent improvement of an old road, as paving it, would probably not be termed a "current expense." You refer to the case of *Miles v. Ashland*, 172 Wis. 605. About all that that case can be taken to hold is that the expense of paving a street, in that it does not recur annually but only at long intervals, could not be held a "current expense." It is apparent that the court wished to uphold the contract in the case and that if the cost of paving these streets were to be held a current or ordinary expense, the city would have exceeded the amount it was allowed to borrow for

ordinary expenses by the charter. Therefore, the case is not even too strong on this point.

However, if all that your county wishes to do is ordinary repair and maintenance work on these roads sec. 67.12 (9) gives the necessary authority for borrowing money to carry on this work.

2. You also wish to know whether soldiers, sailors, and marines may be given preference in the giving out of employment.

Answer, yes.

The legislature of the state has recognized this as a valid preference by providing for preference to "veterans of any of the wars of the United States" in sec. 16.18 of the civil service laws. In several other instances the legislature has granted special privileges or preferences to this class of persons in recognition of a special debt which the public at large owes them. You will notice that I reworded your first question somewhat, so as to leave out mention of soldiers, sailors and marines in stating the purpose for which the money is to be borrowed. The resolution of the board authorizing the borrowing should not read that the money is to be a relief fund for needy soldiers, sailors and marines, but should merely authorize borrowing to defray the expense of repairing town, county and state roads, because money for the relief of soldiers, sailors and marines *as a distinct class* is to be raised under sec. 45.10, Stats., in the form of a tax. Neither should the resolution contain a provision that needy soldiers and marines be preferred. However, as pointed out above, in hiring people to do the repair work, preference may be given to soldiers, sailors and marines.

3. You also wish to know whether it is legal for the county to borrow more money for this fund when it has the two hundred thousand dollars which has been accumulated in the courthouse fund or whether the latter fund must be used in financing the road repair work.

You are advised that it is legal for the board to borrow this money even though it has on hand money which is carried on the county books as a "courthouse fund." There is no provision in the statutes to the effect that all county

funds must be exhausted before any borrowing is done. Whether it is necessary or desirable to borrow is within the discretion of the county board provided that the county is authorized to borrow for the purpose for which the borrowed money is to be used.

JEF

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*Elections — Nominations — Party Committees — Precinct Committeeman*—Chairman of party county committee must call meeting of county committeemen within reasonable time after primary, regard being had to provisions of sec. 5.19, subsecs. (5) and (7), Stats.

Chairman of party county committee may not appoint party precinct committeeman where precinct has failed to elect committeeman.

Party county committee may adopt rule permitting giving of proxy for vote on specific motion with direction how to vote.

October 22, 1934.

THOMAS E. MCDUGAL,  
*District Attorney,*  
Antigo, Wisconsin.

You wish to know whether the chairman of the county committee must call a meeting of the county committee within a certain period after election of party precinct committeemen.

Sec. 5.19, subsec. (7) Stats., provides:

“In all counties the chairman of the county committee shall within two days after the completion of the official county canvass of said primary call a meeting of said county committee, by giving each member thereof a notice in writing, at least five days prior to the holding of such meeting.”

XXI Op. Atty. Gen. 1068 holds that the provisions as to the time for calling meetings of party city committee and the party county committee found in sec. 5.19, subsecs. (5) and (7), Stats., are not mandatory but directory and that if meetings are called at a later time organization of the com-

mittees may be accomplished and officers may be elected. However, the chairman of the county committee must call a meeting within a reasonable time (regard being had to the time provisions in the section mentioned above) and, if he does not do so, he may be mandamusd.

You also wish to know whether, under the provisions of sec. 5.19 (11) the chairman of the county committee may appoint a precinct committeeman for a precinct which failed to elect one.

Answer, No. Sec. 5.19 (11) provides:

“Any vacancy in any committee office shall be filled by the county committee, except that the chairman of the county committee may temporarily fill any vacancy.”

This section could not apply to the given situation in any event because there is no “vacancy” in the position of party precinct committeeman.

“\* \* \* The word ‘vacancy’ conveys to the mind the idea of a place once filled but not so any longer.” *State ex rel. Bancroft v. Frear*, 144 Wis. 79, 97.

Sec. 17.03 sets forth the occasions upon which an office can be held to be vacant. Applying that section and the quotation from *Bancroft v. Frear*, *supra*, there is no ‘vacancy’ in the position of party precinct committeeman when the electors of the precinct fail to elect anyone to fill the position.

You also wish to know whether a party precinct committeeman may vote by proxy at a meeting of the party county committee.

Answer: Yes, if proxy is in written form, directing how the vote is to be cast upon a specific motion.

A party county committee may adopt rules governing its meetings and so may adopt a rule permitting committeemen to vote by proxy. The giving of a proxy, however, is a delegation of power. The statutes provide for the position of party precinct committeeman and he is bound by the rules of law governing delegation of authority by officers.

“An officer, to whom discretion is intrusted, cannot delegate the exercise thereof, but ministerial duties, except

where there is a statutory prohibition, may be delegated." 46 C. J. 1033.

A party precinct committeeman, therefore, may not give a blanket proxy, for that would be an attempt to delegate matters in which the committeeman is to exercise discretion. Since in granting a proxy for a specific purpose with directions how to vote it there is no delegation of discretion, such a limited proxy may be legally given and exercised.

JEF

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*Indigent, Insane, etc.—Public Health—Wisconsin General Hospital*—County board cannot, by contract with medical society, take away from county judge his discretion given to him under ch. 142, Stats., to pass on hospital cases.

October 22, 1934.

GILES V. MEGAN,  
*District Attorney,*  
Oconto, Wisconsin.

With your communication of October 12 you enclose a contract between the Oconto County Medical Society and Oconto county in which the Oconto County Medical Society agrees to provide all medical and surgical care and treatment, emergency or otherwise, as may be required by the county, for one year dating September 22, 1934. You inquire whether said contract is legal in so far as paragraph 10 is concerned. It provides that "No cases be allowed hospitalization unless passed on by the committee of examining doctors, emergency cases excepted." You inquire whether it is not solely within the discretion and province of the county judge to pass on hospital cases under ch. 142, Stats.

This question must be answered in the affirmative. See sec. 142.03 and sec. 142.04; also XXII Op. Atty. Gen. 1051, 894, 875, and 463. In so far as said contract is in violation of the statute as pointed out, it is illegal.

JEF

*Counties—Public Officers—County Board Committee—*  
Member of civil works committee of county board is ineligible to serve on such committee after failing to be re-elected as member of county board.

October 22, 1934.

WALTER B. MURAT,  
*District Attorney,*  
Stevens Point, Wisconsin.

You have furnished us with a copy of the proceedings whereby the Portage county board at its last regular annual meeting elected a committee of three to be known as the civil works committee, to handle all the rural work projects approved by the industrial commission. This committee was empowered to organize a director's office and staff and was further empowered to handle all problems of poor relief, medical relief and civil works relief within the rural confines of Portage county.

The committee was not appointed by the chairman of the county board, pursuant to sec. 59.06, Stats., but there were nominations from the floor and ballots were cast. All of the candidates appear to have been county board members. One of the members elected to this committee was not a candidate to succeed himself as town chairman at the spring election of 1934, but he has continued to serve on this particular committee. You have inquired as to his eligibility to continue as a member of this committee.

We are of the opinion that the member of the committee in question is no longer eligible to serve.

It has frequently been ruled by this office that a member of the county board who fails of re-election ceases to be a member of a committee of that board. XXI Op. Atty. Gen. 389, XIII Op. Atty. Gen. 241, Op. Atty. Gen. for 1912, 806.

However, if the committee in question is not a committee of the county board, it is not necessary that a member of that committee should be a member of the county board. For instance, there are numerous opinions from this office to the effect that the term of office of a member of the county highway committee or of the county state road and bridge committee does not expire because he fails of re-

election to the county board. XX Op. Atty. Gen. 241, XVI 372, XV 318, XIV 218, V 339, IV 1048.

It therefore becomes necessary to determine whether the committee in question is, or is not, a committee of the county board. From such information as we have, it would seem to be a proper inference that this committee is a committee of the county board, even though not appointed by the chairman. All candidates for the committee were board members. No provision was made in the resolution for compensation, and we take it that the members of the committee have been receiving a per diem and mileage provided by statute for committees of the county board. Also the type of work handled by such committee is the same as that which is usually taken care of by relief or similar committees of the county board.

JEF

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*Bonds—Public Printing—Bids*—Bond accompanying bid for state printing under sec. 35.46, Stats., may not be disavowed by surety company unless agent who executed same lacked authority. Authority of agent is discussed.

Bid is ineffective in absence of valid bond.

Lowest bidder may supply valid bond after bids are opened where original bond submitted by him is ineffective.

No bond in excess of that provided for by statute may be required.

Lowest bid may not be rejected because of doubts as to bidder's ability to perform.

No guaranties other than statutory bond can be required of lowest bidder.

October 22, 1934.

F. X. RITGER, *Director,*  
*Bureau of Purchases.*

Sec. 35.46, Stats., provides that bids for state printing shall be accompanied by “\* \* \* a bond, executed by a surety company duly authorized to do business in this state, in the sum of five thousand dollars, to the effect that it guarantees the bidder will, if his bid be accepted, execute

the contract and bond required by law within such time as may be prescribed by said director of purchases."

A certain company's bid was accompanied by a guaranty bond of the X Surety Company. A representative of the bonding company has informed you that the man who signed the bond as the agent of the bonding company had no authority to do so and that the bonding company proposes to repudiate the bond.

You wish the opinion of this department on several questions, which will be answered *seriatim*:

Q. 1. Can the bonding company disavow the bid bond? (a) aside from question of bond's validity; (b) if agent executing it lacked authority?

(a). Because of the form of the bond which consists of a present binding of the company submitting the bid as principal and the X Surety Company as surety to pay five thousand dollars with a condition subsequent upon the happening of which the obligation to pay the penal sum of five thousand dollars is voided, it is the opinion of this department that the X Surety Company cannot at this time disavow the bond. The bonding company has already promised to pay a certain sum to the state and must pay that sum unless "the proposal submitted by the ----- Company, be accepted and the contract awarded to ----- Co., and the said X Surety Company shall enter into contract and furnish bond as required" (quoting from bond, except as to names).

(b) The bonding company cannot disavow the bond unless, as it claims, the agent who signed the bond had no authority to do so. You have not given us sufficient facts about the execution of the bond, the agency of the man purporting to sign for the bonding company, for us to give a definite reply. However, we can discuss the elements involved in arriving at an answer to your question.

(1) In the first place, the acts of an agent bind his principal only when within the authority expressly conferred upon him by the principal—*Emmons v. Dowe*, 2 Wis. 322; *Whitney v. State Bank*, 7 Wis. 620—or within his apparent authority which the principal's acts justify the party dealing with the agent in believing to have been conferred. *Kasson v. Noltner*, 43 Wis. 646; *Cowie v. National Exchange Bank*

of *Waukesha*, 147 Wis. 124, 132 N. W. 900; *Fargo v. Ladd*, 6 Wis. 106; *Zummach v. Polasek*, 199 Wis. 529, 227 N. W. 33; *Commonwealth Telephone Co. v. Paley*, 203 Wis. 447, 233 N. W. 619. See 2 Mechem on Agency (2d ed.) secs. 1720 and 1722.

(2) Persons having notice that they are dealing with an agent are bound to inform themselves of the extent and limitations of his authority. *Smith v. Starkey*, 203 Wis. 56, 233 N. W. 576; *Boelter v. Hilton*, 194 Wis. 1, 215 N. W. 436; *Commonwealth Tel. Co. v. Paley*, *supra*. See also Mechem, sec. 1721.

(3) Although ordinarily no particular form of notice to third persons is necessary to give effect to a revocation of an agent's authority and it is usually sufficient if such person has knowledge of facts which would put a reasonable man on inquiry, dubious or equivocal circumstances will not suffice as notice to one relying on prior course of dealings. *Bernhagen v. Marathon Finance Corp.*, 212 Wis. 495, 250 N. W. 410.

(4) Authority to execute bonds and other sealed instruments must be in writing. 21 R. C. L. p. 820. Principal and Agent, sec. 6:

“\* \* \* But the execution of a sealed instrument by an agent having parol authority only does not bind the principal if the instrument requires a seal. \* \* \* *Graham v. Holt*, 25 N. C. 300, 40 Am. Dec. 408; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330.”

(5) A party who seeks to bind a principal by the act of his agent must prove the authority under which the act was done. If the authority is in writing, or is required by law to be in writing, it should be produced. *Emmons v. Dowe*, 2 Wis. 322. In the instant situation, if the agent had no authority to bind the principal, the bonding company could repudiate the bond. It was the bidder's business to ascertain that the agent with whom he dealt had the requisite authority to write the bond. If the agent once had authority to execute the bond it would be a question of due notice of revocation of his power and due diligence on the part of the bidding company. However, even if the bidding company succeeds in holding the bonding company at the present time the bond could still cause trouble, as it

might later again be repudiated and the bidding company might be unable to establish the authority of the agent. Since there has been a question of the validity of the bond, perhaps it would be best to relinquish it and have another bond substituted. Note that there is no written statement of the authority of the agent accompanying the bond. As it might be difficult to prove his authority without it, such a statement should be demanded. See principle No. 5 on agency, *supra*.

Q. 2. You also wish to know whether, in the event the "bid bond" can be and is disavowed, the bid would have any standing and would be entitled to any further consideration.

Answer: No, as long as there is no valid bond filed with it. The bidder would not then have complied with the provisions of sec. 35.46, as the furnishing of a void bond would certainly not fulfill the requirement of accompanying the bid with a bond. Sec. 35.48 provides:

"No bid shall be considered that does not fully comply with the requirements of section 35.46; \* \* \*."

Q. 3. Would it be proper, in the event that the bonding company disavows the bond, to give the bidder a reasonable length of time, say two or three days, to provide a new "bid bond"?

Answer, Yes.

In XX Op. Atty. Gen. 221 it was held that when the lowest bidder under sec. 74.34, Stats., for the publication of delinquent tax sale notices, by oversight, failed to accompany his bid with a bond, but furnished it almost immediately after bids were opened, the statute was substantially complied with and the county treasurer might award the contract to the bidder. We quote from that opinion, p. 222:

"*Neacy v. Milwaukee*, 171 Wis. 311, 321:

" \* \* \* It is well settled that contracts binding a municipality can be culminated only in the manner prescribed by the charter, and municipal officers must follow the prescribed procedure step by step. *Ricketson v. Milwaukee*, 105 Wis. 591, 81 N. W. 864; *Chippewa B. Co. v. Durand*, 122 Wis. 85, 99 N. W. 603; \* \* \*."

"The rule of substantial compliance prevails, however, that is, 'performance in substance of every condition precedent.' *Chippewa B. Co. v. Durand*, 122 Wis. 85, 101. 'The

council must follow the charter requirements with substantial strictness.' *Ricketson v. Milwaukee*, 105 Wis. 591, 599.

"The purpose of the lowest bidder law and of the bond requirement is to protect the county, not the bidders, or any of them. 19 R. C. L. 1069. So in determining whether the statutory requirements, including that for bond, have been substantially complied with, the guide must be whether such slight or technical departure might tend to prejudice the county. I can see no such tendency in your statement of facts, and I therefore conclude that, as the matter now stands [a bond having been furnished after the filing of the bid], the requirement for the filing of a bond with 'D's' bid has been substantially complied with."

The same line of reasoning would apply in the instant situation. If the substitution of a new bond is permitted, sec. 35.46 will have been substantially complied with.

Q. 4. You point out that in the event a contract for more than one class of work is awarded to any one contractor he must supply a bond in the amount of twenty thousand dollars.

You wish to know whether this bond is to be considered as adequate and fully meeting every requirement of responsibility of any nature which the state raises.

A. This is the only security required by statute and is all that the bidder can be required to furnish.

Q. 5. You wish to know also whether, in the event that the lowest bidder does not have adequate equipment or facilities of various nature and it is clearly indicated to you that he cannot perform with his present equipment and facilities, you can refuse to award the contract on any or all of the classifications on which he has the best bid.

A. You cannot refuse to accept the lowest bid, regardless of any doubts which you may entertain as to the ability of such bidder to perform the contract. The statute gives you no discretion in the matter. It reads as follows:

"\* \* \* Within ten days thereafter such bid or bids of those opened and read shall be accepted as he shall determine is or are a proposal or proposals to do any one or all of the first four classes of printing for the greatest per centum of discount off from the maximum prices established by section 35.43; \* \* \*." Sec. 35.47, Stats.

Any other construction might open the door to considerable collusion and trouble. The idea back of competitive bidding in such instances is to save money for the public by having the work done by the lowest bidder. The state is presumably protected by the bond of the bidder, and if the statutory amount of the bond is insufficient to adequately protect the state, that is a situation to be called to the attention of the legislature for correction.

Q. 6. The contract does not go into effect until January 1, 1935. You wish to know, in the event that your inspection shows that the bidder does not have at the present time adequate equipment, and he states that he proposes to buy or provide additional equipment between the date of the contract being awarded and the date it is effective, what guaranty should or must you require that such equipment is actually provided.

A. The statutes give you no authority to require any guaranty that the printer installs additional equipment before the effective date of the contract. As has already been pointed out, the only guaranty that can be insisted upon is the statutory bond, whether or not you feel it is large enough to adequately protect the state.

JEF

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*Bridges and Highways—Road Machinery—Counties—*  
County board has power to make orders to lease machinery of county to municipalities or other parties.

October 22, 1934.

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

You inquire:

Can a county rent out its machinery to towns, villages and cities, or can it rent out its machinery to private parties or corporations?"

It is a well accepted rule that counties have no other powers than those expressly or impliedly given to them by statute. Sec. 59.07 provides:

"The county board of each county is empowered at any legal meeting to:

"(1) Make such orders concerning the corporate property of the county as they may deem expedient."

Under this express provision an order made by the county board authorizing the leasing of the machinery of the county to the town, village or city or to a private party or corporation for a sufficient consideration would, in our opinion, be authorized. It is believed that the county board will protect the machinery of the county by authorizing the leasing of it only to such persons as are able to use the same without abusing or ruining it and only under such conditions as are justifiable.

JEF

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*Municipal Corporations—Beer Licenses—Municipality may require bond from seller of fermented malt beverages, conditioned upon faithful performance of law.*

October 22, 1934.

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

You present the following question for an opinion from this department:

"Has any municipality the authority to require a tavern keeper, who desires to sell only fermented malt beverages containing less than five per cent of alcohol by weight, prior to issuing him a license for such sale of fermented malt beverages, to furnish a bond to said municipality in a sum fixed by them not to exceed one thousand dollars, said bond being conditioned upon faithful performance under said municipality ordinance pertaining to the possession and sale of malt beverages."

This question must be answered in the affirmative. Sec. 66.05, subsec. (10) of the Wisconsin statutes provides for the issuance of licenses for the sale of fermented malt beverages, and the regulation of such sales. Certain regulations are definitely provided for in the statute, and the leg-

islature has announced, in sec. 66.05, subsec. (10), par. (n), subd. (1),

“The provisions of this section shall be construed as an enactment of state-wide concern for the purpose of providing a uniform regulation of the sale of fermented malt liquors or light wines.”

By virtue of the subsection just quoted, the legislature intended that no municipality should have the right, under the home rule amendment, to enact a charter ordinance abrogating any of the statutory provisions with respect to the sale of fermented malt beverages. In addition, however, to making the statutory regulations of state-wide effect, the legislature provided, in sec. 66.05 (10) (j) :

“The common council of any city, the board of trustees of any village and the town board of any town may adopt any reasonable rule or regulation for the enforcement of this section not in conflict with the provisions of any statute.”

Under sec. 66.05 (10), (a), 9,

“‘Regulation’ shall mean any reasonable rule or ordinance adopted by the council or board of any city, village or town, not in conflict with the provisions of any statute of the state of Wisconsin.”

As a further indication that the provisions of the statute were not intended as an exclusive regulation of the sale of fermented malt beverages, it was provided in sec. 66.05, subsec. (10) (k) :

“Nothing in this subsection shall be construed as prohibiting or restricting any city, village or town ordinances from placing additional regulations in or upon the sale of fermented malt beverages, not in conflict with the terms and provisions of this subsection.”

It has been suggested that the power granted to municipalities to make additional regulations is confined to regulations concerning the *sale* of fermented malt beverages, and would not authorize requiring a bond preliminary to the issuance of a license. This contention was based upon the claim that a distinction existed between the sale of fermented malt beverages and the issuance of a license for such sale. In a recent circuit court decision, however, it was

held, in respect to the additional regulations provided for in sec. 66.05 (10) (k) :

“Some point is made that this refers only to *sale*. There can be no sale without a license in any event, hence this provision must extend to both.” *State ex rel. Torras v. Krauczak*, Milwaukee County case No. 139513.

The answer to your question depends upon whether or not the bond requirement would be held to be a reasonable regulation. The enactment of an ordinance requiring a bond for the sale of fermented malt beverages would be under the police power. Great latitude is permitted a governing body in deciding what type of regulation under the police power will bring about the desired result, and the courts are extremely liberal in sustaining police power regulations. Almost from time immemorial the sale of alcoholic beverages has been considered a fit and proper subject for regulation. *State v. Downer*, 21 Wis. 274. See also *Zodrow v. State*, 154 Wis. 551; *Pennell v. State*, 141 Wis. 55; *Hack v. Mineral Point*, 203 Wis. 215.

The legislature, by ch. 176, Wis. Stats., has made the furnishing of a bond mandatory by those selling intoxicating liquors. The bond required under ch. 176 is conditioned upon the faithful observance of the law by persons selling intoxicating liquors, just as the bond about which you inquire is conditioned upon the faithful observance of the law by those selling fermented malt beverages. It is our opinion that an ordinance requiring such a bond may legally be enacted.

JEF

*Elections*—Printing of name of Senator La Follette in proper place on ballot of Iowa county Robt. M. La Follette is substantial compliance with statute as amended by ch. 284, Laws 1933, requiring that names be given in full.

October 24, 1934.

CHARLTON H. JAMES,  
*District Attorney,*  
Dodgeville, Wisconsin.

The county clerk of your county states that the nomination papers filed herewith on behalf of Senator Robert Marion La Follette had his given name fully spelled, and that on the ballot printed, his name appears as Robt. M. La Follette. He asks whether that is sufficient under our present statutes in view of ch. 284, Laws 1933.

In an official opinion in XXIII Op. Atty. Gen. 516 it was held that all given names should be written in full unless they are too numerous, in such case initials should be used for those given names by which the candidate is not generally known. It was also held that abbreviations such as Thos., Geo., Wm., etc., are permissible where the abbreviations are such that there is no doubt as to what name is meant, but the better practice is to advise that the given names be written in full, without abbreviation. It appears that the ballots are all printed in your county and a ruling from this department that they are defective by reason of the fact that the given name of Senator La Follette is not given in full would necessitate the printing of a new set of ballots for the whole county.

You are advised that it is our opinion that the names as printed on the ballot will be a substantial compliance with the statute and the ballots are legal and the courts would not hold that the votes for Senator La Follette could not be counted by reason of the fact that the given name is not printed in full.

JEF

*Courts—Commitment*—Correction by trial court in commitment papers so as to conform to actual judgment and sentence in criminal case is valid even though made after term.

October 25, 1934.

BOARD OF CONTROL.

You state that one L was sentenced to the Wisconsin state prison on May 2, 1932, the commitment order at that time reading that he was sentenced for a term of two to three years. You say that the prison is in receipt of a communication from the clerk of the circuit court of Waupaca county and commitment, copies of which are attached to your letter, which are to the effect that an error was discovered by the present clerk of the circuit court in the original commitment in this case, and that the commitment should have been made for a term of four to five years. By order of the judge of the circuit court, the Wisconsin prison is informed of this change in the commitment papers. You ask to be advised whether the board and the Wisconsin state prison are to accept this correction in the form presented and to change accordingly the record of the sentence imposed upon this inmate.

It appears from the order of the circuit court that the judgment or sentence of L on the 2d day of May, 1932, was that he be punished by confinement at hard labor at the state prison for the indeterminate term of not less than four nor more than five years. The error was made not in the judgment or sentence, but in the order of commitment. The correction was made on the 22d day of August, 1934. We believe that this error in the commitment papers may be corrected in the manner ordered by the circuit court. See *Hoffman v. State*, 88 Wis. 166.

In the *Hoffman* case, p. 174, the court said:

“\* \* \* By the common law it is well established that a court has no power to review or reverse its own judgment of a previous term, and that as to all matters on which the mind of the court acted, or is presumed to have acted, in the rendition of the judgment, it is precluded from again acting at a subsequent term and changing its opinions or altering its decisions. *Aetna L. Ins. Co. v. McCormick*, 20 Wis. 265. But this rule, it is there held, does not preclude

the court from correcting clerical errors or mistakes in matters of form, even after the term. \* \* \*”

The court has power after the term to correct a mistake in the entry of its judgment so as to make the record conform to the judgment actually pronounced. *Wyman v. Buckstaff*, 24 Wis. 477.

You are advised that it is our opinion that you should accept the correction in the form as presented to you.

JEF

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*Corporations—Co-operative Associations—Fee for filing amendment to articles of incorporation of corporation organized under secs. 185.01 et seq., which increases its capital stock from amount less than five hundred dollars to amount over five hundred dollars (not to exceed twenty-five thousand dollars) is five dollars.*

October 25, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You ask to be advised what the correct fee is for filing an amendment to articles of incorporation of a co-operative association, which amendment increases the authorized capital stock from less than five hundred dollars to a sum in excess of five hundred dollars. The fees relating to co-operative associations are set forth in sec. 185.04, Stats. You state that an opinion on the point was rendered September 29, 1914, which is found in III Op. Atty. Gen. 163. You state that you have followed this opinion but that you have long felt that the opinion is one needing reconsideration.

You say that the opinion holds that the filing fee is five dollars, on the theory that, as soon as a resolution is adopted amending the articles so as to have greater capital stock than five hundred dollars, the association is out of the one dollar class as to fee. You state that such reasoning does not take into consideration the language of sec. 180.07, subsec. (3), which provides that no amendment shall be

effective until filed and recorded. You believe that the fee for such an amendment should be either one dollar or ten dollars, but cannot possibly be five dollars.

