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 Jan. 4, 1937
ORLAND S. LOOMIS, Mauston__________ from Jan. 4, 1937, to______
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† Died Feb. 19, 1936.
 Corporations — Small Loans Companies — Wage assignment provisions of sec. 214.15, Stats., prevail over wage assignment provisions of sec. 241.09 to extent that they conflict.

Small loans licensee may take pledge of personal property as security for loan.

Such licensee may not in same place of business operate insurance or other business without authorization by banking department.

January 6, 1936.

Banking Commission.

You have asked for our opinion upon the following questions:

"1. Is the wage assignment provision in section 214.15 affected by the provisions of the general wage assignment law in section 241.09? Further, what effect do bankruptcy proceedings have on wage assignments?"

It is our opinion that the provisions of sec. 214.15, Stats., constitute an exception to the provisions of 241.09, Stats.

Sec. 241.09 was passed in 1905 and requires wage assignments of a married man to bear the signature of his wife, witnessed by two disinterested witnesses. This section also
limits the validity of the assignment to wages accruing within two months from the date of making such assignment.

Sec. 214.15 was passed in 1933, and limits the wage assignments in the case of small loans. It makes no provision for the signature of the wife, nor is the validity of the assignment limited to any specific period of time.

Special provisions of a statute relating to a particular subject prevail over general provisions in the same or other statutes so far as there is a conflict. *Kollock v. Dodge*, 105 Wis. 187.

Consequently the provisions of sec. 214.15 prevail over sec. 241.09, in so far as they conflict.

Bankruptcy proceedings have the same effect on wage assignments as they do on any other kind of assignments. Where the wage earner is insolvent and makes an assignment of his wages within four months of becoming a bankrupt, the assignment as against general creditors would probably be set aside as constituting a preference under sec. 96 of the Bankruptcy Act. U. S. Code Anno., Title 11, ch. 6, 44 Stats. at Large 666. Otherwise the assignee would be entitled to claim the wages due at the time of the bankruptcy as against general creditors.

"2. Can a small loan licensee, operating under ch. 214, take as security for loans made the deposit or pledge of personal property such as is the practice among pawn brokers?"

The answer is, Yes.

In sec. 214.13, subsec. (4), Stats., it is provided:

"Upon repayment of the loan in full, mark indelibly every obligation and security signed by the borrower with the word 'Paid' or 'Canceled,' and release any mortgage, restore any pledge, cancel and return any note, and cancel and return any assignment given to the licensee by the borrower."

The words "restore any pledge" clearly imply that pledges or deposits of personal property may be taken as security, since such pledges could not be restored if they had not been taken as security in the first instance.
"3. Can a small loan licensee, operating under ch. 214, who has made the maximum charge for a loan secured by a chattel mortgage on an automobile, sell insurance to the borrower and charge him for the premium in addition to the maximum interest charge?"

The answer to this question depends to some extent upon the discretion of the banking department exercised under sec. 214.14, subsec. (3), Stats., which provides:

"No licensee shall conduct a small loans business within any office, room or place of business in which any other business is solicited or engaged in, or in association or conjunction therewith, except as may be authorized in writing by the department upon its finding that the character of such other business is such that the granting of such authority would not facilitate evasions of this chapter or of the lawful orders issued thereunder."

To conduct an insurance business in connection with a small loans business would require the written authorization of the department under the above section, and the granting of such authorization would depend upon the finding of the department on the question of whether or not such insurance business would facilitate evasions of ch. 214 or orders issued thereunder.

Note also the language of sec. 214.14, subsec. (6), which provides:

"No licensee shall, in addition to the interest or charge herein provided, directly or indirectly charge, contract for or receive any other charge or amount whatsoever for any examination, service, brokerage, commission, expense fee, bonus or other things or otherwise. If any interest, consideration or charges in excess of those permitted by this chapter, are charged, contracted for or received, the contract of loan shall be void and the licensee shall have no right to collect or receive any principal, interest or charges whatsoever."

This section is a very stringent one and, assuming that the licensee had authorization from the banking department to operate an insurance business in connection with his loan business, it would seem that the licensee would
have to give the borrower the option of purchasing insurance elsewhere, since the licensee is forbidden to charge any "bonus or other things or otherwise" in addition to the interest or charge permitted by law on the loan itself, and it would be immaterial whether or not the borrower received value for the extra charge made for insurance.

JEF

Fish and Game — Mink — Breeders of mink which have been raised in captivity for not less than four generations must secure fur farm license prescribed by sec. 29.577, Stats.

January 6, 1936.

CONSERVATION DEPARTMENT.

You ask whether a person who raises only such mink as are described in sec. 343.421, Stats., must secure a fur farm license.

We hold that a person breeding mink which have been raised in captivity for not less than four generations must secure the fur farm license prescribed by sec. 29.577.

Sec. 29.577, Stats., provides that any person may establish, operate, and maintain a fur farm upon securing a license and otherwise complying with said section. Sec. 343.421, with the 1935 legislative amendment italicized, reads in part as follows:

"(1) Any person owning or breeding silver, silver black, black foxes or mink which have been raised in captivity for not less than four generations shall have the same property rights therein as enjoyed by owners or breeders of domestic animals."

Persons operating fox farms are not required to secure a license and otherwise comply with sec. 29.577, Stats. Did the legislature, by the 1935 amendment, exempt breeders of
mink so raised in captivity from the provision of said section? It is possible that the legislature intended to do so, but such conclusion cannot be sustained by the unambiguous wording of the statutes. The amendment gives to breeders of certain mink the same property rights as are enjoyed by breeders of domestic animals. The law now requires certain breeders of domestic animals, as well as breeders of mink to be licensed. If the legislature had intended to exempt breeders of such mink from sec. 29.577 it could easily have done so by inserting in said section, "except the mink described in section 343.421," or words of like effect. In the absence of any language indicating such intent the law must be taken to mean just what it expressly provides.

JEF

Education — Public Officers — Vocational School Board — Words and Phrases — Employer — Operator of insurance agency who employs one stenographer and operator of barber shop who employs one journeyman barber are "employers" within meaning of sec. 41.15, subsec. (2), Stats.

January 6, 1936.

Geo. P. Hambrecht, Director,
Board of Vocational Education.

You have inquired as to the qualifications of two persons for membership on a local board of vocational education, under sec. 41.15, subsec. (2), Stats., which, among other things, provides for two "employers" upon such a board.

One of these persons is in the insurance business and employs one stenographer. He is also president of a corporation operating a children's home and, as such officer, has direct relationship with the hiring and discharging of the corporation's seven employees.

The second person is the owner of a barber shop and regularly employs one journeyman barber.
It is our opinion that these persons qualify as "employers" within the meaning of sec. 41.15, subsec. (2).

In X Op. Atty. Gen. 932, we indicated that a housewife employing a maid was eligible to serve as an "employer" member of such a board. While it is true that in IX Op. Atty. Gen. 124, we expressed the thought that the word "employer" as used in the vocational education statutes should be restricted to employers in the vocational and industrial establishments of the community, it is also true that the scope of vocational education has been greatly extended since the rendering of that opinion, and we believe that a reinterpretation of the word "employer" in its broader sense, is now required.

As pointed out in your letter, the vocational schools are now organized so as to meet the educational requirements of the out-of-school groups, in so far as possible. Courses are no longer limited to the trades and industries, but courses are now offered in barber science, salesmanship, commercial relations and, in general, all subjects concerning the field usually included in the term "adult education" as applied to those not enrolled in regular full-time schools.

This broadening of the scope of vocational education no longer requires the use of the words "employer" and "employee" in the rather narrow industrial sense in which they were originally used in speaking of vocational education. To convey the thought that we here have in mind, we can do no better than use the words of the illustrious Justice Holmes in the case of Towne v. Eisner, 245 U. S. 418, 425, where he said:

"* * * A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

JEF
Courts — Minors — Illegitimacy — Under sec. 166.12, Stats., judgment providing for weekly payments for support of illegitimate child may at any time be so modified as to provide for payment of lump sum in satisfaction of judgment.

School Districts — Tuition — Words and Phrases — Enrolled — Pupils enrolled in high school at time of passage of ch. 430, Laws 1935, amending subsec. (4), sec. 40.47, Stats., are pupils who have actually been in attendance at particular school during previous year.

January 6, 1936.

JOHN P. McEVOY,
District Attorney,
Kenosha, Wisconsin.

You have asked for our opinion upon two questions. The first question concerns the power of a court to modify a judgment in an illegitimacy action, where the judgment provides for the future support of the child by weekly payments until the child reaches the age of sixteen years. You inquire whether, after the statutory period for reopening of judgment has expired, the court may modify such judgment so as to provide for the payment of a lump sum in discharge of the judgment.

We believe that this question should be answered in the affirmative upon the basis of the language contained in sec. 166.12, Stats., which reads:

"Whenever the judgment for the future support of the child has not been satisfied by the payment of the lump sum directed to be made, the court shall have continuing jurisdiction over proceedings brought to compel support and to increase or decrease the amount thereof until the judgment of the court has been completely satisfied. Nothing in this section shall in any way be considered a derogation of section 351.30."

This language would seem clearly to give the court continuing jurisdiction in the matter to the end that the obligation of the father should be properly discharged. This
seems to be in accord with the general trend of authority on the subject. Note the following language in 7 C. J. 1003:

"The court may in its discretion open or vacate the judgment [illegitimacy cases] after it has been formally pronounced. Thus a change of circumstances, as where it subsequently appears that maintenance is no longer necessary, may justify the release of defendant from the judgment or, at least, a modification of the terms thereof. But if defendant has pleaded guilty, and has been ordered to make certain payments into court, a subsequent order releasing him from further payments does not discharge his general obligation to maintain the child."

Your second question concerns the interpretation of ch. 430, Laws 1935, which amends subsec. (4), sec. 40.47 to read as follows:

"Every high school shall be free to all persons of school age resident in the district. The board may charge a tuition for each nonresident pupil, excepting a nonresident pupil having a legal settlement as defined in section 49.02 in the high school district, and this provision for tuition shall be available to a public high school without this state; provided its course of study is equivalent to Wisconsin's, and provided it is at least one and one-half miles nearer the pupil's home than is any Wisconsin high school. The provisions of this subsection existing prior to the effective date hereof shall apply to pupils then enrolled in high school and until such pupils complete the prescribed courses for graduation therefrom." (Italics indicate amended portions.)

This law became effective on September 4, 1935, and on August 27, 1935, a number of pupils from a certain township in your county registered or enrolled in a high school outside the state, which they had the right to do prior to the amendment above quoted. Now with the amendment that said high school must be at least one and one-half miles nearer the pupil's home than is any Wisconsin high school, they will be unable to receive the benefit of tuition paid by the township unless they be considered as enrolled in such out-of-state school at the time of the passage of ch. 430.

You state further that the school in which these students enrolled did not open until September 9, but the contention
is made that they are entitled to go to such school by reason of having registered there prior to the passage of ch. 430. On the other hand, the board takes the position that the word "enrolled" as used in the amendment is applicable only where the student has actually entered upon a course of study.

The problem, therefore, is to determine who may be considered as pupils enrolled in the high school at the time of the passage of the act.

While we do not find that our supreme court has passed upon such a question, it has been considered elsewhere. In the case of Board of Education of Albany Village School District v. State, 175 N. E. 217, 218, 37 Ohio App. 453, it was held that "enrolled children" within the meaning of a statute providing for reopening of a school, were those who had actually been in attendance at a particular school during the previous year. This is the only case we have found bearing on the question and, upon reading the case, we see no reason why it should not apply in the instance you mention, as the court there was called upon to determine what school children were covered by the word "enrolled."

Following that case, we conclude that students who have not completed their high school course and who were in attendance at the out-of-state school during the school year 1934-1935, may be considered as enrolled in such school on September 4, 1935, regardless of whether or not they registered for the 1935 fall term before September 4, 1935, and regardless of the fact that the fall term did not commence until September 9, 1935. On the other hand, students who were not in attendance at such out-of-state school during the school year 1934-1935 may not be considered as enrolled in such school on September 4, 1935, merely by virtue of their registration prior to that date.

JEF
Indigent, Insane, etc. — Legal Settlement — Poor Relief — Words "federal works progress administration project" as used in sec. 49.02, Stats., refer to separate and distinct agency and do not include CCC, PWA, Rural Electrification or Resettlement Administration project.

January 6, 1936.

John M. Peterson,
District Attorney,
Neillsville, Wisconsin.

In your letter of November 23 you ask whether PWA, CCC, Rural Electrification and Resettlement Administration projects are deemed to be within the classification of federal works progress administration projects in subsec. (4), sec. 49.02, Stats.

The words "a federal works progress administration project" as used in sec. 49.02 (4) refer to a separate and distinct agency and do not include a CCC, PWA, Rural Electrification or Resettlement Administration project.

Sec. 49.02, subsec. (4), Stats., as amended by ch. 527, Laws 1935, provides in part:

"Every person of full age who shall have resided in any town, village, or city in this state one whole year shall thereby gain a settlement therein; but no residence of a person in any town, village, or city while supported on a federal works progress administration project shall operate to give such person a settlement therein. *

The federal works progress administration is a separate and distinct agency created by Executive Order No. 7034, dated May 6, 1935, under authority of Public Resolution No. 11, 74th Congress. This agency is one of several, financed by the so-called "Four billion dollar federal relief Bill." As the statute refers only to one separate and distinct agency the other agencies mentioned in your inquiry are not included within the meaning of the statute.

JEF
Bridges and Highways — State Highways — Counties — County Board — County Board Resolutions — County board cannot by resolution compel towns to issue bonds for road purposes under sec. 83.14, Stats., in amounts sufficient to cover both towns' and county's shares of such improvements subject to repayment by county of its share to town at later date.

January 6, 1936.

WILLIAM H. STEVENSON,
District Attorney,
La Crosse, Wisconsin.

You have asked for our opinion as to the legality of the following resolution of your county board:

"WHEREAS, the present agreement between county and town units, relative to the amounts set up by each unit for county and town roads according to section 83.14, wherein the town unit raises 50% and the county meets the other 50% for such roads, and

"WHEREAS, any unit in the county may bond for such sums as may be deemed necessary to complete their town road system * * *

"Therefore, be it resolved, that any town unit that bonds itself for road purposes, under section 83.14, must bond for the county's 50% of such amount, and that the county of La Crosse will repay to the respective unit or units on said bond issue or issues, a sum not to exceed $2,000.00 per year, to match a like amount from the unit negotiating the bond, until said bond is retired.

"And be it further resolved, that the payment of interest on such bonds be paid 50% by that county and 50% by the unit sponsoring such bond issues."

It is our opinion that the resolution is advisory or directory only, and that the county board cannot compel towns to include the county's share of road improvements in the town bond issues. We have expressed the opinion that where a town follows strictly the provisions of sec. 83.14, Stats., for improving prospective state highways, the county aid provided for in that section is mandatory. See XXIV Op. Atty. Gen. 253, and opinions therein cited.
It is to be noted, however, that a town may avail itself of the procedure contemplated by the above quoted resolution by virtue of sec. 83.14, subsec. (6), Stats., which provides in part:

"* * * After any town shall have voted the tax required by subsection (1), such town may borrow money for such improvement in anticipation of such tax levy and the appropriation to be made by the county board, and pay the same into the county treasury as an advance, after which construction may proceed. The county shall reimburse the town for such advance when the necessary funds become available."

Since the resolution indicates that it is the wish of the county to have this procedure followed in all instances of town bond issues for road improvement under sec. 83.14, the resolution may have the effect of securing the necessary co-operation from the towns, although a town is free to disregard such resolution if it sees fit to do so.

JEF

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Military Service — Wisconsin Memorial Hospital — Public Officers — Board of Control — Under sec. 45.25, Stats., board of control may enter into leasing arrangement with federal government for use of Wisconsin memorial hospital in caring for veterans eligible for treatment there.

January 10, 1936.

Board of Control.

You state that the Wisconsin memorial hospital was erected pursuant to sec. 45.25, Stats. 1921. This hospital is now under the jurisdiction of the state board of control by virtue of sec. 45.25, and the federal government desires to use the hospital for veterans, but on a different basis than heretofore, in that instead of contracting with the state to
give care and treatment to soldiers who are eligible under the law for admission to said hospital, the federal government desires to operate the hospital under a lease arrangement.

You inquire whether the state board of control may enter into a lease with the federal government for the use of this property owned by the state.

We believe your question should be answered in the affirmative.

Subsec. (4), sec. 45.25, Stats., in part provides:

"The state board of control is authorized and empowered to enter into contracts on behalf of the state of Wisconsin with the federal war risk insurance bureau or any other legally authorized department, bureau or commission of the United States government for the maintenance and care and medical treatment at federal or joint federal and state expense of discharged soldiers, sailors, nurses and marines, who were residents of the state of Wisconsin at the time of their enlistment, and who served in the armed forces of the United States in the war against Germany and Austria and are suffering from mental diseases, and who have or may become beneficiaries under the federal war insurance bureau; * * * ."

This section gives the state board of control wide powers to contract with the federal government for the maintenance, care and medical treatment of veterans. The statute does not attempt to prescribe the details of such contracts and, if it is deemed advisable to make a contract with the federal government for the use of the hospital for such purposes, it would seem to fall within the scope of the powers granted to the state board of control by the statute.

It is apparent that the legislature intended that the state board of control should make arrangements with the federal government on the most advantageous and expedient terms for the care of these unfortunates, and if the plan under consideration appeals to the board as being reasonably calculated to achieve that end, we see no objection to its adoption, since it must be held that the board has all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law. On this latter
point, see *State ex rel. Priest v. The Regents of the University of Wisconsin*, 54 Wis. 159, 170.

We, of course, do not want to be understood as placing our approval upon any particular lease in advance of an opportunity to examine the same.

JEF

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Elections — Delegates to National Conventions — In view of provisions of ch. 139, Laws 1933, amending secs. 5.22 and 5.24, Stats., form of ballot for delegates to national party conventions prescribed by sec. 5.24, subsec. (1), par. (a), Stats., should be changed in accordance with specifications of parties' national committees as to number of delegates.

January 10, 1936.

Theodore Dammann,

Secretary of State.

In connection with the preparation of ballots for delegates to national party conventions, you inquire as to the effect of the repeal of subsecs. (3) and (4) of sec. 5.22, by ch. 139, Laws 1933.

Ch. 139, Laws 1933, was a revisor's bill designed to bring secs. 5.22 and 5.24 in harmony with opinions from this department, XIII Op. Atty. Gen. 30 and XXI Op. Atty. Gen. 100, holding that the number of delegates to a national party convention may be designated by the party machinery and are not limited to four delegates at large and two district delegates as provided by subsecs. (3) and (4) of sec. 5.22 of the 1931 statutes. Ch. 139, Laws 1933, repealed these provisions and amended subsec. (1), sec. 5.22 so as to provide that the number of delegates to be chosen shall be the number specified by the party's national committee.
Subsec. (5), sec. 5.22 was also amended, but the amendment is not material here. Subsec. (6), sec. 5.24 was amended by ch. 139 so as to read:

"Whenever any elector shall vote for more delegates than are specified by section 5.22 his vote shall not be counted for any of such delegates."

However, sec. 5.24, subsec. (1), par. (a), was not changed. This provides among other things:

"An official ballot shall be printed and provided for use of each voting precinct in the form provided herein and annexed hereto. * * *

This form of official ballot provides for voting for four delegates at large and for two district delegates. Obviously this form no longer fits the requirements of sec. 5.22 and is in conflict therewith, since sec. 5.22 now provides for the number of delegates specified by the party's national committee and no longer distinguishes between delegates at large and district delegates.

Consequently, we must advise against the use of the ballot form annexed to sec. 5.24, since if two statutes conflict the later prevails over the earlier and the specific over the general. * * *

Since the law now provides that the number of delegates to be chosen shall be specified by the party's national committee, it would seem that such committee should furnish the necessary information for the printing of ballots in sufficient time so that the ballots can be properly prepared. In the absence of any specific information from the committee of any particular party, we see no reason why the former type of ballot should not be used. That part of the ballot form which provides for both delegates at large and district delegates need not be changed unless a particular party should decide to abolish the distinction between these two
classifications, as the ballot form merely embodies the existing practice in this respect which political parties are free to change. As was pointed out in XIII Op. Atty. Gen. 30, the national party conventions are voluntary organizations which make their own rules and regulations. The delegates are not state officers, and the state merely as a matter of courtesy, so to speak, lends its election machinery to the political parties for their use in selecting the delegates to national conventions, and it is not the function of the legislature to prescribe the number of delegates, whether delegates at large or district delegates. These are matters for the parties themselves to work out, and they should furnish your office with the information necessary for proper printing of their ballots.

JEF

Indigent, Insane, etc. — Legal Settlement — Poor Relief — Person working for year in particular town on federal works progress administration project does not thereby secure legal settlement for poor relief purposes.

January 10, 1936.

RALPH M. IMMELL,
Administrator, WPA.

You have submitted for our opinion the following question:
Does a transient working on a federal works progress administration project (WPA) in some town for a period of a year gain a legal settlement in such town for poor relief purposes?

This question appears to be answered by the provisions of sec. 49.02, subsec. (4), Stats., as amended by ch. 527, Laws 1935. This section, as amended, reads in part 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 or while employed on a federal works progress administration project shall operate to give such person a settlement therein. * * *"

Under the clear language of the statute, a person working for a year in a particular town on a WPA project does not secure a legal settlement for poor relief purposes in such town.

See opinion to John M. Peterson, dated January 6, 1936,* as to the application of the words "federal works progress administration project" used in subsec. (4), sec. 49.02, Stats., as amended by ch. 527, Laws 1935. This opinion holds that the words 'a federal works progress administration project' as used in sec. 49.02 refer to a separate and distinct agency and do not include a CCC, PWA, Rural Electrification or Resettlement Administration project.

JEF

Civil Service — Under ch. 16, Stats., bureau of personnel has power to fix designation of titles and salary ranges for employees of various departments and boards and sole authority of conservation director under sec. 14.71, Stats., is to appoint employees, designate their titles and fix compensation within range prescribed by personnel board.

January 13, 1936.

Conservation Commission.

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

"Under sec. 14.71, Stats., the conservation commission is authorized, 'To appoint such deputies, assistants, experts, clerks, stenographers, or other employees as shall be neces-

* Page 10 of this volume.
sary for the execution of their functions, and to designate the titles, prescribe the duties, and fix the compensation of such subordinates, but these powers shall be exercised subject to the state civil service law.

“When the commission takes proper action and appoints an employee, designates the title and fixes the compensation, may the personnel board pursuant to sec. 16.105, Stats., or any other provisions of the law, change the designation of the title and fix a different rate of compensation?

“It is the contention of the commission that the language of sec. 16.105 does not give the personnel commission authority to change the action of the commission under the direct and positive language of sec. 14.71. In this connection I call your attention to X Op. Atty. Gen. 426, 429.”

It is the opinion of this department that under ch. 16, Stats., the personnel board has sole power to adopt salary ranges, prescribe titles and duties of employees in the various state departments and boards.

While it is true that under the provisions of sec. 14.71 the conservation commission is authorized to appoint deputies, assistants, clerks, and the like, and to designate the titles and prescribe the duties and to fix the compensation of these subordinates, it is manifest that such powers must be "exercised subject to the state civil service law."

A careful reading of the civil service law and sec. 14.71, Stats., leads irresistibly to the conclusion that it was the legislative intent to require that the appointments of deputies, assistants, clerks, and other employees be subject to final approval of the personnel board. In other words, the conservation commission may make recommendations but the final approval is lodged with the personnel board. See II Op. Atty. Gen. 155; XVIII Op. Atty. Gen. 626.

In the latter opinion it was said, p. 628:

"Clearly it is the duty of the bureau of personnel to establish salary ranges after public hearing; and after the establishment of such salary ranges, the director must refuse to certify a salary unless it is within the salary range."
department heads the power merely to recommend the salaries to be paid to the particular employees, with the final power in the bureau of personnel to prescribe the salaries to be paid in a particular department to the subordinates therein employed.

In view of the foregoing we are constrained to hold that the bureau of personnel, pursuant to ch. 16, Stats., has power to fix the designation of titles and fix the rates of compensation in the several departments and that the conservation commission's authority is to appoint employees, designate their titles and fix the compensation within the range prescribed by the personnel board. The opinion in X Op. Atty. Gen. 426 is not directly in point and hence is not controlling herein.

JEF

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**Taxation — Tax Sales — Redemption moneys, under sec. 75.01, Stats. 1933, which subsequently are paid into general fund pursuant to sec. 75.05, Stats. 1933, do not for that reason belong to county but are funds held by county for and to use of certificate holder, his heirs or assigns.**

January 13, 1936.

Clive J. Strang,
District Attorney,
Grantsburg, Wisconsin.

You state that several lots of land were sold for nonpayment of taxes as many as ten to twelve years ago, but that the owner always redeemed the land within the statutory period, thus avoiding the issuance of a tax deed. The tax certificate holders, for unknown reasons, have neglected to make a demand for their money up to the present time. The redemption money is now a part of the general fund. You state further that the county board has taken the position that since this is true the certificate holder is not
entitled to the money, as the matter is outlawed, and you ask our opinion as to the correctness of the county board's contention.

Redemption moneys, under sec. 75.01, Stats. 1933, which subsequently are paid into the general fund pursuant to sec. 75.05, Stats. 1933, do not for that reason belong to the county, but are funds held by the county for and to the use of the certificate holder, his heirs, or assigns.

Sec. 75.01, Stats. 1933, which authorizes the owner or occupant of any lands sold for taxes to redeem the same, provides in part:

"The owner or occupant of any land sold for taxes or other person may, at any time within five years from the date of the certificate of sale, redeem the same or any part thereof or interest therein, by paying to the county treasurer of the county where such land was sold, for the use of the purchaser, his heirs or assigns, the amount for which such land was sold and all subsequent charges thereon authorized by law, * * *.*"

The statute in force at the present time providing for the disposition of redemption moneys, is as follows: (sec. 75.05, as amended by ch. 167, Laws 1935):

"All tax certificate redemption money shall, after the expiration of six years from the date of such redemption of the property, become a part of the general fund and be disbursed as other moneys belonging thereto. The legal holder of any tax sale certificate which has been redeemed may thereafter present the same to the county treasurer who shall pay to such person the amount paid upon such redemption.

It is apparent, from the wording of sec. 75.01, Stats. 1933, that the county treasurer holds redemption moneys paid to him pursuant to that section, in trust "for the use of the purchaser, his heirs or assigns." By no principle of common law can a trustee plead any time limitations as a defense to any action brought by a cestui que trust. In the present case the county treasurer is, by statute, made the trustee of the redemption funds for the certificate holders.
Knudtson v. Leary, 108 Wis. 203, 206. It therefore follows that unless the legislature has enacted some statute of limitations which runs against claims of certificate holders in such cases as the present, the redemption moneys should be paid over to the tax certificate holders. No such statute of limitations is found.

Sec. 75.20, Stats. 1983, which provides in part as follows:

“From and after six years from the day of sale of any land or lots heretofore or hereafter sold for the nonpayment of taxes by any officer of any county, city or village no deed shall be issued on the certificate or certificates issued on such sale and no action shall be commenced thereon; * * *,”

is restricted in its application to actions for the foreclosure of certificates and the application for the issuance of a tax deed, and was not intended to cover the present case.

While it is true that subsec. (4), sec. 330.19, Stats. 1933, provides a six-year statute of limitations upon actions upon a liability created by statute when no different limitation is prescribed by law, as has been hereinbefore pointed out, the statute has no application to a trust relationship. That such trust relationship exists is well settled, for the court in Knudtson v. Leary, supra, held under a statute which provides that the redemption moneys should be paid to the county clerk rather than to the county treasurer:

“* * * During such six years from the date of any such sale the county clerk held such redemption money in trust ‘for the use of the purchaser, his heirs, or assigns’, as provided in sec. 1165. * * *.” (P. 206.)

By ch. 266, Laws 1913, the redemption moneys were made payable to the county treasurer, who thereafter holds such funds in trust for the certificate holders. Similarly, ch. 266, Laws 1913, provided:

“* * * The legal holder of any certificate so redeemed may thereafter [i. e. after the expiration of six years from the date of the sale of the property] present the
same to the county clerk who shall issue an order upon the county treasurer to pay the amount paid upon such redemption."

This procedure, as will be noted by sec. 75.05, Stats. 1933, is still in effect and unaltered.

JEF

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Public Officers — Court Commissioner — United States Conciliation Commissioner — Person who is court commissioner may be appointed and may act as conciliation commissioner at same time.

January 15, 1936.

JOHN H. MATHESON,
District Attorney,
Janesville, Wisconsin.

You state in your letter of January 8 that an attorney in your county who is a circuit court commissioner has been appointed federal conciliation commissioner and that you have been asked to secure an opinion from this department as to whether this situation falls within the prohibition of art. XIII, sec. 3, of the Wisconsin constitution.

You inquire: May a court commissioner serve as a conciliation commissioner appointed by the federal district court?

The applicable constitutional provision involved is art. XIII, sec. 3, Wis. Const., which 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."
It is elementary that a court commissioner holds an office of honor or trust in this state. As a result, the main question is whether or not a conciliation commissioner appointed by the federal district court holds an office of profit or trust under the United States government within the meaning of the constitutional provision quoted above.

The office in question was created by sec. 75, subsec. (a), of the federal bankruptcy act of March 3, 1933 (47 Stats. at L. 1470), amended June 7, 1934 (48 Stats. at Large 925). The commissioner is appointed by the district court, receives twenty-five dollars for each case handled, receives five dollars for each day's work and is placed under the complete supervision and direction of the appointing judge. His remuneration is fixed by statute, is paid from the United States treasury in the same manner as are the salaries of United States treasury officials. However, no bond is filed nor is a regular salary received from the federal government. The main duties appear to be the gathering of data in each particular case relating to the assets and liabilities of the bankrupt, a schedule of claims against such bankrupt and the listing of such bankrupt's creditors. After this material is gathered a hearing is set and his acts are confirmed in whole or in part by the judge who appoints him.

The office of conciliation commissioner appears to be similar to that of a United States census enumerator, which was discussed and construed in a lengthy official opinion found in XIX Op. Atty. Gen. 241. This opinion contains an excellent discussion of the distinction made between those holding offices of profit and trust and those who are merely employees. I refer you to pp. 243-244.

"In discussing the difference between an office of profit and trust, and mere employment, the supreme court of this state has said that to constitute such an office, "'the duties must be continuous and permanent, and not merely transient, occasional, or incidental.' In re Appointment of Revisors, 141 Wis. 592, 608.

"In Coulter v. Pool, 201 P. 120, 187 Cal. 181, the following language is used:
"'a public officer being distinguished from a mere employee in that a public duty is delegated and entrusted to
him, and in that there is a fixed tenure of position, the execution of a public oath of office, and generally of an official bond, the liability to be called to account for malfeasance or nonfeasance in office, and the payment of a salary from the general county treasury.' (Syllabus.)

"In Curtin v. State, 214 P. 1030, 61 Cal. App. 377, it is said that the most essential characteristic of a public office 'is that the incumbent be clothed with some part of the sovereignty, and that the duties be of a continuous character.' (Syllabus.)

"Again in Bowden v. Cumberland County, 123 A. 166, 123 Me. 359, the court says:

"'An "officer" is distinguished from an employee in the greater importance, dignity and independence of his position, in requirement of oath, bond, more enduring tenure, and the fact of duties being prescribed by law.' (Syllabus.)

"* * *

This opinion also pointed out that a liability for malfeasance or misfeasance while in office is an important index of official character.

In the present case it will be noted that the conciliation commissioner has certain duties fixed by law and is paid by statute. However, he has no power to punish those refusing to obey his orders and all action taken by him must receive the approval of the appointing judge before it becomes final. As a result it would seem that the office of conciliation commissioner is one of employment rather than one of profit and trust under the United States and hence, art. XIII, sec. 3, Const., would not apply. See federal bank act as amended June 7, 1934, August 28, 1935, U. S. C. A. Title 11, Bankruptcy, sec. 203.

After careful consideration I have come to the conclusion under the above authority that a court commissioner may be appointed and may act as conciliation commissioner at the same time.

JEF
Opinions of the Attorney General

Taxation — Exemption — Improvements made on real property from May 23, 1935, to May 1, 1937, are exempt from taxation under provisions of sec. 70.11, subsec. (39), Stats., created by ch. 97, Laws 1935.

January 15, 1936.

Walter B. Murat,
District Attorney,
Stevens Point, Wisconsin.

You ask whether the exemptions from 1936 and 1937 tax assessments provided for by ch. 97, Laws 1935, apply only to improvements to real estate made prior to January 1, 1936, or whether improvements made prior to May 1, 1937, come within the purview of the act.

Subsec. (39), sec. 70.11, Stats., created by ch. 97, Laws 1935, reads as follows:

"The assessed value of real property as determined in the 1935 assessment shall not be increased in the 1936 or 1937 assessments by reason of improvements made on such real property."

The section quoted above specifically provides that the assessed valuation of real property as determined in the 1935 assessment "shall not be increased in the 1936 or 1937 assessments by reason of improvements made on such real property." It is manifest therefore, that the assessment to be placed on a particular piece of real property in the 1936 or 1937 assessment shall not exceed the assessed valuation of such real property as determined in the 1935 assessment. Hence any improvements made on real property from the time ch. 97, Laws 1935, goes into effect (May 23, 1935) and prior to May 1, 1937, are exempt from taxation under this law. This construction must be given sec. 70.11 (39) in view of the well settled rule that where the language of the statute is clear and unambiguous there is no room for construction and such statute must be enforced according to its words. State ex rel. Weller v. Hinkel, 136 Wis. 66, 116 N. W. 639; Nordean v. Minneapolis, St. P. & S. S. M. R. Co., 148 Wis. 627, 135 N. W. 150.

JEF
Courts — Criminal Law — Sentences pronounced by court on two counts must be construed as consecutive in view of sec. 359.07, Stats.

January 17, 1936.

Board of Control.

You have submitted a copy of the certificate of conviction and sentence of one A in which the court sentenced A on one count, being a charge of obtaining money under false pretenses, to the state prison for a general indeterminate term of not less than one year nor more than three years. For a second count he was found guilty of forgery in violation of sec. 343.60 of the statutes. The court said:

"* * * Your sentence on this second charge to begin at the time you have served your minimum sentence under the first sentence imposed; in other words, these sentences to run consecutively and not concurrently."

Sec. 359.07, relating to sentences to state prison, provides as follows:

"The sentence of any convict found guilty of treason, murder in the first degree as defined by law, rape, kidnapping, or of any crime the minimum penalty for which is fixed by statute at twenty years or more, to imprisonment in the state prison, shall be for a certain term of time. In all other cases the sentence shall be for a term not less than one year and shall be for a general or indeterminate term not less than the minimum nor more than the maximum term of imprisonment prescribed by law for the offense. In imposing the maximum term, the court may fix a term less than the maximum prescribed by law for the offense. 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 or 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
You will note that this section provides:

"* * * 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 his provision of the statute all sentences are to begin practically on the day of such sentence but

"* * * 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."

It is our belief that the court has no power to impose a sentence for the second count to begin after service of the minimum time under the first sentence imposed. The court had the power to make these sentences consecutive and that is what the court intended to do as the last clause in the sentence clearly indicates. In view of the fact that the court has no power to do otherwise, we are of the opinion that these two sentences should be construed as consecutive sentences, the second sentence to begin at the expiration of the first sentence.

JEF
P. S. March 12, 1936.

In view of the opinion in XXI Op. Atty. Gen. 866 and the decision in Siegel v. State, 201 Wis. 12, we must hold that sentence on the second charge will begin after service of the minimum sentence on the first charge. This opinion is so modified.
Appropriations and Expenditures — Normal Schools —
Each of nine state normal schools is considered separate institution within meaning of sec. 14.32, Stats., as amended by ch. 398, Laws 1935.

January 17, 1936.

BOARD OF REGENTS OF NORMAL SCHOOLS.
Attention Edgar G. Doudna, Secretary.

You ask whether sec. 14.32, Stats., as amended by ch. 398, Laws 1935, regulating out-of-state travel considers each teacher college an institution within the meaning of such law. Sec. 14.32, Stats., as amended by ch. 398, Laws 1935, provides that expenditures "incurred while traveling outside of the state by any officer or employe of the state or of any department or institution thereof" may be audited by the secretary of state as a proper item of expenditure.

The question arises as to whether or not the nine separate teachers' colleges which are each located in different localities may be regarded as separate "institutions" within the meaning of that section of the statutes.

The government of the state teachers' colleges is provided for by sec. 37.01, Stats., which reads in part as follows:

"For the government of the normal schools established, and which may hereafter be established, and for the performance of the duties prescribed to them, there is constituted a board of eleven regents, called 'The Board of Regents of Normal Schools,' * * * ."

It is apparent from the language of this statute that the legislature regarded each normal school as a separate and distinct institution. This intention of the legislature is further strengthened by the provisions of sec. 37.02, subsec. (2), which provides that said board may acquire by condemnation proceedings such parts of lands as it deems necessary for the use of any institution under its control. In both secs. 37.01 and 37.02 it will be noted that the different teachers' colleges are regarded as separate institutions. If the legislature had intended that all nine teacher colleges
Opinions of the Attorney General 29

were to be considered a single institution, it would have so expressed itself in the above mentioned statutes. In view of the language used in ch. 37, Stats., the widely separated geographic locations of the schools and the specialized field of study offered by each of the teachers' colleges, it is our opinion that each of such colleges is an "institution" within the meaning of sec. 14.32, Stats., as amended by ch. 398, Laws 1935.

JEF

Bonds — Taxation — Treasurer's Bond — Under sec. 70.67, Stats., as amended by ch. 521, Laws 1935, personal surety bond is sufficient if given in amount of $250,000, although amount in treasury far exceeds that.

When bond is given solely by surety company it must be in sum equal to amount of state and county taxes.

January 17, 1936.

Clarence J. Dorschel,
District Attorney,
Green Bay, Wisconsin.

You request an opinion as to the limitation of the $250,000 official bond under sec. 70.67, Stats., as amended by ch. 521, Laws 1935. You state that the city of Green Bay has apportioned to it the sum of $463,000 for state and county taxes and inquire whether the city treasurer could give a personal surety bond of only $250,000 and meet the requirement of the statute.

Sec. 70.67, Stats., as amended reads in part as follows:

"The treasurer of each town, city or village shall execute and deliver to the county treasurer a bond, with sureties, to be approved, * * * in the sum of double the amount of state and county taxes apportioned to his town, city or village, not exceeding two hundred and fifty thousand dollars, conditioned * * *. Provided, that when such
bond is executed, or the condition thereof guaranteed, solely by a surety company as provided in section 204.01 [now 204.07], such bond shall be in a sum equal to the amount of such state and county taxes. * * *"

Prior to the amendment by ch. 521, Laws 1935, the limitation of the bond was $500,000, which was reduced to $250,000 by the amendment. This question must be answered in the affirmative as the above quoted statute clearly so provides.

You also ask the following question in the alternative: Could he give a personal surety bond of $250,000 to cover $125,000 of the apportioned state and county taxes and then give a surety company bond of $338,000 to cover the balance of the state and county taxes?

This question must be answered, No, as you will note that only when the bond is executed solely by a surety company as provided in sec. 204.01, Stats. 1931 (204.07, Stats.), then such bond shall be in a sum equal to the amount of such state and county taxes. Here the bond is not given solely by a surety company and therefore that provision of the statute does not apply.

Your third question is: If he gave only one bond executed by a surety company should it be in the sum of $463,000? Yes. The statute clearly so holds.

JEF
Loans from Trust Funds — Municipal Corporations — Municipal Borrowing — Social Security Law — Old-age Assistance — Payment of old-age assistance is "current and ordinary expense" within meaning of secs. 67.12 and 67.125, Stats.

Municipalities are allowed to borrow money from state trust funds for purpose of paying current and ordinary expenses.

January 17, 1936.

LAND DEPARTMENT.

You ask whether expenditures for old-age assistance would be considered current and ordinary expenses within the meaning of secs. 67.12 and 67.125. This question is answered in the affirmative.

"Current and ordinary expenses" mean the usual ordinary, regular, running and incidental expenses. Herman v. The City of Oconto, 110 Wis. 660, 678. Ch. 49, Stats., provides for a compulsory system of old-age assistance. The administration and payment of such assistance is a regular and running expense of government. It is as much a regular expense as support of the poor has been in the past. Support of the poor is a "current expense." Seaboard Air-Line Ry. Co. v. Wright, 122 S. E. 35, 36, 157 Ga. 722.

We hold that expenditure for old-age assistance is a "current and ordinary expense" within the meaning of secs. 67.12 and 67.125. You will note that sec. 67.12, Stats., specifically includes "expenditures under the provisions of chapter 49."

You further ask whether municipalities are allowed to borrow money from the state trust funds for the purpose of paying current and ordinary expenses. We answer your question in the affirmative.

We shall assume that by "municipalities" you mean counties, cities, villages or towns. Subsec. (3), sec. 25.01, Stats., provides that the commissioners of public lands may loan state trust funds to towns, villages, cities, counties and other municipalities. However, the statutes do not designate the purposes for which such funds may be loaned. This
office has held that such funds may be loaned to any municipality for those purposes for which the municipality is authorized to borrow money. XVIII Op. Atty. Gen. 528. Said opinion did not limit loans from said trust funds to the purposes enumerated in sec. 67.04. We believe that such loans also may be made for the purposes enumerated in secs. 67.12 and 67.125. These sections provide for loans for the purpose of paying current and ordinary expenses.

JEF

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Taxation — Tax Sales — Tax Deeds — Service required by sec. 75.12, Stats., on owner of land whose address is unknown may be made by publication; in addition to such publication affidavit should be filed as provided in last sentence of sec. 75.12, subsec. (1).

January 17, 1936.

JAMES L. McGINNIS,

District Attorney,

Amery, Wisconsin.

You request our opinion upon the following:

Under sec. 75.12, Stats., relating to tax deeds, a difficulty arises in a great many cases where the land is unoccupied but encumbered by an unsatisfied mortgage; the owner of the fee title is in California or Florida, and his address is unknown, and cannot with due diligence be ascertained by the county clerk. In such a case it is a practical impossibility to serve a written notice on the owner. The question therefore arises: In what manner can service be made upon the owner?

Sec. 75.12 provides in part:

“(1) 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 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 hereinabove provided shall be served upon the owner or one of the owners of record of said lands. In the event such owner cannot be found by the exercise of due diligence on the part of the owner and holder of the tax certificate or some person holding under him, such owner or person shall make and file an affidavit setting forth such inability to locate said record owner and shall thereupon publish the notice hereinabove provided for once a week for three successive weeks in a newspaper of general circulation published in the county wherein said lands are located. The affidavit herein provided for shall be filed with the officer specified in subsection (2) of this section.

"(2) * * * Every such notice may be served in the same manner as a summons in an action in the circuit court, except as herein otherwise provided, * * *"

When land is unoccupied but incumbered notice of application for tax deed must be served upon the owner as well as upon the mortgagee. XXIII Op. Atty. Gen. 165. Subsec. (1), sec. 75.12, Stats., provides that such notice shall be a "written notice" and subsec. (2) provides that "such notice may be served in the same manner as a summons in an action in the circuit court." The last lines of subsec. (1), beginning with the words "in counties having a population of five hundred thousand or more," set forth a method for service by publication if the owner cannot be found. It is probable that all such part of subsec. (1) applies only to cities of five hundred thousand or more. Such part was enacted by ch. 449, Laws 1931. However, it is entirely possible that such provisions relating to publication may be construed to apply to all cases and not only to those arising in counties with such population.

Secs. 262.12 and 262.13, provide that in specified cases when personal service cannot be made upon a party service may be made by publication. Because of the indefiniteness
of sec. 75.12 on the subject of service it is our opinion that service on such owner should be made by publication for three weeks in the usual manner of publishing a circuit court summons and that in addition thereto an affidavit be filed as provided in the last part of subsec. (1), sec. 75.12. As both the statutes relating to a service by publication of a circuit court summons and the last part of sec. 75.12 (1) provide for a three weeks' publication, such procedure would seem to satisfy the statute, regardless of whether or not the last part of sec. 75.12 (1) applies only to cities of five hundred thousand or more.

JEF

Appropriations and Expenditures — Taxation — Refunds — Taxation of Utilities — Taxes assessed pursuant to ch. 546, Laws 1935, declared never enacted, may not be refunded without specific appropriation by legislature; such appropriation is not made by sec. 20.06, Stats.

Taxes paid pursuant to assessment under ch. 546, Laws 1935, on operation of certain motor vehicles, may not be applied on taxes lawfully assessed against operation of other motor vehicles.

January 17, 1936.

PUBLIC SERVICE COMMISSION.

Attention William M. Dinneen, Secretary.

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

"The commission has collected quarterly flat taxes for the operation of motor vehicles for the last quarter of 1935 pursuant to the provisions of ch. 546, Laws 1935. The supreme court of the state has held, in State ex rel. Finnegan v. Dammann, that ch. 546, Laws 1935, never became a law, and the commission is receiving numerous requests to authorize refunds of taxes paid under its provisions."
In view of the foregoing, you ask the following questions:

"(1) May the commission authorize refund of such quarterly flat tax where the tax paid is greater than would be the tax under the mileage basis provided by law, and where the operator has elected to pay a mile tax:

"(a) If mileage reports have been kept and mileage is duly reported and certified?

"(m) If mileage records have not been kept, but sworn statement as to amount of mileage operated is filed?

"(2) May the commission authorize such refund where, except for the provisions of ch. 546, there is no provision for taxation of the vehicle? For example, the tax paid for a truck of a private motor carrier between six and eight thousand pounds gross weight.

"(3) Is it material to any of the foregoing answers whether or not the tax was paid under protest?

"(4) If, in any of the foregoing cases, a refund may not lawfully be made, has the commission authority to adjust tax payments by applying a tax which has been paid and credited for the operation of one vehicle to the operation of another by the same taxpayer? For example, an operator has paid the quarterly flat tax on three vehicles. This operator actually operated more than three vehicles, but the total mileage operated by all of his vehicles would require the payment of a tax on the mileage basis approximating the amount of the flat tax which was paid on the three vehicles. If no refunds may be authorized, may the payment of taxes which has been made be reapplied so as to cover mileage taxes due from the operation of vehicles other than the three for which the tax was paid?"

Questions 1 and 2 must be answered in the negative. We have carefully examined all the statutes which might be deemed applicable and we are unable to find any authority in the statutes which would permit the public service commission to make refunds of quarterly flat taxes which have been paid pursuant to the provisions of ch. 546, Laws 1935.

The constitution expressly provides, art. VIII, sec. 2:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law. * * *"

Sec. 14.68, subsec. (1), Stats., provides in part:
"Unless otherwise provided by law, all moneys collected or received by each and every officer, board, commission, society, or association for or in behalf of the state, or which is required by law to be turned into the state treasury, shall be deposited in or transmitted to the state treasury at least once a week * * *.*"

The only provisions which might authorize state officers to make refunds are subsecs. (2) and (3), sec. 20.06, which read as follows:

"20.06 There are appropriated from the proper respective funds, from time to time, such sums as may be necessary, for refunding or paying over moneys paid into the state treasury as follows:

"* * *

"(2) Moneys paid into the state treasury in error; but no such refund shall be made except upon the written approval of the governor, secretary of state, state treasurer, and attorney-general.

"(3) Taxes collected and paid into the state treasury in excess of lawful taxation, when claims therefor have been established as provided in sections 71.23, 71.27, 72.08 and 74.73 of the statutes."

In view of the express language of subsec. (3), sec. 20.06, Stats., and in conformity with the rule of statutory construction that the enumeration of one is the exclusion of the other, we are constrained to hold that neither the commission nor the public officers specified in sec. 20.06, Stats., are authorized to refund taxes upon the operation of motor vehicles paid under an invalid statute. Suit must be brought pursuant to the provisions of ch. 285, Wis. Stats.

In view of our answers to questions 1 and 2, it is not necessary to answer question 3. As to whether or not recovery may be had in a suit in cases where a tax was not paid under protest, this fact might constitute a defense to an action brought to recover such taxes. In general, a tax not paid under protest cannot be recovered. Powell v. Board, 46 Wis. 210; Babcock v. City, 58 Wis. 230; State ex rel. Marshall & Ilsley Bank v. Leuch, 155 Wis. 499; Noyes v. State, 46 Wis. 250, 254; Van Buren v. Dunning, 41 Wis. 122.
An examination of the statutes discloses that there is no authority for the public service commission to adjust tax payments by applying a tax which has been paid and credited for the operation of one vehicle to the operation of another by the same taxpayer. As was said in the case of *Monroe v. Railroad Comm.*, 170 Wis. 180, 187, 174 N. W. 450:

"The Railroad Commission being a tribunal of purely statutory creation, its power and jurisdiction must be found within the four corners of the statutes creating it, and we can find within our statutes no such power or jurisdiction as was attempted to be exercised in the present case. * * *

Inasmuch as we are unable to find any authority therefor, we are constrained to hold that the public service commission has no authority to adjust tax payments by applying a tax which has been credited to one vehicle to the operation of another by the same taxpayer.

JEF
Opinions of the Attorney General

Automobiles — Law of Road — Corporations — Motor Vehicle Dealers — Person or company engaged in delivery of motor vehicles from manufacturer to dealer who does not actually sell such vehicles except when they are damaged in transit is entitled to dealers' license plates under sec. 85.02, Stats., for purpose of transporting such cars and should consequently be licensed by division of consumers' credit of state banking department under sec. 218.01, Stats., as condition precedent to securing dealers' license plates under sec. 85.02.

January 21, 1936.

Theodore Dammann,
Secretary of State.

You state that there are several automobile transport companies which transport automobiles from factories to dealers throughout the state, some of these automobiles being driven under their own power. In the past the manufacturers have signed dealers' authorizations for these organizations, although their actual sales have been limited chiefly to instances where vehicles were damaged in transit, in which cases these concerns have been required to assume ownership of the damaged vehicles to dispose of as they see fit.

You state further that the division of consumers' credit of the state banking department set up by ch. 474, Laws 1935, has ruled that these organizations are in the business of transporting rather than selling vehicles and are not subject to license as dealers under ch. 474. This automatically precludes these firms from receiving dealers' license plates from your department.

Our opinion is requested on the question of whether or not these organizations comply with the requirements of sec. 85.02, Stats., so as to be entitled to dealers' license plates upon proper approval by the banking department under ch. 474, Laws 1935, creating sec. 218.01, Stats.

It is the opinion of this department that such persons or companies may be registered under sec. 85.02 so as to be en-
titled to dealers' license plates upon being granted a license by the division of consumers' credit of the state banking department.

Sec. 85.02, subsec. (1), par. (a), provides:

"Every dealer, distributor and manufacturer of motor vehicles in this state shall file a duly acknowledged application for registration with the secretary of state, which shall contain the name under which such dealer, distributor or manufacturer is transacting business within this state, the names and addresses of the several persons constituting the firm or partnership and if a corporation the corporate name under which it is authorized to transact business, the names and addresses of its principal officers, resident general agent and attorney in fact and the place or places of business of such dealer, distributor or manufacturer, and whenever a new place of business is opened such place of business shall promptly be reported to the secretary of state. On receipt of such statement the secretary of state shall issue a certificate of registration to such dealer, distributor or manufacturer which shall be assigned a number."

Subsec. (6), sec. 85.02, provides:

"Number plates shall be furnished by the secretary of state at ten dollars for the first set of two plates and one dollar for each additional set to manufacturers, distributors and dealers whose vehicles are registered in accordance with the provisions of this section. Such plates shall have upon them the registration number assigned to the registered manufacturer, distributor or dealer but with a different symbol upon each set of number plates as a special distinguishing mark and such plates shall be used only on those vehicles used for trial test or adjustment or for demonstration or exhibition or for some purpose necessarily incidental to the sale of such vehicle, or on vehicles while in transit from the factory to a distributor or dealer and being driven by an authorized representative of the manufacturer, distributor or dealer."

The italicized language in subsec. (6), above quoted, clearly indicates that the legislature intended to permit the use of dealers' license plates on vehicles in transit from factory to distributor or dealer. A company engaged in such
transportation business may well be “an authorized representative of the manufacturer, distributor or dealer,” and you have specifically stated that the manufacturers have so certified to you.

We take it that you have had no difficulty on this matter in the past, but that the trouble arises now by reason of the provision contained in par. (i), subsec. (2), sec. 218.01, created by ch. 474, Laws 1935, which provides that no motor vehicle dealer shall be permitted to register or receive dealers’ license plates under sec. 85.02 unless previously licensed by the division of consumer’s credit of the state banking department.

It is true that ch. 474, standing alone, may not contemplate licensing of these firms as dealers by the banking department, although a motor vehicle dealer is defined by that act as one “who is engaged wholly or in part in the business of selling motor vehicles,” sec. 218.01 (1) (a) 2, and, as you have pointed out, these concerns do occasionally sell motor vehicles when they are damaged in transit. As to the sale of such cars, it would seem that they would need a license under ch. 474.

Ch. 474 was designed chiefly to correct certain financial abuses in the sale of motor vehicles on credit, and we do not believe that the legislature intended to repeal by implication the provisions of sec. 85.02, which you have long interpreted administratively to include licensing in the situation under discussion. Administrative interpretations of the statutes, especially when of long standing, are entitled to great weight. Mauel v. Wis. Auto Ins. Co. Ltd., 211 Wis. 230. Also it is well settled that statutes should be construed in the light of the evils they were designed to correct, and that where there are two statutes relating to the same subject they should be so construed as to give effect to both, if possible, the law regarding with disfavor the implied repeal of the one by the other.

It seems to us that an impractical and illogical result would be obtained by refusing dealers’ licenses in the present instance, since it is obvious that these new cars being transported on the highways under their own power must have license plates of some sort, by virtue of sec. 85.01, (1), Stats.
If these concerns are unable to secure dealers' license plates it would be necessary for them to take out regular license plates, unless the manufacturer was willing to procure and lend dealers' plates to these companies. If regular plates were obtained, title would have to be transferred subsequently to the local dealer and again by him to the ultimate purchaser.

Such result would not only be an awkward one, but it would destroy all meaning of sec. 85.02, Stats., as to dealers' license plates in the case of a dealer getting delivery of his cars through one of these concerns, because the cars would of necessity already have regular owner plates on them before they reached the dealer, and there would be no need for him to have any dealers' plates whatsoever. Merely to state such a result is to demonstrate that it was something the legislature never intended to be reached under the statutes here discussed.

JEF

Dairy and Food — Soda Water Beverages — Application for renewal of licenses for manufacture and bottling of soda water beverages must be made before first day of January of each year, otherwise regular fee of fifty dollars per year must be paid.

January 21, 1936.

DEPARTMENT OF AGRICULTURE AND MARKETS.

Attention Harry Klueter.

In your communication of January 3 you state that the last legislature amended subsecs. (1) and (3), sec. 98.12, Stats., by ch. 117, Laws 1935. No change was made in that part of sec. 98.12 relating to the renewal of licenses. You state you have held that where a license was not promptly renewed, such license was forfeited and an application for a new license would have to be made. Certain manufac-
turers of soda water beverages neglected to renew their licenses until after June 8, at which date the fee for a new license became fifty dollars. You state you have refused to accept a renewal fee of five dollars and insisted on a fee of fifty dollars.

You inquire whether this action is in compliance with the provisions of the law above referred to.

Said subsec. (3), sec. 98.12 as amended, reads thus:

"Each application shall be accompanied by a fee of fifty dollars payable to the commissioner, and no license shall be issued until such fee is so paid. In case license is refused, the fee accompanying the application shall be returned by the commissioner to the applicant with notification of refusal."

Subsec. (4), sec. 98.12, Stats., which was not amended, reads as follows:

"Licenses to engage in the manufacture or bottling of any soda water beverage shall expire on the thirty-first day of December next following the date of issue but may be renewed without inspection on or before the first of January of each year upon the application of the licensee and upon the payment of five dollars to the commissioner."

You will observe that under the amendment in subsec. (3) as above quoted, the license fee is now fifty dollars payable to the commissioner, and no license shall be issued until such fee is so paid. Under the above quotation from subsec. (4), sec. 98.12, which was not amended, it appears that renewal of the license may be had upon the payment of five dollars to the commissioner, if the application is made before the first of January of each year.

Since those licenses expire on the 31st day of December of each year, renewals can be made for the coming year by the payment of five dollars prior to January first. Your ruling in the matter is correct. If no renewal is made until after the first of January of each year, then an application must be made and the full amount of fifty dollars must be paid for the license.

JEF
Normal Schools — Normal school scholarships provided for by sec. 37.11, subsec. (12), Stats., created by ch. 535, Laws 1935, are limited as to number in case of any particular school and are available only to students of rank therein specified. However, under subsec. (13) there is no limitation as to number and board of regents of normal schools is bound merely to exercise reasonable discretion in determining whether students meet qualifications therein prescribed. Both subsections are permissive rather than mandatory.

January 24, 1936.

Board of Regents of Normal Schools.

You call our attention to that part of ch. 535, Laws 1935, which created sec. 37.11, subsecs. (12) and (13) of the statutes, these subsections reading as follows:

"(12) The board of regents of normal schools shall have authority to grant scholarships equivalent in value to the payment of all incidental fees to freshmen who, during their high school course, ranked first in scholarship in Wisconsin public high schools and private secondary schools enrolling less than two hundred fifty students; to those ranking first and second in scholarships in Wisconsin public high schools and private secondary schools enrolling two hundred fifty to seven hundred fifty students; and to those ranking first, second and third in scholarships in Wisconsin public high schools and private secondary schools enrolling seven hundred fifty or more students. In case the person or persons eligible for scholarships under the provisions of this subsection do not elect to enroll at a state teachers' college, then the regents shall have the authority to grant the scholarships to the freshmen who were next highest in scholastic rank in the Wisconsin public high schools and Wisconsin private secondary schools."

"(13) The board of regents of normal schools shall have authority to grant scholarships to bona fide residents of the state equivalent in value to the payment of all incidental fees to freshmen who, during their high school course, were good students, are in financial need, and possess qualifications for leadership."
In interpreting the last sentence of subsec. (12), you inquire whether there are an indefinite number who may be awarded a scholarship or whether such scholarships are limited in each case to the student next below the last eligible student provided for in the first part of said subsection.

It is our opinion that the latter interpretation is correct and that scholarships are not open to an indefinite number of students under subsec. (12).

It seems to us that taking the language of subsec. (12) in its common and approved usage the legislature has said that scholarships may be awarded to the No. 1 student in schools of less than two hundred and fifty, to the No. 1 and No. 2 students in schools of from two hundred and fifty to seven hundred and fifty, and to the No. 1, 2 and 3 students in schools of seven hundred fifty or over and that in the event any or all of these individuals do not elect to take advantage of such scholarship, there may be selected as alternates those individuals "who were next highest." We can see no basis for reading into the language of this statute any permission to go down the line beyond the next ranking student in each case. In other words, there is only one alternate for each scholarship, for example, in a school of less than two hundred fifty, such alternate would be the No. 2 student.

You also ask whether a student eligible for such a scholarship must use it the year after he graduates or whether he may stay out of school for a year or longer and take advantage of the scholarship later.

The statute is silent as to this question, but it seems apparent that the legislature must have intended to award scholarships to the honor students each year. Any other construction would be unreasonable. Consequently we see no reason why a student should not be privileged to avail himself of his scholarship award at any time after graduation, subject, however, to the contingency of having an alternate take his place in the event he declines the scholarship in the first instance. To illustrate, if the No. 1 student in the 1936 class of a high school having an enrollment of less than two hundred fifty should decide upon graduating
that he did not intend to avail himself of the scholarship, and the scholarship was then awarded to the No. 2 student, the No. 1 student would not be in a position to change his mind a couple of years later and accept the scholarship, since by that time it would have already been used by the No. 2 student, and subsec. (12) apparently does not contemplate more than one scholarship for any one class in schools of two hundred fifty or less.

On the other hand, in such a case, if the No. 1 student were to accept the scholarship but decided to stay out of school a year or two before going on to normal school, we can see no objection to his using the scholarship later, since the legislature does not prescribe that it must be used the year immediately following graduation from high school.

Now, however, we come to subsec. (13), above quoted, which in a large measure destroys the limitations of subsec. (12).

Under subsec. (13) there are no limitations as to number of students or ranking position in the graduation class, the qualifications being merely that the student is a good student, that he is in financial need, and that he possesses qualifications for leadership. These terms are all relative ones and are susceptible of various meanings according to the viewpoint of the person considering the problem. The only limitation we can read into this section is that, in deciding who are good students in financial need and who have qualifications for leadership, the board of regents of normal schools must exercise its discretion reasonably.

It is to be noted, however, that both subsections (12), and (13), are permissive rather than mandatory, the board of regents of normal schools being given authority to grant such scholarships, but there is no mandate that any scholarships must be given.

JEF
School Districts — Tuition — Words and Phrases — 
Children's Home — Term "children's home," as used in sec. 40.21, subsec. (2a), Stats., created by ch. 410, Laws 1935, means institution, agency, person, association or corporation engaged in business of caring for children, and term includes licensed welfare agency but does not include foster home.

January 24, 1936.

JOHN CALLAHAN, State Superintendent, 
Department of Public Instruction.

You have asked us for an interpretation of the words "children's homes" as used in sec. 40.21, subsec. (2a), created by ch. 410, Laws 1935, and inquire whether the term as there used includes children's welfare agencies and foster homes.

This section of the statutes reads in part as follows:

"All children in children's homes, regardless of whether they were sent there by parents or guardians or by any county, shall be subject to the payment of the legal tuition whenever they attend the public schools of the locality in which the home is located. * * *"

In construction of statutes, all words and phrases are to be construed and understood according to the common and approved usage of the language. 370.01 (1), Stats. What the term "children's home" signifies is an institution or place where children are received and cared for. One of the meanings of the word "home" given in Webster's New International Dictionary is "A place of refuge; an asylum." We take it that it was in this sense that the word was used here by the legislature.

In speaking of children in children's homes, the following modifying words are used in the statute: "regardless of whether they were sent there by parents or guardians or by any county." This language would seem to imply some regularly established institution or agency organized for the purpose of receiving and caring for children committed there by the county or sent there by parents or guardians.
We have not found any judicial construction of the term here discussed, but believe the above interpretation fits in with the purpose of the act, which seems to be that children supported in an institution should not become the educational responsibility of the particular school district wherein the institution happens to be located, but rather that their education should be a state charge, since the statute goes on to provide for certifying such lists to the state superintendent with the amount of tuition due the district. The state superintendent is then to check the report and certify the amount due the district to the secretary of state, who draws on the state treasurer for such amount and the state treasurer in turn forwards it to the treasurer of the school district.