Your suggestion has some force to it but, after a careful consideration of this matter and the opinion rendered in 1914, we believe that in view of the fact that the opinion rendered has not induced the legislature to change the statute, it would be unwise at the present time to change said opinion without additional legislative authority. We believe that this matter should be submitted to the legislature; sec. 185.04 might then be modified by the legislature so as to incorporate the thought that you have expressed. Without such legislation, however, in view of the long acquiescence in the ruling since 1914, we believe that ruling should stand until the legislature changes the statute.

JEF

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*Elections—Nominations—Declaration*—Republican candidate who filed with nomination papers declaration that he would qualify, is nominated on Progressive ticket and receives certificate of nomination need not file another declaration that he will qualify but is entitled to have name placed on ballot in Progressive column.

October 25, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

The county board of canvassers determined that one A. received the most votes for the office of district attorney on the Republican ticket, on which he was running, and for which office he filed nomination papers. The name of A. was written in on the Progressive ticket a sufficient number of times to secure for him the nomination on that ticket. The county clerk issued to A. a certificate or notice of nomination on the Republican ticket and a certificate or notice of nomination on the Progressive ticket. In a court action, subsequently instituted, it was decided on October 13, 1934, that A. actually was not nominated on the Republican ticket. On the basis of this statement of facts you inquire whether

the certificate of nomination on the Progressive ticket was valid, so that A. is entitled to have his name placed on the ballot in the Progressive column.

Answer: Yes. The board of canvassers had determined that A. had been nominated on the Progressive ticket. The county clerk was entitled to accept and rely upon the decision of the board of canvassers, on the result of the election.

“The original statement of the canvassing board as evidence of the result of an election is temporarily sufficient, and, if unchallenged, is conclusive as to who the successful candidate for office is. \* \* \*.” *State ex rel. Graves v. Wiegand*, 212 Wis. 286, 292.

There was no challenge as to Mr. A's nomination on the Progressive ticket. It has been suggested that inasmuch as five days elapsed since A. was notified of his nomination on the Progressive ticket and he did not file a declaration that he would qualify, he is not entitled to have his name placed upon the ballot in the Progressive column because of the provisions of sec. 5.17, subsec. (3), Stats., which reads as follows:

“No person, however, shall be entitled to have his name placed on such ballot who has not filed a nomination paper as provided in sections 5.05 and 5.07 of the statutes, unless he shall file within five days after receiving official notice of his nomination, a declaration that he will qualify as such officer if elected.”

The purpose of requiring the declaration that a candidate will qualify if elected is to prevent the election of an individual who will refuse to act and so create a vacancy. The electors who vote for such an individual are wasting their ballot, and the office is not filled in accordance with the will of the electors.

At the time that A. filed his nomination papers upon the Republican ticket he was, under sec. 5.05 (5) (b), required to file a declaration that he would “qualify as such officer if nominated and elected.” That declaration was not withdrawn and may be relied upon as evidencing the candidate's willingness to qualify and accept the office. The declaration provided for in sec. 5.05, (5) (b) is not limited by the statute to a declaration by the candidate that he will qualify if nominated and elected *on any particular ticket*. It is

simply a declaration that he will qualify if nominated and elected in order that the people will not be casting their ballot for one who will refuse the office and thus create a vacancy. There is, therefore, no necessity for A. to file another declaration that he will qualify if nominated and elected.

“\* \* \* As we have seen, the necessary effect of the primary law is to give an official character and standing to a man who has received the plurality of the votes of his party at a primary election. It may not be strictly accurate to call him a public officer, but the law gives him a certain and definite legal standing and endows him with at least one valuable privilege or right which he may enforce. Until the time of the election he is guaranteed, and in fact holds, a recognized legal position, which may be called, in default of a better term, a *quasi* office, namely, that of a nominated candidate. The giving of a certificate of election to a man who has received the necessary plurality at a primary election, upon the determination of that fact by the proper board, is entirely logical; in fact, just as logical as the giving of a certificate of election to a man who has received the majority of the votes for an ordinary office. His rights under it are not so valuable and last a shorter time, but they are substantial. In view, therefore, of the provisions of the general statutes which make the execution of the certificate a part of the county canvass, and the very sweeping sections which incorporate these provisions into the primary law, we conclude that the law contemplates the execution of a certificate of election to the duly nominated primary candidate.

“From this conclusion it naturally follows that such a certificate must be given like effect, so far as the rights of a nominated candidate are concerned, as a certificate of election to an ordinary office. This court has held that one who has been declared by the proper canvassing board to have been elected to an office, and has received the proper certificate of election and duly qualified, is entitled to the possession of the office and its property and emoluments as against all the world except a *de facto* officer already in possession under color of authority, and that this right persists until a different result is reached in a *quo warranto* action or other proper proceeding to contest the right of the certificate holder. *State ex rel. Jones v. Oates*, 86 Wis. 634, 57 N. W. 296; *State ex rel. McCoale v. Kersten*, 118 Wis. 287, 95 N. W. 120. \* \* \*.” *State ex rel. Rinder v. Goff*, 129 Wis. 668, 682-683.

The *Rinder* case, *supra*, was affirmed in *State ex rel. Barber v. Circuit Court*, 178 Wis. 468, where it was held that the only requirement in the statutes as a condition precedent to the right of a nominee to a place upon a ballot is that he file a declaration that if elected he will qualify. A. has filed such a declaration, has been declared nominated, and has received the proper certificate of nomination on the Progressive ticket. He is, therefore, entitled to have his name appear on the ballot in the Progressive column.

JEF

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*Appropriations and Expenditures—Relief Bills—Public Officers—County Clerk—Recovery Act—Wisconsin Emergency Relief Administration—County clerk may use facsimile signature on county checks issued in payment of W. E. R. A. and other relief bills.*

October 25, 1934.

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

You ask whether a county clerk may use a facsimile signature on county checks issued in payment of Wisconsin Emergency Relief Administration and other relief bills.

Answer, Yes.

Sec. 59.17, subsec. (3), Stats., provides that the county clerk shall:

“Sign all orders for the payment of money directed by the board to be issued, \* \* \*.”

The supreme court of this state in *Dreutzer v. Smith*, 56 Wis. 292, 296, in considering the question of a county clerk's authority to use a rubber stamp where the statute directed that he “write” his name, said:

“\* \* \* The statute requires that ‘he shall by writing his name,’ etc., assign, and the question is whether a person may not write his name, within the meaning of these words, in any other way than with a pen, by forming the letters thereof separately. Does he not, when he takes a stamp

upon which the letters composing his name are fixed in their proper order, and especially if the letters on the stamp are a fac-simile of the letters as they would be formed by him if made there with an ordinary pen, and stamps his name with one motion of his hand, as effectually write his name as though he made the letters separately?"

The court held that a rubber stamp affixed by the clerk was a writing. In view of this decision, it was held in XII Op. Atty. Gen. 68 that the state treasurer could lawfully "sign" state checks with a rubber stamp. See also VII Op. Atty. Gen. 419, IX 82, 86.

In *LaMaster v. Wilkerson*, 136 S. W. 217, 218, 143 Ky. 226, a case which you cited in your letter, the court said:

"In legal contemplation 'to sign' means to attach a name, or cause it to be attached, by any of the known methods of impressing a name on paper, with the intention of signing it. \* \* \*"

See also *Cummings v. Landes*, 117 N. W. 22, 23, 140 Iowa 80.

In view of the authorities set forth above, this department agrees with your opinion that the county clerk may use a facsimile signature on county checks issued in payment of W.E.R.A. and other relief bills.

JEF

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*Counties—Military Service—Soldiers' Relief—Relief office of county cannot take over supervision and control of soldiers' relief.*

October 29, 1934.

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

You inquire whether the relief office of the county can take over the supervision and control of the soldiers' relief and, if so, whether this be done by resolution of the county board.

Soldiers' and sailors' relief is placed by statute under the control of the soldiers' relief commission, the appoint-

ment of which by the county judge is provided for in sec. 45.12, Stats. There is no provision of the statute authorizing the county board to dispense with such a commission. XXI Op. Atty. Gen. 498. There is no authority in the statute authorizing the relief office of the county to take over the supervision and control of the soldiers' relief. Neither is there any provision in the statute from which this might be inferred.

You are therefore advised that both of your questions must be answered in the negative.

JEF

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*Criminal Law—Nonsupport—Indigent, Insane, etc.—Minors—Order of county judge that A and family, who require public relief, be removed from Milwaukee county to X county, place of their legal settlement, is valid.*

If A refuses to comply with order to move to X county he cannot receive further public relief from Milwaukee county.

A may be prosecuted for neglect and nonsupport of family for refusing to move to X county so as to obtain public relief if he does not otherwise support his family.

C. one of A's children, under eighteen, may be held to be neglected child under children's code because of fault of his father in failing to abide by court's order, but said child cannot be placed in Milwaukee county institution; may be committed to state school at Sparta.

October 29, 1934.

CLARK J. A. HAZELWOOD, *Assistant Corporation Counsel,*  
*Office of District Attorney,*  
Milwaukee, Wisconsin.

You state that under the provisions of sec. 49.03, subsec. (9), Stats., proceedings have been taken by X county before the county judge thereof, under which an order has been entered directing the return of one A, his wife and ten minor children, now residing in Milwaukee, to X county, the latter having been determined to be the place of legal

settlement of A and family. X county is willing to receive and care for the family under the poor laws as soon as they return. The order of the county judge of X county was entered after a hearing, notice of which was given to Milwaukee county and Mr. A by service five days prior to the hearing.

You state that it is further provided in this order that in case of the failure of A and his family to abide by the same, no further public relief should be given this family. You state that after receiving this order Milwaukee county relief authorities called in Mr. A and offered him the entire cost of moving his family and household effects back to X county and advised him that if he failed to move within a reasonable time A and family would be barred from receiving further public aid. The family was given a two weeks' grant of relief and it was expected that within said two weeks A would arrange for the removal. However, A and family have continued to refuse to leave Milwaukee county, and you now ask our opinion as to what should be done, realizing that our advice will be followed throughout the state in matters of this kind. You ask:

“(1) Must the relief department of Milwaukee county comply with the order of the county judge of X county and now discontinue all public aid needed by this destitute family?”

“(2) If aid is being continued because of the urgent needs of the A family, does the order of the county judge of X county, which apparently cannot be enforced, set up a bar to Milwaukee county's rights to charge back to X county the costs of aid furnished subsequent to the date of said order?”

In XIX Op. Atty. Gen. 84 it was held that a town, city or village which is liable for the support of a poor person has not the power to remove such person and family from some other town, city or village to its own town, city or village. At that time our attention was directed to the case of *Scott v. Clayton*, 51 Wis. 185, in which it was held that a poor person could be compelled to move by the town liable for its support. It was pointed out in our opinion that the decision was based upon the provisions of sec. 1514, Rev. Stats. 1878, which was repealed by ch. 216, Laws 1895. At the time the opinion was rendered, no statute was in force

to the same effect. After this opinion had been rendered the legislature enacted sec. 49.03, subsec. (9), by ch. 92, Laws 1931. This statute 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.”

Here we find express statutory authority for the order as given by the county judge of X county, and it is also expressly provided that upon the issuance of such order no further public relief shall be given to the person to whom it is directed until he shall comply therewith. In view of the order of the court and the said statutory provision, your first question must be answered in the affirmative. Your second question also requires an affirmative answer.

The third question reads as follows:

“(3) Is it the duty of Milwaukee county authorities to prosecute A under the provisions of sec. 351.30 of the statutes? We refer now to the case of *Zitlow v. State*, 213 Wis. 493, in which it was held that a man who refused to work in return for aid furnished would be convicted under this statute. Is it your opinion that A, who refuses to take his family to X county under the facts above stated, can be convicted under this statute?”

Sec. 351.30 (1) provides in part as follows:

“Any person who shall, without just cause, desert or wilfully neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances; or any person who shall, without lawful excuse, desert or wilfully neglect or refuse to provide for the support and maintenance of his or her legitimate or illegitimate minor child or children under the age of sixteen years in

destitute or necessitous circumstances, shall be guilty of a crime, \* \* \*.”

Assuming that A can provide for his family only by complying with the order of the court and going back to his county where he has a legal settlement and where he can receive public support, and wilfully neglects and refuses to do so, it seems to us that he has violated this statute and comes not only within the letter of it but also within the spirit of it. If the county where he has his legal settlement were the only county in which he could obtain work and he refuses to obtain such work, and leaves his family in destitute and necessitous circumstances by reason of his neglect to do such work, he would be guilty of violation of this statute. Why would he not be guilty if he neglects to obtain the public relief by moving to said county if that is the only way he can bring relief to his family? Under the *Zitlow* case, cited by you, it was held that a man who refused to work in return for aid furnished could be convicted under this statute. Why not, if he refuses to fulfill the conditions that are required to give him public relief? We believe that this question requires an affirmative answer.

Your fourth question reads as follows:

“(4) Do you believe that C, one of A’s children under eighteen, can be held to be a ‘neglected child’ under the children’s code, sec. 48.01 (1) (a) because of the ‘fault’ of his father in failing to abide by this court order? If C is a ‘neglected child’ then the juvenile court can take jurisdiction but the child cannot be sent to a Milwaukee county institution because C is a charge of X county and not of Milwaukee county; hence the commitment would be to the state school at Sparta. Do you agree with this conclusion?”

Sec. 48.01 (1) (a) provides:

“The words ‘neglected child’ shall mean any child under the age of eighteen years who is abandoned by his parent, guardian or custodian; or who lacks proper parental care by reason of the fault or habits of the parent, guardian or custodian; or whose parent, guardian or custodian neglects or refuses to provide proper or necessary subsistence, education or other care necessary for the health, morals or well-being of such child; \* \* \*.”

Under this wording it is perfectly clear, it seems to us, that C is a neglected child under the circumstances. Of

course the juvenile court could take jurisdiction and we believe that, in view of the fact that no public aid can be given to the family under sec. 49.03 (9), the child could not be sent to a Milwaukee county institution, and if otherwise a proper person, the child may be sent to the state school at Sparta.

JEF

*Intoxicating Liquors—Municipal Corporations—Beer Licenses*—Whiskey license cannot be obtained without first obtaining beer license for same building.

November 1, 1934.

F. W. HORNE,  
*District Attorney,*  
Crandon, Wisconsin.

Under date of October 20 you have submitted the following question:

“Where a tavern and a dance hall are on the same description of land but are in separate buildings, and the owner has a beer license for the dance hall, is it necessary to obtain both a beer license and whiskey license for the tavern, or can he obtain a whiskey license without first obtaining a beer license for his tavern?”

You state that the person in question has a beer license for the dance hall but was denied a whiskey license for the tavern for the reason that the town officials required him to first obtain a beer license for the tavern before they would grant him a whiskey license, thus making it necessary for him to obtain two beer licenses.

Under sec. 176.05 (10) (b) it is provided:

“No retail ‘Class B’ license shall be issued to any person who does not have, or to whom is not issued, a ‘Class B’ retailer’s license to sell fermented malt beverages under subsection (10) of section 66.05.”

Under this provision of the statute your question must be answered in the negative. A beer license for the dance hall is not broad enough to cover the building in which the tavern is located. It is perfectly proper to consider the tavern building and the dance hall building as separate premises, which cannot both be covered by one license.

JEF

*Courts—Fish and Game—Fur Dealers*—Fur buyer's license is revoked by conviction of licensee for illegal possession of mink skins during closed season under sec. 29.63, subsec. (3), Stats., and no new license may be issued to him for one year thereafter even though case has been appealed to supreme court and stay of execution has been granted until case has been reversed by supreme court.

November 3, 1934.

H. W. MACKENZIE,  
*Conservation Director,*  
Conservation Department.

You state that Mr. A was convicted in the county court of Columbia county on January 10, 1934, for the illegal possession of mink skins during the closed season. He has appealed his case to the supreme court and it has been scheduled for hearing on November 10. Considering these facts, you inquire whether Mr. A can lawfully obtain a fur buyer's license that is issued under the provisions of sec. 29.134, Stats., before the expiration of one year from the date of his conviction in the county court, inasmuch as he has appealed his case to the supreme court and sec. 29.63 provides for a revocation of his license at the time of his conviction.

Sec. 29.63 (3) (a) and (b) provides:

“(a) 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.

“(b) No license shall be issued to any person for a period of one year following a conviction of such person for a violation of this chapter.”

I understand that a stay of execution has been issued in this case. In sec. 358.14 it is said in part:

“\* \* \* In case such stay is granted the accused shall recognize to the state of Wisconsin in such sum as the court or justice ordering such stay shall determine, with sufficient sureties, for his appearance in the supreme court at the current or next term thereof, to prosecute his appeal or writ of error with effect, and to abide the sentence

thereon, and in the meantime, keep the peace and be of good behavior."

The same provision that he is "to abide the sentence thereon, and in the meantime, keep the peace and be of good behavior" is applicable to a stay granted in a case where there is an offense punishable by imprisonment for life under sec. 358.09. At common law a writ of error operated *per se* as a supersedeas and prevented the issuance of execution to enforce the judgment. The same effect was also given to an appeal in chancery. This matter is now governed by statute.

It was held that ordinarily the perfecting of an appeal from a judgment, decree or order stayed only affirmative proceedings thereunder. 2 R. C. L. 122. A stay of execution or a stay of further proceedings generally applies only to proceedings in the same tribunal. You will note that the conviction under this statute revokes any license theretofore issued. The conviction has been obtained in the lower court and is not rendered a nullity because of an appeal or stay of execution. In XVII Op. Atty. Gen. 494, it was held:

"Under sec. 29.63, subsec. (3), Stats., conviction for violation of fish and game law *ipso facto* revokes any license theretofore issued pursuant to ch. 29. This does not include conviction obtained in justice court from which appeal has been taken entitling applicant to trial *de novo* in circuit court. In that case license is not revoked until conviction is obtained in circuit court."

A different rule, however, applies when the appeal is from the circuit court to the supreme court. While the question is not entirely free from doubt, we are of the opinion that an appeal to the supreme court, although there is a stay of execution ordered pursuant to the authority given the court under the statute, does not nullify the conviction so as to prevent the provision of sec. 29.63 (3) from being applicable. We believe that the license is revoked and no license can be issued to such person for the period of one year.

JEF

*Appropriations and Expenditures—Charitable and Penal Institutions—State Public School—Indians*—Board of control under sec. 46.03, subsec. (3), Stats., has authority to accept and administer funds from federal government for education of Indian children committed to state public school.

November 7, 1934.

BOARD OF CONTROL.

Attention A. W. Bayley, *Secretary*.

In your letter of October 31 you state that there is an opportunity to receive an allotment of federal funds to defray the cost of maintaining certain Indian children in boarding homes. These children have been committed to the state public school and, unless their care is assumed by the federal government, this expense would have to be met by state appropriation. However, the federal government assumes this cost, because these Indian children are entitled to education under the Indian bureau.

It is proposed that the funds advanced by the federal government shall be turned over to the board of control and be disbursed under the regulations prescribed by the Indian bureau. The board of control desires to accept the allotment of this money and to administer it through the state public school according to the terms which may be agreed upon with the commissioner of Indian affairs.

You desire to be advised as to the authority of the board to accept and administer these funds.

It is the opinion of this office that your board, under sec. 46.03, subsec. (3), Stats., has the necessary authority to accept and administer these funds.

The statute provides:

“The said board shall:

“\* \* \*

“(3) 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.”

The words “said institutions” refer back to subsec. (1), sec. 46.03, Stats., which mentions, among other institutions, the state public school.

The statute above quoted is quite comprehensive and discloses an evident legislative intent to have the board of control take advantage of funds which may be offered to the state for the use and benefit of persons committed to state institutions.

JEF

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*Contracts—Public Printing—Bids—Recovery Act—National Industrial Recovery Administration—Codes—Statutes contain no provisions as to N. R. A. code requirements in connection with letting of contracts for printing by county board.*

November 7, 1934.

R. V. BROWN,  
*District Attorney,*  
Elkhorn, Wisconsin.

You state that your county board in November will consider bids for printing their ordinances and proceedings, also for ballots, supplies and legal forms.

In this connection you inquire whether the printers bidding are expected to follow the N. R. A. code, and you state that if the code is complied with all bids will be alike, and that there will be no satisfactory way to divide the work.

So far as we are able to determine, our statutes contain no provisions covering your question. Therefore, in those instances where the statutes provide that printing must be let to the lowest bidder, as for instance in the case of the printing of ballots by the county clerk under sec. 6.25, Stats., such printing would have to be let to the lowest bidder without going into the question of whether such bidder was or was not complying with N. R. A. code requirements. As to any supplies or printing which the county board is at liberty to purchase without calling for bids, it could, of course, use its own judgment in the matter.

JEF

*Criminal Law—Malicious Mischief*—Person maliciously destroying cheese by pouring kerosene on it may be prosecuted for common law offense of malicious mischief.

November 7, 1934.

L. W. BRUEMMER,  
*District Attorney,*  
Kewaunee, Wisconsin.

You state that there are several individuals bound over for trial from justice court on the complaint of destroying cheese by pouring kerosene thereon during the recent milk strike and its accompanying disturbances. You point out that you could find no statute covering this offense and wish to know what charge can be brought against these persons for the malicious destruction of this property.

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.”

The enumeration in the statutes of various crimes and misdemeanors does not exclude common law offenses in this state. This is shown by such statutes as the following:

Sec. 353.27:

“Any person who shall be convicted of any offense the punishment of which is not prescribed by any statute of this state shall be punished only by imprisonment in the county jail not more than one year or by fine not exceeding less than fifty dollars.”

Sec. 343.31:

“Any person who shall be convicted of any gross fraud or cheat *at common law* shall be punished by imprisonment in the state prison not more than four years nor less than one year, or by fine not exceeding one thousand dollars nor less than fifty dollars.

Sec. 353.26:

“All punishments prescribed by the common law for any offense specified in the statutes of this state, and the punishment whereof is prescribed therein, are prohibited.”

In the instant case, these persons could be prosecuted for the common law offense of malicious mischief.

38 C. J. 357, sec. 1:

“\* \* \* Broadly speaking, however, the offense includes all malicious physical injuries to the rights of another which impair utility or materially diminish value, \* \* \*.”

38 C. J. 361, sec. 6:

“The preponderance of authority supports the rule that at common law malicious mischief may be committed as to either real or personal property, or animate or inanimate property, but in some jurisdictions only personal property is subject of the offense.”

For a discussion of the various elements in this offense see 38 C. J. 356-365.

Upon conviction of the offense, punishment would be meted out under sec. 353.27, Stats., set forth above.

See *Smith v. State*, 63 Wis. 453, 23 N. W. 879, holding that an information which alleges the forcible confinement and imprisonment of a person against his will, without alleging any specific intent in such confinement, charges merely the common law offense and is punishable under this section. See also II Op. Atty. Gen. 311; XI Op. Atty. Gen. 619:

JEF

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*Recovery Act—Wisconsin Emergency Relief Administration—Trade Regulation—Warehouses—W. E. R. A. leasing cold storage warehouses in which to store food to be distributed to county poor relief units is not required by sec. 111.02, Stats., to secure license.*

November 7, 1934.

DEPARTMENT OF AGRICULTURE AND MARKETS.

Attention Harry Klueter, *Chief Chemist.*

Sec. 111.02, Stats., provides:

“No person, firm or corporation shall maintain or operate a cold storage warehouse without a license so to do issued by the dairy and food commissioner. \* \* \*”

The Wisconsin Emergency Relief Administration is a state agency carrying on poor relief under the Wisconsin industrial commission. It proposes to store large amounts of food in cold storage warehouses throughout the state, from which the food is to be distributed to the county relief units. In some instances it proposes to lease the entire warehouse and in others so many cubic feet of a warehouse.

You wish to know whether the W. E. R. A. will have to procure a license under sec. 111.02, set forth above either when it leases the entire warehouse or when it leases a part of a warehouse.

Answer, No.

It will not be necessary to consider the effect of leasing part of a warehouse from a person, firm, or corporation having a license to maintain or operate such warehouse because, in any event, the W. E. R. A. would not have to procure a license.

General statutes are not to be construed to include to its hurt the sovereign state. *Sandberg v. State*, 113 Wis. 578, 589, 89 N. W. 504; *Milwaukee v. McGregor*, 140 Wis. 35, 37, 121 N. W. 642, 17 Ann. Cas. 1002; *State v. Milwaukee*, 145 Wis. 131, 129 N. W. 1101.

In *Milwaukee v. McGregor*, *supra*, p. 37, the court, quoting from *The Dollar Savings Bank v. United States*, 86 U. S. 227, 239, said

“The most general words that can be devised \* \* \* affect not’ the sovereign ‘in the least, if they may tend to restrain or diminish any of his rights and interests.’ \* \* \*”

Poor relief is a governmental function; hence, the W. E. R. A., in using these warehouses, is carrying out a governmental function. The state is not specifically named in sec. 111.02, Stats., and, hence, while acting in a governmental capacity, is not bound by it

JEF

*Taxation—Forest Crop Lands*—In case where certain county lands were withdrawn from provisions of forest crop laws on October 8, 1934, and where town treasurer has certified to state treasurer acreage of said lands October 9 and certified report was received by treasurer October 10, 1934, state treasurer is permitted to pay forest crop tax to town treasurer.

November 7, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

You state that on October 8, 1934, certain county owned lands located in the town of Armstrong, Oconto county, were withdrawn from the provision of the forest crop law. On October 10, two days after said lands were withdrawn, you received from the treasurer of the town of Armstrong a certified report of the descriptions and acreage of said lands on which the forest crop tax was payable in 1934. The report is dated October 9, 1934.

You inquire whether the state treasurer is permitted to pay the forest crop tax after the lands have been withdrawn from the provision of the forest crop law.

Sec. 77.04 subsec. (2), Stats., provides:

“As soon after the twentieth day of February of each year as feasible the treasurer of each town in which any forest crop lands lie, shall certify to the state treasurer and also to the tax commission a list of such lands, designating as to each tract whether it is owned by the county, and if not whether the owner has paid the taxes as hereinafter provided. A specific sum per acre as hereinafter provided shall then be paid by the state treasurer to such town treasurer from the appropriation made by subsection (2) of section 20.07.”

You will note that the town treasurer is required to certify to the state treasurer as soon after the 28th day of February of each year as feasible. The land in question was forest crop land up to the 8th day of October, 1934, and had the treasurer certified said land any time prior to the 8th day of October, 1934, there could be no question whatever but that the state treasurer would be required to pay the forest crop tax as provided in sec. 77.04 (2). I

am of the opinion that your question should be answered in the affirmative. The fact that the treasurer did not find it feasible to make the certificate until October 9 or through inadvertence omitted to certify will not deprive the town of the state contributions as provided in the above quoted subsection.

JEF

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*Indigent, Insane, etc.—Legal Settlement*—Giving of notice by supporting municipality to place of legal settlement merely fixes time from which place of legal settlement becomes liable for support of absentee poor persons, and failure to give such notice does not operate to change place of legal settlement.

No legal settlement may be acquired in municipality by person while he is being supported therein as poor person.

November 7, 1934.

VOYTA WRABETZ, *Chairman,*  
*Industrial Commission.*

You wish the opinion of this department as to the legal settlement of a certain family under the following circumstances as set forth in your letter:

“A family by the name of B had a legal settlement in Sawyer county, Wisconsin, up to June of 1928, at which time B and his family removed to other parts, finally settling in Milwaukee in October of 1928. The records of the Milwaukee department of outdoor relief show that this family has received aid practically continuously since March 1929 from Milwaukee county. The statutory notice as provided in Wis. Stats. 49.03, was not served upon Sawyer county until May, 1934. Milwaukee county attributes the delay in giving such statutory notice to the fact that the B family had untruthfully told them at the time they applied for aid that they came to Milwaukee county in 1927. Sawyer county contends that the B family have lost their legal settlement in Sawyer county by virtue of their absence therefrom for over a year, sec. 49.02 (7).”

You ask: 1. Does the B family have a legal settlement in Sawyer county at the present time?

Answer, Yes.

Sec. 49.02, subsec. (7), Stats., provides that a legal settlement may be lost by gaining a new one or by a voluntary and uninterrupted absence from the place of settlement for a year or more. There is no question in the instant case but that the B family have been voluntarily absent from Sawyer county for over a year. However, in order to have lost their legal settlement they must have been absent uninterruptedly.

"We think the voluntary and uninterrupted absence spoken of in said section [49.02 (7) Stats.] must be construed to mean an absence, especially if the party resides within this state, during which the party is not a pauper needing and receiving support, \* \* \*." *Town of Scott v. Town of Clayton*, 51 Wis. 185, 191.

To the effect that support elsewhere as a pauper within a year of removal prevents loss of legal settlement see XXII Op. Atty. Gen. 1041; XX Op. Atty. Gen. 1103.

It then becomes necessary to determine whether, because no notice under sec. 49.03, Stats., was given by Milwaukee county to Sawyer county until several years after the B family left Sawyer county, the B family have lost their legal settlement in Sawyer county.

The court, in *Town of Scott v. Town of Clayton*, *supra*, p. 192, said:

"\* \* \*. After such necessity for support occurs, and the notice is given, the voluntary absence of such poor person from the town in which he has a settlement is interrupted within the meaning of the statute. \* \* \*."

This would seem to indicate that the giving of notice to the place of legal settlement is a prerequisite to making the giving of relief an interruption of absence from such place of settlement, but it must be borne in mind that the necessity of giving notice in order to interrupt the period of voluntary absence from the place of legal settlement was not involved in that case, and therefore the paragraph last quoted was mere *obiter dicta*. That the giving of notice is not such a prerequisite is an argument sustained by the following provision in sec. 49.03, subsec. (3), Stats.:

“\* \* \*. In case such notice is not given within ten days, the same may be given at any other time, but the county shall be liable only for the expense incurred for the support of such person from and after the time of the giving of such notice.”

This indicates that the giving of notice merely marks the time from which the place of legal settlement becomes liable for support furnished by the municipality to which a poor family has moved and does not affect the place of legal settlement.

See also *Town of Saukville v. Town of Grafton*, 68 Wis. 192, in which a poor person having a legal settlement in the latter town was supported for a period of four years by a private individual as a pauper working for his board and clothes and the court held that at the end of that time the man had not lost his legal settlement. In that case there had been no notice to the town of Grafton, as the charity was private, for which there is no remuneration from a municipality.

In the recent case of *Town of Rolling v. City of Antigo*, 211 Wis. 220, 248 N. W. 119, it was held that a family having a legal settlement in the city of Antigo which moved into the town of Rolling and received aid there within a year from a *voluntary charitable* organization still retained its legal settlement in the former municipality. If the giving of notice to the place of legal settlement were necessary to prevent loss of legal settlement when a poor family is supported in another municipality, aid from a private organization could not have prevented loss of legal settlement in Antigo, since a private organization would give no notice because not entitled to reimbursement.

From the above authorities it is concluded that, in the instant case, the fact that Milwaukee county failed to give notice to Sawyer county until several years after it first rendered aid to the B family did not operate to defeat the family's legal settlement in Sawyer county. Such delay in giving notice means merely that Milwaukee county cannot collect from Sawyer county for aid given the B family prior to the time such notice was given. The B family still retains its legal settlement in Sawyer county because the members received aid as paupers within a year after leaving that

county and that county became liable for its support upon receipt of notice from Milwaukee county. In other words, notice has nothing whatsoever to do with legal settlement. See XXII Op. Atty. Gen. 222, in which a similar ruling was made in a case in which no notice was given.

2. You also inquire: Does the B family have a legal settlement in Milwaukee county at the present time?

Answer, No.

Since it has not lost its legal settlement in Sawyer county, it follows that no new settlement has been acquired.

In any event, no legal settlement could have been acquired in Milwaukee by the B family because it received aid as a poor family within a year after removing there and has been on relief practically continuously since then.

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. \* \* \*”

On this point see XXII Op. Atty. Gen. 147; XIV 604, 605; XIII 212, 213, etc.

JEF

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*Labor—Apprentices—Public Health—Recovery Act—Beauty Parlors—Contract of apprenticeship for beauty parlor apprentices which is in conflict with beauty parlor statute, minimum wage law and beauty parlor code is invalid.*

November 10, 1934.

BOARD OF HEALTH.

Attention Dr. C. A. Harper.

You have inquired whether a beauty parlor apprentice, as defined in ch. 159, Stats., can be indentured for a period of one or two years in accordance with the master and apprentice statute, ch. 106, Stats., and in this connection you have submitted to us some memoranda relative to a proposed two-year apprentice indenture.

The proposed indenture calls for a pre-apprenticeship training period of approximately six months, and the following wage scale during the apprenticeship:

|                   |        |           |  |  |
|-------------------|--------|-----------|--|--|
| 1st three months, | \$6.00 | per week, |  |  |
| 2d " "            | 7.00   | " "       |  |  |
| 3d " "            | 8.00   | " "       |  |  |
| 4th " "           | 9.00   | " "       |  |  |

During the second year, the wages would be for the

|                   |         |           |  |  |
|-------------------|---------|-----------|--|--|
| 1st three months, | \$10.50 | per week, |  |  |
| 2d " "            | 11.50   | " "       |  |  |
| 3d " "            | 12.50   | " "       |  |  |
| 4th " "           | 13.50   | " "       |  |  |

and a \$50.00 bonus from the employer at satisfactory completion of the contract.

We believe this plan of apprenticeship for beauty parlor apprentices to be objectionable, for several reasons.

In the first place, the beauty parlor statute contemplates only a six-months' apprenticeship for operators. Sec. 159.12, Stats., provides in part:

"Apprentices must practice for six months under the supervision and direction of a licensed manager before they shall be eligible to be licensed as operators. \* \* \*"

If an apprentice completed such a six-months' apprenticeship she would be entitled to a license under the law as an operator. After receiving an operator's license she would be entitled to the code wages for such an employee, which are considerably higher than those specified under the proposed indenture plan, the minimum code wages being as follows:

First, in cities over 500,000 population and their trade areas,  
\$18.00 per week.

Second, in cities of 2,500 to 100,000 population and their trade areas, \$17.00 per week.

Third, in cities under 2,500 population and their trade areas,  
\$15.00 per week.

Since the indenture would therefore conflict with the code, it would be invalid.

In the second place, the pre-apprenticeship training period of approximately six months is in no way contemplated by the beauty parlor statute, and since there would presumably be no wages during this period it would conflict with minimum wage rulings of the industrial commission made pursuant to powers granted that commission under ch. 104, Stats. The commission has ruled that apprentices in beauty parlors are not subject to the minimum wage law during the first two months of employment, but during the third month they must be paid at least 16 cents per hour; during the fourth, fifth and sixth months at least 18 cents per hour, and thereafter at least 22½ cents per hour in cities of 5,000 or more and 20 cents elsewhere.

It is also very doubtful if the general statute on master and apprentice, ch. 106, applies to beauty parlor apprentices, since an indenture period of not less than one year is provided by sec. 106.01, subsec. (3), whereas sec. 159.12, Stats., provides for a six-months' apprenticeship for an operator in a beauty parlor. Ch. 106, the general statute on master and apprentice, was adopted in 1911, and the beauty parlor statute setting up a specific six-months' apprenticeship was adopted in 1925. It is a well recognized and familiar rule of statutory construction that where there is an apparent conflict between the provisions of a specific and general law the specific law prevails over the general. *Kepner v. United States*, 195 U. S. 100; *Jones v. Brodhead Roller Rink Co.*, 136 Wis. 595; *Polk v. Railroad Comm.*, 154 Wis. 523.

JEF

*Charitable and Penal Institutions — Feeble-minded —*  
 When person not in fact mentally deficient is committed to colony for feeble-minded board of control, acting as commission in lunacy, may declare him competent and order his release from institution.

November 14, 1934.

A. W. BAYLEY, *Secretary,*  
*Board of Control.*

You wish to know what procedure is to be followed in releasing from a colony for the feeble-minded a person who the staff of the institution, upon a study and review of his case, has decided is not in fact a feeble-minded person.

You ask:

1. Can a superintendent of a colony for the feeble-minded declare a patient committed to said institution to be not a mentally deficient person and order his release from the institution?

Answer, No.

Sec. 52.03, subsec. (3), Stats., provides:

“The superintendent of each institution with the approval of the board of control, shall have power to discharge inmates, but no epileptic inmate shall at any time thereafter be sent or returned to any county home.”

The superintendent has not the authority to declare an inmate competent; the statute merely provides that he may discharge inmates with the consent of the board of control.

You also ask:

If the answer to question 1 is in the negative, would it then be the proper procedure for the board of control, sitting as a commission in lunacy, to make inquiry into the mental condition of the patient, and if, as a result of such action, it finds the patient to be mentally competent, order his release from the institution?

Answer, Yes. The statute makes express provision for such procedure.

Sec. 52.03, subsec. (4), Stats., provides:

“In case any person shall be sent to either of said institutions through mistake in the diagnosis of his mental condition or disease or from any other cause, to be determined

by the board of control acting as a commission in lunacy, such person if insane shall be transferred to a state hospital for the insane, or if a resident of Milwaukee county, to the Milwaukee hospital for the insane; and if found neither insane or mentally deficient such person shall be returned to the county from which committed. \* \* \*"

JEF

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*Automobiles—Law of Road—Speed Limits—*Maximum speed limit as fixed by sec. 85.40, subsec. (6) and (7), Stats., applies to business districts and residence districts outside of incorporated cities and villages as well as within those municipalities.

November 14, 1934.

**HIGHWAY COMMISSION.**

Attention F. J. O'Meara.

In your communication of October 15 you inquire whether business district and residence district as defined in subsecs. (28) and (29), sec. 85.10, Stats., are limited to incorporated cities and villages.

Sec. 85.10 (28) and (29) provides:

"(28) BUSINESS DISTRICT. The territory contiguous to a highway when fifty per cent or more of the frontage thereon for a distance of three hundred feet or more is occupied by buildings in use for business.

"(29) RESIDENCE DISTRICT. The territory contiguous to a highway not comprising a business district where the frontage on such highway for a distance of three hundred feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business."

You refer us to sec. 85.40 (6), (7) and (8) which read as follows:

"(6) IN BUSINESS DISTRICTS. The maximum permissible speed on any highway in a business district shall be fifteen miles per hour; but local authorities may increase this speed as provided in section 85.43.

"(7) IN RESIDENCE DISTRICTS. The maximum permissible speed on any highway in a residence district shall be

twenty miles per hour; but local authorities may increase this speed as provided in section 85.43.

“(8) ON OTHER HIGHWAYS WITHIN A MUNICIPALITY. The maximum permissible speed on any highway not in a business or residence district within the incorporated limits of a city or village shall be twenty-five miles per hour; but local authorities may increase this speed as provided in section 85.43.”

Your question is given for the purpose of determining the speed limit in business and residence districts outside of incorporated cities and villages. You state that the act as it first passed the legislature contained a subsec. (9), which fixed the speed limit outside of incorporated cities and villages as 40 miles an hour, but the act was referred back to the legislature, which struck out this subsection.

You will note that the language in subsecs. (28) and (29), sec. 85.10, above quoted, is broad in its terms and is not limited to incorporated cities and villages. We believe that the subsections intend to convey the exact ideas expressed and that they apply to places outside of incorporated cities and villages as well as to those within such municipalities. The fact that incorporated cities and villages are expressly mentioned in subsec. (8) and are not mentioned in subsecs. (6) and (7) of sec. 85.40 indicates a legislative intent not to limit the provisions of subsecs. (6) and (7) to incorporate cities or villages. The need for the speed limit within business and residence districts arises from the concentration of population in such places and it would appear that the same need exists within such concentration whether the place is incorporated or unincorporated. You are therefore advised that the business districts and residence districts defined in sec. 85.10 (28) and (29) and referred to in sec. 85.40 (6) and (7) are not limited to incorporated cities and villages.

JEF

*Public Health—Cemeteries*—Proper authority to move bodies from old cemetery to new consists of (1) consent of next of kin, and (2) permit from proper health officer or officers.

November 14, 1934.

INDUSTRIAL COMMISSION.

Attention Voyta Wrabetz, *Chairman*.

You state that a work project has been submitted to the W. E. R. A. by the city of Wisconsin Rapids which calls for the removal of bodies from an old cemetery to a new cemetery in order that the old cemetery may be used for park purposes. The old cemetery is the property of the city of Wisconsin Rapids.

You wish to know whether the contemplated removal of these bodies from one cemetery to another may be legally accomplished, and, if so, what is the proper procedure to be followed.

Sec. 351.42, Stats., reads:

“Any person, not lawfully authorized, who shall dig up, disinter, remove or convey away any human body or the remains thereof, or shall knowingly aid in such disinterment, removal or conveying away, or any accessory thereto, either before or after the fact, shall be punished by imprisonment in the state prison not more than three years nor less than one year or in the county jail not more than one year, or by fine not exceeding five hundred dollars.”

This is but declaratory of the common law wherein,

“The disinterment of a dead body without authority, is a misdemeanor and indictable \* \* \* as an offense ‘highly indecent and contra bonos mores’ \* \* \*.” 17 C. J. 1149, sec. 33.

Proper authority to disinter a body and remove it to another resting place consists of: (1) the consent of the persons entitled to raise an objection to the removal of the dead body, and (2) a permit from the proper officer.

(1) “The right to change the place of burial primarily belongs to the next of kin, unless there is a surviving spouse, in which case he or she has the preference.” 17 C. J. 1141, sec. 8.

(2) Rule 11 of the Wisconsin state board of health for the transportation of the dead provides:

“When disinterred bodies are removed from one cemetery to another, or from one part of a cemetery to another part of the same cemetery, and transported by private conveyance [as opposed to transportation by a common carrier], the written consent of the health officer of the district where the body is buried and the health officer of the town, village or city where the body will be reinterred, shall be sufficient authority for the removal.”

Sec. 69.43, Stats., provides:

“No sexton or person in charge of any premises in which interments or cremations are made shall inter or cremate or permit the interment or cremation of any body unless it is accompanied by a burial permit as herein provided.”

Hence, before bodies may be disinterred, removed from the old to the new cemetery and reinterred in the new cemetery, a permit to that effect must be procured from the health officer of the city of Wisconsin Rapids, and if the new cemetery is outside of the city, a permit from the health officer of the municipality in which the new cemetery is located.

In conclusion, then, bodies may legally be moved from one cemetery to another upon the procuring of the proper authority which consists of, (1) the consent of the next of kin, and (2) a permit from the proper health officer or officers.

JEF

*Abandonment — Criminal Law — Extradition — Indigent, Insane, etc.—Legal Settlement*—Under law of this state extradition may be had for violation of sec. 351.30, Stats. However, if man to be extradited is not fugitive from justice state in which he is may refuse extradition.

Advisability of resorting to extradition in abandonment cases is discussed.

Wife and children of man who resides in Michigan who have resided in given municipality in this state over two years without receiving relief of any kind have acquired legal settlement under sec. 49.02, subsec. (5), Stats.

November 14, 1934.

WENDELL MCHENRY,  
*District Attorney,*  
Waupaca, Wisconsin.

A and B, husband and wife, resided in the state of Michigan for ten years. They have two children aged nine and ten years respectively. About two years ago the wife, B, left her husband, taking with her the two children. Since that time she has resided in the home of her parents in Waupaca county. A, the husband, continues to reside in the state of Michigan, and, since June, 1934, has failed to contribute money for the support of either the children or his wife. Under these circumstances you wish to know whether or not, if a warrant for abandonment is issued, extradition papers would be issued and the defendant husband brought to Waupaca county in the event he fought extradition.

Sec. 351.30, Stats., provides:

“Any person who shall without just cause, desert or wilfully neglect or refuse to provide for the support and maintenance of his wife in destitute or necessitous circumstances; or any person who shall, without lawful excuse, desert or wilfully neglect or refuse to provide for the support and maintenance of his or her legitimate or illegitimate minor child or children under the age of sixteen years in destitute or necessitous circumstances, shall be guilty of a crime, \* \* \*.”

If A has wilfully neglected or refused to support his wife and family he can be prosecuted under the above section of the statutes.

*Adams v. State*, 159 N. W. 726, 164 Wis. 223, 226 says:

“\* \* \* The place where the children were, not where the father was, during the period complained of, fixes the venue of a prosecution for nonsupport of children.”

See also XII Op. Atty. Gen. 643; XI Op. Atty. Gen. 527.

In the instant situation the wife and children have been in Wisconsin during the husband's failure to support, thus the venue for prosecution under sec. 351.30 is in Waupaca county, Wisconsin.

The fact that in this case the wife left the husband, taking the children with her, does not justify the husband's failing to support his family. In *Adams v. State*, *supra*, 226 the court said:

“\* \* \* the removal of the minor children by the wife to another county, even without cause for such removal, would not justify the father in refusing to support them,  
\* \* \*”

See also *Beulfuss v. State*, 142 Wis. 665 and XIII Op. Atty. Gen. 227, in which it was held that prosecution under sec. 4587c (now sec. 351.30) for abandonment of children may be brought in the county where the children are located, although they were taken there by the mother without the father's consent.

So far as prosecution under sec. 351.30 is concerned it does not matter that the husband was in Michigan and the wife in Waupaca county when the husband stopped supporting his family. In this state it has been held that refusal to support and physical separation of the parties need not coincide in point of time to be an offense under sec. 4587c, now sec. 351.30. In *Spencer v. State*, 132 Wis. 509, and *State v. Witham*, 70 Wis. 473, our court has held that refusal to provide support, even though such refusal comes at a time when the two spouses are separated, constitutes an offense under this section.

It has been shown that A could be prosecuted under sec. 351.30, Stats. in this state. XVI Op. Atty. Gen. 816 and XIX Op. Atty. Gen. 447, hold that violation of sec. 351.30 is grounds for extradition. However, there is one important complication in securing the extradition of A from Michigan and that is, A is not a fugitive from justice

in this state, within the meaning of sec. 5278 U. S. Rev. Stats., because he was not in this state when the crime was committed. As far as the statutes of Wisconsin are concerned, this fact would not affect the possibility of extradition, for our statutes provide for extradition for commission of a crime in this state even where the offender is not a fugitive from justice. See ch. 364, the uniform criminal extradition act. This act also provides for the surrender by this state of persons charged with crime in another state who are not fugitives from justice. If Michigan has adopted the uniform extradition act or has a provision for the surrender of criminals who are not fugitives from justice extradition could be had in the instant case. I refer you to a very comprehensive discussion of the possibility of extradition in a case very similar to yours found in XIX Op. Atty. Gen. 447.

Quoting from a letter to Sidney J. Hanson, district attorney of Richland county dated August 24, 1934 (not published), advice which applies to your case:

"Whether or not the governor of Wisconsin would grant extradition in the instant case is a question we are not qualified to answer. However, it may be well to point out that many district attorneys are somewhat reluctant to ask for extradition in cases such as this because they feel that the expense to the community of getting the man back into the state is not justified by the benefits obtained. [See Sec. 364.24, Stats., on expenses of extradition.] In many instances, the man has no money or property and so his family is not benefited by his return and the community is out a large sum of money. [To say nothing of the possibility of having the support of the husband fall on the county too.] It would, perhaps, be well to look into the matter of A's financial condition, from the standpoint of possible gain to B, and the children, in having him prosecuted and also from the standpoint of a valid defense to the action, before incurring the expense involved in extradition. I do not mean to imply that there are not cases in which extradition and prosecution would result in benefit to the family and justify any expenditures made; neither am I attempting to decide whether it is advisable in the instant case.\* \* \*"

The advisability of extradition will have to be decided by you, since you can best judge from all the facts in the case.

You also wish to know whether or not the wife and children, having resided with the wife's parents in a municipal-

ity in Waupaca county for over a period of two years without having obtained relief of any kind, have acquired a legal settlement in said municipality for relief purposes.

Answer, Yes.

Sec. 49.02, Stats., provides :

“(1) A married woman shall always follow and have the settlement of her husband if he have any within the state;

\* \* \*

“\* \* \*

“(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.”

See XX Op. Atty. Gen. 244.

Since A, the husband, has no legal settlement in this state B and the children have acquired a legal settlement in the municipality in Waupaca county in which they have resided for more than two years (twice as long as statutory requirement) without receiving relief of any kind under the provisions of sec. 49.02 (5).

JEF

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*Railroads—Train Crews*—Subsec. (4a), sec. 192.25, Stats., does not set forth full crew requirements applying to operation of engines, cars, etc., therein enumerated on main lines except when switching nor to other than switching operations within railroad yards.

November 14, 1934.

PUBLIC SERVICE COMMISSION.

Attention Wm. M. Dinneen, *Secretary*.

Ch. 304, Laws 1931, added subsec. (4a) to sec. 192.25, statutes, which reads as follows :

“It shall be unlawful for any railroad company in the state of Wisconsin to operate any locomotive, locomotive crane, pile driver, steam shovel, cut widener, gas-electric motor car, or gas-electric switch engine or any other similar self-propelled vehicle propelled by any form of energy whether properly denominated an engine or locomotive,

when used on its tracks for the purpose of switching cars, with less than a full train crew consisting of one engineer, one fireman, one conductor and two helpers. \* \* \*

You wish to know whether, by virtue of the addition of this paragraph, the full crew requirements of sec. 192.25, "apply to the operation of trains upon the main lines of railroads and to other than switching operations within railroad yards, when such trains are propelled by gas-electric motor cars or engines or by other devices whereby electrical energy is used for motive power."

Answer: This subsection applies only to switching operations, whether on the main line or within railroad yards.

In *State v. Chicago & N. W. R. Co.*, 205 Wis. 252, 254, 237 N. W. 132, the court said in speaking of sec. 192.25, subsec. (1):

"At the outset it must be noted that the statute, being penal in its nature and in derogation of the common law, must be strictly construed, and will not be extended by implication. \* \* \*"

The same statement applies to the other subsections of sec. 192.25, including subsec. (4a).

In XI Op. Atty. Gen. 177 (1922), this department ruled that sec. 192.25, subsec. (1), Stats., relating to full crews on passenger trains does not apply to trains propelled by gasoline motors, because of the fact that the requirement of a fireman indicates that the law was intended to apply to steam propelled trains only.

XIX Op. Atty. Gen. 82, 83 (1930), reasoned:

"\* \* \* If this construction [found in XI Op. Atty. Gen. 177] is correct, it follows that it would also be applicable to secs. 192.25 (2) and 192.25 (4), since in each of these sections the employment of firemen is specifically required."

It held, p. 83:

"The fact that firemen are specifically required by these sections definitely indicates that the legislative intent was to establish full crews for the operation of steam trains upon which there is employment for firemen."

Therefore, until the addition of subsec. (4a), as set forth above, by the legislature in 1931, sec. 192.25, Stats., re-

quired full crews only for steam propelled engines and trains.

The question then is: To what extent did subsec. (4a) extend full crew requirements to other than steam propelled engines and trains? The statute is quite clear on that point for it provides for a full train crew on gas-electric motor cars or engines, etc. "when used on its tracks for the purpose of switching cars." Therefore, subsec. (4a) sets forth full crew requirements applying only to the operation of engines, cars, etc., therein enumerated while switching in railroad yards or on main lines, and not to their regular operation on main lines nor to other than switching operations within railroad yards.

JEF

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*Counties — County Liability — Public Officers — Deputy Sheriff*—County is not liable for tortious act of deputy sheriff while in performance of public or governmental function.

November 19, 1934.

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

In your communication of November 16 you state that one of the deputy sheriffs of your county, when returning from Madison, where he had delivered an insane patient to the hospital at Mendota had a car accident in which the parties in the other car were injured and suffered some personal loss in damaged property. These parties have filed claims with the county board of Washburn county, which will be up for action this week. You state it is your opinion that the duties being performed by the sheriff's office in this instance were in the exercise of a public or governmental function and you have so advised the board. You state that you believe that the principle of law stated in *Engel v. Milwaukee*, 158 Wis. 480, is applicable and the only exception being cases coming within the provisions of

sec. 66.095, Stats. You ask to be advised whether we agree with your conclusion.

We believe that you are correct in your conclusion. While in the *Engle* case the principle in question was applied to a city instead of a county, we believe that the same holds true in the case of counties. In *Apfelbacher v. State*, 160 Wis. 565, the principle was applied to a state and the court there held that the state is not liable for the tortious acts of its agents and officers while engaged in the discharge of a governmental function. This case was cited with approval in *Jensen v. Oconto Falls*, 186 Wis. 386, and the principle was there stated in broad language on page 391 as follows:

“\* \* \* It is \* \* \* well settled that negligence in the performance of a purely governmental function by the officers of a municipality is not actionable although this exemption gives no right to maintain a nuisance. \* \* \*”

A county is a municipality and you are advised that it is our opinion that your county is not liable for the injuries suffered through the negligence of its officer while performing a governmental function.  
JEF

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*Charitable and Penal Institutions—Reformatory—Trade Regulation—Negotiable Instruments—Checks—State reformatory is not liable because of blank endorsement on check by which money intended for B is obtained by A, inmates of institution.*

November 19, 1934.