It would seem that a child welfare agency, as that term is used in the statute, would come within the definition of a "children's home."

Child welfare agencies are defined in sec. 48.35, subsec. (1), Stats., as follows:

"The term 'child welfare agency' as used in sections 48.35 to 48.42 is defined as any person, firm, association or corporation, and any private institution which receives for control, care and maintenance, with or without transfer of custody, for more than seventy-five days in any consecutive twelve months' period at any one time more than four children under twelve years of age unattended by their parents or guardians, but not counting, in the case of an individual, children related to such person, for the purpose of providing such children with care and maintenance or of placing them in foster homes whether for gain or otherwise.

This definition fits in with the interpretation hereinbefore made.

We consider, however, that a foster home in which a child is living is not a "children's home" within the meaning of ch. 410. In XXII Op. Atty. Gen. 191, we expressed the opinion that a child placed in a foster home under the provisions of sec. 48.07, where no compensation charge is made upon the county, has a residence where located, for school purposes. Reference is made in that opinion to the cases of
State ex rel. School District No. 1 of Waukesha v. Thayer, 74 Wis. 48, and State ex rel. Smith v. Board of Education, 96 Wis. 95. See also XXII Op. Atty. Gen. 149, wherein it was stated that a minor who was placed on probation and placed in a home in a rural district, not primarily for the purpose of attending school in that district, has a residence for school purposes in such district.

In the case of a foster home, the child is securing a home with a particular family rather than with an institution, agency, association, corporation or person who makes it a business to take in children, and we do not believe that it was the intention of the legislature by ch. 410 to change by implication the well-established law on the school privileges of foster children.

JEF

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Public Officers — Malfeasance — Poor Relief Director — Supervisor from one of wards of city is not eligible to office of city relief director.

January 24, 1936.

INDUSTRIAL COMMISSION.

You state that a certain city in a county which has abandoned the county relief system has appointed as its director of relief a supervisor from one of the wards in the city. In this connection our attention is called to the following sections of the statutes:

62.09, subsec (2), par. (c), and subsec. (7), par. (d), which read as follows:

“(c) 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.”
"(d) 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."

Our opinion is requested upon the following questions:

1. Is the office of this supervisor vacated immediately upon the making of the contract with the city of A?
   The answer is, Yes.

   Sec. 62.09 (2) (c), above quoted, specifically provides that the office shall become vacant upon the acquiring of any such interest by the person holding such office. A supervisor is a city officer by virtue of the definition provided by sec. 62.09, (1) (a), and a pecuniary interest is acquired the moment the contract is made.

2. Is the office of this supervisor vacated upon his entering upon the duties of director of relief for the city of A?
   This question we deem to be sufficiently answered by the answer to 1 above.

3. Is the contract between the supervisor and the city of A void?
   The answer is, Yes.

   Sec. 62.09 (7) (d), above quoted, specifically provides that such contract shall be null and void.

4. Does the supervisor, by entering into this contract, make himself presently amenable to the penalties provided in Wis. Stats., 348.28 or do the penalties of that section attach when he enters upon his duties?
   The answer is, No in either case.

   In the case of State v. Bennett, 213 Wis. 456, sec. 348.28 was construed as not making it an offense for an officer of a municipality to have a pecuniary interest in a contract unless the contract was made by, to, or with him in his official capacity or employment, or in some public or official service. See XXIV Op. Atty. Gen. 666. It is obvious that in the present instance the contract was not made by or with
the person in his official capacity, since a supervisor from one of the wards of a city has nothing to do with the hiring of a relief director by the city.

5. May the supervisor resign from his position as member of the county board and then enter into a valid contract with the city to act as director of relief?

The answer is, Yes.

Upon resigning his position as supervisor, the person in question would no longer be a city officer and the prohibitions of sec. 62.09 (2) (c) and (7) (d) would not apply.

JEF

Courts — Statutes of Limitation — School Districts — Tuition — Claim of school district against county for pro rata share of expense of operating school pursuant to sec. 40.21, subsec. (2), Stats., is subject to six-year limitation prescribed by sec. 330.19 (4), Stats.

January 24, 1936.

WENDELL McHENRY,
District Attorney,
Waupaca, Wisconsin.

You state that for several years children whose parents are county charges have attended a certain school district in your county and this district has never made any claim on account of these children for the pro rata share of the expense of operating the school under the provisions of subsec. (2), sec. 40.21, Stats. You state the school district now desires to file a claim against the county for the entire period of time for which the children of this family have been enrolled.

You ask for an opinion as to whether there is any limitation as to the time for which this claim can be filed.
Sec. 40.21, subsec. (2), was amended by ch. 430, Laws 1935, but it was practically a re-enactment of former legislation. See: Ch. 425, sec. 61, Laws 1927; XXIV Op. Atty. Gen. 49; XX Op. Atty. Gen. 742, 743.

It has been held that a failure to file in time will not defeat the claim. See XXIV Op. Atty. Gen. 635 and V Op. Atty. Gen. 896. It would seem, however, that a six-year limitation may be applicable. Sec. 330.19, subsec. (4), Stats. provides a six-year limitation:

"An action upon a liability created by statute when a different limitation is not prescribed by law."

This may be a six-year limitation. See XX Op. Atty. Gen. 742. I am aware of no other limitation than the one of six years as indicated above.

JEF
Counties — Public Officers — County treasurer shall furnish on demand to any person upon payment of lawful fees therefor certified copy of unpaid taxes on certain designated lands.

Fee charged for service contemplated by sec. 59.20, sub-sec. (9), Stats, should be fee designated therein. Neither county treasurer nor county board has authority to alter or change statutory fees in such cases as present.

Fees obtained by county treasurer for furnishing certified copy of any book, record, account, file or paper in his office which by law is declared to be evidence, where county treasurer is on salary basis in lieu of fees, are county funds and should be paid into county treasury.

January 24, 1936.

JOHN H. MATHESON,
District Attorney,
Janesville, Wisconsin.

You state that the county treasurer of your county has, pursuant to a request therefor, certified as to the condition of taxes on certain designated real estate. This work was done personally by the treasurer on his own time. No charge was made against the person requesting this service. However, the county treasurer is now in receipt of a check paying for this service at the rate of five cents a description.

You ask whether it is the duty of the county treasurer to furnish upon request certified copies of unpaid taxes to mortgagees and others.

Sec. 59.20, Stats., provides:

"The county treasurer shall:

"(9) Make and deliver to any person on demand and payment of the lawful fees therefor a certified copy or transcript of any book, record, account, file or paper in his office and make any certificate which by law is declared to be evidence, and collect as fees therefor ten cents for each folio of any copy or transcript and twenty-five cents for each certificate."
The matter certified to by the county treasurer here is, by virtue of sec. 328.11, subsec. (2), declared to be presumptive evidence of the facts stated therein. Sec. 328.11, subsec. (2) provides:

"A transcript of so much of said books, files and records, as relates to the assessment or sale for taxes of any parcel of land in any specified year or years, certified in substantially the following form:

"I hereby certify that the annexed and foregoing is a true and correct transcript of all books, records, papers, files and proceedings of every name and nature on file or of record in my office relating in any wise to the assessment of taxes upon or to the sale for taxes of the following described lands . . . situated in the county of . . . , state of Wisconsin, for the year (or years) A. D. . . . , and of the whole thereof. In testimony whereof I have hereunto set my hand this . . . day of . . . , A. D. . . . .

"County Clerk (or Treasurer) of . . . county shall be received in evidence with the same effect as the originals and as presumptive evidence of the facts stated in such certificate."

Under this statute it is clear that the county treasurer shall furnish, upon demand and the payment of his lawful fees in such case made and provided for, a certified copy of unpaid taxes.

Prior to 1919, sec. 59.20, subsec. (9), provided only for the performance of this duty and no specific provision was made therein for the payment of fees. However, sec. 67, ch. 695, Laws 1919, amended subsec. (9), sec. 59.20, Stats. and added the fees to be collected where the county treasurer furnishes certified copies or transcripts of any book, record, account, file or paper in his office which by law is declared to be evidence.

You ask further, if it is determined that it is the county treasurer's duty to furnish certified copies of unpaid taxes, whether the fee fixed in sec. 59.20 (9) should be charged therefor or whether a different fee fixed either by himself or by the county board may be charged.
The fee to be charged for the service contemplated by sec. 59.20 (9) should be the fee designated therein. Neither the county treasurer nor the county board has authority to alter or change statutory fees. County boards have only such authority as is delegated to them by the legislature. No statute giving the county board any power in the matter of fixing these fees is found. It therefore follows that the fees as provided for by statute are controlling.

In your last question you ask: If a county treasurer does this work personally, on his own time, and if this does not fall within the terms of sec. 59.20 (9), is he entitled to keep these fees or should they be turned into the county treasury?

Fees paid to the county treasurer for furnishing a certified copy of any book, record, account, file or paper in his office which by law is declared to be evidence, where the county treasurer is on a salary basis, in lieu of fees, are county funds and should be paid into the county treasury. You do not specifically state that the treasurer in question is on a strictly salary basis. However, we assume that such is the fact. Sec. 59.15, subsec. (7), Stats.

Where a county board fixes the salary of a county officer on an annual basis, such officer is not entitled to keep the fees collected by him in his official capacity. Op. Atty. Gen. for 1912, 411, VI Op. Atty. Gen. 126, VII 637, X 889. Where a county officer is on an annual salary basis, fees collected by him must be paid into the county treasury. XVII Op. Atty. Gen. 603, XX Op. Atty. Gen. 51. Such fees are corporate property. Gregory v. Milwaukee County, 186 Wis. 235. It is equally well settled that a county treasurer is entitled only to the salary fixed for his office and the county board cannot allow such county treasurer any moneys in addition to his salary for the performance of any of his duties. Quaw v. Paff, 98 Wis. 586, 590, Kewaunee Co. v. Knipfer, 37 Wis. 496. Although it appears that the services performed by this county treasurer were done on his own time, such fact is immaterial, as the service performed is made a statutory duty (sec. 59.20 (9) ) of the county treasurer. It is a service performed within the scope of his offi-
cial duties as a county officer and one of his official duties. The supreme court in Qauw v. Paff, supra, p. 590, said:

"* * * 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. * * *"  

JEF

Public Officers — Justice of the Peace — County Pension Department — Justice of peace is eligible to serve as member of county pension department.

January 24, 1936.

PENSION DEPARTMENT.

In your letter of January 14 you ask whether a justice of the peace is eligible to serve as a member of the county pension department.

We answer your question in the affirmative.

Judges of the county, circuit and supreme courts cannot hold an office of public trust, except a judicial one, during the term for which they are respectively elected. Art. VII, sec. 10, Wisconsin constitution; sec. 256.02, subsec. (2), Stats. No such constitutional or statutory prohibition is imposed upon a justice of the peace.

The question remains whether the two offices mentioned are incompatible under the common law. We have examined the statutes relating to the duties and functions of a justice of the peace and a member of the county pension department and find nothing which, in our opinion, would render the two offices incompatible. For a discussion of incompatible offices see V Op. Atty. Gen. 852; L. R. A. 1917A, p. 222; 46 C. J., sec. 46, p. 941.

JEF
Taxation — Exemption — College of Divine Savior of St. Nazianz is chartered college within meaning of that term as used in sec. 70.11, subsec. (4), Stats.

January 29, 1936.

John Cashman,
District Attorney,
Manitowoc, Wisconsin.

You state that the Society of the Divine Savior is a religious order which was incorporated on September 27, 1899. From its articles of incorporation it appears that its purposes are for the conducting, pursuing, promoting and establishing of churches, seminaries, schools and colleges in the state of Wisconsin. It appears further from the articles of incorporation that it is a noncapital stock, nondividend corporation, which is not organized for pecuniary profit, and that it received a charter from the secretary of state at the time of its incorporation. The Society of the Divine Savior has a college which is located at St. Nazianz.

You inquire whether such college is a chartered college and exempt from taxation as provided for by subsec. (4), sec. 70.11, Wis. Stats.

That portion of subsec. (4), sec. 70.11 which is relevant provides as follows:

"* * * and the lands reserved for grounds of a chartered college or university, not exceeding eighty acres; * * *

It is manifest that the answer to your question is dependent upon the interpretation given to the phrase "chartered college." From our consideration of both the history of the statute and the purposes for which it was passed, we have concluded that the college of the Divine Savior of St. Nazianz is, inasmuch as it received a charter from the secretary of state at the time of its incorporation, a "chartered college" within the meaning of that term as such is used in the exemption statute. It therefore follows that it is en-
It should be pointed out that the land must be used for charitable or educational purposes to be exempt under the statute.

JEF

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**Taxation — Tax Sales** — County may collect in next assessment of county taxes amount of taxes illegally assessed plus interest at rate of eight per cent since date when such taxes were due and payable, where it appears that assessment was illegal by reason of fact that lands sought to be taxed were erroneously described.

January 29, 1936.

FULTON COLLIPP,

*District Attorney,*

Friendship, Wisconsin.

You state that certain lands in your county by reason of being erroneously described were illegally assessed as far back as 1931 and that the county board has now passed resolutions pursuant to sec. 75.25, Stats., providing for the charging back to the city of Adams the amount due, with the statutory eight per cent interest charge.

You ask whether the county can collect, in the next assessment of county taxes, the amount of these illegally assessed taxes with interest at the rate of eight per cent per annum since 1931.

A county may collect in the next assessment of county taxes the amount of taxes illegally assessed plus interest at the rate of eight per cent since the date when such taxes were due and payable, where it appears that the assessment was illegal by reason of the fact that the lands sought to be taxed were erroneously described.

Sec. 75.25, Stats., provides:
"If the county board, on making an order directing the refunding of money on account of the invalidity of any tax certificate or tax deed, shall be satisfied that the lands described in such certificate or deed were justly taxable for such tax or some portion thereof; or, when the treasurer shall have withheld from sale any delinquent lands under the provisions of section 74.39, they shall be satisfied that such lands were justly taxable for such tax or some portion thereof, they shall fix the amount of such tax justly chargeable thereon on each parcel thereof, and direct the same to be assessed in the next assessment of county taxes, with interest thereon at the rate of eight per cent per annum from the time when such tax was due and payable to the end of the year in which such tax will be levied; and the county clerk, in his next apportionment of county taxes, shall charge the same as a special tax to the town, city or village in which such lands are situated, specifying the particular tract of land upon which the same are to be assessed and the amount chargeable to each parcel and the year when the original tax was assessed, and certify the same to the clerk of the proper town, city or village; and the clerk receiving such certificate shall enter the same on the tax roll accordingly."

It appears from your letter that proper resolutions provided for by the above section have been passed by the county. This statute seems too clear to admit of any construction. The precise question here raised was necessarily before the supreme court of this state in Roberts v. Waukesha County, 140 Wis. 593. In that case the lands were illegally assessed by reason of an incorrect description as far back as 1895. In 1905 the county board ordered a refund of the taxes to the holders of tax certificates and provided that the amount of the taxes, together with the statutory interest, should be levied as a special tax along with the 1905 taxes upon the property of the plaintiff. The court in sustaining the county's authority to so proceed, said, pp. 597-598:

"The powers conferred by the provisions of sec. 1186, Stats. (1898), must be considered in connection with the provisions of sec. 1184, Stats. (1898). These two sections of the statutes should, if reasonable, be so interpreted as to operate harmoniously. It is obvious that the legislature intended that the power of the county board under sec. 1186,
Stats. (1898), to direct a reassessment of taxes upon lands in cases where the original assessments are invalid on account of irregularities in the tax proceedings, was to embrace all cases under sec. 1184, Stats. (1898), whereby the county is liable to refund the money paid it on account of the invalidity of a tax certificate or tax deed. The liability of the county to refund taxes for errors in description which make a tax void is not questioned, and we think properly not. * * *

"* * *

"We cannot sustain the decision of the trial court holding that the county board was without power and jurisdiction in directing that the plaintiff's lands were legally taxable for the sums the board found to be just and proper taxes. The reassessments pursuant to the resolutions of the county board, and the issuance of the tax certificates on the sale of the plaintiff's lands for nonpayment of the taxes included in such reassessments, must be held to have been legally authorized. * * *

JEF

Loans from Trust Funds — Social Security Law — Commissioners of public lands are authorized to loan trust funds to counties for purpose of paying children's aid, blind pensions and old-age pensions.

January 29, 1936.

COMMISSIONERS OF PUBLIC LANDS.

You inquire whether your commission is authorized to loan the state trust funds administered under the provisions of ch. 25 of the Wisconsin statutes to counties within this state for the purpose of paying children's aid, blind pensions and old-age pensions. Your question is answered, Yes. In XVIII Op. Atty. Gen. 528, it was held by this office that under ch. 25, Wis. Stats., the trust funds might be loaned to municipalities mentioned in subsec. (3), sec. 25.01 for purposes there specified and also for purposes for which those municipalities were authorized by law to borrow money.
Among the municipalities mentioned in sec. 25.01, subsec. (3), are counties. That opinion further held that reference might be had to ch. 67, and particularly sec. 67.04, to determine the purposes for which loans might be made.

Sec. 67.04, subsec. (1) par. (m) provides that a county may borrow "To provide relief and assistance to those in need." This paragraph, authorizing counties to borrow to provide relief and assistance for those in need, was inserted by ch. 9, Laws Special Session 1931-1932, at a time when counties began to find themselves financially handicapped to take care of the mounting expenditures for relief purposes. Neither this office nor the supreme court of this state has had occasion to construe sec. 67.04 (1) (m) as to what might be included as relief and assistance to those in need. Sec. 370.01 (1) provides that "All words and phrases shall be construed and understood according to the common and approved usage of the language," except that technical words and phrases shall be given any peculiar and appropriate meaning which they have acquired in the law. We have been unable to discover that the words "relief and assistance" have acquired any peculiar meaning and consequently these words must be construed according to their common and approved usage. Upon examination of Webster's New International Dictionary, we find that the word "relief" is defined:

"The removal or partial removal, of any evil, or of anything oppressive or burdensome, by which some ease is obtained; succor; alleviation; comfort; ease."

It is further defined as "Aid in the form of money or necessities for indigent persons." Assistance is defined as "Help; aid; furtherance; succor; support."

Children's aid, or what is popularly known as mother's pension, is provided for in sec. 48.33. This section provides for the granting of aid for the support of children. Sec. 47.08 provides for the granting of a blind pension, and sec. 49.20 to 49.23 provide for the old-age pension, which is spoken of in the statutes as being old-age assistance. It is a common condition precedent to the granting of children's aid, blind pension or old-age assistance, that the proposed
beneficiary be of limited financial means. The statutes contemplate that any payments made as children's aid, blind pension or old-age pension shall be to persons actually in need, and for the purpose of relieving and aiding or assisting them. It is our opinion, therefore, that your commission is authorized to loan trust funds to counties of this state for the purpose of paying children's aid, blind pensions and old-age pensions.

JEF

Banks and Banking — Escheat of Bank Deposits — Reports under sec. 220.25, subsec. (3), par. (b), Stats. (ch. 294, Laws 1935), need not be made when officer knows person who made deposit is still living; but under par. (c) of said section report required must be made and published even though party be living.

Where there are no such deposits in bank no report need be made.

We know of no way to avoid penalty for failure to report by January 31 except to comply with statute, and if it is absolutely impossible to get all data ready so as to make complete report, partial report should be made; such report should show that supplemental report will follow.

January 30, 1936.

THEODORE DAMMANN,
Secretary of State.

You state that many banks are asking additional information as to their duty under ch. 294, Laws 1935.

Under sec. 220.25, subsec. (3), par. (b) created by ch. 294, Laws 1935, reports of escheated deposits and other property need not be reported when the bank knows that the owners are living. You state that under par. (c), however, of the same subsection, this provision is notably absent. The
banks want to know if the ten to nineteen year items are to be reported and published notwithstanding the owner is known to be living.

This question must be answered in the affirmative. You will note that the wording of pars. (b) and (c) is almost identical, but the words "unless known to such officers to be living" are conspicuously absent in par. (c). The conclusion is inevitable that that is not an element to be considered in construing the provisions of par. (c). The report must be made and published by the officers of the bank even though the person is known to be living.

You say that in the event there are no ten or twenty year items on hand in any bank, you infer no reports need be made under subsec. (3) (b) and (c) of said act. You are correct in this conclusion.

You also state that some banks report that owing to the large amount of work involved, they fear complete reports cannot be made by January 31 and ask an extension of time. You inquire how these banks can avoid the penalty of sec. 220.25, subsec. (5) (e) and, if partial reports are made, whether they should show on their face that supplementary reports are to follow.

Said sec. 220.25 (5) (e) reads thus:

"Any banking institution which shall violate any of the provisions of this section shall forfeit to the state the sum of one hundred dollars for every day that such violation continues."

This is a very drastic provision, the forfeiture of one hundred dollars a day being very large. I would say that if possible, the banks should make the reports as required in said law. If it is absolutely impossible to make a complete report before the lapse of time specified in the statute, a partial report should be made, and it would be the safest practice that such report should show that it is only partial and that a supplemental report will follow as soon as it is possible to make it. These precautions should be taken in order to avoid the drastic forfeiture.

JEF
School Districts — Detachment of Territory — Under sec. 40.85, Stats., territory located wholly in one town cannot be attached to school district in another town.

January 31, 1936.

DEPARTMENT OF PUBLIC INSTRUCTION.

You ask our opinion on the following:

"Blanchardville school district is located in the town of Blanchard. In 1931, under sec. 40.85 an application was made to detach some territory which is in the Blanchardville district and which lies contiguous to district No. 4 in the town of York.

"The Blanchard town board held a meeting and detached the territory from the Blanchardville district and attempted to attach it to district No. 4, town of York. In accordance with law a meeting of the boards of the towns of Blanchard and York was held. After a hearing the town board of the town of York refused to vote to attach this territory to its district No. 4. That left the territory in no school district. The Blanchard town board set this territory back in the Blanchardville district as there was no other district to which it was contiguous.

"* * *. Since that time [1931] the owner of the territory in question has refused to pay his school taxes, and the county charges them back to the town of Blanchard as illegal descriptions. The result is that the tax is spread over all the property of the town. The owner of this property claims to be in 'no man's land' so far as school taxes are concerned."

You ask whether the town board of the town of York was within its rights in refusing to accept this property as part of school district No. 4 of the town of York, and whether the town board of the town of Blanchard was within its rights in setting the property back into the village district with the consent of the village.

Under sec. 40.85, Stats., territory located wholly in one town cannot be attached to a school district in another town.

Sec. 40.85 provides in part:
“(1) Whenever a school district maintaining a high school, other than a union free high school district, consists of territory both within and without the corporate limits of any city or village, the territory lying outside such limits, or any portion thereof adjoining another existing school district, may be detached as herein provided. But no detachment of territory shall be made in a manner so that the remainder of the district shall consist of noncontiguous territory.

“(5) Upon the filing of such application the clerk shall call a joint meeting of the school board and of the board of the town or boards of the towns in which the territory to be detached is located, said meeting to be held within twenty days from the date of filing.

“(a) If the application complies with the requirements of this section, the school board shall forthwith make and enter a written order detaching the territory as requested in such application, and describing such territory.

“(b) The town board or boards shall forthwith make and enter a written order creating a new school district of such detached territory or any part thereof or attaching all or part of such territory to some adjacent existing district or districts. If the territory detached is located in two or more towns, the supervisors of such towns shall vote jointly, and a majority vote of those present shall control.

The language of the above section is clear and unambiguous. If the territory to be attached is wholly located in one town there shall be a joint meeting of the school board and the board of the town in which the property is located. In such case the detached territory may be attached to a contiguous district in the same town. If the property to be detached is located in two or more towns there shall be a meeting of the school board and the boards of such towns. In this case the detached territory may be attached to a contiguous district in either town. But sec. 40.85, Stats., makes no provision for attaching territory which lies wholly in one town to a school district that lies in another town.

In your outline of facts you state that the town board of Blanchard attempted to attach territory which is wholly in the town of Blanchard to a school district in the town of York. The statute does not authorize one town to attach territory wholly within its boundaries to a district in another
town. You further state that a joint meeting was held of the town boards of Blanchard and York. As the territory in question lies wholly in the town of Blanchard there is no authority for such joint meeting of town boards.

Under the statute in question it is clear that there can be no detachment of territory unless territory is attached to some contiguous district. In the present case no provision was made to attach the territory to another district. The action of the Blanchard town board attaching the territory to a school district in the town of York was without authority and illegal. Therefore, the territory in question legally has never been detached from the Blanchardville district.

By holding that the territory in question has never been legally detached the answers to your specific questions are too obvious to need further comment.

JEF

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**Taxation — Tax Sales** — Owner of real estate seeking relief under sec. 75.61, subsec. (2), Stats., must pay county treasurer such part of total taxes, interest and charges due as is proportion of found value of property to original assessment.

January 31, 1936.

L. A. KOENIG,

*District Attorney,*

Phillips, Wisconsin.

In your communication of December 16 you ask whether the words "proper proportional tax" and "proper charges" as used in sec. 75.61, subsec. (2), Stats., include such interest items as are payable upon redemption of taxes.

Sec. 75.61, subsecs. (2), Stats. provides:
“Whenever the county owns and holds tax certificates upon real estate and the owner of said real estate or any person, firm, association, or corporation holding a valid lien thereon shall claim the assessment of said real estate to be greater than the value that can ordinarily be obtained therefor at private sale, the respective town board, village board or city council where said real estate is situated may take proof under oath of the value of said real estate and make a finding thereon. Upon the filing of said finding with the county treasurer he shall accept from said owner or lien holder the proper proportional tax on said real estate based upon the value so found, together with the proper charges, as in the case of redemption of tax certificates, shall cancel said tax certificate, and shall give to said owner or lien holder a receipt for said tax.”

Tax statutes conferring special privileges, when open to construction, should be construed strictly against the privilege. Douglas County Agricultural Society v. Douglas County, 104 Wis. 429, p. 431.

As a general rule the statutes relating to delinquent taxes mention specifically the principal tax and the interest and charges thereon. See secs. 74.32, 74.33, 74.39, 75.07 and 75.62. Sec. 75.61, subsec. (2), Stats., does not mention specifically “interest” but refers to the “proper proportional tax * * * together with the proper charges.” The question arises as to whether “proper proportional taxes” means the total amount due, that is, principal taxes plus interest, or just the principal tax. In view of the rule of statutory construction above set forth we hold that “proper proportional tax” means the total amount due, taxes plus interest but exclusive of charges. Thus, the owner of real estate seeking relief under sec. 75.61 (2) must pay the county treasurer such part of the total taxes, interest and charges due as the found value of the property bears to the original assessment.

JEF
Education — School Administration — Supervising teachers are entitled to minimum salary prescribed by legislature.

January 31, 1936.

WENDELL MCHENRY,
District Attorney,
Waupaca, Wisconsin.

In your communication of December 12 you ask our opinion on the following: Under the provisions of sec. 39.14, subsecs. (2) and (7), Stats. (ch. 322, Laws 1935), the minimum salary for supervising teachers was changed from $1,000 to $1,200 per annum. The salary of such teachers in this county at the present time is $1,100. Demand has been made to pay these teachers the minimum fixed by the legislature from September 1 to date. Does the action of the legislature supersede the action of the county board so as to render the county liable for the difference in pay?

Supervising teachers are entitled to the minimum salary prescribed by the legislature.

Subsec. (1), sec. 39.14, Stats., provides that county superintendents shall employ supervising teachers. Subsec. (2) of said section provides that the county board shall fix the salary of supervising teachers, which salary shall not be less than $1,200 for ten months in each year.

In State ex rel. Harbock v. Mayor, 189 Wis. 84, our court held that the home rule amendment to sec. 3, art. XI, of the state constitution imposes no limitation upon the power of the legislature to deal with education, and this entire subject of education remains with the legislature. Counties are purely auxiliaries of the state and can exercise only powers conferred upon them by statute or necessarily implied therefrom. Spaulding v. Wood Co., —— Wis. ——, 260 N. W. 473. The statutes confer upon counties all the powers they possess, prescribe all the duties they owe, and impose all liabilities to which they are subject. Frederick v. Douglas Co., 96 Wis. 411.
Applying the above rules, the legislative enactments relating to supervising teachers supersede actions of the county board. The teachers in question are entitled to the salary prescribed by the legislature.

JEF

Indigent, Insane, etc. — Mothers’ Pensions — Social Security Law — Old-age Assistance — Aid to dependent children may be granted for support of minor child over sixteen years of age.

Counties need not prorate old-age assistance if full aid is not received from state. Word “shall” in sec. 49.38, subsec. (2), Stats., shall be construed to mean “may.”

January 31, 1936.

WILLIAM A. ZABEL,
District Attorney,
Milwaukee, Wisconsin.

Attention C. Stanley Perry, Assistant Corporation Counsel.

In your letter of January 7 you ask our opinion on the following:

“A is a dependent child over the age of sixteen years, but otherwise meeting the requirements of the definition of a dependent child found in section 48.33 (12). However, he is the only dependent child in the family in question.”

Your question is: Can the juvenile court, acting in its discretion, grant aid to A?

Aid to dependent children may be granted for the support of a minor child over sixteen years of age.

Sec. 48.33, subsec. (5), par. (a) (ch. 554, Laws 1935), provides:
"There must be one or more dependent children living with the person charged with their care and custody and dependent upon the public for proper support and who are under the age of sixteen; provided, that the court in its discretion may also grant aid for the support of minor children over sixteen, but in such cases the county shall not be entitled to any federal aid."

Sec. 48.33, subsec. (12), Stats., defines a "dependent child" to be a certain child under the age of sixteen years. As a general rule sec. 48.33 (5) (a) provides that aid may be granted for the support of dependent children. As an exception to this rule the court in its discretion may grant aid to minor children over sixteen years of age. This specific exception to the general rule gives a judge discretionary power to grant aid to minors over sixteen years of age.

You further call our attention to a conflict in the provisions of secs. 49.51, subsec. (4) and 49.38, subsec. (2), Stats. You ask whether it is mandatory that counties pro-rate old age assistance to recipients if the Secretary of State has prorated to counties the amount of aid due them from the state.

Counties need not pro-rate old age assistance if full aid is not received from the state. The word "shall" in sec. 49.38, subsec. (2) shall be construed to mean "may."

Secs. 49.51, subsec. (4) and 49.38, subsec. (2) Stats. provide:

49.51 (4) "Whenever the state shall prorate the appropriations for state aid for old age assistance, aid to dependent children, and blind pensions among the counties entitled thereto, the counties may reduce the amounts allowed to the beneficiaries in the following quarter, by the amount of the state and federal aid unpaid. Such reduction shall be made on a pro rata basis and shall apply until the state and federal aid is paid in full. The amount unpaid by the state shall remain as a charge against the state. Whenever the state shall reimburse the counties for this unpaid amount, the counties shall in turn pay the full amount to the beneficiaries entitled thereto."

49.38 (2) "On or before the twentieth day of January, April, July and October the secretary of state shall draw his warrant for reimbursement to the respective counties of
eighty per cent of the amounts paid by them as old-age assistance during the preceding quarterly period; provided that if the total amount payable to all counties under this section shall exceed the amount available for such quarterly period under the appropriation made in subsection (5) of section 20.18, the secretary of state shall prorate the amount available among the various counties according to the amount paid out by them respectively. Whenever the secretary of state shall prorate the amount available to the various counties, the counties in the next following quarter shall prorate to the recipients of old-age assistance such proportion of the amount allowed as the amount paid by the state bears to the full amount due from the state.”

Sec. 49.51 (4) relates to old-age assistance, aid to dependent children and blind pensions and provides that if the state prorates state aid the counties may prorate to recipients of such aids. Sec. 49.38 (2) relates only to old-age assistance and provides that if the state prorates state aid the counties shall prorate to recipients.

Sec. 49.38 (2) is a specific enactment relating to the subject of old-age assistance. Ordinarily, a specific provision in a statute relating to a subject prevails over a general provision. Applying such rule we would be compelled to hold that counties shall pro rate old-age assistance under sec. 49.38 (2).

However, such rule of statutory construction cannot be applied if the clear intent of the legislature is contrary to the result obtained by applying such rule. To determine the legislative intent we may resort to the legislative history of the enactments in question. Polzin v. Wachtl, 209 Wis. 289, 295 and 298.

Substitute amendment No. 1, S., to Bill No. 38, S. (1935), with amendments thereto became ch. 554, Laws 1935. This substitute amendment related only to old-age assistance. It contained sec. 49.38 (2) in the form in which it became law.

Amendment No. 2, S., to Bill No. 38, S. (as shown by said Substitute Amendment No. 1, S.), was introduced in the closing hours of the 1935 session. This amendment related not only to old-age assistance but also to aid to dependent children and blind pensions. It was intended to make such changes in our state law as were necessary to conform with
recent federal legislation relating to such subjects. The records of the legislative reference library (drafting department) show that the amendment when taken from the drafting department contained sec. 49.51 (4) in the form in which it became law, excepting that in place of the word “may” was the word “shall.” Thus, both sec. 49.38 (2) in Substitute Amendment No. 1, S., and sec. 49.51 (4) in said amendment No. 2, S., contained the word “shall.” Before introducing the same, the author, by a notation in his handwriting, changed the word “shall” to “may.” The amendment passed with such change. It seems obvious that the failure to change the word “shall” in sec. 49.38 (2) was an oversight and, considering the circumstances under which the bill was passed, an excusable one because sec. 49.38 (2) was not included in the amendment.

As the last evidence of the intent of the legislature shows that it intended that counties should have the right in their discretion either to prorate or to pay in full under the sections in question we hold that the word “shall” in sec. 49.38, subsec. (2), Stats., shall be construed to mean “may.”

JEF
Courts — Costs and Fees — Sec. 271.04, subsec. (1), Stats., as revised by ch. 541, Laws 1935, relates to statutory costs and does not limit attorney fees in foreclosure actions to one hundred dollars, nor does it invalidate clauses in mortgage contracts providing for stipulated sum as attorney's fees on foreclosure. Taxable costs and attorney fees are separate items.

February 5, 1936.

CHARLES L. LARSON,

District Attorney,

Port Washington, Wisconsin.

You call our attention to ch. 541, Laws 1935, which revises sec. 271.04, Stats., to read in part, as follows:

"When allowed costs shall be as follows:

"(1) Fees. When the amount recovered or the value of the property involved is one thousand dollars or over, the attorney fees shall be one hundred dollars; when it is less than one thousand dollars, but over two hundred dollars, the fees shall be fifty dollars; and when it is less than two hundred dollars the fees shall be fifteen dollars."

You inquire whether this provision limits the attorney fees in foreclosure actions to one hundred dollars, and if the effect of this section is to invalidate the provisions of a mortgage in case the amount specified in the mortgage for attorney fees exceeds the above sum.

We believe your inquiry should be answered in the negative.

It is our opinion that the purpose of the revision in question was to do away with the itemized costs formerly taxable under sec. 271.04, and substitute therefor a flat sum for statutory costs, depending upon the amount in controversy rather than upon the number of folios in the pleadings, the number of copies, and the nature of the instrument drafted, etc. It is well recognized by the legal profession that the old system of taxing costs was a rather cumbersome one, that it lent itself to abuse, and placed
a premium upon voluminous and repetitious pleadings, and that the amount of costs taxed as compared to the amount of money in controversy was often disproportionate and inequitable.

At this point it would be well to differentiate between the solicitor's fee and the taxable costs. Mortgages commonly contain a provision whereby the mortgagor agrees to pay "all expenses incurred for the purpose of the foreclosure suit, and in addition to the taxable costs in such suit, a reasonable sum of money as solicitor's fees to be included, with the expenses above mentioned, in the judgment or decree." In some instances there is a stipulated sum mentioned for solicitor's fees instead of a "reasonable" sum. It is to be noted that the compensation for the attorney is something over and above the expenses and taxable costs, although the taxable costs, other than actual disbursements are, in a sense, a form of compensation to the attorney, which the mortgagor agrees to pay, and we believe that it was in this sense that the words "attorney fees" were used in the revision of sec. 271.04, subsec. (1), Stats., as distinguished from the allowance of a reasonable or stipulated solicitor's fee in addition to the taxable costs.

Ch. 541, Laws 1935, was introduced in the legislature as a revisor's bill,—Bill No. 50, S., by the committee on judiciary. In a note on p. 1 of the bill it is stated that although the revisor of statutes takes full responsibility for the bill, he is able to say that he has had the counsel and co-operation of the advisory committee on rules and procedure (sec. 251.18) in the preparation of the bill. It is also stated in the note that where a change is made there is a note calling attention to the change and giving a reason therefor. Furthermore, the main purpose of the act is described in the following language in the note above mentioned.

"The purpose, in chief, is to make the statutes more clear, concise and compact; to plainly express the meaning which has been judicially attributed to various provisions; to strike out obsolete provisions and those which have been superseded or impliedly repealed or which are duplications; to supply omissions and defects and correct errors, and to modernize the phraseology."
At the bottom of p. 115 of this bill appears the following note:

"Note: (1) and (11) are now just as in R. S. 1858. No change whatever as to allowances. It is time to modernize 271.04. The last sentence of old (12) duplicates 271.03. See costs in supreme court, 271.35."

A glance at sec. 271.35, relating to costs in the supreme court shows such costs to be on a flat rate basis (except for the printing of cases and briefs) and it was apparently intended to revise sec. 271.04 along similar lines.

Sec. 271.04 before revision simply related to the subject of statutory costs, and we do not think that in its revised form it was intended to cover any different subject. The matter of statutory costs and the allowance of attorney's fees are two separate and distinct matters. For instance, it has been held in foreclosure cases that there can be no allowance as attorney fees in addition to those given by statute unless in pursuance of a stipulation in the mortgage. Wylie v. Karner, 54 Wis. 591, 12 N. W. 57. We take it, therefore, that in case the mortgage makes no provision for the allowance of a stipulated or reasonable attorney's fee the allowance, whether you call it attorney's fees or statutory costs, would be limited to the amount provided by ch. 541. However, if the mortgage contract calls for a stipulated attorney fee, the legislature would be powerless to change such fee, since to do so would impair the obligation of existing contracts in contravention of art. I, sec. 10, U. S. Const., and art. I, sec. 12, Wis. Const., and the same might be true even though the provisions were only for a reasonable attorney's fee, since there may well be cases wherein such statutory attorney fees as the legislature might set would, in fact, be entirely unreasonable.

We do not consider that it was the purpose of ch. 541 to change the existing law on the allowance of attorney's fees as distinguished from costs. In this connection we call attention to sec. (12) of the preface to the Wisconsin statutes wherein the revisor of statutes says:
“12. Construction of Revised Statutes. A major rule for the interpretation of revision acts is the reverse of the corresponding rule for construing other legislative acts. Disregard of this distinction often results in error. The general rule of construction of statutes is that every legislative act intends some change in the law; a change of language implies a change of law. That rule does not apply to the construction of revision acts. The rule there is to the contrary. As to acts which revise or restate the law there is the presumption that no change in substance was intended unless the change in language clearly indicates an intent to change the substance. * * *.”

Consequently, we would say here that the change of language that arises by the use of the words “attorney fees” in ch. 541 by no means implies any change in the existing law on the allowance of attorney’s fees, as distinguished from the allowance of statutory costs. It is to be remembered that attorney or solicitor fees and the taxable costs are allowed as separate items in the judgment where the mortgage provides for attorney fees and the two should not be confused.

We are authorized to state that the revisor of statutes concurs in the opinion herein expressed.

JEF

Public Health — Barbers — Beauty Parlors — Sec. 158.01, subsec. (1), par. (c), Stats., does not authorize barber to do finger waving; sec. 158.01, subsec. (14), par. (f), does not authorize cosmetician to cut hair of men and boys.

February 7, 1936.

Board of Health.

You inquire whether a licensed barber may do finger waving and whether a licensed cosmetician may cut the hair of boys or men.

We believe both questions should be answered in the negative.
Sec. 158.01, as created by ch. 467, Laws 1935, defines barbering as follows:

"Definitions. The following terms, whenever used in this chapter, shall have the meanings indicated as follows:

1. 'Barbering' is directly or indirectly engaged in any one of or any combination of the following practices for compensation:
   a. Shaving, trimming the beard or cutting the hair;
   b. Giving facial or scalp massages or treatments with oils, creams, lotions, or other preparations, either by hand or mechanical appliances;
   c. Singeing, shampooing, arranging, dressing, or dyeing of the hair, or applying hair tonics;
   d. Applying cosmetic preparations, antiseptics, powders, oils, clay or lotion to the scalp, face or neck."

The only words which might be broad enough to cover finger waving are the words "arranging" and "dressing" mentioned in par. (c), above. Finger waving consists of wetting the hair and shaping it in the form of a wave with the fingers. "Waving" of the hair appears to be the function of a cosmetician rather than the work of a barber. We believe the statutes bear out this distinction. Sec. 159.01, subsec. (1), defines the cosmetic art, as follows:

"'Cosmetic art' is the systematic massaging with the hands or mechanical apparatus of the scalp, face, neck, shoulders and hands, the use of cosmetic preparations and antiseptics; manicuring, bobbing, dyeing, cleansing, arranging, waving, curling and marcelling of the hair and the use of electricity for stimulating and for the removal of superfluous hair."

Note that the word "waving" is included in this definition and not in the definition of barbering quoted above. It is a principle of statutory construction that a specific statute prevails over a general one. Hence, we conclude that since "waving" is specifically covered by the statute definition of "cosmetic art," the general words "arranging" and "dressing" contained in the statutory definition of barbering, should not be extended by implication so as to include "waving."
We might also add that sec. 159.01, subsec. (11), par. (b), provides that the license requirements to practice cosmetic art shall not apply to barbers "licensed under the laws of this state, in the performance of the usual and ordinary duties of their vocation."

It is a matter of common knowledge that finger waving has not been one of the usual and ordinary duties of the barbering vocation in this country, nor do we understand that applicants for barbers' licenses are required to take any examination in finger waving, although applicants for licenses to practice cosmetic art are so examined.

Consequently, we conclude that a barber's license does not authorize him to do finger waving.

Sec. 159.01, subsec. (1), above quoted, also defines the cosmetic art as including "bobbing" of the hair. Sec. 158.01, subsec. (14), makes certain exceptions to the requirements for barber licenses, and provides in par. (f), thereof,

"But this subsection shall not be construed to authorize any of the persons exempted to shave or trim the beard or cut the hair of any person for cosmetic purposes, excepting, however, that persons licensed pursuant to chapter 159 may bob, shape, thin, singe and shampoo hair in addition to the rights and privileges conferred in chapter 159."

Apparently this provision was intended to draw a distinction between cutting hair and bobbing hair, and it seems to have been the legislative intent that a cosmetician may bob hair, but not cut hair. It may not be easy to draw the dividing line between these two operations in all cases, but we do believe that the two terms have come to have fairly common and approved meanings. No man or boy of any size would speak of having his hair "bobbed." After the childhood curls have once been removed and the hair has once been cut short, the boy or man speaks of having his hair "cut"—never "bobbed." On the other hand, when the women, a few years back, decided to forego a part of their crowning glory, the operation was referred to as "bobbing," and today the word "bobbing" has been restricted pretty much to the cutting of women's and girls' hair, and
perhaps, also, the hair of boy babies whose mothers sometimes prolong the period of baby curls to the advanced age of four or five, unless the boy's masculinity rebels at such treatment at an earlier age.

In view of the foregoing we are constrained to rule that a cosmetician may not cut the hair of boys and men.

JEF

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Corporations — Municipal Power Districts — Required number of voters' signatures under sec. 198.03, subsec. (2), Stats., need not be filed at one and same time.

Voter may not withdraw his signature to petition for creation of power district after county clerk has notified public service commission in accordance with sec. 198.04, subsec. (1).

February 8, 1936.

PUBLIC SERVICE COMMISSION.

In your communication of February 5 you ask opinion upon the following:

On January 17 the county clerk of Lincoln county advised you that petitions signed by a sufficient number of voters in the listed municipalities in Lincoln county, pursuant to sec. 198.03 (2), had been filed with him, petitioning him to call an election to determine whether a municipal power district should be created. On January 29 he advised you that of the total number of signatures on the petitions, namely 889, 301 had been withdrawn, which left a total of 588. The record in the secretary of state's office indicates that there were approximately 7,900 votes for governor in the districts set out in the petitions, and the 588 after withdrawal is, therefore, less than the ten per cent which the statute requires:

The district attorney of Lincoln county has advised you that the great majority of signatures to the petitions filed
with the county clerk of Lincoln county were filed early in 1935, and that several petitions were invalidated because of a defect in the procedure followed. These petitions were then withdrawn and the matter has been dormant until December, 1935, when additional names were filed and counted along with the petitions filed early in 1935 to make up the total required by statute.

You say that two questions arise in connection with this matter:

"(1) Can the names obtained in December, 1935, be properly added to the names obtained in April, 1935, for the purpose of making up the required number of names under the statute? * * *

"(2) The county clerk has certified that a sufficient number of names were on these petitions for him to proceed in the manner required by statute as of the date he made the certification to us, which certification brought us officially into the picture. Do the withdrawals of a number of names sufficient to reduce the signatures to below the necessary number automatically withdraw the certification by the county clerk and at the same time take the matter out of our province? In other words, is there before us at the present time a certification which requires us to proceed to make a finding as to the feasibility of the project?"

Secs. 198.03, subsec. (2) and 198.04, subsecs. (1) and (2), Stats., provide as follows:

"Sec. 198.03 (2). In lieu of the resolutions provided for by subsection (1) of this section, a petition may be presented to the county clerk of said county signed by at least ten per cent of the voters in said proposed district. Such petition shall declare that, in the opinion of the petitioners, public interest or necessity demands the creation and maintenance of a municipal power district. The petition may be on separate sheets of paper, but each sheet shall contain the affidavit of the person who circulated the same, certifying that each name signed thereto is the true signature of the person whose name it purports to be."

Sec. 198.04 (1). "Upon receipt of the certified copies of resolutions or the petitions mentioned in section 198.03, such county clerk shall forthwith notify the public service commission in writing that the municipalities filing said
resolutions or those named in said petition as constituting the proposed power district had petitioned him to call an election without delay for determining whether such district should be created.

“(2) Within ninety days after receipt of said notice of the county clerk the public service commission shall file in writing with said clerk its recommendations as to the feasibility or nonfeasibility of the proposed district with reasons therefor. Certified copies of such recommendations shall at the same time be filed by the commission with the clerk of each municipality included within said proposed district.”

It appears from the facts submitted that some of the required number of signatures of voters were filed with the clerk in April, 1935, and the balance in December of the same year. From the very nature of any proceedings requiring a petition signed by voters there will be a considerable lapse of time intervening between the time such petition is first circulated and the time the required number of signatures is obtained. In the present case some of the first signatures were withdrawn because of invalidity of the proceedings. Then additional petitions were circulated. In view of the express legislative intent in subsec. (7), sec. 198.06, Stats., the statutes relating to the procedure required in the formation of a power district should be liberally construed. XXIV Op. Atty. Gen. 185. It is our opinion that your first question should be answered in the affirmative.

You further ask whether a voter may withdraw his name from a petition after the clerk has notified the public service commission in accordance with sec. 198.04, subsec. (1). After such notice is given to the public service commission the commission must make its written recommendation to the clerk as to the feasibility or nonfeasibility of the proposed district. Upon receipt of such recommendation the clerk, without delay, must call an election. All the steps as outlined in sec. 198.04, Stats., are mandatory. Therefore, it is our opinion that a voter may not withdraw his signature from a petition after the clerk has issued his notice to the commission in accordance with the statute.
From the above it follows that your commission now has before it a certification which requires the report specified in sec. 198.04, subsec. (2).

JEF

Courts — Justice of the Peace — Cutting Timber or Christmas Trees — Justice of the peace has probably no jurisdiction to try and hear cases involving violations of ch. 107, Laws 1935.

February 10, 1936.

ROBERT A. NIXON,
District Attorney,
Washburn, Wisconsin.

You inquire under date of January 10 whether a justice of the peace has jurisdiction to hear and try cases involving violation of ch. 107, Laws 1935.

Subsec. (2), sec. 331.175, created by ch. 107, contains the following:

"Any person who fails to send such notice as in this section required shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than twenty-five dollars or imprisoned in the county jail for not less than twenty days."

You will note that where imprisonment is provided for only the minimum twenty days is prescribed but no maximum. In 16 C. J. 1351, it is provided:

"* * * a statute which fails to fix the maximum is unconstitutional [citing State v. Dunson, 138 La. 131]. However, a statute is not unconstitutional because it fails to limit the maximum punishment which may be imposed by the court, where there is a general statute which fixes the maximum [citing Palmer v. State, 168 Ala. 124, 53 S. 283; State v. Kight, 106 Minn. 371, 119 N. W. 56]."
On page 1352 of 16 C. J. it is provided:

"* * * In the absence of a constitutional requirement, a statute which fixes merely a minimum penalty is not invalid, since the penalty to be imposed is within the discretion of the legislature [citing Palmer v. State, 168 Ala. 124, 53 S. 283; Myers v. State, 51 Tex. Cr. 463, 103 S. W. 859]."

The justices of the peace have jurisdiction to determine all prosecutions for offenses arising within their respective counties the punishment of which does not exceed six months' imprisonment in the county jail or a fine of one hundred dollars, or both such fine and imprisonment, except as otherwise provided. Sec. 360.01 (5), Stats.

Sec. 353.27 provides:

"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 two hundred and fifty dollars."

While a definite answer cannot be given to you on the question submitted for the reason that our court has not definitely passed upon the question to our knowledge, it is our opinion that our court may hold that the penalty prescribed in said ch. 107, Laws 1935, is void for the reason that no maximum punishment is prescribed and therefore the penalty fixed by sec. 353.27, Stats., would be applicable. If the court follows that reasoning, then a justice of the peace will have no jurisdiction, as the penalty prescribed in sec. 353.27, Stats., is beyond the jurisdiction of the justice of the peace.

JEF
Courts — Practicing Law without License — Notice to debtor by agent who is not attorney at law to appear before him and pay certain bill, saying that if he fails to do so action will be commenced against him, is not violation of any statute.

February 10, 1936.

WILLIAM H. STEVENSON,
District Attorney,
La Crosse, Wisconsin.

You have submitted a notice to a debtor which was sent by an agent who does not purport to be an attorney. This notice advises the debtor to appear before such agent to settle a claim and further advises him that if he does not appear, he, the agent, will bring action on the claim in court. You inquire whether this is in violation of any law.

We do not know of any law that the agent violates as he does not represent himself to be an attorney at law. Bearing in mind the provisions of sec. 256.30, Stats., subsecs. (2) and (3), which must be construed in harmony with art. VII, sec. 20, Wis. Const., which reads,

"Any suitor, in any court of this state, shall have the right to prosecute or defend his suit either in his own proper person, or by an attorney or agent of his choice,"

we do not believe that any valid statute of this state is violated by the notice above referred to.

JEF
Banks and Banking — Escheat of Bank Deposits —
Under sec. 220.25, subsec. (3), par. (e), Stats., it is optional with bank whether it publishes notice in one newspaper of general circulation for four consecutive weeks or notice in four different newspapers of general circulation in said county for each of four consecutive weeks.

February 12, 1936.

BANKING COMMISSION.
Attention H. F. Ibach, Commissioner.

You state that sec. 220.25, subsec. (3), par. (e), Stats., provides that certain reports and notices regarding unclaimed bank deposits be published once each week for four consecutive weeks in a newspaper of general circulation in the county where the bank is located.

Upon the foregoing statement of facts you ask the following:

"Is it permissible for this required publication to be made in more than one paper of general circulation in the county?
"For example, in a county with four or more newspapers of general circulation, could a bank publish this notice in different papers on each of the four consecutive weeks?"

The material provisions of sec. 220.25, (3) (e), Stats., as created by ch. 294, Laws 1935, are as follows:

"A copy of the reports required by paragraphs (c) and (d), together with a notice directed to whom it may concern, stating that such deposits or property have been unclaimed for a period of ten or twenty years, as the case may be, and requesting all persons having knowledge or information relative to the whereabouts of such depositors or other possible claimants to give such information to the subscribing officer, shall be displayed in a prominent place in such bank for a period of thirty days from the date of the filing of such report, and in cases provided by paragraph (c), a copy of such report and notice shall be published once each week for four consecutive weeks in a newspaper of general circulation in the county where such bank is located, and the expense of publication shall be deducted proportionately from such deposits."
It is manifest that the requirements of the statute are twofold: (1) that the report shall be published once each week for four consecutive weeks, and, (2) that the publication be in a newspaper of general circulation in a county where such bank is located.

It would seem that, in view of sec. 370.01, (2), relating to construction of statutes and rules therefor, which provides, in part,

"Every word importing the singular number only may extend and be applied to several persons or things as well as to one person or thing * * *

that sec. 220.25, (3) (e), should be construed to permit the publication in a county with four or more newspapers of general circulation of the notice required therein in different papers on each of the four consecutive weeks.

In other words, it is optional with the bank whether it publishes the notice in one newspaper of general circulation for four consecutive weeks, or whether the bank publishes the notice in four different newspapers of general circulation in said county for each of the four consecutive weeks.

JEF
Appropriations and Expenditures — Mileage — Public Officers — County Board — County Board Committee — County board members are not entitled to mileage for each day while attending annual or special meeting of board.

Members of county board committee are entitled to mileage for each day of committee attendance.

In counties containing population of one hundred thousand or more and less than two hundred fifty thousand annual salary provided county board members under sec. 59.03, subsec. (2), par. (f), Stats., does not include payment for services on highway committee.

February 17, 1936.

LYALL T. BEGGS,
District Attorney,
Madison, Wisconsin.

In your letter of January 10 you ask whether members of the county board and county board committees other than the highway committee are entitled to mileage for each day of meeting of the board or a committee.

County board members are not entitled to mileage for each day while attending an annual or special meeting of the board.

Members of county board committees are entitled to mileage for each day of committee attendance.

That board members are not entitled to mileage for each day while attending the annual meeting of the county board has been held in XXIV Op. Atty. Gen. 805. That members of the county board committees are entitled to mileage for each day of committee service is clear from the wording of sec. 59.06, subsec. (2), Stats. This subsection reads in part:

"* * * The number of days for which compensation and mileage may be paid a committee member in any one year, * * * are limited as follows: * * * ."

As indicated, the number of days for which mileage may be allowed is limited by pars. (a) and (b) of said subsection as amended by ch. 236, Laws 1935.
You further call our attention to ch. 407, Laws 1935, and ask whether the last sentence of the new material created by this chapter affects the manner in which members of the Dane county highway committee are to be compensated.

Ch. 407, Laws 1935, amended sec. 59.03, (2) (f), by adding at the end thereof the following:

“As an alternative method of compensation, any county board in counties having a population in excess of twenty-five thousand which is subject to the provisions of this subsection, may at its annual meeting, by a two-thirds vote of members elected, fix the compensation of the members of such board to be elected at the next ensuing election at an annual salary not to exceed five hundred dollars which shall be in full for all services for the county including all committee service under section 59.06, and subsection (1) of section 82.05, except that such members shall be entitled to mileage. The provisions of subsection (1) of section 82.05, however, shall not apply to any county containing a population of more than one hundred thousand.”

Said amended paragraph applies only to counties having a population of less than two hundred fifty thousand. Dane county has a population of more than one hundred thousand and less than two hundred fifty thousand and, therefore, is within the application of the last sentence of the above-quoted addition to said paragraph.

The material inserted by the 1935 legislature briefly provides that counties with a population in excess of twenty-five thousand, as an alternative method of paying county board members, may pay an annual salary of not more than five hundred dollars. Such annual salary shall be in full payment for services on the county board and for all committee services, including services on the highway committee. The last sentence of this new material is most confusing. If interpreted literally it would confuse greatly sec. 82.05, subsec. (1), Stats., relating to the highway committee. Considering the new material as a whole, the provisions of sec. 82.05, (1), and what appears to be the intent of the legislature, we conclude that said last sentence means as follows:
"In counties containing a population of one hundred thousand or more the annual salary provided under this alternative method shall not include payment for services on the highway committee."

This construction is apparent if the first three words of said sentence are changed to read "The reference to" in lieu of the words "The provisions of."

JEF

School Districts — Rural Schools — Sec. 40.225, subsec. (1), Stats., as amended by ch. 49, Laws 1935, makes it mandatory to offer two years of instruction beyond eighth grade in certain school districts.

February 17, 1936.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

You ask our opinion upon the following: Sec. 40.225, subsec. (1), Stats., as amended by ch. 49, Laws 1935. Is it now mandatory to offer two years of instruction beyond the eighth grade in the cases indicated in that amended subsection?

Sec. 40.225, (1), as amended by ch. 49, Laws 1935, makes it mandatory to offer two years of instruction beyond the eighth grade in certain school districts.

Sec. 40.225, (1), as amended, reads:

"All school districts which do not maintain a high school and all of whose territory is outside of the limits of any union free high school district and which in the preceding school year had an average daily attendance of not more than fifteen grade pupils and whose teacher has the qualifications required for a first grade county certificate or some form of state certificate shall offer two years of instruction beyond the eighth grade. Any other school district not maintaining a high school and all of whose territory is outside of the limits of a union free high school district and
which has a teacher with the qualifications required for a first grade county certificate or some form of state certificate may offer such advanced instruction beyond the eighth grade in its common or graded school. Such course of instruction shall 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. The provisions of this section shall not apply to state graded schools of the first class and shall be optional with state graded schools of the second class."

The language of this statute is clear and unambiguous. Consequently there is no room for construction and it must be enforced according to its words. State ex rel. Weller v. Hinkel, 136 Wis. 66, 116 N. W. 639; Nordean v. Minn., St. P. & S. S. M. R. Co., 148 Wis. 627, 135 N. W. 150.

The words "shall" and "may" must be given their ordinary meaning unless such construction would manifestly defeat the object of the statute. Equitable Life Ass. Soc. v. Host, 124 Wis. 657, 673.

In the above statute it is obvious that the words "shall" and "may" were used discriminately. In the first sentence of the subsection the word "may" in the old statute was changed to the word "shall." The same procedure was followed in the third sentence and in the amendment to subsec. (2) of said section. In the second sentence the word "may" was as obviously intended in the permissive sense, as the very content of the sentence presents a different set of facts than in the first sentence.

It will be noted that it is mandatory to offer a two-year course of study beyond the eighth grade only in those districts to which the facts in the first sentence apply. Also note the exception in the last two sentences of subsec. (1).
You further ask what courses must be offered in such two years of study to entitle a district to state aid under sec. 20.28.

The third sentence of subsec. (1) specifically designates the courses which shall be offered and the courses which may be offered. Such part of the permissive courses must be made available as will enable a pupil to be enrolled in at least three courses in accordance with subsec. (4), sec. 40.225. The amount of aid and the conditions upon which it shall be given are clearly set forth in said subsec. (4).

JEF

Constitutional Law — Corporations — Motor Vehicle Dealers — Par. (g), subsec. (7), sec. 218.01, Stats., created by ch. 474, Laws 1935, is valid and reasonable exercise of police power and hence is constitutional enactment.

February 17, 1936.

DIVISION OF CONSUMER CREDIT,

State Banking Department.

You have called our attention to par. (g), subsec. (7), sec. 218.01, Stats., as created by ch. 474, Laws 1935, and you inquire as to its constitutionality.

This paragraph reads as follows:

"It shall be unlawful for any motor vehicle dealer or motor vehicle salesman to change the speedometer reading of any used vehicle offered for sale."

It is our opinion that this section is constitutional in that it is a reasonable and valid exercise of the police power, since its apparent purpose is to prevent fraud and deception in the sale of used cars. The end for which such power is exercised seems to be a public one, and the means em-
ployed are reasonably adapted to the accomplishment of the end and are not arbitrary or oppressive.

It has frequently been held that one of the legitimate objects of the exercise of the police power is the prevention of fraud and deception. *Armour & Co. v. N. Dakota*, 240 U. S. 510, 60 L. ed. 771, Ann. Cas. 1916D, 584 (1915); *State v. Hutchinson Ice Cream Co.*, 168 Iowa 1, 147 N. W. 195, L. R. A. 1917B, 198 (1914); *People v. Dehn*, 190 Mich. 122, 155 N. W. 744 (1916); 12 C. J. 920, sec. 429; 6 R. C. L. 203, 208, secs. 199 and 202.

Examples of this are to be found in sec. 352.08, Stats., prohibiting false branding of weight, measure, count or contents of packages of food and ch. 125, Stats., regulating weights and measures. If, for instance, the state prohibits the offering for sale as milk bread any bread unless all the fluid used in the preparation of such bread is milk or contains milk solids and milk fats in certain proportions, as was done by sec. 125.22, by analogy it would seem that the state could likewise prohibit the offering for sale of a used car as a car with ten thousand mileage, a car which had actually traveled fifty thousand miles. Public health is involved in one instance and public safety in the other, although there may be difference in degrees.

Another good example is to be found in sec. 343.413, Stats., which prohibits fraudulent advertising. We see no reason why the same plan cannot be carried over to prohibit the implied misrepresentation as to the mileage of a car which occurs when the dealer turns back the speedometer reading on a used car offered for sale. That such practice is fraudulent and deceptive can hardly be denied, although in the past the practice has been so common that the alert purchaser of used cars has come to pay little attention to speedometer readings. It is also true that there may be evasions of the statute in question in one form or another and that there will be some difficulty of enforcement, but these are not matters which go to the question of constitutionality unless it can clearly be shown that the means sought to accomplish the end which the legislature here had in view are unreasonably adapted to the accomplishment of such end.

JEF
Counties — County Board — Indigent, Insane, etc. — Poor Relief — County board is not authorized to pay to towns balance of county relief funds upon changing from county to unit system of relief.

February 17, 1936.

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

You ask our opinion on the following:

“Our county has been operating on the county system of relief. The county board has voted to return to the unit system on April first. It appears there will be a balance of money in the county relief funds on said date. Has the county board power to distribute such money to towns in the county in proportion to the assessed valuation at the time the tax was levied?”

The county board is not authorized to pay to towns the balance of county relief funds upon changing from the county to the unit system of relief.

“'Counties are purely auxiliaries of state and can exercise only powers conferred on them by statute or necessarily implied therefrom.' Spaulding v. Wood County, — Wis. __, 260 N. W. (adv. sheets) 473 (syllabus).

“In the case of Frederick v. Douglas County, 96 Wis. 411, our court said on page 417, quoting from 1 Dillon, Mun. Corp. (4th ed.), sec. 25:

"'* * * 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. * * *.'" XXIV Op. Atty Gen. 429.