BOARD OF CONTROL.

It appears that while one A was incarcerated in the state reformatory, a check was sent to that institution payable to one B. The names of A and B were very similar and A represented that he was the individual for whom the check was intended. A endorsed the drawee's name on the back of the check and handed it to the steward of the said reformatory who, by sec. 46.07, is directed to handle money of inmates. The steward, acting in accordance with the

duty imposed by law, took the check to the bank and obtained the money for the prisoner by endorsing in blank the name of the Wisconsin state reformatory upon the back of the check below the signature written by A. The proceeds of the check, consequently, came to the hands of A instead of B, for whom they were intended. Effort is now being made to hold the state reformatory liable for the repayment of the amount of the check by virtue of that portion of the negotiable instruments law known in Wisconsin as sec. 116.69, subsec. (1), which provides:

“Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

“(1) If the instrument is payable to the order of a third person he is liable to the payee and to all subsequent parties.”

You request our opinion as to whether or not the reformatory is liable for this repayment.

It is our opinion that the Wisconsin state reformatory is not liable for this repayment. The reformatory was established and is operated by the state of Wisconsin as a governmental agency of the state, under the supervision of your board, which is also created by statute. Such attributes and advantages as accrue to the state by virtue of its sovereignty extend to the Wisconsin state reformatory as a branch of the sovereign government.

“The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles, or interests of the state would be divested or diminished; or liabilities imposed upon it; \* \* \*.” 59 C. J. pages 1103-1104.

This rule has been applied many times in this state and more particularly in the following cases: *City of Milwaukee v. McGregor*, 140 Wis. 35; *State v. City of Milwaukee*, 145 Wis. 131; *Sullivan v. School Dist. No. 1, City of Tomah*, 179 Wis. 502; *Necedah Mfg. Corp. v. Juneau Co.*, 206 Wis. 316; *Young v. Juneau Co. Id.*; *Fulton v. First Volunteer Company of Oconto*, 204 Wis. 355.

“\* \* \* The above statutes do not, either expressly or by necessary implication, refer to the state, and it is a general rule that such statutes in general terms do not bind the state. *Milwaukee v. McGregor*, 140 Wis. 35, 121 N. W. 642; *U. S. v. Hoar*, 2 Mason, 311; *Jones v. Tatham*, 20 Pa. St. 398; Endlich, *Interp. Stats.* sec. 161; *Cole v. White Co.* 32 Ark. 45; *Gilman v. Sheboygan*, 2 Black (U. S.) 510. In *Jones v. Tatham*, *supra*, the court said (page 411):

“Words of a statute applying to private rights do not affect those of the state. This principle is well established, and is indispensable to the security of the public rights. The general business of the legislative power is to establish laws for individuals, not for the sovereign; and, when the rights of the commonwealth are to be transferred or affected, the intention must be plainly expressed or necessarily implied.”

*State v. Milwaukee*, 145 Wis. 131, 135.

It is our opinion that the present case is a proper one for the application of the rule laid down in the decisions referred to above, and that consequently, there is no liability upon the part of the Wisconsin state reformatory by virtue of its blank endorsement on the check.

JEF

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*Mortgages, Deeds, etc.—Taxation—Tax Sales—Refunds*  
—County board has no right to cancel tax certificates, reimburse purchaser of certificates, and charge present value of certificates back as special tax, except in cases where there is invalidity in sale of certificates.

Right acquired by second mortgagee in purchasing tax certificates on land on which he holds mortgage is right to add amount paid for them to his mortgage lien.

November 21, 1934.

R. V. BROWN,  
*District Attorney,*  
Elkhorn, Wisconsin.

A was the owner of a first mortgage on a certain piece of property owned by B. C, a bank, had a blanket second mortgage covering this and other property adjoining owned

by B. To protect its mortgage interest in the property in question and adjoining property, C purchased from the county treasurer the outstanding tax certificates on the property in question and the adjoining property, all of which was covered in its blanket mortgage and which at that time was assessed all in one parcel to B. Some time later, A foreclosed his mortgage in an action in which C, the bank, was a party defendant. By the judgment in this action C was barred of all right, title and interest in the property. A bid in the property at the foreclosure sale at less than the face value of his judgment. After the foreclosure sale C, the bank, made application to the county treasurer to have its tax certificates canceled as void and to have the county treasurer reimburse it for the money it had paid for them and to have the amount charged back against the property in question as a special tax. The county board at first resolved that these tax certificates be canceled and the present value thereof be paid to the holder (bank), but later rescinded its action before any money was paid to the bank.

You state that it is your opinion that under these circumstances (1) the county board has no authority to cancel the tax certificates in question, return the money paid for them to the bank and charge their present value back as a special tax, that therefore the county board properly rescinded its resolution to that effect, and that (2) since the bank was also the mortgagee of the land in question, the only right it acquired by purchasing the tax certificates on it was the right to add the amount of the tax payments plus interest to the face of its mortgage.

This department agrees with you in your conclusions on the facts as set forth above.

Counties owe their creation to the general statutes of the state and the statutes define and limit their powers, liabilities, and duties. *Frederick v. Douglas County*, 96 Wis. 411, 416, 71 N. W. 798. See 1 Dillon, Mun. Corp. secs. 23, 25.

There is no statutory authorization for the cancellation of the tax certificates and the return of the money paid for them in the instant case.

The only provision for the cancellation of tax certificates

other than upon their redemption is found in sec. 75.22, Stats., which provides in part:

“If after the sale or conveyance of any lands sold for the nonpayment of taxes and within the time hereinafter prescribed it shall be discovered that the sale or the certificate issued thereon was invalid, the county board shall make an order, briefly stating the reason therefor, directing that the money paid for such certificate on the sale, and all subsequent charges thereon, and all subsequent taxes paid on the lands described therein by the purchaser or his assigns, be refunded with interest to such purchaser or his assigns,  
\* \* \*.”

The only provision for reassessment when certificates are canceled and money refunded is found in sec. 75.25, Stats.:

“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 \* \* \* were justly taxable for such tax or some portion thereof; \* \* \* they shall fix the amount of such tax \* \* \* and direct the same 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 town, city or village in which such lands are situated, specifying the particular tract of land upon which the same are to be assessed  
\* \* \*.”

There is nothing in the facts set forth above to indicate any invalidity in the tax certificates in question, hence they cannot be canceled and the taxes charged back as a special tax. A mere misapprehension as to the rights it would acquire by the purchase of the certificates on the part of the bank (according to one of the letters you enclosed, the bank thought it could obtain a tax deed) does not affect their validity.

The only right acquired by the bank when it purchased these tax certificates was the right to add the amount paid out for taxes plus interest to the face of its mortgage.

Sec. 74.67, Stats. provides in part:

“Whenever any person having any lien upon any real estate, obtained pursuant to law, shall have paid any taxes on such real estate \* \* \* he shall have a further lien upon such real estate as against the person under whose

title he claims such first lien and all other persons then claiming under him for the amount of money so paid, with interest at the rate of eight per cent per annum, and against all other persons claiming title to such real estate under such person accruing subsequently to the time of recording the notice hereinafter specified."

The legal effect of purchasing tax certificates against property by a mortgagee of such property (the position of the bank in the instant case) is equivalent to that of paying the taxes, for he cannot acquire a tax deed thereby cutting off the equity of redemption of his mortgagor. All he can do, as has been said, is to add the amount paid for taxes plus interest to the face of his mortgage.

In *Burchard v. Roberts*, 70 Wis. 111, 120, the court said:

"\* \* \* we are satisfied on principle and authority, and especially in view of the statute which will presently be cited [R. S. 1878, secs. 1158-1160, now 74.67-74.69], that in the present case the purchase of the land at the tax sale for the mortgagees, and the taking of tax certificates thereon, must be regarded as for the protection of the estate and the mutual benefit of the mortgagees and mortgagor. As was said by Dixon, C. J., in *Fisk v. Brunette*, 30 Wis. 102, such purchase and the taking of the certificates must be regarded as so much money advanced to the mortgagor on the faith of the security."

In *Hill v. Buffington*, 106 Wis. 525, as in the instant case, a tax certificate was purchased by the second mortgagee and the court held, p. 529:

"The purchase of the tax certificate by *Buffington* [second mortgagee] must, under our statute and decisions, be held to have amounted to the payment of the tax for the protection of the estate, and for the mutual benefit of both of the mortgagees and the mortgagor. *Buffington* could not thereby acquire a tax lien upon the land paramount to that of the first mortgagee, nor could he take a tax title which would cut off the first mortgagee or the owner of the equity of redemption. He acquired thereby simply a 'further lien' upon the land as against the mortgagor and all persons then claiming under him; not a lien independent of his mortgage lien, or superior to it or to that of the first mortgage, but of the same nature as his mortgage, and constituting simply an addition to the mortgage debt of the amount due on the certificate when he acquired it.

\* \* \*

See also *Fischel v. Thompson*, 126 Wis. 73, and *Johnson v. Bank of New Richmond*, 188 Wis. 620.

The above statutes and authorities establish the correctness of your conclusions.

JEF

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*School Districts—Transportation of School Children—*  
When children belonging in one school district attend school in another district under mistaken impression that they live in latter district neither district is liable for their transportation.

November 21, 1934.

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

You wish the opinion of this department concerning liability for transportation in the following situation:

Mr. A upon moving into the tract known as Kieckers Subdivision was erroneously informed by the town clerk that his land lay in school district No. 13 when in fact it was a part of school district No. 6. Acting on the information received from the clerk, Mr. A sent his children to school in District No. 13 during the years 1932–1933 and 1933–1934. (The A family lives about 2.3 miles from the school in district No. 13 and over 6 miles by road from the school in district No. 6.) Kieckers Subdivision was on the opposite side of the Milwaukee River from the rest of district No. 6 and thus was commonly supposed to be a part of district No. 13. District No. 13 paid Mr. A's claim for transportation for the year 1932–1933. He is now claiming reimbursement for the year 1933–1934. On September 20, 1934, the town board made Kieckers Subdivision a part of District No. 13.

In the light of the facts as set forth above it is the opinion of this department that Mr. A cannot collect from either school district money for transportation for the year 1933–1934.

In other words, neither school district is liable for such transportation. District No. 13 is not liable because the

A family were not residents of that district in the year 1933-1934. The statutes provide only for a district's paying for the transportation of children residing within its boundaries, i. e., "residing in the district." See sec. 40.34, subsec. (1), Stats. District No. 6 is not liable for the transportation because there is no provision for a district's paying for the transportation of pupils beyond its boundaries except when its own school has been closed and all of its pupils are sent into another district to school. Sec. 40.34, subsec. (1), Stats.

You will note that in ch. 495, Laws 1933, approved July 26, 1933, sec. 40.34, subsec. (1) was amended so that under the present statute, unless

1. The district votes to transport all the children of the district
2. The district is a consolidated district or
3. The district has voted to close its school and provide tuition and transportation, transportation is provided only for those who live over two and one-half miles from the school house in case of a common school.

Sec. 40.34, subsec. (1), Stats., provides:

"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 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. 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. 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."

Thus even if the A family had been residents of district No. 13 during the year 1933-1934, that district would not have had to furnish them transportation because they live only 2.3 miles from the school in district No. 13. (According to the 1931 statutes transportation was to be furnished by common schools for all of those residing over two miles from the school.)

You inquire further whether district No. 13 can collect the total amount of transportation for the past two years from district No. 6. This must be answered in the negative because under the reasoning set forth above district No. 6 was never liable for transportation of the A children to school in district No. 13.

You state that district No. 13 has failed to send in the transportation form to the state covering the case for the year 1933-1934 and wish to know whether district No. 6 can collect their state refund in this case. The answer is: No, because district No. 6 was not liable for this transportation. District No. 6 cannot collect from district No. 13 for the same reason. District No. 6 will not lose anything, because it has not paid for this transportation nor does it have to pay.

A study of the provisions of the statutes leads to the conclusion that Mr. A is not entitled to reimbursement for transportation for the year 1933-1934 from either district.  
JEF

*Public Officers—Malfeasance—Town Board*—Members of town board are not entitled to compensation for services in connection with promoting C. W. A. project nor to traveling expenses.

Town board members illegally acquiring compensation or reimbursement may be prosecuted under sec. 348.28, Stats., or sued in civil action to declare them trustees of money so received.

November 21, 1934.

JOHN A. CONANT,  
*District Attorney,*  
Westfield, Wisconsin.

The town board of one of the towns in Marquette county made several trips to Madison and other places to promote projects under C. W. A. and to get men to work on those projects. You write that they stated that they expected no remuneration and that, in order that no charge would be discovered at the annual meeting when the accounts were audited, they had the town treasurer deposit \$300 of the money received as gasoline tax in the county treasurer's office, from which sum they withdrew \$95.47 to pay themselves for their services.

You wish to know whether these men are entitled to any compensation.

Answer, No.

Sec. 60.60, Wis. Stats., provides:

“The compensation of supervisors [of a town] shall be four dollars per day unless a different sum is fixed by the annual town meeting. \* \* \* No town officer shall be entitled to pay for acting in more than one official capacity or office at the same time.”

The court said in *State v. Cleveland*, 161 Wis. 457, 459:

“A public official's right to compensation is purely statutory; what the statute gives he receives, but no more. Mechem, Pub. Off. secs. 855, 856. Expenses are not allowed to town supervisors by any statute. Moreover, sec. 850 [now sec. 60.60] of the Wisconsin Statutes expressly fixes their compensation at the sum named by the annual town meeting, or in default of action by the town meeting at the sum of \$3 per day [now \$4]. No provision is made for

traveling expenses, and this means that, like other officials in that situation, they must defray their own expenses of this nature."

See also III Op. Atty. Gen. 766.

In the case of *Quaw v. Paff*, 98 Wis. 586, 590, the court said:

"\* \* \* Officers take their offices *cum onere*, and can acquire no right, legal or equitable, to a salary in excess of that provided and fixed by law before they enter upon their official duties. Whether the salary incident to an office be adequate or inadequate is entirely immaterial. The officer accepting an office has no right to demand more for the performance of its duties, or the performance of any duty, as such officer, not required by law, but which may be required of him by the governing body of the corporation and voluntarily performed. All services performed, which are within the scope of his official duties, or which are voluntarily performed as such officer by request or otherwise, are, in contemplation of law, covered by his official salary. *Kewaunee Co. v. Knipfer*, 37 Wis. 496. \* \* \*"

See also *Henry v. Dolen*, 186 Wis. 622, 624; *Outagamie Co. v. Zuehlke*, 165 Wis. 32, 40, 161 N. W. 6.

From the above authorities it will be seen that whether the town board in the instant situation regarded the \$95.47 which they withdrew from the funds in the county treasurer's office as reimbursement for expenses incurred or compensation for their services, they were not entitled to it. Nor does the fact that the services performed were beyond what they were strictly required to do, alter this conclusion.

You also wish to know whether there is any penalty to which these town board members would be subject for appropriating this money as they did.

Answer, Yes.

Sec. 348.28, Wis. Stats., provides:

"Any officer \* \* \* of any \* \* \* town \* \* \* who shall \* \* \* do any other act in his official capacity, or in any public or official service not authorized or required by law, \* \* \* shall be punished by imprisonment in the county jail not more than one year, or in the state prison not more than five years, or by fine not exceeding five hundred dollars; \* \* \*"

III Op. Atty. Gen. 766 holds that town officers voting themselves expenses not provided for by law are guilty of violation of sec. 4549 [now sec. 348.28], Stats.

In *State v. Cleveland, supra*, the court held that where a town board had allowed itself traveling expenses not allowed by statute, the members could be prosecuted under sec. 348.28, Stats.

Aside from criminal prosecution under sec. 348.28, a taxpayer may bring a civil action against these town supervisors to recover the amount they have appropriated. *Webster v. Douglas County*, 102 Wis. 181, 194, 77 N. W. 885; *Neacy v. Drew*, 176 Wis. 348, 360, 187 N. W. 218; McQuillin on Mun. Corp. Vol. 2, sec. 540.

*Quaw v. Paff, supra*, holds that

“An officer who obtains public money from the treasury by forms of law, ostensibly for extra services, but to which he has no right in fact, does not thereby obtain title to such money, and on a failure of the proper officers to respond favorably to a demand by a taxpayer to compel a return of such money, such taxpayer may, acting in his own behalf and in behalf of other taxpayers, maintain an action to charge such officer as a trustee of such money, and to compel him to account for the same and pay it over to the rightful owner.” (Syllabus.)

According to the above authorities these members of the town board may be criminally prosecuted under sec. 348.28, Stats., and/or sued in a civil action to declare them trustees of the money they appropriated.

JEF

*Unemployment Insurance*—In setting up reserves and paying assessment for administrative fund under unemployment reserves and compensation act, municipalities may charge amount thereof to appropriations made for maintenance, construction, machinery repairs, etc., in case of county highway employees.

In case of highway maintenance or construction work performed by county for state, county is not authorized to directly charge these items to state.

November 21, 1934.

HIGHWAY COMMISSION.

Attention Thos. J. Pattison, *Secretary*.

You state that the compulsory provisions of the unemployment reserves and compensation act, ch. 108, Wis. Stats., apply to the state and municipal corporations, including counties. You assume that most counties which have not recently defaulted in their obligations will be permitted to use the book reserve plan and credit the reserve monthly with the amount of the contribution instead of paying it in cash to the industrial commission. It will then be necessary for the counties to keep detailed pay roll records and on the basis of the monthly pay roll of defined employees credit the reserve with two per cent and pay the industrial commission the two-tenths of one per cent to the administrative fund, as provided in sec. 108.19, Stats.

You state further that the principal class of county employees to come within the provisions of the act are those employed in the county highway organizations. At times these employees are employed on county work and paid with funds appropriated by the county, and at other times they are employed by the county on maintenance or construction of state trunk highways, and are paid with funds advanced by the county and later reimbursed by the state.

You further point out that there appears to be no provision in the act directing that the contributions to be credited by the county to the reserve or to be paid to the industrial commission should be taken from any particular fund, and you ask the following questions:

1. In setting up the reserves and paying the assessment for the administrative fund pursuant to ch. 108, Stats., may

municipalities charge the amounts thereof to appropriations made for maintenance, construction, machinery repair, etc., on the basis of the pay rolls of "defined" employees whose salaries or wages are paid from such appropriations?

2. May the state or is the state required to reimburse the counties for the amounts the counties are required to credit to the unemployment reserve and pay to the administrative fund in accordance with chapter 108 of the Wisconsin statutes, based on the pay rolls of the men employed by the county on maintenance or construction work performed by the county for the state?

We are answering your first question in the affirmative. The word "maintenance" is a large term and has been given a fairly broad meaning depending upon the surrounding circumstances and the connection in which it is applied. 38 C. J. 338; XIX Op. Atty. Gen. 530. Presumably that term would include pay rolls on maintenance work. We see no reason why the reserves or assessments for the administrative fund under ch. 108 should be classified any differently than the pay roll itself. The idea back of the act seems to be to place at least a part of the social cost of unemployment upon industrial and business units, and it naturally results in an increased labor cost. In the case of municipalities, therefore, the cost should come from whatever appropriation the cost of the labor comes, be it maintenance, construction, repair or whatever other name may be used.

Your second question is answered in the negative. We find nothing in the statutes requiring the state to reimburse the counties for the amounts the counties are required to credit to the unemployment reserve or pay to the administrative fund. The employees protected by the fund are county employees and not state employees, even though as county employees they may be at times engaged in the maintenance of state trunk highways pursuant to arrangements made between the county highway committee and the state highway commission under sec. 84.07, subsec. (1), Stats. While it is true that the county under such an arrangement is not, strictly speaking, an independent contractor operating in a proprietary or profit-making capacity, yet the county is under no positive obligation to assume

the maintenance of such highways and probably could decline to enter into arrangements with the state highway commission. Nevertheless, it is contemplated that the counties will act in harmony through their county highway committees with the state highway commission in entering into the arrangements provided for by the above statute. *Lickert v. Harp*, 213 Wis. 614. Presumably the counties would not want to enter into such arrangements if they were going to take a loss by reason of standing the expense of unemployment insurance in maintaining state highways, and consequently this increased expense will have to be taken into consideration in future contracts or arrangements between county highway committees and the state highway commission, and it will, indirectly, result in increased cost to the state. However, in the absence of a contract covering the situation, we would say that there is no authority for requiring the state to reimburse the counties for these items.  
JEF

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*Courts—Public Officers—Garnishment—Recovery Act—Wisconsin Emergency Relief Administration—Earnings of person not based on bare subsistence needs are subject to attachment under sec. 304.21, Stats.*

Executive order of September 25, 1933, exempts from garnishment only wages payable to single men and women to cover subsistence needs.

November 21, 1934.

OLIVER L. O'BOYLE, *Corporation Counsel,*  
*Office of District Attorney,*  
Milwaukee, Wisconsin.

A transcript of judgment has been filed with the Milwaukee county clerk against a person who is classified as chief senior engineer on a certain W. E. R. A. project in that county. This person is not indigent and was not taken from the relief lists. He earns \$1.50 an hour on a thirty hour a week basis.

You wish to know whether his earnings are subject to attachment under sec. 304.21, Stats.

It is the opinion of this department that such earnings as those described above are subject to attachment. We agree with your position as stated in your letter that such a person is a regular employee of the county and that his earnings are money due him from the county within the meaning of the statute.

If he is a single person without dependents he is entitled to no exemption. It is our opinion that the executive order to which you refer in your letter (a copy of which is herewith enclosed) confers exemption only upon single men and women who are working on W. E. R. A. projects for wages in such amounts as to cover bare subsistence needs, such wages being in lieu of direct relief. Such an interpretation is supported by the following excerpt from the order, which sets forth the occasion for its issuance:

"WHEREAS sums of money granted to the Wisconsin Emergency Relief Administration by the Federal Emergency Relief Administration are expended for relief purposes in the form of wages to workers on FERA projects in such amounts as to give each worker sufficient wages to cover bare subsistence needs as determined by case work investigation, and

WHEREAS the Federal Emergency Relief Administration has issued an order that no moneys payable as FERA wages to cover subsistence needs be subject to garnishment or attachment, \* \* \*"

The order exempts from garnishment "\* \* \* wages payable to single men and women to cover subsistence needs \* \* \*"

The wages of the person in the instant case are not merely wages to cover subsistence needs and hence do not come under the exemption set forth in the executive order discussed above; therefore they are subject to attachment under sec. 304.21, Stats.

JEF

*Appropriations and Expenditures—Constitutional Law—Teachers' Retirement System—Taxation—Income Taxes—* Ch. 417, Laws 1933, is attempt to impair constitutional rights and is therefore invalid.

November 21, 1934.

ALBERT TRATHEN, *Director of Investments,*  
*Annuity and Investment Board.*

You have requested this department to advise you concerning the constitutionality of ch. 417, Laws 1933, authorizing the annuity and investment board to pay a certain sum of money to Mrs. John Stafford. Said chapter provides that such money be paid "from the contingent fund of the teachers' retirement system."

The contingent fund referred to in said ch. 417 is derived, in part, from income surtax, sec. 71.26, subsec. (6), Wis. Stats., and is set apart as a trust fund by sec. 25.28. The contingent fund was established in 1921 to provide for teachers employed prior to the taking effect of the retirement system then created and to provide for teachers entitled to benefits under the law of 1911.

The retirement system created in 1921 established a contractual relationship between the state and the teacher, a relationship protected by the constitution from legislative impairment or destruction. *State ex rel. O'Neil v. Blied*, 188 Wis. 442, 206 N. W. 213 (1925).

Although the legislature has plenary power over state funds, nevertheless, the legislature cannot constitutionally divert a special fund so as to impair contractual obligations or to commit a breach of trust. *Trustees v. Dailey*, 10 Fla., 112, 81 Am. Dec. 194 (1862); *State ex rel. McKinley v. Cardozo*, 8 S. C. 71, 21 Am. Rep. 275 (1876); 12 C. J. 999, sec. 612; 59 C. J. 233-234, sec. 378; 6 R. C. L. 334, sec. 326.

The contingent fund, therefore, is, in effect, held by the state as trustee for the use of those teachers who are entitled to participate in such fund according to the provisions of the teachers' retirement act. The rights of such teachers to this fund is protected by both state and federal constitutions. Ch. 417, Laws 1933, is an attempt by the legislature to divert a part of this fund from the purposes to which it was dedicated by the legislature to the impairment

of the rights of private individuals entitled thereto. The act in question, therefore, besides presenting various other serious constitutional difficulties, must be held invalid as an attempt to impair constitutional rights.

JEF

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*Education—County Normal Schools—Public Officers—County Normal School Board*—Members of county normal school board are not entitled to salary.

*Taxation—Tax Sales*—County board has no power to lower interest rate on tax certificates to apply to those certificates that have already been issued.

*Bridges and Highways—Town Bridges*—If county board orders building of bridge on appeal taken under sec. 81.14, subsec. (1), Stats., it is not compelled to pay back part of cost but may do so in its discretion in view of sec. 83.03 (6).

November 22, 1934.

SIDNEY J. HANSON,  
*District Attorney,*  
Richland Center, Wisconsin.

You have submitted three separate propositions for an official opinion. We will combine them all in one opinion.

You direct us to sec. 41.37, Wis. Stats., which provides for the creation of a county normal school board, its personnel, etc., but makes no provision in respect to salaries of the members thereof. Certain members of the county board of your county desire information as to how the salary for the members is set and who determines what the salary of the members shall be.

We find no provision in the statute for any compensation either by way of salary or reimbursement of expenses of the members of the county normal school board. In such case the officer takes his office *cum onere*. The rule laid down in *State v. Cleveland*, 161 Wis. 457 as to town officers is here applicable. The court said, p. 459:

"A public official's right to compensation is purely statutory; what the statute gives he receives, but no more. Mechem, Pub. Off. secs. 855, 856. Expenses are not allowed to town supervisors by any statute. Moreover, sec. 850 of the Wisconsin Statutes expressly fixes their compensation at the sum named by the annual town meeting, or in default of action by the town meeting at the sum of \$3 per day. No provision is made for traveling expenses, and this means that, like other officials in that situation, they must defray their own expenses of this nature."

I have not overlooked the provisions of sec. 59.15 (1) (e), which authorizes the county board at its annual meeting to fix the annual salary for each county officer to be elected during the ensuing year and who will be entitled to receive a salary payable out of the county treasury. This cannot apply to the county normal school board, as no statute provides that the members are entitled to a salary. You are therefore advised that the members of the county normal school board are not entitled to any salary or compensation whatever.

You also state that at the present time your county is charging interest at the rate of eight per cent on tax certificates and this rate or a higher rate was in force at the time such certificates were issued. The query now arises whether, in the face of the wording in sec. 75.01 (2), Stats., the county board of your county can lower the rate of interest to be paid as provided in sec. 75.01 (1m), so that the lower interest rate would apply in those instances where certificates have been previously issued. In other words, could they make the lower interest rate retroactive.

This question must be answered in the negative.

Sec. 75.01 (2) provides:

"The rate of interest to be paid in any county on certificates of sale of lands 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. The rate so fixed by any county board shall continue to be the rate in such county until changed by a succeeding county board. The interest to be paid on any such certificate at the time of redemption thereof shall be determined by the rate in force at the time such certificate was issued."

You will note that the interest to be paid on any certificate at the time of redemption thereof shall be determined

by the rate in force at the time such certificate was issued. In other words, the county board has no power to lower the interest rate on a certificate that has been issued. The acts of the county board are not retroactive.

You also submit the following: In the event that an aggrieved party takes an appeal to the county board in accordance with sec. 81.14 (1) and the county board determines that a bridge should be repaired and the chairman of the board causes said highway and bridge thereon to be repaired, is the entire cost of such expense charged back to the particular township in which the bridge is located or do the provisions of sec. 87.01 apply so that the county is compelled to furnish aid in accordance with the provisions of the latter section?

The provisions of sec. 87.01, requiring the county board to make appropriation for the building of bridges in towns, are limited to those cases therein specified, that is, the town must have voted to construct or repair any bridge on a highway maintainable by the town, and must have provided for such portion of the cost for such construction or repair as is required by this section. Then a petition may be made to the county board, who is then obligated to appropriate such sums as the statute requires. XV Op. Atty. Gen. 121. Sec. 81.14 (1) covers a case that does not come within the condition required under sec. 87.01. There the town has refused to improve this street or build the bridge. Of course the county board is authorized under sec. 83.03 (6) to aid in the construction and improvement of any road or bridge in the county. So here the county board may aid in constructing the bridge in question if it desires to do so.

JEF

*Trade Regulation—Trading Stamps*—Giving of trade receipts in connection with sale of merchandise which are collected by children, child depositing largest sum of money represented by trade receipts being entitled to prize, is violation of trading stamp act.

November 23, 1934.

R. C. LAUS,  
*District Attorney,*  
Oshkosh, Wisconsin.

You have submitted to this department a question in regard to the legality of a so-called business building plan being operated by the Economy Drug Store at one of the cities in your county. The plan in question operates as follows: Trade receipts are given with each purchase from the store of the advertiser. These receipts are then collected by children who deposit the same in the merchant's store. The child who deposits the largest sum of money, represented by the trade receipts, has the first right to choose one of the prizes offered by the Economy Drug Store. The question is whether it is in violation of sec. 134.01 subsec. (1), Stats., the trading stamp law.

As the children in question are entitled to compete for a prize only when trade receipts are deposited and such receipts are given only with the purchase of goods, the plan submitted clearly comes within the purview of said sec. 134.01 (1) and hence is illegal. You however raise the question as to whether the provisions of sec. 110.07 would be applicable in this case.

Sec. 110.07 provides:

“While this chapter is in effect and for sixty days thereafter, any code, agreement, plan or license, if approved by the governor pursuant to his rules and regulations, and any action complying with the provisions thereof taken during said period, and any code, agreement or license approved, prescribed and in effect pursuant to any federal law, which by such law are exempt from the provisions of the antitrust laws of the United States, as long as such exemption from the antitrust laws of the United States prevail, shall be exempt from the application of the provisions of the antitrust laws of this state and more particularly the following trade statutes: 31.22, 99.14, 111.07 to 111.10, 133.01 to

133.05, 133.09 to 133.24, 134.01, 226.07 to 226.09, 286.32, 286.36, 294.04, 343.33, 343.413, 343.681, 348.40, 352.08.”

There is no code, agreement, plan or license approved by the governor governing drug stores. Neither is there any code, agreement or license approved by any federal law which would interfere with the above statute. The federal code does not authorize anything to be done that is unlawful but only prohibits certain things to be done. You are therefore advised that the practice submitted is illegal and in violation of sec. 134.01 (1), Stats. See also XX Op. Atty. Gen. 670.

JEF

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*Automobiles—Taxation—Motor Fuel Tax*—Under provisions of sec. 78.03, subsec. (6), Stats., state treasurer is to cancel and surrender old bond whenever new bond has been furnished by wholesale dealer in motor fuel, as soon as he and attorney general are satisfied that all liability under old bond has been fully discharged.

November 27, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

Sec. 78.03, subsec. (6), Stats., provides that no license to act as a wholesaler of motor fuel shall be issued until the person applying for such license shall have filed a bond with the state treasurer. You state that such a bond runs for a term of one year except in instances in which it is renewed by the payment of the premium for the following year or notice is given by the company that it is canceled. You have on file a number of bonds which have been canceled and new bonds furnished by other surety companies have been sent to take their place. The surety companies whose bonds have been canceled are asking that the canceled bonds be returned and that they be relieved of any further liability.

You wish to know whether, after you have received notice to cancel a bond, and have sent an auditor to audit the

accounts of the dealer for the period covered by the bond and the auditor finds that all taxes due the state from the dealer have been paid, you can legally return the bond to the bonding company and relieve the bonding company of any further liability.

Sec. 78.03 (6) provides in part:

“\* \* \*

“If the surety upon said bond shall so elect, said bond may be conditionally canceled at any time by the filing by said surety with the wholesaler and the state treasurer written notices of such conditional cancellation, but said surety so filing said notices shall not be discharged from any liability already accrued or which may accrue under said bond before the expiration of sixty days after the filing of said notices, \* \* \*. Whenever a new bond shall be furnished by a wholesaler as aforesaid, the state treasurer shall cancel and surrender the old bond of the wholesaler as soon as he and the attorney general shall be satisfied that all liability under the old bond has been fully discharged.”

The statute of limitations on sealed instruments in general provides that action on them must be brought within twenty years. Sec. 330.16, Stats. Aside from any statutory provision, the wise and business-like thing to do would be to retain these bonds for the twenty-year period after they are canceled, so that should any delinquencies in paying taxes for the period in which they were in full force and effect be discovered at a later date, the surety company might be sued. Once a bond has been returned it would be extremely difficult, if not impossible, to prove its existence and terms so as to collect on it.

However, by the statute set forth above, it appears that for some particular reason, perhaps to encourage surety companies to furnish these bonds readily and at a reasonable price, perhaps to simplify records and to enable you to terminate at a definite and early date liability thereunder, canceled bonds are to be surrendered as soon as you and the attorney general are satisfied that all liability under them has been fully discharged. The statute seems to mean that regardless of the fact that the statute of limitations has not run on a bond it is to be surrendered as soon as the treasurer and attorney general are satisfied that there are

no defaults of the wholesaler for which suit may be brought on the bond and that the state is to take the chance that no defaults will later be discovered upon which suit could have been brought. In other words the state is to take a chance on occasional losses for the sake of "settling accounts" with the surety company at an early date and long before the statute of limitations on the bond has run.

JEF

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*Appropriations and Expenditures—Normal Schools—*  
Board of normal school regents may pay North Central Association of Schools and Colleges for membership dues and inspection fees of teachers' colleges seeking to be accredited in that association. However, inspection fee may not be paid in advance of inspection.

November 30, 1934.

BOARD OF REGENTS OF NORMAL SCHOOLS.

Attention Edgar G. Doudna, *Secretary*.

You state that four of our state teachers colleges have been members of the North Central Association of Schools and Colleges, a voluntary organization of educational institutions which sets up accrediting lists of high schools and colleges. Membership dues vary from \$5.00 to \$50.00, and an inspection fee of \$400.00 is required. Such an inspection fee is now demanded of one of the teachers colleges to be paid in advance of the inspection.

In this connection you inquire first as to the validity of payment of state funds for membership service and inspection fees of this character, and second as to the right of the board of regents of normal schools to pay in advance a fee for inspection.

This office is of the opinion that state funds may properly be paid for such membership service and inspection, but that the inspection fee may not be paid in advance of the rendering of that service.

Sec. 2, art. VIII, Wisconsin constitution, provides:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law: \* \* \*."

Sec. 20.38, subsec. (2) (b), Stats., provides that there is appropriated from the general fund to the board of normal schools

“Annually, beginning July 1, 1933, three hundred thirty-five thousand dollars *for operation* other than teachers’ salaries, of the several state teachers’ colleges.”

The question then arises whether or not the expenditures mentioned may properly be made from the appropriation for “operation.” In deciding this question it is first necessary to discuss briefly, and in a general way, the functions of the North Central Association of Schools and Colleges.

As we understand it this association performs a very vital function in the accrediting of high schools and colleges belonging to this association, and considerable difficulty might be experienced by a student transferring from an unaccredited state teachers’ college to another college belonging to the association. At least there might be a likelihood of a substantial loss of credits. The same situation would probably apply in the case of a teacher who had graduated from an unaccredited teachers college and who wanted to advance herself in her profession by doing graduate work at an accredited college. Furthermore, high schools that desire to be accredited in the association might well be reluctant to hire teachers graduating from unaccredited institutions.

The primary purpose of state teachers’ colleges is to prepare persons to qualify for teaching in the public schools. Sec. 37.09, Stats., and under sec. 37.02, Stats., the board of regents of normal schools has all powers necessary or convenient to accomplish the objects and perform the duties prescribed by law. Since, as we are informed, a great many of our high schools in this state, particularly the larger ones, are members of the association, it becomes practically a necessity for the teachers’ colleges preparing teachers to qualify for positions in these schools to become accredited by the North Central Association.

Having in mind the result which is desired, namely, the preparation of teachers qualified in the fullest sense of the word for teaching in public schools which adhere to certain standards, we believe the appropriation made for “opera-

tion" other than teachers' salaries is broad enough to cover these expenditures, as it has been held that the word "operate" means to have or produce a desired result or effect; and also to act effectively. *Union Tank Line Company v. Richardson*, 183 Cal. 409, 191 Pac. 697, 698.

However, we do not believe that the board of regents of normal schools is authorized to pay a fee for inspection in advance of the inspection, in view of the provisions of sec. 37.07, Stats., on auditing accounts, which in part provides as follows:

"All payments for the erection, repairs or enlargement of any normal school buildings, or for fixtures or furniture therefor, and all disbursements from the normal school fund income, including the expenses of boards of visitors of normal schools and of teachers' institutes shall be made by the treasurer of said board on the warrant of the secretary of state drawn in accordance with the certificate of the president and secretary of the board, after being audited and allowed pursuant to its rules and regulations, and not otherwise; and in case of a donation no such warrant shall be issued for any part thereof until the sums donated and subscribed shall have been paid into the state treasury, *nor in any case until the work shall be done, the services rendered*, buildings erected or fixtures or furniture purchased under the direction of said board, and pursuant to a contract made with it. \* \* \*"

JEF

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*Loans from Trust Funds—School Districts—Request for special meeting to vote on question of improving school building and conduct of such meeting is discussed.*

November 30, 1934.

DEPARTMENT OF PUBLIC INSTRUCTION.

Attention John Callahan, *State Superintendent*.

You have submitted to us a request for the calling of a special district meeting which is in substantially the following form with names omitted.

*"Request for Clerk to call a Special District Meeting.*

*"To Mr. A, clerk of Union Free High School District of the town of B and the village of C, county of D.*

"Sir: You are hereby requested to call a special meeting of the above district on the 24th day of November, 1934, at 8 o'clock in the afternoon, in the high school building, for the purpose of voting on the following propositions, viz.:

"1st. To authorize the school board to make application for a loan of \$11,000 from the state trust funds, payable in 15 years, with interest at the rate of 4 per cent per annum, payable annually in 14 installments, for the purpose of improvement of present school building.

"2nd. To raise by tax a sufficient sum to pay the principal and interest of such loan as it becomes due."

In connection with this request, the clerk has asked several questions on which you request our opinion. For purposes of convenience, the questions are stated with answers.

1. Have the petitioners the right to fix the date and hour of the meeting, or is such discretion left to the clerk?

A-1. The statute on special meetings, sec. 40.03 (4), Stats., provides as follows:

"Special meetings shall be called by the clerk, or, in his absence, by the director or treasurer, on the written request of five electors, or may be called by the board on its own motion, and notice thereof, specifying particularly the business to be transacted, shall be given in the manner prescribed for noticing the annual meeting."

The statute is silent as to the fixing of the date and hour of the meeting. In XII Op. Atty. Gen. 106, it was ruled that no particular form is required for the request. It is provided in sec. 40.03, subsec. (5), Stats., that if no hour is fixed in the notice, the special meeting shall be held at eight o'clock in the afternoon. Also we would suggest that the best practice would be for the clerk to conform as nearly as possible with the terms of the request, since this office has ruled that the commissioners of public lands are not authorized to lend state funds for the purpose of erecting an addition to a school building on an application which lacks proof of request for calling the special meeting. XVIII Op. Atty. Gen. 241. If the clerk deviates too far from the terms of the request, the question might arise in examining the application for the loan whether there was any request for the particular special meeting called by the clerk.

2. It will be noted that two questions are to be presented. According to the existing rules in this district elections are

held between one and eight o'clock, with the right of the elector to appear within that time and cast his ballot. Can these petitioners demand that the vote on the questions be taken at a specific hour?

A-2. The answer to this question has already been pretty largely answered in the answer to the first question. It might be added, however, at this point, that this department has held that the statutes contemplate a mass assemblage in proceedings of this sort. V Op. Atty. Gen. 382. It is to be noted that the statute, sec. 40.06, calls for a meeting rather than an election. As was pointed out in the case of *State ex rel. Bruce v. Davidson*, 32 Wis. 114, 123, mentioned in the opinion above cited, a meeting is a deliberative body or assembly at which the propositions to be considered are open for discussion and amendment, and may be adopted or rejected, or adopted in part and rejected in part. Also,

“\* \* \* The right to debate the proposition, and to propose amendments thereto, cannot be taken away by the action of any number of the electors acting individually and not in their aggregate capacity \* \* \*.”

To meet the requirements of a meeting it would, therefore, seem that the meeting should be called for some specific hour, such as eight o'clock in the afternoon, rather than to set the time between the hours of one and eight o'clock in the afternoon, as is done in the case of an election, where the electors come in one by one throughout the afternoon and cast their ballots individually.

3. The first question states in part “For the purpose of improvement of present school building.” Is this specific enough from the standpoint of law to warrant submitting the question to the voters in the district, since this “improvement” may take many different forms? We understand that the basis of the petition is an addition to the school building, and does not contemplate any specific improvement within the present school plant.

A-3. The word “improvement” has been given a fairly broad meaning and has been construed to cover not only repairs and additions, but also new buildings. *Peters v. Stone*, 193 Mass. 179, 79 N. E. 336, 337. Consequently we

do not believe that the use of the word "improvement" rather than the word "addition" is fatal to the proceedings.

4. Is the school board required to submit to the voters the exact questions as stated in the petition, or may the school board reform these two questions so as to clarify provisions which are not clear?

A-4. We would advise that the school board submit to the voters the exact questions as stated in the petition. If any questions as to clarity arise, these may be discussed and ironed out at the meeting, but in order to avoid difficulties in having the loan application approved, the request, notice of meeting and question voted on should conform to each other as closely as possible. For instance, sec. 40.03 (4), Stats., in referring to the notice of the special meeting provides: "\* \* \* specifying particularly the business to be transacted." If the question voted on should differ from the request and notice, it might be well argued that there was no request or notice of a special meeting to consider the particular question voted upon.

5. May the school board amend any of the provisions in the questions? For example, may the board provide that the money be borrowed elsewhere, or, that the interest rate be different, or that the maturity date be changed? May it submit a lesser or greater sum than is provided in the questions?

A-5. We do not believe, in view of what has already been said, that the school board should attempt in any way to amend the substance of any of the provisions mentioned in the request.

6. Assuming that a majority of the voters specifically adopt the two provisions in the request, is the school board then required to follow them exactly, or may they modify such provisions which in their judgment will result most favorably to the district?

A-6. The school board is required to follow exactly the provisions adopted at the meeting. Any other procedure would constitute a disregard of the wishes of the electors and would open the door to grave abuses. Also, the attor-

ney passing on the loan application would not be likely to approve the application if it differed from the provisions authorized and adopted by the voters.

JEF

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*Taxation—Forest Crop Lands*—Withdrawal of forest crop lands cannot be completed until taxes mentioned in sec. 77.10, subsec. (2), par. (a), Stats., have been paid. After withdrawal such lands are taxed same as if they had never been forest crop lands.

November 30, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

In connection with sec. 77.10, Stats., you inquire whether the state treasurer should certify to the county treasurer the descriptions and amounts of taxes due where an owner of forest crop lands has made application to withdraw such lands, and if so, when this should be done. You also inquired whether these lands will be placed on the general property tax roll until the order of withdrawal is issued.

It is our opinion that such lands do not cease to become forest crop lands until after the taxes called for by sec. 77.10, subsec. (2), Stats., are paid.

Sec. 77.10 (2) (a) provides:

“Any owner of any forest crop lands may elect to withdraw all or any of such lands from this chapter, by filing with the conservation commission a declaration withdrawing from this chapter any description owned by him which he specified, and by payment by such owner, other than a county, to the state treasurer within thirty days the amount of all real estate tax that would ordinarily have been charged against such lands had they not been subject to the provisions of this chapter with simple interest thereon at five per cent per annum, less any severance tax and supplemental severance tax or acreage share paid thereon, with interest computed according to the rule of partial payments at the rate of five per cent per annum. The exact amount of such tax shall be determined by the tax commission after hearing and upon due notice to all parties interested, provided that when the tax rate of the current year has not

been determined the rate of the preceding tax year may be used. On receiving such payment the state treasurer shall certify that fact to the conservation commission, whereupon the conservation commission shall issue an order of withdrawal and file copies thereof with the tax commission, the assessor of incomes, the clerk of the town and the register of deeds of the county in which such land lies. Such land shall then cease to be forest crop lands as of the date of such payment to the state treasurer, and if the owner is a county as of the date of filing such declaration."

Sec. 77.10 (4) provides as to taxation after withdrawal as follows:

"When any description ceases to be a part of the forest crop lands, by virtue of any order of withdrawal issued by the conservation commission, taxes thereafter levied thereon shall be payable and collectible as if such description had never been under this chapter."

In case the owner does not pay the amount due on account of said withdrawal, we find no authority for having the state treasurer certify to the county treasurer the descriptions and the amount due.

However, we do not see how the withdrawal can be completed without paying the taxes. If the taxes are not paid, the land continues to be forest crop land, as no order of withdrawal is to be issued by the conservation commission until the state treasurer certifies to the commission that he has received payment of the taxes.

JEF

*Counties—Metropolitan Sewerage Commission—Municipal Corporations—Town Sewers*—It is not essential that utility district be created under sec. 59.96, Stats., before town board can proceed to provide sewerage facilities for portion of town affected and enter into contract with Milwaukee metropolitan sewerage district for treatment and disposal of sewerage.

District created under sec. 60.30, Stats., is under supervision and control of town, city or village, but if sanitary district is created under secs. 60.301, *et seq.* it is under control of commissioner for district. In either case contract can be made with municipality or so-called utility district. Functions are defined in statutes quoted.

All costs of connecting with Milwaukee metropolitan sewerage district system must be paid from funds assessed to district directly benefited and not to whole town.

December 3, 1934.

#### BOARD OF HEALTH.

You state that there is a sewage disposal problem in a portion of a town in Milwaukee county not at present located within the Milwaukee metropolitan sewerage district. Conditions detrimental to public health and comfort have been caused by the discharge of sewage into gutters and roadside ditches, and you state that you have directed the town officials to abate such conditions through the installation of public sewerage facilities with final disposal of the sewage through the Milwaukee metropolitan sewerage system. A section of the town to be provided with sewers is immediately adjacent to the area now within the metropolitan sewerage district.

In connection with this development, you have submitted the following questions, which will be taken up in the order in which they are numbered.

“(1) Is it essential that a utility district be created under section 59.96 of the statutes before the town board can proceed to provide sewerage for the portion affected and enter into a contract with the Milwaukee Metropolitan Sewerage District for treatment and disposal of the sewage?”

This first question must be answered in the negative. The town board is authorized under sec. 60.30, Stats., as follows:

“The town board, may, whenever they may deem it necessary for the public health, cause a sewer or sewers to be constructed and maintained in any part of the town where an outlet can be obtained into any sewerage system and alter or repair any sewer so constructed within the town, and may divide the town into surface or storm water sewer or drainage districts, and in so doing such work the town board shall proceed in accordance with subsection (12) of section 62.15 and sections 62.18, 62.20 and 62.21, inclusive, so far as the same may be applicable, except that any town may levy a special tax of not more than three mills on the dollar of the assessed value of the taxable property in any sewer district for the extension or improvement of the sewer system of such district, and for the purpose of this section the town board shall have and may exercise all the powers conferred by said sections upon the common council and board of public works of cities and may issue bonds against said sewer district in the same manner as provided for the issue of general city bonds for construction of sewers in chapter 67 of the statutes. Any notice therein required shall be given by posting such notice in three public places in said town for two weeks or by publication thereof for two weeks successively in any newspaper in said town.”

I also direct you to sec. 59.96, subsec. (9), par. (c), which provides:

“The metropolitan sewerage commission and the sewerage commission of a city of the first class are authorized and empowered, in their names, to contract with any utility district, town, village or city in such county outside of the boundaries determined to be in the same drainage area as the sewerage system of such city of the first class, for the transmission and disposal of sewage from such utility district, town, village or city. Before said utility district, town, village or city shall be permitted to connect its sewers with or use any main sewers, such sewers shall be approved as provided by paragraph (n) of subsection (6) of section 59.96.”

The second question reads:

“(2) If so, what legal procedure must be followed to create a utility district under section 59.96 of the statutes

in order to protect the public health and abate existing insanitary conditions?"

In view of the negative answer to the first question, this one does not require an answer.

Your third question is as follows:

"(3) What are the functions of a utility district created under section 59.96, and does such a district created operate under the supervision of the Metropolitan Sewerage Commission or under the town board?"

A district created under sec. 60.30 is under the supervision and control of the town, city or village, but if a sanitary district is created under secs. 60.301 *et seq.*, it is under the control of the commissioners for the district. In either of these cases a contract could be made with the municipality of the so-called utility district. The functions, of course, are defined in the statutes cited.

"(4) Can any portion of the cost of connecting with the Milwaukee metropolitan sewerage system be paid from town funds when only a portion of the town is to be served at the present time, or must the entire cost be assessed to the district directly benefited?"

This question must be answered in the negative for the costs must be assessed to the district directly benefited. See secs. 60.30 to 60.309.

JEF

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*Criminal Law—Fraudulent Advertising—Advertisement in newspaper by individual for sale of real estate giving only his home and office telephone numbers is not deceptive advertising in violation of sec. 343.413, Stats.*

December 3, 1934.

REAL ESTATE BROKERS' BOARD.

You inquire whether it is a violation of sec. 343.413, Stats., for a real estate broker to place an advertisement in the newspaper for the sale of real estate and instead of giving his own name, placing two telephone numbers which are his home and his office numbers respectively.

Said sec. 343.413, subsec. (1) provides:

“No person, firm, corporation or association shall, with intent to sell or in anywise dispose of real estate, \* \* \* or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, \* \* \* an advertisement of any sort regarding real estate, \* \* \* which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.”

The question is: Is such advertisement you speak of a deceptive advertisement?

Subsec. (2), sec. 343.413 contains the following:

“\* \* \* And every such firm, corporation or association, engaged in any such business, in advertising goods, property or service for sale, shall affirmatively and unmistakably indicate and state that the seller is a business concern, and not a private party.”

You will note that this last sentence cannot apply to individual persons. It applies only to firms, corporations or associations. In subsec. (1), sec. 343.413 you will note that that subsection applies to persons, firms, corporations or associations. There is nothing in the advertisements in your letter that would indicate in any manner that the sale is being made by a private party or leaseholder not engaged in the real estate business as referred to in subsec. (2), sec. 343.413. You are therefore advised that it is our opinion that said advertisement is not violative of sec. 343.413.

JEF

*Minors—Mothers' Pensions—Legal Settlement—Children* who have lived in one town in certain county for over year have obtained legal settlement there so as to entitle them to aid under sec. 48.33, Stats., although during that year they were receiving aid for dependent children from county of former settlement.

December 6, 1934.

L. A. BUCKLEY,  
*District Attorney,*  
Hartford, Wisconsin.

A and B are minor children whose parents are dead. They had a legal settlement with their parents in X county, where the parents died. Soon after the death of their parents they were placed in the home of their grandparents in Washington county, where they have been for more than one year in the same town. During this year aid was granted them under sec. 48.33, Stats., by X county.

You wish to know whether these children have acquired a legal settlement in Washington county so as to be entitled to aid for dependent children from said county.

Answer, Yes.

Sec. 48.33, subsec. (5), par. (b), provides that aid shall be granted only when such child has a legal settlement in the county in which application is made for aid.

Sec. 49.02 (5) provides:

"Every minor whose parent \* \* \* 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."

Sec. 49.02 (4) provides in part:

"\* \* \* 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. \* \* \*"

These children have resided in one town in Washington county for more than one year. The question, then, is: Did the payment of aid under sec. 48.33 by X county for the care of these children during the year in which they have been residing in Washington county with their grand-

parents prevent their gaining a legal settlement in Washington county? We think not.

It is evident that the legislature favored the acquiring of a legal settlement for the purposes of receiving aid under sec. 48.33 by children in the place of their residence; also that they intended that the requirements for a legal settlement entitling one to aid under sec. 48.33 should be less stringent than those for a legal settlement entitling one to aid under the regular poor relief statutes found in ch. 49. In fact sec. 48.33 formerly required mere residence in a county in order to secure aid for dependent children. In 1929 the law was changed so that a "legal settlement" was required, but a study of sec. 48.33 leads one to the conclusion that the "legal settlement" here required more nearly approaches a year's residence in one town, village or city than it does the "legal settlement" required by the "poor laws." This conclusion is fortified by the following provision:

Sec. 48.33 (5) (b) :

"\* \* \* 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."