We have been unable to find any statute which would authorize the county, either expressly or impliedly, so to remit its surplus relief money. On the contrary, the supreme court in Town of Crandon v. Forest Co., 91 Wis. 239, 243, said in part:
“We have not been referred to any statute expressly or by fair implication authorizing the county board to remit or cancel a valid tax. The powers of the county board are statutory, and it has no common-law authority and no implied powers except such as are fairly incident and reasonably necessary to the exercise of its express powers.

* * *

In view of the above decisions we hold that your question must be answered in the negative.

JEF

Elections — Nominations — Petition presented under sec. 5.025, Stats., need not have attached thereto affidavit verifying signature on petition.

It is duty of city clerk to pass upon sufficiency of petition presented under sec. 5.025.

February 17, 1936.

JACOB A. FESSLER,
District Attorney,
Sheboygan, Wisconsin.

You inquire whether it is necessary that a petition presented under the provisions of sec. 5.025, Stats., requesting a city primary election, have attached thereto an affidavit specifying that the persons signing the petition are duly qualified electors.

Your question is answered in the negative.

Sec. 5.025 provides 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."

It will be noted that this section does not state that an affidavit must be attached to the petition and there is no authority for reading into the statute such a requirement. Were it not for the fact that other sections of the statute require such an affidavit to be attached to certain other types of petitions, probably no question would have been raised as to the necessity of such an affidavit to a petition presented under sec. 5.025. In at least three other places, namely, secs. 5.05, subsec. (5), par. (b), 5.26, subsec. (3) and 10.43, subsec. (2), the legislature has provided for verifications. It is not to be presumed that the legislature omitted such a requirement from the petition under sec. 5.025 through inadvertence, but that such omission was intentional.

Under sec. 370.01, subsec. (1),

"All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law shall be construed and understood according to such peculiar and appropriate meaning."

The only word in sec. 5.025 which might be construed as having a special meaning is the word "petition." In standard dictionaries and in 48 C. J., page 1052, a petition is described as a request in writing. It has also been defined by the courts as a request in writing, in Shaft v. Phoenix Mutual Life Ins. Co., 67 N. Y. 544, in Feustermacher v. State, 25 Pac. 142, and in Bergen v. Jones, 45 Mass. 371. In Davis v. Henderson, 104 S. W. 1009, a petition was held to be a formal written request or prayer for a certain thing to be done, the signers of which attach their signatures voluntarily. See also Schumacher v. Byrne, 237 N. W. 741.

The petition which prompted your question commences as follows: "We, the undersigned, qualified electors * * * ,"
following which there appears the name and address of each petitioner, together with the date of his signature. It would appear that the petition was fair upon its face and that the presumption should be that the signers actually were qualified electors. In construing statutes regulating elections, moreover, the courts must keep in mind that the object of elections is to ascertain the popular will, and the object of the laws is to secure the rights of duly qualified electors. *State v. Anderson*, 191 Wis. 938. A strict construction of a statute relating to elections which would defeat the will of the electors is to be avoided. *Manning v. Young*, 210 Wis. 588. We see no reason why the same liberal rule would not apply in construing other statutes seeking to give the electors an opportunity to express the popular will. Consequently, it is our opinion that a petition presented under the provisions of sec. 5.025 need not have attached thereto a verification in the form of an affidavit in order to be valid.

You also inquire whether the city clerk must check a petition presented under the provisions of sec. 5.025 and decide upon its sufficiency.

This question is answered in the affirmative. Sec. 10.33 provides:

"Except as otherwise provided, the clerk of every city, village or town, other than cities having more than one hundred thousand inhabitants, shall have general charge and supervision of the conduct of elections and registrations within said municipality. He shall perform the following duties, and such other duties as may be imposed upon him by law, or as may be necessary for the proper conduct of elections and registrations:

"* * *"

"(6) To review, examine and certify the sufficiency and validity of petitions and nomination papers."

The fact that a petition presented under sec. 5.025 does not have thereto attached a verification as to the signatures upon it, perhaps places more responsibility upon the city clerk in deciding upon the sufficiency of the petition. This difficulty, however, is one of an administrative rather than a legal nature.

JEF
Bonds — Municipal Corporations — Taxation — Special Assessments — When special assessments securing bonds are turned over to county treasurer for credit in lieu of cash, county becomes owner of such special assessments and is entitled to collections thereon.

When special assessments securing bonds are turned over to county treasurer for credit in lieu of cash, cash credit retained by municipality is trust fund for bondholders.

February 17, 1936.

WILLIAM H. FREYTAG,
District Attorney,
Elkhorn, Wisconsin.

In your communication of December 16, 1935, and subsequent correspondence per our request, you submit the following facts for our opinion:

On August 13, 1926, and May 20, 1927, a city issued respectively water and sewer special assessment bonds and paving special assessment bonds. In settling with the county treasurer for the tax rolls for the years 1932, 1933 and 1934 the city turned over to the county treasurer its delinquent rolls including special assessments for water, sewer and paving and was given full credit for the same. The county treasurer has not collected enough of the delinquent rolls of the city to pay the county's share of the said city's roll for any of said years. However, he has collected a certain amount of the special assessments.

1. Before the county's share of the city's roll is satisfied by collections on these delinquent rolls by the county treasurer is the treasurer obligated to pay the collections made on the special assessments to the said city?

2. Is the county treasurer obligated upon demand to pay over to the bondholders whose bonds are secured by the special assessments all of the money collected by him on such assessments?

When special assessments securing bonds are turned over to the county treasurer for credit in lieu of cash, the county becomes the owner of such special assessments and is entitled to the collections thereon.
When special assessments securing bonds are turned over to the county treasurer for credit in lieu of cash the cash credit retained by the municipality is a trust fund for the bondholders.

The special assessment laws have undergone frequent legislative changes during the past few years. To give meaning to our answers to your inquiries we find it necessary to examine briefly the recent history of the statutes relating to special assessments.

The 1923 statutes, secs. 62.20 and 62.21, provided two methods of financing special improvements; namely, by contractor’s certificates and special improvement bonds. Generally speaking the certificates and bonds were a lien on particular property, and carried with them all the municipality’s interest in the special assessments levied for their payment. The city and county acted as agent for the collection of the special assessments, and the moneys collected were trust funds. The bonds were subject to foreclosure as real estate mortgages. Tax certificates taken by a county upon sale for failure to pay the assessments in reality were the property of the certificate holders. United States National Bank v. Lake Superior T. & T. Ry. Co., 170 Wis. 539; State ex rel. Donnelly v. Hohe, 106 Wis. 411; XIV Op. Atty. Gen. 382; XVI Op. Atty. Gen. 775.

Ch. 342, Laws 1925, made substantial changes in the law relating to the financing of special improvements in a manner other than by contractor’s certificates. This chapter provided that special assessments may be paid in annual instalments; that bonds may be issued, payable only out of such instalments; that paid instalments be kept in a special fund constituting a trust fund; that the bonds were in the nature of “blanket” bonds upon the collections from an entire improvement and were not a bondholder’s lien upon a particular property; that the lien of the special assessment became the lien of the municipality issuing the bonds; that the bond issue shall not exceed ninety per cent of the special assessments and that the municipality may replenish deficiencies in the special bond fund by transfers from its general or other special fund. The effect of this change was to make the municipality the owner of the special assess-
ments, but all collections were to be held in trust and paid to the bondholders.

Ch. 406, Laws 1927, again changed sec. 62.21, Stats., relating to instalment assessments and bonds. The underlying principle of the new bond provisions seems to be the same as the 1925 law; that is, the assessments are owned by the municipality but the collections thereon are trust funds. This chapter further provided that bonds may be issued in an amount equal to one hundred per cent of the assessments and that such bonds may be secured by assessments on a particular property or an entire project. It further was provided that uncollected special assessments "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." This language seems to give municipalities power to return special assessments to the county for credit and to retain cash in lieu of such returned assessments.

Ch. 472, Laws 1929, provided that delinquent special assessments which have been returned to the county treasurer for credit may be charged back to the municipality at the end of three years. It gave municipalities authority to order a special sale of certificates charged back to them, said sale price to be equal to or less than the face of the certificates. The municipality further was authorized to bid at such special sale. Such provisions clearly demonstrate that the special assessments are considered the property of the municipality or the county, depending on their treatment, and not the property of the bondholders. However, the municipality is a trustee for the bondholders of all collections from the assessments.

Ch. 194, Laws 1931, amended sec. 62.21 (2) (a), Stats., relating to bonds, and provided that the city may levy a general tax not exceeding ten per cent of the special assessments due in the current or subsequent tax rolls for the purpose of purchasing delinquent special assessment certificates at the county tax sale. It further provided that land acquired by tax deed by the city-purchaser of such certificates be exempt from further taxes. This again indicates that the city and not the bondholder is the owner of the special assessments.
Ch. 179, Laws 1933, permitted a municipality to return delinquent special assessments to the county in trust for collection, in which case they shall not be charged back at the end of three years.

Ch. 201, Laws 1935, provided that when delinquent special assessments have been charged back to a municipality the county treasurer, upon demand, shall assign the certificates to such municipality. The municipality in turn is empowered to sell or hypothecate the certificates.

The bonds in question were issued in 1926. As indicated in the above brief historical sketch such bonds were "blanket" bonds secured by the collection of special assessments on an entire improvement; the lien of the special assessments belonged to the city, but the city was obligated to keep all collections in a special trust fund for bondholders. The bondholders in question did not have a specific lien on the property subject to assessment nor did they become the owners of tax certificates issued upon tax sale of such delinquent special assessments. The statutes gave to the bondholders in question no right of foreclosure. However, the bondholders did have a right to all collections made on such assessments, the city collecting and holding the same in trust.

In the present case the city returned special assessments securing such bonds to the county treasurer and received full credit for them. This, in effect, was a sale to the county. The city retained, as payment for the assessments, cash which it otherwise would have been obligated to return to the county. The cash retained by the city became a trust fund for the bondholders. Sec. 62.21 (2) (d), Stats., specifically provides that all moneys collected on such assessments "shall be kept in a separate fund appropriately designated and used only for the purpose of paying the principal and interest of such bonds until all such bonds are fully paid." The city in its trust capacity was obligated to pay the bondholders the cash it withheld from the county as payment for the assessments.

The county having purchased the assessments, it became the owner thereof and consequently all collections therefrom. See sec. 74.19 (3) of the 1931 statutes as amended

From the above rules it follows that in answer to your questions the county treasurer is neither obliged to pay the collections on the special assessments to the city nor to the bondholders. The bondholders have a right to collect from the city that received credit for such assessments from the county. That city has, or should have, the necessary money in its special assessment fund.

The above statements relative to the county's ownership of the assessments and the collections therefrom are based upon the assumption that the city was authorized to return the assessments to the county in lieu of cash and that the county was authorized to accept them on the same basis. Whether or not such authority existed with reference to the assessments in question, we believe the city is liable as it actually retained cash which should have been paid to the bondholders. But the bonds and assessments in question were issued in 1926. Prior to the effective date of ch. 406, Laws 1927, the law did not authorize municipalities to return special assessments to the county for credit in lieu of cash. Prior to said effective date special assessments were returned in trust and the collections were kept in a separate fund and returned to the city for the bondholders.

Ch. 406, Laws 1927 (sec. 62.21 (1) (d), Stats.), provided that delinquent special assessments shall be returned to the county treasurer “and accepted and collected by the county in the same manner as delinquent general taxes on real estate.”

Ch. 472, Laws 1929, provided in part:

62.21 (1) (h) 1. "All special assessments and instalments of special assessments which are returned to the county treasurer as delinquent by any city, town or village treasurer and accepted by the county treasurer in lieu of cash, under paragraph (d) of subsection (1) of this section, shall be set forth in a separate column of the delinquent return and shall likewise be plainly distinguished in such return from special assessments or instalments of special assessments issued under laws prior to the passage and publication of chapter 406 of the laws of 1927. * * *"
This provision apparently interprets sec. 62.21 (1) (d) to mean that special assessments shall be returned to the county treasurer as general taxes in lieu of cash. It is our opinion that if the city has not made sufficient collections to retain cash for the returned special assessments, such assessments must be returned in trust for collection. Otherwise the rights of bondholders to the collections would be greatly impaired because the county is authorized to satisfy its roll out of the first collections of a delinquent roll. The quoted portion of ch. 472, Laws 1929, further seems to imply that special assessments or instalments thereof issued prior to the effective date of ch. 406, Laws 1927, are not eligible to be returned for credit in lieu of cash. We cannot find that the courts so have held, but understand that the general practice has been to disallow credit for special assessments that were issued prior to ch. 406, Laws 1927. If such is the correct interpretation of the law the county treasurer had no authority to allow credit in lieu of cash for the assessments in question. Such assessments should have been received by said treasurer in trust for collection. All collections therefrom should have been returned to the city for the bondholders. Therefore, it is possible that the bondholders, in addition to their right of action against the city, should compel the county treasurer to turn over to the city the collections from such assessments. The county, it is true, has already given credit to the city, but it would have its right to an adjustment with the city.

JEF
Insurance — Municipal Corporations — Firemen's Pension Fund — Cities maintaining paid fire department shall have firemen's pension fund. All moneys received by such cities under two per cent of insurance premiums provision of sec. 201.59, Stats., shall be paid into such pension fund.

February 17, 1936.

INDUSTRIAL COMMISSION.

You ask our opinion upon the following:

"In a number of Wisconsin cities are fire departments, in which two, four or more members are hired and paid for full time service as firemen, while other members of the same fire departments are volunteers or call-men, rendering fire department service only at times of fires, on special call by the chief of the fire department or by regular established fire alarm system, and are paid only for such occasional fire service.

"Question 1: Are cities having such part paid fire departments obliged to establish and maintain a pension fund in favor of the full paid members of such departments under the provisions of sec. 62.13 of the Wisconsin statutes?

"Question 2: If Question 1 is answered in the affirmative, then must the entire two per cent fire department dues paid to such city under the provisions of section 201.59 of the Wisconsin statutes be placed into the pension fund for the benefit and protection of such full-time members of the fire department, even though in practice in the past, part or all of such fire department dues have been used to pay the volunteers or call-men rendering fire department service only occasionally on special call?"

Cities maintaining a paid fire department shall have a firemen's pension fund. All moneys received by such cities under the two per cent of insurance premiums provision of sec. 201.59, Stats., shall be paid into such pension fund.

Sec. 62.13, subsec. (10), par. (a), Stats., provides in part:

"Each city having a paid fire department shall have a firemen's pension fund. There shall be paid into such fund the following: Receipts from taxation of fire insurance companies or agents; one per cent of the salary of each member of the department; * * *"
Sec. 201.59, subsec. (1), provides in part:

“Every city, village or town maintaining a fire department, as herein provided, shall be entitled, for the support thereof, to two per centum upon the amount of all premiums which, during the preceding calendar year, shall have been received by, or shall have been agreed to be paid to any company, for insurance, including property exempt from taxation, against loss by fire in such city, village or town.”

Subsec. (8), sec. 62.13, authorizes the city council to provide for either a paid or a voluntary fire department. The wording of this subsection recognizes that a paid department may have part- and full-time members. Your statement of facts clearly indicates that the cities in question have paid fire departments. Sec. 62.13, (10) (a), makes it mandatory for such cities to have a firemen’s pension fund.

Sec. 201.59 is the general statute giving to municipalities maintaining fire departments two per cent of certain fire insurance premiums. Such money is given “for the support” of fire departments. The legislature, by the specific provisions of sec. 62.13, (10) (a), ordered such moneys to be paid into the pension fund in cities maintaining paid fire departments. In accordance with the well-established rule that a specific provision in the statutes governs a general rule we must hold that the moneys received by cities having paid fire departments pursuant to sec. 201.59, Stats., shall be paid into the pension fund.

JEF
Indigent, Insane, etc. — Poor Relief — Insurance — Military Service — Veteran’s adjusted service certificate is “policy of insurance” within meaning of sec. 49.025, Stats., relating to poor relief.

February 17, 1936.

WALTER B. MURAT,
District Attorney,
Stevens Point, Wisconsin.

You ask whether a veteran’s adjusted service certificate is a “policy of insurance” within the meaning of sec. 49.025, relating to relief of poor.

A veteran’s adjusted service certificate is a “policy of insurance” within the meaning of sec. 49.025 relating to poor relief.

Sec. 49.025, Stats., provides:

“No person shall be denied relief as a poor person on the ground that he has an equity in the home in which he lives or a cash or loan value not in excess of three hundred dollars in a policy of insurance. No applicant for relief shall be required to assign such equity or insurance policy as a condition for receiving relief.”

A policy of insurance is generally defined as:

“Broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specific contingency. * * *.” 32 C. J. 975.

The supreme court has defined a “policy of insurance” as follows:

“* * * All policies or contracts of insurance are contracts of indemnity,—contracts ‘whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril.’ Shakman v. United States Credit System Co., 92 Wis. 366, 374, 66 N. W. 528. Ducommun v. Inter-State Exchange, 193 Wis. 179, 186-187.”
Not all insurance is in the nature of an indemnity contract. Life insurance is one of several exceptions to the general rule. 32 C. J. 975, 63 A. L. R. 717, Note 13. A policy of insurance has at least the following ingredients: (1) the subject matter, (2) the risks insured against, (3) the amount, (4) the duration of the risk, and (5) the premium of insurance.

Veterans’ adjusted service certificates, issued pursuant to the World War Adjusted Compensation Act (38 U. S. C. A., sec. 591, et seq.), provided in part: that a certificate be issued to veterans with a “face value equal to the amount in dollars of twenty-year endowment insurance that the amount of his adjusted service credit increased by 25 per centum would purchase, at his age on his birthday nearest the date of the certificate, if applied as a net single premium, calculated in accordance with accepted actuarial principles and based upon the American Experience Table of Mortality and interest at 4 per centum per annum, compounded annually;” that the adjusted service credit be computed by allowing a certain sum for each day of active service of a veteran; that a beneficiary of such certificate be named by the veteran and in default thereof the same be paid to the veteran’s estate; that the face value of the certificate be paid, (1) to the veteran twenty years after date of the certificate, or (2) upon the death of the veteran prior to the expiration of such period to the beneficiary named; and that loans be made on such certificates in accordance with terms provided.

These provisions seem to supply all the necessary ingredients of an insurance policy. The government in effect recognized that a veteran was underpaid for his period of service. The amount of such underpayment was determined, and a contract of paid-up insurance issued. The face amount of the contract was based upon the amount of paid-up insurance the underpayment would purchase at the veteran’s particular age. The government, in lieu of immediately paying the back salary, kept such salary as a premium for a commensurate paid-up policy. The risk involved was the possibility of the veteran’s death before the expiration of the twenty-year period; in event of such death the full face of the policy became payable.
It is to be noted that we hold that the adjusted service certificate is an insurance policy within the meaning of sec. 49.025. This opinion does not pertain to the bonds which will be issued in June in payment of such certificate.

JEF

Taxation — Exemption — Cemetery lands owned by corporation organized under general incorporation laws are not exempt from general taxes.

February 20, 1936.

LYALL T. BEGGS,
District Attorney,
Madison, Wisconsin.

In your recent letter you ask our opinion on the following:

"We have in Dane county a corporation organized for profit under chapter 180 which is dealing in the sale of cemetery lots."

You ask: Is the property of the corporation which is dedicated and used for burial purposes exempt from general taxes?

Cemetery lands owned by a corporation organized under the general incorporation laws are not exempt from general taxes.

Sec. 70.11, Stats., provides:

"The property in this section described is exempt from taxation, to wit:

"(8) Lands owned by any cemetery association used exclusively as public burial grounds and tombs and monuments to the dead therein; including lands adjoining such burial grounds, and greenhouses and other buildings and outbuildings thereon, owned and occupied exclusively by such cemetery association for cemetery purposes; all ar-
articles of personal property owned by any cemetery association necessarily used in the care and management of such burial grounds, and all funds exclusively devoted to such purposes; all flowers and ornamental plants and shrubs raised for the decoration of such burial grounds, and which may be sold in the manner and for the purposes mentioned in section 157.09; also all property held by donation, bequest or in trust for cemetery associations under the provisions of sections 157.05 and 157.11."

Prior to the enactment of ch. 398, Laws 1911, said subsection, then numbered sec. 1038, subsec. 7, read as follows:

"Lands used exclusively as public burial grounds, and tombs and monuments to the dead therein; also all property held by donation, bequest or in trust for cemetery associations under the provisions of section 1447."

The provisions last above quoted predicated the exemption of cemetery lands solely upon the use or character of the lands and not upon the ownership thereof. In 1911, by ch. 398, the legislature amended said statute to substantially its present form. At the time ch. 398 became law and for a considerable period prior thereto our laws authorized the organization of cemetery associations (sec. 1442, Stats. 1898 and 1911, now ch. 157), and further provided that corporations might be formed, under the general incorporation laws, to conduct, pursue, promote, or maintain "cemeteries, and the purchase, holding and regulation thereof" (sec. 1771, Stats. 1898 and 1911). Thus the statutes provided for the organization of nonprofit cemetery associations and for cemetery corporations organized for profit.

By ch. 398, Laws 1911, the legislature predicated the exemption of cemetery lands not only upon their use or character but also upon their ownership. As stated, the previous law provided "lands used exclusively as public burial grounds * * *;" as amended the provision provided: "lands owned by any cemetery association used exclusively as public burial grounds * * *"); It appears that this change in the basis of the exemption was deliberate. The words "owned by any cemetery association" were inserted in the original bill by an amendment. (See Bill No. 58, A., 1911 session.) Although cemetery corporations organized
for profit then were authorized, only the words "cemetery associations" were used in the amendment. These words must be given their ordinary meaning. Then, as now, cemetery associations were authorized and regulated by our statutes. That the words "cemetery association" meant the nonprofit organization authorized by statute is further evidenced by the references in the amendment to the sections of the statutes relating to cemetery associations.

It is our opinion that both by the express wording of sec. 70.11, subsec. (8), and by its legislative history it must be concluded that cemetery lands owned by a corporation organized under the general incorporation laws are not exempt from general taxes.

JEF

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**Courts — Consecutive Sentences — Prisons — Prisoners — Parole** — Sentences of person convicted on four counts, giving him terms of one to three years on each count, sentences for first year to run consecutively and after that concurrently, are valid.

Prisoner is eligible for parole six months after he has served four years and for discharge six years after conviction.

February 20, 1936.

**Board of Control.**

You have submitted an inquiry by Oscar Lee, warden of the Wisconsin state prison, and you ask to be advised when the man referred to becomes eligible to parole consideration.

Mr. Lee states that one A was received at his institution on October 4, 1935, from the circuit court of Eau Claire county. A was convicted on four counts for forgery. He was given four terms of one to three years on each count. The first years of the four sentences are to run consecutively, after that the sentences are to run concurrently. He is a second offender.

Sec. 57.06, subsec. (1), Stats., provides as follows:
"The board of control, with the approval of the governor, may, upon ten days' written notice to the district attorney and judge who participated in the trial of the prisoner, parole any prisoner convicted of a felony and imprisoned in the state prison, * * * who, if sentenced for less than life, shall have served at least one-half of the term for which he was sentenced, not deducting any allowance of time for good behavior, * * * ."

Sec. 359.07, Stats., provides in part, after providing for an indeterminate term:

"* * * 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; * * * ."

In an official opinion in XXI Op. Atty. Gen. 866, it was held that the sentences of a defendant found guilty on four counts at the same trial, judgment sentencing him to an indeterminate sentence to run consecutively after service of the minimum term for each count, are valid.

It is our opinion that the ruling of the trial judge is in compliance with the statute and that the minimum sentence on all four counts will have been served by October 4, 1939. The maximum term in such sentence on each count was fixed at three years. The prisoner, therefore, will be eligible for parole six months after October 4, 1939.

The prisoner, however, under sec. 53.11 (3), will be eligible to discharge six years after the date of conviction, unless his term is shortened by good time.

JEF
Courts — Clerk of Court — Taxation — Income Taxes — Clerk of circuit court should charge fees for filing and docketing income tax warrants provided for by ch. 519, Laws 1935, in accordance with provisions of sec. 59.42, subsecs. (1) and (2), Stats.

February 20, 1936.

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

You call our attention to ch. 519, Laws 1935, and inquire whether, under this chapter, the tax commission is required to pay any fees to the clerk of the circuit court for filing and docketing the income tax warrants provided for in that chapter. You also inquire if the answer would be the same whether the clerk is on a salary or on a fee basis.

Answering your last question first, we would say that the result would be the same whether the clerk is on a salary or a fee basis.

As we understand it the only difference in the two cases is that where the clerk is on a salary basis the fees are turned over to the county treasurer, as provided by sec. 59.15, subsecs. (7) and (8), Stats., and also that the clerk on a fee basis is entitled to certain additional charges for certain services specified in sec. 59.42, subsec. (41), pars. (a) and (b), which are not material here. There appears to be absolutely no difference as to the filing and docketing fees to be charged by the clerk.

Your principal question, however, calls for more extended consideration.

Sec. 71.36, subsec. (1), as created by ch. 519, Laws 1935, provides for the issuance of warrants by the tax commission, directing the sheriff to levy upon property of the delinquent income taxpayer. Subsec. (2), in part, provides as follows:

"The sheriff shall within five days after the receipt of the warrant, file with the clerk of the circuit court of his county a copy thereof, and thereupon the clerk shall enter in the delinquent income tax docket, in the column for delinquent
income tax debtors the name of the taxpayer mentioned in
the warrant, and in appropriate columns the amount of the
tax or portion thereof and penalties for which the warrant
is issued and the date when such copy is filed, and there-
upon the amount of such warrant so docketed shall become
a lien upon the title to and interest in real property or
chattels real of the person against whom it is issued in the
same manner as a judgment duly docketed in the office of
such clerk. * * *”

Nothing is said about clerk fees in this section.
Sec. 270.745, also created by ch. 519, further provides:

“Delinquent income tax docket. At the time of filing the
warrant provided by sections 71.36 or 71.37, the clerk shall
enter in the delinquent income tax docket, either arranged
alphabetically or accompanied by an alphabetical index, in
books to be provided by the county and kept by such clerk, a
docket of such warrant containing:
“(1) The name at length of each delinquent income tax
debtor, with his place of abode, title and trade or profes-
sion, if any such be stated in the warrant.
“(2) The date of the warrant.
“(3) The day and hour of entering such docket.
“(4) The amount of delinquent income taxes with inter-
est, penalties and costs as set forth in the warrant.
“(5) If the warrant be against several persons such
statement shall be repeated under the name of each person
against whom the warrant was issued, in the alphabetical
order of their names, respectively, when the docket is ar-
ranged alphabetically, or entered in the index under the
name of each such person when the docket is kept with an
alphabetical index accompanying.”

Again the statute is silent as to the fees of the clerk for
such services.
We next turn to sec. 59.42, Stats., relating to the fees
chargeable by circuit court clerks, in order to determine if
any of the items there are so worded as to be sufficiently
broad to cover items of the sort here in question, since it is
well settled law that the right of a public officer to compen-
sation is purely statutory. If the statute provides for com-
ensation, he receives it, but otherwise not. Mechem, Public
Officers, pars. 855, 858; State v. Cleveland, 161 Wis. 457,
459. And when the legislature adds to his duties he is not
entitled to additional fees unless the same is expressly provided for in the act or by some general provision of law. *McCumber v. Waukesha County*, 91 Wis. 442.

In reading over the various items in sec. 59.42, for which the clerk shall collect fees, we find some forty-one items, most of which are in no way material here. We understand that a number of clerks have been billing the Wisconsin tax commission under subsec. (4), sec. 59.42, which provides a fee,

“For docketing each judgment or transcript of judgment, one dollar, and for satisfying judgment, twenty-five cents.”

We believe this practice is incorrect, since an income tax warrant is not a judgment.

Sec. 270.53 (1) defines a judgment as follows:

“A judgment is the final determination of the rights of the parties in the action.”

Amplifying this statutory definition in the case of *Blaikie v. Griswold*, 10 Wis. 293, the court considered a judgment to be the decision or sentence of the law, given by a court of justice as the result of proceedings instituted for the redress of injury. This is in accord with the general rule in other jurisdictions that a judgment is the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it in an action or proceeding. *Ft. Worth Acid Works v. City of Ft. Worth* (Tex.), 248 S. W. 882, 884; *State v. Walton* (Okla.), 236 Pac. 629, 632, and numerous other cases.

Obviously there can be no judgment before a matter gets into court, even though an income tax warrant may have some of the incidents and results of a judgment.

Probably the broadest subdivision of sec. 59.42 is subsec. (2), which provides a fee

‘For filing every paper in a cause, or any paper required by law to be filed in the office of the clerk of the circuit court, ten cents.”
Sec. 71.36 (2), plainly requires income tax warrants to be filed in the office of the clerk of the circuit court, and hence, in the absence of anything in the statutes to the contrary, we conclude that a charge of ten cents for filing such warrants is a legitimate charge, under sec. 59.42 (2).

The only other subsection of sec. 59.42 which might have any application, is subsec. (1), which provides:

“For entering upon the court record the title of each action or proceeding commenced or coming into court by appeal or otherwise, fifty cents.”

This raises the question whether or not the filing of an income tax warrant constitutes “an action or proceeding commenced or coming into court.”

Sec. 260.03 defines an action as follows:

“An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.”

The word “proceeding” on the other hand, is a broader term, and has been defined as a prescribed act or mode of action for carrying into effect a legal right. W. S. Tyler v. Rebic. 161 N. E. 790, 791, 118 Ohio St. 522.

We believe that ch. 519, Laws 1935, was designed to provide a mode of action or procedure for carrying into effect the legal right of income tax collection, and that, consequently, this is a “proceeding,” although not an action within the meaning of sec. 260.03.

The qualifying words “commenced or coming into court by appeal or otherwise” in sec. 59.42, subsec. (1), above quoted, must also be considered. We doubt if it can be said that this proceeding is commenced in court, since it has its inception in a warrant issued by the tax commission to the sheriff. Neither does it come into court by appeal, but we do believe it comes into court “otherwise” since the statute provides that the sheriff must file the warrant with the clerk of the circuit court, and we take it that once the warrant is filed, “it has come into court,” and that it derives its effec-
tiveness as a lien by virtue of the fact that it has become a court record.

We are therefore constrained to rule that the clerk of the circuit court should charge fees for the filing and docketing of income tax warrants under subsecs. (1) and (2), sec. 59.42, Stats.

It has been suggested that such procedure will involve administrative difficulties, particularly in those counties where clerks demand payment in advance, since it is estimated that there will be several thousands of these warrants filed, and if a separate voucher is made out for each warrant by the clerk and sent to the tax commission and then audited through the office of the secretary of state, the clerical and bookkeeping work will be tremendous and delay will result in the filing and docketing of warrants in those counties whose clerks require payments in advance. These, however, are administrative difficulties which have no bearing on the legal question presented and until the legislature sees fit to supplement ch. 519 so as to make it more workable, the parties concerned will have to administer the law as best they can. Perhaps the procedure could be simplified somewhat by having the clerks submit bills monthly, say on the first and fifteenth of the month, instead of putting each bill through separately.

JEF
Indigent, Insane, etc. — Social Security Law — Old-age Assistance — Sec. 49.31, subsec. (2), Stats., relating to payment of old-age assistance to responsible person or corporation for benefit of beneficiary, does not require appointment of guardian. If assistance laws are administered by pension department it is duty of such department to designate such responsible person or corporation.

February 20, 1936.

Wendell McHenry,
District Attorney,
Waupaca, Wisconsin.

You request our opinion upon the following:

"The county board has created a county pension department. Is such department empowered to appoint guardians for certain old-age assistance beneficiaries under the provisions of sec. 49.31, subsec. (2), Stats., or is such action the function of the county judge?"

Sec. 49.31, subsec. (2), relating to the payment of old-age assistance to a responsible person or corporation for the benefit of a beneficiary does not require the appointment of a guardian. If the assistance laws are administered by a pension department it is the duty of such department to designate such responsible person or corporation.

Sec. 49.51, subsec. (1), par. (b), provides that the county board may provide for a county pension department and that such department shall administer all laws relating to old-age assistance. In XXIV Op. Atty. Gen. 709 this department held that the public assistance laws shall be administered either by the county judge or by a pension department. After a department is created it shall administer all laws relating to such assistance. This general rule should be applied to the provisions of sec. 49.31 (2), unless the context clearly indicates otherwise.

Sec. 49.31 (2) provides:

"If the beneficiary is, on the testimony of at least three reputable witnesses, found incapable of taking care of him-
self or his money, the county judge may direct the payment of the instalments of the old-age assistance to any responsible person or corporation for his benefit, or may suspend payment, for such period as the judge shall deem advisable."

The quoted provision makes no reference to the general laws of the state relating to the appointment of guardians. It provides that if it is found upon the testimony of at least three reputable witnesses that a person is incapable of taking care of himself or his money the assistance may be paid to any responsible person or corporation. Such procedure is not in accord with the general laws relating to the appointment of guardians and does not require the legal appointment of guardians. It contemplates a less formal and more expeditious procedure. The finding that a person is incapable of taking care of himself or his money in our opinion is to be made by the agency administering the old-age assistance laws. If the judge is such agency the finding is made in his capacity as administrator of old-age assistance. Such finding need not be based upon such evidence as is required for a finding of incompetency at a guardianship hearing. This interpretation seems consistent with the balance of the subsection, which provides that the payment of assistance may be made to a responsible person or may be suspended. These powers are given to the administrative agency and not to the judge in his strictly judicial capacity.

We conclude that it is the function of the pension department to make the necessary finding required by this subsection, to direct that payment be made to such responsible person or corporation as it shall designate, or to suspend payment for such period as it shall deem advisable. If the pension department is of the opinion that a responsible person or corporation is only one that has been appointed guardian of a beneficiary by the county court and has deposited a sufficient bond, it may so order. Proper proceedings for the appointment of a guardian then should be brought in county court. However, it must be borne in mind that the circumstances of a particular case may not justify a court finding of incompetency and the appointment of a guardian. In that event the department should appoint such person or corporation as it deems responsible.

JEF
Automobiles — Law of Road — Sec. 85.135, subsec. (1), Stats., created by ch. 489, Laws 1935, and relating to payment of judgments growing out of negligent operation of motor vehicles, applies only to judgments which have been rendered after November 23, 1935, and which have resulted from accidents occurring after said date.

February 20, 1936.

JOHN H. MATHESON,
District Attorney,
Janesville, Wisconsin.

You submit the following question for our opinion:

Does sec. 85.135, Stats., created by ch. 489, Laws 1935, and relating to payment of judgments growing out of negligent operation of motor vehicles, apply to judgments rendered prior to the effective date of the chapter and to judgments rendered after said effective date but resulting from accidents which occurred prior to said effective date?

Sec. 85.135, subsec. (1), Stats., created by ch. 489, Laws 1935, and relating to the payment of judgments growing out of negligent operation of motor vehicles, applies only to judgments which have been rendered after November 23, 1935, and which have resulted from accidents occurring after said date.

Sec. 85.135 (1) provides:

“No person who shall have been found negligent in respect to his operation of a motor vehicle in any civil action for damages growing out of an accident, and against whom a final judgment shall have been rendered on account thereof, shall drive an automobile upon and along any public highway of this state until such judgment is fully paid and satisfied.”

This subsection refers to a person who “shall have been” found negligent, and to a judgment which “shall have been” rendered. Sec. 370.01, subsec. (29) Stats. provides:

“The words ‘shall have been’ include past and future tenses.”
Considering subsec. (1), sec. 85.135 by itself and as apart from the entire section, it appears to apply to all judgments, whether rendered before or after the effective date of ch. 489. However, to consider this subsection as a thing apart from the entire section would be violative of the cardinal rule that a part of an act must be examined by the light of the entire act.

With few exceptions the acts of the legislature provide that they shall “take effect upon passage and publication.” Ch. 489, creating sec. 85.135, by sec. 3 provided:

“This act shall take effect sixty days after passage and publication.”

Some meaning must be given to this deliberate delay in the application of the act. If the act was intended to apply to all judgments this particular enacting clause seems of no purpose, and indeed seems to deny such intention. Considering the act as a whole, it appears that the legislature intended to give the public ample notice of the future risk attendant on driving on our highways and to give the public ample time to secure itself against such risk by obtaining liability insurance or by doing such other acts as it might wish for the purpose of preparing itself for this far-reaching change in our motor vehicle laws.

With this construction of the section in question it follows that it applies neither to judgments rendered prior to the effective date of the act, nor to judgments rendered after such effective date which resulted from accidents occurring prior thereto. This construction coincides with the general rule that statutes should be construed prospectively unless the context clearly indicates otherwise. Ch. 489 was published on September 24, 1935. It became effective sixty days thereafter, namely, November 23, 1935.

JEF
Indigent, Insane, etc. — Social Security Law — Old-age Assistance — State pension department may prescribe rules for making application for old-age assistance on behalf of person who is mentally or physically incapacitated to make such application personally.

February 20, 1936.

Pension Department.

You request our opinion upon the following:

X, on whose behalf a grant of old-age assistance is sought, in all respects is eligible for such assistance. However, he is bedridden and helpless and his mind is so affected that he can neither supply information nor affirm an application for assistance. No guardian has been appointed for him. In view of the provisions of secs. 49.27 and 49.31, subsec. (2), Stats., can such assistance be granted to him?

The state pension department may prescribe rules for making application for old-age assistance on behalf of a person who is mentally or physically incapacitated to make such application personally.

Sec. 49.27 provides:

“An applicant for old-age assistance shall file his application in writing with the county judge of the county in which he resides, in such manner and form as shall be prescribed by the board of control. All statements in the application shall be sworn to or affirmed by the applicant, setting forth that all facts are true in every material point.”

The words “board of control” appearing in this section should be construed to mean “state pension department.” The last legislature transferred the administration of old-age assistance from said board to said department. The failure to amend this section apparently was an oversight.

Sec. 49.27, if literally construed, requires each person seeking assistance to personally make and sign an application therefor. Such construction prevents a person from receiving assistance if, because of infirmities, he is unable to perform such acts. To conclude that the legislature intended that a person must be able to perform such acts as a
prerequisite to receive assistance is incredible. We believe such provisions are directory. If such provisions do not meet the needs of the purpose of the old-age assistance laws the state pension board properly may make the necessary rules to provide for the deficiencies. In our opinion a rule authorizing the person caring for or the guardian of such infirm person to make application on his behalf would be proper.

Sec. 49.31 (2), mentioned in your inquiry, has been interpreted by this department in an opinion to the district attorney for Waupaca county, dated February 20, 1936.*

*Page 115 of this volume.
JEF

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Elections — Election Notices — Legal notices required by sec. 6.11, subsec. (1), Stats., are published in newspapers selected by county clerk unless county board, by proper resolution, decides to publish same in more than two newspapers.

February 20, 1936.

CLIVE J. STRANG,
District Attorney,
Grantsburg, Wisconsin.

You ask whether the county clerk or county board designates the newspapers in which election notices are to be published pursuant to sec. 6.11, subsec. (1), and sec. 6.82, subsec. (2), Stats.

Sec. 6.11, subsec. (1), provides that the county clerk shall:

"* * * prepare under his signature and seal a notice containing so much of the notice of the secretary of state as may be applicable to his county, including constitutional
amendments or other questions, together with a statement of the several county officers to be elected by the voters of his county and cause the same to be published as provided in section 6.82. * * *

Sec. 6.82, subsec. (2), reads in part as follows:

“All primary or election notices or certificates of election, required by law to be published, shall be published in from one to four newspapers of general circulation published within the county or city. * * * In no case shall any such notice be published in more than two newspapers unless authorized by a resolution adopted by the county board or city council, which resolution may designate by name the newspapers in which all such notices shall appear, and shall be in force until rescinded by like action. * * *”

Sec. 6.11 (1) clearly requires the county clerk to publish the election notices mentioned therein and provides that such notices are to be published pursuant to sec. 6.82 (2). Under the last quoted section, the required election notices are published in only two newspapers, unless the county board, by proper resolution, decides to publish same in more than two newspapers. If such resolution is adopted the board, under the express wording of the statute, may designate all newspapers in which such notices are to be published. In the absence of such action by the county board, it would seem that the clerk, not the county board, would designate the newspaper in which election notices are to be published under sec. 6.11 (1). A similar construction was given ch. 22, Laws 1859, by our supreme court in Beal v. St. Croix County, 13, Wis. 500. Ch. 22, Laws 1859, required the county to publish in a newspaper a statement of delinquent lands returned to him, together with notice of sale. Suit was brought against the county by a publisher whose paper was selected by the county treasurer for purposes of publishing the required notices. The county refused to pay on the ground that the county board had already selected a newspaper for that purpose. In allowing the claim of the publisher, the court, p. 503, said:
"* * * it is a sufficient answer to the objection of the county, to say that this law imposes the duty specifically upon the treasurer to cause this printing to be done, and fixes the printer's fees therefor. And it was not competent for the board of supervisors, by any contract, to divest the treasurer of this authority, or to set aside the provisions of the statute. Their contract would be good as to matters subject to their control. But they cannot, by making contracts, divest the authority of other officers, or assume to themselves the control of matters which the law has not subjected to their supervision. If this were not so, they might, under the guise of contracting, assume the entire management of county affairs, and where the law said a thing should be done by one officer, and upon certain terms, they could contract that it should be done by another, upon different terms. They might contract with an attorney to perform all legal services necessary for the county, and notify the district attorney that his services could be dispensed with, and so of any other services required."

In the case of The People v. The Board of Supervisors of Courtland County, 58 Barb. 139, the New York supreme court held that under a statute requiring the county clerk to publish certain legal notices he, rather than the county board, had authority to select a newspaper in which said notices were to be published.

In view of the cases cited above construing statutes similar to the one involved, it would seem that the county clerk, rather than the county board, has authority to designate the newspaper in which election notices are to be published pursuant to sec. 6.11 (1) and sec. 6.82 (2). Of course, the county board may designate the newspapers to be used, if it adopts a proper resolution providing for publication in more than two newspapers.

JEF
Appropriations and Expenditures — Conservation Commission — Public Lands — Chs. 365, 398 and 526, Laws 1935, authorize conservation commission to advertise recreational advantages of Wisconsin outside state by exhibits at outdoor shows and similar expositions; expenses of employees in this connection may be lawfully paid.

February 21, 1936.

Conservation Department.

You state that during the spring and summer of each year requests are made of the conservation department to put on exhibits at outdoor shows and similar expositions held outside of the state where the recreational advantages of Wisconsin can be shown to the interested traveling public.

You inquire whether your department can lawfully make expenditures for such exhibits and pay the expenses of personnel in connection therewith while outside the state.

It is our opinion that your inquiry should be answered in the affirmative.

Ch. 365, Laws 1935, added a new paragraph to subsec. (7), sec. 23.09, Stats., to read as follows:

“To collect, compile and distribute information and literature as to the facilities, advantages and attractions of the state, the historic and scenic points and places of interest within the state and the transportation and highway facilities of the state; and to plan and conduct a program of information and publicity designed to attract tourists, visitors and other interested persons from outside the state to this state; also to encourage and coordinate the efforts of other public and private organizations or groups of citizens to publicize the facilities and attractions of the state for the same purposes."

It was plainly the intent of this statute to advertise the state and attract tourists from without as well as within the state. In order to do this out-of-state advertising and exhibits will be necessary. It would be difficult to give effect to the intention of the legislature otherwise, and it is a
fundamental rule in the construction of statutes to ascertain and give effect to the intention of the legislature. *Dagan v. State*, 162 Wis. 353.

Ch. 526, Laws 1935, makes the necessary appropriation to the conservation commission to carry out the purpose of ch. 365 as follows:

"Annually, beginning July 1, 1935, fifty thousand dollars, for the execution of its functions under paragraph (1) of subsection (7) of section 23.09."

Sec. 14.32, Stats., as amended by chs. 163 and 398, Laws 1935, provides in part:

"The secretary of state shall not audit items of expenditure for tips, porterage, 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, except as herein provided, items of expenditure incurred while traveling outside the state by any officer or employee of the state or of any department or institution thereof unless in the discharge of his duties required by the public service * * *;"

It would seem that the expenses of employees of the conservation commission incurred outside of the state in work of the sort here under consideration would constitute expenses incurred in the performance or discharge of duties required by the public service within the meaning of the above statute so as to warrant the auditing of such items of expenditure by the secretary of state, assuming, of course, that the particular items are otherwise proper and legitimate.

JEF
Appropriations and Expenditures — Refunds — Automobiles — Automobile Licenses — Payments made to secretary of state for license fees for registering motor vehicles in excess of amount required by law cannot be recovered without appropriation by legislature; sec. 20.06, Stats., does not make such appropriation, especially when such payment is made voluntarily and without protest.

February 21, 1936.

THEODORE DAMMANN,
Secretary of State.

You ask whether in view of the recent decision of Judge A. G. Zimmerman pertaining to the license fee on the automobile owned by Clarence Born, it is permissible for the secretary of state to return over-payments in similar situations.

The only provision which might authorize state officers to make refunds are subsecs. (2) and (3), sec. 20.06, Stats., which read as follows:

“(2) Moneys paid into the state treasury in error; but no such refund shall be made except upon the written approval of the governor, secretary of state, state treasurer, and attorney-general.

“(3) Taxes collected and paid into the state treasury in excess of lawful taxation, when claims therefor have been established as provided in sections 71.23, 71.27, 72.08 and 74.73 of the statutes.”

Our constitution provides in art. VIII, sec. 2:

“No money shall be paid out of the treasury except in pursuance of an appropriation by law. * * *”

Sec. 14.68 (1) provides in part:

“Unless otherwise provided by law, all moneys collected or received by each and every officer, board, commission, society, or association for or in behalf of the state, or which is required by law to be turned into the state treasury, shall be deposited in or transmitted to the state treasury at least once a week * * *.”
In view of the express provision of subsec. (3), sec. 20.06, and in conformity with the rule of statutory construction that the enumeration of one is the exclusion of the other, we conclude that neither the secretary of state nor the state treasurer is authorized to refund license fees on motor vehicles. As to whether or not recovery may be had when paid under protest, is not passed upon here. The general rule is that taxes not paid under protest cannot be recovered. *Powell v. Board*, 46 Wis. 210; *State ex rel. Marshall & Ilsley Bank v. Leuch*, 155 Wis. 499; *Noyes v. State*, 46 Wis. 280, 254. See XXV Op. Atty. Gen. 34.

We know of no statute which authorizes you to refund this tax, especially in a case where the payments were made without protest.

JEF

Corporations — Cemetery Memorial Dealers — Words and Phrases — Place of Business — “Active place of business” that must be maintained in this state by nonresident under provisions of sec. 157.15, subsec. (7), Stats., is one in which cemetery memorials are lettered and displayed.

February 21, 1936.

DEPARTMENT OF STATE.

You request our opinion upon the following:

“In your opinion dated October 28, 1935 [XXIV Op. Atty. Gen. 677], you ruled that a nonresident may obtain a cemetery memorial dealer’s license under the provisions of ch. 532 if such nonresident establishes a place of business in Wisconsin within a reasonable time after the license is issued. We now ask whether such place of business may be just an office or a desk or must it be a place of business in which cemetery memorials are lettered and displayed?”
The “active place of business” that must be maintained in this state by a nonresident under the provisions of sec. 157.15, subsec. (7), Stats., is one in which cemetery memorials are lettered and displayed.

Sec. 157.15 (1) (b) and (7) provides:

“(1) (b) ‘Dealer’ means any person who sells or offers for sale at retail any cemetery memorial, and who has an established place of business in the state of Wisconsin which has been operated continuously for at least one year and in which cemetery memorials are lettered and displayed.”

“(7) A nonresident of this state may secure a cemetery memorial dealer’s or salesman’s license by conforming to all of the provisions of this section, except that a nonresident dealer shall maintain an active place of business in this state.”

Subsec. (2) (a) of sec. 157.15 provides that no person shall engage in or follow the business of a cemetery memorial dealer without first procuring a license from the secretary of state.

The regulation of memorial dealers and salesmen was the subject to much controversy in the last legislature. Various bills, substitutes, and amendments were proposed and introduced. Bill No. 581, S., which was supplanted by substitute amendment No. 1, S., became law as ch. 532, Laws 1935. It is obvious from a reading of the above-quoted provisions that the determination of the meaning of the final product gives opportunity for continued controversy. Consideration of the above provisions in the light of the act as a whole does not dispel the shadows of ambiguity. However, confusion and even contradiction in a law will not prevent courts giving effect to its purpose if the intent can be determined by the history of the law. Peterson v. Widule, 157 Wis. 641.

Bill No. 474, S., relating to the same subject as ch. 532 and in many respects similar to it, was given unusually thorough consideration by the legislature. Only a refusal to accept the report of a committee on conference prevented this bill from passing both houses. This bill defined a “memo-
rial dealer” as “any person who sells or offers for sale any cemetery memorial.” The qualifying provisions relating to place of business appearing in ch. 532 were not contained in this definition. This bill contained the same provisions relating to a nonresident as are contained in subsec. (7), sec. 157.15, above quoted. More specifically, the bill did not require a resident seeking a dealer’s license to maintain a place of business in this state but did require a nonresident to do so. Bill No. 581, S., which was introduced as a compromise measure after the defeat of Bill No. 474, S., contained provisions identical to those above mentioned. Substitute Amendment No. 1, S., to Bill No. 581, S., which became law, defined a dealer as in the present law and retained the same provisions relating to licensing of nonresidents.

This history of the legislation in question shows that the legislature intended that nonresidents should be compelled to maintain at least such a place of business in this state as is required of residents. Sec. 157.15 (1) (b) requires resident dealers to maintain a place of business in which cemetery memorials are lettered and displayed. This further indicates the legislative conception of a memorial dealer’s place of business. We conclude that the nonresident must maintain a place of business in which cemetery memorials are lettered and displayed.

JEF
Appropriations and Expenditures — Taxation — Refunds — Taxation of Utilities — Refund of taxes unlawfully assessed pursuant to ch. 546, Laws 1935, is not authorized by any legislative appropriation.

Claim for such refund must be presented to legislature and, if refused, suit may be brought against state under secs. 285.01 to 285.04, Stats.

February 21, 1936.

ROBERT K. HENRY,
State Treasurer.

You have referred to us the request made under date of January 24, 1936, of Express Freight Lines, Inc., for a refund of the sum of $1442.00 being in payment, made under protest, of certain taxes demanded by the public service commission, allegedly under threat of stoppage of operations of said Express Freight Lines, Inc., as a motor carrier. The taxes so paid were assessed under the provisions of ch. 546, Laws 1935, which the supreme court of this state has declared never to have been lawfully enacted. State ex rel. Finnegan v. Dammann, 264 N. W. 622.

We have previously informed the public service commission that, inasmuch as these taxes have been paid or turned into the general fund of the state, the commission has no power to make refund of any taxes so paid, even though the payment may have been made under protest and under what amounts to duress. XXV Op. Atty. Gen. 34.

As stated in substance in that opinion, the constitution of this state provides in sec. 2, art. VIII:

“No money shall be paid out of the treasury except in pursuance of an appropriation by law.”

We are unable to ascertain that the legislature has made any appropriation at any time to provide for a refund of any taxes on account of the operations of motor carriers which may be in excess of lawful taxation. By subsec. (3), sec. 20.06, Stats., the legislature has made an appropriation for refund of taxes collected and paid into the state treasury in excess of lawful taxation; but that appropriation
clearly applies only to claims for such unlawful taxation as may be established in the manner provided in secs. 71.23, 71.27, 72.08 and 74.73 of the statutes. None of the sections of the statutes just specified refers in any way to taxation or any excess of lawful taxation upon the operations of motor carriers.

We are assuming, but without deciding, in this opinion that the Express Freight Lines, Inc., has a claim for payment of taxes in excess of lawful taxation, and which claim the state ought to recognize and admit as valid. The question represented is not one of the justice of such claim, but rather one of the statutory procedure for its allowance and payment.

We are unable to find any provision for the allowance and payment of any such claim, except the provisions contained in sec. 285.01 to 285.04, Stats. In accordance with the provisions of those sections, it is our opinion that in order to obtain payment of its claim the Express Freight Lines, Inc., can commence an action against the state in the supreme court to obtain a refund of the sum stated. We are also of the opinion that such action cannot be brought unless and until a claim for such refund has been presented to the legislature and refused by that body.

While we do not presume to speak for the legislature of this state, it seems probable, however, that if the fact of the payment of various amounts by various motor carriers of taxes pursuant to the provisions of ch. 546, Laws 1935, was brought to the attention of the legislature, that body would be inclined to ascertain the total amount of taxation which has been made in excess of lawful taxation and to make express provision for a refund to each motor carrier who could establish a claim therefor in such manner as might be provided by the legislature.

We are unable to ascertain any procedure whereby such refund may be made except by presentation of the claimant's claim therefor to the legislature and, in case of the refusal of such claim, by a suit against the state pursuant to the provisions of secs. 285.01 to 285.04 inclusive.

JEF
Opinions of the Attorney General 131

Automobiles — Law of Road — When automobile registered in this state in previous year but not used in current license year (as shown by affidavit of owner thereof) is transferred, registration fee to be paid by transferee shall be computed in same manner as is provided for new vehicles.

February 21, 1936.

William A. Zabel,
District Attorney,
Milwaukee, Wisconsin.

Attention Herman A. Mosher.

Our attention has been called to an opinion of this department dated June 4, 1935, given to Theodore Dammann, secretary of state,* in which it was held that "Full year's registration fee must be paid on all automobiles registered in this state in the previous year whether transferred or not" under sec. 85.01, subsec. (4), par. (h) Stats. 1933, and we note an apparent conflict in the statutes.

We have reconsidered this matter and we now reach the conclusion that our former opinion dated June 4, 1935, was erroneous in so far as it purported to rule that the full registration fee was required to be paid on automobiles registered in Wisconsin in the previous year, even though transferred under sec. 85.01 (4) (h).

Sec. 85.01 (4) (h), Stats. 1933, reads as follows:

"Part year fees. The registration fees named in this section shall be paid in full on all automobiles, motor trucks, motor delivery wagons, passenger automobile busses, motor cycles or other similar motor vehicles, or trailers or semitrailers used in connection therewith, registered in the state in the previous year excepting vehicles transferred as hereinafter provided. For new vehicles and vehicles not previously registered in this state, the fees shall be computed on the basis of one-twelfth of the registration fee prescribed for such vehicles multiplied by the number of months of the year which have not fully expired on the date of appli-

*Not published.
cation. When a nonregistered vehicle which has not been used in the current license year (as shown by the affidavit of the owner) shall be transferred, the registration fee to be paid by the transferee shall be computed in the same manner as provided above for new vehicles. * * *.*

It will be noted that the first part of the above quoted section states:

"The registration fees named in this section shall be paid in full on all automobiles, motor trucks, motor delivery wagons, passenger automobile busses, motor cycles or other similar motor vehicles, or trailers or semitrailers used in connection therewith, registered in the state in the previous year excepting vehicles transferred as hereinafter provided."

The italicized part of the statute represents a change in the law made in the year 1933. This part of the statute did not exist in the 1931 statutes. By the very wording thereof it excepts from the full payment of the license fees those transferred vehicles which are thereafter referred to in the same section of the statutes, which reads as follows:

"When a nonregistered vehicle which has not been used in the current license year (as shown by the affidavit of the owner) shall be transferred, the registration fee to be paid by the transferee shall be computed in the same manner as provided above for new vehicles."

These italicized words, which are part of sec. 85.01 (4) (h), also represent a change made in the law in 1933 and did not exist in the 1931 statutes. The question now arises as to what is meant by nonregistered vehicles.

After careful consideration of the statute, we conclude that a nonregistered vehicle is a vehicle which may have been registered in the previous year but for which a license has not been applied in the current license year. This is the only logical interpretation of the word “nonregistered” as used in this statute, as is readily seen by tying up this last referred to new change in the 1933 statute with the new change in the first part of the 1933 statute, viz., "excepting
vehicles transferred as hereinafter provided.” Reading the new parts of the 1933 statute together, as was the legislative intent, we have the following:

“The registration fees named in this section shall be paid in full on all automobiles * * * registered in the state in the previous year excepting vehicles transferred as hereinafter provided. * * * When a nonregistered vehicle which has not been used in the current license year (as shown by the affidavit of the owner) shall be transferred, the registration fee to be paid by the transferee shall be computed in the same manner as provided above for new vehicles.”

The very fact that the legislators used the word “excepting” when they talked about vehicles registered in the previous year and tied that up with the transferred vehicles mentioned in the same section of the statute, indicates that they certainly must have meant that the transferred vehicles herein referred to are an exception to the requirement that all vehicles registered in the previous year must pay a full license fee; that is, that certain vehicles licensed in the previous year are excepted from paying the full license fee and those excepted vehicles are those transferred as aforesaid. If this were not true, then the allowing of monthly reduction in the license fee for such “transferred vehicles” would not be an exception to the express statement that all vehicles registered in the previous year must pay a full license fee. This word “exception” must be given some meaning and the foregoing interpretation is the only meaning which can be given it.

In Bouvier’s Law Dictionary the word “exception” is defined to mean as follows:

“The exclusion of something from the effect or operation which would otherwise be included.

“* * * it must be of part of the thing previously described, and not of some other thing; * * *”

This foregoing construction of the word “nonregistered” as referring to vehicles that may have been registered in the previous year in this state but which have not been registered in the current license year is further substantiated
by an analysis of the other subsection of sec. 85.01, Stats. 1933, which shows conclusively that registration of vehicles is an annual requirement in this state and therefore in any current license year a vehicle for which no license has yet been applied is a nonregistered vehicle, although no penalty is imposed for such nonregistration until after February 1 of each year, as is set forth in sec. 85.01 (1). A vehicle for which no license has yet been applied for in any current license year is a nonregistered vehicle.

Sec. 85.01 (5) provides in part:

“All motor vehicles, * * * shall be registered annually and automobile, * * * registrations shall expire on the thirty-first day of December of the year for which registration is made. * * *”

Sec. 85.01 (4) (a) provides in part:

“There shall be paid annually to the secretary of state for the registration of each automobile, a fee * * *”

Sec. 85.01 (3) provides in part:

“The secretary of state shall register the vehicle described in the application, giving it a distinguishing number, and shall thereupon issue to the applicant a certificate of registration and a certificate of title, * * * and furnish him registration number plates. * * *”

Sec. 85.01 (1) provides in part:

“No automobile, * * * shall be operated upon any highway unless the same shall have been registered in the office of the secretary of state, and the registration fee paid. After February first, any person who shall operate an automobile, * * * unless the same shall have been registered, * * * may be arrested * * *. The absence of number plates shall be prima facie evidence that the vehicle is not registered. * * *”

All of the foregoing statutes show that registration is an annual requirement and that a vehicle is either registered or nonregistered in the current license year and that regis-
tration and nonregistration refer to the status of the automobile relative to its being licensed in the current year. This construction of the word nonregistered is further substantiated by the judicial interpretation of said word in the case of *Bursack v. Davis*, Wis., 225 N. W. 738, p. 740, where the court said:

"* * * the absence of the license plate is prima facie evidence of nonregistration, * * *"

The foregoing interpretation of "nonregistered vehicles" as meaning vehicles not licensed in the current year is conclusively shown to have been the intent of the legislators when we compare sec. 85.01 (4) (h) of the 1933 statutes, looking especially at its changes, with sec. 85.01 (4) (h) of the 1931 statutes.

Sec. 85.01 (4) (h) of the 1931 statutes provides in part:

"The registration fees named in this section shall be paid in full on all automobiles, * * * registered in the state in the previous year. For new vehicles and vehicles not previously registered in this state, the fees shall be computed on the basis of one-twelfth of the registration fee prescribed for such vehicles multiplied by the number of months of the year which have not fully expired on the date of application. * * *"

By comparing this statute with the 1933 statute and the changes we can see that the legislators intended to give the transferee of a used car the same advantage in his license fee as it gave to new car purchasers and purchasers and owners of foreign automobiles, and justly so, since as to such purchasers it was a new car and had not used the highways in such year, and the purchaser thereof should not be taxed for such use for a full year any more than the purchaser of a new, and/or foreign automobile. It was also the purpose of the legislators to encourage the use of automobiles so as to permit the state to profit through the gasoline tax, and it was thought by the legislators that allowing a rebate on the license fee to a transferee of a used car which had not been in use that year would not deprive the state of its fee required for the use and maintenance of the roads,
since such automobiles had not used the roads that year and any charge levied for that part of the year during which the car was unused would be unearned and would encourage its purchase from one who apparently could not afford to drive it. It therefore deprived the state of the gasoline tax which the state would derive from the use thereof. Such would also tend to stimulate business. This is substantiated by the general agitation which existed at the time of the passage of the 1933 law to keep more cars in operation as is well illustrated in newspaper articles and reports over that period.

The circuit court of Dane county, the Honorable A. G. Zimmerman presiding, in the case of Clarence Born v. Theodore Dammann, Secretary of State, decided this same matter on December 11, 1935, and it was there held:

"* * * the plaintiff in this case may be required to pay a registration or license fee only proportionately for the unexpired months of October, November and December, 1935; and that there should be returned to the plaintiff the excess registration or license fees that he paid over and above the sum as indicated."

You are therefore advised that when an automobile registered in this state in the previous year but not used in the current license year (as shown by the affidavit of the owner thereof) is transferred the registration fee to be paid by the transferee shall be computed in the same manner as provided for new vehicles.

JEF
Criminal Law — Nonsupport — Indigent, Insane, etc. — Poor Relief — Relief department may refuse relief to individual who will not accept reasonable offer of employment. Such individual may be prosecuted for nonsupport under sec. 351.30, Stats.

Violence and attempted intimidation of relief workers do not of themselves justify cutting off relief, but subject guilty parties to criminal prosecution.

Matter of publicity in answering relief complaints is one of policy, any rule of reason should govern in such matters.

Relief may be refused applicant who fails to furnish information reasonably required as condition precedent to granting relief.

Relief department may require applicant to turn in license and title to car in proper cases before granting relief.

February 28, 1936.

Lyall T. Beggs,
District Attorney,
Madison, Wisconsin.

You have asked for our opinion upon the following questions, which, for purposes of convenience, we are setting forth with the answers immediately following each question.

"(1) If a person refuses to accept employment at a reasonable wage or quits a job, can the relief department refuse to give relief both to the person and his entire family? If relief must be furnished in such cases, can the relief department or some relief official prefer charges against the head of the family for nonsupport?"

A. This question, if answered categorically in the affirmative or in the negative, might lead to misinterpretation and misinterpretation, and we wish to avoid laying down any flat rule which can be applied to all cases without exception.

On the one hand it is unfair to ask the taxpayers to support people in idleness who have reasonable offers of em-
ployment, and the effect upon the morale of the relief recipient in such cases is even more harmful socially. On the other hand, relief officials should not place themselves in the position of forcing needy persons to accept working conditions and wages which are unfair or dangerous to the worker.