Aid given under sec. 48.33 is not to be classed with poor relief under ch. 49, Stats. Ch. 48 is entitled "Child protection and reformation." Aid granted under it is something more than the mere granting of enough money to cover the barest necessities to destitute persons; it is the granting of a sum sufficient to insure that the children of a family receiving it may be raised to be healthy and useful members of society. The provisions of sec. 48.33 recognize the state's interest not only in maintaining the bare existence of children in the less privileged classes but in promoting the proper rearing of its future citizens. That the legislature distinguished between the two types of aid is shown by the provision in sec. 48.33 (5) (c) :

"\* \* \* Such aid [aid to dependent children by a county in which the children have no settlement] shall not operate to prevent the gaining of a legal settlement within the county, \* \* \*"

In XV Op. Atty. Gen. 186, 187, the writer said:

“The aid given [under sec. 48.33] 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).”

XVIII Op. Atty. Gen. 81 also substantiates the view that the receipt of a mother’s pension is not poor relief.

No situation exactly similar to the one you describe has ever been considered in the opinions of this department. There are two opinions, however, in which situations having similar elements are discussed.

In XXI Op. Atty. Gen. 709 it was held that when minor children and their mother had no legal settlement in a county and were granted aid under sec. 48.33 (5) (c) and then moved to another county, where they lived for a year receiving aid from the first county, they gained a legal settlement in the second county. This situation differed from the one in question in that aid from the first county was given under sec. 48.33 (5) (c), whereas in the instant situation the children had a legal settlement in the first county.

In XVIII Op. Atty. Gen. 711 it was implied that the receipt of a mother’s pension from a county of former residence does not prevent the gaining of a legal settlement in the new county.

In XXI Op. Atty. Gen. 709, mentioned above, this department held that the receipt of aid under sec. 48.33 (5) (c) from a county of former residence does not prevent the gaining of a legal settlement in another county. In the situation now under discussion aid was granted by the county of former residence on the basis of legal settlement. We do not think that the fact that aid in this case was compulsory on X county, whereas, in XXI Op. Atty. Gen. 709 it was given voluntarily under sec. 48.33 (5) (c), should alter the conclusion that the family gained a legal settlement in the second county.

In view of the above statutes and arguments this department is of the opinion that the children in question now have a legal settlement in Washington county so as to entitle them to aid for dependent children from said county.

JEF

*Fish and Game—Rabbits*—Under subsec. (2), sec. 29.24, Stats., owner of lands may hunt rabbits thereon although nonresident.

Such person, however, is still subject to limitations in sec. 29.24.

December 6, 1934.

JAMES L. MCGINNIS,  
*District Attorney,*  
Amery, Wisconsin.

You refer us to sec. 29.24, subsec. (2), Stats., and you inquire whether this section permits a nonresident of this state who owns land in the state to hunt rabbits and squirrels on such land without a hunting license. You say you have been unable to find any interpretation of said section but that the wording of the statute itself seems to indicate that the subsection applies to residents and nonresidents alike, as there is no qualification of the word owner in the statute.

We believe that your construction of this statute is the right one.

The wording of sec. 29.24 (2) is as follows:

“The owner or occupant of any land, and any member of his family may without license hunt thereon rabbits and squirrels at any time.”

The owner of land may live in this state or he may live in some other state or county. This statute expressly authorizes the owner, without exception, to hunt rabbits or squirrels at any time on his land without a license.

You also inquire whether the various restrictions as to time and method of hunting apply to owners who are hunting rabbits and squirrels on their own property.

Sec. 29.24 (3) provides:

“Except as provided in subsection (2), no person shall have in his possession or under his control, or use, for hunting rabbits, any ferret, snare, trap, or any device or contrivance designed or used for the purpose of driving rabbits out of their holes or dens. The owner or occupant or any person upon written request of the owner or occu-

pant of any land in the county of Door may use a ferret thereon for hunting rabbits.”

Subsec. (2), sec. 29.24 permits only the owner or occupant of land to hunt rabbits thereon without a license. It merely relieves the owner or occupant of land who desires to hunt rabbits thereon from the requirements of a license but does not relieve him from the general restrictions on hunting. We believe that he is subject to the other restrictions as to the methods of hunting of rabbits and squirrels. He may hunt without a license of course at any time. XIII Op. Atty. Gen. 165.

JEF

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*Automobiles—Corporations—Criminal Law—Taxation—Motor Fuel Tax—Manager and officers of corporation who as agents of corporation commit crime are guilty as principal as well as corporation.*

December 10, 1934.

THOMAS A. BYRNE,  
*Assistant District Attorney,*  
Milwaukee, Wisconsin.

You desire an opinion on the following set of facts and the application thereto of sec. 78.21, Stats.:

The M Company is a Wisconsin corporation, licensed under sec. 78.03, Stats. to do business as a wholesaler of motor fuel in this state. Under the requirements of said section, the corporation has posted a bond with the state treasurer in substantially the form set forth in subsec. (6), in the penal sum of six thousand dollars.

C, the general manager of said corporation, which has its office and principal place of business in Milwaukee county, is a paid employee of the company, having practically complete charge of actual business operations of the company, except that we understand he is not authorized to purchase gasoline and other motor fuels without first obtaining the consent of the officers of the company. We also understand that he may not make disbursements of

the moneys of the corporation without countersignature of the secretary and treasurer. C is not a director, nor an officer, nor a stockholder.

The corporation now owes the state in excess of two thousand dollars gasoline tax. A portion of this was due October 20, and the balance November 20. C has admitted on behalf of the company that the motor fuel has been sold and that the tax has not been paid to the state.

You state that the statute provides that the wholesaler is liable to the criminal punishment provided in sec. 343.20, it appearing that the wholesaler in this case is a corporation, which cannot be imprisoned as a felon.

You desire our advice first, as to whether Mr. C is liable to conviction under sec. 78.21 under the circumstances outlined above; and second, in the event he is not liable to such prosecution, as to whether any officers of the corporation are subject to prosecution under this section.

The fact that the wholesaler under your statement of facts is a corporation and that it cannot be imprisoned if found guilty, for violation of sec. 343.20, does not militate against its prosecution and conviction. In all such cases, the court will be limited to imposing a penalty that can be imposed as a fine. If it can be shown at the trial that C was instrumental as the agent of the wholesaler in committing the acts which constitute the offense, he may be convicted of said offense by reason of the fact that he acted as agent for the company. It is a well recognized rule of law that an agent who commits the crime for a principal, knowing that the act is unlawful, is equally guilty as principal. 16 C. J. 125. The same principle applies to an officer of the corporation. If it can be shown that the officer was the agent of the corporation and instrumental in performing the unlawful act, then such officer is also guilty. Both of your questions are therefore answered in the affirmative.

JEF

*Banks and Banking—Bonds*—Bank is entitled to bond for reimbursement in case it issues duplicate draft in place of one that was lost.

December 10, 1934.

PUBLIC SERVICE COMMISSION.

You request advice on the procedure to be followed for securing a duplicate of a bank draft purchased by one of your inspectors and made payable to the public service commission but never received nor cashed by you. You state that the bank, in order to issue a duplicate, has required a surety bond, the premium of which is five dollars, for its protection. On August 22, this matter was turned over to the state treasurer with the request that he secure the duplicate for you. However, on the 23rd of August he advised you that he could do nothing regarding this matter, since the draft had never passed through his hands. You then requested the secretary of state to pass a voucher covering the premium on the surety bond required, but were informed by Mr. Nickerson, acting auditor, that there is nothing in the statutes that he knew of which would permit the secretary of state to approve such payment.

You attach a letter from the cashier of the Kraft State Bank, which issued the check, in which he explains why, under the bank's rules, it cannot pay the draft without receiving security. You ask whether we can do anything for you to secure a duplicate.

To this question we must answer, No. The bank is justified in asking for a bond, for if it should issue a duplicate and pay it and the original draft should show up later, the bank would be liable to pay it to the bearer. See sec. 327.27, Stats. If your commission is required to pay the premium, the only reimbursement that you could get for that is to submit it to the legislature for an appropriation.  
JEF

*Appropriations and Expenditures—Highway Commission—Bridges and Highways—Intrastate Bridges—*Money received by county under sec. 84.03, Stats., as its share of money appropriated by sec. 20.49, subsec. (4), may not be used to pay assessment against county for its share of cost of bridge to be constructed under sec. 87.02.

December 11, 1934.

A. B. CURRAN,  
*District Attorney,*  
Prairie du Chien, Wisconsin.

Crawford county's share of the money appropriated by subsec. (4), sec. 20.49, Stats., and allotted under the provisions of sec. 84.03 is \$67,013.16. The amount to be paid by Crawford county as its share of the cost of the Boscobel bridge over the Wisconsin river between Crawford and Grant counties as determined by the Wisconsin highway commission under sec. 87.02 is \$37,248.60. You wish to know whether the \$37,248.60 assessed against the county may be paid out of the \$67,013.16 allotted to it under sec. 84.03.

Answer, No.

Sec. 20.49 provides for the appropriation of certain moneys from the general fund to the state highway commission and then provides for their apportionment and distribution. Subsec. (4) provides for the following apportionment:

"On July 1, 1932, and annually thereafter, to meet the provisions of subsections (2) and (3) of section 84.03, eleven million dollars."

Sec. 84.03 (2), referred to in sec. 20.49 (4), appropriates three million of the eleven million dollars provided in the latter statute to the several counties as state aid for the respective county trunk highway systems.

Subsec. (3), sec. 84.03, provides:

"The remainder of the appropriation under subsection (4) of section 20.49 shall be allotted by the state highway commission to the several counties of the state as state aid for the construction of the state trunk highway system in

such counties, under the provisions of chapter 83, or for the retirement of bonds issued under section 67.13 or 67.14.  
\* \* \*

The bridge at Boscobel is to be built under sec. 87.02 (1) (b) and it is under sec. 87.02 (5) (b) that the \$37,-248.60 is assessed against Crawford county as its share of the cost of the bridge. The money received by Crawford county for the improvement of state trunk highways is to be spent under the provisions of ch. 83 or for the retirement of bonds issued under sec. 67.13 or 67.14. Therefore, it is not available to take care of expenditures under ch. 87. The statute having specified for what purposes the money received by Crawford county as its share of the money appropriated under sec. 20.49 is to be used, it can be used for no other purposes.  
JEF

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*Automobiles—Law of Road*—By virtue of provisions of sec. 85.91, subsec. (3), Stats., judge may order suspension or revocation of license for violation of sec. 85.40 (1), and when this is done secretary of state must cite offense as violation of 85.40 (1) in his notice to convicted person; he cannot bring notice under provisions of sec. 85.08 (10) (a) to (j).

Secretary of state must require defendant to file proof of financial responsibility while case is being appealed.

Secretary of state should require filing of proof of financial responsibility for three years more from date of final judgment in case appeal is affirmed.

December 11, 1934.

THEODORE DAMMANN,  
*Secretary of State.*

You state that many judges throughout the state have suspended or revoked the driving licenses of persons convicted under sec. 85.40, subsec. (1), Stats. You point out that conviction under sec. 85.40 (1) is not set forth as a cause for suspension or revocation of licenses in sec. 85.08

(10), pars. (a) to (j). It has been your policy to consider the speeding charge under sec. 85.40 (1) as reckless driving and to send out suspension notices citing the offense as being reckless driving under sec. 85.08 (10) (f). You wish to know whether this policy is within the law or whether you should ask the judges to secure conviction under sec. 85.08 (10) (f) instead of sec. 85.40 (1) when they wish you to suspend a person's driving privileges.

Sec. 85.08 (10) :

"The motor vehicle driver's license and all of the registration certificates, including those issued in accordance with sections 85.01 and 85.02, of any person who shall by a final order or judgment have been convicted of or shall have pleaded guilty to or shall have forfeited any bond or collateral deposited to secure the appearance for trial of the defendant (where such forfeiture shall not have been vacated) for any of the following offenses, or offenses coming within any of the following classes, hereafter committed:

"\* \* \*

"(f) Reckless driving;

"\* \* \*

"\* \* \* shall be suspended forthwith \* \* \*"

As you point out sec. 85.40 (1) is not listed in this subsection. Sec. 85.40 (1) reads:

"It shall be unlawful for any person to operate any vehicle upon a highway carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection or at speeds greater than those specified in this section or in a manner so as to endanger or be likely to endanger the property, life, or limb of any person, or without due regard to the traffic, surface, width of the highway and any other condition of whatever nature then existing."

At the outset, we shall point out that facts warranting a conviction under sec. 85.40 (1) set forth above might not warrant a conviction for reckless driving. In other words, one who may be guilty under sec. 85.40 (1) need not necessarily have been driving recklessly. However, that is really beside the point, for it is definitely beyond your power to revoke or suspend a license for reckless driving when the conviction on which such revocation or suspen-

sion is based is for an entirely different offense. That would in effect be overriding the judgment of a court. Besides, sec. 85.08 (10) provides licenses shall be suspended when the person has been convicted, has pleaded guilty or forfeited bond or collateral deposited to secure appearance for trial for any of the offenses set forth below. The persons here in question have never been convicted, pleaded guilty or forfeited bond or collateral deposited to secure appearance for trial for reckless driving nor any offense which necessarily falls within that class. From a study of the statutes it will be seen that sec. 85.08 (10) (a) to (j) sets forth the offenses upon conviction of which the person's operator's license is automatically and forthwith suspended unless stayed by the court and that there are other statutes naming offenses upon conviction of which licenses *may* be suspended by specific order of the court if it so decides. It is under the latter type of statute that the licenses of the people here in question may be revoked.

Sec. 85.91 (3) provides:

"Any person violating any of the provisions of \* \* \* subsections (1) to (5) of section 85.40 \* \* \* shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished in addition to any other penalty provided by law, by a fine not to exceed one hundred dollars or by imprisonment in the county or municipal jail for not more than six months, or by both such fine and imprisonment. The operator's license of such person may also be revoked or suspended for a period not to exceed one year; and for the second or each subsequent conviction within one year thereafter such person shall be punished by a fine not to exceed two hundred dollars or by such imprisonment not to exceed one year, or by both such fine and imprisonment, and in addition thereto by suspension or revocation of the operator's license for not to exceed one year."

According to the above statute upon a conviction under sec. 85.40 (1) a judge *may* order the suspension or revocation of the convicted person's driver's license. Therefore, when you receive a report of a conviction under sec. 85.40 (1), ordering the suspension or revocation of the person's driving privileges, it is your duty to send out a suspension notice citing the offense as a violation of sec. 85.40 (1).

You point out that sec. 85.08 (11) (a) contains the sentence:

“\* \* \* 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, \* \* \*”

Also that sec. 85.08 (11) (b) provides in part:

“\* \* \* If, however, the enforcement of such judgment should be stayed so as to excuse the filing of such security during any part of such three year period then the period of such stay shall be added to the three year period if such judgment is sustained. \* \* \*”

You wish to know whether, when a judgment is appealed, you can require the defendant to file financial responsibility while the case is being appealed. Answer, Yes. The sentence you pointed out in sec. 85.08 (11) (a), which is set forth above, gives you authority to do so.

You also wish to know, in case the judgment is sustained, for how long a period you can require financial proof to be filed?

Answer: Financial proof must be filed for a period of three years from the final judgment. The sentence from sec. 85.08 (11) (b) quoted above means that the period of such stay while appeal is taken cannot be deducted from the three year period required by sec. 85.08 (11) (a).

JEF

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*Appropriations and Expenditures—Recovery Act—Wisconsin Emergency Relief Administration—Municipalities may enter into groups, make contracts with Wisconsin Emergency Relief Administration for relief purposes and make appropriations for such purposes to be disbursed by director of relief for group.*

December 11, 1934.

INDUSTRIAL COMMISSION.

Attention Voyta Wrabetz, *Chairman.*

You state that this office has approved as to form an indenture or agreement entered into by and between the Wisconsin Emergency Relief Administration and municipi-

palities joining together as a group for the administration of relief.

Now some question has arisen as to clauses 4 and 5 of this indenture. Clause 4 provides that the director of relief for the group shall make and sign all checks or orders for payment from the relief group's bank account, it being the policy of the W.E.R.A. in making reimbursements to the relief groups to make orders for payment payable to the directors of relief for the group or in the name of the relief group. Clause 5 provides the proportion of relief to be borne by the individual municipality joining in the indenture with the express limitation that in no event shall a municipality be required to contribute more than the disbursement actually incurred for administering relief to persons legally settled therein, plus the cost of relief given to persons who reside in the municipality but who do not have a legal settlement therein.

You state that it has been necessary for the W.E.R.A. to adopt this method of disbursing funds in order to have all accounts and records kept in one central accounting division for efficient administration and audit.

A certain city attorney has objected to the above clauses of the indenture on the grounds that it is illegal for the city to appropriate money to be disbursed by officials other than city officials and that it is necessary for the city council to audit and approve all bills.

It is our opinion that the arrangement in question is not illegal.

We understand there is some misapprehension as to exactly how the procedure would be carried on, and that it is not intended to have the group relief director draw checks upon the city treasury. The procedure would be for any particular municipality, by proper appropriation, to order payment to the relief group for its share of the expenses incurred in any one month. The W.E.R.A. would make its check for its share of the relief expenses payable to the relief director who would thereafter draw checks upon the group's banking account, to discharge obligations incurred in the administration of relief in the group.

The responsibility of caring for the poor in a municipi-

pality is made a mandatory obligation upon the municipality, providing the county has not adopted the county unit system under ch. 49, Wis. Stats. The statutes do not provide specifically and minutely how the municipalities shall discharge their obligations, and it has been frequently recognized by our supreme court that a municipality may discharge its obligation by entering into a contract to have a third party administer the proper relief. *Meyer v. Town of Prairie du Chien*, 9 Wis. 233; *McCaffrey v. Town of Shields*, 54 Wis. 645; *Patrick v. Town of Baldwin*, 109 Wis. 342; *St. Joseph's Hospital v. Withee*, 209 Wis. 424.

In joining in the indenture, a municipality is really contracting with the relief group to care for indigent persons in the municipality.

Ch. 363, Laws 1933, contains the following pertinent provisions:

“SECTION 5. DISTRIBUTION OF FUNDS TO LOCAL RELIEF AGENCIES. 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. \* \* \*.”

“SECTION 6. ADMINISTRATION.

“(1) \* \* \*

“(2) \* \* \*

“(3) \* \* \*

“(4) 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.

“(5) The industrial commission may make such investigations and adopt such rules and regulations as are necessary to insure the observance of the conditions prescribed in this section, and the proper accounting and reporting of relief receipts and disbursements by public relief agencies. Such rules and regulations shall conform with the requirements of the federal government in allotting moneys appropriated by congress for relief purposes to this state.”

This chapter expressly provides for the organization of groups such as is contemplated under the indenture. Also we would call attention to an executive order signed by Governor Schmedeman on September 25, 1934, pursuant to authority granted him under sec. 101.34, Stats., in which

order he expressly designated the directors of relief in the various groups as the proper persons to make disbursements to discharge obligations incurred by the group. The material part of that order reads as follows:

"IT IS HEREBY ORDERED, pursuant to authority contained in section 101.34 of the Wisconsin Statutes, that the directors of relief in the various groups operating under indentures with the Wisconsin Emergency Relief Administration are designated as the proper persons to disburse and expend money appropriated for the relief of needy persons residing within the boundaries of the municipalities joining the various groups."

Sec. 101.34, under which this order was issued, provides as follows:

"The governor is authorized to accept for the state the provisions of any act of the seventy-third congress whereby funds or other benefits are made available to the state, its political subdivisions, or its citizens, so far as the governor may deem such provisions to be in the public interest; and to this end the governor may take or cause to be taken all necessary acts including (without limitation because of enumeration) the making of leases or other contracts with the federal government; the preparation, adoption and execution of plans, methods, and agreements, and the designation of state, municipal or other agencies to perform specific duties."

We believe the emergency relief legislation above discussed supersedes any prior statutes which may be inconsistent therewith, by reason of the familiar rule of statutory construction that where statutes conflict in terms the later ordinarily prevails over the earlier, although we do not feel that there is necessarily any real conflict here, under the view we have taken as to the authority of a municipality to make contracts for relief purposes, and particularly in view of the express authorization therefor under ch. 363, Laws 1933, sec. 101.34 Stats., and the executive order issued thereunder.

JEF

*Public Officers*—Sheriff cannot be compensated for car expenses when no provision has been made therefor as part of compensation to be paid him.

Compensation of sheriff cannot be increased or diminished after his election.

If provided for at proper time sheriff may be compensated for car expenses in one of several ways.

December 14, 1934.

HAROLD M. DAKIN,  
*District Attorney,*  
Watertown, Wisconsin.

The sheriff of Jefferson county is paid an annual salary in lieu of fees. He is required to collect and turn over to the county all service fees. In the efficient administration of his duties it is necessary for him to use an auto in which to drive to various places in the county to which he is called. You wish to know whether, in addition to his salary, he is entitled to any compensation for the use of his car.

Answer, No.

Sec. 59.15, subsec. (1), Stats., provides:

“The county board at its annual meeting shall fix the annual salary for each county officer, \* \* \* 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.”

When a sheriff’s compensation (in any county but Milwaukee) is fixed at a definite sum of money as salary with no mention of an allowance for expenses in addition to that sum, he is entitled to his salary and nothing more except compensation for keeping prisoners under sec. 59.15, subsec. (1), par. (a), Stats. To pay him for the use of his car would be increasing his compensation during his term of office, an act expressly prohibited by sec. 59.15 (1)

“\* \* \* The salary so fixed shall not be increased or diminished during the officer’s term, \* \* \*.”

This means that the county board may not reimburse him for past expenditures nor make an allowance for future expenditures during the remainder of his term.

To the effect that the allowance of expenses incurred in running his car would be illegal, see: *Quaw v. Paff*, 98 Wis. 586; *Parsons v. Waukesha County*, 83 Wis. 288, XVII Op. Atty. Gen. 314, X 592, 152, XX 386, 717.

In *Parsons v. Waukesha County*, *supra*, the compensation of the sheriff had been changed before his election from a fee-bill system to a salary system and he was to receive two thousand five hundred dollars a year in lieu of all fees and compensation to which he would have been entitled under the other system. At the end of his term of office he presented to the board of supervisors a bill for services rendered and money expended by him during his term of office. The bill was disallowed and the court upheld the county board in its action saying, p. 290:

“\* \* \* The object of the statute, and of the action of the county board under it, was to give a gross sum in lieu of specific fees, but not to open the door for the sheriff to make charges against the county, not theretofore authorized or allowed by law. This construction is strengthened by the exception from the effect of the law and resolution under it of ‘compensation for keeping and maintaining prisoners in the common jail.’ The law having made no other exception, [except in counties of 300,000 or more inhabitants], the court can make none. \* \* \*”

You also ask:

“How can the sheriff be compensated for such expense necessarily incurred by him?”

I presume that in this question you mean compensation for expenses to be incurred in the future.

In the first place, let me point out that no change in the compensation due the sheriff can be made which will have any effect until the term to run from 1937-39. It is too late to change the compensation of the newly elected sheriff who is to take office this coming January.

The statute (sec. 59.15 (1)) provides that the county board at its annual meeting shall fix the salary of county officers “to be elected during the ensuing year.”

See *State ex rel. Banks v. McClure*, 91 Wis. 313, 315, 64 N. W. 992, holding that the salary of the sheriff must

be fixed before his election and cannot be changed during his term of office.

*Hull v. Winnebago County*, 54 Wis. 291, 293-295:

"\* \* \* It is quite clear that the statute contemplates that the power [to fix salaries] 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 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.  
\* \* \*

"\* \* \* At one time the board had power to fix the salary of the county treasurer after his election, and before the commencement of his term of office. Chapter 220, Laws of 1863. \* \* \*"

The statute applicable in this case read:

"At the annual meeting in November \* \* \* the county board of supervisors for the several counties shall fix and determine the amount of the annual salary that shall be received by each and every county officer *who is to be elected* in their respective counties during the ensuing year \* \* \*"

See also *State ex rel. Sommer v. Erickson*, 120 Wis. 435; XX Op. Atty. Gen. 35, XXI 602.

Since the sheriff of Jefferson county has already been elected and qualified, even though he has not yet taken office, his salary cannot be changed except in accordance with sec. 59.15 (5), which allows for change in *kind* but not in *amount* of payment.

The county board may change the compensation as to amount, the change to be effective after the 1935-37 term. Compensation may then be given for expenditures made in running a car by making definite provision therefor when his salary is fixed. This may be done in three ways: (1) By simply increasing the lump sum to be paid him as salary by the estimated amount he will have to expend during the term in running his car, (2) by fixing his salary at a flat sum plus a certain amount for expenses (See XX Op. Atty. Gen. 35) or (3) by fixing his salary at a fixed amount plus a certain compensation for mileage. (See XX Op. Atty. Gen. 1141).

JEF

*Courts—Subpoena*—High school principal need not permit officer to call teacher or pupil from class for questioning in absence of subpoena.

Questions of policy are discussed.

December 14, 1934.

DEPARTMENT OF PUBLIC INSTRUCTION.

Attention John Callahan, *State Superintendent*.

You have requested an opinion on the following situation:

“A sheriff or one of his deputies, or chief of police or one of his officers, appears at the high school office and requests the high school principal to call from a class a pupil or teacher for interrogation by the officers of the law relative to an accident or a crime concerning which the pupil or the teacher may know something or be implicated.”

You ask:

Is the high school principal required to assist the law officer in such a case?

Can he refuse to assist him unless a proper warrant is produced?

Can he be charged with obstructing justice in case he refuses assistance?

Is the principal protected from possible suit by pupil or teacher?

In the absence of a subpoena requiring the student or teacher to appear in court and give testimony, the officer would have no right to insist upon interrogation. Consequently the high school principal would not be required to assist the officer in such case unless a proper subpoena or warrant for arrest were produced, and, in the absence thereof, he could not be charged with obstructing justice, nor would he be liable in a civil suit by any party. When the evidence of a certain witness is desired in any action or other form of legal proceeding the ordinary method of procuring such testimony is by service of a subpoena upon the person whose testimony is wanted. 22 Cyc. Pl. & Pr. 1328.

"An indictment will lie for dissuading, hindering, and preventing a witness from appearing before a court pursuant to a subpoena \* \* \*." 22 Cyc. Pl. & Pr. 1351.

But we know of no rule which would impose liability in such a case in the absence of a subpoena. If the officer were seeking to arrest a student or teacher, the following rule would apply:

"\* \* \* However, it has always been the rule that, except in cases where the public security has demanded it, arrest without a warrant has been deemed to be unlawful. Well established exceptions to this rule have been long recognized in cases of felony, and of breaches of the peace committed in the presence of the party making the arrest. \* \* \*." 5 C. J. 395.

It would seem to us, however, that as a matter of policy, school officials should co-operate to the fullest possible extent in the administration of justice even though it results in some interruption of daily routine. A recitation in algebra can wait, but oftentimes a proper investigation of a serious accident or crime cannot, and if all citizens were to refuse to divulge information concerning accidents or crimes unless served with subpoena directing them to appear for formal questioning, it would be most difficult and oftentimes impossible to render justice quickly and efficiently, if at all.

The school children of today are the citizens of tomorrow, and they should be taught that the administration of justice is of mutual benefit to all members of the community and that every citizen is under an obligation to further it as a matter of public duty.

JEF

*Building and Loan Associations—Words and Phrases—Public Halls*—Elks lodge giving public dances in its building, to which public is invited, comes under provisions of sec. 215.15, Stats., which prohibits building and loan association from making loan upon public hall.

Corporation or unincorporated local association connected with incorporated parent lodge may not become member of building and loan association.

December 18, 1934.

A. J. CONNORS,  
*District Attorney,*  
Barron, Wisconsin.

You direct our attention to sec. 215.15, Stats., which provides that it shall be unlawful for a building and loan association to make a loan upon a public hall, theatre, church, school building, hotel or public garage and you also direct our attention to sec. 215.20, which provides that a person of full age and sound mind may become a member of a building and loan association, thereby precluding a corporation from becoming a member.

You submit the following question:

“Is an Elks lodge building in which the members have dances and parties a public hall within the meaning of the statute?”

In an official opinion in XII Op. Atty. Gen. 377, we held that the term “public dance” applies to all dances to which the public is admitted without discrimination upon payment of admission fee and the law in question (ch. 222, Laws 1923) applies to private individuals as well as to organizations giving dances. In XIV Op. Atty. Gen. 500, it was held that a hotel furnishing music and permitting its guests to dance after dinner comes within a statute requiring a license for a public dance. A building in which lodging is furnished for one or two transient persons is a public building within the purview of our statutes. See VI Op. Atty. Gen. 99. Your first question cannot be answered definitely without further knowledge of how the Elks lodge in question conducts the dances. If public dances are held in said hall, in which anyone that pays the

admission fee is permitted to participate, then the hall necessarily is a public hall. If, however, only members of the lodge and such as are invited to participate have a dance in said place and only such dances are given, then I would say that the hall is not a public hall within contemplation of sec. 215.15, above referred to. You will note that the other buildings associated with the words "public halls" are any theatre, church, school building, hotel or public garage. Anyone is permitted to enter all these places without discrimination.

"Is a local chapter of the lodge, which has received charter from the parent lodge, which parent lodge is incorporated, although the local association is unincorporated, precluded from becoming a member of the building and loan association?"

You are correct in your conclusion that a corporation may not become a member of a building and loan association even though the consent of three-fourths of the stockholders of both corporations is given. See VII Op. Atty. Gen. 383 and cases cited. I do not believe that an unincorporated local association can become a member of the building and loan association under the statute above mentioned and the ruling of this department cited.

JEF

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*Appropriations and Expenditures*—State horticultural society may not set up endowment fund but must turn over all receipts to state treasury within one week from date of receipt under sec. 20.78, Stats.

December 19, 1934.

HORTICULTURAL SOCIETY.

Attention H. J. Rahmlow, *Secretary*.

You have referred us to an amendment to the constitution of the Wisconsin state horticultural society which makes provision for the creation of a special fund to be known as the endowment and binding fund, the principal of which shall never be used for any purpose but which shall be invested.

You ask for an opinion as to the legality of this amendment.

It is our opinion that such a fund may not be set up by your society because of sec. 20.78, Stats., which in part provides as follows:

“All appropriations made by law from state revenues for any department, board, commission, or institution of the state, or any society or association receiving state aid are made on the express conditions that such department, board, commission or institution, society or association, as the case may be, pays all moneys received by it into the state treasury within one week of receipt, \* \* \*.”

The statute is plain and unambiguous. It requires all receipts to be paid over to the state treasury within one week from the time received. Consequently, you could not set up such a fund unless the legislature should see fit to change the statute above quoted.

JEF

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*Bridges and Highways—State Highways—Public Officers—County Highway Committee—Town chairman is only ex officio member of county highway committee in cases of state aid construction.*

Sec. 83.14, subsec. (3), Stats., is mandatory.

Provisions of sec. 83.14 are limited to prospective state highways.

December 19, 1934.

CHAS. M. PORS,  
*District Attorney,*  
Marshfield, Wisconsin.

You state that several of the chairmen of towns in the county have been called in by the county highway committee to take up the matter of building or repairing bridges on town roads and also repairing and improving town roads. The state in no way participates in the cost of this work. You inquire whether the town chairmen are acting as ex officio members of the county highway committee on such matters, so as to be entitled to per diem and mile-

age from the county, or whether they should be paid by the town.

You have advised the county board that such fees should be paid by the town rather than the county, under sec. 82.05, subsec. (3), Stats. We concur in this conclusion.

Sec. 82.05, subsec. (3), provides:

*“The town chairman of each town in which state aid construction is performed shall be ex officio a member of the county committee, or shall act with such committee on all matters affecting such construction in his town, provided the town has voted a portion of the cost thereof.”*

It is obvious under this section that a town chairman is only ex officio a member of the county highway committee when state aid construction is performed, which you state is not the case here. The statute is plain and calls for no construction.

You also call our attention to sec. 83.14, Stats., which provides in subsec. (1):

*“Any town meeting or village board may vote a tax of not less than five hundred dollars to improve a designated portion of the system of prospective state highways. The town or village board may accept cash donations for such purposes, and when accepted subsequent proceedings shall be the same as if a tax of like amount had been voted. Highways in villages shall not be eligible to improvement under this section wherever the buildings fronting the highways average more than one to each sixty lineal feet of highway. The tax voted shall not exceed the rate of one mill on the dollar on the taxable property provided that every town and village may vote five hundred dollars, and such tax shall be collected as other taxes, and shall be paid to the county treasurer when the county taxes are paid.”*

Subsec. (2) of said section provides for the petitioning by the county board to the town board to appropriate at least an equal amount as the county's share.

Subsec. (3) provides:

*“The county board shall thereupon appropriate for the improvement a sum equal to or greater than the amount voted therefor by the town; and shall raise the same by tax on all the taxable property of the county.”*

Subsec. (4) provides:

"No county shall be required to appropriate in any year over two thousand dollars for work in any town or village."

You state that it is your belief that this office has been of the opinion that the statute is mandatory upon the county board where the provisions of the statute have been followed by the town board.

You are correct in this assumption, and we refer you to the following opinions on the subject: XII Op. Atty. Gen. 522, XIV 509, XVII 219, XVIII 604.

Further inquiry is made in your letter as to what constitutes prospective highways under sec. 83.14, Stats., and specifically, whether this applies to state and county highways, or whether the term also covers purely town roads.

Sec. 83.14, subsec. (1), above quoted, mentions only "prospective state highways," and hence does not apply to county or town highways. See XVIII Op. Atty. Gen. 581, and XXI Op. Atty. Gen. 596 on this point.

JEF

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*Indigent, Insane, etc.—Old-age Pensions*—One who resided in state of Wisconsin seventy-six years and in county of Outagamie for period of only eight years is not entitled to old-age pension in Outagamie county.

December 21, 1934.

BOARD OF CONTROL.

You refer us to sec. 49.22, Stats., concerning old age assistance, which reads:

"Old-age assistance may be granted only to an applicant who:

"\* \* \*

"(3) Has resided in the state and county in which he makes application:

"(a) Continuously for at least fifteen years immediately preceding the date of application, but continuous residence in the state and county shall not be deemed to have been interrupted by periods of absence therefrom if the total of such periods does not exceed three years, or,

“(b) Forty years, at least five of which have immediately preceded the application;

“\* \* \*”

You state that the case of one A has been called to your attention and questions submitted as to whether under the facts as stated he is eligible to old-age pension. This man has resided in the state of Wisconsin all his life, which is seventy-six years, and has resided in Outagamie county for a period of eight years, his residence prior to that time having been in Milwaukee county.

You will note that under the above statute, he must have lived in the state and county either fifteen years immediately preceding the date of application or forty years, at least five of which have immediately preceded the application. This man did not live in Outagamie county fifteen years. He is therefore not entitled to old-age pension. See XXII Op. Atty. Gen. 453, XX 942 and XV 15, 27.

JEF

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*Public Health—Beauty Parlors*—Owner of beauty parlor is not required to have himself licensed as manager as long as he hires duly licensed manager for his shop, who, in turn, hires only duly licensed operators and apprentices.

December 21, 1934.

BOARD OF HEALTH.

You state that a question has arisen concerning the interpretation of ch. 159, Stats., as relating to the cosmetic art law. You say it is now becoming a custom that an unlicensed person may develop offices, buy the necessary equipment for a place of business in which cosmetic art is practiced, and then employ some licensed manager to take charge of the shop and also employ such assistants to the manager as the demand for business may make necessary. Naturally, the owner of the parlor, not being a licensed cosmetician and therefore knowing nothing about the application of cosmetic art, may endeavor at times to dictate to the manager, who is licensed to practice cosmetic art,

regarding the procedure which might be carried on in such place of business.

The question submitted is whether this is permissible under the law. In other words, does the law authorize the state board of health to prohibit anyone except a person licensed to practice the cosmetic art as a manager from owning a shop where the practice of cosmetic art is carried on.

In an official opinion in XIII Op. Atty. Gen. 419 it was held that the owner of a beauty parlor not himself licensed as a manager or proprietor does not violate the statutes so long as he hires only duly licensed managers. Sec. 159.05 then was quoted as it read at that time. The penalty now for violation of the law is found in sec. 159.15. While the wording of the statute now is somewhat different, still, we believe that the law does not contemplate that the owner of a beauty parlor is guilty of a violation of the statute if he hires only duly licensed managers, operators and apprentices. The opinion that was rendered over ten years ago has not been questioned before and the legislature has not made any changes in the law necessitating a change in the ruling. We believe that the ruling should not now be changed unless the legislature, by a change of the statute, changes it. This matter can easily be presented to the legislature for action. A criminal statute must be strictly construed and, so strictly construed, it does not show that an owner of a beauty parlor who hires only duly licensed managers, operators or apprentices has violated the law.

JEF

*Public Health—Beauty Parlors*—State board of health has power to regulate prices for services rendered public in schools of cosmetic art to extent of covering only cost of materials used in each case.

Charging of cost of materials to persons treated will not classify school as beauty parlor.

Board of health has no power to fix prices for services in schools of cosmetic art other than authorizing prices charged for services rendered to cover only cost of materials in each case.

December 21, 1934.

BOARD OF HEALTH.

Attention Dr. C. A. Harper, *State Health Officer*.

You refer us to sec. 159.03 of the statutes, which reads in part as follows:

“The state board of health shall enforce the provisions of this chapter and shall prescribe and promulgate rules and regulations governing schools of cosmetic art and for the examining and licensing of managing and itinerant cosmeticians, and shall make and enforce reasonable rules governing the sanitary and hygienic conditions surrounding the practice of cosmetic art and the conduct and operation of beauty parlors and schools of cosmetic art.  
\* \* \*”

You state that on July 14, 1927, the state board of health adopted regulations regarding schools of cosmetic art, a copy of which we find on pages 15 and 16 of a pamphlet enclosed with your letter. Regulation No. 5 reads as follows:

“A school shall not be conducted as a beauty parlor and prices for services rendered the public shall cover only cost of materials. Price list must be submitted for approval and then posted on a card in large type in the school.”

You also state that students in schools of cosmetic art pay a tuition fee and their practical experience is gained in working on the public. It appears that many people are frequenting these schools on account of the nominal charge being made for the services of these students, and we note that the regulation of the board states that the

prices charged shall cover only the cost of materials. You also state that under the N.R.A. code it appears, at times at least, that the cost of work to patrons is more than the actual cost of materials; that this means leaving a small profit, as the result of these patrons visiting these cosmetic schools. The schools do not pay a license fee. You submit the following questions:

“First: Is the state board of health in error in its regulation when it states that the prices for services rendered the public shall cover only cost of materials?”

We believe that this question may be answered, No. We think that it must be considered a reasonable regulation to limit the prices for services rendered to the cost of the materials. We take it that the cost of materials in different cases will vary with the persons treated, and to limit the charges to the cost for each person is without objection.

“Second: Since the students pay a large tuition fee, and the public is invited to act as subjects for these students while taking their practical training, if any type of charge is made, even for the cost of materials, would such a procedure classify the school as a beauty parlor?”

We do not believe that they would be considered as beauty parlors so long as the cost of services is limited to the cost of materials used. If, however, a higher cost were permitted to be charged then there might be serious objection, and in that case the school might be considered as a beauty parlor.

“Third: Has the state board of health power and jurisdiction to fix the prices of work which is done on the public in schools of cosmetic art, more than to simply state that such prices charged for services rendered shall cover only the cost of materials?”

This question we answer, No. Under sec. 159.03, above quoted, the board is authorized to make and enforce reasonable rules governing the sanitary and hygienic conditions. The fixing of prices for services in schools of cosmetic art has no relation, it seems, to the sanitary or hygienic conditions of the school and is not included in the powers given to the board. We find no express provision in the

statute authorizing the state board of health to fix prices other than charges for the actual cost of the materials used in each case.

JEF

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*Indigent, Insane, etc.—Legal Settlement.*—Girl who has been residing in her uncle's home in one municipality in W county for year or more since her majority, although supported by her father, who is resident of another county, has gained legal settlement in W county.

December 21, 1934.

L. A. BUCKLEY,  
*District Attorney,*  
Hartford, Wisconsin.

B, a widower, resides and for many years has resided and has a legal settlement in M county. Four years ago he placed his invalid daughter, then eighteen years of age, in the home of her uncle in W county and has since that time paid for her care and support. The father now wishes to have his daughter sent to the hospital for treatment. You wish to know whether this girl, now twenty-two years of age, has acquired a legal settlement in W county.

Answer, Yes.

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 answering your question I am assuming that this girl has been living for the past year or more in the same town, city or village in W county. Otherwise, your question would not arise for it is only since her twenty-first birthday that the girl could establish a settlement separate from that of her father. See sec. 49.02 (2), Stats.

If she has resided in one town, city or village in W county for a year or more since attaining the age of twenty-

one she has a legal settlement in W county unless it can be said that she was supported as a pauper during that time.

XII Op. Atty. Gen. 16, holding that one who makes his home with his daughter and is supported by her, having no other means of support, is not a pauper and that by one year's residence he secures a legal settlement in the municipality in which his daughter resides, reasons:

"The word 'pauper' is defined in 3 Words and Phrases, 2d Series, 923, as a person whose support imposes a burden on the public treasury. It was held that one may be ever so destitute of estate or ability to earn a livelihood, and yet not be a pauper; he may be cared for by the voluntary action of friends or relatives. The duty to care for him may be, by law, cast on relatives, and he becomes a member of the pauper class only when, the other means of support failing, he becomes a public charge. *Weeks v. Mansfield*, 80 A. 786. See *The Town of Ettrick v. The Town of Bangor*, 84 Wis. 256."

*Monroe County v. Jackson County*, 72 Wis. 449, 457:

"\* \* \* We do not think that the support of a mother by her daughter should be deemed in the law a merely charitable support within the rule stated in the case of *Saukville v. Grafton*, 68 Wis. 192, 195. When support is furnished by a child to a parent, it is presumed to be furnished as a legal and moral duty which the child owes to the parent, rather than as a charity. See sec. 1503, R. S. The support of the mother by the daughter is not supporting a poor person as a pauper within the meaning of subd. 4, sec. 1500, R. S., above quoted. \* \* \*"

This girl has been supported by her father, who is under a moral and legal (sec. 49.11, Stats.) duty to provide for her. She has not received aid from the public nor from any private charitable organization. Support from a relative under moral and legal obligation to furnish it is not held to place the recipient within the definition of a person supported as a pauper. See the above authorities. Therefore, the girl concerning whom you write has not been supported as a pauper, and, having resided in one town, city or village in W county for a year or more since her twenty-first birthday, she has acquired a legal settlement in that county.

JEF

*Fish and Game—Words and Phrases*—“Open water” as defined in sec. 29.25, Stats., includes water where some one has destroyed weed conditions to extent that weeds offer no partial or whole concealment of hunter.

December 21, 1934.

JOHN A. CONANT,  
*District Attorney,*  
Westfield, Wisconsin.

You state that a blind for duck shooting was built within the rush line on Puckaway Lake on a place where blinds have been built and used for many years. There is no question as to the legality of this blind as originally constructed. In was inside of the rush and vegetation line sufficient to partially conceal a hunter. During the night of October 5 some one cut off the rushes around this blind. A complaint was then made that the blind was illegal and the conservation department, after investigation, issued instructions to permit its use, but now the department's warden has orders to attach a red tag to it, thereby making it illegal and subjecting its users to prosecution.

You state that the department as its authority cites an opinion of the attorney general that a legal blind is rendered illegal by ice breaking off the surrounding rushes. You say it is your idea that this opinion does not control for, the rushes having been cut off, which in itself constitutes an illegal act, should not, in your judgment, render the use of the blind an illegal one.

Where the rushes have been broken off by natural causes a different case is presented than where they were intentionally cut. It was also held by this department that open water as defined in sec. 29.25, Stats., includes water where frost has destroyed the weed condition to the extent that the weeds offer no partial or whole concealment of the hunter. XX Op. Atty. Gen. 774. We have also held that a construction of a pier in open water does not change the character of such water; it is a violation of sec. 29.25, Stats., to shoot at game birds from such pier. IX Op. Atty. Gen. 469.

You do not cite us any statute holding that the cutting of weeds by a person who is lawfully upon a lake is an

illegal act. We know of no statute which so provides. The weeds, having been destroyed, are no longer in existence. Whether they were destroyed by ice or by some person, in my opinion, makes no difference. The weeds being no longer present, it will follow that that part of the lake will then be in open water under the provisions of sec. 29.25 (2), which defines open water as follows:

“‘Open water’ is any water outside or beyond a natural growth of vegetation extending over the water surface, and of such height as to offer partial or whole concealment for the hunter.”

JEF

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*Courts—Public Officers—Garnishment—Quasi-garnishment—*Under sec. 304.21, Stats., secretary of state should apply to payment of judgments against state officers and employees filed with him any amount due such officers and employees, including that due for expenses incurred by them in performance of their duties.

December 21, 1934.

THEODORE DAMMANN,

*Secretary of State.*

Attention C. A. Nickerson, *Auditor.*

You have referred us to an official opinion rendered by the attorney general to the secretary of state on June 27, 1918, VII Op. Atty. Gen. 364, in which it was held that money due from the state to reimburse an officer or employee for money advanced by him for traveling or other expenses is subject to the provisions of the quasi-garnishment law, now sec. 304.21, Stats. You state that this opinion has been questioned at various times and your department has agreed to ask for a reconsideration of the question involved. You state that you were willing to do this on account of the argument advanced that application to the satisfaction of judgments of the money advanced by officers and employees for traveling expenses might cause interruption of the state's work through inability of the judgment debtors to continue the financing of neces-

sary travel. You ask to be favored with an opinion on this matter.

We have carefully considered the opinion rendered over sixteen years ago. The wording of the statute is substantially the same now as it was then. The officials have acted upon this opinion and have paid out money to the judgment creditors relying upon it. The statute does not apply only to the state but also to cities, counties, villages, towns and school districts. In view of the fact that the legislature has not changed the statute so as to give it a different meaning than the construction placed upon it by the attorney general, and in view of the fact that the construction is reasonable and is really called for by the language used, we deem it inadvisable to change the ruling of the opinion but we adhere to it for the reasons stated in said opinion.

JEF

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*Insurance—Liability Insurance—Physicians and Surgeons—Malpractice—Relief units in furnishing physicians for indigent and other persons needing relief are not liable for torts of such physicians.*

It is good practice for relief units to engage only physicians for such professional services who will carry liability insurance, protecting their patients against negligent services of physicians.

Liability insurance policy should contain stipulation as suggested.

December 21, 1934.

INDUSTRIAL COMMISSION.

You state that a question has arisen concerning the liability of relief units for malpractice of physicians paid by the relief units to treat persons on relief in need of medical care. These physicians are under an agreement with the local relief units to perform standard services, such as house calls, office calls, attendance, etc., for which a definite price is arranged. You say the relief units do not have any control over the method of treatment prescribed by a physician other than this contract, which also speci-

fies that the drugs used shall be of the most inexpensive type consistent with the best interest of the patient. You inquire whether under this set-up the local relief unit would be liable for any malpractice of the physician and in the event that the relief unit is not so liable you desire to require that all physicians treating relief patients carry a liability insurance.

In an official opinion in XXI Op. Atty. Gen. 927, it was held that a malpractice suit can legally be brought by an inmate of the state prison against a prison physician or dentist, but it was also held that the principle which makes a government immune from suits arising out of wrongs committed by its officers and agents while in the performance of governmental functions protects only the government and does not prevent personal liability from attaching to the officer and agent. In *Apfelbacher v. State*, 160 Wis. 565, 576, 152 N. W. 144, the court said:

“A denial of the application of the doctrine of *respondet superior* to the state when exercising a governmental function does not leave a person injured remediless. He has his cause of action against the person or persons actually committing the wrong. \* \* \*”

Reference was made to *Morrison v. Fisher*, 160 Wis. 621, 152 N. W. 475, 21 R. C. L. 1184, 36 L. R. A. 293. The same principle applies to the relief units which are performing a governmental function as an arm of the government in taking care of indigent persons or others needing relief, but there is no objection (and it would undoubtedly be a good policy to pursue) to the relief units engaging only physicians that will take out liability insurance so that the patients, even though on relief, may be fully protected against negligent physicians.

In this connection we will suggest that the liability insurance should be taken out under a policy which has the following clause as part of the contract:

The insolvency or bankruptcy of the holder hereof shall not release the Company from the payment of damages for injuries sustained or loss suffered by any person or persons as the result of an act or omission covered by this contract and occurring while this contract is in full force and effect; and in case execution against the holder hereof

is returned unsatisfied in an action brought by the injured or his or her personal representative in case of death resulting from such act or omission, because of such insolvency, bankruptcy or any other cause, then an action may be maintained by the injured person or his or her personal representative against the Company under the terms of this contract for the amount of judgment in said action, not exceeding the amount of this contract applicable thereto.

It is essential that this be in the policy, as liability insurance may not inure to the benefit of the injured person if the doctor goes into bankruptcy. This has sometimes been done to defeat the very purpose of the insurance, but it cannot be so defeated if the policy contains that stipulation.

JEF

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*Public Officers—Dance Hall Supervisor—Special Deputy Sheriff—Unemployment Insurance—Dance hall supervisor while acting and person deputized by sheriff in emergency are public officers duly appointed and exempted under sec. 108.02, subsec. (e), par. 4, Stats.*

December 21, 1934.

#### INDUSTRIAL COMMISSION.

You have referred two inquiries to this department which were received from Mr. Roscoe Grimm, district attorney for Rock county. You ask for an official opinion and submit the questions in his own language.

“1. Pursuant to a county dance ordinance, the sheriff of the county has employed under him, from time to time, certain dance inspectors who are chosen by the county board and serve as required to supervise dancing in the rural districts of the county. They are paid on a fee basis by the county. I assume that they would be exempt under section 108.02 (e) 4.”

Supervisors of dance halls are provided for under sec. 59.08 subsec. (9), Stats. The material part of this subsection, which is an authorization to the county board, reads thus:

“\* \* \* Upon the passage of such an ordinance the county board shall select from persons recommended by the county board a sufficient number thereof whose duty it shall be to supervise public dances according to assignments to be made by the county board. Such persons while engaged in supervising public dances or places of amusement shall have the powers of deputy sheriffs, and shall make reports in writing of each dance visited to the county clerk, and shall receive such compensation as the county board may determine and provide. \* \* \*”

These public dance supervisors, you will note, are given the power of deputy sheriffs. We are of the opinion that they are public officers within contemplation of sec. 108.02, subsec. (e), par. 4, and do not come under the term “unemployment” as provided in said statutory provision.

You also inquire:

“2. In case of emergency, the sheriff is authorized to deputize any reasonable number of men and may call upon all the resources of the county to suppress riots, etc. Such special deputies are probably considered elected or appointed public officers but it might be well to have a ruling on it.”

You are advised that it is our opinion that such special deputies will be considered as appointive public officers within contemplation of sec. 108.02 (e) 4. See *Vilas County v. Industrial Commission*, 200 Wis. 451.

JEF

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*Appropriations and Expenditures—Counties*—County board has no power to appropriate and put in its budget money for charitable institutions such as Salvation Army.

December 21, 1934.

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

You inquire whether the county board in session has power to appropriate and put in its budget money for charitable institutions, such as the Salvation Army, a Chil-

dren's Home Finding Society, etc. You say you have examined the statutes relative to powers of county boards but can find no authorization for the above.

It is the settled rule of law in this state that county boards have no powers except those expressly conferred or necessarily implied from the statutes. There is power given to appropriate money for the support of the humane societies. See sec. 58.07 (5); XVIII Op. Atty. Gen. 129. So there are provisions in the statute promoting immigration to advance the cause of agriculture in the state. See sec. 59.08 (10), Stats., XVIII Op. Atty. Gen. 596. See also: XXIII Op. Atty. Gen. 238, XXI 1065. Without any statutory authority for authorizing the county board to appropriate money for charitable institutions such as the Salvation Army, I am constrained to hold that it cannot do so.

JEF

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*Recovery Act—Federal Emergency Relief Administration—Workmen's Compensation—Persons working under Federal Emergency Relief Administration do not come under workmen's compensation act as employees.*

County has no power to pay premiums to insurance companies to insure workmen under F. E. R. A. for compensation covering injuries and fatalities. Governor, however, has power to create set-up to provide for such insurance.

December 21, 1934.

WALTER B. MURAT,  
*District Attorney,*  
Stevens Point, Wisconsin.