In 21 R. C. L. 705, we find the following language:

"An able-bodied man, who can, if he chooses, obtain employment which will enable him to maintain himself and his family, but refuses to accept that employment, is not entitled to public relief, though relief may properly be extended to the wives and children of such men, * * * ."

In support of this proposition see the English case of Attorney General v. Merthyr Tydfil Union, (1900) 1 Ch. 516, 69 L. J. Ch. 299, 23 Eng. Rul. Cas. 14, is cited. It was suggested in that case, however, that if the person through his obstinacy refused employment, and was thereby deprived of relief until such time as he was in urgent need thereof, it would then be incumbent upon the relief authorities to furnish him with emergency relief to prevent actual physical suffering.

On the second part of your question relating to criminal prosecution for nonsupport, we refer you to the case of Zitlow v. State, 213 Wis. 493, which discusses the matter rather thoroughly. It is there clearly pointed out that the wilful refusal of the head of a family to accept work subjects him to prosecution for nonsupport under sec. 351.30, Stats. The court, however, suggests that the statute can not be made the instrumentality for enforcing upon working men intolerable conditions of employment, and that the statute has no application to a bona fide labor dispute.

It is obvious that in such matters great discretion should be exercised by relief authorities and that a thorough and impartial investigation should be made before refusing relief to a family or instituting criminal proceedings for nonsupport.

"(2) In the event that relief recipients, either the head of the family or other members of the family, use physical force and violence and attempt to intimidate caseworkers to
get such caseworkers to comply with the demands of the recipients, is the welfare department justified and acting within its legal rights in discontinuing relief both to the person who committed the act of violence and also other members of the family?"

A. This question is answered in the negative. The granting or refusing to grant relief is in no way conditioned upon the behavior or manners of relief recipients in dealing with relief officials, except that the relief department is privileged to demand a full disclosure of the individual's assets and needs before granting relief. In cases of violence or other acts amounts to a disturbance of the peace, the criminal statutes provide a remedy, and it was never intended that the criminal statutes should be enforced by denying relief. On the other hand, there is no reason why caseworkers should be forced to endure physical violence or other indignities in the discharge of their duties, and the protection afforded them by the criminal statutes should be freely invoked where the circumstances warrant. Otherwise, mob rule, violence and intimidation would rapidly supersede the orderly procedure provided by law for the administration of relief.

“(3) Frequently relief clients' names appear in newspapers relative to complaints made against the relief department. Is the relief department justified in making public answer to these complaints and in doing so divulging the information which it has at hand in connection with the administration of relief for said persons and also divulging the persons' names, if such name has already received the publicity of the press?"

A. The answer to this question involves administrative policy rather than law, and we believe the greatest care should be exercised in such matters.

If the relief recipient himself has disclosed to the press information which would otherwise be treated as confidential, he should not complain if publicity is given to an answer to his published complaint in the form of a dignified statement of the facts from the records. In other instances, information as to complaints reaches the newspapers from
sources over which the individual or his family has no con-
trol. In such instances, no useful purpose would be served by
a public airing of family affairs, and unnecessary embar-
rassment or hardship might result to innocent members of
the family. We understand that some relief departments
have been able to work out a policy with the local newspa-
pers whereby all complaints are checked against relief de-
partment records before any publication is made. This pol-
icy is a very helpful one and undoubtedly often saves relief
officials from unwarranted criticism in the press.

Relief officials are carrying on a most difficult work, call-
ing for the utmost tact and good judgment, and, for the
most part, they are doing a splendid job. Unfortunately,
however, the smooth running of a relief organization is not
news, but complaints against such a department are news,
and it seems to us that much might be done by way of se-
suring greater publicity to the methods, problems, construc-
tive efforts and administrative organization of relief work
in order that the public may more fully appreciate the other
side of the picture.

"(4) When a relief client upon reasonable notice being
given by the relief department refuses to appear at the re-
lief department for the purpose of giving information which
is necessary in order to administer relief to said client, has
the relief department the right to refuse to furnish relief
both to the client and family until such information is
furnished?""

A. In answering this question, we believe that ordina-
rily it would be proper to refuse relief to an individual un-
der such circumstances, although, if his family is in actual
need the members should not be made to suffer through his
stubbornness, the same as would be true if he refused to
work.

The proper administration of relief calls for the co-opera-
tion of the relief recipient, and the relief officials should be
reluctant to expend public funds for relief until the appli-
cant makes a proper showing that he is entitled thereto.
The burden is upon him, since the information concerning
his circumstances is best known by himself, and he should
not be permitted to say—"I want relief, but refuse to dis-
close the facts as to my circumstances. You must find out such matters yourself.” It is difficult enough to check information after it has been voluntarily given, to say nothing of ferreting out the information in the first instance.

“(5) Where a person who applies for relief states that he is the owner of an automobile, does the relief department, if it deems it advisable, have the right to require the applicant for relief to turn over to the relief department the license and title to said car before relief will be given? Further, if a person fails at any time to turn over the title and license to an automobile, does the relief department have the right to refuse further relief to the head of the family or any other member of his family?”

A. "In XX Op. Atty. Gen. 334, it was pointed out that a relief department could refuse relief until such time as the applicant had sold and converted his automobile into cash for the purpose of purchasing the necessities of life, although it was not indicated there that this should be done in all instances. See also XXI Op. Atty. Gen. 596.

It being legal to compel the sale of the car, it would appear to be equally reasonable to require the recipient to forego the use thereof during such time as he is on relief. Money needed for the necessities of life should not be expended on gasoline for pleasure riding. On the other hand, if the applicant can show reasonable earnings through the use of a car, he ought not to be required to surrender his license plates and title. Neither should his family be compelled to suffer if he refuses to turn in his license plates and title where this is properly required of him as a condition precedent to granting relief.

Each case should be considered upon its individual merits, and any attempt to administer relief by rules as inflexible as the multiplication tables is bound to cause trouble. Relief should neither be denied nor cut off capriciously, and the applicant should be thoroughly informed as to the reasons therefor before any such action is taken, and he should be given every opportunity to conform to the reasonable policies and rulings of the department.

In submitting this request you kindly furnished us with a copy of a letter written to you by Dr. Alfred W. Briggs,
state administrator of the public welfare department, in which he discusses most of the foregoing questions. We wish to express our indebtedness for the use of this material in the preparation of this opinion.

JEF

*Public Officers — County Children's Board — Railroads — Passes — Woman who is wife of railroad man, eligible to receive railroad pass because of the relationship, and who has been appointed member of county children's board cannot use free pass on railroad.*

February 28, 1936.

*Board of Control.*

A woman who is the wife of a railroad man and therefore eligible to receive a pass because of that relationship, has recently been appointed member of a county children's board. She is serving on that board without pay simply as an interested citizen. She has not accepted the appointment because she has been informed that by so doing she would lose the right to use her pass. You inquire whether an appointment as a member of a county children's board, created pursuant to sec. 48.29, Stats., would prevent such person from legitimately using a railroad pass.

Sec. 11, art. XIII, Wis. Const., and sec. 348.311, Stats., clearly provide that no incumbent of any office or position under the constitution or laws shall accept or use "in any manner, or for any purpose, any free pass or frank, or privilege withheld from any person," for the traveling accommodation of any person.

The office which the woman in question holds is clearly one created under the laws of the state of Wisconsin, that is to say, it was created by the county board under the power given to county boards by sec. 48.29 Stats., and as there defined, the members of the board hold an office or position within the meaning of the constitutional provision above mentioned and of sec. 348.311, Stats.


In view of the above authorities your question is answered in the affirmative.

JEF

Courts — Public Officers — County Board — County Board Committee — Garnishment — Quasi-garnishment — Per diem allowed members of county board and county board committees is "salary" within meaning of sec. 304.21, Stats.

Mileage is "repayment of disbursements" within meaning of said section.

February 28, 1936.

Orville A. DuBois,
District Attorney,
Rhinelander, Wisconsin.

In your letter of February 17 you ask whether the per diem and mileage allowed members of the county board for board and committee meetings are salary or wages within the meaning of sec. 304.21, Stats. You further ask whether such per diem or mileage is a repayment for a disbursement within the meaning of the new material inserted in said section by ch. 334, Laws 1935.
Per diem allowed members of county board and county board committees is a "salary" within the meaning of sec. 304.21. Mileage is "repayment of disbursements" within the meaning of said section.

Sec. 304.21, Stats., relates to the quasi-garnishment of public employees. It provides that a judgment against a public employee may be filed with a designated public officer and thereafter sums due the employee from the municipality or state shall be applied on said judgment. This section contains, in subsec. (2), among others, the following provisos:

"* * * provided that if the sum or sums due as aforesaid is for salary or wages of any officer or employe of any state, county, city, village, town, school district or other municipal corporation, the same shall be exempt from the provisions of this section to the same extent as salaries and wages are by law exempt from garnishment; provided further that any repayment to any such officer or employe of disbursements made and expended by such officer or employe in discharge of the duties of his office, shall not be subject to any judgment or lien mentioned and described herein; * * *

"Salary" is an agreed compensation for the rendering of services which are not menial in nature. It is based upon time and not upon the amount of services rendered. The very essence of the per diem compensation to county board members is the payment for services rendered upon the basis of time. "Per diem" usually is held to be synonymous with "salary." 54 C. J. 1123, Note 61 and p. 1125, Note 86 (e).

The purpose of a "mileage" allowance to board members is to reimburse them for expenses involved in traveling to and from official business. Sec. 59.03 (2) (f) refers to mileage as compensation for an expense. The mileage allowance is computed in accordance with sec. 14.71 (6). This subsection, by its wording, is intended to "reimburse" the recipient of a mileage allowance. "Mileage" is not based upon time given to public service but upon miles traveled, whether or not such traveling is done during the time for which a salary is paid. Although the mileage allowance is
not based upon actual disbursements it is based upon a rate per mile which is calculated to be the average cost of travel together with depreciation on the vehicle used.

The second proviso in sec. 304.21, above quoted, relating to disbursements, is in the nature of an exemption. Exemption statutes should be liberally construed in favor of the debtor. *Below v. Robbins*, 76 Wis. 600, 602.

JEF

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**Public Lands — Taxation — Assessment — Taxable**

lands upon which tax had been imposed in previous years but which were inadvertently omitted from 1934 tax roll should be placed upon 1935, 1936 or 1937 assessment roll for 1934 taxes.

Assuming proper assessment under 70.44, Stats., it is held under facts given that lien for 1934 taxes relates back and attaches as of August, 1934.

Sovereignty of federal government is not to be extended to defeat and destroy state's right to collect tax lawfully levied justly owing and due.

February 28, 1936.

**ROBERT A. NIXON,**

*District Attorney,*

Washburn, Wisconsin.

You state that on April 18, 1935, an owner of land, which was situated in Bayfield county, conveyed such land by warranty deed to the United States of America. At that time the requested statement of the county treasurer as to back taxes showed unpaid taxes for the years 1931, 1932 and 1933. The county treasurer stated that no 1934 taxes were assessed. The taxes for 1931, 1932 and 1933 were duly paid. You state further that no reason appears why the lands were omitted from the 1934 tax roll and that it is now apparent that they should have been placed thereon.
You ask whether it is possible under sec. 70.44, Stats., to make an assessment in either 1935, 1936 or 1937 for the 1934 taxes as property omitted from the 1934 tax roll. You ask further, assuming an affirmative answer to your first question, whether such taxes when levied will constitute a lien against the real estate and whether the lands may be sold and title of the United States divested by the sale of these lands for unpaid taxes.

Taxable lands upon which a tax had been imposed in previous years, but which were inadvertently omitted from the 1934 tax roll may be placed upon the 1935, 1936 or 1937 tax roll for the 1934 taxes.

Sec. 70.44, Stats., provides:

"Real or personal property omitted from assessment in any of the three next previous years unless previously reassessed for the same year or years, shall be entered once additionally for each previous year of such omission, designating each such additional entry as omitted for the year 19 . . . (giving year of omission) and affixing a just valuation to each entry for a former year as the same should then have been assessed according to his best judgment, and taxes shall be apportioned, and collected on the tax roll for such entry."

Under this statute the right to place property inadvertently or erroneously omitted from the tax roll in one or all of the three next previous years on a following year's tax roll is clear. An assessor as a public officer is under a continuing duty to place such property on the tax roll. Mere neglect or refusal of a public officer, such as an assessor, to perform his duty to the public at the time appointed therefor (when the 1934 assessment roll was completed) cannot frustrate the remedial purpose of this statute. State ex rel. Burnham v. Cornwall, 97 Wis. 563, 73 N. W. 63; State ex rel. Blaine v. Erickson, 170 Wis. 205, 174 N. W. 919. You are therefore advised that it is the absolute duty of the assessor to place the property hereinbefore described upon the next assessment roll so that the 1934 taxes may be collected.

Your next inquiry is whether the taxes when so assessed will constitute a lien upon the lands.
In 1934 the lands here in question were not included within any of the exemption provisions of sec. 70.11, Stats. It is apparent that the lands were taxable at that time and that a tax should have been assessed thereon for 1934. By virtue of a remedial statute, sec. 70.44, Stats., these lands shall be placed on the assessment roll for a forthcoming year and the lands taxed as for the year of omission just as though the assessor had not failed in his duty. The statute creates no new obligation—it is merely remedial. The statute is predicated upon the principle that it is the duty and obligation of every individual to pay that proportion of the taxes warranted by his property existing at the time when the assessment, although omitted, should have been made. It is remedial in effect in that it provides for the steps of procedure for the enforcement of such obligation and collection of the tax when such has not been paid because of some irregularity or omission in the levy. State ex rel. Davis and Starr Lbr. Co. v. Pors, 107 Wis. 420, 428.

Considerable confusion in the law surrounding the question of when a lien for taxes actually attaches to the land prevailed until Petition of Wausau Investment Co. et al., 163 Wis. 283, was decided. In that case it became material for purposes of exemptions to determine at what time the lien actually attached. After reviewing the statutes and authorities on the subject, the court held, pp. 289-290:

"The conclusion that we now reach from examination of the taxation statutes is that the law contemplates that the assessment roll is to be completed, except for the correction of mistakes and clerical errors, on the first Monday in August when the assessor delivers the assessment roll to the town clerk for filing and preservation in his office. Sec. 1064, Stats. The assessor is required to begin the preparation of the roll on the 1st day of May. Personal property (with certain exceptions) must be assessed as of that date and no change of location or ownership thereafter affects the assessment thereof, but real property may be assessed at any time between that date and the sitting of the board of review. Sec. 1033 and sub. 8, sec. 1040. The board of review is required to sit on the last Monday of June and the assessor lays the roll before the board. Secs. 1060, 1061. This board has very complete power to hear complaints, take testimony, raise or lower assessments, correct errors,
place omitted property on the roll, and in fact fully to complete the same. The statute fixes no date upon which real property is to be assessed, and in view of the very extensive powers of the board of review over the roll and the fact that it is in no sense a completed document until the board finishes its labors, we conclude that if real estate passes from the taxable class to the exempt class, or vice versa, at any time prior to the first Monday in August, when the roll is completed, verified by the assessor, and filed with the town clerk, it would be the duty of the board to change the roll by striking out or adding such real estate, as the case may be. No changes in the roll are authorized to be made thereafter except such as are necessary to correct mere errors or mistakes. The inclusion therein of property then subject to taxation cannot be called an error or mistake. When the annual taxes are thereafter levied they are necessarily levied on the property rightly included in the roll on the first Monday in August and hence the levy must be considered as relating back to that date."

Since that time the section (70.06) fixing the date for the assessment of property was amended (ch. 461, Laws 1929, and renumbered to be 70.10 by ch. 349, Laws 1933), so that it now fixes the date for the assessment of real property to be as of the same date as personal property, i.e., May 1. See sec. 70.10, Stats.

No change in ownership after May 1 could affect the taxability of this property. In the instant case it is apparent that the property not being in any exempt class as of May 1, 1934, was taxable. Further, following the decision in Petition of Wausau Investment Co., supra, it appears that had the land been assessed at the proper time a lien would have attached for such taxes as of August, 1934. See Judd v. Fox Lake, 28 Wis. 583; Schlitz Realty Corp. v. Milwaukee, 211 Wis. 62; XVI Op. Atty. Gen. 160. However the land was not assessed at the proper time and if a lien is held to have attached as of 1934 it can be done so only on the doctrine of relation back as such theory was announced by our court in Peters v. Myers, 22 Wis. 602, and followed in Flanders v. Merrimack, 48 Wis. 567; Nicolet Securities Co. v. Outagamie Co., 217 Wis. 439. In the case of Peters v. Myers, supra, the court, p. 606, said:
The law made all taxes assessed on any tract of land, and all costs, charges and interest thereon, a lien upon the land until paid. Sec. 115, ch. 15, R. S. 1849. And, as already remarked, owing to the invalid provision in the law of 1854, the taxes for 1857 were not properly assessed upon the land until after the passage of the re-assessment law of 1862; yet when they were assessed under that law, they are referred to a period anterior to the deed, and are to be treated as an incumbrance from that time."

In the recent case of Nicolet Securities Co. v. Outagamie Co., 217 Wis. 439, 441-442, the court affirmed this doctrine of relating the lien back.

"* * * The defendant concedes that the reassessed tax constitutes a lien on real property as of the time when the tax was originally assessed under the doctrine of relation. Peters v. Myers, 22 Wis. 602; Simmons v. Aldrich, 41 Wis. 241; Flanders v. Merrimack, 48 Wis. 567, 4 N. W. 741; Pier v. Fond du Lac County, 53 Wis. 421, 10 N. W. 686; Evans v. Sharp, 29 Wis. 564, 575; Nelson v. Gunderson, 189 Wis. 139, 207 N. W. 408.

"* * * The plaintiff merely asserts what has long been the declared law, that the lien of the reassessment when made is the same as the lien of the 1923 tax, had it been properly levied, assessed, and proper proceedings had for the sale of the property. This has been a rule of law in this state for over sixty years, and we find nothing in the statute which changes or attempts to change the rule established in Peters v. Myers, supra. * * *"

Under the authorities cited and assuming a proper assessment under sec. 70.44, Stats., it must be held that the lien for 1934 taxes will attach as of August 1934.

You state that the property was conveyed by a warranty deed. Although we have no copy of such deed at hand, if it is assumed that it is a regular warranty deed, no doubt a covenant against encumbrances was contained therein. As the lien for the 1934 taxes attached to the lands prior to the time of the conveyance (April, 1935) this particular covenant was breached and the vendee, when required to pay off such encumbrances, may be indemnified therefor in a cause of action against the vendor. Peters v. Myers, 22 Wis. 602. Although some doubt may exist because the vendee in
this case is the United States of America and because of the possible applicability of the doctrine announced in *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316, 4 L. ed. 579, it is manifest that the federal government may not impair, impede, obstruct or cut off the state's rights to tax this land where the same is situated wholly within its boundaries. Manifestly, the federal government's sovereignty should not be extended so as to destroy the state's right to collect a tax lawfully levied and which is justly due and owing. You are advised that the assessor should place the property on the assessment roll in compliance with the mandatory provisions of sec. 70.44, Stats., and to give proper notice to the federal government of the fact that such taxes are due and owing. When the federal government is apprised of the situation, it will, no doubt, cause such taxes to be paid and then seek redress as against the vendor on his warranty deed or more particularly the covenant against encumbrances contained therein.

JEF
Indigent, Insane, etc. — Social Security Law — Old-age Assistance — Rule of state pension department requiring that old-age assistance shall not be allowed for any period prior to date of certificate issued pursuant to sec. 49.29, subsec. (1), Stats., is valid.

March 2, 1936.

PENSION DEPARTMENT.

In your communication of February 24 you ask our opinion upon the following: The state pension department, in accordance with sec. 49.50, subsec. (2), Stats., has promulgated the following rule:

"Payment of old-age assistance, aid to dependent children and blind pensions shall not be started earlier than the date the application is officially approved. Initial payment is to be made on the first of the month following, covering the period from the date of official approval to the end of the month."

The validity of this rule has been questioned on the ground that sec. 49.29, subsec. (1), Stats., gives the county administrative agency authority to determine when old-age assistance shall commence, and that such agency may order the assistance to commence prior to the date of a certificate issued pursuant to sec. 49.29 (1). You ask whether your rule is valid under the statutes.

The rule of the state pension department requiring that no old-age assistance shall be allowed for any period prior to the date of the certificate issued pursuant to sec. 49.29 (1) is valid.

Secs. 49.27, 49.28 and 49.29 (1) provide:

Sec. 49.27 "An applicant for old-age assistance shall file his application in writing with the county judge of the county in which he resides, in such manner and form as shall be prescribed by the board of control. All statements in the application shall be sworn to or affirmed by the applicant, setting forth that all facts are true in every material point."
Sec. 49.28: "The county judge shall promptly make or cause to be made such investigation as he may deem necessary. The county judge shall decide upon the application, and fix the amount of the old-age assistance, if any, and such decision shall be final; provided that the county board may at any time reduce or discontinue entirely such assistance granted to any beneficiary. An applicant whose application for old-age assistance has been rejected or whose allowance has been stopped, may not again apply until the expiration of twelve months from the date of his previous application."

Sec. 49.29 (1): "The county judge shall issue to each applicant to whom old-age assistance is allowed, a certificate stating the date upon which payments shall commence and the amount of each instalment, which may be monthly or quarterly, as the judge may decide."

The above provisions contemplate that the prescribed procedure shall be completed before assistance may be paid to an applicant. The steps in this procedure may be briefly stated as follows:

1. Formal application for assistance;
2. Investigation by administrative agency;
3. Determination of eligibility of applicant and fixing of the amount of assistance;
4. Issuance of certificate.

Following the procedure above outlined, the administrative agency must make an investigation after formal application is made for assistance. After making such investigation, the agency must determine whether the applicant is eligible to receive assistance. This determination is based upon the facts existing at the time the determination is made and not upon facts existing at some prior or future date. If the agency finds that the applicant is eligible to receive assistance, such assistance is available to him as of the date of such determination and not as of some prior or future date. If he is entitled to assistance the agency should immediately issue the certificate prescribed by sec. 49.29 (1).

You state that it is contended that sec. 49.29 (1) gives the administrative agency authority to allow assistance for a period antedating the issuance of such certificate. This
subsection provides that if assistance is allowed the judge shall issue a certificate “stating the date upon which payments shall commence and the amount of each instalment, which may be monthly or quarterly * * *.” It appears that the word “payments” as here used refers to the actual payment or disbursement to the applicant of the assistance allowed. The judge is given authority to state when such payments or disbursements shall commence, to state the amount of each payment or disbursement and to state whether such payments or disbursements shall be monthly or quarterly. The judge is given no authority to state when the assistance or pension shall commence but is given authority to state when the payments or disbursements of the assistance or pension allowed shall commence. Thus the applicant is entitled to assistance or pension as soon as the certificate is issued and the judge is given authority to state in the certificate when such assistance or pension shall be paid to the applicant.

It is possible that the word “payments” is used in the sense of the accrual of the assistance. If so, the word “assistance” could be substituted for the word “payments.” It must be noted that the word “payments” or the substituted word “assistance,” is followed by the words “shall commence,” which mean future and not past time. Whether the word “payments” is taken to mean the actual “disbursements of the assistance allowed” or the “assistance itself” the language clearly does not authorize allowance of assistance for a period prior to the date of the certificate.

The word “payment” obviously has been used in both meanings in the state pension board rule above quoted. In the first sentence of the rule it is ordered that payment (meaning assistance) shall not start earlier than the date the application is approved, and in the second sentence it is ordered that the initial payment (meaning disbursement) shall be on the first day of the month following. We believe this rule is a valid exercise of your powers. We suggest that further confusion may be avoided by amending the rule in such a way that the word “payment” will not be used with the two different meanings.

That the law does not authorize the allowance of old-age assistance for a period antedating the certificate is substan-
tiated by sec. 49.38, Stats. This section provides that state aid shall be paid quarterly and that if the amount payable to counties shall exceed the amount of state funds available the secretary of state shall prorate the amount available. If the county administrative agency were authorized to allow assistance for a period antedating the certificate the secretary of state would have no up-to-date records upon which an accurate prorating of funds could be made. JEF

Prisons — Prisoner, under sec. 53.11, Stats., may earn "good time" when he is out on parole, conditional pardon or any other legal form of release.

March 4, 1936.

BOARD OF CONTROL

In your letter of February 4 you state that you would be pleased to be advised as to whether an inmate of the Wisconsin state prison can earn "good time" while on parole from that institution and prior to the expiration of his term.

Sec. 53.11, Stats., provides:

"(1) The deputy warden shall keep a true record of the conduct of each convict, specifying each infraction of the rules of discipline. At the end of each month the said deputy shall give a certificate of good conduct to each convict who shall require it, against whom is recorded no infraction of the rules of discipline. Every convict who is now or may be hereafter confined in the state prison and shall conduct himself in a peaceful and obedient manner and faithfully perform all the duties required of him shall be entitled to a diminution of time from the term of his sentence, not exceeding the amounts specified in the following table, for the respective years of his sentence and pro rata for any part of a year, where the sentence is for more than a year:
Good time granted

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<th>Good Time Granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>First year</td>
<td>One month</td>
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<tr>
<td>Second year</td>
<td>Two months</td>
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<td>Third year</td>
<td>Three months</td>
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<td>Fourth year</td>
<td>Four months</td>
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<tr>
<td>Fifth year</td>
<td>Five months</td>
</tr>
<tr>
<td>Every year thereafter</td>
<td>Six months</td>
</tr>
</tbody>
</table>

“(2) Any convict who violates any regulation of the prison or refuses or neglects faithfully to perform all the duties required of him, and has become entitled to any diminution of his sentence, shall forfeit from his good time earned, for the first offense, five days; for the second offense, ten days; and for the third and each subsequent offense, twenty days; and in addition thereto, the warden may, with the consent of the board of control, cancel and deprive him of all or any part of the good time theretofore earned.

“(3) 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 under this section.”


The statute above quoted is a beneficial one and should be liberally construed in favor of the convict. Op. Atty. Gen. for 1910, 399. This department consistently has held that when a prisoner is released on conditional pardon or parole the running of his sentence is not suspended. Crooks v. Sanders, 123 S. C. 28, 115 S. E. 760, holds that a prisoner is entitled to “good time” while released on a parole which does not suspend the running of the sentence.

In view of the fact that a prisoner on parole or conditional pardon is under restraint and supervision, that the running of a sentence of a prisoner so released is not suspended, and that the statute should be liberally construed in favor of the prisoner, we are of the opinion that “good time” should accrue during the period of such release.

JEF
Appropriations and Expenditures — Unemployment Relief Funds — In absence of judicial determination of question, state treasurer may not safely honor requisitions for federal relief funds upon approval of some person or agency other than industrial commission.

March 4, 1936.

ROBERT K. HENRY,
State Treasurer.

You state that the public welfare department of Wisconsin has been making requisitions upon the secretary of state and the state treasurer for pay rolls and expense accounts.

The first requisition to which you call our attention reads in part:

"The public welfare department hereby recommends that checks, according to the detail attached, be drawn upon the unemployment relief trust fund out of federal funds."

The requisition is numbered and states the amount on the face thereof. It is signed by Alfred W. Briggs, director, and bears the following approval:

"Approved
Industrial Commission
Voyta Wrabetz,
Commissioner."

Two other requisitions to which you direct our attention are similar as to form, except the approval, which reads as follows:

"Approved:
Voyta Wrabetz
Chairman, Industrial Commission."

You inquire as to the sufficiency of these approvals. We take it that your question is raised because of the governor's executive Order No. 5 of February 19, 1936, the material part of which reads as follows:
"Pursuant to the direction and authority of the federal relief administration, those portions of Executive Orders numbers 2 and 4, dated April 25, 1935 and December 7, 1935, respectively, are amended and modified to the following extent:

"1. All responsibility and authority granted to the industrial commission for the disbursing and accounting of any and all federal relief funds and surplus commodities granted to the state of Wisconsin for relief purposes, is hereby transferred and delegated to the Honorable Voyta Wrabetz, chairman of the industrial commission.

"2. The industrial commission is hereby relieved of any and all authority and responsibility in connection with the matters covered in paragraph 1 hereof as of this date."

We understand that Howard O. Hunter, assistant federal relief administrator, sent a telegram from Washington on February 17, 1936, to the industrial commission, which telegram reads as follows:

"You are herewith relieved of all responsibility for receiving, disbursing or accounting for any federal emergency relief funds which may now be or hereafter granted to the state of Wisconsin."

It would seem from the foregoing executive order, and telegram from the relief administrator, that the governor purported to act under federal authority and in conjunction with the federal administrator in transferring the power to disburse federal relief funds from the industrial commission to its chairman. No Wisconsin statute is referred to in the executive order as authorizing the transfer, and we do not find any Wisconsin statute directly authorizing such a transfer.

On April 29, 1935, this department rendered an opinion (XXIV Op. Atty. Gen. 270) to your office in which it was concluded that the industrial commission was the proper agency for the receipt and distribution of relief funds under ch. 15, Laws 1935, which was published on March 27, 1935.

This opinion was rendered after the governor had issued Executive Order No. 2 on April 25, 1935, designating the industrial commission as the agency for the distribution and administration of relief funds appropriated by ch. 15,
Laws 1935, and ordering and authorizing said commission to perform the duties of distributing and administering relief funds in the manner provided by ch. 363, Laws 1933, although in the opinion it was suggested that the executive order was probably superfluous and immaterial, in view of the provisions of ch. 363.

On July 25, 1935, ch. 286, Laws 1935, was published. This chapter appropriated from the general fund from the revenues derived from ch. 15, Laws 1935, a sum not exceeding $200,000.00 "to the industrial commission or such agency as the governor may designate, to administer said chapter." The appropriation itself is not important here, since your inquiry is directed to requisitions for federal funds, whereas the funds appropriated under ch. 286 are state funds derived from Wisconsin taxes. Ch. 286 is significant, however, from the standpoint of the inferences which may be drawn therefrom as to the legislative intent respecting administration of relief. It is apparent from the language of ch. 286 that the legislature considered that the administration of ch. 15 was vested in the industrial commission, or such agency as the governor might designate, although the language falls short of an express direction to that effect.

Section 8, ch. 15, Laws 1935, appropriated from the general fund for relief purposes, among other things, (subsec. (d) ) "all funds made available to this state for the relief of the destitute or the unemployed, or both, by acts of the Congress of the United States." Consequently, if the industrial commission is the proper agency to administer ch. 15, it is undoubtedly the proper agency to disburse federal relief funds coming into the state treasury.

Sec. 28.20, subsec. (1), Stats., authorized the governor on behalf of the state to enter into such contracts or agreements with the president of the United States as the president may deem necessary or advisable in carrying out the provisions of an act of congress entitled "An act for the relief of unemployment through the performance of useful public work, and for other purposes," approved March 31, 1933, and any other act of congress amendatory thereof or supplementary thereto.
A careful reading of the remainder of sec. 28.20 would seem to indicate that this section related to works projects rather than direct relief, and even if it be considered broad enough to cover direct relief, we do not understand that the governor ever attempted to utilize his powers under this section for the purpose of making a contract with the president covering the subject of disbursing federal relief funds.

Sec. 20.57, subsec. (4), Stats., appropriates from the general fund to the industrial commission,

"All moneys made available to the state and accepted by the legislature or governor pursuant to section 101.33 are, as such moneys become available for unemployment or other emergency relief or for public works (other than highway construction) to be undertaken to relieve unemployment, to be distributed and expended as required by the several acts of congress making such funds available and the rules and regulations issued thereunder by the federal authorities in whom the administration of these acts shall be vested. * * *"

It is to be noted that this section practically gives the federal government complete control over the distribution and expenditure of federal funds in this state, since the funds are "to be distributed and expended as required by the several acts of congress * * * and the rules and regulations issued thereunder by the federal authorities."

The significant thing to note, however, for present purposes is that the appropriation runs to the industrial commission—not to such agency as the governor may designate, nor to such agency as federal authorities may designate.

The fact that the appropriation runs to the industrial commission is important for the reason that sec. 2, art. VIII, Wis. Const., provides:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law. * * *"

No exceptions are made in favor of federal or any other funds. We take it that once money is in the treasury—no matter how it gets there—it can only be paid out pursuant to an appropriation.
In the present instance, the agency to which the appropriation runs has been relieved of its stewardship over the funds in question as far as any moneys appropriated under sec. 20.57, subsec. (4), are concerned. At least an attempt has been made to so relieve it, and for the purposes of answering your inquiry relative to any funds under sec. 20.57, subsec. (4), we do not deem it necessary to decide whether or not the governor and the federal relief administration had the power to transfer the disbursement of federal funds from the industrial commission to some other agency, or related questions, such as whether, the designation having once been made to the industrial commission, the power to thereafter designate some other agency might be exercised, or whether the chairman of the industrial commission is in legal contemplation an "agency" within the meaning of ch. 286.

The real question as we see it under sec. 20.57 (4) is whether, when an appropriation has been made by law, the power to disburse funds from the appropriation may be exercised by any person or agency other than the one to whom the appropriation has been made.

If sec. 2, art. VIII, Wis. Const., is to be strictly construed, it would seem that the above question should be answered in the negative.

The general rule is that provisions of appropriation or revenue statutes are not to be extended by implication or construction beyond the clear import of the language used, nor will they be enlarged so as to embrace matters or persons not specifically named or pointed out. 59 C. J. 1133-1134.

On the other hand, a respectable argument may be made to the effect that ch. 15, Laws 1935, ch. 286, Laws 1935, ch. 363, Laws 1933, secs. 28.20, 20.57 (4), 101.33 and 101.34, Stats., taken together and read as a whole, evidence a legislative intent to accept the benefits of federal relief funds subject to federal laws, rules and regulations, and that consequently, if federal authorities see fit to designate some agency other than the industrial commission to disburse federal relief funds, then the appropriation statutes should be construed as though the appropriation ran to such substituted agency.
It has been held that where the purpose of a statute is clear, the legislative language should be construed strictly or liberally according to the effect as regards such purpose. *State v. Helmann*, 163 Wis. 639.

Ch. 15 makes an appropriation for relief purposes and includes federal funds, but the statute is silent as to to whom the appropriation runs. It may be that the constitutional objection to the spending of funds by an agency other than the one to whom the appropriation runs, noted above in the case of sec. 20.57, subsec. (4), would probably not apply to funds appropriated under ch. 15, and as to such funds the question is one of determining what is the proper agency under the law to expend such funds.

What view the court might take in the present instance is a matter for conjecture, and you would be acting at your peril upon any prediction which we might make were we inclined to make one.

In view of the foregoing discussion, the importance of the question, and the apparent likelihood of litigation arising with respect thereto, it is our advice that you may not safely honor the requisition in question in the absence of an order of a court directing such payment.

JEF
Criminal Law — Second Sentences — Prisons — Prisoners — Prisoner in Waupun may be tried and sentenced while he is already serving term, and governor may issue temporary permit to take prisoner out of prison for that purpose.

March 6, 1936.

Harold M. Dakin,
District Attorney,
Watertown, Wisconsin.

You desire advice on the following facts and circumstances:

“In October, 1934, one K and two others attempted to hold up and rob the Ixonia bank in Jefferson county. The two others were apprehended, tried and convicted and sentenced to the state prison for three to seven years. K was accosted as a suspect in Milwaukee and shot it out with the officers. As a result he was tried in criminal court in Milwaukee and sentenced to the state prison for a period of one to twenty years.”

You state that after conviction you issued a detention warrant which is now in the possession of the warden in the state prison. You say that a request has come to you from K that he be brought to trial before your circuit court on the charge that has been made against him. You presume that it is his hope that the sentence when imposed would commence to run then so that when he had served his time under the sentence from the Milwaukee court both sentences would have been served. You inquire whether K can be brought back from Waupun and tried and sentenced while he is already serving a term there.

This question must be answered in the affirmative. Sec. 57.115, Stats., reads:

“Whenever an emergency exists which, in the opinion of the governor makes it advisable, the governor may permit the temporary removal of a convict from confinement for such period and upon such conditions as he may determine.”
I take it that such temporary removal may be made for the purpose of having the convict tried for a charge brought against him. See XV Op. Atty. Gen. 25, XVI Op. Atty. Gen. 502, II Op. Atty. Gen. 301. In the last opinion it was stated, p. 302:

"It has often been held that a convict who commits an offense while serving his sentence may be tried and sentenced to a term in addition to his original sentence. People v. Majors, 65 Cal. 138; S. C. 52 Am. Rep. 295; Peri v. People, 65 Ill. 17; Coleman v. State, 35 Tex. Crim. Rep. 404."

See also 41 L. R. A. (n. s.) 1095.

The above rule is adopted in all states except Missouri. See note to the above citation. One of the reasons that the court has given why this should be permitted is that it may be impossible to convict after the prisoner has served his term because the witnesses may all have disappeared and in important cases it is deemed advisable to place the defendant on trial, especially if the crime for which he is to be tried is of more importance and more serious than the one for which he is serving a term.

JEF

Criminal Law — Extradition — Prisons — Prisoners — Sheriff need not arrest person who is fugitive from justice and hold him for requisition on mere information received from authorities from Minnesota when person is under charge for similar offense in this state.

March 6, 1936.

Harold M. Dakin,
District Attorney,
Watertown, Wisconsin.

In your recent letter you state that you caused a warrant to be issued against one C on the charge of nonsupport of his wife and child. The preliminary hearing was had and
the man was bound over to the circuit court for trial. He is now out on bond conditioned for his appearance at the next term of your circuit court.

You further state that C has a divorced wife and a minor child in Minnesota. A warrant for abandonment has been issued in Hennepin county, Minnesota, against this same man. The Minnesota authorities have telegraphed the sheriff of Jefferson county, demanding that he arrest C on their warrant in order that they may extradite him. You say you have informed the sheriff that he cannot be returned to Minnesota until after his case is disposed of here. You ask to be advised as to the proper procedure in this case. You believe that this man should not be turned over to the Minnesota authorities under these circumstances as, in that event, your county and state would be forced to assume a burden that they need not assume as long as you can make C work and support his family.

In an official opinion in XIX Op. Atty. Gen. 225, it was ruled:

"Deportation of inmate of prison can be made only after termination of his imprisonment; pardon, commutation of sentence or conditional pardon, conditioned on deportation will answer call of statute."

That decision was predicted on the federal statute concerning the application by the immigration service of the United States department of labor for deportation. Your situation arises, however, under the uniform criminal extradition act which was enacted by various states besides the state of Wisconsin, and in sec. 364.02, Stats., provides:

"Subject to the qualifications of this chapter, and the provisions of the constitution of the United States controlling, and acts of congress in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state."

Sec. 364.04 reads thus:
"When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney-general or any prosecuting officer in this state to investigate or assist in investigating the demand, and to report to him the situation and circumstances of the person so demanded, and whether he ought to be surrendered."

Sec. 364.19 reads as follows:

"If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor at his discretion either may surrender him on the demand of the executive authority of another state, or may hold him until he has been tried and discharged, or convicted and punished in this state."

See also secs. 364.13 to 364.15, Stats.
You are advised that your advice to the sheriff is correct and that there is no authority for the sheriff to arrest him under the facts stated simply on a statement received from the Minnesota authorities directed to the sheriff.
JEF

Social Security Law — Old-age Pensions — One receiving old-age assistance from one county loses right to same by removal to another county. Application for assistance must be made in county to which such person moves.
Old-age assistance beneficiary, under proper circumstances, may be cared for in institution outside state.

March 6, 1936.

JAMES L. McGINNIS,
District Attorney,
Amery, Wisconsin.

You ask opinion upon the following:
If an old-age assistance beneficiary moves from the county from which he is receiving assistance to another
county does the original county or the county of his new
residence pay him assistance?

Your question is answered in XXIV Op. Atty. Gen. 711. The caption in that opinion reads in part as follows:

"Those receiving assistance from one county lose right to
same by removal to another county. Application for as-
sistance must be made in county to which such persons
move."

You further ask whether a Wisconsin old-age assistance
beneficiary may live in a fraternal or religious home located
in Minnesota.

Sec. 49.23, Stats., provides in part:

"Old-age assistance shall not be granted or paid to a
person:

"(1) While or during the time he is an inmate of and re-
ceives the necessities of life from any charitable institution
maintained by the state or any of the political subdivisions
of the state, or is an inmate of a private charitable, benevo-
lon or fraternal institution or home for the aged to which
no admission charge as a life tenant has been made; pro-
vided that application for old-age assistance may be made
while the applicant is an inmate of a county home, but if
assistance is granted it shall not begin until he ceases to be
an inmate of such home."

The above italicized words, in effect, specify that no per-
son shall receive assistance who is an inmate of a private,
benevolent, or fraternal institution which supports such in-
mate without charge. The obvious purpose of this provision
is to prevent a person who already is being cared for from
becoming an expense to the public. If an institution re-
quires an admission charge a person may be an inmate
thereof and at the same time receive old-age assistance.

Presuming that the Minnesota institution in question is
one which requires an admission charge, we find nothing in
the law which prevents a beneficiary from being cared for
at such institution while receiving old-age assistance. How-
ever, it must be remembered that a beneficiary must be a
resident of this state. Whether or not residence is lost de-
pends upon the facts in each case. A person may go to and
temporarily stay at an institution without this state for the purpose of receiving special treatment or care and nevertheless retain his residence in Wisconsin. For a discussion of the meaning of "resident" and "residence" see XXIV Op. Atty. Gen. 711.

Jef

Public Officers — School Districts — School Board Member — Member of nonsalaried city school board may act as its secretary and receive compensation therefor.

March 6, 1936.

Walter B. Murat,
District Attorney,
Stevens Point, Wisconsin.

You inquire whether a city board of education is empowered to elect one of its own members as secretary and whether such secretary may be compensated at a rate to be determined by such board of education. We understand that the members of the board of education in question do not receive any salary or compensation for their services.

It is our opinion that your inquiry should be answered in the affirmative.

Sec. 40.52, subsec. (3), Stats. provides:

"The board shall elect one of its members president and another vice president; and shall elect a secretary (the city clerk or other competent person being eligible). The city treasurer shall be treasurer of the school board."

There is no language in this statute from which it may be inferred that a board member is not eligible to act as its secretary. It is expressly provided that the president and vice president must be members of the board, but when it comes to the secretary the legislature apparently intended.
to widen the field from which such officer might be chosen instead of limiting the position to board members. The words "or other competent person" must be given some meaning if possible. These words are very broad and, in the absence of express legislation to the contrary, it would be difficult if not impossible to construe such words so as to exclude board members. The officers of almost any sort of an organization consist of a president, vice president, treasurer and secretary, and usually these positions can be held only by members. Ordinarily some express provision would be necessary in order to make an outsider eligible. However, when such provision does exist there is no reasonable basis afforded thereby from which to infer that because an outsider is eligible members are consequently rendered ineligible by such provision. Such construction would be most illogical and unreasonable and hence should be avoided.

Sec. 40.53, subsec. (10), Stats., empowers the board to fix the compensation and prescribe the duties of all persons employed or appointed by the board. We see no reason why this statute does not apply in the case of the secretary of the board unless there are some other provisions of law which would bar him from accepting compensation.

Sec. 62.09, subsec. (6), par. (d), Stats., provides in part that no city officer receiving a salary shall receive for services of any kind rendered the city any other compensation.

Members of the board of education are city officers by virtue of sec. 62.09, subsec. (1), Stats., and we take it that if a person receives a salary as a school board member he will, by virtue of sec. 62.09 (6) (d), mentioned above, be barred from accepting any other compensation with certain exceptions mentioned in sec. 62.09 (6) (d). The inference is plain that a city official not receiving a salary may lawfully accept compensation for the performance of work other than that which he is required to perform in connection with his nonsalaried office. It is a rule of statutory construction that where the legislature has expressed its intention in one particular such expression impliedly excludes others. "Expressio unius est exclusio alterius." Here the legislature has made an express provision as to the receipt of other compensation by salaried city officers and, in view
of the foregoing rule, such provision should not be extended by implication so as to apply to nonsalaried officers.

We do not believe such an arrangement to be in violation of sec. 348.28, Stats. That section in brief prohibits an officer, agent, clerk or employee of a city or school board from receiving or acquiring any direct or indirect pecuniary interest in any purchase or sale of realty, personalty or thing in action, or in any contract or bid in relation thereto, or in relation to any public service, or the doing of any other act in any public or official service "not authorized or required by law."

Inasmuch as we have said above that the transaction in question is authorized by law, sec. 348.28, Stats., would not apply.

JEF

Municipal Corporations — Incorporation of Villages — Words and Phrases — Person who pays personal property taxes is taxpayer within meaning of sec. 61.01, Stats., relating to incorporation of villages.

March 11, 1936.

Theodore Damann,
Secretary of State.

You say: Sec. 61.01, Stats., specifies that certain territory may be incorporated as a village upon application of five "taxpayers" and upon further compliance with ch. 61. You ask: Is a personal property taxpayer a taxpayer within the meaning of this section?

A person who pays personal property taxes is a taxpayer within the meaning of sec. 61.01 Stats. relating to incorporation of villages.

Sec. 61.01 provides:
“Any part of any town or towns not included in any village, all lying in the same county, not more than one-half square mile in area, with a resident population of not less than one hundred and fifty; or of a greater area than one-half square mile and a population of not less than two hundred; or not less than one square mile in area, lying in two or more adjoining counties, with a population of at least four hundred persons to every square mile thereof, may, upon application therefor by not less than five taxpayers and residents of such territory and upon compliance with the conditions of this chapter, become incorporated as a village by such name as may be designated in the order of the court for its incorporation with the ordinary powers of a municipal corporation, and such as are conferred by the statutes.”

In construing a statute words should be given their ordinary and common meaning unless the context clearly requires otherwise. We find nothing in the statutes relating to the subject in question which would justify giving an unusual meaning to the word “taxpayer.” “‘A taxpayer is * * * ‘a person chargeable with a tax,’” or “‘a person owning property in the state subject to taxation, and on which he regularly pays taxes.’” * * *.” Baugh v. Little, 282 Pac. 459, 462, 140 Okla. 206. Ordinarily “taxpayer” includes both a real and personal property taxpayer. Considering the statute in question, it would seem that at least some personal property taxpayers would have as much interest in the question of village incorporation as real property taxpayers. We believe the word “taxpayer” should be given its ordinary meaning.

JEF
Public Officers — County Board — Social Security Law — Old-age Assistance — Membership on county board does not preclude person from receiving old-age assistance.

March 13, 1936.

HAROLD M. DAKIN,

District Attorney,

Watertown, Wisconsin.

You ask our opinion upon the following:

A member of the county board fulfills all the requirements of a person entitled to old-age assistance. Does his membership on the board preclude him from receiving such assistance?

Membership on the county board does not preclude a person from receiving old-age assistance.

Old-age assistance shall be administered either by the county judge or a county pension department. XXIV Op. Atty. Gen. 763. A member of the county board may not be appointed a member of the county pension department. XXIV Op. Atty. Gen. 698. Although the county board may create a board committee to advise with the county judge or county pension department (XXIV Op. Atty. Gen. 768) such committee does not have the power to control or dictate the policies and decisions of such judge or department. In the judge or pension department and not in the county board lies the power to administer old-age assistance laws.

Under the above rules the judge or pension department has complete power to pass upon the eligibility of a board member to receive assistance and to allow or deny such assistance. Action of the judge or department pursuant to such power is not subject to review by the county board.

With the above rules in mind we do not find any statute or rule that would be violated by the allowance of old-age assistance to a board member.

JEF
Public Officers — County Pension Department — W. P. A. appointee who co-ordinates its projects in particular county may be member of county pension department of such county.

March 13, 1936.

HAROLD M. DAKIN,
District Attorney,
Watertown, Wisconsin.

You ask if an appointee of the W. P. A. who co-ordinates its projects in Jefferson county is eligible to be a member of the county pension department. The duties of such appointee are to supervise the work projects so as to insure the honest and efficient execution of the work relief program.

The only statutory or constitutional provision which might make these two positions incompatible is art. XIII, sec. 3, Wis. Const., which provides:

"No member of congress, nor any person holding any office of profit or trust under the United States (postmasters excepted) * * * shall be eligible to any office of trust, profit or honor in this state."

This office has held that membership upon a county pension department is an office of public trust in this state. XXIV Op. Atty. Gen. 765. Hence the only question to be determined is whether a W. P. A. co-ordinator holds an office of profit or trust under the United States. The type of service rendered by the individual to the federal government determines whether such individual holds an office of profit or trust within the meaning of art. XIII, sec. 3, Wis. Const. XXII Op. Atty. Gen. 1032; XXIII Op. Atty. Gen. 150.

Public resolution No. 11, 74th Congress, approved April 8, 1935, 49 Stats., at Large 115, appropriated certain funds for relief purposes and provided that the president might accept the services of any state, or local official as may be necessary and may prescribe his authority, duties, responsibilities and tenure. Such power was exercised by the
In executive Order No. 7034 dated May 6, 1935, wherein the federal administrator was authorized to make the necessary appointments in order to carry out the function of resolution No. 11. These appointees, which include the state director and local officials such as a W. P. A. co-ordinator, are not required by said resolution to file a bond or take an oath of office. They hold their positions only as long as the various projects last. All acts of those working under the W. P. A. must be approved before they become effective.

In considering the term “public officer” as used in art. XIII, sec. 3, Wis. Const. this office in XIX Op. Atty. Gen. 241 said, pp. 243-244:

“In discussing the difference between an office of profit and trust, and mere employment, the supreme court of this state has said that to constitute such an office, "the duties must be continuous and permanent and not merely transient, occasional, or incidental." In re Appointment of Revisors, 141 Wis. 592, 608.

“In Coulter v. Pool, 201 P. 120, 187 Cal. 181, the following language is used: "a public officer being distinguished from a mere employee in that a public duty is delegated and entrusted to him, and in that there is a fixed tenure of position, the execution of a public oath of office, and generally of an official bond, the liability to be called to account for malfeasance or nonfeasance in office, and the payment of a salary from the general county treasury." (Syllabus.)

"Public office" is the right, authority, and duty created and conferred by law by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portions of the sovereign functions of government to be exercised by him for the benefit of the public Commissioners' Court of Limestone County v. Garrett, (Tex.) 236 S. W. 970, 972; Board of Education of Doerun v. Bacon, (Ga.) 95 S. E. 753, 754; Lacy v. State, (Ala.) 68 So. 706, 710; Walker v. Rich, 249 P. 56, 58.”

It will be noted that the position of W. P. A. co-ordinator lacks the essential elements of a public office as he is not required to take an oath or file a bond; nor does he have a fixed and definite term of office. Furthermore, as any action
taken by him is advisory only and must be approved by the
president or his authorized agent in all cases, such co-or-
dinator is not invested with a portion of the sovereign func-
tions of government to be exercised by him for the benefit
of the public. Hence the position of W. P. A. co-ordinator is
not an office of profit or trust under the United States
within the meaning of art. XIII, sec. 3, Wis. Const., and
therefore one holding such position may also be a member
of a county pension department.
JEF

Bonds — Public Health — Cemetery Memorial Salesmen
— Liability on bond of memorial salesman pursuant to sec.
157.15, Stats., is limited to amount of bond for all claims
arising out of transactions during license year.

March 13, 1936.

THEODORE DAMANN,
Secretary of State.

You inquire as to whether or not the bond furnished by a
memorial salesman pursuant to sec. 157.15, subsec. (3),
par. (e), Stats., carries a cumulative liability, that is to say,
whether or not it would cover several claims each in the
sum of two-hundred dollars or whether the total liability of
all claims during any one year is limited to two hundred
dollars.

It is our opinion that the latter construction is the cor-
rect one. The statute provides that licenses shall be issued
for the calendar year ending June 30, and that the applica-
tion for a salesman's license "shall be accompanied by a cer-
tificate that the applicant has a valid and effective two hun-
dred dollar bond or indemnity contract * * * or a
cash bond in like amount, indemnifying any person who is
damaged by reason of any misrepresentation, breach of
warranty or fraud."
From the very wording of the statute it is clear that a salesman may have a license for one year and that he may deposit the sum of two hundred dollars in cash to cover his liability. This provides an absolute limit in amount for the time specified, there being no provision for any additional bond or cash during the year.

Under the very words of the statute the liability on the bond is limited to two hundred dollars for any and all claims that may grow out of any transactions during the calendar year during which the license is in force.

JEF

Elections — Nominations — Voting machines cannot be used at election for delegates to national conventions of various parties unless they are constructed so that “principles” of candidates may be shown on ballot.

March 13, 1936.

THEODORE DAMANN,
Secretary of State.

You ask whether voting machines may be used if their use would make it impossible to have the “principles” of the several candidates for delegates to the various national party conventions on the ballot as authorized by sec. 5.23, subsec. (1), Stats.

Sec. 5.23 (1) provides in part:

“Nominations for candidates for president and vice president and for delegates shall be made by nomination papers, in the manner provided by sections 5.05 and 5.07, except that the nomination paper shall refer to the election to be held on the first Tuesday of April, in the year in which such candidates are to be voted for, and except that the nomination papers and ballot for any delegate may contain a statement of the principles or candidates favored by such candidate for delegate, which statement shall follow his name and be expressed in not more than five words. * * *"
This section clearly provides that a candidate for delegate to the national convention of his party may designate his "principles" on his nomination papers and such "principles" may also appear on the official ballot. It would seem that where a candidate designates the "principles" for which he stands on his nomination papers, he would be entitled to have such "principle" placed on the ballot after his name. Besides if this were not done, it would be impossible for an elector to know just for whom he should vote if he wishes to support some particular "principle." Election statutes should be construed so as to effect the will of the electors. *State ex rel. Oaks v. Brown*, 211 Wis. 249, 249 N. W. 50.

As the will of the electors could not be effectuated if the "principle" of those who are candidates for delegates to the various national conventions is not placed on the official ballot, such "principles" must be a part of such ballot.

In considering the use of voting machines in cases where the presidential and official ballots and referendum ballots were to be voted separately, this office held that such machines may be used only if they were so constructed as to permit the elector to vote on each ballot separately. I Op. Atty. Gen. 247, V Op. Atty. Gen. 658, 703, 739, IX Op. Atty. Gen. 435.

The discussion found in these opinions might be applied in the present case. Hence voting machines may be used only if the "principles" of a candidate for delegate to the national convention of his party can be shown on the ballot in such machine. If this cannot be done, voting machines should not be used in an election for such delegates.

JEF
Courts — Justice of the Peace — Criminal Law — Arrest and Examination — Justice of peace is entitled to five cents per folio for testimony taken and transcribed by shorthand reporter at preliminary hearing in criminal case.

March 13, 1936.

F. W. Horne,
District Attorney,
Crandon, Wisconsin.

You desire an interpretation of sec. 307.01, Stats., with reference to fees of justices of the peace for taking testimony at a preliminary hearing in shorthand.

This section which prescribes fees of justices of the peace reads as follows:

“For taking an examination, testimony or for any writing down in a cause, twelve cents per folio if transcribed at the request of either party, otherwise five cents whether done by a stenographer, shorthand reporter or otherwise.”

Your inquiry is directed to the correct amount to be charged by a justice of the peace for taking testimony at a preliminary hearing in shorthand and transcribed by a stenographer, the testimony having been returned to the circuit court as a part of the proceedings in a criminal case.

The testimony was taken as a necessary part of the proceedings in a criminal case pursuant to secs. 361.12 and 361.13, Stats., and was written out and returned to the circuit court pursuant to secs. 361.16 and 361.27, Stats., and not “at the request of either party” within the meaning of the statute above set forth.

Therefore the justice of the peace is entitled to five cents per folio from the county when properly certified, pursuant to sec. 59.77, Stats. See also XXII Op. Atty. Gen. 810.

JEF
Public Officers — District Attorney — County Pension Department — Offices of district attorney and member of county pension department are incompatible.

March 13, 1936.

JOHN M. PETERSON,
District Attorney,
Neillsville, Wisconsin.

You ask our opinion upon the following:
May a county board in a county having less than five hundred thousand population name the district attorney as a member of the county pension department?

The offices of district attorney and member of the county pension department are incompatible.

The district attorney is a constitutional officer. He is the legal advisor of the county, the county board, county committees and county officers. He is also a representative of the public when performing his duties as prosecutor. Although he generally acts as a legal advisor to a county officer, it may become his duty to prosecute a criminal or civil action against such officer. Because of such duties the district attorney cannot be a member of the county board (sec. 59.03 (3) Stats.), the county highway committee (XI Op. Atty. Gen. 875), the income tax board of review (XXI Op. Atty. Gen. 431); he cannot be the income tax assessor (VII Op. Atty. Gen. 484), the public administrator (Op. Atty. Gen. for 1910, 602).

The old-age assistance laws specify that the district attorney shall represent the pension department in certain cases. Under subsec. (1), sec. 49.26, Stats., the county judge (or county pension department, XXIV Op. Atty. Gen. 763) in certain cases shall receive, manage, lease, transfer, and defend and prosecute actions relating to property of an applicant for old-age assistance. Subsec. (3) of said section requires the district attorney to represent the judge or pension department in respect to such duties.

Under the old-age assistance laws the county board appropriates the money needed for assistance and the administration of assistance and it may prescribe the qualifica-
tions of employees in the pension department. Controversy between the board and the pension department might well arise.

If the district attorney became a member of the pension department he would not only be supervising his own acts under his specific duties to such department but might find himself as a member of such department in conflict with himself as the legal advisor of the county board. The law neither contemplates nor tolerates such conflict of duties. To allow such conflict of duties obviously would be unfair to the public, the county board, the pension department, and the district attorney. In accordance with the policy of this state as set forth in the opinions cited and the cases cited therein we hold that the office of district attorney and membership in the county pension department are incompatible.

JEF

Taxation — County Tax Rate — County tax maximum of one per cent should be computed on valuation for current year and not on valuation for preceding year as provided by sec. 70.62, subsec. (2) of 1935 statutes.

March 13, 1936.

TAX COMMISSION.

You ask us to advise whether the county tax maximum of one per cent is now computed on the valuation for the current year or the valuation for the preceding year.

The county tax maximum of one per cent should be computed on the valuation for the current year and not on the valuation for the preceding year as provided by sec. 70.62, subsec. (2), Stats.

Sec. 70.62 (2) reads:
"The total amount of county taxes assessed, levied and carried out against the taxable property of any county in any one year shall not exceed in the whole one per centum of the total valuation of said county for the preceding year as fixed by the tax commission; provided that such limitations shall not apply to any taxes levied to pay the principal and interest upon any valid bonds or notes of the county now outstanding or hereafter issued; (and provided further that in counties having a population of two hundred fifty thousand or more such limitation shall not apply to any taxes levied pursuant to section 59.083 of the statutes to provide for the exercise of the powers and functions relating to the consolidation of municipal services in such counties.)"

By Bill No. 36, A., which became ch. 89, Laws 1935, the legislature amended the above subsection by striking out the word "preceding" and inserting in lieu thereof the word "current." This bill was introduced January 23, 1935 and was published as ch. 89 on May 21, 1935.

By Bill No. 409, A., which became ch. 450, Laws 1935, the legislature further amended said subsection by adding the second proviso, which appears in parentheses in the above quotation. Bill No. 409, A., was introduced on March 6, 1935, and was published as ch. 450 on September 13, 1935. Note that Bill No. 409, A., was introduced after Bill No. 36, A., but before Bill No. 36, A., was published as ch. 89.

Bill No. 409, A., contained the wording of the statute as it was at the time the bill was drafted and introduced. In other words, the bill contained the words "preceding year" and not the words "current year." Although ch. 89, which changed the law to read "current year" was published before Bill No. 409, A., was finally passed, said bill was not changed to correspond with the new law as created by ch. 89. Bill No. 409, A., then became law, retaining the words "preceding year."

Bill No. 556, S., a revisor's bill, which would have correlated and harmonized the conflict between ch. 89 and ch. 450 by restoring the word "current," died with the sine die adjournment of the legislature. As a consequence subsec. (2), sec. 70.62 appears in the 1935 statutes in accordance with the wording of the chapter last published, namely, ch. 450.
Upon the above facts you ask whether the law now provides that taxes assessed against property of any county shall not exceed the given percentage of the valuation for the preceding year or the current year under sec. 70.62, subsec. (2), Stats. As a general rule when a statute amends a former statute all provisions in the original statute not found in the amending statute are repealed. Ashland W. Co. v. Ashland Co., 87 Wis. 209. In commenting upon the above rule the court in State ex rel. Board of Regents v. Donald, 163 Wis. 145, pp. 147, 148, said:

"This is because the inference is necessarily strong that such was the legislative intention. The rule, however, is not ironclad. The idea of all such rules is to carry out the legislative intention, and if it appear that the legislative intention was otherwise the rule must go and the intention prevail. The rule is not sacred, but the intention is. The intention 'is to be determined from the nature and language of the amendment, from other acts passed at or about the same time, and from all the circumstances of the case.' Bank of Metropolis v. Faber, 150 N. Y. 200, 44 N. E. 779."

(italics ours.)

A study of the facts surrounding the legislative bills in question clearly indicates the legislative intent. By ch. 89, the legislature took affirmative action in changing the word "preceding" to the word "current." Ch. 450 dealt with consolidation of municipal services and the issuing of bonds and levying of taxes therefor in Milwaukee county. It did not purport to alter that part of the statute amended in ch. 89. Ch. 450 contained the words "preceding year" and not "current year" for the reason that the law so provided when the bill was drafted and introduced. That the bill was not changed after ch. 89 became law was clearly an oversight.

As the history of these measures shows that the legislature intended to change the word "preceding" to "current" we hold that such is the law and the 1935 statutes should so read. However, we need not rely solely on the legislative intent. In The State v. Stillman, 81 Wis. 124, p. 126, the court said:
The rewriting and re-enactment of the whole section with the amendment or amendments engrossed, is a mere rule of the legislature to secure a clearer and readier understanding of the place and effect of the amendment. It is no part of the legislative act. The act consists of the amendment alone. * * *” (Italics ours.)

Under this rule ch. 450 was effective only in so far as it added the proviso clause.
JEF

Taxation — Income Tax — Privilege Dividend Tax — Sec. 3, ch. 505, Laws 1935, as amended by ch. 552, Laws 1935, so-called privilege dividend tax law, does not apply to national bank association shares.

March 13, 1936.

TAX COMMISSION.

Attention Alvin Johnson

You request our opinion as to the applicability of ch. 552, Laws 1935, relative to the privilege dividend tax, to dividends declared by national banks in the state of Wisconsin.

Ch. 552, Laws 1935, which was an act to amend subsec. (2) of sec. 2 and subsecs. (1), (4) and (6) of sec. 3 of ch. 505, Laws 1935, relating to the correction and clarification of such chapter, reads in part as follows:

“(Section 3.) (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared * * * and paid by all corporations (foreign and local) after the passage and publication of this act and prior to July 1, 1937. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.
"(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin.

"(6) The provisions of this section shall not apply to dividends declared and paid by a Wisconsin corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipts of dividends from which a privilege dividend tax has been deducted and withheld and the distribution thereof to its stockholders."

Sec. 5219 of the revised statutes, as amended (12 U. S. C. A. sec. 548, from act of June 3, 1864, sec. 41, 13 Stats. at Large 99, 112 and act of February 10, 1868, 15 Stats. at Large 34) provides in part:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause."

The material portion of sub. (c) of that clause follows:

"In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources: Provided, however, That a State which imposes a tax on or according to or measured by the net income of, business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations."
By sub. (c) a state may (1), in imposing an income tax upon an individual, include income from national bank association shares, and (2), in determining the bank's income tax, it may include the net income received from all sources. Aside from these two enlargements, the rule is clearly stated that a state may tax the shares of a national bank association in one of four forms, to the exclusion of the others. For the purpose of the question here raised, the enlargements by sub. (c) are not important.

In conformity with the United States statutes above quoted, the legislature provided the method of taxation of national bank association shares. Sec. 70.40, Wis. Stats. 1935, provides as follows:

"The taxation of the income of state banks, national banks and trust companies shall be in lieu of all taxes upon the capital, surplus, property and assets of such banks, except that no real estate owned by any such bank or trust company or constituting the whole or any part of its capital, surplus or assets shall be exempt from taxation; and excepting further that no tangible personal property owned by any such bank or company shall be exempt from taxation unless such personal property be furniture, fixtures and equipment used in the banking offices of such bank or trust company."

The income tax act in Wisconsin (ch. 71, Wis. Stats. 1933) has been construed as being an act that levies a tax which is measured by net income as contrasted with a direct tax upon net income. Income Tax Cases, 148 Wis. 456.

When the foregoing statutes and the various constructions which they have received are considered, it is at once apparent that the determination of the question of the applicability of the so-called "privilege dividend tax" to national bank association shares depends upon the type of tax the so-called privilege dividend tax really is.

Our supreme court in State ex rel. Froedtert Grain and Malting Co. Inc., v. Tax Commission of Wisconsin, 265 N. W. 672, held that sec. 3, ch. 505, Laws 1935, as amended by ch. 552, Laws 1935, which imposes a two and one-half per cent tax on the transaction by which corporate dividends are declared and received out of income derived from prop-
erty and business transacted within this state, was an excise tax. In that case the court said, p. 675:

"However the legislature may have regarded the tax, we have no difficulty in construing the statute as imposing an excise or privilege tax upon the transaction involved of transferring the dividends from the corporation to its stockholders."

In that opinion it was said further, p. 676:

"* * * But the tax is an excise tax, a tax on the transaction involved. It is an excise tax imposed on the devolution of income, derived from the transaction of business within the state, which is confessedly a proper subject of taxation. * * *"

By sec. 5219 of the revised statutes, as amended (12 U. S. C. A. sec. 548, from act of June 3, 1864, sec. 41, 13 Stats. at Large 99, 112 and act of February 10, 1868, 15 Stats. at Large 34) congress has provided the conditions as to the form and method by which a state may tax national bank association shares.

It has generally been held that a state may tax in only one of the ways provided for by this statute and that the United States statutes form the exclusive rule as to the taxation of national banks. Bank of California v. Richardson, 248 U. S. 476; City of Pittsburgh v. First National Bank, 55 Pa. 45.

In as much as the supreme court of Wisconsin has held this tax to be an excise tax it is objectionable here for two reasons: (1) because it is not in the category of income tax which is the basis the state has elected to use in taxing national bank association shares; (2) because it would be a tax on the operation of the bank and an obstruction to the exercise of its corporate powers. Second Nat. Bank v. Caldwell, 13 Fed. 429. It therefore follows that the privilege dividend tax as provided for by sec. 3, ch. 505, Laws 1935, as amended by ch. 552, Laws 1935, does not apply to national bank association shares.

JEF
Public Officers — Constable — Justice of the Peace — School Board — Town Supervisor — Words and Phrases — Elective Officers — Justice of peace, member of town board of supervisors, constable, etc., are elective officers within meaning of Wisconsin statutes.

March 13, 1936.

M. W. Torkelson, Administrator,
Works Progress Administration.

In your letter of February 26 to the attorney general you state that you are in receipt of a ruling from the national administrator to the following effect:

“For your information, persons who are candidates for, or hold elective offices shall not be employed on administrative staffs of the works progress administration.”

You state that you are anxious to know as soon as possible what are considered elective offices and particularly whether such officers as members of school boards, justices of the peace, members of the town boards of supervisors, constables, etc., are elective officers within the meaning of the Wisconsin statutes.

The term “elective office” has been defined in Words & Phrases, Second Series, Vol. 2, page 238, as follows:

"‘Elective’ as used with reference to officers in a civil service act, meant officers who are elected by the people or those whom the people are or have been accustomed to elect. Ayers v. Hatch, 56 N. E. 612, 613, 175 Mass. 489.

Within the meaning of Civil Service Law (Laws 1899, p. 802, c. 370), sec. 12, providing that one clerk of each elective judicial officer shall be exempt from civil service, a coroner is an ‘elective judicial officer.’ People ex rel. Schulum v. Harburger, 116 N. Y. Supp. 994, 997, 132 App. Div. 260.

The offices of justices of the Municipal Court of the city of New York are elective within Const. art. 10, sec. 5, providing, in relation to filling vacancies in office, that, in case of elective officers, no person appointed to fill a vacancy
shall hold his office under such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy. In re Markland, 132 N. Y. S. 735, 737, 73 Misc. Rep. 363.”

Town officers, which include members of the town board and town constables, are elected under sec. 60.19, Stats. Justices of the peace are made elective officers by sec. 60.57, while village officials, including justices of the peace are elected pursuant to sec. 61.19. Hence, it is apparent that the officers enumerated above would be considered “elective officers” within the definition given above.

School board members in common school districts are elected by the annual school meeting, under sec. 40.04, sub-sec. (3), and hence would also be considered elective officers. Members of a board of education under a city school plan may either be elected by the people or appointed by the mayor under sec. 40.52 (1), pars. (a) and (b).

JEF

Courts — Estates — Claims — Social Security Law — Old-age Pensions — Under sec. 49.25, Stats., it is duty of agency administering old-age assistance to file claim against estate of deceased assistance beneficiary.

March 16, 1936.

PENSION DEPARTMENT.

In your letter of March 4 you ask our opinion upon the following:

“Assuming that the administration of old-age assistance in a county is lodged with the county judge, may he as administrator of old-age assistance file a claim for reimbursement out of the estate of a deceased beneficiary when such estate is being probated in his own court?”
Under sec. 49.25, Stats., it is the duty of the agency administering old-age assistance to file a claim against the estate of the deceased assistance beneficiary.

Sec. 49.25, Stats., provides in part:

"On the death of a person who has been assisted under sections 49.21 to 49.39, or of the survivor of a married couple, both of whom were so assisted, the total amount paid together with simple interest at three per cent annually shall be allowed and deducted from the estate of such person or persons by the court having jurisdiction to settle the estate. * * *

This statute, by implication, requires that a claim be filed against the estate of a deceased assistance beneficiary. We have held that old-age assistance laws shall be administered either by the county judge or the county pension department, and that the acting agency shall administer all laws relating to such assistance. XXIV Op. Atty. Gen. 763. In this case the judge is the acting agency. Therefore he must file the claim in question. When filing such a claim the judge is acting as administrator of assistance laws. The filing of such claim is purely a ministerial duty. At a later date the judge will allow or disallow such claim, but his action in so doing will be in his judicial capacity as county judge and not his ministerial capacity as assistance administrator. Before the claim is allowed or disallowed attorneys for the state and other parties interested and attorneys for the claimant will have an opportunity to be heard. It is our opinion that the law requires the county judge to file such claim, even though it must be filed in his own court.

JEF
Public Officers — County Clerk — County Pension Department — In absence of court ruling person may not safely hold both offices of county clerk and member of county pension department.

March 16, 1936.

PENSION DEPARTMENT.

You ask whether the county clerk may be appointed as a member of the county pension department.

In the absence of a court ruling a person may not safely hold both the offices of county clerk and member of county pension department.

It is a well settled rule of common law that he who, while occupying one office, accepts another incompatible with the first, *ipsa facto* vacates the first office. The incompatibility which shall operate to vacate the first office exists where the nature of the duties of the two offices is such as to render it improper, from consideration of public policy, for one person to retain both. Such policy does not countenance one person's performing inconsistent functions.

The duties of the county clerk relative to the assistance laws are prescribed in secs. 47.09, 48.33, subsec. (10), 49.37, subsec. (3) and 49.50, Stats. We visualize no definite conflict between such duties and the duties of a member of the pension department. However, the wording of sec. 49.50 (4), which relates to appeals, provides that notices of hearings before the state pension department shall be given to the assistance applicant, the county clerk, and the agency administering assistance. The section further seems to contemplate appeals by the county as well as the applicant. The county, at least, is expressly authorized to be represented at such hearing. Service on the county clerk apparently is considered notice to the county authorities. Whether the clerk's duties in relation to such appeals are antagonistic to the duties of a member of the pension department is doubtful.

In view of the possibility of incompatibility between the two offices and the possibility that a clerk who accepts such
membership may vacate his position as clerk, we advise that it would be judicious to refrain from appointing a county clerk to the pension department.

JEF

Counties — County Board — Social Security Law — County Pension Department — County board may create county pension department at special meeting of board.

March 16, 1936.

PENSION DEPARTMENT.

You ask opinion upon the following:

May the county board create a county pension department at a special meeting or must such action be taken at a regular meeting?

A county board may create a county pension department at a special meeting of the board.

It is apparent from the language of sec. 59.04, subsec. (2), Stats., that a special meeting of the county board is a legal meeting, and that any of the powers which the board possesses may be exercised at a special meeting as well as at a regular meeting, unless otherwise specifically provided. *Appleton v. Outagamie County*, 197 Wis. 4, p. 9. Sec. 49.51, (2) (b) authorizes a county board to provide for a county pension department. The statute does not specify that such action shall be taken at any particular meeting of the board. Therefore, in accordance with the rule of *Appleton v. Outagamie County*, supra, such action may be taken at a special meeting. See also VIII Op. Atty. Gen. 396.

JEF
Appropriations and Expenditures — Bridges and Highways — State Highways — Constitutional Law — Under art. VIII, sec. 2, Wis. Const., no money can be paid out of treasury except pursuant to appropriation, and no money may be paid out under ch. 439, Laws 1935, since there is no appropriation for purposes mentioned in statute created.

March 20, 1936.

HIGHWAY COMMISSION.

You have called our attention to ch. 439, Laws 1935, which creates sec. 83.02, Stats., the material part of which reads as follows:

"Any town obligation, outstanding and unpaid, together with interest, shall be assumed and paid by the state, where such obligation was incurred by the town in the building of an interstate free bridge which subsequently is made a part of the state trunk highway system. The provisions of this section shall apply to such outstanding town obligations incurred in the building of an interstate free bridge where such bridge was made a part of the state trunk highway system before the effective date of this section."

You point out that this law does not specifically designate the funds to be used in making payments mentioned in the statutes, and you inquire under what appropriation such payments are to be made.

It is our opinion no payments may be made out of the treasury in the absence of a specific appropriation.

Art. VIII, sec. 2, Wis. Const. provides in part:

"No money shall be paid out of the treasury except in pursuance of an appropriation by law. * * * ."

This provision of the constitution is clear and unmistakable and has been rigidly adhered to by the Wisconsin supreme court. See State ex rel. Bell v. Harshaw, 76 Wis. 280; B. F. Sturtevant Co. v. Industrial Comm., 186 Wis. 10; Clas v. State, 196 Wis. 430.

Consequently the provisions of ch. 439, Laws 1935, cannot be carried out until such time as the legislature makes the necessary appropriation.

JEF
Insurance — Physicians and Surgeons — Prepayment at fixed yearly or monthly rate for future medical services does not constitute insurance.

March 20, 1936.

H. J. Mortensen,
Commissioner of Insurance.

You ask whether the plan hereinafter discussed constitutes insurance within the meaning of the Wisconsin insurance laws.

Several physicians contemplate the establishment of a clinic, providing a prepayment plan for medical services. Patients will be charged a monthly or annual rate, payable in advance, payment being made irrespective of the amount of medical services rendered.

It is our opinion that the proposed plan does not constitute insurance.

The statutes do not define the term "insurance," but it has been defined as follows:

"* * * An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. * * *" Shakman v. United States Credit System Co., 92 Wis. 366, 374.

"A contract by which one party, * * *, promises to make a certain payment * * * upon the destruction or injury of something in which the other party has an interest, is a contract of insurance, whatever may be the terms of payment of the consideration * * * or the mode of estimating or securing payment of the sum to be insured in case of loss, * * *" Commonwealth v. Wetherbee, 105 Mass. 149, syllabus.

"* * * a contract whereby one for a consideration agrees to indemnify another for liability, damage, or loss by certain perils to which the subject may be exposed, * * *." I Joyce, The Law of Insurance (2d ed.), ch. I, sec. 2.

"* * * An agreement by which the insurer, for a consideration, agrees to indemnify the insured against loss, damage or prejudice to certain property described in the
agreement, for a specified period, by reason of specified perils. * * ""Barnes v. People, 168 Ill. 425, 429.

Many other definitions of insurance and insurance contracts could be given but they differ in form only, and not in substance. Ordinarily, although not always, an insurance contract is a contract of indemnity, and the business of insurance is the business of making contracts of indemnity.

The contract to which you have called our attention does not appear to be one of indemnity, nor does it appear that an insurance company could be organized for such purpose. Sec. 201.04, Stats., lists some seventeen purposes for which insurance corporations may be formed in Wisconsin, but plans of the sort here under discussion are not included in the list.

It seems to us that the plan merely involves payment in advance on a retainer basis for future medical services. As far as we know the plan is a relatively new one in medical practice in this country, and it may raise questions of professional ethics and social policy, which it is not the function of this office to discuss here. However, the principle of payment for professional services on a yearly or other periodic basis regardless of the amount of service rendered is of long standing in the legal profession. Many of the leading and most ethical lawyers of this and other states have been accepting annual retainers for years from corporations and individuals. Under these arrangements the lawyer is obligated in advance to furnish all legal service that may be required by the client during the course of the year. Such service may range from practically nothing on the one hand to situations where on the other hand very heavy demands may be made upon the lawyer's time and energy. Thus the retainer may amount to what is practically a gratuity in the one instance, to compensation which is entirely inadequate in other instances.

Apparently neither the legislature nor the insurance department has ever considered such transactions to constitute insurance, nor do we believe that such construction should be implied in the case of physicians furnishing medical or surgical care on some periodic retainer basis irrespective of the amount of services rendered.
Another point to be remembered is that our statutes provide heavy penalties for unauthorized insurance in secs. 348.474 and 348.488. Penal statutes are strictly construed and one should not have to guess as to whether or not he has committed a crime. In fact, one cannot be said to willfully violate a statute which is so unclear in any particular situation that he must guess what his duty is thereunder. Brown v. State, 137 Wis. 543.

In view of the foregoing and at least in the absence of an opportunity to thoroughly examine a copy of the contract in question, we are constrained to rule that the proposed plan does not violate the Wisconsin insurance laws.

JEF

Architects and Professional Engineers — While person need not be registered professional engineer to hold office of city engineer, he must be so registered if his duties require him to do any of engineering work mentioned in sec. 101.31, subsec. (1), par. (cm), Stats.

March 20, 1936.

ARTHUR PEABODY, Secretary,

Registration Board of Architects and Professional Engineers.

You have inquired whether a person who is not a registered professional engineer under sec. 101.31, Stats., is eligible for the office of city engineer.

It is our opinion that the statutes relating to the office of city engineer do not require that he be registered under sec. 101.31. However, in so far as his duties as city engineer may call for the practice of professional engineering as defined by sec. 101.31, subsec. (1), par. (cm), he becomes subject to the provisions of that law. We held in XXII Op.
Atty. Gen. 126 that employees of a municipal corporation were not included within the exemption to sec. 101.31, subsec. (7), par. (e), Stats.

In other words, it is the work which an engineer performs that determines whether he must be registered and not the holding of any office. If a person were elected or appointed city engineer and never found it necessary to do any of the things specified in sec. 101.31, subsec. (1), par. (cm), he would not need to be a registered professional engineer.

It would seem, however, that at some time or another the average city engineer would be called upon to perform certain work which would constitute the practice of professional engineering within the meaning of the statute and that it would consequently be unwise in most instances to appoint or elect an unlicensed engineer to the office of city engineer.

JEF

Railroads — Sec. 192.01, Stats., providing for forfeiture for neglect or refusal to stop passenger train in village, does not apply and cannot be invoked in case of neglect or refusal to stop train in incorporated city.

March 20, 1936.

William H. Stevenson,
District Attorney,
La Crosse, Wisconsin.

You state that evidence has been presented to you consisting of an admission by the representative of the Chicago, Burlington and Quincy Railroad Company that between June 2, 1935, and September 29, 1935, no regular passenger train was scheduled to stop at the city of Onalaska in this state. We assume, from the statement in your letter, that
this railroad company neglected or refused to stop any of its trains at Onalaska at any time during the period above referred to.

You inquire whether this neglect or refusal constitutes a violation of sec. 192.01, Stats., which in substance directs every corporation operating a railroad to "stop at least one passenger train each day each way" at a station, which is required to be provided in every incorporated or unincorporated village having a post office and containing two hundred inhabitants or more, if the line of such railroad runs through or within one-eighth of a mile of such village. The statute further provides:

"* * * Every such corporation neglecting or refusing fully to comply with this section, after demand therefor by any resident of such village, shall forfeit not less than twenty-five dollars nor more than fifty dollars for each and every day such neglect or refusal shall continue."

The answer is No.

It is our opinion that sec. 192.01 is a penal statute which is clear and unambiguous in its language and which accordingly does not either require or admit of judicial construction to ascertain its meaning.

We think the law is clearly settled in this state that penal statutes "will not be construed to include anything beyond their letter, even though within their spirit, and nothing can be added to them by inference or intendment." 25 R. C. L. 1082, 1083, citing Weirich v. State, 140 Wis. 98, in which case the following language may be found, p. 100:

"* * * As has often been said, judicial construction is only invokable to solve uncertainties. So where there is no ambiguity there cannot, legitimately, be judicial construction * * *." 25 R. C. L. 1082, 1083, citing Weirich v. State, 140 Wis. 98.

It seems clear to us that sec. 192.01, above referred to, makes no requirement with reference to stopping of trains in cities, and provides no penalty for neglect or refusal to perform any such requirement. Doubtless it may be argued that the legislature never intended to require railroads to stop trains in tiny villages and permit them to pass through
incorporated cities without such requirement. That is probably true. But it is just as true that the legislature so far has not seen fit to make any specific requirement with respect to the stopping of trains in cities. And it may be added that the legislature doubtless assumed that there was no necessity for enacting any such requirement with respect to cities. At any rate, there has been no such enactment, and we are of the opinion that a statute providing for a forfeiture for refusal or neglect to stop trains in villages cannot be invoked because of such failure or neglect with respect to incorporated cities.

JEF

Automobiles — Motor Transportation — Operation of motor vehicle on W. P. A. project is not within purview of ch. 194, Stats.

March 21, 1936.

PUBLIC SERVICE COMMISSION.

You request our opinion upon the following:

“We are submitting herewith the form of agreement which is entered into between the W. P. A. and truckmen for the hire of trucks to be used in connection with W. P. A. projects. It appears that there are three different classes of hiring under these contracts:

“(1) The rental of a truck by the hour with gas, oil, maintenance, etc., furnished by the owner, but without the furnishing of a driver.

“(2) The rental of a truck by the hour with gas, oil, maintenance, etc., furnished by the owner, and with driver also furnished.

“(3) The rental of a truck from one who is called a ‘relief owner operator,’ that is to say, the owner operates the truck himself and he is a person who is included on the relief rolls. The rental of the truck and the compensation
paid to the relief operator is computed in separate items so that a part of the compensation is paid as wages and a part as truck rental.

"Will you kindly advise as to whether, in any or all of the above classes, the operation of the motor vehicle is included within the purview of ch. 194, Stats., and, if so, as to whether the operation is that of a contract motor carrier or that of a private motor carrier?"

The operation of a motor vehicle on a W. P. A. project is not within the purview of ch. 194, Stats.

Secs. 194.01, subsecs. (11), and (14) and sec. 194.05, subsec. (1), provide:

194.01 "In this chapter, unless the context otherwise requires:

"* * *

"(11) 'Contract motor carrier' means any person engaged in the transportation by motor vehicle of property for hire and not included in the term 'common motor carrier of property.'

"* * *

"(14) 'Private motor-carrier' means any person engaged in the transportation of property by motor vehicle other than an automobile or two-wheeled trailer while used therewith, upon the public highways, and not included in the term 'common motor carrier of property' or 'contract motor carrier of property.'"

194.05 (1) Neither this chapter nor section 76.54 shall apply to motor vehicle or vehicles owned or operated by the United States, any state, or any political subdivision thereof."

It is our opinion that the truck operations described in your request are not within the purview of ch. 194. The owners of the trucks are not carriers. They rent their trucks to the federal government for use by the government. That the government hires the owners to drive the trucks does not alter the fact that the government is operating the trucks. The owners are employees of the government. The principle of Standard Oil Co. v. Public Service Comm. of Wis., 259 N. W. 598, applies to the facts submitted. As the government is operating the trucks in question the provisions of ch. 194 do not apply. Sec. 194.05 (1).

JEF
**Hotels and Restaurants** — Restaurant exempt from compliance with sec. 160.02, subsec. (2), Stats., because of its existence prior to March 1, 1936, continues to be so exempt although it passes from one proprietor to another.

March 23, 1936.

**BOARD OF HEALTH.**

In your communication of February 24 you state as follows:

In your opinion reported in XXIV Op. Atty. Gen. 726 you held that sec. 160.02, relating to hotel and restaurant permits, applies to new places of business commencing operations after March 1, 1936, regardless of whether or not the proprietor may have been operating a restaurant under the old law at another location prior to that date. The question now arises as to a place of business operating prior to March 1, 1936, that changes proprietors after said date. Is the state board of health obliged to refuse a restaurant permit to the new proprietor until provisions of subsec. (2) have been complied with?

A restaurant exempt from compliance with sec. 160.02 (2), Stats., because of its existence prior to March 1, 1936, continues to be so exempt although it passes from one proprietor to another.

Sec. 160.02 (2) provides:

“No permit shall be issued to conduct, operate or maintain any restaurant where there is conducted any other business except the sale of fermented malt and nonintoxicating beverages, intoxicating liquors, chewing gum, candies and other confections, tobaccos, or newspapers, unless such restaurant and the kitchens or other places used in connection therewith are completely and effectively separated from such other business in the same room or place by substantial partitions extending from the floor to the ceiling with self-closing doors for ingress and egress. The provisions of this subsection shall apply only to restaurants commencing business after the effective date of this subsection.”
Ch. 160 is a public health measure. The issuance of a restaurant permit depends upon the nature of the place licensed and not upon the character of the person seeking the permit. In this respect the law differs somewhat from the law relating to the issuance of liquor licenses.

The legislative history of ch. 400, Laws 1935, which created sec. 160.02 (2) Stats., indicates that the legislature refused to put the above restrictions upon existing places of business. The law provides that it shall apply only to restaurants commencing business after March 1, 1936. It relates to the nature of the premises in which a restaurant is maintained and not to the proprietorship of a restaurant. The legislature apparently realized the hardship that would be suffered if existing restaurant premises were compelled to make renovations that would comply with the new law. The intent was to deny anyone the right to begin a new restaurant without complying with the law. As the law is severe in its nature and contains substantial penalties it should be strictly construed. The law in no manner indicates that existing restaurants may not be transferred without compliance with the law.

JEF

Education — Vocational Education — Fact that municipality has paid high school tuition for person does not relieve it from obligation to pay vocational school tuition for same person.

March 23, 1936.

Board of Vocational Education.

You ask our opinion upon the following:

Is a town liable for tuition of a young man while he is attending a vocational school, if it has already paid four years of tuition to a high school district? The young man in question is a high school graduate.
The fact that a municipality has paid high school tuition for a person does not relieve it from the obligation to pay vocational school tuition for the same person.

We assume from the facts given that the town in question maintains no vocational school.

Sec. 41.18, Stats, provides in part:

"* * * Any person over the age of fourteen years who shall reside in any town, village or city not having a vocational school, and who is otherwise qualified to pursue the course of study, may with the approval of the board of vocational education, be allowed to attend any school under its supervision. Nonresident pupils shall be subject to the same rules and regulations as resident pupils."

Under sec. 41.18 a resident of a municipality not having a vocational school may attend a vocational school in another municipality. The consent of the municipality of the residence of the person attending such school is not required.

Under sec. 41.19 a municipality is authorized to charge tuition for nonresident students, such tuition to be paid by the municipality of residence. Therefore by specific provisions of the statutes the person in question is entitled to attend a vocational school in another municipality and the tuition charged must be paid by his residence municipality, unless the fact that the latter municipality has paid his high school tuition changes the rule.

The statutes provide:

"* * * any person over fourteen years of age * * * otherwise qualified * * * may * * * be allowed to attend any school * * *

The discretion is lodged entirely in the municipality maintaining the vocational school. We find nothing in the law that excludes a person from attending a vocational school simply because he is a high school graduate or because his residence municipality has paid his high school tuition.

JEF
Social Security Law — Old-age Assistance — Word “denial” as used in sec. 49.50, subsec. (4), Stats., is not confined to absolute denial of assistance.

March 25, 1936.

LOUIS W. CATTAU,
District Attorney,
Shawano, Wisconsin.

In your communication of March 12 you ask an opinion on the following:

Under sec. 49.50, subsec. (4), Stats., it is provided that any one denied old-age assistance may apply to the state pension department for a review of such denial. Has the state pension department jurisdiction of a case in which assistance has not been absolutely denied but the applicant is dissatisfied with the amount granted?

The word “denial” as used in sec. 49.50 (4) is not confined to an absolute denial of assistance.

Sec. 49.50 (4) provides in part:

“To enable this state to receive federal aid for old-age assistance, aid to dependent children, and blind pensions, any persons whose application for any of these forms of assistance has been denied by the county officer charged with the administration of such form of assistance may apply to the state pension department for a review of such denial. * * *”

Applicants for old-age assistance are entitled to have their assistance “fixed with due regard to the conditions in each case.” Sec. 49.21. The discretion given to the administrative agency by the assistance statutes must be used in a reasonable manner so as to carry out the intent of the law. (See opinion to state pension department* dated March 25, 1936.) Although the administrative agency allows a person a certain amount of assistance, such allowance may, in fact, be a denial of the assistance to which the person is entitled under the law. Therefore, the word “denial” as used in sec. 49.50 (4) is not confined to an absolute denial of assistance.

JEF

*Page 205 of this volume.
Parks — Public Officers — County park commission may fix wages of its employees within limits of budget upon which it is operating.

March 25, 1936.

John P. McEvoy,
District Attorney,
Kenosha, Wisconsin.

You inquire whether the county park commission may fix the salaries and wages to be paid its agents and employees appointed under sec. 27.03, subsec. (2), Stats., within the limits of the budget or whether the county board has this power.

It is our opinion that such salaries and wages may be fixed by the county park commission, although the county board may indirectly exercise a large degree of control in such matters through its jurisdiction over county finances.

Sec. 27.03, subsec. (2), provides that the county park commission "may also appoint such other agents and employees as may be necessary to carry out its functions, and may remove them at pleasure, and make all rules and regulations concerning its work."

We take it that, in the absence of anything in the statutes to the contrary, this language would imply the power to fix the compensation of agents or employees appointed by the commission, since the power to employ implies the power to fix the terms of employment, unless the terms of employment are otherwise provided for by law.

It is true that sec. 59.15, subsec. (1), par. (e), Stats., gives the county board wide powers with reference to the fixing of salaries or compensation for offices or positions created by any special or general provision of the statutes. However, the positions in question are not created by special or general provisions of the statutes, but are created by the county park commission acting under statutory authority given to it. Sec. 59.15, subsec. (3), gives the county board the power to fix or change the number of deputies, clerks and assistants that may be appointed by any county
officer and the power to fix or change the annual salaries of such appointees. We do not consider this statute to be applicable since these persons are not appointed by any county officer.

It is to be remembered, however, that the county board controls county finances and, in providing a budget for the county park commission, the county board may take into consideration the salaries of its employees and revise the requests made by the commission in this or any other respect, although there would appear to be no legal objection to the county park commission's taking the initiative in the matter of fixing the salaries of its employees within the limits of a budget which has already been approved by the county board.

JEF

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**Social Security Law — Old-age Assistance** — One convicted of felony but placed on probation and not imprisoned is not barred from receiving old-age assistance under sec. 49.22, subsec. (5), Stats.

March 25, 1936.

**PENSION DEPARTMENT.**

You ask our opinion upon the following:

X was convicted of a felony but instead of being committed to the penitentiary was placed on probation. Is conviction of a felony and placement on probation equivalent of imprisonment for a felony within the meaning of sec. 49.22, subsec. (5), Stats.?

One convicted of a felony but placed on probation and not imprisoned is not barred from receiving old-age assistance under sec. 49.22 (5).

Sec. 49.22 (5) provides:
“Old-age assistance may be granted only to an applicant who:

"*  *  *

"(5) During the period of ten years immediately preceding such date has not been imprisoned for a felony.”

The statute in question provides that a person “imprisoned” for a felony shall not be entitled to receive assistance. The statute does not provide that a person “convicted” of a felony shall not be entitled to assistance. The word “imprisonment” in its ordinary normal use as distinguished from its legal use means actual confinement in a jail or prison. We are of the opinion that the legislature did not intend that a person convicted of a felony but placed on probation should be barred from assistance.

JEF

\[\text{Social Security Law — Old-age Assistance — Intent of old-age assistance laws is to assist not only those persons who are absolutely destitute but also those who have property which cannot readily be converted into cash without undue hardship and loss.}

\text{Word “property” as used in sec. 49.23, subsec. (2), Stats., means any kind of property.}

\text{Old-age assistance administrative agency has certain discretion, but such discretion is limited by provisions of law and such discretion must be reasonably used so as to carry out intent of law.}

\text{Administrative agency may not grant assistance without securing public if there is danger that applicant’s property will be placed without reach of public’s claim for reimbursement.}

March 25, 1936.

PENSION DEPARTMENT.

In your letter of March 4 you request an opinion upon the following:
"A who has applied for old-age assistance has two thousand dollars on time deposit in the bank. This is all the property which A possesses. It is less in amount than the five thousand dollar maximum which is permitted in sec. 49.23 (2) if the term 'property' is to be interpreted as meaning any kind of property."

You say A is otherwise eligible to receive assistance and ask whether he is entitled to assistance;

1. The intent of the old-age assistance laws is to assist not only those persons who are absolutely destitute but also those who have property which cannot readily be converted into cash without undue hardship and loss.

2. The word "property" as used in sec. 49.23, subsec. (2), Stats., means any kind of property.

3. The old-age assistance administrative agency has certain discretion, but such discretion is limited by the provisions of the law and such discretion must be reasonably used so as to carry out the intent of the law.

4. The administrative agency may not grant assistance without securing the public if there is danger that applicant's property will be placed without the reach of the public's claim for reimbursement.

Secs. 49.20, 49.21, 49.23 (2), 49.24, 49.25 and 49.26 (1) provide:

49.20 "For the more humane care of aged, dependent persons a state system of old-age assistance is hereby established. Such system of old-age assistance shall be administered in each county by the county judge, under the supervision of the state pension department. The cost of old-age assistance shall in the first instance be borne by the county, but the county shall be entitled to state and federal aid as provided in section 49.37."

49.21 "Any person who shall comply with the provisions of sections 49.20 to 49.39, shall be entitled to financial assistance in old age. The amount of such old-age assistance shall be fixed with due regard to the conditions in each case, but in no case shall it be an amount which, when added to the income of the applicant, including income from property, as computed under the terms of this act, shall exceed a total of one dollar a day."
49.23 “Old-age assistance shall not be granted or paid to a person:

“(2) if the value of his property or the value of the combined property of husband and wife living, together exceeds five thousand dollars.”

49.24 “The annual income of any property which is not so utilized as to produce a reasonable income, shall be computed at five per cent of its value.”

49.25 “On the death of a person who has been assisted under sections 49.21 to 49.39, or of the survivor of a married couple, both of whom were so assisted, the total amount paid together with simple interest at three per cent annually shall be allowed and deducted from the estate of such person or persons by the court having jurisdiction to settle the estate. Of the net amount recovered pursuant to the provisions of this section or section 49.26, one-half shall be paid over to the United States government. All other amounts recovered shall be paid into the treasuries of the state and its political subdivisions which contributed to the old-age assistance recovered, in the proportion in which they respectively contributed.”

49.26 “(1) If the county judge deems it necessary, he may require as a condition to the grant of a certificate, that all or any part of the property of an applicant for old-age assistance be transferred to the county court, except that in counties having a population of five hundred thousand and having a manager of county institutions such property shall be transferred to such manager of county institutions. Such property shall be managed by the county court or said manager of county institutions, who shall pay the net income to the person or persons entitled thereto. The county judge or said manager of county institutions shall have power to sell, lease or transfer such property, or defend and prosecute all suits concerning it, and to pay all just claims against it, and to do all other things necessary for the protection, preservation and management of the property.”

The expressed intent of the old-age assistance laws is to establish a system for “the more humane care of aged, dependent persons.” (Sec. 49.20.) Subject to the limitation of one dollar per day, the old-age assistance “shall be fixed with due regard to the conditions in each case.” (Sec. 49.21.) The administrative agency is required to investi-
gate each application and to fix the amount of assistance. (Sec. 49.28.) The language of the statute confers no arbitrary powers upon the administrative agency. It confers discretion which the agency is in duty bound not to abuse. (XX Op. Atty. Gen. 1229.) The amount of assistance fixed must reasonably correspond to the conditions in each case. Such amount must be within the intent and confines of the law.

As indicated, the allowance of assistance is subject to specified limitations. Sec. 49.23 (2) provides that assistance shall not be granted "if the value of his property * * * exceeds five thousand dollars." The word "property" means any kind of property. If the word is given its normal meaning, there is no ambiguity; therefore, there is no room for construction. Sec. 49.23 (2) does not entitle a person to assistance if he has property valued at less than five thousand dollars. It provides that assistance shall not be allowed to one who has property exceeding such value, but may be allowed to one who has property not exceeding such value. If the property value exceeds five thousand dollars, the administrative agency has no discretion; if it does not exceed such sum the agency has discretion. This discretion must be exercised in the manner indicated above. In form, sec. 49.23 (2) is a limitation; in substance, it broadens the meaning of "aged dependent persons." In effect, it says that a person may be dependent when owning a four thousand dollar home or a four thousand dollar mortgage, neither of which produces sufficient income for the owner's support nor could readily be converted into cash without undue loss. In other words, the intent of the law is to assist not only those persons who are absolutely destitute but also those persons who have property which cannot readily be converted into cash without undue hardship and loss.

Sec. 49.25 provides:

"* * * the total amount [assistance] paid together with interest at three per cent annually shall be allowed and deducted from the estate of such person or persons by the court having jurisdiction to settle the estate. * * *"

Sec. 49.26 (1) provides:
"If the county judge [or county pension department, XXIV Op. Atty. Gen. 763] deems it necessary, he may require as a condition to the grant of a certificate, that all or any part of the property of an applicant for old-age assistance be transferred to the county court, * * *.

Thus, plainly the law intends that if a recipient of aid has property the public shall be reimbursed from such property for all said advances. With the provisions of sec. 49.25 in mind the words "if the county judge deems it necessary," appearing in 49.26 (1), are definitely limited. The judge has no power to decide whether or not the applicant shall reimburse or secure the public, but he has power to determine whether or not a transfer of property is necessary in order that the public will be secured for the aid advanced. With this obvious meaning the first sentence of sec. 49.26 (1) shall be taken to provide:

"If the county judge deems it necessary, in order that the public be secured, he may require that * * * property be transferred * * *.

The discretion so given to the judge must not be abused. He may not allow assistance without securing the public if there is danger that the applicant's property will be placed without the reach of the public's claim for reimbursement.

A study of the law as a whole reveals certain general principles that must be borne in mind by the administrative agencies. The intent of the law is to provide more humane care for the needy aged. The law permits allowance of assistance if the aged have property which cannot be converted into cash without undue hardship or loss. The intent is to care for the aged even though in some cases they have property, but the public, which is furnishing the aid, is entitled to reimbursement from such resources. The law does not intend that property profitably invested may be conveyed to the court and assistance granted in order that such property may be conserved. The law does not intend that money shall be paid to the aged in order that their estates may be kept intact or conserved for their heirs. If the law so provided (we believe it definitely provides otherwise), it
is very doubtful that it would be valid. As stated by former Attorney General Owen,

"* * *. public funds raised by taxation can only be used for public purposes. It is a public purpose to relieve the poor and indigent from want. It may even be a public purpose to aid persons not absolutely indigent in order to prevent pauperism, but it is not a public purpose to aid persons who are neither indigent nor likely to become indigent merely because they have the misfortune to be blind." V Op. Atty. Gen. 830, 831.

We believe the old-age assistance law should be construed and should be applied by the administrative agencies in such manner as will give more humane care to aged dependent persons; it should not be construed and applied in such manner as will render the law of doubtful validity and thereby deny the aged its benefits.

It may be of assistance to apply this interpretation of the law to specific facts.

1. A person otherwise eligible to receive assistance has two thousand dollars cash in the bank, or two thousand dollars in liberty bonds or other bonds or property readily convertible to cash without undue loss. This person is not dependent within the meaning of the law. To allow assistance would be an abuse of discretion.

2. A person otherwise eligible to receive assistance has a homestead valued at $4,000. Whether or not a homestead readily may be converted into cash, the owner may receive assistance. This seems to be the intent of the law. Estate of Wicksburg v. Shier, 209 Wis. 92, 96. The reasons for this exception are that the home usually is given privileges in the law, and the home, by its nature, is furnishing shelter, which is a necessary part of any type of assistance. We do not mean to say that in all cases one may receive assistance when owning a home. The circumstances of each case must be considered by the administrative agency. The public always should be assured of reimbursement. In fixing the amount of assistance the provisions of sec. 49.24, Stats., must be applied.

3. A person has a mortgage valued at four thousand dollars which is in default and which cannot readily be sold
without undue loss. The administrative agency may deem it to the benefit of both the owner and the public to grant assistance and take the mortgage as security. We believe such action would be reasonable use of the discretion given.

Your specific question has been answered under paragraph 1 above. Administration of the law in question will present countless different facts and circumstances. The administrative agency should use the discretion given to it in a manner which will reasonably carry out the provisions and intent of the law.

JEF

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Bridges and Highways — Trunk Highways — Words and Phrases — Traffic Regulation — Term "traffic regulation" used in sec. 84.10, subsec. (1), par. (b), Stats., includes upkeep and repair of traffic control signals such as speed signs, stop signs and stop and go lights installed pursuant to sec. 85.70, Stats.

March 27, 1936.

L. A. Buckley,
District Attorney,
Hartford, Wisconsin.

You call to our attention sec. 84.10, subsec. (1), par. (b), Stats., as amended by ch. 299, Laws 1935, and ask whether the term "traffic regulation," as used therein, includes traffic regulation signs, such as speed signs, stop signs and stop and go lights.

Sec. 84.10 (1) (b) reads as follows:

"There shall be allotted to each city and village for the maintenance of streets within its limits selected by the state highway commission, not a part of the state trunk highway system, but forming connections through said city between portions thereof, or between such system and the highway
systems of adjoining states, the following amounts per mile of street corresponding to the classification of highways stated: Primary federal aid, five hundred dollars; secondary federal aid, four hundred dollars; other state trunk highways, three hundred dollars. Said allotments may be used for maintenance, repair, construction, snow removal and traffic regulation on said connecting streets, and may be cumulated for any such purpose."

It is a general rule of statutory construction that all words shall be construed and understood according to the common and approved usage of the language. See sec. 370.01, (1), Stats.; In re Karkowski's Estate (Wis.), 264 N. W. 487.

"Street traffic" in the ordinary sense includes travel upon the street for any proper purpose by pedestrians and vehicles. * * * the general movements and intercommunication of the people carried on upon the streets, including travel, the driving of vehicles, the hauling of movables, the transportation of passengers, and all the multifarious activities which may properly avail themselves of the use of a public highway." 63 C. J. 762.

The use of stop signs and traffic control signals by municipalities is authorized by sec. 85.70, Stats., which reads as follows:

"No order, ordinance or resolution declaring any highway to be an artery for through traffic shall be effective until the official stop sign or traffic signal has been installed thereat."

Therefore, the term "traffic regulation" in both the ordinary and statutory senses includes the use of proper traffic control signs.

In view of the discussion given above, it is the opinion of this department that moneys appropriated under sec. 84.10 (1) (b) may be used to maintain and keep in repair traffic control signals such as speed signs, stop signs and stop and go lights used on streets in a municipality.

JEF
Contracts — Prisons — Prisoners — Person convicted of felony, sentenced to prison and placed on probation under stay of sentence may legally become party to contract.

March 28, 1936.

Board of Control.

In your communication of March 12 you state that one L. B. was convicted of forgery and fraud in violation of secs. 343.56 and 343.401, Stats. He was sentenced to the Wisconsin state prison for a term of one to seven years on the first count and not less than one nor more than one year on the second count. Execution of the sentence was stayed and he was placed on probation for seven years in care of the state board of control.

You state that negotiations have been begun under which L. B. is to enter into a contract to lease a farm for the coming year. The transaction involves considerable money and property and the question has been raised as to the legality of this proceeding. You submit the following question:

"Can a person convicted of a felony in Wisconsin, sentenced to a prison, and placed on probation under a stay of sentence, in accordance with the provisions of ch. 57 of the Wisconsin statutes, legally become a party to a contract?"

This question must be answered in the affirmative. See XIV Op. Atty. Gen. 192, where it was held:

"Paroled inmate of Wisconsin state reformatory may enter into contract of copartnership and sue for value of his services, so long as he does not violate any orders or rules of board of control."

This is a well considered opinion and we do not deem it necessary to repeat the same argument. It is controlling in this case.

JEF
Elections — Polls — Ch. 120, Laws 1935, creating sec. 6.35, Stats., on closing hours of polling places, applies to town elections held each spring.

March 30, 1936.

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

You ask if ch. 120, Laws 1935, changing the closing hours of polling places, applies to town elections held each spring.

Town elections are held pursuant to ch. 10 of the statutes. Sec. 10.55, Stats., provides:

"The qualifications of electors, the creation and qualification of inspectors and clerks of election, their oath of office, the opening and closing of the polls, the challenging of voters, the determination of such challenges, the opening of ballot boxes, the counting of the ballots before unfolding them, the keeping of tally sheets, the counting of the votes, the determination of the result and all other election procedure at and for town elections or special town elections shall be governed by the provisions of chapter 6 of the statutes, so far as applicable and not otherwise provided in this chapter."

Ch. 120, Laws 1935, repealed and recreated sec. 6.35, Stats., which is a part of ch. 6 of the statutes. Hence, the hours of opening and closing polling places specified by ch. 120, Laws 1935, would apply to town elections held each spring.

JEF
Taxation — Extension of Time for Payment of Taxes — Where time for payment of real estate taxes is extended by cities, villages or towns pursuant to ch. 7, Laws 1935, so that county does not receive its taxes until after July 1, 1936, county must pay state interest provided by sec. 74.27, Stats.

March 30, 1936.

F. W. Horne,
District Attorney,
Crandon, Wisconsin.

You request the opinion of this department upon the following:

Must the county pay interest and penalty on the taxes charged against it by the state for the state's special charges where the county does not receive the taxes by reason of the state extending the time for payment until June 30, 1936?

The answer to your question is “Yes.” At the outset it should be pointed out that the extension of time for the payment of real estate taxes up to July 1, 1936, is authorized by the provisions of ch. 7, Laws 1935, which is entitled,

“An Act to authorize cities, villages, and towns to extend the time on payment of taxes on real estate assessed in the years 1934 or 1935 to persons who are unable to pay such taxes.”

It is plain from a reading of the act that it is not the state which extends the time for the payment of real estate taxes but the cities, villages or towns under authority conferred by said act in their discretion.

Under the provisions of sec. 74.15, Stats., the state taxes must be paid “on or before the first Monday of March in each year, though it may occasion a deficiency in the town, city or village taxes.” No exception is made in cases where the date of payment of real estate taxes is extended pursuant to law.
Under the provisions of sec. 74.27, Stats., entitled, "Penalties upon counties" it is provided:

"When any county shall fail, neglect or refuse to pay the state treasurer the whole or any part of the state tax lawfully apportioned to and levied upon such county at the time and in the manner required by law such county shall pay to the state treasurer, in addition to the amount so due, and unpaid on such tax, interest at the rate of ten per centum per annum from the time such tax was due and payable, until the same, together with such interest thereon, shall be fully paid. * * *"

In view of the foregoing, we are constrained to hold that in cases where the county does not receive its taxes until after July 1, 1936, by reason of the city, village or town extending the time for payment of such taxes pursuant to ch. 7, Laws 1935, the county must pay the state the interest and penalty provided by sec. 74.27, Stats.

JEF

Taxation — Tax Sales — Proposed county ordinance which purports to authorize sale of general tax certificates by county at ten per cent of their face value upon condition that certain drainage district bonds outstanding on these lands be surrendered and canceled would be invalid.

March 30, 1936.

SAMUEL SIGMAN,
District Attorney,
Appleton, Wisconsin.

You have submitted a proposed county ordinance which purports to authorize the sale of general tax certificates by the county at ten per cent of their face value upon the condition that certain drainage district bonds outstanding on
these lands be surrendered and canceled, and you ask our opinion as to the authority of the county board to pass such an ordinance.

It is our opinion that such a proposed county ordinance would be invalid for want of authority on the part of the county board to enact it.

A county is one of the civil subdivisions of a state for judicial and political purposes, created by the sovereign power of the state of its own will. It is vested with certain functions of corporate existence. As a territorial subdivision it possesses, in the functions of administration of justice and the maintenance of the public highways, the attributes of a quasi municipal corporation. Sherman County v. Simons, 109 U. S. 735, 3 S. Ct. 502, 27 L. ed. 1093; Lund v. Chippewa County, 93 Wis. 640, 67 N. W. 927, 34 L. R. A. 181; Northern Trust Co. v. Snyder, 118 Wis. 516, 89 N. W. 460, 90 A. S. R. 867. It has only such powers as are clearly and unmistakably granted to it by charter, statutes, or other acts of the legislature. Becker v. La Crosse, 99 Wis. 414, 75 N. W. 84; City of Superior v. Roemer, 154 Wis. 345, 141 N. W. 250. Any ambiguity in the statute upon which the assertion of the power rests is to be resolved against the quasi municipal corporation and the power or authority denied. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 443; Nash v. Lowry, 37 Minn. 261, 263, 33 N. W. 787.

If any authority exists for the enactment by the county of an ordinance, such as the one here proposed, it must be said to exist by reason of secs. 75.34 and 75.35, Stats. 1935, which provide:

"75.34 (1) The several county treasurers, when no order to the contrary shall have been made by the county board, shall sell and transfer, by assignment, any tax certificates held by the county to any person offering to purchase the same for the amount for which the land described therein was sold, with interest thereon at the rate of eight per cent per annum; but every such sale shall include all certificates in the hands of such treasurer on the same lands.

"(2) No county board shall, at any session thereof, sell, convey or transfer, or order or direct the sale, conveyance or transfer of any tax certificates owned or held by the county at less than the face value thereof unless such board
shall have previously directed the county clerk to give notice of their intention so to do by publication thereof for four successive weeks in some newspaper published in the English language in such county, and having a general circulation therein, and such notice has been so given. Any and all sales, conveyances or transfers of such tax certificates made in violation of these provisions shall be null and void."

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

Sec. 75.35 authorizes the county board by an order duly recorded in its records to prescribe the terms of sale. However, sec. 75.34 specifically provides the condition that must be complied with before a sale of the certificates at less than the face value thereof can be validly effected. Obviously, this specific qualifying provision when considered along with the general language "terms of sale" creates an ambiguity necessitating a construction of the phrase "terms of sale." Was it the legislative intent to bestow upon the county boards authority to prescribe and determine any and all terms of sale without regard for whether such terms were merely concerned with the procedural phase of such sale? Both the legislative history of these sections (which were formerly all in one chapter, Rev. Stats. 1858, ch. 18), and a construction of the phrase "terms of sale" (Smith v. The Board of Supervisors of Barron County, 44 Wis. 686, 692), conclusively establish a negative answer to that question. The court in the above case had before it sec. 1, ch. 138, Laws 1861, which was substantially the same as the present sec. 75.35, Stats., for construction. In denying the county board any discretionary power with respect to the terms of such tax sale, the court held:

"The proviso in sec. 1, ch. 138, Laws of 1861, in relation to these terms, is: 'provided further, that the board of supervisors may, by an order to be entered in their minutes,
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prescribe the terms of sale and the rate of interest chargeable by such treasurer on such certificates.

"It may be a little difficult to ascertain the exact meaning of this language; but we think it more consistent with the first part of the section, and more reasonable, and according to the evident legislative intention, to hold that the word 'terms,' here used, refers solely to the amount or sum to be paid on the principal, less than the whole amount of the principal, and to the interest less than the twenty-five per cent., and perhaps may refer also to the number of the certificates to be sold to one person, and confers no further power or discretion upon the board of supervisors in respect to such sales." Smith v. The Board of Supervisors of Barren Co., 44 Wis. 686, 692-693.

Neither has this decision ever been overruled nor this applicable language criticised so far as we are able to ascertain. It must be held to state the law of the state of Wisconsin on the subject. Concerning any other construction of the phrase "terms of sale," the following quotation from the court's opinion in the above entitled case, at p. 693, is pertinent:

"A construction of this language which would allow the board of supervisors to prescribe by such order, as the terms of sale, that payment might be made in anything besides money, or on credit, or that the county treasurer might enter into an executory contract of sale, or make a conditional sale, would be most dangerous and pernicious, and work incalculable mischief by uncertainty, insecurity, litigation and loss; consequences which certainly were never anticipated by the legislature.

"We must hold that the statute confers no power upon a county treasurer to make, and no authority upon the board of supervisors to order him to make, any other than an absolute and fully executed sale of tax certificates, and for cash in hand. The very language of the power itself, 'to sell and transfer by assignment,' must mean such a sale with present payment, and by assignment and delivery, and no other."

To expedite the sale of tax certificates during depression times and to provide a little elasticity overcoming that portion of the established rule that tax certificate sales should be for one hundred per cent of their face value, the legisla-
ture by ch. 199, Laws 1882, amended sec. 664, Rev. Stats. 1878, relating to powers of the county board so as to permit the sale of tax certificates held by the county at less than the face value thereof. This enactment following so closely upon the decision of the supreme court in the Smith case, supra (1878), the legislature must have had before it the holding of the court in that case. It might easily and readily have broadened the powers of the county board with respect to the terms of tax certificates sales yet it chose only to modify the rule to permit a sale of the certificates at a figure less than the face value thereof contingent upon compliance with certain conditions. To prescribe that the sale should be conditioned upon the surrender and cancellation of drainage district bonds is without authority or support in either statute or case law.

It seems well settled that the county board may by appropriate resolution and proceedings sell the tax certificates in its possession at less than the face value thereof. XX Op. Atty. Gen. 1192. Sec. 75.34 (2) in the statutes since its enactment as a part of sec. 664, Ann. Stats. 1889, is express authority therefor. In Town of Bell v. Bayfield County, 206 Wis. 297, 239 N. W. 503, the county authorized the county clerk to sell tax certificates at less than the face value. The legality of the procedure was sustained.

JEF
Elections — Election Inspectors — Whether county and city committees of Democratic party have power to create rules and regulations as to membership of party is question for party itself to determine and is not governed by statute.

Under sec. 6.31, Stats., appointments as party representatives at polling places may be made by county or city party committee. Party committee has no power to change term of office of party committeeman under sec. 5.19, subsec. (4), Stats.

Election officials under sec. 6.32 (4) (b) are chosen from list submitted by ward chairman to city or county committee, and such list shall bear signature of chairman and secretary of county or city committee.

March 31, 1936.

William A. Zabel,
District Attorney,
Milwaukee, Wisconsin.

You have requested our opinion on the following questions:

Q. 1. Have the county and city committees of the Democratic party a right to create rules and regulations governing its members?

A. 1 Sec. 5.19, Stats., makes provision for party committees in counties, cities and precincts, although no provision is made directly answering the question asked above. Subsec. (10), provides:

"Each committee and its officers shall have the powers usually exercised by such committees, and by the officers thereof, in so far as is consistent with this act."

In XXIII Op. Atty. Gen. 709, 710, this office stated that a party county committee may adopt rules governing its meetings. In IV Op. Atty. Gen. 1140, attention was called to the dearth of statutes regulating the powers and duties of party committees. It was there held that each party, as a purely voluntary organization, has the power to make its own rules
and regulations. We take it that it is up to each party to work out its own rules and regulations governing its members and that it is no particular concern of the state how this is done. Consequently there has been no attempt to work out such things by statute. While the state lends its election machinery to political parties for their convenience in placing their candidates before the public to be voted on, it does not purport to dictate to political parties how they shall create rules and regulations governing members.

Questions of internal organization must be settled from within the party rather than by resort to the statutes. Whether or not the Democratic party has authorized the county and city committees to create rules and regulations governing its members is a matter upon which we are not officially informed, and it is not the function of this office to direct how such party questions should be settled.

Q. 2. Have the county and city committees a right to specify as to who shall become members of the Democratic party?

A. 2. Again, the answer to this question pertains to party organization with which this office cannot be officially concerned. It would seem, however, that for many practical purposes, this question should be answered in the negative. An illustration or two will explain this.

Suppose that X decides to become the candidate for the Democratic nomination as district attorney for Dane county, even though he lacks the support of any county or city committee. He circulates, or has circulated, the necessary nomination papers and in the primary election is chosen as the party's candidate and is elected in the November election in spite of the positive assertion of the party organization that he is not a member of the party. It would be idle to say that he is not a Democrat. At least the question would be a highly academic one, with Mr. X duly elected to office as the Democratic party's candidate. For year's in Wisconsin before the formation of the Progressive party persons who are now in office as Progressives ran for office on the Republican ticket and were elected, although the regular Republican organization did not consider them to be Republicans. The voters are really the only ones who
can answer such questions and, when they have answered the question, any views which the county or city committee may hold to the contrary are quite immaterial.

Q. 3. Have the county and city committees the right to state that only registered members of the party be considered as the only ones who shall represent the party in the booth, if such party has the right of representation in these booths?

A. 3. We believe this question is answered in the affirmative by the provisions of sec. 6.31, Stats., which provides:

"Two party agents or representatives, and a substitute or alternate for each, may be appointed for each polling place to act as challenger for each political party and its candidates and to observe the proceedings of election officers. Such appointments may be made by the county or other proper local committee of the party making such nominations. Candidates nominated by nomination papers and candidates for city offices, may themselves make such appointments. Each such appointment shall be in writing under the hand of the person making it, specifying the name and residence of the appointee, election district for which he is appointed, and the name of some substitute to be appointed in case of his failure to serve or absence from the polling place, and be filed with the clerk of the city, town or village at least three days before election. The clerk shall thereupon issue a permit, upon a printed slip or card, to such appointee, which shall be his warrant of authority to be present during the election and to be inside the railed inclosure during the counting of the ballots. If any person so appointed as agent fails to serve or shall be absent for any part of election day, the clerk may issue a permit to the substitute or alternate, who may act instead of such absentee or person failing to serve."

Q. 4. Has the county committee the right to remove a committeeman if said committeeman refuses to comply with the rules and regulations adopted by such committee or city committee?

The answer is, No.

Sec. 5.19, subsec. (4), Stats., provides:

"The term of office of each party committeeman elected shall be for the two years next succeeding the date of his election."
The statutes give the county committee no right to change the expressed will of the electors. However, any vacancy in any committee office is filled by the county committee, except that the chairman of the county committee may temporarily fill any vacancy. Sec. 5.19, subsec. (11), Stats.

Q. 5. Have the duly elected chairman and secretary the right to demand and submit only registered members to the various respective officials of towns and villages when a committeeman fails to submit a list for certification for election officials?

A. 5. The statutes furnish no direct answer to this question. Only such persons selected by the chairman from each ward shall act as election inspectors according to sec. 6.32, subsec. (4), par. (b). We do not understand that the chairman and secretary would have any right to submit a list in the absence of such selection, and consequently it would seem that this question should be answered in the negative.

Q. 6. Can the officers of a county committee in behalf of the active elected committeeman within a town or village demand that only registered members be appointed as election officials when such party is entitled to such appointments according to law?

A. 6. This question is answered in the affirmative upon the basis of the provisions of sec. 6.32, subsec. (4), par. (b), Stats., which provides:

"Such inspectors, clerks and ballot clerks shall be chosen from a list submitted to the mayor of the city, or to the president of the village, for that purpose by the regular county committee or city committee of the aforesaid two parties. Such list shall be submitted by the chairman from each ward to the city or county committee, and only such persons so selected by the chairman from each ward shall act as such inspectors, which list shall bear the signature of the chairman and secretary of said county or city committee."

It is to be noted that although only persons selected by the chairman from each ward shall act as inspectors, yet the list "shall bear the signature of the chairman and secretary of said county or city committee." This constitutes in effect
a veto power which might be exercised in such a way as to insure that only registered members of the party would be appointed as election officials.

JEF

Elections — Orthodox Hebrews whose religious practices and beliefs make it impossible for them to vote on April 7, 1936, which date falls within holiday season of Passover, should be given opportunity to vote under absent voting statutes, secs. 11.54 to 11.68, inclusive.

March 31, 1936.

WILLIAM A. ZABEL,  
District Attorney,  
Milwaukee, Wisconsin.

You state that the religious precepts of orthodox Hebrews prohibit them from voting during the week in which the April 7 elections take place, as this is a holiday season. They request that they be permitted to vote as absentee voters prior to election day.

It is your opinion that under sec. 11.54, Stats., this should be permitted, and you ask for our opinion on the subject.

We are inclined to concur in your opinion, although the subject is by no means free from doubt.

Sec. 11.54, Stats., provides:

"Any qualified elector of this state registered, whose registration is required or who swears in his vote as herein provided, who is absent or expects to be absent from the city, town or village in which he is a qualified elector, or from this state, or who because of sickness or physical disability cannot appear at the polling place in his precinct, on the day of holding any general, special, primary, county, city, village or town election, may vote at any such election as provided in sections 11.54 to 11.68, inclusive, of the statutes.”
Strictly construed, this statute would bar the voters in question from absent voting, since they do not come within the letter of this statute.

However, in the case of State ex rel. Oaks v. Brown, 211 Wis. 571, it was held that the will of the electors should be given effect although there may have been informalities or failure to comply with election statutes.

In the interests of good citizenship every effort should be made to so construe the statutes as not to deprive an elector of the right to vote, merely on account of his religious beliefs, sincerely entertained, which makes it impossible for him to vote on the particular day set for an election, and we are reluctant to read into the statutes any legislative intent to deny to such a voter this important franchise.

We think that it must have been the intention of the legislature in passing secs. 11.54 to 11.68 of the statutes to provide opportunities for voting to those who are unable to be at the polling places on election day and that the statute should be construed in the light of such intention. The purpose of a statute must be considered in determining the legislative intent. Pagel v. School Dist. No. 1 of Town of Concord, 184 Wis. 251.

It is to be noted that the legislature in providing the procedure to be followed in absent voting has not confined the word "disability" to its physical sense in all of the sections relating to the subject.

Sec. 11.58, Stats., provides a form of affidavit to be printed on the envelope in which the ballot is enclosed. This affidavit contains the following:

"* * * That I cannot appear at the polling place in said precinct on the day of said election."

Sec. 11.59 commences with these words: "Such absent or sick or disabled voter."

Sec. 11.61 uses the same words, and the same is true in sec. 11.62, where we find these words used twice. Also these words appear in sec. 11.63. If the legislature had intended to limit cases of disability to "physical disability" it is reasonable to infer that language to such effect would have also been used in the sections above referred to.
While it may well be that additional legislation more specifically providing for cases of the sort here under consideration should be provided, we feel it our duty to give the existing language of the statutes the very broadest possible construction to the end that the right of suffrage be not in effect denied on account of religious beliefs.

JEF
Appropriations and Expenditures — School Districts — State Aid — Under sec. 40.39, subsec. (2), par. (d), Stats., where high school fails to receive its share of state aid one year through failure to make required reports state superintendent may apportion this amount in with next annual distribution less ten per cent penalty and reduce amount distributed to other schools accordingly.

April 1, 1936.

John Callahan, State Superintendent,
Department of Public Instruction.

You state that when the high school apportionment was made on March 27, 1935, for the school year ending June 30, 1934, a certain high school failed to have apportioned to it its share of state aid under sec. 20.27, subsec. (2) Stats., because of no report from the high school inspectors, this report being necessary for making the certification of state aid. The amount due the high school in question was consequently apportioned among other high schools of the state.

In the high school apportionment made in March, 1936, for the year ending June 30, 1935, the amount in question, less ten per cent, was deducted from the total amount allotted to other high schools of this class in the state.

You inquire whether the state superintendent was justified in deducting this amount and apportioning the balance among the other high schools of this class.

We believe your question should be answered in the affirmative upon the basis of sec. 40.39 (2) (d), Stats., to which you have called our attention.

This section provides:

"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."
The purpose of this statute is clear. Apparently the legislature intended that a high school should not lose its state aid completely because of failure to make the required reports but that it should receive such aid in the next annual distribution, less a deduction of ten per cent. This, in effect, means that the school in question receives no aid one year but gets double aid the next year, less the penalty. If there is to be money available for the double apportionment in the next year there must be a corresponding deduction from the other schools entitled to receive aid from the fund in order to make up the difference. This works no injustice since the other schools received correspondingly more than their share the year previous, when the delinquent school received no aid.

While it is true that the report in question was the high school inspector's report and not a report required of the high school itself, we nevertheless feel that the words "owing to any failure to make the required reports" contained in sec. 40.39 (2) (d) are broad enough to cover the situation. There was a failure to make a "required" report, since, as we understand it, the high school inspector's report is as necessary for making the certification for state aid as is the annual high school report by the high school clerk, and in the absence of such inspector's report no state aid could be apportioned to the school in question.

It seems to us that this construction is in accordance with the plain command of the language in sec. 40.39 (2) (d) and that any other construction would produce an unfair result not intended by the legislature.