You state that recent decisions of the supreme court are to the effect that persons working under F.E.R.A. do not come under the Wisconsin workmen's compensation act. (*Village of West Milwaukee v. Industrial Comm.*, 255 N. W. 728.) You state that several counties and cities have therefore attempted to make contracts with insurance companies by the terms of which such municipalities shall pay premiums to the insurance company and the insurance com-

pany shall pay doctor and hospital bills and other benefits for workmen engaged in F.E.R.A. work when injured, practically identical with the benefits accruing to employees who are under the workmen's compensation act. The question arises whether the city or county may legally so contract.

It is the well accepted principle of law that a county has no greater powers than those given to it by statute, either expressly or impliedly. I know of no provision authorizing the county to pay something for the workmen when it has no legal obligation to pay it. Cities have greater powers now under the home rule provisions of the constitution than counties. Whether a certain city has the power to make such insurance contract will depend upon the powers of such particular municipality. It is, however, true that the governor has powers under sec. 20.02, subsec. (9), and sec. 101.34, Stats., to cause to be set up an insurance plan to protect workers on F.E.R.A. projects from disabilities and fatalities suffered on such projects. See XXIII Op. Atty. Gen. 568, 585, 623.

JEF

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*Counties—Public Officers*—County board committee must be composed of county board members. One not member of board serving on committee cannot be compensated for his services.

December 22, 1934.

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

At its last regular session your county board set up a committee of three to hear and adjust the grievances of those working on relief projects, and to handle disputes arising in regard to farm drought relief, sailors' and soldiers' relief and other forms of relief. Two members of this committee are members of the county board; but the third member, appointed to represent labor, is not a member of the board. The per diem for the committee has

been fixed at four dollars, the same rate as is paid to the county board members while in session.

You wish to know whether the county board may authorize the payment of the per diem to the member of the committee who is not on the county board.

Answer, No.

This committee is not especially provided for by any special statute and must consequently have been appointed under the general statute authorizing county board committees, sec. 59.06, Stats.:

“(1) 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 resolutions.”

Such committees may be provided for by the board at any of its meetings.

When there is no substantial reason why the thing required to be done by statute might not as well be done after the time prescribed as before, no presumption that by allowing it to be so done it may work an injury or wrong, nothing in the act itself, or in other acts relating to the same subject-matter, indicating that the legislature did not intend that it should rather be done after the time prescribed than not done at all, the courts will deem the statute directory merely. *State ex rel. Cothren v. Lean*, 9 Wis. 279. See: *Mills v. Johnson*, 17 Wis. 598; *Burlingame v. Burlingame*, 18 Wis. 285.

The general rule is that a committee of the county board must consist of members of the county board. See *Forest County v. Shaw*, 150 Wis. 294, XIX Op. Atty. Gen. 302, 303:

“Members of a committee are not officials as such and can only be members of such committees because of their official capacity as members of the board. \* \* \*.”

In line with this rule it has been held that a member of a county board who fails to be re-elected can no longer act as a member of a county board committee. See Op. Atty.

Gen. for 1912, 806, XIII Op. Atty. Gen. 241, XXI 389 and XXIII 712.

The only exceptions to the foregoing rules exist in the case of committees specifically provided for and set up in other sections of the statute, e.g., the county agricultural committee provided for in sec. 59.87 (9), county highway committee set up by sec. 82.05, Stats., mediation board provided for in sec. 281.23.

However, as pointed out above, the committee here in question comes within the general rule; therefore it must be composed of county board members. Since the third member of this committee is not a member of the county board, he has no right to be on the committee and hence has no standing as a committee member. Because no one but county board members may be a member of a committee set up by that board, this third member cannot be paid for his services. The county board may authorize payment of moneys only under express or implied statutory authority. *Frederick v. Douglas County*, 96 Wis. 411. There is no statutory authorization, express or implied, for compensating a person who, though ineligible for the office, has been appointed as a member of a county board committee. He is neither officer nor employee of the county but a mere volunteer.

You are therefore advised that the county board may not compensate the member of the committee in question who is not a member of the county board.

JEF

*Banks and Banking—Public Deposits—Recovery Act—Federal Emergency Relief Administration—*Money received from F. E. R. A. by state in form of check to governor which is deposited first in state treasury and then in public depository is public deposit within meaning of ch. 34, Stats.

Money to pay for insurance of these funds is to be taken from emergency fund provided for by sec. 20.02, subsec. (9), Stats.

December 27, 1934.

ROBERT K. HENRY,  
*State Treasurer.*

Money from the federal government for unemployment relief purposes is received by this state from time to time in the form of a check from the federal government to the governor of this state. The governor deposits the money in the state treasury. The money goes into the general fund and, as are other state moneys, is deposited by the state treasurer in one or more of the banks serving as state depositories. It is finally expended by the industrial commission through orders on the state treasury subject to the method and requirements of the F. E. R. A.

You wish to know whether this money is to be considered a public deposit within the meaning of ch. 34, Stats.

It is the opinion of this department that this money is a "public deposit" within the meaning of ch. 34, Stats., and that it must be insured with the state board of deposits.

Sec. 34.01, subsec. (1) defines a public deposit as "moneys deposited by 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, in any state bank, savings and trust company, mutual savings bank, or national bank in this state, including private funds held in trust by a public officer for private persons, corporations or associations of individuals."

Under this section of the statute this department held, in XXII Op. Atty. Gen. 319, that reconstruction finance

corporation moneys deposited by the governor or unemployment relief trustees are public deposits. Money deposited by the governor in that instance is money deposited by an officer of the state and, hence, by the state. In the instant situation the money is deposited in the banks by the state treasurer, who ordinarily deposits all moneys for the state. Therefore, it is even more clearly a deposit by the state.

This department has also ruled in XXII Op. Atty. Gen. 180 that federal funds distributed to local units of government or committees by the industrial commission are public deposits and are covered by ch. 34, Stats.

This money is also clearly within the definition of public moneys upon which interest must be paid to the state board of deposits to insure it.

Sec. 34.01, subsec. (5), provides:

“‘Public moneys’ shall include all moneys coming into the hands of the state treasurer \* \* \* by virtue of his office without regard to the ownership thereof.”

Sec. 34.01 (2) defines a public depository as “a state bank, savings and trust company, mutual savings bank, or national bank in this state which receives or holds any public deposits.”

Sec. 34.06 (2) provides that any bank receiving public deposits must pay into the state deposit fund a certain percentage on the average daily balance of such deposits. Therefore, since the money you describe is a public deposit, the bank in which it is deposited must pay the required amounts to the state board of deposits.

Ch. 34, Stats., was enacted to secure adequate protection by means of a system of state insurance of all public moneys coming into the hands of any official of this state or one of the subdivisions of the state and deposited by him in a bank. The money here in question is deposited by the state treasurer in a bank serving as a state depository and is to be considered a public deposit within the meaning of ch. 34.

You state in your letter:

“If the money being sent to the state and deposited in the general fund for distribution by the industrial commission is held to be a public deposit, then it will be necessary

for the general fund to contribute 2% on the daily balances of such money to the deposit fund which will entail a large expense on the general fund."

It is evident from this that you are under the impression that the money to pay for the insurance of these deposits is to be taken directly from the general fund. This is incorrect as there is no statutory provision for such a procedure. The money is to be paid out of the emergency fund appropriated to the executive department by sec. 20.02, subsec. (9) :

"To the executive department, such sums as may be necessary to enable the state to receive the benefits to which it may be entitled under any act of the seventy-third congress designed to promote economic recovery, which is accepted by the governor for the state pursuant to section 101.34."

JEF

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*Public Officers—School Director—Town Treasurer—*Offices of school district director and town treasurer are not incompatible.

December 27, 1934.

L. A. KOENIG,  
*District Attorney,*  
Phillips, Wisconsin.

You wish to know whether the offices of town treasurer and director of the common school district, located in the same town, are incompatible.

Answer, No.

46 C. J. 941-943, sec. 46:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in the conflict of interest, as where one is subordi-

nate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the other or to audit the accounts of the other. \* \* \*"

The question then is: Is there anything inconsistent in the duties of town clerk and director of the school district?

We think not. The duties of the town treasurer are set forth in sec. 60.49, Stats. A study of them will show that as far as school district moneys are concerned, his dealings are with the county treasurer, town clerk, school district treasurer and the school district clerk. See subsecs. (5), (6), (7), (8) and (9) of the section. The director of the school district is not even mentioned in this section.

The duties of the district director are set forth in sec. 40.09:

"(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. \* \* \*"

XXII Op. Atty. Gen. 293, holding that the offices of school district treasurer and town treasurer are incompatible, points out that sec. 40.10 (2) Stats. requires the school district treasurer to "apply for, and receive, and if necessary sue for all money appropriated to, or collected for the district." The incompatibility of these two offices arises in the fact that the school district treasurer might have to sue the town treasurer for school moneys. Since it is the duty of the district treasurer to sue for school moneys, such action against the town treasurer would not be included in the general duty of the director to represent the school district, which is set forth in sec. 40.09 (2) and (3) quoted above.

Therefore, we find nothing inconsistent in one man's performing the duties of both district director and town

treasurer. This is the holding of X Op. Atty. Gen. 740. The statutes involved, i.e., those setting forth the duties of the two offices, are substantially the same now as they were in 1921, when the earlier opinion was written, and we see no reason for changing the ruling.

You are, therefore, advised that the offices of school district director and town treasurer are not incompatible.

JEF

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*Taxation—Tax Collection—Remedy of county against county treasurer who has omitted certain lands from list of those to be sold for delinquent taxes is action on county treasurer's bond, joining treasurer and his sureties as co-defendants.*

December 27, 1934.

CHARLES F. MORRIS,  
*District Attorney,*  
Washburn, Wisconsin.

You wish to know what remedy, if any, Bayfield county has on the following statement of facts:

The county treasurer, relying upon the statement of the land owner, who promised some time during the month of May, 1933, to pay the taxes for 1932 on his land, did not include the descriptions of that land in his notice of sale until it was too late to publish them as required by statute. The land owner has failed to pay or redeem the taxes.

Sec. 74.33, subsec. (1), Stats., provides:

“The county treasurer shall, on the fourth Monday of April in each year, make out a statement of all lands upon which the taxes have been returned as delinquent and which then remain unpaid, except public lands held on contract and lands mortgaged to the state, containing a brief description thereof, with an accompanying notice stating that so much of each tract or parcel of land described in said statement as may be necessary therefor will, on the second Tuesday in June next thereafter and the next succeeding days, be sold by him at public auction at some public place \* \* \* for the payment of taxes, interest and charges thereon; \* \* \*.”

You will notice that the statute provides that the treasurer shall advertise for sale all lands (with certain exceptions which do not include the lands omitted from the list in the instant case) upon which the taxes have been returned delinquent. No discretion is vested in the county treasurer whereby he may omit from the list of land to be sold any lands upon which the taxes remain unpaid except in instances of irregular assessment or some error in taxing in which event he may withhold the lands from sale "and report the lands so withheld from sale to the county board at the next session thereof with his reasons for withholding the same." (Sec. 74.39, Stats.)

In *Florida Central and P. R. Co. v. Reynolds*, 183 U. S. 471, 475, 46 L. ed. 283, 285, 22 S. Ct. 176 (1902) the United States supreme court pointed out:

"\* \* \* They [taxes] are obligations of the highest character, for only as they are discharged is the continued existence of government possible. They are not cancelled and discharged by the failure of duty on the part of any tribunal or officer, legislative or administrative. Payment alone discharges the obligation, and until payment the State may proceed by all proper means to compel the performance of the obligation. No statutes of limitation run against the State, and it is a matter of discretion with it to determine how far into the past it will reach to compel performance of this obligation."

From this it will be seen that the debt for the taxes in question still remains. The question is: Is there any legal procedure for collecting this debt?

See XXII Op. Atty. Gen. 371, which holds:

"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." (Caption.)

This same opinion suggests at p. 372:

"\* \* \* 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."

A further study of the cases decided by our supreme court involving sec. 74.33 up to the present time fails to

reveal any in which this question was involved. There is no provision in the statutes for carrying the sale of the land here in question over to another year, so it is very doubtful whether a sale of this land at the next tax sale would be upheld. If the sale is void the tax deed issued on it would also be void.

Sec. 74.10 (1) provides:

“In case any person shall refuse or neglect to pay the tax imposed upon him the treasurer shall levy the same by distress and sale of any goods and chattels belonging to such person wherever the same may be found within his town, city or village \* \* \*”

In *Allen v. Allen*, 114 Wis. 615, 627, the court taking into consideration several statutes including sec. 1097 (now 74.10 (1) cited above) and sec. 1114 (now 74.19), said:

“\* \* \* We think, therefore, that it must be held that taxes upon real estate are to be collected primarily out of the personalty of the owner or occupant.”

In the same case it was also decided at p. 628 that the verified return of the local treasurer made under sec. 1114 (now 74.19), stating that he was unable to find any personal property out of which to collect the tax upon real estate “\* \* \* is conclusive, and that the remedy for a false return should be against the officer making it.” The conclusion of the court that the affidavit of the local treasurer made in accordance with sec. 74.19 is conclusive, the wording of sec. 74.10 itself, and the fact that all of the cases we have read in which the remedy found in the latter section was used were cases in which it was used by a local treasurer, establishes the remedy found in sec. 74.10 as one which is to be employed only by local and not by county treasurers. Thus sec. 74.10 would be of no help in the present situation.

Nor can these taxes be collected in an action for debt. See *Nelson v. Gunderson*, 189 Wis. 139, 141. An action in debt in Wisconsin for taxes will lie only for taxes on personal property (sec. 74.12) or for taxes against the real property of a public service corporation (sec. 74.13) or for income taxes (sec. 71.18 (3)).

Therefore, aside from the extremely doubtful procedure, which has no statutory sanction, of selling this land at the next tax sale, there is no way in which the county can collect these taxes as such.

As a last resort, the county could bring an action on the county treasurer's bond, joining the treasurer and his sureties as codefendants. To omit intentionally lands upon which taxes have been returned delinquent from the list of lands to be sold for taxes is to act without authorization of statute and, in fact, contrary to statutory provision. Hence, when the county treasurer failed to list the lands in question, he was guilty of a breach of duty. Therefore, since the man owning the land has failed to pay the taxes which he promised the treasurer he would pay, the county has suffered a loss by reason of the treasurer's nonfeasance (failing to list the lands for sale). The treasurer is liable for this loss occasioned by his breach of duty.

In *The Town of Crandon v. Forest County*, 91 Wis. 239, 244, the court said:

"The powers and duties of the county treasurer in respect to taxes returned as delinquent are prescribed by law, and he is required to advertise and sell the lands charged with such taxes, if payment is not made before the time fixed for such sale. The county board has no power to alter or modify the law, or to absolve him from the performance of any of his official duties. In case of a failure to perform his duty as thus prescribed, he and his sureties on his official bond are liable for all damages that may ensue, \* \* \*. The duty of the county treasurer to proceed to advertise and sell the lands returned in the present instance for the entire tax, if legal, still remained, and parties interested had a right to insist upon its performance or damages for his failure or neglect of official duty."

See also *City of Milwaukee v. United States Fidelity and Guaranty Co.*, 144 Wis. 603, 129 N. W. 786; *Forest County v. United Surety Co.*, 149 Wis. 323; *Bartlett v. Hunt*, 17 Wis. 214; sec. 19.01, subsecs. (2) and (3) on official bonds.

I hope that the above discussion will aid you in determining what remedy to employ in the solution of your problem.

JEF

*Prisons—Prisoners—Probation*—In absence of order or agreement from probationer who has absconded and has money due him, board of control cannot collect said money and turn it over to his family.

December 28, 1934.

BOARD OF CONTROL.

You state that one J was convicted of nonsupport in one of the circuit courts of the state of Wisconsin in June 1934 under the provisions of sec. 351.30. Sentence was deferred and he was placed on probation in the custody of the state board of control under the provisions of ch. 57, Stats. During the month of October 1934, J violated his probation by absconding and on October 25 the board of control, in accordance with sec. 57.05, issued an order revoking his probation.

You say that at the time J absconded he was regularly employed and there remains due him the balance of approximately twenty dollars for salary. The probation officer supervising this case requested the employer to turn this balance over to him to be used for the care of J's destitute family. The employer hesitated to do this without official authority. If J could be apprehended an order would be secured from him directing the employer to turn the balance over to the probation officer but this is impossible for the reason that the defendant's whereabouts are unknown. You request an opinion on the following question:

"Has the board of control, through its probation division, sufficient authority to collect the amount due for J for salary and disburse it for the support of J's family?"

There is nothing in the statute which authorizes you to collect the money under such circumstances as you have outlined.

Sec. 57.075 provides as follows:

"The state board of control shall create a revolving fund out of any moneys in its hands belonging to persons who have been placed on probation, and who have violated their contracts and absconded, or who may in the future violate

their contracts and abscond, or whose whereabouts is, or may become, unknown. Said funds shall be used to defray the expenses of clothing or other necessities, and for transporting probationers who are without money or other means to secure the same; provided that all payments made from such funds shall be re-collected from such probationers for whose benefit they are paid whenever collection thereof is possible; and provided further that any moneys belonging to any absconding probationers so paid into the said revolving fund shall be repaid to such probationers in accordance with law, with interest at three per cent, in case a lawful claim therefor is filed with said board of control showing the legal right of the claimant to such money."

The statutes cover exactly such a case as is presented by you. You have no contract with J nor any authority given by him to you to collect this money and give it to his family. In the absence of any such contract, sec. 57.075 as above quoted is applicable to the case. If it is thought that the board of control should have the power to collect the money under the circumstances here stated and pay it over in its discretion to the family of the probationer, it would be well to submit the matter to the legislature for an addition to the statute giving the board such powers. Your question is answered in the negative.

JEF

*Indigent, Insane, etc.—Medical Aid*—Question whether notice given under sec. 49.18, subsec. (2), Stats., as to need of emergency operation or treatment, from which last phrase of statute (probable duration of hospitalization) is omitted is sufficient is open to dispute, but we believe that courts would probably hold notice under circumstances as substantial compliance with statute.

Patient may be treated in hospital as long as it is reasonably necessary under circumstances or until he has recovered sufficiently to leave hospital.

Sec. 49.18 applies only to indispensable emergency operations or treatment. If after patient has left hospital further treatment is necessary poor authorities of county should be called in.

December 28, 1934.

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

You state that one, A, who has never been on poor relief of any kind but who is without very much visible means, was injured in your county by contacting a wood saw, so that an amputation of the leg became necessary. Without any approach to the proper officials of the town, he was taken to Eau Claire to the hospital. Within twenty-four hours a notice in conformity with sec. 49.18, subsec. (2), Stats., was sent to the chairman of the town. The notice was in compliance with the provisions of said statute excepting that it does not contain the last clause of said section, namely, "and the probable duration of hospitalization." You say so far the notice from Eau Claire county has not been sent to your county clerk and you do not know whether such notice will be given. Your county is about to go on the county relief system and this party will probably be a hospital patient after the county system takes effect.

Your question reads as follows:

"For what part of the treatment and hospitalization is the notice given effective? Would it extend after the operation has been performed necessary to save life until

there is a complete recovery, or would it be only until such treatment has been given as necessary to prevent immediate death from the effects of such injury?"

Sec. 49.18, subsecs. (1) and (2), Stats., provides:

"(1) Unless the board or council shall have designated some other official therefor, the town chairman, village president, mayor or chairman of the county board, when in his opinion reason therefor exists, shall provide temporary medical relief for a poor person, and liability for expenses so incurred shall be the same as though incurred by the board or council.

"(2) Except in counties having a population of two hundred fifty thousand or more, the town, city, village, or county, as the case may be, shall be liable for the hospitalization of a person entitled to relief under this chapter, without previously authorizing the same, when, in the reasonable opinion of a physician called to attend such person, immediate hospitalization is required, for indispensable emergency operation or treatment, and prior authorization for such hospitalization cannot be obtained without delay likely to be injurious to the patient. There shall be no liability for such hospitalization beyond what is reasonably required by the circumstances of the case, and liability shall not attach unless, within twenty-four hours after admission of the patient, a written notice be mailed or delivered to the official designated in subsection (1), reciting the name and address of the patient, so far as known, and the nature of the illness or injury, and the probable duration of hospitalization."

If the notice prescribed by statute must be given within twenty-four hours in order to attach liability, there may be some doubt as to whether the notice herein which omits the last phrase giving the probable duration of hospitalization is sufficient. But as that is only an estimate and the real facts are given upon which the estimate must be based, I believe a court would hold that there was a substantial compliance with the statute in this case. This statute provides that there shall be no liability for such hospitalization beyond what is reasonably required by the circumstances of the case. I believe that, in view of this provision, if the notice required by this statute is given the patient may be treated in the hospital as long as it is reasonably necessary under the circumstances or until he is recovered sufficiently to leave the hospital.

You also inquire:

“Does such notice dispense with the necessity of calling in the poor authorities of the county where the patient is situated, and is notice to our county clerk necessary in order to make our relief authorities liable?”

“On the other hand can a claim be made for a complete settlement of all treatment and hospitalization following the immediate emergency operation without further or other notice?”

If, after the patient has left the hospital, he requires further treatment the poor authorities of the county where the patient is situated should be called in, as this section applies only to the hospitalization.

JEF

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*Criminal Law—Elections—Public Officers—Vacancies—*  
Person who is convicted of violating sec. 37 of United States criminal code, which is conspiracy to violate sec. 117 of United States criminal code (bribery), loses right to vote and right to hold office in Wisconsin.

December 28, 1934.

WILLIAM J. MCCAULEY,  
*Assistant District Attorney,*  
Milwaukee, Wisconsin.

You ask:

Does a person lose his citizenship, and the privileges of the same in Wisconsin who has been convicted of violating section 37 of the United States criminal code, which is conspiracy to violate sec. 117 of the United States criminal code? You say that sec. 117 of the United States criminal code refers to a United States officer accepting a bribe.

Sec. 37 of the United States criminal code (18 U.S.C.A. sec. 88) reads as follows:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the con-

spiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both."

In sec. 6.01 of our statutes, it is provided:

"\* \* \* any person who shall have been convicted of bribery, shall be excluded from the right of suffrage unless restored to civil rights."

As one of the qualifications for the holding of a public office in Wisconsin is to be an elector, it follows that a person who is guilty of bribery loses the right to hold public office and the right to vote. Those are his civil rights which can be restored to him by a pardon.

I also refer you to sec. 17.03 (5), which gives as one of the grounds for causing a vacancy, the following:

"His conviction by a state or United States court of and sentence for treason, felony or other crime of whatsoever nature punishable by imprisonment in any jail or prison for one year or more, or his conviction by any such court of and sentence for any offense involving a violation of his official oath, in either case whether or not sentenced to imprisonment. \* \* \*"

We might also refer you to art. XIII, sec. 3, Wisconsin Const., which contains the following:

"\* \* \* no person convicted of any infamous crime in any court within the United States; \* \* \* shall be eligible to any office of trust, profit or honor in this state."

In *Becker v. Green County*, 176 Wis. 120, 124, our court held:

"\* \* \* By the great consensus of authority upon the subject, it ["infamous crime"] is now deemed to mean as here used—a crime punishable by imprisonment in the state prison. \* \* \*"

As a conspiracy to commit crimes of higher grades merges into the higher crime upon its execution, it follows that a conspiracy to commit a felony is a felony. As bribery is a felony punishable by imprisonment in state prison, a conspiracy to commit it is also a felony.

We are constrained to hold that a person who commits the conspiracy to commit bribery loses the right to hold

office and the right to vote. He does not forfeit his citizenship. He however forfeits his civil rights. The right to vote and the right of citizenship are not identical in meaning. The possession of political rights is not essential to citizenship. 6 Amer. & Eng. Encyc. of Law 15.

JEF

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*Bridges and Highways—Damages—Fills—Courts—Statute of Limitations*—Question of whether conservation commission has right to build fill for highway across waters covering lake is question between state and conservation commission, not between conservation commission and private parties.

Statute of limitations has run against damages to real property, fill having been made fifteen years ago.

December 28, 1934.

H. W. MACKENZIE,  
*Conservation Director.*

In your recent letter you state that the conservation department in 1920 finished a fill across a narrows in the west end of Plum Lake near the village of Sayner in Vilas county. At that time a roadway supported on a wooden trestle was at the location of the subsequent fill. This trestle work had been condemned as unsafe for all ordinary transportation. The trestle itself had been placed at this location a number of years before by a logging railroad company and jointly between the town of Plum Lake and the state. The old grade had been improved and for a number of years had been used and considered as a town road.

With the condemning of the trestle it became necessary to do something at the narrows where the road crossed, and after due consideration it was deemed best to make a fill at this point, and in this fill was installed an eight-foot corrugated, galvanized iron pipe through which an ordinary rowboat can pass and which was considered ade-

quate to take care of all transportation requirements that might develop into the west bay of Plum Lake, which is a shallow bay and which had been used very little for fishing or other purposes.

You further state that a study of the blue print which you attach will indicate another shallows over which a railroad trestle had been built farther up in the lake, that it was ordinarily considered that launch travel was not practical into the west bay of Plum Lake, and that the only craft that could navigate the west bay was a rowboat, canoe, etc., which the pipe installed in the fill provided for.

You say that the lands affected by this operation were then owned by the Stange Lumber Company of Merrill, Wisconsin. One of these descriptions, namely lot 2, was subsequently sold to Floyd Thomas of Sayner, but lot 8 is still owned by the Stange Lumber Company. The Stange Lumber Company recently communicated with your department, stating that the members of the company felt their interests had been damaged by the fill that had been made across the lake, that their property at that point including the frontage on the bay had been damaged, and sought a settlement with your department.

You add that since the construction of this fill the road in question has been materially improved and is now considered as a primary forest highway under the jurisdiction of your department and the state highway commission jointly.

You inquire whether your department, acting for the state, had a legal right to make the fill as above described.

As we understand it, the fill was made in a place which was originally a part of the lake and the question of the right to make such fill at that location is a question between the state and the conservation department and not between the conservation department and private owners.

You also inquire whether the conservation commission or the state is liable in any way for damage to the Stange Lumber Company or other property owners for the fill before mentioned that has been made by that commission.

This fill was constructed in 1920, about fifteen years ago. Under sec. 330.19 (5) suits for damages are outlawed in six years. It follows that at the present time there is no liability for damages. Besides the state is not liable for the torts of its officers, which is a well settled proposition in this state. *Apfelbacher v. State*, 160 Wis. 565.

JEF



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