JEF
Elections — Election Returns — Returns of delegate and judicial elections must be reported in same manner as returns of general or primary elections under sec. 6.595, Stats.

April 2, 1936.

THEODORE DAMMANN,
Secretary of State.

You inquire whether judicial and delegate elections are general elections so as to come within the provisions of sec. 6.595, Stats., which provides as follows:

"The chairman of the inspectors, or one of them appointed by such chairman, shall immediately after the votes are tabulated or counted at each general or primary election, report the returns of such election to the county clerk or county election commissioner, who shall immediately upon the receipt thereof make the same public. Such county clerk or election commissioner shall keep his or its office open for such purpose and shall post all returns received in the same order that the names of the candidates or special questions appear on the ballot. This section shall not apply to counties having a city of the first class."

Sec. 5.01 provides:

"The words and phrases in this title, shall, unless the same be inconsistent with the context, be construed as follows:

"(1) The word 'primary', the primary election provided for by this title.

"* * *

"(3) The word 'election', a general or municipal election, as distinguished from a primary election."

The words "this title" must be held to refer to chapters 5 to 12 of the statutes. See State ex rel. Oaks v. Brown, 211 Wis. 571, 249 N. W. 50.

Under sec. 5.22, delegates to national conventions "shall be chosen at an election," without specifying what kind of an election.
Under ch. 8, justices and judges are chosen at elections which are called judicial elections. Under the definitions found in sec. 5.01, however, only two main types of elections are recognized, that is, primary election and general or municipal election. Inasmuch as the judicial and delegate elections cannot be classified as primary elections, it would appear that they must fall into the other main group of general elections.

If judicial and delegate elections are general elections within sec. 6.595, the chairman of inspectors or one of them appointed by the chairman must, "report the returns of such election to the county clerk or county election commissioner."

Under sec. 5.22, which provides for delegate elections, subsec. (2) states:

"Except as otherwise provided, such election shall be noticed, held and conducted, and the results canvassed and returned in the manner provided for judicial elections."

Sec. 8.05, relating to judicial elections, provides in part:

"Elections for justice, judge and superintendent shall be noticed, held, conducted and the results canvassed and returned in the same manner as general elections. * * *"

An inference might be drawn from that portion of sec. 8.05 quoted above to the effect that judicial elections are distinguished from general elections. It is unnecessary to decide definitely, however, whether judicial and delegate elections are general elections in the strict sense of the word, because whether they are or not, the returns of the judicial and delegate elections must be reported to the county clerk or county election commissioner in the same manner as returns of general or primary elections, under the specific language of sec. 5.22 (2) and sec. 8.05, Stats. JEF
Appropriations and Expenditures — Social Security Law — Poor Relief — State treasurer is authorized to receive for general fund federal aid for old-age assistance, blind pensions and aid to dependent children.

State moneys and federal moneys received by state and appropriated for old-age assistance, blind pensions and aid to dependent children shall be disbursed from general fund in usual manner upon warrant of secretary of state.

April 3, 1936.

PENSION DEPARTMENT.

In your letter of March 31 you ask our opinion upon the following question:

"The state pension department is required by the social security board to furnish a statement of the attorney general designating the official authority to receive and disburse federal funds for the purposes of the state plan for old-age assistance, with respect to the plan for aid to dependent children, and with respect to the plan for blind pension, together with a citation of the appropriate state law pertaining to this point."

The state treasurer is authorized to receive for the general fund the federal aid for old-age assistance, blind pensions and aid to dependent children.

State moneys and federal moneys received by the state and appropriated for old-age assistance and blind pensions and aid to dependent children shall be disbursed from the general fund in the usual manner upon warrant of the secretary of state.

Pertinent Wisconsin statutes read in part as follows:

14.42 "The treasurer shall:
"(1) Receive and have charge of all money paid into the treasury, and pay out the same as directed by law."

20.18 "There is appropriated from the general fund, payable upon certification of the proper state department:
"* * *
"(5) On July 1, 1935, five hundred thousand dollars and annually, beginning July 1, 1936, one million dollars, and in addition thereto all moneys received from the federal gov-
ernment to match expenditures of the state and its political subdivisions, for state and federal aid for old-age assistance, to be allotted according to the provisions of section 49.38.”

49.38 (2) “On or before the twentieth day of January, April, July and October the secretary of state shall draw his warrant for reimbursement to the respective counties of eighty per cent of the amounts paid by them as old-age assistance during the preceding quarterly period; provided that if the total amount payable to all counties under this section shall exceed the amount available for such quarterly period under the appropriation made in subsection (5) of section 20.18, the secretary of state shall prorate the amount available among the various counties according to the amount paid out by them respectively. Whenever the secretary of state shall prorate the amount available to the various counties, the counties in the next following quarter shall prorate to the recipients of old-age assistance such proportion of the amount allowed as the amount paid by the state bears to the full amount due from the state.”

Sec. 20.18 (1), (4), and (5) appropriates from the general fund certain sums for the aids mentioned and in addition to such sums the aid received from the federal government. These provisions presume at least that the federal aids will be paid into the general fund of this state. As a general rule all moneys due to the state are paid to the state treasurer and deposited in the general fund. Although the statutes do not specifically so provide, it is our opinion that the state treasurer is the proper officer to receive the federal funds.

Secs. 47.08 (11), 48.33 (11) and 49.38 (2) provide that the secretary of state “shall draw his warrant” for the aids payable to the municipalities of this state or “shall pay” such aids to the municipalities. This is in accordance with the practice in this state. Disbursements from the state funds are made upon warrant of the secretary of state, which is countersigned by the state treasurer. The act of each party is necessary to make a proper disbursement.

JEF
Appropriations and Expenditures — University — Library deposits by students, required and authorized to be withdrawn by students upon graduation or earlier withdrawal from university, are forfeited. Accumulated prior to 1930, they may be transferred to appropriation for general university operation made in sec. 20.41, subsec. (1), par. (a), Stats.

April 6, 1936.

J. D. Phillips, Business Manager,
University of Wisconsin.

You state that at the meeting of the regents of the university of Wisconsin on March 11, 1936, the following action was taken:

"That the attorney general be asked for an opinion as to whether or not the lapsed library deposits in the amount of $20,000 in 20.41 (1) (e) may be transferred to 20.41 (1) (a) Regents, Unassigned."

You state that the university collects library deposits from all students, and credits these deposits to the 20.41 (1) (e) appropriation under the following regulations of the regents:

"Action of the board of regents on June 20, 1916:
"That upon the recommendation of the library committee, every matriculated student of the university for the regular year beginning with 1916-17, be required to make a library deposit of $1.00, said deposit, less charges for fines and damages, to be returnable to the students by the bursar, upon graduation or earlier withdrawal from the university.'"

You say that the above regulation was amended by the executive committee of the board of regents on March 25, 1921, as follows:

"That the change of library fee deposit from $1.00 to $2.00 be authorized; returnable feature of deposit to be terminated after six years, and to be credited to the library "laboratory" fund.'"
You also state that students, upon graduation or earlier withdrawal from the university, are reminded to withdraw their library deposits. Nevertheless, many students do not request a refund of these deposits. At the present time there is approximately $20,000 of such deposits that were made prior to July 1, 1930, and are, therefore, not returnable to the depositors under the regulations quoted above. You state that it is proposed to transfer these accumulated deposits totaling $20,000 from the 20.41 (1) (e) appropriation to the appropriation for general university operation made in sec. 20.41 (1) (a) of the statutes, under the authority of sec. 20.41 (1) (e), which reads as follows.

“All moneys received by each and every person as thesis deposits and as deposits or payment for breakage, consumption, use and wear of canoe lockers, laboratory and gymnasium equipment, apparatus, laundry and supplies, and for military suits, shall be paid within one week after receipt into the general fund, and are appropriated therefrom as a revolving appropriation for the purchase, care, use and repairs of such lockers, equipment, apparatus, laundry, supplies, and suits, or other purposes for which such deposits or payments are made. Forfeited or lapsed deposits may be transferred by the regents to other appropriations made by section 20.41.”

You request an opinion as to whether the regents may lawfully declare these and similar deposits forfeited or lapsed and transfer them to the appropriation made by sec. 20.41 (1) (a) for general university operation.

This question must be answered in the affirmative. The above quoted section, 20.41 (1) (e), expressly authorizes such transfer and I have no doubt that the regulation as to forfeiture of these funds is a valid regulation.

JEF
Municipal Corporations — Cities — Ordinances — Police Courts — City is liable for keep of person convicted of violation of city ordinance and sentenced to county jail.

April 6, 1936.

Victor O. Tronsdal,
District Attorney,
Eau Claire, Wisconsin.

You submit the following: A man was convicted for violation of a city ordinance and sentenced to the county jail or fined and given an alternative sentence to the county jail. There is a stay of execution and the person convicted was placed on probation to the state board of control or to the county probation officer. Upon violation of his term of probation he was placed in the county jail by the probation officer to serve the sentence. You inquire whether the city of Eau Claire is charged with the keep of the prisoner in the county jail or whether it should be paid by the county.

Sec. 62.24, subsec. (2), par. (e), Stats., provides:

"The police justice may punish violation of city ordinance by fine or imprisonment, or both, and may sentence any person convicted of violation of city ordinance, or of a misdemeanor, to pay a fine and the costs of prosecution or be imprisoned in the county jail, and may order the prisoner, if able, to be kept at hard labor. Prisoners confined in the county jail or in some other penal or correctional institution for violation of a city ordinance shall be kept at the expense of the city and such city shall be liable therefor."

The last sentence in this statute was enacted by ch. 31, Laws 1935, and is applicable and decisive of this question.

JEF
Courts — Criminal Law — Statute of Limitations — Taxation — Income Taxes — Statute of limitations upon crimes specified in sec. 71.09, subsecs. (11) and (12), Stats., runs from time of commission of such crimes.

April 7, 1936.

Tax Commission.

In your communication of March 24 you ask whether the statute of limitations as applied to the crimes set forth in sec. 71.09, subsecs. (11) and (12) runs from the time of the commission of an offense or from the time of the discovery thereof.

The statute of limitations upon crimes specified in sec. 71.09, subsecs. (11) and (12) runs from the time of the commission of such crimes.

Sec. 71.09 (11) and (12) and sec. 353.22, Stats., provide:

71.09 (11) "Any officer of a corporation required by law to make, render, sign or verify any return, who makes any false or fraudulent return or statement, with intent to defeat or evade the assessment required by this act to be made, shall upon conviction be fined not to exceed five hundred dollars or be imprisoned not to exceed one year, or both, at the discretion of the court, with the cost of prosecution."

"(12) Any person, other than a corporation, who fails or refuses to make a return at the time hereinbefore specified in each year or shall render a false or fraudulent return shall upon conviction be fined not to exceed five hundred dollars, or be imprisoned not to exceed one year, or both, at the discretion of the court, together with the cost of prosecution."

353.22 "Any prosecution by indictment, information or otherwise for a criminal offense not punishable by imprisonment in the state prison must be commenced within three years after the commission thereof, unless otherwise provided by law."

Sec. 353.22 specifically provides that prosecution for certain offenses shall be commenced within a given time from the commission of such offenses "unless otherwise provided by law." This is the general statute of limitations relating
to misdemeanors. We find no provision in the statutes which would take sec. 71.09 (11) and (12) out of the general rule prescribed by this section. You indicate that sec. 330.18 (6) might apply to the crimes in question. We believe sec. 330.18 (6) applies only to civil actions and cannot be invoked to preserve a prosecution for crime.

JEF

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Elections — Nominations — Prohibition party is not entitled to regular election ticket at 1936 September primary, unless it qualifies under provisions of sec. 5.05, subsec. (6), par. (e), Stats.

If Prohibition party candidate in any subdivision in state received one per cent of total vote cast at last preceding general election such party is entitled to regular party ticket in said subdivision.

April 9, 1936.

THEODORE DAMMANN,
Secretary of State.

You ask whether the Prohibition party is entitled to a regular party ticket at the September primary. It does not appear that any Prohibition party candidates received one per cent of the total vote cast at the last preceding general election.

Your question is answered, No.

In XXII Op. Atty. Gen. 134 this department held that the Prohibition party was not entitled to a regular party ticket at the September primary in 1934, as none of its candidates secured one per cent of the total vote cast at the last preceding general election. We believe that opinion should likewise be followed at the 1936 primary election. That opinion followed similar rulings made by this department in the past.
In XIX Op. Atty. Gen. 195 it was held that the Prohibition party was entitled to a party ticket because its candidate for United States senator received more than one per cent of the total vote cast at the last preceding election. The opinion expressly overruled XVIII Op. Atty. Gen. 656, which held that the Prohibition party was not entitled to a party ticket. That opinion was so rendered due to a mistake in computing the number of votes received by that party's candidate.

Again in 1926, this department held that the Prohibition party was entitled to a regular party ticket, inasmuch as one of its candidates received more than one per cent of the total vote cast at the last preceding election. XV Op. Atty. Gen. 153, 170. A like ruling was given in VII Op. Atty. Gen. 140, and the rule therein stated was also applied to the Socialist party vote in XIII Op. Atty. Gen. 604. In all these opinions, the provisions of sec. 5.05, subsec. (6), par. (d), Stats., were followed. This section as far as applicable reads as follows:

"* * * But any political organization which at the last preceding general election was represented on the official ballot by either regular party candidates or by individual nominees only, may, upon complying with the provisions of this act, have a separate primary election ticket as a political party, if any of its candidates or individual nominees received one per cent of the total vote cast at the last preceding general election in the state, or subdivision thereof, in which the candidate seeks the nomination, under such designation as the chairman and secretary of such organization shall certify to the secretary of state as the name of such party, which shall not duplicate the name of any other party."

This section has not been changed by the legislature, so as to affect the rule of the opinions cited above, since it was first considered in 1918.

The supreme court in State ex rel. Ekern v. Dammann, 215 Wis. 394, gave this statute a similar interpretation when it said, p. 401:

"It will be noted that by the terms of this section a new political group may, for its first year, be represented on the official ballot by individual nominees only. At the next elec-
tion the group may have a separate primary election ticket as a political party if any of its nominees at the first election received the vote required by the section."

In view of the discussion given above, it is the opinion of this department that the Prohibition party is not entitled to a regular party ticket at the September primary in 1936, in the absence of a showing that any of its candidates received one per cent of the total vote cast at the last preceding general election.

As pointed out in XXII Op. Atty. Gen. 134, a party may have a separate ticket if it complies with the provisions of sec. 5.05 (6) (e), relating to new political parties. Also, if a Prohibition party candidate in any political subdivision received one per cent of the total vote cast, the Prohibition party will be entitled to a separate party ticket in such subdivision.

JEF

Corporations — Public Officers — Secretary of state may not refuse to accept for filing under sec. 181.03, Stats., certificate of dissolution from corporation whose corporate rights and privileges he has declared forfeited under sec. 180.08, subsec. (2), Stats.

April 9, 1936.

THEODORE DAMMANN,
Secretary of State.

You state that there have been left at your office for filing certain dissolution papers of a corporation whose corporate rights and privileges have already been declared forfeited under sec. 180.08, Stats., and you inquire as to the propriety of accepting the dissolution papers for filing.
We see no good reason why such papers should not be accepted for filing, although we expressly refrain from going into any detailed discussion of the legal effects, if any, of such filing, since that is not a question of concern for your office. We are concerned here merely with the duties of the secretary of state in connection with the filing of corporate records.

It is not the function of the secretary of state to pass upon the effectiveness or validity of corporate papers submitted to him for filing, provided the same comply with the statutes as to form. He is neither a judicial nor quasi-judicial officer. As was said in the case of West Park Realty Co. v. Porth, 192 Wis. 307, 312,

"The secretary of state is a mere ministerial officer. He possesses no judicial powers, and in fact, if the legislature had attempted to vest him with such, the act would be unconstitutional and void. * * *"

It is to be noted also that the court in the case above mentioned did not consider a corporation to be extinct merely because the secretary of state had declared its corporate rights and privileges to be forfeited under sec. 180.08, subsec. (2), Stats. The court said, continuing from the language above quoted:

"* * * It therefore becomes apparent that when the legislature authorized the secretary of state to declare a forfeiture, it merely intended that such declaration should operate as a cause for forfeiture, which could be enforced in a proper action brought by the attorney general or by any private party in the name of the state, under the provisions of sec. 286.36 of the Statutes."

This theory is not confined to Wisconsin. Note the following language from 8 Fletcher Cyclopedia Corporations (1919), p. 9060.

"In Illinois the cancellation which the statute authorizes the secretary of state to enter upon his records in case a corporation fails to make its annual report is not an absolute forfeiture of the charter but is merely prima facie evidence of nonuser of which the public can avail in a direct proceeding."
Thus it would seem that, if the corporation’s existence was not *ipso facto* terminated by the declaration of forfeiture, the stockholders should have the power to dissolve the corporation voluntarily under sec. 181.03. It would be illogical and unreasonable to say that a corporation which ought to be dissolved could not be dissolved by voluntary action of its stockholders but must be dissolved only in an action brought by the attorney general or a private party in the name of the state.

On the other hand, even if the declaration of forfeiture were considered to terminate the corporation’s existence as a matter of law, the most that could be said about now filing a certificate of dissolution would be that such certificate is a nullity and mere surplusage. We do not understand that the secretary of state may refuse to accept for filing under a certain statute papers which are proper as to form merely because he entertains the belief that such papers may be of no legal effect, or may not accomplish what is intended to be accomplished. If the papers comply with the statutes as to form, and do not violate the same, the secretary of state has no discretion in the matter. See 1 Fletcher Cyc. Corp. (1919), p. 419.

Were the secretary of state to refuse to accept such certificate for filing after a declaration of forfeiture, he would be placing himself in the position of determining judicially that the corporation’s existence had terminated as a matter of law, and that it therefore had no power to file a certificate of dissolution. This we believe he has no authority to do under the doctrine of the *West Park Realty Co.* case.

JEF
Indigent, Insane, etc. — Poor Relief — W county is not liable for support of one who has moved from W county to X county and has established legal settlement pursuant to sec. 49.02, Stats., in X county.

April 9, 1936.

Buchanan Johnson,
District Attorney,
Plainfield, Wisconsin.

You desire a ruling upon the following facts:

A and his family moved from W county to X county on August 15, 1933, and had never before that date made application for or received public aid. On December 6, 1933, A made application for relief in X county and received some relief on December 8 and 9 of 1933, in the form of a bill of groceries and a sack of flour. Due notice was given to W county and the bill was presented to and paid by W county.

You state that no other or further relief was extended by X county to A but it appears that a new application for relief was made to X county on December 6, 1934, but that no aid was extended or given by X county until December 12, 1934, which was but a few days over a year from the time previous relief had been given.

The question arises as to whether or not W county is liable for the relief extended on December 12, 1934, and thereafter by X county under sec. 49.02, Stats.

It appears that the application for relief by A was made to X county on December 6, 1934. He had received relief on December 8 and 9, 1933. In XXIII Op. Atty. Gen. 702 it was held that mere application for aid without receiving same does not prevent person from acquiring a legal settlement under sec. 49.02, subsec. (4), Stats. Said subsec. (4), sec. 49.02 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. * * *"
Following the ruling in said opinion, a full year having elapsed during which the said person received no public aid, we are of the opinion that he thereby acquired a legal settlement in X county.

JEF

Courts — Estates — Grand Army Home for Veterans — Sec. 45.07, subsec. (2), par. (j), Stats., created by ch. 422, Laws 1935, is not retroactive.

Necessity of probate proceedings in case of death of member of Grand Army Home for Veterans depends upon facts in each case.

April 9, 1936.

Wendell McHenry,
District Attorney,
Waupaca, Wisconsin.

Sec. 45.07, subsec. (2), par. (j), Stats., as created by ch. 422, Laws 1935, concerning which you ask an interpretation, reads as follows:

“All members who enter the home shall sign an agreement as follows: ‘I, in consideration of having received domiciliary care, agree that in event of my death, leaving no heirs at law or next of kin, all personal property owned by me at the time of my death, including money or choses in action held by me and not disposed of by will, whether such property be the proceeds of pension, compensation, or life insurance, or otherwise derived, shall vest in and become the property of the state of Wisconsin for the sole use and benefit of the Grand Army Home for Veterans, subject to be reclaimed by any legatee or person entitled to take the same by inheritance at any time within five years after my death.’”
You inquire first whether this statute is intended to be retroactive so as to apply to members who entered the Home prior to its passage.

This inquiry is answered in the negative.

The presumption obtains, except as to some mere remedial statutes, that unless the contrary clearly appears, enactments have only a prospective effect. *Chicago, T. & T. Co. v. Bashford*, 120 Wis. 281; *Lanz-Owen & Co. v. Garage Equipment Mfg. Co.*, 151 Wis. 555, 561. This is particularly true in the case of statutes conferring new rights, the courts generally holding that such statutes do not have a retroactive effect, unless such intention is fairly expressed or clearly implied. *Read v. Madison*, 162 Wis. 94.

We find no evidence of a legislative intent to make the statute in question retroactive.

You inquire secondly as to the necessity for probating estates of members by officials of the Home.

This is a question which must be answered by applying the general principles of probate law to the facts in each particular case. We take it that when a member dies his property and estate are subject to administration by the county court of the county of which he was an inhabitant at the time of his death. Sec. 311.01, Stats.

In case where the member's estate consists entirely of personal effects and cash it would be a useless procedure for the Home to have the estate probated. See XX Op. Atty. Gen. 209. However, in such a case, if there are creditors who feel that they have just claims against the estate which are prior to the rights of the Home, under sec. 45.07, (2) (j), it would be their responsibility to apply for administration if they wanted their claims allowed. We do not consider that the burden of instituting probate proceedings necessarily falls upon the Home, which happens to be in possession of the deceased member's cash and personal effects.

On the other hand, there may be cases where the estate consists of lands, nonnegotiable securities, etc., where probate proceedings would be desirable from the standpoint of the Home, and, in the absence of application for administration by the widow or heirs within thirty days from the date
of the death, the Home, or any principal creditor, could petition for administration by virtue of sec. 311.02, subsec. (2), Stats. In such a case, we take it, the Home would be sufficiently interested in perfecting its title to the estate to take the necessary probate proceedings without forcing creditors to act first.

JEF

Counties — Clerk of Circuit Court — Taxation — Income Taxes — Income tax warrants under ch. 519, Laws 1985, need be entered by clerk of circuit court only in delinquent income tax docket.

Subsecs. (4) and (37), sec. 59.42, Stats., do not apply to income tax warrants.

April 9, 1936.

JOHN H. MATHESON,
District Attorney,
Janesville, Wisconsin.

You have inquired whether income tax warrants under ch. 519, Laws 1935, shall be entered in the court record in addition to being entered in the delinquent income tax docket.

This question is answered in the negative, as far as the court record referred to in sec. 59.39, subsec. (2), Stats., is concerned.

We do not understand that ch. 519 requires of the clerk any more than entry of the warrant in the delinquent income tax docket, which, of course, is a court record, although it is not the court record referred to in sec. 59.39, subsec. (2), Stats.

Subsec. (2), sec. 71.36, as created by ch. 519, Laws 1935, provides in part:
"The sheriff shall within five days after the receipt of the warrant, file with the clerk of the circuit court of his county a copy thereof, and thereupon the clerk shall enter in the delinquent income tax docket, in the column for delinquent income tax debtors the name of the taxpayer mentioned in the warrant, and in appropriate columns the amount of the tax or portion thereof and penalties for which the warrant is issued and the date when such copy is filed, * * * ."

Sec. 59.39, subsec. (2), to which you call our attention, provides among other things that the clerk of the circuit court shall:

"Keep in his office a book to be called a court record and enter therein the names of the plaintiffs and defendants in every civil action, suit or proceeding brought in such court either by summons, appeal, change of venue or otherwise, the names of the attorneys of the respective parties, a brief statement of the nature of the action or proceeding, the date of filing every paper therein and of each proceeding taken, the time when the same is put upon the calendar for trial, and when and how disposed of; the volume and page of the minute book, where the minutes had of proceedings in every case can be found, and the volume and page of the record of judgments and orders, where any judgment, order or report has been entered, so as to make such record a history in brief of each action or proceeding from its beginning to the final disposition of the same; and a complete index of all proceedings therein."

It is obvious that this language is not applicable to income tax warrants. There is no plaintiff and no defendant, since no action has been commenced. There are no attorneys of record and the matter was never "put upon the calendar for trial."

In view of the foregoing we are constrained to rule that delinquent income tax warrants need be entered only in the delinquent income tax docket.

You ask further, in the case it is our opinion that delinquent income tax warrants be entered in the court record, whether the clerk may also charge two dollars for filing such warrants under sec. 59.42, subsec. (40), which provides that at the time of the commencement of any special proceeding the sum of two dollars shall be paid to the clerk of the court.
While an answer to this question is not necessary in the light of what we have heretofore said, it would seem that the special proceedings referred to in sec. 59.42 (40) are the special proceedings contemplated by the procedure in civil actions provided for by ch. 260, Stats.

Sec. 260.02, Stats., provides:

“Remedies in the courts of justice are divided into:

(1) Actions.
(2) Special proceedings.”

Income tax warrants do not derive their effectiveness by virtue of any remedies in a court of justice, and as indicated in XXV Op. Atty. Gen. 110, the administration of ch. 519 from the standpoint of the fees of the clerk of the circuit court calls for further legislation.

Ch. 519 was taken almost verbatim from ch. 61, sec. 380, Cahill’s New York laws for 1930. In construing the New York statute in the case of In re State Tax Commission, 240 N. Y. S. 309, the court said, pp. 311-312:

“* * * I am of the opinion that it was the intention of the Legislature to give to the tax commission power to conduct all remedies which would be available under the Civil Practice Act without requiring the state tax commission to go through a needless performance of personal service, the entry of judgment, and the issue of execution. * * * It was within the power of the Legislature to give to the state tax commission special remedies to compel the payment of taxes and penalties in addition to the ordinary remedy of bringing suit to enforce payment. Concededly no action was commenced by the state tax commission in the form presented by section 775, of the Civil Practice Act, with reference to actions instituted and judgments recovered thereon.”

Manifestly the New York court did not consider proceedings under the income tax warrant statute to constitute actions or proceedings under the statutory provisions concerning civil actions, and it seems to us that like reasoning should apply under similar statutes in Wisconsin relating to income tax warrants and civil actions.
In XXV Op. Atty. Gen. 110 we indicated that the clerk of court was entitled to charge fifty cents for filing an income tax warrant by reason of sec. 59.42, subsec. (1), which authorizes such charge for entering upon the court record the title of each action or proceeding commenced or coming into court by appeal or otherwise.

There may be some doubt as to the correctness of such a charge if the term "court record" is to be strictly limited to the record provided for in sec. 59.39 (2), above quoted, and it could well be argued that the term should be so construed. This would leave the clerk, then, with only the ten cent fee provided in sec. 59.42, subsec. (2).

On the other hand, the delinquent income tax docket is plainly a "court record" of some sort, since the clerk of the circuit court is required to keep such record, and it has many of the other attributes and effects of the record of the circuit court.

Consequently, we are of the opinion, although not without some misgivings, that the fifty cent fee may be collected, together with the ten cent fee provided in sec. 59.42, subsec. (2).

You also inquire whether the clerk of court is to receive no compensation for issuing transcripts of judgment under sec. 59.42, subsec. (37) and no compensation for satisfying judgments under sec. 59.42, subsec. (4).

For the reasons heretofore discussed in this opinion, and in the opinion of February 20, 1936,* on the same subject, it is our conclusion that sec. 59.42, subsecs. (37) and (4), Stats., have no application to income tax warrants and no charges under this section may be made in the case of income tax warrants.

JEF

*Page 110 of this volume.
Social Security Law — Old-age Assistance — Words and Phrases — Income — Word “income” as used in sec. 49.21, Stats., means “means of support.”

April 9, 1936.

PENSION DEPARTMENT.

In your recent communication you ask whether the word “income” as used in sec. 49.21, Stats., means “gross or net” income.

The word “income” as used in sec. 49.21 means “means of support.”

The old-age assistance system was established for the express purpose of providing care for aged dependent persons. Sec. 49.20. A recipient of old-age assistance is barred from receiving any other type of relief. Sec. 49.31. The intent of the old-age assistance laws is to assist not only those persons who are absolutely destitute, but also those persons who have property which cannot readily be converted into cash without undue hardship and loss. March 25, 1936.* It is further the intention of such laws to make assistance available to persons who have an income, but which income does not provide a sufficient means of support. The amount of assistance granted to such persons is subject to the limitation that it shall not exceed one dollar per day when added to the income of the beneficiary. Sec. 49.21.

With these expressed or clearly implied fundamentals in mind, we conclude that the word “income” as used in sec. 49.21 means “means of support.” This interpretation is in accordance with our statements in XXIV Op. Atty. Gen. 461, 462. Although the cited part of that opinion construed the word “income” to mean “means of support,” other language in the opinion (pp. 462-463) indicated that “income” means “gross income.” Gross income may or may not be a person’s “means of support.” A person’s “means of support” does not necessarily mean a person’s “net income” as

*Page 205 of this volume.
that term is sometimes used. The old-age assistance administrative agency must consider the facts in each case and determine a person's income, that is, his "means of support."

The following hypothetical cases may be of assistance to you in following our interpretation of the law.

a. A person owns no property but earns a salary in the amount of $25.00 per month. In this case the person's gross income is the same as his "means of support."

b. A person owns a two-flat building and lives in one flat thereof. He has no income excepting a rental of $50.00 per month from the second flat. After payment of the expenses necessary in operating the building, such as taxes and insurance, there remains for the owner only $10.00 per month. The administrative agency may allow assistance, but in determining the allowance the fact that the owner has a place of shelter should be considered.

c. A person operates a popcorn stand, the profits from which constitute his only means of support. He has a gross income of $60.00 per month but after paying the necessary expenses incident to the operation of such stand he has a profit of only $20.00. Assistance may be granted in the discretion of the administrative agency subject to the limitations provided in sec. 49.21.

The results arrived at upon the above assumed facts are not meant to govern all cases with similar facts. Other attendant facts may vary the results. In determining "income" or "means of support" the provisions of sec. 49.24 must be considered. The administrative agency must use its discretion in each case in a reasonable manner so as to carry out the intent of the law. XXV Op. Atty. Gen. 205.

JEF
Public Officers — Coroner — Vacancies — Under sec. 17.03, subsec. (4), Stats., office of coroner becomes vacant when incumbent ceases to be inhabitant of county from which he is elected. Whether his residence has changed in given case is one of fact, which attorney general has no power to decide.

April 13, 1936.

JAMES P. CULLEN,
District Attorney,
Prairie du Chien, Wisconsin.

You state that the coroner in your county has accepted employment in an adjoining county and has moved thereto with his family. He has a contract of employment with a certain company for six months, at the end of which time he will decide whether he will stay with the company and reside permanently in the adjoining county. He expects in the meantime to continue to vote in Crawford county.

You inquire whether, under the circumstances, a vacancy exists in the office of coroner in your county.

The question of whether the coroner has changed his residence so as to vacate his office is one of fact, which the attorney general has no power to decide. This can be authoritatively determined only by a court of competent jurisdiction in an appropriate proceeding. XV Op. Atty. Gen. 505.

Sec. 17.03, subsec. (4), Stats., provides that any public office shall become vacant in the case of a local office, where the incumbent ceases "to be an inhabitant of the district, county, city, village, town, ward or school district for which he was elected or within which the duties of his office are required to be discharged; * * * ".

It would seem that when a person moves with his family to another county to accept employment there, he ceases to be an inhabitant of the former county. The most that can be said as to his plans for the future in such a case is that they are uncertain. This is more or less true in every case where a man accepts employment in another county or moves his family there. There is at the time of moving no
definite or fixed intention to return to the former abode. It is true that a person in such circumstances doubtless feels at the time that if the new venture proves unsuccessful and no other attractive opportunity presents itself, he will return to his former home and employment if he can.

Sec. 370.01, subsec. (6), Stats., provides that the word "inhabitant" as used in the statutes shall be construed to mean a resident in the particular locality in reference to which that word is used.

Various interpretations of the term "residence" have been given in the construction of election laws and poor relief statutes.

Sec. 6.51 (2) provides,

"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."

We do not consider the mere intention of such person to regard his former home as his residence to be the determining factor.

It is rather a question of whether he now has the intention of moving back to such former home.

JEF
Legislature — Assemblyman — Senator — Public Officers — Alderman — Office of assemblyman or state senator is compatible with office of alderman in any of cities of Milwaukee county.

April 15, 1936.

Theodore Dammann,
Secretary of State.

In your communication of April 13 you ask our opinion upon the following:

Is the office of alderman in any of the cities of Milwaukee county incompatible with the office of assemblyman or state senator?

The office of assemblyman or state senator is compatible with the office of alderman in any of the cities of Milwaukee county.

We find no statutory provision which prevents an assemblyman or a senator from holding such office of alderman. It is our opinion that there is no incompatibility between the offices mentioned under the common law rule. The nature and the duties of the offices in question are not such as to render it improper, from considerations of public policy, for one person to retain both offices. We have previously held that a member of the legislature may also hold the office of town supervisor (VII Op. Atty. Gen. 642) or be a member of the county board (XVII Op. Atty. Gen. 261, XXI Op. Atty. Gen. 439) or hold the office of town chairman (I Op. Atty. Gen. 485, VIII Op. Atty. Gen. 159 and X Op. Atty. Gen. 305). Although the duties of an alderman are somewhat different from the duties of the offices above mentioned, we do not believe there is such a difference as would make such office incompatible with membership in the legislature.

JEF
Unemployment Insurance — Employment of persons by county for purpose of constructing fire lanes, planting trees, etc., on county owned forest crop lands is subject to ch. 108, Stats., where such employees are not hired on annual salary basis.

April 16, 1936.

Robert A. Nixon,
District Attorney,
Washburn, Wisconsin.

You state that under the provisions of ch. 77, Stats., relating to the taxation of forest crop lands, the county of Bayfield has set aside certain county owned lands which have been entered under the provisions of this chapter as forest crop lands. It has been the practice of the county to employ persons residing near said lands to construct fire lanes, plant trees and otherwise carry on forestry work. These men have been employed for short periods of from ten to twenty days during the year with the view of spreading the work among settlers in need of it.

You state further that the industrial commission has advised county officers that the employees in question are subject to ch. 108, the unemployment compensation act.

You also say that if the law is to be interpreted in such a way that the county is required to make contributions for a large number of men who are employed but a short time, it would be more economical to discontinue the practice of spreading employment and put on a small number of men permanently. In view of the foregoing our opinion on the question of interpretation of the law is requested.

It is our opinion that the employment in question is not exempt from the operation of ch. 108.

Sec. 108.02, Stats., defines at great length the terms “employee,” “employer” and “employment” as used in the unemployment compensation act. We will not here take the space to repeat these definitions. Suffice it to say that the definitions are sufficiently broad to cover the employment in question.
Certain exemptions to the act are included in sec. 108.02, subsec. (e), but none of these exemptions are applicable here.

These exemptions, among other instances, cover the following: First. Employment by a governmental unit on an unemployment work relief project, recognized as such by the industrial commission. Second. Employment as an elected or appointed public officer. Third. Employment by a governmental unit on an annual salary basis.

These exemptions have been construed by the industrial commission in the following rules.

Under rule 6 employment under governmental unemployment relief projects includes employment on C. W. A. or F. E. R. A. projects or on a work project of any municipality for which such governmental unit was reimbursed in whole or in part by the industrial commission. Other work relief projects are so classified only upon specific written approval of the commission on a showing that they are genuine governmental unemployment relief projects.

Rule 4 as to exempted public officials reads as follows:

"'An elected or appointed public officer', within the meaning of section 108.02 (e) 4, is a person who holds a position which under the statutes, court decisions, or attorney general's opinions (unless overruled) has been held to be an office, as distinguished from a mere employment."

Rule 5 as to exempted public employees reads as follows:

"A person will be considered as being employed by a governmental unit on an annual salary basis', within the meaning of section 108.02 (e) 5, when such person is hired by a governmental unit for regular work (as distinguished from temporary or seasonal work) and is employed at a fixed monthly (or annual) salary on a permanent (rather than a temporary) basis.

"Under this rule a person shall be deemed employed for regular work only when he is regularly employed for (and paid a salary for) at least ten months per year."

It is apparent that the employees in question are not covered by any of the statutory exemptions or industrial commission rules construing such exemptions.
The authority of the industrial commission to make such rules is found in sec. 108.14, subsec. (2), which provides in part:

"The commission shall have power and authority to adopt and enforce all rules and regulations which it finds necessary or suitable to carry out the provisions of this chapter."

The fact that the county, in the interests of economy, may find it expedient to discontinue the practice of spreading employment under the circumstances is a matter to be addressed to the consideration of the legislature and cannot alter the law as it now stands, however much that might appear desirable.

JEF

Taxation — Tax Sales — Partial payment for redemption of land made pursuant to sec. 75.01, subsec. (4), Stats., sold for taxes should be in sum not less than ten dollars and then in multiples of five dollars.

April 16, 1936.

ROBERT A. NIXON,
District Attorney,
Washburn, Wisconsin.

You state that a tender of two hundred dollars has been made to the county treasurer of your county by the owner of twenty-three descriptions of real estate as partial payment of delinquent taxes on such lands pursuant to sec. 75.01, subsec. (4), Stats. 1935. This tender was accompanied by a request that the treasurer apply the sum of two hundred dollars on each of the twenty-three descriptions for delinquent taxes for the year 1931.
You ask whether sec. 75.01 (4) is to be so construed as to permit partial payment of delinquent taxes in amounts less than ten dollars for each description and in multiples of five dollars.

Sec. 75.01 (4), created by ch. 244, Laws 1933, provides in part:

"(4) Redemption of land sold for taxes may be made in partial payments of not less than ten dollars and in any multiple of five dollars. * * *

By ch. 244, Laws 1933, a new section was added to the statutes. See sec. 74.325, Stats. 1935. This section was addressed to and concerned the same general subject matter as sec. 75.01 (4), Stats. Sec. 74.325, Stats. 1935, provides in part:

"The tax on any parcel of land returned to the county treasurer as delinquent may be paid in instalments of not less than ten dollars and in any multiple of five dollars. * * *

Although sec. 75.01 (4), Stats. 1935, seems so clear in its language directing that partial payment on land sold for taxes should be in payments of not less than ten dollars as to admit of no construction, Julius v. Druckrey, 214 Wis. 643, 254 N. W. 358, if an aid to construction need be invoked the language of sec. 74.325, Stats., a statute enacted simultaneously with the statute here in question, by the same chapter (ch. 244, Laws 1933) and addressed to the same general subject matter, is conclusive.

"The tax on any parcel of land * * * may be paid in instalments of not less than ten dollars and in any multiple of five dollars. * * *" Sec. 74.325, Stats.

You are therefore advised that partial payments made pursuant to sec. 75.01 (4) for the redemption of any land (description) sold for taxes should be in a sum not less than ten dollars and then in any multiple of five dollars.

JEF
Fish and Game — Subsec. (11), par. (c), and subsec. (17a), sec. 29.33, Stats., do not conflict.

April 17, 1936.

John R. Cashman,
District Attorney,
Manitowoc, Wisconsin.

You ask if the provisions of secs. 29.33, subsec. (11), par. (c), and subsec. (17a), Stats., conflict. These sections read as follows:

“(11) (c) No fish of the following varieties caught in seines, fyke, drop or pound nets in the waters of Lake Michigan or the northern part of Green Bay shall be retained, sold, or transported of a length less than that specified for each variety, and such measurement of length shall be taken in a straight line from the tip of the nose to the utmost end of the tail fin, except that the measurement of dressed fish shall be the length of the carcass, namely:

Lake Trout --------------- 12 inches
Whitefish --------------- 13 inches

“(17a) It shall be unlawful for any person, persons, firm or corporation to transport or cause to be transported in any manner to any points without the state from any points within the state any lake trout or whitefish of a length less than fifteen inches.”

From an examination of the two sections of the statute quoted above, it would appear that the legislature intended that a certain size of trout or whitefish might be caught and used for home consumption or disposal, while a larger size only may be shipped outside of the state. Any trout or whitefish may be caught that is the length prescribed by sec. 29.33 (11) (c) but only those trout and whitefish that are fifteen inches in length or longer may be shipped outside the state.

It is a well settled rule that if a supposed incongruity between two statutes can be avoided by a reasonable construction, such construction should be adopted. Hite v. Keene,
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137 Wis. 625, 119 N. W. 303; State ex rel. Hayden v. Arnold, 151 Wis. 19, 138 N. W. 78; Krueck v. Phoenix Chair Co., 157 Wis. 266, 147 N. W. 41.

As such construction can be given in the present case, this office holds that subsecs. (11), (c), and (17a), of sec. 29.33 of Stats. do not conflict.

JEF

Athletic Commission — Boxing Matches — Religious organization charging admission to boxing tournament is not exempt from license provisions of ch. 169, Stats.

April 20, 1936.

THOMAS W. CALLAHAN,
District Attorney,
Darlington, Wisconsin.

You state that a certain church organization of young people is going to hold a boxing tournament in La Crosse, and that several parochial schools in your vicinity wish to enter a team composed of young men from their parishes in Lafayette and Iowa counties. To raise sufficient funds to equip a team and pay its expenses to La Crosse, it is proposed to hold an elimination tournament. We take it from your statement of facts that admission is to be charged.

You inquire whether a license, under ch. 169, Stats., is necessary.

It is our opinion that such a license is necessary.

Sec. 169.01, subsec. (9), Stats., provides in part:

"Any club or organization may hold or conduct strictly amateur boxing and sparring matches and exhibitions on the payment of the annual license fee of ten dollars in all cities, villages and towns of the state upon the compliance
and in accordance with all the provisions of this section with respect to obtaining a license and sanction from the state athletic commission and subject to all the rules and regulations of such commission. * * * No fee shall be required from the regular men's club, community center, social center, conducting amateur bouts, under a competent director, which is affiliated with a religious group, or school board, where no admission charge is made, except that they shall be required to pay the necessary expenses of the commission for making examinations of participants but said bouts shall be under the supervision of the commission as all other bouts."

Sec. 169.01, subsec. (20), par. (a), provides:

"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 in intramural, interscholastic or intercollegiate competition if the participants therein are bona fide students of their respective schools. All such boxing or sparring matches or exhibitions so conducted shall be by and with the consent of, and under the supervision of the governing body of such university, college, normal school or high school."

From your statement of facts the organization in question would not appear to come within the exemptions mentioned in either of the above quoted sections. The statute is clear and unambiguous. Consequently, under familiar rules there is no room for construction. Gilbert v. Dutruit, 91 Wis. 661.

JEF
Appropriations and Expenditures — Bonds — Soldiers' Relief Commission — County board is authorized to pay for surety bond for soldiers' relief commission.

April 20, 1936.

JOHN R. CASHMAN,
District Attorney,
Manitowoc, Wisconsin.

In your communication of March 31 you ask whether the county board is authorized to pay for a surety bond to be filed by the soldiers' relief commission.

Subsec. (1), sec. 45.12 provides that the county judge shall appoint a soldiers' relief commission. Subsec. (2) of said section provides:

"* * * He shall require the members of the commission to execute to the county a joint and several bond, with sufficient sureties to be approved by him, in a sum equal to the tax levied in the current year for expenditure by the commission; said bond or bonds shall be filed with the county clerk."

Sec. 204.11 provides in part:

"* * * Any public officer, required by law to give a suretyship obligation, may pay the lawful premium for the execution of such obligation out of any moneys available for the payment of expenses of his office or department, unless such payment is otherwise provided for or is prohibited by law."

By the express language of sec. 45.12 the members of the soldiers' relief commission are required to furnish a bond. Sec. 204.11 is a general statute relating to all public officers. The members of the said commission, being public officers, are authorized by this section to pay for their bond premium out of any moneys available for the payment of expenses of their office or department. It is our opinion that the county board may pay such premiums upon presentation of a proper expense statement as provided by sec. 45.15.

JEF
Opinions of the Attorney General

Civil Service — Employees in classified service under ch. 16, Stats., who voluntarily waived portions of their salary during depression cannot now recover portion so waived even though they received less than minimum salary levels set by bureau of personnel.

April 20, 1936.

Glenn Frank, President,
University of Wisconsin.

You state that you have been directed by the regents of the university of Wisconsin to request an opinion from this office as to the legality of salary waivers which temporarily bring the net compensation of certain employees of the university in the classified service below the minimum salary level set by the bureau of personnel.

It is our opinion that an employee holding a position in the classified service may voluntarily waive a part of his salary, as has been done in the past by practically every department of the state government and the university of Wisconsin.

However, it is very clear that an officer would be violating secs. 16.01 to 16.30, inclusive, Stats., by paying such an employee less than the minimum amount in the salary range set by the bureau of personnel, in the absence of such a voluntary waiver.

Sec. 16.105, subsec. (2), provides for the establishment and maintenance of standard salary ranges for all positions and employments in the state service to which ch. 16, the civil service statute, applies.

Sec. 348.269, Stats., provides:

"Whoever, after a rule has been duly established and published, according to the provisions of sections 16.01 to 16.30, makes an appointment to office or selects a person for employment, contrary to the provisions of such rule, or willfully refuses or neglects otherwise to comply with, or to conform to, the provisions of sections 16.01 to 16.30, or violates any of such provisions, shall be deemed guilty of a misdemeanor. If any person shall be convicted under this
section, any public office which such person may hold shall by force of such conviction be rendered vacant, and such person shall be incapable of holding office for the period of five years from the date of such conviction."

In the case of Schuh v. City of Waukesha, 265 N. W. 699, it was held that a city employee, who, after receiving the full amount of the stipulated salary, returned ten per cent at the city's request for use for relief purposes, was not entitled to subsequently recover such amount from the city, since it constituted a voluntary contribution to the city. However, it was held in the same case that where the city attempted to step up the contribution from ten per cent to forty per cent without the consent of the employee, such employee was not bound to abide by the change, and could recover the enforced contribution in spite of a prior compromise settlement, whereby but twenty per cent of the salary was withheld.

There is perhaps no great distinction in principle between the case where the employee receives a check for the full salary and returns ten per cent thereof and the case where the employee consents that ten per cent deduction from his salary check may be withheld as a voluntary contribution on his part. As the court said in the Schuh case, the case should not be made to turn upon the mere mechanics of the operation. It seems to us that the net result is the same in either event.

The cases and text-writers are by no means in accord as to the problem presented here.

We find this statement in 22 R. C. L. 538:

"As a general rule an agreement by a public officer to render the services required of him for less than the compensation provided by law is void as against public policy. * * *"

The rule is similarly expressed in a note in 70 A. L. R. 972. On the other hand, the rule is stated in 43 C. J. 702, sec. 1173, as follows:

"The rule supported by the weight of authority is that a municipal officer who continues to hold his office for the full term and receives his compensation at a fixed rate, without
dissent, thereby waives his right to claim a higher rate named in some act or ordinance; but he does not waive his right to claim the salary due him by receiving a smaller amount, when he does so without any settlement or compromise, but under protest and claiming, at the same time, his right to the full amount. * * *

One of the latest cases on the subject is that of Steele v. City of Chattanooga, (Tenn. 1935) 84 (2d) S. W. 590. The attendant circumstances are quite parallel, and the reasoning of the court appeals to us as being sound as well as being equally applicable to the situation here under discussion. In this case the salaries of policemen and firemen were fixed by statute. The city of Chattanooga, on account of the depression, was unable to collect a large percentage of its assessed taxes, resulting in material loss of revenue and necessitating a curtailment of expenditures in the various departments. The employees in question signed waivers authorizing the city auditor to take twenty per cent from their salaries each month. This suit was brought by a former employee to recover the amount of the reduction in his salary which he had voluntarily waived. The employee contended that the statute was mandatory and that a sound public policy forbade that it be circumvented and rendered inoperative even by agreement with the city and the affected official or employee. The city, on the other hand, contended that the employee was estopped to claim the amount which he voluntarily agreed to forego, the city having acted on his agreement and refrained from effecting a reduction in expenditures as it could have done by dismissing some of the firemen and policemen instead of retaining all of them at a reduced salary as it was induced to do by the agreement in question.

The court said at p. 591:

"The charge is made that appellant signed the reduction agreement because of duress and under threat of losing his position if he did not do so, but he is unable to designate any official of the city who made such threat or brought any compulsion to bear upon him. Such compulsion as existed arose from economic conditions and was not personal or official. We are of opinion, rather, that the agreement was
Opinions of the Attorney General

voluntarily entered into in order to obviate the dismissal of any of the personnel because of the reduced appropriation for the department. It is apparent that, if the agreement to reduce salaries had not been made, the city would have had no other course open to it except to reduce the number of men employed, but no one was told that if he, individually, refused to sign the agreement, he would be discharged. This was not compulsion or duress, nor was it a threat. It was merely a frank and truthful statement of existing conditions and the two alternatives open to the city and its employees."

In view of the importance of the question we will take the liberty to quote further from this case at some length in order that the reasoning of the court may be fully understood.

The court said further, at p. 592:

"The authorities upon the subject are not in agreement. Some courts hold that a public officer is not estopped by accepting less than the salary to which he is entitled by law, even where the reduction is supported by express agreement upon his part. Such holdings are based upon considerations of public policy which we do not find present here, for the reason, among others, that the contract is executed rather than executory. There is now no possibility that the public good will be in any wise affected; the service of this particular employee having been terminated. Conceding, but not deciding, that a sound public policy would forbid the enforcement of an executory contract of this nature, we are unable to see wherein any question of public policy is involved after the service has been performed and reduced compensation paid and accepted without protest by the officer. Second Nat. Bank v. Ferguson, 114 Ky. 516, 71 S. W. 429; DeBoest v. Gambell, 35 Or. 368, 58 P. 72, 353. In the latter case the court observed and applied a distinction between an executed and an executory contract to accept a reduction in salary.

"We are of opinion appellant should be repelled from a court of conscience in his attempt to gain an unconscionable advantage from an agreement to which he voluntarily assented for his own benefit and that the chancellor correctly held him estopped from recovering in this case.

"McQuillen, in his admirable work on Municipal Corporations, in volume 2, p. 249, sec. 542, states the general rule as follows: 'The acceptance of a less sum than that allowed by law, as salary or compensation, without objection, and
in full satisfaction for services rendered will ordinarily estop the officer or employee from claiming more.’

"* * *


“Cases taking a contrary view are collected in 19 Ann. Cas. 1075.”

It would seem to us that public policy in times of depression would best be served by such voluntary waivers rather than by discharging employees to the end that the remaining employees might enjoy the full salary provided by law or in a manner prescribed by law for a particular classification. The problem during the years of depression was a very real one and scarcely a department of state or local government was free from making the choice on the one hand of discharging employees or retaining such persons in employment on voluntary waivers on the other hand. It seems to us that the wisdom of the policy adopted by the state and university is scarcely open to question, although the courts may differ on the question of the legality of voluntary waivers.

In view of the foregoing, and particularly in the light of what our court said in the Schuh case and what the Tennessee court said in the Steele case, we are of the opinion that employees in the classified service who in the past voluntarily waived portions of their salary cannot now recover the part so waived, even though they received less than the minimum salary levels set by the bureau of personnel.

JEF
Civil Service — Under sec. 16.24, Stats., personnel board which has ordered reinstatement of discharged employee is without power to enforce its order by court action. This can be done in action commenced by employee.

April 23, 1936.

Bureau of Personnel.

You state that the personnel board has instructed the director of personnel to ask the attorney general for an opinion on the powers of the board to enforce an order directing an employing officer to re-employ a discharged employee who has been given a hearing under ch. 204, Laws 1935, amending subsec. (1), sec. 16.24, Stats.

Sec. 16.24, Stats., provides in part:

“(1) No permanent subordinate or employe in the competitive division who shall have been appointed under the provisions of sections 16.01 to 16.30 or the rules made pursuant thereto shall be removed, suspended without pay, discharged, or reduced in pay or position except for just cause, which shall not be religious or political. In all such cases the appointing officer shall, at the time of such action, furnish to the subordinate in writing his reasons for the same. The reasons for such action shall be filed in writing with the director prior to the effective date thereof. Within thirty days of the receipt of such notice and reasons from the appointing officer, the employee may appeal to the board, and within sixty days after the date of appeal, the board shall hold a public hearing thereon.

“(a) After the public hearing before the board, the board shall either sustain the action of the appointing officer, or shall reinstate the employe fully, or upon such conditions as the board shall determine.”

The language of the statute above quoted is clear and unambiguous. It would appear to be the plain duty of an employing officer to re-employ an employee whose reinstatement has been ordered under sec. 16.24 (1) (a).

However, we do not consider that there is anything further to be done in the matter by the personnel board after it has made its order. While the discharged employee whose
re-employment is being wrongfully refused could doubtless bring a mandamus action to compel the employing officer to give effect to the order of the board, we do not see that the board itself would have any legal or protectible interest which could properly be the subject of judicial determination. This being true, it is hardly in a position to become a party to any proceeding involving the rights of the employee in question. In the case of State ex rel. La Follette v. Dammann, 264 N. W. 627, our supreme court held in a declaratory judgment action, that there must be a justiciable controversy between persons whose interests are adverse and that the plaintiff must have a legally protectible interest in controversy.

However, we might call attention to the fact that sec. 348.269, Stats., provides:

“Whoever, after a rule has been duly established and published, according to the provisions of sections 16.01 to 16.30, makes an appointment to office or selects a person for employment, contrary to the provisions of such rule, or wilfully refuses or neglects otherwise to comply with, or to conform to, the provisions of sections 16.01 to 16.30, or violates any of such provisions, shall be deemed guilty of a misdemeanor. If any person shall be convicted under this section, any public office which such person may hold shall by force of such conviction be rendered vacant, and such person shall be incapable of holding office for the period of five years from the date of such conviction.”

We take it that the filing of a criminal complaint under this section could be done as in any criminal case by anyone familiar with the facts regardless of his personal interest in the matter, and that the complaint would not necessarily have to be made by the discharged employee.

JEF
Social Security Law — Old-age Assistance — It is function of old-age administrative agency in proper cases to direct payment of funeral expenses authorized by sec. 49.30, Stats.

Counties are entitled to eighty per cent reimbursement from state for moneys expended for funeral expenses pursuant to sec. 49.30.

April 23, 1936.

PENSION DEPARTMENT.

In your communication of April 15 you ask our opinion upon the following:

1. Is it the duty of the county old-age assistance administrative agency or the regular county or local relief channels to direct payment of funeral expenses authorized by sec. 49.30, Stats.?

2. Are counties entitled to eighty per cent reimbursement for moneys expended for funeral expenses pursuant to sec. 49.30?

It is the function of the county old-age administrative agency in the proper cases to direct payment of funeral expenses authorized by sec. 49.30.

Counties are entitled to eighty per cent reimbursement from the state for moneys expended for funeral expenses pursuant to sec. 49.30.

Sec. 49.30 provides:

"On the death of a beneficiary such reasonable funeral expenses for burial shall be paid to such persons as the county judge may direct; provided, that these expenses do not exceed one hundred dollars and provided further that the estate of the deceased is insufficient to defray these expenses."

This section was passed in substantially its present form as a part of the original old-age pension law in 1925. It expressly refers to a "beneficiary," meaning an old-age as-
sistance beneficiary. The payment of funeral expenses as provided by said section undoubtedly is part of the old-age assistance plan as evolved in this state. Such assistance laws provide that they shall be administered either by the county judge or by a county pension department and the acting agency shall administer all laws relating to old-age assistance. XXIV Op. Atty. Gen. 763. Clearly then, it is the duty of the old-age assistance administrative agency to direct the payment of funeral expenses in the proper instances pursuant to sec. 49.30.

In your second question you ask whether counties are entitled to reimbursement for moneys expended for such funeral expenses. Sec. 49.38, subsec. (1), provides that the county treasurer shall certify to the secretary of state and the state pension department the amount paid out (for assistance) during the preceding quarterly period. This subsection further provides that if the state pension department shall be satisfied that the amount claimed has actually been expended "in accordance with the provisions of sections 49.20 to 49.39" it shall record its approval on the certificate filed with the secretary of state, who shall pay eighty per cent thereof to the county. It seems apparent that moneys expended for funeral expenses under sec. 49.30 are expended "in accordance with the provisions of sections 49.20 to 49.39." It is our opinion that the counties are entitled to proper reimbursement for such expenditures.

JEF
Social Security Law — Poor Relief — State pension department has power to review denial of assistance upon appeal by applicant.

April 23, 1936.

Pension Department.

You have submitted the following question and ask our opinion thereon:

Upon appeal to the state pension department by an assistance applicant who has been denied assistance has such department the power to review the action of the county or juvenile court?

Your question assumes that the assistance laws are administered by the county or juvenile court. The statutes provide that such laws shall be administered by the judge of the county or juvenile court. Application for blind pension shall be made to the county judge. Sec. 47.08, subsec. (5), Stats. Similarly, aid to dependent children and old-age assistance shall be administered by the county judge or juvenile judge. Secs. 48.33 (1) and (2), 49.20, 49.27, and 49.28, Stats.

The statutes expressly give the state pension department power to review a denial of assistance. Sec. 47.08 (6) (b), relating to blind pensions, provides that the decision of the county judge upon any application for a blind pension shall be final “unless there is an appeal from such decision as provided in subsection (4) of section 49.50.” Sec. 49.50 (4) relates to all three forms of assistance. It provides that any applicant may apply to the state pension department for review of any denial of assistance. Such board shall accord the applicant a fair hearing and may make any necessary further investigation. After such hearing and investigation the board shall fix the amount of assistance to be granted, “and such determination shall have the same effect as an order of the county officer charged with administration” of such assistance. In view of the clear and definite language of sec. 49.50 (4) we conclude that the state pension department has the power to review a denial of assistance upon appeal by the applicant.

JEF
Public Officers — Town assessor is entitled only to such compensation as is fixed according to law. Annual town meeting may fix compensation of town assessor under sec. 60.61, Stats. If not fixed by annual town meeting it may be fixed by town board in certain towns. Compensation may be fixed after assessor is elected, although this should be avoided if possible.

April 23, 1936.

TAX COMMISSION.

You call our attention to ch. 118, Laws 1935, which repealed and recreated sec. 60.61, Stats., relating to the compensation of town assessors, and which reads as follows:

“In all towns, in counties having a population of two hundred and fifty thousand inhabitants or upwards, and in all towns having an assessed valuation of four million dollars or more, town assessors shall be paid such compensation for their services as may be allowed them by the annual town meeting. In all other towns such compensation if not fixed by the annual town meeting shall be not less than three nor more than five dollars per day.”

You inquire first: To what compensation is the town assessor entitled in a town in a county having a population of two hundred and fifty thousand inhabitants or more and by whom shall his compensation be fixed in the event the annual town meeting neglects to fix the same?

It is our opinion that the town assessor is entitled only to such compensation as the annual town meeting shall fix, and that he receives no compensation until it is fixed by the annual town meeting.

A public officer takes his office cum onere and is entitled to no salary or fees except what the statutes provide. Outagamie County v. Zuehlke, 165 Wis. 32.

The rule is also stated in 46 C. J. 1019, sec. 250, as follows:

“Statutes relating to the fees and compensation of public officers must be strictly construed in favor of the government, and such officers are entitled only to what is clearly given by law. * * *”
However, we see no reason why the next succeeding annual town meeting should not take care of the matter of fixing compensation for the services previously rendered by the town assessor. The wording of the statute would not preclude such action, and there is every good reason why the assessor should be paid, although, as above pointed out, he cannot be paid until the compensation has been fixed by the annual town meeting.

You inquire secondly, whether “in all other towns” the compensation of the assessor may be fixed at the annual town meeting, and if so, whether there are any limits to the compensation fixed.

It is our opinion that in such towns the compensation may be fixed at the annual town meeting, and that there is no express limitation as to the amount of compensation.

The words “in all other towns such compensation if not fixed by the annual town meeting shall be not less than three nor more than five dollars per day,” clearly imply that the annual town meeting may fix such compensation. Otherwise, the italicized words would be meaningless. The limitation of not less than three nor more than five dollars per day is construed to apply only where the compensation is not fixed by the annual town meeting.

By a familiar rule of syntax qualifying phrases are to be referred to the next preceding antecedent. Jorgensen v. Superior, 111 Wis. 561, 566; State v. Bennett, 213 Wis. 456, 474. Following this rule, we would say that the words “shall be not less than three nor more than five dollars per day” refer to the words “if not fixed by the annual town meeting.”

Thirdly, you inquire: If the compensation is not fixed by the annual town meeting, who is to determine the compensation within the statutory limitation of “not less than three nor more than five dollars per day?”

It is our opinion that if “in all other towns” such compensation is not fixed by the annual town meeting the same may be fixed by the town board.
Sec. 60.29, subsec. (1), Stats., provides that the town board shall have charge of all affairs of the town not by law committed to other officers.

Sec. 60.61 provides that the compensation, if not fixed by the annual town meeting, shall be not less than three nor more than five dollars per day. This clearly implies that there is power somewhere other than in the annual town meeting to fix such compensation, and it would seem that such power is in the town board by virtue of sec. 60.29 (1), above referred to.

Lastly, you inquire whether the town board, if it is authorized to fix compensation, may do so after the day upon which the assessor is elected in April.

This question is answered in the affirmative. The statute does not prescribe the time when such compensation must be fixed, although, ordinarily, it would be better practice to fix such compensation before election so as to avoid questions such as might arise if it was attempted to increase or decrease the compensation during the term of office.

JEF
Education — Recreational Activities — Question of making levy for recreational activities must be resubmitted to voters before such tax can be levied in case voters have voted that board of school directors provide for such activities but have refused to approve necessary tax levy under sec. 43.50, subsec. (5), Stats.

April 29, 1936.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

You state that at the April 7 election in a certain city, the following two questions were submitted to the voters:

"Shall the board of education of the city of S. exercise all the powers granted by section 43.50 of the 1933 Wisconsin statutes pertaining to the establishment and maintenance of recreational activities in the city of S.?

"Shall the common council of the city of S. levy and collect a special tax equal to the amount of money required by the board of education for such purposes but not to exceed four-tenths of a mill as provided by law?"

The first question received the majority of the votes cast and the second question was defeated by a small majority. You inquire whether it will be necessary to submit the second question again.

This question is answered in the affirmative, in so far as the levying of any taxes is concerned.

Sec. 43.50, subsec. (3), Stats., makes provision for levying a tax to carry on recreational activities mentioned in sec. 43.50, subsec. (1). However, sec. 43.50, subsec. (5), provides:

"The tax provided for in subsection (3) shall not be levied or collected until after the question of the levy and collection of such tax shall have been submitted to the qualified school electors of such city pursuant to law, at some regular or special election, and shall have been favorably voted by a majority of those voting upon such question at such election. After a favorable vote on such question, as provided above, such tax shall be levied and collected annually
until the voters of the school district of such city shall, by majority vote, order the discontinuance thereof. The question of such discontinuance shall be submitted in the manner the question of authorizing the levy and collection of the said tax is required by law to be submitted."

This statute is very clear and express. In so far as money is necessary to carry out the program provided for in the first question submitted to the voters, such money will have to be raised with the approval of the voters as provided in sec. 43.50, subsec. (5), above quoted.

Sec. 43.50, subsec. (3), provides:

"The board shall report to the common council at or before its first meeting in September of each year, the amount of money required during the next fiscal year for the support of such activities and thereupon, subject to the provisions of subsection (5), the common council shall levy and collect a special tax in the manner that other taxes are levied and collected, equal to the amount of money so required; but said tax shall not in any one year exceed the maximum mill tax rate prescribed for the school extension fund in section 65.08, for all the activities conducted in said city pursuant to this section, and said tax shall not be used or appropriated, directly or indirectly, for any other purpose."

We take it that it would be entirely proper for the board to submit the estimate to the common council under the above statute, and that the question of levying a tax to raise such amount of money could again be submitted to the electors at "some regular or special election."

You inquire also, if the question must be submitted again, whether or not it is going to be necessary to petition the city authorities to have it so submitted or if it automatically comes up again at the next election.

The statutes do not specifically provide what is to be done in a case such as the present, but we believe the city authorities should be petitioned to again submit to the voters the question of levying a tax, and that such question does not automatically come up at the next election. Otherwise, for the sake of consistency, it would be necessary to rule that the question would have to be submitted again and again indefinitely until carried, by reason of the affirmative
vote on the first question. We do not believe the statutes should be so construed, since the legislature undoubtedly never intended such an unreasonable result. Statutes are not to be so construed as to result in an absurdity. *Price v. State*, 168 Wis. 603.

The voters have expressed their will as to a recreational program, but nothing much can be done to carry out such a program until the voters are willing to approve of the necessary tax levy.

JEF

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*Appropriations and Expenditures — Recovery Act — Codes* — All assessments collected by trade practice commission pursuant to sec. 110.08, Stats., and more particularly by virtue of pertinent enabling provisions contained in various approved codes, may be deposited in state treasury; such deposits are appropriated to governor to be used for administration of ch. 110, Stats., subject to single qualification that general fund be reimbursed in such amount as will equal funds heretofore advanced therefrom for administration of ch. 110, Stats. 1933.

April 29, 1936.

HONORABLE PHILIP F. LA FOLLETTE,  
Governor.

You state that you have by executive order No. 6, dated March 26, 1936, issued pursuant to and by and with the authority conferred upon you by secs. 110.03 and 110.05, Wisconsin Stats. 1935, abolished the Wisconsin recovery administration and created the Wisconsin trade practice department. Within such department, there is created the Wisconsin trade practice commission and a trade practice review board. The stated duties and functions of such department are “to administer the duties and functions provided for in
chapter 110 of the Wisconsin statutes.” Executive order No. 6, dated March 26, 1936, Philip F. La Follette, governor, state of Wisconsin.

By subsequent action, you amended various existing codes for fair competition pursuant to authority given you by sec. 110.05, Stats. by striking therefrom “code authority” and substituting therefor the newly created “trade practice commission.” Authority by such amendment is given the trade practice commission to budget the expenses provided for by sec. 110.08, Stats., and upon your approval it may assess and collect the assessments as provided for by such section. Under the new system, you state that the trade practice commission, a trade practice committee and regional trade practice committees will necessarily incur expenses in their administration of the codes.

You ask whether it is proper for the trade practice commission to deposit all assessments collected by it with the state treasury and whether these funds when deposited are appropriated to the governor by subsec. (10), sec. 20.02.

All assessments collected by the trade practice commission pursuant to sec. 110.08, and more particularly by virtue of the pertinent enabling provisions contained in the various approved codes, may be deposited with the state treasury and such deposits are appropriated to the governor to be used for the administration of ch. 110, Stats., subject to the single qualification that the general fund is to be reimbursed in such an amount as will equal the funds heretofore advanced therefrom for the administration of ch. 110, Stats. 1933.

Sec. 110.08, Stats., provides:

“(1) Every code prescribed or approved by the governor shall contain provisions for assessing against and collecting from all persons, firms and corporations subject to the code, as employers, on a fair and equitable basis therein set forth, (a) assessments sufficient to reimburse the state for the expenses incurred by it in connection with the initial promulgation of the code and its administration, to be paid to the state treasurer at such times and upon such certifications by the governor as may be prescribed in said code; and (b) assessments sufficient to pay the expenses incurred by any
code authority or administrative agency established by such
code when covered by a budget of such code authority or
administrative agency approved by the governor.

“(2) No agent of any code authority shall demand or re-
ceive any assessment or payment of any kind except for the
purposes stated in subsection (1) of section 110.08. No such
agent while performing his duties as such shall collect dues
or assessments or solicit membership for any organization,
association or group. Any person violating this subsection
shall be dismissed and in addition thereto upon conviction
shall be punished by a fine of not to exceed one hundred dol-
lars or by imprisonment in the county jail for not to exceed
three months, or by both such fine and imprisonment.”

Although this statute does not specifically provide that
the assessments collected pursuant to subdivision (b)
should be paid into the state treasury, they should be so
deposited, for they are considered to come within the cate-
gory of those moneys described in sec. 14.68, Stats. Such
section provides in part:

“Unless otherwise provided by law, all moneys collected
or received by each and every officer, board, commission, so-
ciety, or association for or in behalf of the state, * * *
shall be deposited in * * * the state treasury * * *,”
and should, therefore, be so deposited.

The mere fact that assessments are collected by and in
the name of the trade practice commission rather than in
the name of the state of Wisconsin, does not lessen the ap-
plication of sec. 14.68. Although created by gubernatorial
fiat the trade practice commission is as much an agency of
the state as if it had been created, like the industrial com-
mission, by direct legislative enactment.

Sec. 20.02 (10) provides:

“To the governor, all moneys collected pursuant to sec-
tion 110.08, to be used for the administration of chapter
110. All amounts heretofore advanced from the general
fund for the administration of chapter 110, statutes of 1933,
are to be repaid to the general fund when the amounts col-
lected under section 110.08 are adequate.”
Since the funds deposited by the trade practice commission in the state treasury were all collected pursuant to sec. 110.08, Stats. 1935, they are appropriated to the governor, subject to the single qualification hereinbefore mentioned, "to be used for the administration of chapter 110" under the above quoted section of the statutes.

JEF

Municipal Corporations — Cities — Water Pipes — Sec. 62.19, Stats., does not give municipality authority to assess abutting owners for repair or replacement of water lateral.

April 29, 1936.

PUBLIC SERVICE COMMISSION.

Attention Wm. M. Dinneen, Secretary.

You request our opinion upon the following questions:

"May a city (operating a water system), which has already laid service pipes at a particular depth and assessed the cost against the landowner, require the pipes to be laid again at a greater depth and charge this cost against the abutting owner?"

"May a city, which owns its water system, charge against an abutting property owner the cost of constructing a lead service pipe to connect the city’s main with the customer’s premises, even though the property owner has paid for an existing iron service pipe? In other words, under the statutes, may the abutting owner be assessed for a second or further construction as well as original construction?"

As we believe said questions involve identical statutory considerations the following discussion may be applied to both questions:
Sec. 62.19, Stats., contains provisions relating to the laying of water mains and laterals which form a part of a municipally owned plant. In general, said sections provide that the cost of water mains and laterals shall be assessed to the abutting or benefited lots. Subsec. (4) of said section provides:

"No lot or parcel of land shall be assessed for more than one water main and one heating main laid in the same street or alley."

The quoted subsection is limited in its application to water or heating mains and makes no reference to water laterals. Subsec. (5) of said section, treating of water laterals, contains no similar provision. An examination of the history of subsec. (4) reveals that at one time it applied to laterals, as well as mains. By Bill No. 21, S., 1921 Session (ch. 242, a reviser's bill) said subsection was amended in such a manner that it would not apply to laterals. The purpose of such amendment appears from the reviser's note to said bill, which reads as follows:

"The word 'main' is substituted for 'pipe' so as to make clear that the limitation refers to mains and not laterals, since there may be occasions when more than one lateral will be required by the same lot."

From this note it seems obvious that the legislature did not intend to allow an assessment for the relaying of the same lateral but only intended to allow an assessment against a lot for more than one lateral. However, in view of the express language of subsec. (4) and the rule of statutory construction as expressed by the supreme court in Oconto Co. v. Town of Townsend, 210 Wis. 85, 96, we do not believe that subsec. (4) may be construed to apply to laterals.

Subsec. (5), sec. 62.19, relating to laterals, provides in part:

"* * * The said board shall advertise for proposals for the construction of such service lateral and let the same by contract, or the council may direct the work to be done directly without the intervention of a contract, and at the
completion of the work there shall be assessed upon the lots or parcels of land benefited thereby, the cost of such lateral, or the average current cost of laying such laterals."

This provision expressly states that "at the completion of the work" the cost of the lateral shall be assessed against the land benefited by the improvement. The subsection gives no authority to make assessments to pay for the repair or replacement of a lateral already installed. On the contrary, the language seems to relate only to the original laying of the lateral. The facts in your first question indicate that the lateral in question was not laid at a sufficient depth. To replace this lateral at a greater depth is in the nature of a repair or a correction of an error on the part of the municipality. We find no authority for charging the cost of such replacement to the abutting owner. We arrive at the same conclusion upon the facts set forth in your second question.

JEF

Automobiles — Law of Road — Municipal Corporations — Ordinance may adopt by reference ch. 85, Stats., without quoting such chapter in detail in ordinance.

Robert L. Wiley,
District Attorney,
Chippewa Falls, Wisconsin.

In your recent letter you ask opinion upon the following: Can an ordinance adopt by reference ch. 85, Stats., without quoting said chapter in detail in the ordinance? An ordinance may adopt by reference ch. 85, without quoting such chapter in detail in the ordinance. It has been uniformly held that an ordinance or statute may adopt by reference another ordinance or statute or
part thereof. *Garland v. Hickey*, 75 Wis. 178, 183; *Southern Operating Co. v. City of Chattanooga et al.*, 159 S. W. 1091, 1092; *Green v. Town of Lakeport*, 239 Pac. 702, and cases cited on page 705; Municipal Police Ordinances by Horr & Bemis, 775; Lewis' Sutherland Statutory Construction, 2d ed. vol. 2, sec. 405.

If an ordinance adopts by reference on a given date a certain statute and that statute later is amended the ordinance might not be construed to adopt such amendment unless such intention is clearly expressed in the ordinance. Therefore, if the applicable parts of ch. 85 are adopted by reference we suggest that the adopting language clearly state that ch. 85, as it exists at any given time, is adopted.

The following citations may be of assistance to you in drafting said ordinances: V Op. Atty. Gen. 778; XIII 246; XIV 140; XVII 281; XIX 466; XVIII 616; XX 931; *First Wisconsin National Bank v. Jahn*, 179 Wis. 117, 121, 122.

JEF

Appropriations and Expenditures — Counties — County Board — Indigent, Insane, etc. — Poor Relief — When county changes from county to unit system of relief surplus moneys raised for county relief system may be appropriated for other purposes.

April 29, 1936.

ROBERT L. WILEY,

District Attorney,

Chippewa Falls, Wisconsin.

In your recent request you state as follows: Chippewa county has gone off the county system of relief. Before changing to the unit system of relief the county had raised
money for relief purposes and now has considerably more relief money than is needed to carry its relief burden. Can this money be used for purposes other than for relief?

When a county changes from county to unit system of relief the surplus moneys raised for the county relief system may be appropriated for other purposes.

The statutes do not require that relief funds be kept in a separate fund and used only for relief purposes. When taxes levied for relief purposes are paid they become part of the county general fund.

"* * * By law all money belonging to the county as such, and not coming into its hands in the capacity of trustee, is treated as one fund, out of which all its liabilities are to be discharged. * * *" Montague v. Horton, 12 Wis. 599, 603.

We cannot find any case which alters the rule expressed in the Montague case. If more than the necessary funds have been appropriated for relief purposes it is our opinion that the board may reappropriate such funds for other purposes. See XXI Op. Atty. Gen. 1056 and XXV Op. Atty. Gen. 92.

JEF
Prisons — Prison Labor — Workmen's Compensation —

Employment of county prisoners under secs. 56.08 and 56.09, Stats., is not subject to workmen’s compensation act.

May 1, 1936.

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

You inquire whether one who is employed under sec. 56.08 or sec. 56.09, Stats., is subject to the workmen’s compensation act.

Sec. 56.08 makes provision for employment of county prisoners. Among other things it provides that the sheriff may make contracts in writing subject to the approval of the court for the employment of prisoners. The court designates some person to whom payment shall be made for the use of the prisoner’s dependents, and at the end of each week the sheriff pays over to such person the earnings of the prisoner. If the prisoner works for the county the sheriff issues a county order for an amount equal to one dollar per day for the number of days’ labor and the order is paid out of the general fund by the county treasurer.

Sec. 56.09 makes provision for a county rock pile in counties of less than one hundred thousand, where prisoners may be employed in breaking rock for highways, if not employed under sec. 56.08.

It is our opinion that prisoners employed under the provisions of secs. 56.08 and 56.09 are not subject to the workmen’s compensation act, for the reason that there is no contract of hire, express or implied, oral or written, between the employer and the prisoners. The prisoners have nothing to say about such employment, and presumably it is a part of their punishment.

Sec. 102.07, subsec. (4), Stats., makes “every person in the service of another under any contract of hire, express or implied” an employee within the meaning of the workmen’s compensation act.
It has been held that the relationship of employer and employee is indispensable to recovery under the workmen's compensation act. *Milwaukee Toy Co. v. Industrial Comm.*, 203 Wis. 493.

Also it has been held in the case of a special employer to whom an employee is loaned that there must be consent on the part of the employee to work for such special employer in order to bring the parties within the workmen's compensation act. *Seaman Body Corporation v. Industrial Comm.*, 204 Wis. 157.

The act clearly contemplates the voluntary relationship of employer and employee that arises out of a contract, express or implied, between the parties, and we have found no authority for extending its application to involuntary servitude imposed as punishment upon prisoners.

The only exception that comes to our attention is that provided for injured prisoners in state institutions under sec. 56.21, Stats.

JEF

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*Social Security Law — Old-age Pensions —* Recipient of old-age assistance may receive medical and surgical assistance through regular relief channels.

May 4, 1936.

John H. Matheson,

District Attorney,

Janesville, Wisconsin.

You ask whether a recipient of old-age assistance may also receive medical and surgical assistance through the regular relief channels.
Sec. 49.31, subsec. (1), Stats., provides:

"During the continuance of old-age assistance no beneficiary shall receive any other relief from the state or from any political subdivision thereof except for medical and surgical assistance."

The language of the above subsection clearly implies that a recipient of old-age assistance also may receive medical and surgical assistance. This department, in interpreting a similar provision of the mothers' pension law, has held that a recipient of mothers' pension may receive medical and surgical assistance through regular relief channels. XX Op. Atty. Gen. 146. See also XIX Op. Atty. Gen. 548.

JEF

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**Indigent, Insane, etc. — Poor Relief** — County asylum may receive reimbursement from state for patient committed as inebriate in contemplation of sec. 51.08, Stats.

May 5, 1936.

**BOARD OF CONTROL.**

You state that X has been committed to a county asylum as an inebriate for "ninety days or until such time thereafter as in the judgment of the superintendent and the attending physician may deem necessary." You inquire whether this patient is to be considered an asylum patient and whether the county asylum will receive reimbursement from the state the same as in the case of a regularly committed insane person pursuant to sec. 51.08, Stats.
Sec. 51.08, subsec. (1), Stats., provides:

“For the purpose of settlement with the county the expense of the maintenance, care and treatment of each inmate in any state hospital or asylum for the insane shall be computed at the rate of five dollars and forty cents per week, and the expense of the maintenance, care and treatment of each inmate in any county hospital or asylum for the insane shall be computed at the rate of four dollars and fifty cents per week. For each such inmate maintained at public charge elsewhere than in the county of his legal settlement the whole rate shall be chargeable to the state and one-half thereof chargeable over by the state against the county, if any, in which such inmate has a legal settlement. For all other such inmates maintained at public charge one-half of said rate shall be chargeable to the state and one-half to the county in which such inmate has a legal settlement. All such charges shall be adjusted as provided in section 46.10, but nothing herein shall prevent the collection of the actual per capita cost of maintenance, or a part thereof by the state board of control or by the county in counties having a population of five hundred thousand or more, pursuant to law.”

Sec. 49.07 was amended by ch. 353, Laws 1935, so as to include within its provision a person who is an inebriate or drug addict who may be committed to the county home of his county, if there be one therein. See sec. 51.26 (2), (5) and (6). In view of these provisions, your question must be answered in the affirmative. See also In Re Gardner, 264 N. W. 647.

JEF
Indigent, Insane, etc. — School Districts — Tuition —
Cities and villages of legal settlement were not liable for
 tuition of indigent pupils attending school elsewhere prior
to passage of ch. 430, Laws 1935, which became effective
September 5, 1935.

May 6, 1935.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

You have submitted a request for an opinion based upon
the question presented to you by the clerk of school district
No. 4 of Freedom. The clerk sets forth that during the
years 1932, 1933 and 1934 four children were enrolled in
the school under the age of twenty-one years, the parents
of which children had been moved into the district by the
city of Kaukauna. The parents were supported as indigents
by Kaukauna. The clerk desires to know whether under
sec. 40.21, Stats., the district is entitled to collect tuition
from the city of Kaukauna for these children.

Sec. 40.21, subsec. (2), reads as follows:

"Every person of school age maintained as a public
charge shall for school purposes be deemed a resident of the
school district in which he resides, except that such school
district shall be compensated by the municipality or by the
county in case the county system of poor relief is in effect
in such municipality in which such person of legal school
age has a legal settlement as defined in section 49.02 with
an amount equal to the pro rata share of the year's expense
of maintaining such school, based upon the total enrollment
and year's expense of the maintenance of such school. In
case such person maintained by the county has his legal set-
tlement outside the county then the county shall pay such
school district's pro rata share and such county may recover
such sums paid, from any municipality in the state where
the legal settlement may be established."

The statute was last amended in 1935 to include cities and
villages who might maintain persons as indigents. As the
law stood in 1931 and 1933 there was no provision in the
statute placing a duty upon the village or city in regard to the tuition for indigent persons. Sec. 40.21 (2) first appears in the Laws 1873, ch. 156. At the time this section was adopted relief was administered in the first instance by towns or upon adoption of the proper resolution by the county board by the county.

At a later period, various amendments were added to ch. 49, Stats., imposing certain duties on villages and cities in reference to the administration of relief until we now have the present system where since 1919 the cities and villages have the same duties in reference to relief matters as did towns prior thereto. It is apparent that at the time ch. 49 was being amended to impose additional burdens upon villages and cities and thus relieve counties from part of their burden on relief matters, sec. 40.21 (2) was disregarded and the necessary amendments were not made imposing upon the cities and villages the duty to pay tuition in these cases.

Although in the beginning it was evident the statute was intended to be in harmony with relief laws, still the failure upon the part of the legislature to make changes in sec. 40.21 (2) corresponding with the changes in ch. 49 could not change the statutory liability of the cities and villages. Consequently until the amendment to sec. 40.21 (2) in 1935 the school districts could not recover from a city or village for tuition of children of parents who were legally settled in a city or village and receiving relief therefrom.

The answer to your question, therefore, is that up to the time of the adoption of the amendment to sec. 40.21 (2) on September 5, 1935, the district could not recover from a village or city. See XXIV Op. Atty. Gen. 602.

JEF
Fish and Game — Violations of conservation commission orders issued under ch. 29, Stats., cannot be punished by penalties provided for violations of ch. 23, Stats.

May 6, 1936.

Conservation Department.

You call our attention to sec. 23.09, subsec. (11), Stats., which provides:

“Any person violating any rule or regulation of the state conservation commission shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment.”

You inquire whether these penalties apply to conservation commission orders drawn under ch. 29 of the statutes. This inquiry is answered in the negative.

In XXII Op. Atty. Gen. 74, this department expressed the opinion that conviction for violation of the rules and regulations of the commission made under sec. 23.09 could not be construed as a violation of ch. 29. Similarly, we believe that a violation of an order promulgated under ch. 29 cannot be construed as a violation of ch. 23, and that the penalties provided in one chapter relate only to violations of that chapter, and cannot be extended by implication to another chapter.

You call our attention to the case of State v. Sorenson, 218 Wis. 295, in which chs. 23 and 29 were construed together as setting up a standard limiting the authority of the conservation department so as to render sec. 29.085 a constitutional enactment rather than one containing an unlawful delegation of legislative power. That, however, is quite a different matter from the lifting of the penalties of the one chapter and inserting them in the other chapter. One should not have to guess as to what penalties he will incur by violating the law, and the courts do not favor an extension of criminal statutes by implication. A statute provid-
ing punishment and fine, being highly penal, must be strictly construed. *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437. It is also well established that a penal statute will not be construed so as to multiply offenses where such a construction can reasonably be avoided. *State v. Columbian Nat. Life Ins. Co.*, 141 Wis. 557.

Hence an offense under ch. 29 should not also be construed as an offense under ch. 23, and vice versa.

JEF

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*Automobiles — Taxation — Motor Fuel Tax — Refunds* — Owner of truck which, while it remains on highways, pumps by means of small gasoline consuming pump oil from tank on chassis to household tank is not entitled to refund under sec. 78.14, Stats.

May 6, 1936.

ROBERT K. HENRY,

*State Treasurer.*

In your recent letter you state:

"Oil companies when delivering gas oil or fuel oil to residences for heating purposes use a tank truck on the chassis of which is a small pump which pumps the fuel oil from the tank truck to the tank in the residence they are delivering to. This pump is driven by the engine of the truck.

"* * * The truck does not leave the highways."

You ask whether the owner of the truck is entitled to a refund under sec. 78.14, Stats., as to that portion of the gas consumed by the pump in the unloading operation.

An owner of a truck which, while it remains on the highways, pumps by means of a small gasoline consuming pump
oil from a tank on the chassis to a household tank is not entitled to a refund under sec. 78.14, Stats., on the gas consumed by that operation.

The pertinent provision of the statute considered is as follows:

Subsec. (2), sec. 78.14, Stats.:

"Any person who uses motor fuel, upon which has been paid the tax required to be paid under this chapter, for the purpose of operating or propelling stationary gas engines, tractors used for agricultural purposes, motor boats, airplanes, or who shall purchase or use any motor fuel for cleaning or dyeing or for any commercial use or purpose other than operating a motor vehicle upon the public highways of this state, shall be reimbursed and repaid the amount of the tax so paid upon filing a sworn claim with the state treasurer upon forms prescribed and furnished by him, provided, however, that such claim be filed within ninety days after the purchase of the motor fuel, or the claim will not be allowed * * *.”

The rule that a statute granting exemptions or a refund is to be strictly construed against the person claiming such exemption or refund and in favor of the state is so universally accepted and applied as to need no citation of authority.

That provision of the exemption statute which might possibly be relied upon to support a claim for refund under the facts as hereinbefore stated is:

"Any person who uses motor fuel * * * for the purpose of operating or propelling stationary gas engines, * * * shall be reimbursed and repaid the amount of the tax so paid * * *.”

However, this language, when read in connection with the entire exemption statute, and particularly that portion of the statute which reads, “for any commercial use or purpose other than operating a motor vehicle upon the public highways of this state,” is conclusive against the claimant here. That the legislature did not intend to exempt or provide a refund to an owner for a tax paid upon motor fuel used by a portable gas pump that is attached to
a truck operating upon the highways of the state is certain. This gas pump or engine, being carried on and over the highways, and being used upon the highways, is clearly not such a stationary gas engine as is contemplated by the legislature in subsec. (2), sec. 78.14, Stats.

In XXII Op. Atty. Gen. 872 it was held that one who uses motor fuel in a farm truck for power purposes on the farm is not entitled to a refund for motor fuel tax; a fortiori one who uses motor fuel in a truck for power purposes on a highway is not entitled to a refund.

JEF

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Public Officers — School District and Town Officers — Taxation — Tax Sales — Purchase of tax certificates by town and school district officers is not violative of sec. 348.28, Stats. In view of provisions of sec. 62.21, subsec. (4), it is inadvisable for town officers to purchase tax certificates covering land in their own municipalities.

May 6, 1936.

Philip F. La Follette,
Governor.

In your communication of April 27 you ask our opinion upon the following question:

"Does sec. 348.28 of the Wisconsin statutes prohibit town and school district officers from purchasing or investing in tax certificates?"

In State v. Bennett, 213 Wis. 456, sec. 348.28, Stats., was construed as not making it an offense for an officer, agent or clerk of the state or of a municipality to have a pecuniary interest in the purchase or sale of property unless the purchase or sale is made by, to, or with him in his official
capacity or employment, or in some public or official service. We have examined the statutes relating to the purchase and sale of tax certificates and to the duties of town and school district officers. Subject to the exception hereafter noted, we have found no statutory provision which gives such officers power to purchase tax certificates in their official capacity or service or on behalf of the municipality they represent. The purchasing of tax certificates by such officers would be strictly in their individual capacity and under the rule of the Bennett case, not violative of sec. 348.28. We refer you to XXIV Op. Atty. Gen. 666, XVI Op. Atty. Gen. 633, XXIV Op. Atty. Gen. 210 and 243, and XXIII Op. Atty. Gen. 443.

Sec. 62.21, subsec. (4), Stats., gives the town governing body power to authorize its treasurer to redeem or acquire in the name of the town certain outstanding tax certificates. If any such outstanding tax certificates were owned by members of such governing body and such governing body authorized the purchase thereof it would appear that such members would have a pecuniary interest in a purchase or sale of personal property made in their official capacity and consequently in violation of sec. 348.28, Stats. This apparently would present a situation in which the original purchases of the certificates by the members of the governing body were legal but the ownership of such certificates might disqualify such members at a later date from performing their duties as officials. Because of this contingency we deem it inadvisable for an officer of a town to purchase certificates covering land in his own municipality.

JEF
Appropriations and Expenditures — Public Health —
Federal aid for child welfare, public health nursing, promotion of welfare and hygiene of maternity and infancy may be received by this state under sec. 20.43, subsec. (2), Stats., without reducing state appropriation provided by sec. 20.43, subsec. (13).

May 8, 1936.

BOARD OF HEALTH.

You state that the federal government requests an interpretation of our laws relating to state appropriations to the state board of health for the operation of a bureau of child welfare, public health nursing and the promotion of the welfare and hygiene of maternity and infancy. You refer specifically to sec. 20.43, subsecs. (2) and (13) and sec. 146.18, subsec. (1), Stats. You further state that federal rules, promulgated pursuant to the social security laws, provide that no federal aid will be granted for the purposes above named if such aid is used to reduce state appropriations for such purposes. You ask whether such reduction is necessary under the above law.

Secs. 20.43 (2), (13) and 146.18 (1) provide:

Sec. 20.43 "(2) All moneys received by this state as federal aid for public health services, to be expended for the purposes specified in the acts of congress pursuant to which such federal aid is given and in accordance with plans prepared by the board of health and approved by the United States Public Health Service.

"(13) Annually, beginning July 1, 1933, forty-three thousand three hundred fifty dollars for the operation of a bureau of child welfare and public health nursing and the promotion of the welfare and hygiene of maternity and infancy. To this appropriation shall be added any amounts received from the United States for these purposes, but the appropriation herein shall be diminished by the amounts so received from the United States."

Sec. 146.18 "(1) The state board of health shall prepare and submit to the proper federal authorities a state plan for maternal and child health services. Such plan shall conform with all requirements governing federal aid for this purpose and shall be designed to secure for this state
the maximum amount of federal aid which can be secured on the basis of the available state, county, and local appropriations. It shall make such reports, in such form and containing such information, as may from time to time be required by the federal authorities, and comply with all provisions which may be prescribed to assure the correctness and verification of such reports."

Sec. 20.43 (13), passed in 1921, made possible the establishment of a bureau of child welfare and public health nursing in this state. The moneys appropriated by this subsection were augmented for several years by federal funds made available by the so-called federal "document No. 97" approved November 23, 1921. In 1929 the federal enactment became inoperative and the financial aid flowing therefrom was no longer available to this state. The legislature then increased the state appropriation for the purposes mentioned in sec. 20.43 (13) from twenty-three thousand dollars to fifty-one thousand dollars, the later sum representing the previous aggregate of both state appropriations and federal aids. When so increasing the state appropriations the legislature also provided that the sum granted should be reduced by any federal aids received. Although such federal aids were not forthcoming the legislature in 1931, 1933 and 1935 continued to appropriate what was deemed to be a sum sufficient to maintain the child welfare bureau without curtailment of its functions. By ch. 556, Laws 1935, sec. 20.43 (2) was created and sec. 146.18 (1) was repealed and recreated. Secs. 20.43 (2) and (13) and 146.18 (1) as they now appear in our statutes are ambiguous, if not conflicting. To ascertain the meaning of such provisions we may resort to the approved methods to determine legislative intent. In Wisconsin Industrial School for Girls v. Clark Co., 103 Wis. 651, 659, the supreme court said:

"By one of the most familiar rules for statutory construction, we may and should reject any meaning that may be attributed to the statutes which would lead to an absurd or unreasonable result. It is often said that the true rule to be observed in a situation like the one before us is to look to the whole and every part of the law, to the intent appa-
ent from the whole, to the subject matter, to the effect and consequences, to the reason and spirit, and thereby ascertain the ruling idea present in the legislative mind at the time of its enactment, and then, if the manifest purpose of the lawmakers can thereby be reasonably spelled out of the words they used to express it, to give effect to such purpose, though the meaning thus adopted be quite contrary to the literal sense of the words.* * *”

That part of sec. 20.43 (13) which requires that the state appropriation be reduced by the amount of federal aid received was enacted at a time that the legislature anticipated that the federal act known as “document No. 97” would be extended. Under that act federal aids could be used to reduce state appropriations. By ch. 556, Laws 1935 the old sec. 146.18 (1), which related to the obsolete federal act, was repealed. A new sec. 146.18 (1) was created by said chapter for the express purpose of authorizing and directing the state board of health to make plans to comply with new federal legislation. Sec. 20.43 (2), also created by said chapter, appropriates to the board of health all moneys received from the federal government for public health purposes, “to be expended for the purposes specified in the acts of congress pursuant to which such federal aid is given and in accordance with plans prepared by the board of health and approved by the United States Public Health Service.” Both sec. 146.18 (1) and sec. 20.43 (2) show a legislative intent to secure all possible federal aid to develop and foster our health services. Both sections express an intent to comply with such federal laws and rules as might be necessary to secure such aid. Inasmuch as sec. 20.43 (13) was passed with the now obsolete federal act in mind, and as secs. 20.43 (2) and 146.18 (1) are a more recent legislative expression and relate to present federal laws, we believe the later sections should prevail over sec. 20.43 (13). To hold that the appropriation provided by sec. 20.43 (13) must be reduced by federal aid received would deny the state all federal aid for the purposes mentioned. In view of the expressed legislative intent to develop our health services by the use of federal aid such conclusion would be absurd and unreasonable.
It is our opinion that federal aid for child welfare, public health nursing, the promotion of the welfare and hygiene of maternity and infancy may be received by this state under sec. 20.43 (2) without reducing the state appropriation of $43,350 provided by sec. 20.43 (13).

JEF

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Fish and Game — Gill nets with mesh not less than two and five-eighths nor more than two and seven-eighths inches may be used in Lake Michigan and northern part of Green Bay for purpose of taking herring, chubs, bluefins, perch and smelt. Mesh of gill nets allowed in southern Green Bay for taking whitefish and lake trout is same as is provided in northern Green Bay and Lake Michigan, being four inches until June 1, 1937, and thereafter not less than four and one-fourth inches.

Pilot fish is species of whitefish.

May 8, 1936.

John R. Cashman,
District Attorney,
Manitowoc, Wisconsin.

You direct our attention to sec. 29.33, subsec. (11), Stats., wherein the size of mesh for catching certain named species of fish is designated. You state that this statute does not designate any specific size of mesh for the catching of a fish known as a “pilot” fish. You state there will be a run on pilot fish in Lake Michigan soon and the fishermen are asking what size of mesh they can use or if there is any limit. You ask for an opinion as to whether there is any provision designating the size of mesh in which pilot fish may be legally caught.
We asked you to secure full information as to just how large this fish is, how it looks and what name it is given in the particular locality in question. In answer to our question, you have written, under date of March 25:

“In 'Coregonid fishes of the Great Lakes' by Walter Koelz, department of commerce, bureau of fisheries, Document No. 1048, p. 544 a description of the pilot fish is given. Around here this particular fish is called 'pilot' or 'Menominee' and it grows to the size of one to one and one-half pounds. On page 516, figure 30, you will find a picture of the pilot fish. I am informed that there is no size for the pilot or Menominee.”

In a communication from H. W. MacKenzie, conservation director, under date of April 29, he quotes:

“Dr. David Starr Jordan, president of Leland Stanford Junior University and Dr. Barton Warren Evermann, ichthyologist of the United States fish commission, prominent scientists who have made careful studies of fish and fish life, in their book ‘American Food and Game Fishes’ state as follows:

“'This species is known as Menominee whitefish (Lakes Superior and Michigan), round whitefish (British America), frostfish (Lake Champlain and Adirondack lakes), shadwater (Lake Winnepesaukee), pilotfish (Lake Champlain), chivey (Maine), Chateaugay shad (Chateaugay Lake), and blackback (Lake Michigan).

“'The round whitefish is found in the lakes of New England, westward through the Adirondacks and the Great Lakes, thence northward into Alaska, from which it may be seen that this species is the most widely distributed of the American whitefishes.

“'The Menominee reaches a length of 12 to 15 inches, and a weight of 2 pounds; the average weight of those taken to market, however, does not exceed one pound.

“'This species, like all others of its genus, spawns in the fall, but nothing distinctive is known of its habits. It is ordinarily found in rather deep water of the lakes, and does not often enter streams. It is not regarded as a game fish, but as an article of food it ranks with the other smaller whitefishes. Considerable quantities are taken each year in Lake Champlain and the small Adirondack lakes, while in Lakes Huron, Michigan and Superior still larger quantities are caught, gill nets being the gear usually employed for the purpose.'"
According to this information, therefore, the so-called pilot fish is none other than a species of whitefish and the statutes provide certain mesh nets can be used for the purpose of taking whitefish.

Sec. 29.33, subsec. (11), provides that in waters of Lake Michigan and the northern part of Green Bay, gill nets with a mesh not less than four inches may be used for the purpose of taking lake trout and whitefish until June 1, 1937, and thereafter the mesh shall not be less than four and one-fourth inches. Gill nets with a mesh not less than two and five-eighths inches, nor more than two and seven-eighths inches may be used for the purpose of taking herring, chubs, bluefins, perch and smelt.

Certain specifications for meshes of gill nets are also given for the waters of southern Green Bay and Lake Superior and the mesh of gill nets allowed in southern Green Bay for the taking of whitefish and lake trout is the same as is provided in northern Green Bay and Lake Michigan.

Par. (c), subsec. (12), sec. 29.33 provides that all nets of mesh other than as specified in this section (29.33) and all nets or set hooks used in violation of this section are contraband and shall be seized and confiscated whenever found in any prohibited water or on any vessel, dock, reel or fishing premises or in any boat or landing place bordering on such waters. According to this paragraph it would therefore be unlawful for any person or persons to use, in any manner, any net or nets other than those specified in this section.

Mr. MacKenzie says the conservation department would not object if Menominee whitefish happen to be taken in chub nets of two and five-eighths inches to two and seven-eighths inches, but when it comes right down to a point of law, a four-inch mesh gill net is specified at this time for all whitefish. I believe this answers fully your questions.

JEF

May 8, 1936.

Theodore Dammann,

Secretary of State.

You have inquired whether receivers of national banks are required to make the reports to the secretary of state that are called for by sec. 220.25, subsec. (3), pars. (a), (b) and (c), Stats.

This question is answered in the affirmative.

The provisions of sec. 220.25, provided by pars. (a) (b) and (c) of subsec. (3), as created by ch. 294, Laws 1935, read as follows:

"(a) It shall be the duty of every banking institution which holds on deposit or otherwise any fund, funds or property of any kind, known by such banking institution to have escheated to the state, to inform the attorney-general of such fact within thirty days after it becomes known to such banking institution.

"(b) The cashier or managing officer of every banking institution shall, within thirty days after the first of January, annually return to the secretary of state a sworn statement in duplicate showing the names of persons who have left on deposit or otherwise any fund, funds or property of the value of ten dollars, or more, and have not dealt with respect thereto for a period of twenty years by adding to or withdrawing therefrom, or asserting any claim to such fund, funds or property for such period, unless known to such officer to be living. Such statement shall show the amount of such deposit, including interest, or the value and nature of such property, and the depositor's or owner’s last known place of residence or business. Such subscribing officer shall certify that said report is a complete and correct statement of all such unclaimed funds and property to the best of his knowledge, after diligent inquiry. The duplicate copy of such report shall be delivered by the secretary of state to the attorney-general immediately upon its receipt.

"(c) The cashier or managing officer of every banking institution shall, within thirty days after the first day of January, every five years commencing January 1, 1936,
return to the secretary of state, a sworn statement showing the names of persons who have left on deposit or otherwise any fund, funds or property of the value of ten dollars, or more, and have not dealt with respect thereto for a period of ten years by adding to or withdrawing therefrom, or asserting any claim to such fund, funds or property for such period. Such statement shall show the amount of such deposit, including interest, or the value and nature of such property and the depositor's or owner's last known place of residence or business; such subscribing officer shall certify that said report is a complete and correct statement of all such unclaimed funds and property to the best of his knowledge, after diligent inquiry."

The statutes make no exception in favor of receivers of national banks, and we believe that the words "cashier or managing officer of every banking institution" are sufficiently broad to cover the situation.

A national bank is a "banking institution." Appeal of Woodbury, 96 Atl. 299, 78 N. H. 50.

A national bank still remains a "banking institution" even though a receiver has been appointed, since it has been frequently held that this does not work a dissolution of the bank. Numerous cases to this effect are cited in a note on the effect of appointment of receivers of national banks in 12 U. S. C. A. 192.

Furthermore, it is obvious that the receiver is the "managing officer" of an insolvent national bank. The federal statute under which a receiver is appointed provides that he "shall proceed to close up such association, and enforce the personal liability of the shareholders, * * *." 12 U. S. C. A. 191. This clearly implies management. It has been held that the receiver stands in the place of the bank. Scott v. Armstrong, 146 U. S. 499. And that he represents the bank, its stockholders and creditors. Case v. Terrell, (La. 1871) 78 U. S. (11 Wall.) 199, 20 L. ed. 134. It seems too plain to call for further argument that the receiver and no one but the receiver is the "managing officer," of a national banking institution in receivership.

In so far as the present question is concerned, the statute is clear, express and unambiguous, and using its terms according to the common and approved usage of the language
in the manner that statutes should be construed according to sec. 370.01, subsec. (1), we conclude that in the light of the reasoning above set forth, sec. 220.25 applies to receivers of national banks.

JEF

Criminal Law — Libel and Slander — Two witnesses other than one slandered must hear language used at identically same time as required under sec. 348.41, subsec. (3), Stats.

Date of admission by defendant may be alleged as date of crime and proof may be made that slanderous words were uttered on date prior to date of admission.

May 8, 1936.

SIDNEY J. HANSON,

District Attorney,

Richland Center, Wisconsin.

You say that a certain party in your community has a valid cause of action under sec. 348.41, Stats. It is, however, impossible to establish the date when the slanderous words were uttered. The complainant went to the party allegedly making the statements and accused that person in the presence of other witnesses of having made the statements charged. That person admitted in part, at least, having made the statements complained of.

Sec. 348.41, Stats., reads in part as follows:

"(2) Every person who, in the presence and hearing of another, other than the person slandered, whether he be present or not, shall maliciously speak of or concerning any person, any false or defamatory words or language which shall injure or impair the reputation of such person for virtue or chastity or which shall expose him to hatred, con-
tempt, or ridicule shall be guilty of a misdemeanor for which said person shall be punished as heretofore provided in subsection (1). Every slander herein mentioned shall be deemed malicious if no justification therefor be shown and shall be justified when the language charged as slanderous, false, or defamatory was true and was spoken with good motives and for justifiable ends.

“(3) No conviction shall be had under the provisions of subsection (2) upon the testimony of the person slandered unsupported by other evidence, but must be proved by the evidence of at least two persons other than such person who heard and understood the language charged as slanderous or by admission of the defendant.”

You inquire whether subsec. (3), sec. 348.41 means that two persons other than the one slandered must both hear the language used at identically the same time or whether it means that if two people hear practically the same words used at different times by the same person this is sufficient to indict.

In the United States constitution in art. III, sec. 3, it is provided:

"* * * no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."


"* * * It is not sufficient to prove by one inadequate line of testimony that one statement made by the defendant is false, and then by another inadequate line of testimony that another statement made by him is false. There must be full corroboration for each assignment. * * *" Wharton, Criminal Evidence, Vol. 3, 11th ed., sec. 1397, citing, Lea v. State, 64 Miss. 278, 1 So. 235; Williams v. Com. 91 Pa. 493; Reg. v. Parker, Car. & M. 639; Reg. v. Hare, 13 Cox, C. C. (Eng.) 174.
"The general rule as to corroboration ought not to be defined further than that the corroboration of the witness must be clear, positive and strong so that in connection with the evidence of the witness who testifies directly, it will convince the jury beyond a reasonable doubt. * * *" Wharton, Criminal Evidence, Vol. 3, 11th ed., sec. 1397.

Your question must be answered to the effect that two persons other than the one slandered must hear the identical language used at the same time.

You also inquire where it is impossible to establish the date the slanderous words were used and the defendant at a subsequent time admits in the presence of two witnesses having used such language, whether it would be proper to charge the person with the slander as of the date of his having made the admission.

This question must be answered in the affirmative.

JEF

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Trade Regulation — Trusts and Monopolies — One making contract which is unfair and unreasonable is liable for penalties of statute pertaining thereto irrespective of fact that department has not ruled same to be unfair and unreasonable.

May 8, 1936.

CHARLES L. HILL, Chairman,
Department of Agriculture & Markets.

You refer to ch. 52, Laws 1935, relating to fair trade practices and unfair discriminations, which provides for a review by the department of agriculture and markets of any contract which is considered to be unfair and unreasonable as to the minimum resale price stipulated therein. You refer particularly to subsec. (7), par. (a), sec. 133.25, Stats.
You state:

"In case one makes such a contract and the department should after hearing find that the contract is unreasonable, does the exemption provided in 133.25 exempt him from punishment during the period that the contract was in existence and before it was found unreasonable or can he be punished only in case the contract is continued after the department finds it unreasonable?"

I find nothing in the statute which exempts a person who is guilty of having made such an unreasonable contract. He would be guilty if he violates the statute prior to the determination by the department. Probably there would be reason in a good many cases for the prosecutor to use his discretion not to bring a prosecution if everything was done in good faith but anyone who is guilty of making a contract which is unfair and unreasonable is guilty of it even though the department has not yet passed upon the question. It is apparent that any person or dealer may protect himself by not acting on such contract before he has a ruling from the department that the same is not in violation of the statute.

JEF

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**Public Officers — County Board — Malfeasance** — Member of county board who is employed on strictly salary basis by his father, general contractor, is guilty of malfeasance in office under sec. 348.28, Stats., if he sells material to county amounting to several hundred dollars a year.

May 8, 1936.

Wendell McHenry,

*District Attorney,*

Waupaca, Wisconsin.

You state that you have been requested to issue a warrant against a member of the county board for violation of sec. 348.28, Stats. The facts in brief are these: A, who is
a member of the county board, is employed by his father, B, a general contractor. A claims that he is working on a straight salary basis and has no interest in the business other than being an employee of his father on such basis. B sells materials to the county running into several hundred dollars a year and has been in the habit of doing this for several years, both before and since the son became a member of the county board. You ask whether or not an employee on a salary basis under the facts above set forth is guilty of violating sec. 348.28.

In an opinion in XXIII Op. Atty. Gen. 454 it is held that a member of a sewer committee of a city council who is an employee of a sewer contractor to whom the sewer contract is let by the council probably has such interest in the contract as would constitute a violation of sec. 348.28, Stats.

The case of Edward E. Gillen Company v. City of Milwaukee et al., 174 Wis. 362, is cited as an authority.

In XXIV Op. Atty. Gen. 113 it was held that the teaching contract of a teacher who is a minor daughter of one of the members of the school board making the contract is probably invalid under sec. 348.28.

In sec. 348.28 it is made malfeasance in office for any officer of any county "who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner, * * * or in any contract, * * * in relation to any public service" or sale of any property. In XX Op. Atty. Gen. 862 it was held that a husband who was a member of the school board which contracts with his wife to teach in school probably is guilty of malfeasance under sec. 348.28, and the contract probably is void.

A great many decisions are cited. The question is not entirely free from doubt but in view of the fact that the statute is so all-inclusive and in view of the authorities cited, we believe that the court may well hold that A is guilty of malfeasance in office under sec. 348.28.

JEF
Elections — Corrupt Practices — Printing of sample ballot by citizens' committee of village and its distribution to certain workers at polls, purpose of which was to gain votes for candidate for village president not nominated at primary and to have his name written on official ballot, said printed ballot being designed and intended only for use of worker and to be given to voter only upon request, is not violation of corrupt practices act, especially in view of fact that authors and object of printing and distribution of sample ballot were well known through village.

May 8, 1936.

WENDELL McHENRY,
District Attorney,
Waupaca, Wisconsin.

You have submitted a question contained in a letter received by you, stating facts upon which you have been requested to bring a prosecution against one B for violating the corrupt practices act.

It appears that at the annual election for the village of Weyauwega this year, one, A, was nominated to the office of village president and his name was the only name which appeared on the official ballot for that office. After the ballots were printed, citizens of that village brought out as a candidate one, B, to oppose A for village president. An organization of business men and others was formed in the village which finally comprised thirty-seven workers, all working without compensation for the purpose of informing the voters of B's candidacy and giving them information as to how a voter might cast his ballot for B. There were four hundred forty-one votes cast. There were five hundred fifty voters. In order to get this information to the voters, a sample village ballot was printed, in which the name of B is printed in large type in red ink and beneath which, in a box, was an arrow pointing to B's name, stating "Write the name [B] on this line on the regular ballot, then place X opposite the name." These ballots were distributed to the thirty-seven workers with instructions to such work-
ers to show such ballot to the voters so that such voters might see and understand how to cast a ballot for B. There was no other circulation or distribution of these ballots except that in some cases the voter, on being shown such sample ballot by one of the workers, would ask to be given one of such ballots to take with him while he voted. Each of these workers was a resident and voter in the village and was personally known to each voter to whom he showed this ballot. The plan of getting this knowledge to the voters was as follows: There were approximately thirty-seven of such workers. A list of voters was compiled by the committee and the names of about three hundred thirty of such voters were picked out and assigned to these various workers, such workers being assigned persons whom they knew personally. The sample ballot so given to these workers did not have printed thereon the name of the author or publisher or person authorizing it to be used. Under these circumstances, the ballot being for the personal use of the workers and not for general circulation or issuance to the voters, the question as to whether or not there has been a violation of sec. 12.16, Stats., arises.

Sec. 12.16 provides:

“No person shall publish, issue or circulate or cause to be published, issued or circulated otherwise than in a newspaper, as provided in subsection (1), of section 12.14, any literature or any publication tending to influence voting at any election or primary, which fails to bear on the face thereof the name, given and surname, and address of the author, the name, given and surname, and address of the candidate in whose behalf the same is published, issued or circulated, and the name, given and surname, and address of any other person causing the same to be published, issued or circulated.”

You inquire whether this statute was violated.

The purpose of the statute is to prevent unauthorized statements from being made and circulated in a campaign which fail to bear on the face thereof the given name, surname and address of the author. While this statement of facts comes very near to being within the letter of the prohibition of the statute, still I believe it is not within the
spirit of it. These workers were known to all the voters and the effect of the work done was the same as if one of the workers had been asked by the voter whether he should vote for B instead of for A. Upon being asked by the voter to write down the name of such candidate and the office for which he was running, he complied with such request. This would certainly not be within the spirit of the prohibition of the law. This simply aided the voter in remembering the name and the office for which this man was running. As the printed ballot as described was not used for general circulation but was used only incidentally in case the voter asked for it, I believe it is not within the spirit of the prohibition of this statute. The voter was informed and knew all the facts that the statute requires to be printed on the sample ballot for circulation. You are, therefore, advised that you are justified in refusing to bring a prosecution for violation of the corrupt practices act. Had these ballots as described been mailed to voters who were not informed as to who sent them, it would be a clear violation of the statute.

JEF

Elections — Corrupt Practices — Mere printing of hand bills or other writing by printer who does not circulate or aid in circulating same is not in violation of ch. 12, Stats.

May 8, 1936.

WENDELL McHENRY,

District Attorney,

Waupaca, Wisconsin.

You state that you had three cases in your county at the last municipal elections where individuals caused hand bills to be printed and circulated the eve before election without bearing the name and address of the author, and which were issued for the express purpose of influencing voters.
You state that it seems to you that the printers who printed these hand bills should be equally liable with the parties having them printed and that one is just as guilty as the other. However, you say there seems to be nothing in ch. 12, Stats., fixing such liability.

In addition to the penalties contained in ch. 12 we direct your attention to sec. 348.226 which also applies to violations of ch. 12. You are correct in your statement that there is no penalty provided for the printing of such hand bills so long as the party does not circulate the hand bill or aid in circulating it. The mere printing of sample ballots or hand bills by a printer was not intended to be a violation of the law as long as such printer is not circulating or helping to circulate the same. It might be very difficult in certain cases for the printer to find out what the bills or hand bills which he prints are to be used for and it seems to have been the intention of the legislature because of such fact to confine prosecutions only to those mentioned in the statute.

JEF

Banks and Banking — Public Deposits — Where public depositor, under ch. 34, Stats., assigns its claim against defunct bank to board of deposits such depositor is bound by terms of assignment. Where closed bank is able to repay one hundred per cent plus interest statute makes no provision whereby board of deposits may return such interest to public depositor.

May 11, 1936.

Board of Deposits.

You state that in 1933 the state of Wisconsin and thousands of municipalities throughout the state assigned their claims against hundreds of banks to the board of deposits. The claims arose out of the failure of banks to repay part or
all of the public funds on deposit in such banks to the credit of such municipalities. Certain banks, particularly in Milwaukee county, have repaid one hundred per cent of all deposits, and, in addition, have paid interest on the unpaid balance of such deposits from the date of closing at the rate of six per cent per annum, which total interest amounts to ten and eight-tenths per cent of the original deposits.

The state treasurer and the county treasurer of Milwaukee county have raised the question as to whether such interest should be paid to the board of deposits of Wisconsin, or to the respective municipalities which had funds on deposit in such banks. The payments have been made to the board of deposits without prejudice to the rights of the county or state to claim interest.

It is our opinion that such interest should be paid to the board of deposits.

Sec. 34.08, subsec. (3), par. (a), Stats. reads as follows:

"Losses as defined by subsection (6) of section 34.01 shall become fixed as of the date the loss occurs and shall be paid pro rata based on the original loss out of the state deposit fund without interest, as rapidly as sufficient funds are available in the state deposit fund to permit a payment of not less than five per cent except in case of final payment. Any funds received by the board of deposits as a loan shall be paid pro rata to all public depositors whose interest in claims against public depositories are pledged to secure such loans. Claims having a balance of five hundred dollars or less shall be paid in full at the time of the making of the next succeeding payment of claims from the public deposit fund. On the occurrence of a loss as defined in subsection (6) of section 34.01 each public depositor suffering such a loss shall within sixty days thereafter assign all its interest in such deposit to the state deposit fund and on failure so to do shall forfeit all right of claim against the state deposit fund."

A similar provision was contained in sec. 34.06, subsec. (4), Stats. 1933.

From this section it is our opinion that the transaction which occurred between the public depositors and the board of deposits must be likened to the relationship between an assignor and an assignee. We therefore refer to the law
applying to such relationship. In the absence of statute and provisions in the contract of assignment to the contrary the assignee acquires all the right, title and interest which the assignor may have had in the property assigned, and accepts it subject to all defects. In other words, the assignor for a consideration gives his property, whatever its value may be, to the assignee and thereafter the assignee assumes the risks incident thereto.

It is also to be noted that the statute in this case does not make it mandatory for the public depositor to enter into this relationship. It does so upon its own volition, but the statute does make it mandatory upon the board of deposits to accept such assignments. The question then arises as to whether or not the statute contemplates that the board of deposits, being compelled to take the assignment, must take it subject to all the defects and, in addition, subject to a further claim being made upon it by the public depositor in the event that the property assigned should prove to be of greater worth than the assignor deemed it to be when it made the assignment.

It would appear that this question should be answered in the negative.

The board of deposits, as such forced assignee, is but a creation of the statutes, being a public corporation, and it has only those rights, powers and duties which the statute gives it. The statute states that the losses shall be paid pro rata based on the "original loss" out of the state deposit fund "without interest" as rapidly as sufficient funds are available. It is further provided that the loss becomes fixed as of the date when the loss occurs. These provisions expressly negative any power in the board of deposits to make payments on the original loss with interest. Consequently, the interest which the board of deposits may receive from those few banks which pay out one hundred per cent plus interest goes back into its fund to offset, in part, the losses which may be sustained on other deposits. This seems to be in harmony with well established principles of insurance, upon which the public deposits law is based.

Therefore, we take it that when the assignment has been made the parties are governed by the terms of the assignment and the statutory limitations upon the board's power.
Counties — County board is without authority to employ rural electrical inspectors.

May 11, 1936.

INDUSTRIAL COMMISSION.

You state that sec. 167.16, Stats., makes it "the duty of every contractor and other person who does any electric wiring in this state to comply with the Wisconsin state electrical code, and the company furnishing the electric current shall obtain proof of such compliance before furnishing such service; * * * This section further provides:

"* * * Proof of such compliance shall consist of a certificate furnished by a municipal or other recognized inspection department or officer, or if there is no such inspection department or officer it shall consist of an affidavit furnished by the contractor or other person doing the wiring, indicating that there has been such compliance."

You point out that there is a considerable amount of rural electrical work being done, and at least some of this work is being done by unqualified or only partially trained men, and that, under such circumstances, an affidavit of compliance would not give any particular assurance of actual compliance with the electrical code. You desire, therefore, to know whether or not county boards may hire electrical inspectors.

This question is answered in the negative.

Counties have only such powers as are given to them by statute expressly or by implication. Frederick v. Douglas County, 96 Wis. 411.

We have been able to find no statute which expressly or impliedly gives the county power to hire inspectors for this purpose. The statutes do give villages and cities power to regulate electrical instalment under sec. 66.05, subsec. (8), par. (c). This appears to be the only provision in the statutes giving any governmental unit such powers.

JEF
Appropriations and Expenditures — Horicon Marsh — Fish and Game — Wild Life Refuges — Public Officers — Conservation Commission — Under sec. 29.571, Stats., it is duty of conservation commission to establish wild life refuge on Horicon marsh, but commission must keep within limits of appropriation provided by sec. 20.20, subsec. (25), for that purpose and size of area to be acquired for such purpose is within discretion of commission.

Maximum amount of appropriation need not be used if lesser sum will suffice.

Water levels created by dam are within jurisdiction of public service commission under sec. 81.02, except that private property must not be flooded without compensation.

Conservation commission is not liable for acts of those over whom it has no control.

May 14, 1936.

Conservation Department.

You have referred to us a letter from Honorable C. M. Davison, judge of the circuit court, Dodge county, to the chairman of the conservation commission, and in connection therewith you have asked our opinion on a number of questions as to the duties of the conservation commission respecting secs. 29.571 and 20.20, Stats.

The letter which gives rise to your question reads as follows:

"May 2, 1936.

Robert B. Goodman,
Marinette, Wis.
Dear Sir:

"I have your letter stating that it would be impracticable to flood the 1100 acres that the state owns and that it would cost too much money. With that I do not agree.

"In the first place, it would not cost a cent. The county surveyor here will survey the lands for nothing. The hunting clubs will furnish the posts and set them, so that there will be no cost there. It would not flood up the river because we keep the water 40 rods south of section 25. There is a fall from the south end of section 25 to the dam of nearly eight feet. Your objection to this plan is as silly as it is laughable. The only thing that was ever practical to you
was the beginning of this foolish lawsuit wherein you spent $10,000, whereby your commission attempted to steal from the honest landowners their land without paying them anything, but I and the supreme court of Wisconsin put an end to that racket. Your whole administration of the conservation program in Wisconsin is a joke. You haven't paid your game wardens for the last two months at least. All the money that is being taken in is squandered in administration. You would do a great service to the state of Wisconsin if you would resign.

"When I decided the Horicon Marsh case, I retained jurisdiction of the case to regulate the dam. The supreme court approved my position in that matter. You have the keys to the dam. I now demand that you turn the keys over to this court and that you deposit the keys to the dam within ten days to the clerk of this court.

"Furthermore, in 1928 the legislature passed a law that you were to spend $25,000.00 in building a dam. That was done. And that you collect $25,000.00 each year and spend it in the purchase of Horicon marsh. That you haven't done, and I demand now that you collect this $25,000.00 for the year 1936 and spend it in the purchase of land of the Horicon marsh and that you collect the $25,000.00 each year from 1928 up to the present time and spend it in buying land in the Horicon marsh. The supreme court held in their decision that this was mandatory upon the part of the conservation commission. I am going to see to it that you obey the law. This dog-in-the-manger attitude that you have taken toward Horicon marsh is going to be stopped and stopped plenty.

"Last year you disobeyed eight injunctional orders that I issued in reference to Horicon marsh. The supreme court has now held that I was justified in issuing the injunctional orders that I did. You wilfully disobeyed them. That I think will take care of you and your dog-in-the-manger commission. Your commission is just like the boy that wants to bat all the time. If he can't bat all the time then he don't want to play ball. In a decision of the supreme court the rights of all parties were defined plainly and they are going to be carried into effect. You are not going to be allowed to abandon Horicon marsh in the face of the declared law by the supreme court of the state of Wisconsin, so you had better get busy.

Sincerely yours,

C. M. Davison,

Circuit Judge."
The first question you have asked is:

"1. Under the recent decision of the supreme court in State v. Adelmeyer, et al., what is this commission authorized to do and what are its limitations?"

The supreme court in the case of State v. Adelmeyer et al., 265 N. W. 838, held that the state cannot flood privately owned lands without compensation in connection with the restoration of the natural levels of the Rock river in Horicon marsh, which restoration the conservation commission was authorized to effect by sec. 29.571, Stats., and that the lowered levels of such waters resulting from private drainage of the marsh have now, in effect, become the natural levels through lapse of time and acquiescence by the state.

Sec. 29.571, Stats., subsec. (1), provides:

"A wild life refuge, game preserve and fur farm shall be established on the Horicon marsh in Dodge county under the supervision of the conservation commission."

And subsec. (3) provides:

"The conservation commission shall purchase or acquire by condemnation proceedings the land known as the Horicon marsh, or as much thereof as it deems necessary, and may construct such buildings thereon and provide such equipment as is reasonably required to carry out the purposes of this section."

We take it that in view of the supreme court's decision in State v. Becker, 215 Wis. 564, no privately owned lands may be incorporated into a "wild life refuge" without compensation to the landowners.

Consequently, it would seem that any such refuge established by the commission must be limited to lands now owned or hereafter acquired by the state, and that, in view of the Adelmeyer case, the state must pay for any privately owned lands which it proposes to flood, regardless of the fact that, in doing so, it is merely restoring natural levels which were destroyed by drainage.
Your second question reads:

"2. Is the commission the final authority as to the amount of land necessary to be purchased to establish this refuge?"

Sec. 29.571, subsec. (3), above quoted, directs the conservation commission to purchase or acquire by condemnation proceedings the land known as the Horicon marsh "or as much thereof as it deems necessary."

This language clearly invests the commission with authority to determine for itself how much land is necessary for the purposes specified, and it would be unlikely that the courts would disturb any reasonable exercise of that discretion.

The third question reads:

"3. Is the commission the final authority as to the expenditure of funds in securing lands and making improvements to establish the refuge?"

This question can be answered in pretty much the same way as the preceding question, subject, however, to the maximum appropriation provided by law.

Sec. 20.20, Stats., appropriates all moneys in the conservation fund to the state conservation commission, subject to certain allotments, one of which is included in subsec. (25), which reads as follows:

"Annually, for ten years, beginning July 1, 1927, twenty-five thousand dollars for the purchase of land, the construction of buildings and equipment and the operation of the wild life refuge, game preserve and fur farm established on the Horicon marsh by section 29.571."

This, in effect, means that the conservation commission may spend out of its funds not to exceed a total of $250,000.00, for the purposes mentioned in said subsection.

This language is by no means open to the construction that the conservation commission must spend $250,000.00 under this section, whether or not it feels such expenditure
to be necessary. The theory back of all appropriations is that they provide maximum amounts which cannot be exceeded, not that the total amount of the appropriation must be spent even though it would be wasteful and uneconomic to do so.

If the commission can carry out the intent of the legislature by spending only half or some other portion of the appropriation, it should do so, since economy in governmental expenditures is just as desirable as is economy in private business.

The fourth question reads as follows:

"4. Is the commission required to expend the amount of the appropriations made by section 20.20, statutes?"

This question is sufficiently answered in the answer to the preceding question.

The fifth question reads as follows:

"5. In the event the commission determines that the 1,100 acres now acquired by the state in the south end of Horicon marsh is sufficient to establish a wildlife refuge, will this comply with the requirements of section 29.571, statutes?"

This question is answered in the affirmative for the reasons already mentioned.

The sixth question is as follows:

"6. May the water levels at Horicon dam be raised to the maximum level provided for the dam at Hustisford?"

The maximum levels provided for the dam at Hustisford have, as a matter of law, no relation to the water levels which may be maintained at the Horicon dam.

The main thing to remember in the operation of the Horicon dam is that the state must keep within the limits of the decision of the Adelmeyer case, and that if the state pro-
ceeds to so operate the dam at Horicon as to result in the taking of privately owned lands, it will be necessary to compensate the owners thereof, since such parties have the rights provided under ch. 32 on condemnation in the event that there has been a taking of their property.

If it is the decision of the commission that the 1,100 acres which the state now owns in Horicon marsh is sufficient for a wild life refuge, we would advise that application be made to the public service commission under sec. 31.02, Stats., to establish new water levels which may be maintained on such lands, since the levels established by the public service commission for the Horicon marsh area prior to the Adelmeyer case were based on the theory that the state had the right to re-establish without compensation levels on navigable waters, which levels had been lowered by private drainage. This theory was refuted by the supreme court in the Adelmeyer case and the levels now to be maintained by the operation of the dam at Horicon must be such as to result in no damage to privately owned lands reclaimed by drainage. In other words, it is the levels after drainage which must now be observed rather than the levels prior to drainage. The public service commission is the proper body under sec. 31.02 to determine what those levels are or should be.

The seventh question is as follows:

"7. May this level be maintained if it does not interfere with the rights of the owners of the dam at Hustisford?"

This question is, to a large extent, answered by the answer to the preceding question.

Any questions as to what is proper in the operation of the Horicon dam are within the jurisdiction of the public service commission, except as to the flooding of private lands without compensation, which cannot be done, as above pointed out.

The eighth question is as follows:

"8. In view of the decision of the supreme court in State v. Adelmeyer, et al., is it now mandatory for this commis-
sion to set aside $25,000 each year from its appropriations for use in establishing a wild life refuge on Horicon marsh?"

This question is covered to a large extent by the answer to the third question. We do not read into the statutes any mandate by the legislature to spend any particular sum of money, although the conservation commission must not spend in all more than $250,000, under sec. 20.20, subsec. (25), nor could the commission allow more than $25,000 out of its funds in any one year for such purposes.

The ninth question is as follows:

"9. In event these funds are set aside up to $250,000, is it obligatory on this commission to expend these funds in establishing a wild life refuge on Horicon marsh?"

We believe that it is obligatory that a wild life refuge be established on Horicon marsh, but, as above pointed out, it is not necessary, as a matter of law, that $250,000 be expended for such purpose, if a lesser sum will suffice.

The tenth question is as follows:

"10. In turning over the keys, under protest, to the gates of the state's dam at Horicon as ordered by Judge Davison in his letter of May 2, 1936, copy of which is attached hereto, can there be any liability attached to this commission or the state on account of any action taken by Judge Davison or his agents or representatives in operating said dam in such manner as to cause damage to any of the land owners in the area known as Horicon marsh?"

Without in any way expressing any opinion on the validity of the purported order in question, it is quite apparent that there is no liability on the part of the state or conservation commission under the circumstances.

We are informed that these keys have been delivered to the court under protest, and as a consequence of threats to punish various representatives of the conservation commission for contempt of court. Obviously the commission can-
not be liable for such use of the keys as may be made by persons over whom it has no control and who have obtained possession of the keys by duress.

JEF

Automobiles — Taxation — Motor Fuel Tax.— Bulk stations are not ipso facto exempt from provisions of sec. 78.40, Stats. Rules as to applicability of sec. 78.40 to bulk station laid down in XXIV Op. Atty. Gen. 176 are adhered to and followed.

Service stations operating under leases, resellers' agreements or sales contracts submitted are held to be "leased outlets" within meaning of that term as used and defined in sec. 78.40 (1) (f).

Sec. 78.28 does not apply to or preclude state from levying and collecting license fee as provided by sec. 78.40.

May 14, 1936.

TAX COMMISSION.

You state that the major oil companies operating bulk stations or wholesale plants in Wisconsin have in most instances refused to supply you with sales data and information showing the degree, if any, to which each bulk station or wholesale plant is an instrumentality in interstate commerce and that by reason thereof you are unable to properly administer the provisions of sec. 78.40, Stats. You have also referred to XXIV Op. Atty. Gen. 776, wherein it was held, among other things, that whether a given bulk station or wholesale plant is so engaged in business that a burden would be placed on interstate commerce by the imposition of a license tax is a question of fact to be determined in each case.
Under such a statement of facts you ask what procedure to follow with respect to the administration of sec. 78.40, Stats.

Sec. 78.40, subsec. (2), provides:

"No person shall engage in the business of a motor fuel distributing company in this state unless he shall first have secured a license to engage in such business from the tax commission. Such license shall be issued for the calendar year and shall be renewable annually."

By par. (a), subsec. (1), sec. 78.40, Stats., a "person" is defined to mean:

"* * * and include individuals, groups of individuals, copartnerships, trusts, associations, joint stock companies, corporations, receivers, trustees and all firms however or organized and whatever be the plan of operation."

The term "business" according to par. (b) is to be construed "to mean and include any activity engaged in by any person or caused to be engaged in by any person with the object of gaining benefit, either directly or indirectly."

Sec. 78.40 (1) (f) provides in part:

"The term 'motor fuel distributing company' shall be construed to apply to and be applied to the business of any person, domestic or foreign, owning operating or maintaining, directly or indirectly, under the same general management, control, supervision or ownership one or more sales outlets; * * * ."

The only exception provided for by statute from the licensing tax is sec. 78.40 (1) (f):

"* * * provided, however, that co-operative associations organized under chapter 185 or limited profit sharing co-operative organizations organized under the laws of some other state and conducted on a genuine co-operative basis as defined in sec. 185.01 shall not be considered a motor fuel distributing company. * * * ."

No other exception is found in the act. While it is true that under the facts stated in XXIV Op. Atty. Gen. 776, it was held that sec. 78.40 could not be construed to apply to
certain bulk stations, that opinion did not hold that all bulk stations *ipso facto* were exempt. It expressly provided that whether or not they were excepted depended upon the facts peculiar to each case. The rules laid down in that opinion are affirmed here. If the taxing authority is satisfied that a station comes within the exempt class, no license fee for such station should be exacted. As a corollary thereto, however, it follows that if the taxing authority is not so satisfied, it is its duty to impose such a tax, in accordance with the statutes. That bulk stations are a proper subject to the license tax imposed is settled. Any exemption which may be claimed must be clearly established and shown in this connection the supreme court in its decision in the case of *Will of Chafin* (1933), 210 Wis. 675, 680, 247 N. W. 425, specifically established that "taxation is the rule laid down and exemption is the exception."

You state further that the major oil companies report few service stations under their control and management and that sales are made through leased outlets. You ask whether, in view of sec. 78.40 (1) (f) you are to construe that section to mean that the so-called leased outlets are under the management, supervision, or control of the major oil companies.

Sec. 78.40 (1) (f) provides in part:

"* * * One or more sales outlets shall, for the purpose of this section, be treated as being under a single or common ownership, control, supervision or management if directly or indirectly owned or controlled by a single person or any group of persons having a common interest in such outlet or outlets, or if any part of the gross revenues, net revenues or profits from such sales outlet shall, directly or indirectly, be required to be immediately or ultimately made available for the beneficial uses, or shall directly or indirectly inure to the immediate or ultimate benefit of any single person or any group of persons having a common interest therein. Lease and ownership, lease and agency, lease and release, or oral or written agreements, or contracts, where such relationships, agreements or contracts embrace provisions for exclusive sale of particular commodities in whole or part, or where contracting parties share any expenses of the retail operations, or where there is no reasonable rental involved, or where the rental is based upon the dollar or
quantity volume of business done, or where the contracting parties have the relation of employer and employee, either directly or by inference, or where relationships, agreements or contracts provide for unequal cancellation of same, or where operation of such sales outlet is under a common name shall be deemed to constitute operations under the same general management, supervision or ownership."

It has been the practice of these major oil companies to require the execution of a reseller’s agreement or sales contract simultaneously with the lease. An understanding of the transaction requires a study of the lease in conjunction with the so-called resellers’ contracts or agreements.

In many of these contracts it is provided that the lease shall automatically terminate contemporaneously with the cancellation or expiration of the contracts. Many contracts provide for equal cancellation of the contract at the expiration of the term, but reserve to the seller, i. e., “the major oil company” “during the above term or any extension, the right to cancel the contract at any time without cause by giving buyer ten days’ written notice mailed to the last known address of buyer.” This clause clearly gives the seller or major oil company superior cancellation rights. It is clearly “unequal cancellation” as that term is used. Sec. 78.40, Stats. Manifestly to set out each detail of the leases used by the ten or twelve major oil companies and the contracts wherein they do not circumvent the provisions of the statute would be to extend this opinion unduly. It is sufficiently clear that from the amount of control that is exercised by the major oil companies through their leases and particularly the resellers’ contracts over these stations that they, the major oil companies, are in “full enjoyment of the advantages inherent in a general store system * * *.”


You inquire further as to the meaning of that portion of sec. 78.28, Stats., which reads as follows:

“The license tax herein levied and provided for is in lieu of any excise, license, privilege or occupation tax upon the business of * * * distributing motor fuel, and no city,
village, town, county, township, or other subdivision or municipal corporation of the state shall levy or collect any such tax * * *

The statute is clearly a prohibition against municipalities, using that term in a broad sense, within the state from levying, collecting or enforcing additional excise license privilege or occupational taxes upon the business of manufacturing, storing, selling, using or distributing motor fuel. This prohibition does not include the state and a license tax as provided for by sec. 78.40 may be imposed and collected by the state. It is elementary that a section of the statute must be read in its entirety and not in piecemeal form. A reading of the entire section immediately discloses that the first part of the section, "The license tax herein levied and provided for is in lieu of any excise, license, privilege or occupation tax upon the business * * * distributing motor fuel," is explained or modified by that which follows. Had the legislature intended the prohibition contained in sec. 78.28, Stats., to extend to and include the state, that language specifically designating certain municipalities which should not collect an additional tax would be surplusage. It seems clear that any other construction except the one which we have placed upon this section would render portions of sec. 78.40 nugatory. It is likewise well settled that general statutes are not to be construed to include, to its hurt, the state. Sandberg v. State, (1902) 113 Wis. 578, 589, 89 N. W. 504; Milwaukee v. McGregor, (1909) 140 Wis. 35, 37, 121 N. W. 642, 17 Ann. Cas. 1002; Sullivan v. School District, (1923) 179 Wis. 502, 507, 191 N. W. 1020; State v. Milwaukee (1911), 145 Wis. 131, 129 N. W. 1101; United States v. Barker, (1817) 15 U. S. (2 Wheat.) 395; United States v. Ringgold; (1834) 33 U. S. (8 Pet.) 150, 163; Stanley v. Schwalby, (1895) 162 U. S. 255, 272, 40 L. ed. 960, 16 Sup. Ct. 754.

Manifestly the courts, in view of the rule above laid down, would not construe the section of the statute here under consideration as applying to the sovereign state itself.

You are therefore advised that the prohibition contained in sec. 78.28 refers only to municipalities within the state and not to the sovereign state itself.

JEF
Taxation — Occupational Tax — Chain Store Tax — So-called distributing branches or supply depots of breweries operating within and under laws of state and so-called branches of Roundy, Peckham and Dexter Company, Milwaukee, are sales outlets within purview of sec. 76.75, Stats., and chain store occupational tax is applicable to such distributing plants or branches.

May 14, 1936.

TAX COMMISSION.

Attention L. B. Krueger, Chain Store Tax Division.

You request the opinion of this department relative to the application of sec. 76.75, Stats., to so-called distributing branches or supply depots of breweries organized under the laws of this state. You also inquire as to the status of supply depots or so-called branches operated by Roundy, Peckham and Dexter Company, of Milwaukee, Wisconsin.

Ch. 545, Laws 1935, imposes a chain store occupational tax upon

"* * * any person, firm or corporation, domestic or foreign, owning, operating, or maintaining, directly or indirectly, under the same general management, control, supervision or ownership two or more sales outlets * * *" (par. (j), subsec. (1), sec. 76.75, Stats.).

Par. (i), subsec. (1), sec. 76.75 provides in part:

"The term ‘sales outlet’ shall be construed to mean and include any store or stores, or any mercantile establishment, or places where a business of any kind is conducted and which are operated, maintained or controlled by the same person, firm, corporation, * * * in which goods, wares, articles, * * * are sold or offered for sale or held in readiness to sell or from which such goods are distributed either at retail or wholesale * * *.”

The method of conducting businesses at the distributing branches of the breweries and at the so-called branches of Roundy, Peckham and Dexter Company is rather involved
and because of the conclusions arrived at by this office it will be unnecessary to set forth in detail these operations.

We are of the opinion that both the distributing branches or supply depots of breweries operating under the laws of this state and the branches of Roundy, Peckham and Dexter Company are within the purview of sec. 76.75 and that the chain store occupational tax is applicable to them.

It has been suggested that the articles distributed and sold by the branches of Roundy, Peckham and Dexter Company bring the method of doing business into interstate commerce and hence the state has no authority to levy a license tax under the rulings of the United States supreme court.

On this point you are referred to XXIV Op. Atty. Gen. 776, which opinion we hereby affirm. If, in fact, interstate commerce is burdened in the method of doing business, no license tax may be levied. If, however, interstate commerce is not burdened, a license tax may be imposed.

JEF

Banks and Banking — Trade Regulation — Warehouse receipts issued by warehouseman licensed under sec. 100.13, Stats., are acceptable as collateral for loans in excess of regular statutory limit under provisions of sec. 221.29, subsec. (1).

May 21, 1936.

Banking Commission.

You inquire whether the warehouse receipts issued by a warehouseman licensed under sec. 100.13, Stats., will be acceptable as collateral for loans in excess of the regular statutory limit, under the provisions of sec. 221.29, subsec. (1), Stats.
This question is answered in the affirmative upon the basis of the express language of sec. 221.29, subsec. (1), which we will not take the space to quote here.

From your letter we take it that your question arises through the fact that ch. 550, Laws 1935, revised sec. 99.32, under which warehousemen were formerly licensed, and that this provision now comes under sec. 100.13.

However, since this was a revisor's bill, we do not believe that any change in the law was intended. In this connection we call attention to sec. 12 of the preface to the Wisconsin statutes, wherein the revisor of statutes says:

"12. Construction of Revised Statutes. A major rule for the interpretation of revision acts is the reverse of the corresponding rule for construing other legislative acts. Disregard of this distinction often results in error. The general rule of construction of statutes is that every legislative act intends some change in the law; a change of language implies a change of law. That rule does not apply to the construction of revision acts. The rule there is to the contrary. As to acts which revise or restate the law there is the presumption that no change in substance was intended unless the change in language clearly indicates an intent to change the substance. * * * ."

JEF
Indigent, Insane, etc. — Expenses of detention under sec. 51.04, Stats., pending sanity hearings are governed as to rates by sec. 51.08 and as to payment by sec. 51.07, Stats. Costs and expenses of proceedings include detention.

May 21, 1936.

Board of Control.

You have asked our opinion on a number of questions arising under ch. 51, Stats.

You inquire first: When a detention pending a sanity hearing has been ordered under sec. 51.04, are the expenses governed by sec. 51.08, Stat., as to rates?

This question is answered in the affirmative.

Sec. 51.08, subsec. (1), Stats., provides:

“For the purpose of settlement with the county the expense of the maintenance, care and treatment of each inmate in any state hospital or asylum for the insane shall be computed at the rate of five dollars and forty cents per week, and the expense of the maintenance, care and treatment of each inmate in any county hospital or asylum for the insane shall be computed at the rate of four dollars and fifty cents per week. For each such inmate maintained at public charge elsewhere than in the county of his legal settlement the whole rate shall be chargeable to the state and one-half thereof chargeable over by the state against the county, if any, in which such inmate has a legal settlement. For all other such inmates maintained at public charge one-half of said rate shall be chargeable to the state and one-half to the county in which such inmate has a legal settlement. All such charges shall be adjusted as provided in section 46.10, but nothing herein shall prevent the collection of the actual per capita cost of maintenance, or a part thereof by the state board of control or by the county in counties having a population of five hundred thousand or more, pursuant to law.”

We see no reason why the words “maintenance, care and treatment of each inmate” should not be applicable to one who is being detained for observation under sec. 51.04, Stats. For instance, such a person under detention at the
Wisconsin general hospital would clearly be an "inmate in any state hospital" within the meaning of the statute above quoted.

Consequently, you inquire whether, if the rates under sec. 51.08 apply, only one-half of said rate is chargeable to the committing county or whether the entire amount is chargeable to the committing county.

We believe this question is answered by sec. 51.07, subsecs. (3) and (4), which provides:

"(3) 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."

"(4) If the insane person is a resident of any county in this state other than the county from which he was committed, the commitment shall not be invalid for that reason, and the county in which such person resides shall reimburse the county from which he was committed all lawful expenses of the examination and commitment, payment thereof to be enforced in the manner that charges for the maintenance of such persons are enforced."

In other words, the detention expenses are paid by the committing county in the first instance under subsec. (3), but the committing county is to be reimbursed by the county of legal settlement under subsec. (4).

Thirdly you inquire whether under sec. 51.07, subsec. (4), the state board of control is the proper party to make the charge against the county of residence where the commitment is to a state institution and if the state superintendent of county institutions does this as to commitments in county institutions.

This question is answered in the affirmative.

It is provided in sec. 51.07, subsec. (4), above quoted, that payment is to be enforced in the manner that charges for the maintenance of such persons are enforced.
Since payment is enforced in the manner that charges for maintenance are enforced, we refer to sec. 51.08, subsec. (1), on maintenance, to that part which reads:

"* * * All such charges shall be adjusted as provided in section 46.10, but nothing herein shall prevent the collection of the actual per capita cost of maintenance, or a part thereof by the state board of control or by the county in counties having a population of five hundred thousand or more, pursuant to law."

The matter of preparation of statements is covered by sec. 46.10, Stats., which seems to provide that this should be done in the manner indicated by your question.

Fourthly you inquire what is meant by the words "lawful charges" as used in sec. 51.07, subsec. (4), above quoted. We take it that this includes the fees of the judge and examining physicians and the costs and expenses of the proceedings as outlined in sec. 51.07. In addition thereto we believe that the expenses of detention under sec. 51.04 constitute a part of the expenses of the proceedings as was indicated in our opinion in XXIII Op. Atty. Gen. 221. The manner of payment thereof is governed by sec. 51.07, subsecs. (3) and (4), Stats., as above pointed out.

JEF
**Indigent, Insane, etc. — Poor Relief — Legal Settlement**

One who resided in Veterans' Home at Milwaukee for more than one year prior to amendment to sec. 49.02, subsec. (4), Stats., by ch. 408, Laws 1933, gained legal settlement in Milwaukee county. Under present law time spent in such institution is not to be included in year of residence required for legal settlement.

May 21, 1936.

**HAROLD M. DAKIN,**

*District Attorney,*

Watertown, Wisconsin.

In your letter of May 11 you ask our opinion upon the following:

On September 28, 1930 X was admitted to the Veterans' Home in Milwaukee for treatment and has been in that hospital ever since. On December 10, the wife of X was admitted to the Jefferson county asylum for the insane and has been a patient in that institution ever since. The children of this family are in various state institutions but supported by Jefferson county. Is Milwaukee county liable for the support of the family of X?

The present sec. 49.02, subsec. (4), Stats., provides that the time spent by any person as an inmate of any state or United States institution for the care of veterans shall not be included as part of the year necessary to acquiring a legal settlement in the municipality where the institution is located. However, before the passage of ch. 408, Laws 1933, sec. 49.02 (4) provided 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."

Under the above-quoted statute, which was in force for more than a year after X entered the Milwaukee institution, only "support as a pauper" barred the gaining of a legal
settlement. In XXII Op. Atty. Gen. 690 it was held that by a continuous residence for more than a year as an inmate of the Wisconsin Veterans' Home at Waupaca, Wisconsin, a person gained a legal settlement in the town in which the institution is located. The rule of this opinion applies with equal force to an inmate of the Veterans' Home at Milwaukee. It is our understanding that the institutions are similar in purpose and nature, excepting that the former is a state financed institution and the latter a federal financed institution. X, therefore, gained a legal settlement in Milwaukee county. As the settlement of the wife and children follows that of the father, Milwaukee county is liable for the support of the family. This is true even though the wife and children of X were receiving public support in Jefferson county. XXII Op. Atty. Gen. 128.

JEF

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Trade Regulation — Pawnbrokers — Pawnbrokerage business is regulated by sec. 115.07 and sec. 348.478, Stats.

May 31, 1936.

Division of Consumer Credit,

State Banking Department.

Attention G. Erle Ingram, Special Counsel.

You request information relative to state laws regulating pawnbrokers and you particularly ask whether or not the interest rates charged in the pawnbrokerage business are subject to the state usury laws.

Sec. 348.478, Stats., is the only statutory provision that has come to our attention which specifically pertains to pawnbrokers. This section provides that it shall be unlawful for any pawn or loan broker to accept from any minor any personal property as security for money loaned without
the written consent of the parent or guardian of said minor. The statute further provides penalties for violations thereof.

Unlike most states, Wisconsin has no special pawnbrokers' licensing and regulatory act. In the absence of such special act a pawnbroker may charge only such interest rates as are within the general state usury laws. The following quotations from Levine's "The Law of Pawnbroking" state what appears to be the universal rule:

"When no special pawnbroking interest rate is fixed by state statute or municipal ordinance, the pawnbroker may charge only the regular statutory rate of interest which may be demanded on other contracts for the loan of money." Sec. 61, page 65.

"A pawnbroker is guilty of usury: (1) When he contracts for, or receives as interest, a higher rate than that fixed by the general interest law, in the absence of any special statute or ordinance permitting him to charge the rate of interest demanded by him. * * *" Sec. 62, page 67.

Ch. 115, Wis. Stats., sets forth our state laws pertaining to the regulation of rates of interest. Sec. 115.07 appears to us to be the particular statute which regulates interest rates charged by pawnbrokers. This section provides in part:

"(3) And when the payment of the money loaned shall be secured, * * * by chattel mortgage, bill of sale, pledge, receipt or other evidence of debt upon chattel goods or property, * * * any person who, as principal or as agent for another, shall ask, demand, or receive, take, accept or charge, in addition to the interest aforesaid, more than an amount equal to seven per centum per annum of the original sum actually loaned for the time of such loan, on sums of a hundred dollars or less, * * * shall be guilty of a misdemeanor * * *"

It will be noted that the quoted portion of sec. 115.07 pertains particularly to those persons who loan money upon the security of a "chattel mortgage, bill of sale, pledge, receipt, or other evidence of debt upon chattel goods or property." A pawnbroker is generally defined as one who loans money on property delivered in pledge. Corpus Juris defines a pawnbroker and pawnbrokerage as follows:
"A. Pawnbroker. While in general terms a pawnbroker may be said to be one who lends money, usually in small sums, upon property delivered in pledge, more accurately speaking he is a person who makes a business or occupation of lending money at interest on the security of personal property deposited in his keeping.

"'Pawnbrokerage' is commonly denominated as the business of loaning money on personal property delivered as security for loans." 48 C. J. 560.

The pawnbrokerage business clearly appears to be included within the broad language of sec. 115.07 (3) and it is our opinion that said section applies to such business. It therefore follows that anyone wishing to engage in the pawnbroker's business must secure a license from the banking commission, sec. 115.07 (3a), and abide by and submit to the interest rates and supervision provided by sec. 115.07. JEF

Bonds — Public Officers — County Treasurer — Taxation — Tax Collection — County treasurer is required to inform taxpayer on request what his taxes amount to.

Treasurer's liability on his bond, if any, for giving erroneous information, runs to taxpayer.

In giving information to any other person treasurer should specify that information is for sole benefit of taxpayer and is not to be deemed representation to any other person.

May 22, 1936.

LYALL T. BEGGS,

District Attorney,

Madison, Wisconsin.

You state that the Home Owners Loan Corporation is requiring its applicants to secure a certificate from the county treasurer as to the amount of taxes including interest and fees due on the land proposed to be mortgaged to the Home Owners Loan Corporation. Sec. 74.61 requires the
county treasurer, upon request from the taxpayer, to give such taxpayer a statement of the amount of taxes due upon each parcel of land owned by such taxpayer in cases where the county treasurer has the tax roll.

Sec. 19.02 permits individuals who suffer loss by reason of the negligence or default of an officer to sue the officer on his bond. Sec. 19.01, Stats., requires the treasurer to give a bond running generally to any person injured by his failure to perform his official duties. The county treasurer desires to know what liability he would incur if he should make a mistake in furnishing the information requested.

His official duty requires him to give the information to the taxpayer. His liability, therefore, would run to the taxpayer. As to the extent of the treasurer's liability, we call your attention to the case of Johnson v. Brice, 102 Wis. 575, where the court held the register of deeds liable to a purchaser of land, who in purchasing had relied on the tract index which was required by law to be kept by the register of deeds. The register of deeds had failed to note a mortgage on the tract index. The court held the register of deeds liable only after the purchaser had exhausted all his other remedies. His liability then arises after the injured party has exhausted all other recourse.

Since the county treasurer has no official duty to perform in this matter for the Home Owners Loan Corporation, it is our opinion that he would not be liable on his bond since liability on his bond is predicated on neglect or default in performing official duties.

We find nothing in the statute requiring the county treasurer to make his certification as to the amount of taxes due, nor do I find anything in the statute requiring him to give such information to the Home Owners Loan Corporation or any person other than the taxpayer.

I would suggest that in place of filling in the certificate, the county treasurer make a statement such as the following:

"This information is given for the sole benefit of the taxpayer herein named in accordance with sec. 74.61, Stats., and is not to be deemed to be a representation to any other person."

JEF
Taxation — Forest Crop Lands — Under forest crop law town treasurer must make his certification on or before February 25.

Such certification must certify as to payments made for current year on or before February 20 of current year and delinquent payments for previous year made between last February 21 and current February 20.

Year, for purpose of state appropriation under forest crop law, runs from February 21 to next February 20. Appropriation made in intervening July is available to match all payments made by owner within such year and is also available for administrative expense.

Any certificates on hand and not honored should be paid proportionately out of moneys available.

Payment should be made only on proper descriptions.

If certifications are received after February 25 or after time state payment is made and no funds are available certifications must remain unhonored unless legislature appropriates further money to pay late certifications.

May 22, 1936.

CONSERVATION DEPARTMENT.

You make the following statement and request:

"I. Subsection (2) of section 77.04 requires town treasurers to certify acreage eligible for payment of the state contribution as soon after the 20th day of February as feasible, while the state is required to pay the towns on or before February 25 under subsection (1) of section 77.05. Though the time limit brings these provisions into conflict, no administrative problem developed until February, 1935, when the total acreage reached a point where a proportionate reduction pursuant to subsection (1) of section 77.05 was indicated.

"The state office then charged with making these payments had received only a negligible number of certifications by February 25, 1935, and, therefore, made payment at the rate of ten cents per acre on these and subsequent certifications. This department now has certifications for a total of 107,821.08 acres and an unexpended balance of $1,999.22 with which to meet the claims."
"The following questions arise:

A. Shall we pay these late claims at the rate of ten cents per acre, paying them in the order in which the certifications were received until the fund is exhausted? Or should we now make an apportionment which would pay each certification at 1.85 cents per acre?

B. It is our understanding that of these unpaid certifications, only those applying to lands previously delinquent and subsequently paid may be included in the 1936 apportionment. Is this correct?

II. To avoid further difficulty this year, apportionment has been postponed until the following points are also clarified:

A. Many certifications erroneously list one or more descriptions of land which our original records reveal are not forest crop lands. May we strike out such wrong descriptions and proceed with apportionment? Or must we return the certifications for correction by the town treasurer?

B. With reference to the principle that the town must not be deprived of the state contribution because of late certification (XXIII Op. Atty. Gen. 743), what shall be done with town claims received after apportionment has been made and no funds remain? Will we be remiss in our duty by failing to pay any late claims after the funds are exhausted?"

Sec. 77.04, subsec. (2), Stats., permits town treasurers to make their certification to the state "as soon after the twentieth day of February of each year as feasible.

Sec. 77.05 (1) provides:

"* * * On or before the twenty-fifth day of February of each year the conservation commission shall pay * * * the sum of ten cents on each acre so certified to him * * *"

In 1933 the same duty was placed on the state treasurer. These two statutes obviously give rise to a conflict and, therefore, require construction.

The fundamental rule of construction of statutes is to ascertain and give effect to the intent of the legislature, the rule being that the spirit or reason of the law will prevail over the letter. State ex rel. Time Ins. Co. v. Superior Court, 176 Wis. 269. State ex rel. U. S. F. & G. Co. v. Smith, 184 Wis. 209.
Any lands which become forest crop lands are exempt from taxation. Sec. 77.03, Stats. The units of government thus deprived of the power to tax such lands are reimbursed by the state and the owner. The owner must pay his share on or before February 20 or the lands will be returned delinquent and sold for delinquent taxes as are other lands. Sec. 77.05 (1). The state reimburses on or before February 25. Sec. 77.05 (1). Ordinary real estate taxes are payable on or before February 1. Sec. 74.03 (1). There are, of course, certain provisions for the extension of the time of payment.

We may conclude, therefore, that it is the legislative intent that the forest crop land shares shall be paid on or about the same time as are the general property taxes, in lieu of which the owner and the state pay certain sums per acre. This intent also appears rather clearly in sec. 77.01, wherein the legislature declares its intent to foster forest growth "in a manner which shall not hamper the towns in which such lands lie from receiving their just tax revenues from such lands." See also XVII Op. Atty. Gen. 184.

Such intent must naturally control the provisions of sec. 77.04 (2), previously alluded to, so as to limit the period of time in which the town treasurer can make his certification. Such limitation must be immediately governed by sec. 77.05 (1) in view of what has been said, and particularly in view of sec. 370.02 (3), which reads as follows:

"If conflicting provisions be found in different sections of the same chapter the provisions of the section which is last in numerical order shall prevail unless such construction be inconsistent with the meaning of such chapter."

Accordingly, therefore, we are constrained to hold that the town treasurer must make his certification on or before February 25 in order to share equally. You are advised to make payment in full, if possible, on certifications on hand on February 25. A great hardship would be caused if your department were to withhold all payments until all certifications were in. Such action would result in penalizing those towns whose treasurers promptly performed their duties.
The law, therefore, requires you to (1) pay the state's share on acreage which was certified to you as paid on or before February 20, 1936 and (2) requires you to pay the state's share on acreage which had been previously returned delinquent as of February 20 and subsequently paid and so certified to you on or before February 20, 1936. You are further authorized to use part of that appropriation for administrative expense. Sec. 20.07 (2) and sec. 77.14, Stats. There are, therefore, three items of expense chargeable to this appropriation and none other. Among those items, we cannot find any authority to equalize payments made last year.

You call our attention to the fact that in XXIII Op. Atty. Gen. 743 we advised the state treasurer that he could make payment on a certification dated October 9. That is undoubtedly true if there are sufficient funds left in the appropriation. If the town treasurer makes his certification after February 25 of lands on which the owner's share had been paid prior to February 20, your department could not refuse payment if there were any moneys remaining in the appropriation for that year. But if there was no money remaining, you would not be remiss in your duty upon your failure to pay on such certification. State ex rel. Redenius v. Waggenson, 140 Wis. 265.

With these principles in mind, we direct your attention to your first question.

The statute, of course, requires you to make a proportionate payment in the event the appropriation is not sufficient to make the full payment of ten cents per acre. The law also requires that you honor all certifications which you had before you so long as you have sufficient money so to do. Therefore, if the money at hand is not sufficient to pay the certificates in your hands in full, you should proportion the payment over all the certificates in your hands.

Sec. 20.07 (2) appropriates on July 1, 1935, for the fiscal year 1935-36, $150,000 to carry out the provisions of ch. 77. Sec. 77.05 (1) requires you to pay on or before February 25, 1936, out of the appropriation for that year, the state's acreage share on each acre certified to you by the town treasurers, on which acreage the owner on or before
February 20 has paid his acreage share, and on each acre certified as having been previously returned delinquent as of February 20 and as having been subsequently paid.

I. Therefore the answer to your first question is that you should not pay these late claims at the rate of ten cents per acre in the order in which the certificates were received until the fund is exhausted, but that you should make an apportionment on each claim. It is true that payments should have been made earlier but it is also true that the town treasurers, in fairness to the department administering this law, should have had their claims in prior to February 25.

II. It is true that you may pay on any unpaid certifications which you have if the unpaid certifications include payments on lands which were delinquent as of February 20, 1935, and were subsequently paid. Payment on such unpaid certifications must be included in the 1936 apportionment.

III. If certifications on which payment is to be made erroneously list descriptions which your records reveal are not forest crop land, you should strike out such erroneous descriptions and make the apportionment on the basis of the rest of the certification. This, of course, emphasizes the duty on your department to make absolutely certain that your records include, and include correctly, the description of forest crop lands.

IV. If town claims are received after the apportionment has been made, which of course is presumed to be as of February 25, and no funds remain in your hands to make further payments, you will not be remiss in your duty by failing to pay such late claims.

The duty of this department is to construe the law so as to make it workable, i. e., to carry out the legislative intent and harmonize any conflicting provisions. It is evident that the statute is quite conflicting in its provisions and it is easy to see where a great deal of trouble may arise in the future under the present provisions of this law. We believe, however, that this opinion has given the only possible harmonious construction to the law as it presently stands.

JEF
Appropriations and Expenditures — Assessors' Plats — Municipal Corporations — Towns — Taxation — Neither town board nor annual town meeting has authority to order and pay for assessor's plat.

May 25, 1936.

Lyall T. Beggs,
District Attorney,
Madison, Wisconsin.

You state in your communication of May 14 that at the annual town meeting of the town of Burke, located in Dane county, it authorized the town board to employ a surveyor for the purpose of making assessor's plats within the township. The assessor's plat as finally completed did not give the dimensions of all of the various pieces of property nor are the properties described so that they could be located by a surveyor. You have written the following opinion to the register of deeds and you state that you would appreciate advice as to its correctness. Your opinion reads thus:

"You have asked me whether certain assessor's plats of the town of Burke which you have handed to me for my inspection comply with the provisions of sec. 70.27 of the Wisconsin statutes.

"I would first call your attention to the fact that sec. 70.27 applies only to lands situated within the limits of a city or village.

"I understand that the assessor's plat was authorized by a vote of the electors of the town at their annual town meeting.

"I can find nothing in the statutes which authorizes an assessor's plat of this nature. It is true that sec. 60.18 (12) gives the electors of the town at their annual town meeting the power to confer upon town boards having a population of not less than five hundred and having therein one or more unincorporated villages all powers relating to villages and conferred on village boards by ch. 61 of the statutes. Ch. 61 of the statutes, however, does not give the village board the power to provide for an assessor's plat. Prior to 1933 sec. 61.34 (10) gave the village board the power to provide for an assessor's plat. Sec. 61.34 was repealed by ch. 187 Laws 1933."
"In view of the fact that as the law now stands there is no power conferred by ch. 61 to a village board relative to assessor's plats, I am of the opinion that a town board or the annual town meeting would have no authority to order an assessor's plat. As to the manner in which the plat has been drafted, I am of the opinion that it is faulty for the reason that it would be impossible for a surveyor to locate the various lots by the plat.

"The statute evidently contemplates a plat of some certainty in that it states that for purposes of conveyance land may be described by reference to the plat."

We have carefully examined your opinion and the statutes involved and agree with your conclusions as to the power of the town board or the town meeting to provide for an assessor's plat.

JEF

Architects and Professional Engineers — Architect registered prior to 1931 who fails to renew his certificate within two years after July, 1931, must be considered new applicant.

Foreign architect who applied in 1932 for registration but failed to complete his application until 1936 must be considered applicant for registration in 1936.

Persons permitted to make plans and supervise erection of buildings used for private residences or farm purposes may use title "designer," "house designer," or "building designer."

May 28, 1936.

ARThUR PEABODY, Secretary,

Registration Board of Architects and Professional Engineers.

You submit two questions relating to sec. 101.31, subsec. (9), par. (g), Stats.

That section reads as follows:
"Certificates of registration shall expire on the last day of the month of July of the second year following their issuance or renewal and shall become invalid on that date unless renewed. It shall be the duty of the secretary of the board to notify every person registered under this section of the date of the expiration of his or her certificate and the amount of the fee that shall be required for its renewal for two years; such notice shall be mailed at least one month in advance of the date of the expiration of said certificate. Renewal may be effected at any time during the month of July by the payment of a fee of five dollars. The failure on the part of any registrant to renew his certificate every second year in the month of July as required above, shall not deprive such person of the right of renewal, but the fee to be paid for the renewal of a certificate after the month of July shall be increased ten per cent for each month or fraction of a month that payment of renewal is delayed; provided, however, that the maximum fee for delayed renewal shall not exceed twice the normal renewal fee. Architects registered prior to this section becoming effective shall be required to renew their registration on or before July thirty-first of the second year following the passage of this act."

The first question relates to an architect whose registration was valid up to 1931, when he allowed his registration to lapse. This architect attempts now to renew his registration by payment of the required fee. In 1931 certain amendments were made to the law. The last sentence quoted above applied to architects who were previously registered, giving them the right to renew within two years after the passage of the act. Since this architect did not renew within such time, his right to do so lapsed and he must be treated as a new applicant.

In the second case, an architect registered in Minnesota was accepted in Wisconsin for registration in 1932. He did not complete his registration due to failure to pay the entire required fee. This year he remitted the remainder of the fee and asked to be registered this year. Since he has not been registered in Wisconsin it would be proper for you to re-examine his application at this time for the purpose of granting a registration in 1936. In other words, this application should be considered as one made not for 1932 but for 1936 and judged on that basis.
You also ask whether under the registration law mechanics or builders permitted to make plans and supervise the erection of buildings or parts thereof used for private residences or farm purposes can use the title “designer,” “house designer,” or “building designer.”

The only statutory restriction on the use of titles in reference to architectural work is found in sec. 101.31 as set forth in subsec. (1) in the following language:

“* * * it shall be unlawful for any person * * * to use in connection with his name or otherwise assume, use or advertise any title or description tending to convey the impression that he is an architect or a professional engineer with the intent to practice the profession of architecture or professional engineering, unless such person has been duly registered or exempted under the provisions of this section.”

Subsec. (7) (f), sec. 101.31 exempts the following persons from the provisions of sec. 101.31:

“Nothing contained in this section shall prevent persons, mechanics or builders from making plans and specifications for, or supervising the erection, enlargement or alterations of any building or part thereof which is used for a private residence for a single family or a building for farm purposes or for any auxiliary building in connection with any such residential building or farm building. Nor shall anything contained in this section prevent persons, firms or corporations, mechanics or builders from making plans and specifications for, or supervising the erection, enlargement or alteration of any other class of building, the dimensions of which are not in excess of fifty thousand net usable cubic feet. Nor shall anything contained in this section prevent persons, firms or corporations, mechanics or builders, from making repairs or interior alterations to buildings, which do not affect health or safety.”

Persons coming within this exception might use the titles or descriptions mentioned.

JEF
Minors — Illegitimacy — Where settlement is proposed or pending in filiation proceedings it is not necessary to issue or serve summons or quasi criminal warrant in order to bring agreement into court for approval; parties may appear voluntarily for that purpose. In such cases proceedings are civil in nature and rules governing civil procedure apply.

May 29, 1936.

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

You inquire whether it is permissible in filiation proceedings for settlement agreements to be entered into and the parties submit to the jurisdiction of the court without any process being issued and you state that it has been the practice in your county to bring the matter into court regardless of whether or not the parties have entered into a written settlement agreement.

You also inquire as to whether the parties can be brought into court without the issuance and service of process.

You call our attention to the fact that it has been the practice in many counties to merely enter into an agreement, leaving out what seems to you to be the most important element, that is, the serving of summons by an officer or warrant by the sheriff thereby bringing the defendant into court, but that you refuse to follow such procedure.

It is elementary that filiation proceedings are statutory, there being no such procedure at common law. These statutes are generally considered to be in the general nature of a police regulation, the main object being to furnish maintenance for the child and indemnity to the public against liability for its support. In some jurisdictions the proceeding is regarded as penal and in such jurisdictions the statute must be strictly construed. However, in most jurisdictions, where the object of the proceeding is simply to compel the putative father to support his child, the proceeding
is uniformly held to be civil in its nature and Wisconsin is one of the latter. 3 R. C. L. 750; State v. Smith, 146 Wis. 111, 33 L. R. A. (n. s.) 463, and note.

In the case of Goyke v. State, 136 Wis. 557, it was said, p. 559:

"* * * It has characteristics of both, and as to such as are similar to those of criminal actions the rules and practice therein are applicable, and as to such as are the same or similar to those of civil actions the rules of practice therein are applicable. * * *

Applying this statement of the court to the proposition of a settlement entered into before the action is commenced, it is our opinion that the proceedings as to settlement are governed by the rules in civil controversies. State ex rel. Mahnke v. Kablitz, 217 Wis. 231; Francken v. The State, 190 Wis. 424; State ex rel. Reynolds v. Flynn, 180 Wis. 556.

The matter is fully discussed by the court in the cases cited and it is there stated that the liability sought to be enforced is primarily a liability to the mother and the remedy is given for her benefit; that the state is remotely interested for the reason that if the father does not furnish support he may be called upon to do so by the state; that the claim of the state is contingent and is purely a pecuniary one and has naught to do with the violation of any criminal statute.

In answer to your first inquiry, sec. 166.07, Stats., clearly contemplates that settlement agreements may be made out of court.

"* * * Such agreement may be entered into at any time prior to final judgment, either before or after issuance of process. * * *"

If the agreement is entered into before the issuance of process and is satisfactory to the mother we do not conceive it to be the law that any court proceeding is then necessary, except that it is proper under the provisions of sec. 166.07 of the statutes to obtain the approval of the court to the
terms of the settlement and make the proper record as therein provided for.

From all of the foregoing it is our opinion that in Wisconsin, especially where a defendant has offered a settlement, the proceedings have the characteristics of a civil proceeding and your conception that the service of a summons by an officer or warrant by the sheriff "is the most important element of the proceeding" does not seem to be warranted by the authorities.

There can be no question here as to the right of the state ultimately to enforce the obligation of the father for the support of the child. Whether or not such a settlement agreement is entered into his liability continues. This is provided for by sec. 166.12, Stats.

As to whether or not parties may be brought into court without issuance of process, that we think is sufficiently answered by the opinion in the Wisconsin cases above referred to holding that the proceedings are civil rather than criminal and by reference to sec. 262.17, Stats., which provides:

"A voluntary appearance of a defendant is equivalent to a personal service of the summons upon him."

As stated in the excerpt from the opinion in the case of Goyke v. State, supra, where a proceeding in court is contemplated merely for the purpose of approving a settlement agreement the rules of civil practice certainly apply and the above statute providing for a voluntary appearance, the parties coming into court merely to obtain the approval of the court to the settlement agreement, it is our opinion that the rules governing the civil actions apply and that the parties may come in voluntarily for the approval of such an agreement. Such a proceeding has all of the characteristics of a civil proceeding and none of a criminal proceeding.

JEF
May 29, 1936.

O. L. O'Boyle, Corporation Counsel,
Milwaukee, Wisconsin.

You call our attention to sec. 83.08, subsec. (2), Stats., granting authority to the county highway committee to acquire lands necessary for highway widening, relocation, or grade separation projects.

You state that it is sometimes difficult, especially in large grade separation projects, to accurately award damages before the project is commenced, although it is necessary to make some sort of an award in order to acquire title so that the contractor can go to work on the land in question.

Consequently you inquire if the county highway committee, once having made an initial award as contemplated by sec. 83.08 (2), may thereafter, at the completion of the project and on their own initiative, make an amended award increasing the damages to the landowner, if, in the committee's judgment, such additional damages over the amount of the initial award are justified.

Sec. 83.08 (2) provides in part:

"If for any reason the needed lands cannot be acquired by contract for a reasonable price, the county highway committee shall acquire the same either by condemnation proceedings in the manner provided by chapter 32 of the statutes or by section 83.07, or shall make and sign an award of damages to the landowner and, when approved by the state highway commission, shall file the same with the county clerk; and thereupon the amount so awarded shall be payable the same as when the land is acquired by contract; and the landowner may receive the same without prejudice to his right to claim and to contest for a greater sum. When such award shall have been made, approved and filed, the
highway authorities and their contractors and employes may take possession of the premises and proceed with the contemplated highway improvement and construction.

* * *

We do not understand that the county highway committee has any more power than the statute gives it. As was said in the case of *Breckheimer v. Dane County*, 209 Wis. 131, p. 134:

"* * * In so far as the statutes created the county highway committee, with certain authority in relation to awards for damages to landowners, and empowered the county judge to appraise the owner's damages, their respective jurisdiction is limited to such as is conferred within the four corners of the statutes. As their authority in these respects is of purely statutory creation, they are without jurisdiction or power to act except as authority is conferred upon them by statute. *Madison Rys. Co. v. Railroad Comm.* 184 Wis. 164, 166, 198 N. W. 278; *Union Indemnity Co. v. Railroad Comm.* 187 Wis. 528, 538, 205 N. W. 492; *State ex rel. Van Straten v. Milquet*, 180 Wis. 109, 113, 192 N. W. 392; *Chippewa Power Co. v. Railroad Comm.* 188 Wis. 246, 254, 205 N. W. 900. * * *"

Our attention is also called to the case of *Carisch v. County Highway Committee*, 216 Wis. 375, where the court held that on making its award to the land owner the county highway committee has no right to review such award.

We believe that the holdings of the *Breckheimer* and *Carisch* cases require us to answer your question in the negative.

Consequently you are advised that the county highway committee is not empowered to raise an award previously made, approved, and filed. At least we feel that is the safest advice to render in view of these two cases, although there is some question in our mind as to whether the court would say the same thing in a case of the sort we are considering here, as there are a number of good reasons, some of which you mention in your request, why a more liberal rule should apply here and the necessary power be read into the statute by implication.
We believe, however, that it should be possible to work out such situations with relatively little trouble and delay by a friendly appeal to the county judge under sec. 83.08 (2).

Under 83.07 (3) the county judge may inform himself in respect to the matter in such manner as he may in his discretion determine. The chances are that if the parties were agreed on a revised figure, very little would be required by the judge in the way of testimony or proof, and the whole matter could be disposed of amicably. The judge's award would then eliminate any question of the county highway committee having exceeded its powers.

JEF
Intoxicating Liquors — Sec. 176.30, subsec. (3), Stats., which provides that liquor shall not be sold "within one mile of any of the state hospitals for the insane" means that liquor shall not be sold within one mile of any insane hospital building in which any inmate is housed.

June 2, 1936.

LYALL T. BEGGS,
District Attorney,
Madison, Wisconsin.

You state that sec. 176.30, subsec. (3), Stats., prohibits the sale of liquor "within one mile of any of the state hospitals for the insane," and refer to XXIII Op. Atty. Gen. 191, 207, which interprets this language to mean "within one mile of the main hospital building rather than one mile from the hospital property limits." You state that you are inclined to believe that the mile limit should be measured from the hospital property line and ask for a more detailed opinion on this question.

Sec. 176.30 (3) provides in part:

"No person shall sell, or in any way deal or traffic in, or for the purpose of evading law, give away any such liquors in any quantity whatsoever within one mile of any of the state hospitals for the insane, * * *"

The above provision as enacted by ch. 13, Laws Special Session 1933, was almost identical with sec. 1557, 3, Stats. 1917. The drafting records of the legislative reference library indicate that said provision was taken from the statutes as they existed prior to the prohibition era. Prior to 1917 this provision had been part of the laws of this state for many years. Other sections of the then existing laws provided that licenses should not be issued for the sale of liquor within given distances from schools, veterans' homes, parks, etc. In some instances the law specifically required that distances should be measured "from the grounds" of the institution mentioned: (sec. 1548, 5, "* * * within
a distance of three hundred feet of any public school grounds, said distance to be measured from the boundaries of the school grounds), (sec. 1548, 7, (c), “within three miles of the grounds of any military reservation”). Another statute required that the distance involved should be measured from the main building of the university: (sec. 1548, 7, (a), “within a distance of three thousand two hundred feet of the main building of any state university”). The statute in question did not specify the manner in which the one mile limit should be measured; and we have found no decision or opinion interpreting the statute.

The above brief review of statutory provision as existing in 1917 indicates that the legislature failed to specify the manner in which the one mile limit in question should be measured, either because of an oversight or because it was felt that the term “state hospital for the insane” has a definite meaning. In either event the meaning of the statute remains to be determined by construction.

The statute in question is a criminal statute; any person violating any of its provisions is subject to a fine of not less than one hundred dollars nor more than two hundred fifty dollars and to imprisonment in the county jail for a term not exceeding six months. As a general rule a penal statute shall be strictly construed (Minneapolis, Threshing Machine Co. v. Haug, 136 Wis. 350), and if doubt exists as to its meaning the interpretation least drastic to the person sought to be prosecuted should be adopted, provided that such meaning does not defeat the obvious intention of the legislature (Miller v. Chi. & N. W. Ry. Co., 133 Wis. 183). On the other hand the purpose of the statute in question was to protect the inmates of state hospitals for the insane and the statute should be liberally construed to effect this purpose. In re Brady, 106 N. Y. S. 921; In re Place, 50 N. Y. S. 640, 645; In re Herring, 117 N. Y. S. 747. To hold that the one mile limit in question should be measured from the main hospital grounds or from any of the hospital grounds, which might include a noncontiguous farm used in connection with the hospital, would do violence to the fundamental rules governing construction of penal criminal
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Statutes. To hold that the one mile limit should be measured from the main building of the hospital would lose sight of the beneficent purpose of the law. We believe the law should be interpreted to mean that no person shall traffic in liquors within one mile of any insane hospital building in which any inmate is housed. We believe such construction will stand the test of strict construction and will, at the same time, give effect to the intent of the law, insofar as such intent is ascertained. Our opinion in XXIII Op. Atty. Gen. 191, 207, is modified as herein indicated.

JEF

Public Officers — County Board — Malfeasance — Purchasing Agent — Member of county board who has been appointed purchasing agent for county cannot act as such agent and at same time as agent of book or stationery company in making purchases for county from his principal.

June 2, 1936.

Thomas E. McDougal,
District Attorney,
Antigo, Wisconsin.

You have submitted the following statement of facts:
A is a member of the county board and has been appointed purchasing agent for the board. He also is the authorized agent of a book and stationery company and in such capacity takes orders from the different county offices and places them with this company. You state you have no knowledge, direct or indirect, whether or not he receives a commission as such agent.

You inquire whether this man can act as purchasing agent for the county and also act in the capacity of general salesman for the stationery company in making sales to the county. In other words, is this incompatible with his office as a member of the county board?
The answer is that he cannot act in both capacities in view of sec. 348.28, Stats. The two positions are incompatible.

You also inquire whether or not this man could still sell to the county as an agent for this stationery company while being a member of the county board.

This must be answered in the negative. The appointment as county agent is made under sec. 59.07, subsec. (7), Stats. See: XXIII Op. Atty. Gen. 454. It is well for you to read carefully the case of State v. Bennett, 213 Wis. 456, and the following opinions: XXIV Op. Atty. Gen. 210, 260 and 312. See also sec. 348.28, Stats.

JEF

Public Health — Pharmacy — Public Officers — Board of Pharmacy — Under sec. 151.01, subsec. (1), Stats., only practicing pharmacist is eligible to membership on state board of pharmacy; to practice pharmacy he must be registered.

Member of such board whose term has expired may continue to act until his successor is appointed and has qualified.

June 4, 1936.

BOARD OF PHARMACY,
Milwaukee, Wisconsin.

Attention Henry G. Ruenzel, Secretary.

You inquire whether a person who is not a registered pharmacist is eligible to serve on the state board of pharmacy, and whether a member of the board who has been elected its president may continue to serve in such capacity
after his term has expired in the event that no successor to
his place on the board has been named.

It is our opinion that only a registered pharmacist is eli-
gible for membership on the state board of pharmacy, but
that a member of the board who is its president can con-
tinue to act in such capacity until his successor is appointed.

Sec. 151.01, subsec. (1), Stats., provides:

"The state board of pharmacy consists of five resident
pharmacists, at the time of appointment actually engaged in
practice, appointed by the governor, one each year for a
term of five years."

To be actually engaged in practice a pharmacist must be
registered by virtue of sec. 151.04, subsec. (2), Stats., which
provides:

"No person shall retail, compound or dispense drugs,
medicines or poisons, except paris green, in packages la-
beled '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 hun-
dred, only a registered assistant pharmacist is required."

Both of the sections above quoted are clear and express
and permit of no exceptions.

As to an officer holding over, the general rule is expressed
in 22 R. C. L. 598, as follows:

"Where an officer under color of right continues in the
exercise of the duties of the office after his term of office
has expired, or after his authority to act has ceased, he is an
officer de facto, although he has no right to hold the office
as against the one rightfully chosen his successor. * * *"

In State ex rel. Pluntz v. Johnson, 176 Wis. 107, the court
said, p. 109:
The general trend of judicial decisions in this country is to the effect that where the written law contains no provision, either express or implied, to the contrary, an officer is entitled to hold his office until his successor is elected and qualified.

The same thought is expressed in 46 C. J. 968. Consequently, if no successor to your president has been appointed to membership on the board, there is no reason why he cannot continue to serve in that capacity, as we understand that he was elected president of the board at the annual meeting on April 24, 1936, for the ensuing year.

JEF

Public Officers — Industrial Commission — Electrical Inspectors — Statutes do not authorize industrial commission to examine and certify qualified electrical inspectors.

June 4, 1936.

INDUSTRIAL COMMISSION.

You refer to our opinion to your department of May 11, 1936,* holding that counties do not have power to hire electrical inspectors, and you state that it is physically impossible for the commission's electrical deputy to make inspections of private dwelling houses. Hence sec. 167.16 is not entirely effective, and many persons residing in rural communities are victimized by persons holding themselves out as electrical inspectors.

Under the circumstances you inquire if it would be possible for the industrial commission, upon a showing to it of competency by examinations or otherwise, to certify as to the qualifications of certain persons as electrical inspectors.

It is our opinion that the statutes do not authorize any

*Page 316 of this volume.
such certification. Consequently, such certification would be without legal effect. Furthermore, in so far as the industrial commission would be put to expense in examining and certifying inspectors, the question of illegal expenditure of public funds might also be raised.

The powers of the industrial commission are derived exclusively from the statutes. *Kelley v. Tomahawk Motor Co.*, 206 Wis. 568. Therefore we cannot advise the commission that it may properly engage in any activity or function not delegated to it by statute, expressly or by implication.

If the present statutes do not make adequate provision for rural electrical inspections, we believe such shortcoming should be called to the attention of the legislature for correction. In the meantime the statutes as they now read will have to suffice.

JEF

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*Elections — Intoxicating Liquors* — Local option election was probably invalid where notice thereof under sec. 176.38, Stats., was posted only six days in advance of election and it was commonly believed that election would be invalid, many people not voting for that reason, chairman announcing election to be invalid and votes not having been recorded by clerk.

June 5, 1936.

ALOYSIUS W. GALVIN,

*District Attorney,*

Menomine, Wisconsin.

You state that a petition by the requisite number of voters was filed with the town clerk of a certain town in your county to submit the question of local option on the sale of intoxicating liquor and fermented malt beverages. The town clerk posted the notice only six days instead of ten
days, as required by statute. The questions were submitted on the same ballot and the town voted dry on both questions.

After the ballots were counted the chairman of the town announced that the election was invalid and consequently the clerk did not record the votes, although the ballots were not destroyed.

Prior to the election one liquor and beer license had been issued. The holder of this license refused to discontinue business, claiming that the election was invalid because of defective notice and because of the failure to record the vote.

You inquire whether the license holder can be prosecuted for selling liquor and beer after the town voted dry. You also ask whether his license is effective until July 1, and whether he can be prosecuted after July 1 if the town board should grant him another license for the sale of liquor and beer.

We might add that in addition to the facts set forth in your letter we have been informed that it was widely rumored in the town prior to election day that the proposed election would be invalid because of insufficient notice and that many voters refrained from voting for that reason. While it is almost impossible to verify this fact, we believe this situation to be of importance in the light of what we will have to say in answer to your questions. The readiness of the town chairman to announce an opinion as to the invalidity of the election, and the fact that the clerk did not record the votes, lend credence to the report that the voters and election officials commonly thought the election to be invalid. How far this affected actual voting is difficult to say, but at least this situation must be considered in answering your questions.

It is our opinion that the validity of the election in question is sufficiently doubtful to render inadvisable any prosecution for illegal sale of liquor or beer on the theory that the town voted dry. Also it would follow that if the election was invalid a license expiring July 1 would be effective until that time, and a new license could be granted to be effective after that date.

The object of elections is to ascertain the will of the people. Where the statute requires ten days' notice of an elec-
tion and only six days’ notice is given, resulting in widespread rumors prior to the election that the same will be invalid, thus causing many voters to refrain from voting, it can hardly be said that the will of the people has been ascertained with any degree of certainty.

We call attention to the case of Janesville Water Co. v. Janesville, 156 Wis. 655, which held that where ten days’ notice of an election was required and the first notice was published on a Sunday nine days before the election, the notice was insufficient, and such insufficiency invalidated the election, since it did not satisfactorily appear that the voters had adequate time in which to consider and discuss the subject voted upon and, the vote being close, the two days additional, which a legal notice would have given for consideration by the people, might have changed the result.

We do not understand that the Janesville case has ever been expressly overruled, although we are not unmindful of the language of the court in the case of State ex rel. Oaks v. Brown, 211 Wis. 571, where the Janesville case was distinguished.

In the Oaks case, the city clerk failed to give correct notice of a special election as required by sec. 10.36, subsec. (3), Stats. However, the statute contained this express saving clause that “the failure to give such notice shall not invalidate such election.” Furthermore, that election came within the purview of sec. 5.01, subsec. (6), Stats., which provides:

“This title shall be so 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.”

The court pointed out, p. 577, that the words “This title” referred to elections under chs. 5 to 12, inclusive, of the statutes, and it was clearly indicated that were it not for the saving clause in sec. 10.36 (3), and the rule as to construction contained in sec. 5.01 (6), both quoted above, the court would probably have held the election invalid.

Neither of these saving factors appears in the present situation, since local option elections are not held under chs.
5 to 12, inclusive, but are held pursuant to sec. 176.38, Stats. Subsec. (2) thereof provides:

"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."

Note also that nothing is said as to defective notices not invalidating the election.

Furthermore, in the Oaks case there was a spirited campaign going on almost continuously from October 31 to April 4 with reference to the merits of the proposition voted upon. As a result of the heated campaign, the vote cast was the largest ever cast at any election held in the city of Oshkosh up to that time. Consequently no one was apparently misled by the informality of the election notice, and the resulting vote undoubtedly expressed the will of the people correctly, which we believe is the underlying and persuasive reason for the decision in that case.

The court went a long way in the Oaks case, and we believe its holding should not be extended beyond the statutes and facts involved there. While the result in that case was undoubtedly sound, we do not feel that the so-called election which we are discussing here can properly be considered as coming within the doctrine of that case.

JEF
Public Officers — County Board Committee — County Highway Committee — Under sec. 82.05, subsec. (1), Stats., county highway committee may be elected at May meeting of county board.

County highway committee holds office for one year.

Newly elected county highway committee cannot take over duties of old committee until old committee's one year term expires.

All other committees of newly elected county board should be appointed by chairman of board prior to first day of June under sec. 59.06 (1).

June 5, 1936.

SIDNEY J. HANSON,

District Attorney,
Richland Center, Wisconsin.

You ask the following questions:
(1) Can a county highway committee be elected at the May meeting of the county board?

(2) Do the members of the county highway committee, elected at the November annual meeting in the fall of 1935, hold their positions until the annual November meeting of 1936?

(3) Should all other committees of the county board be appointed at the May meeting or do the members of the various committees hold over until the annual meeting in November, 1936?

In XIX Op. Atty. Gen. 302, this office pointed out that sec. 82.05, Stats., providing for the county highway committee requires that the committee shall be composed of not less than three nor more than five persons. On the other hand, sec. 59.06 (1), Stats., relating to the appointment of other committees of the county board, provides for the appointment of such committees from among the members of the county board elect. In the opinion mentioned it was held that it was not necessary that the membership of the county highway committee be composed of members of the county board and that therefore the members of that committee
continued to hold their membership on the committee even after they were no longer members of the county board. The contrary rule applies to committees elected under and in pursuance to sec. 59.06 (1), Stats.

Sec. 82.05 (1) provides that each county board shall elect a county highway committee to serve for one year or until successor members are elected. The committee is to begin service as soon as elected or on the first day of January following their election, as may be designated by the board. Sec. 59.04 (1) (a) provides for the so-called annual meeting in November. Sec. 59.04 (1) (b) provides for a meeting every May and also provides that the board acting at such meeting may transact any and all business permitted by law to be transacted at the annual meeting.

Therefore, a county highway committee could be elected at the May meeting of the board to take office upon election or on the first day of the succeeding January. This power would be limited only by the requirement of sec. 82.05 (1), wherein it is provided that such committee shall serve for one year. The life of the present committee could not, therefore, be terminated before the expiration of the year for which that committee was elected.

In answer to your third question, I am of the opinion that all other committees of the county board automatically lose their power to act as a committee of the board upon the expiration of the terms of the county board members. As stated in XIX Op. Atty. Gen. 302, 303:

"Certainly the old committee members, including the chairman of the old board, could not act after their official terms expired, for they would not then be members of the county board and of course would not be members of any committee."

Accordingly, all other committees designated by the county board to be appointed, should be appointed by the chairman thereof prior to the first day of June from the members of the county board elect. Sec. 59.06 (1). Such committees do not hold over until the annual meeting in No-

JEF

Public Health — Barbers — One who has not been actively engaged in barbering for period of one year in this state immediately preceding date of application for barber shop manager’s license is ineligible for such license by virtue of sec. 158.12, subsec. (2), par. (a), Stats.

June 8, 1936.

BOARD OF HEALTH.

You inquire whether a barber shop manager’s license may be granted to a person who has not been actively engaged in barbering full time for a period of one year in this state immediately preceding the date of application for a shop manager’s license.

The answer is, No.

Sec. 158.12, subsec. (2), par. (a), Stats., provides that a barber shop manager’s license may be granted only to one

“Who holds an unexpired master barber’s license, and who has been actively engaged in barbering for a period of one year in this state immediately preceding the date of application for a shop manager’s license.”

This statute is clear and unambiguous and should not be enlarged upon by administrative interpretation. If the words of a statute express clearly its sense and intent there is no room for construction. Gilbert v. Dutruit, 91 Wis. 661; Wisconsin Public Service Co. v. Railroad Commission, 185 Wis. 536.

JEF
Corporations — Foreign Corporations — Railroads —
Amendments to charter of railroad corporation need not be
filed in pursuance of ch. 226, Stats.
In absence of showing damage to state question of possi-
ble grounds for forfeiture of railroad charter thirty years
ago should not now be raised by secretary of state.

June 8, 1936.

THEODORE DAMMANN,
Secretary of State.

You state that the Great Northern Railway Company has
recently submitted a copy of an amendment to its articles
of incorporation for filing. At this time you raise several
questions in reference to that filing. These questions
summed up are:

(1) Under the laws of 1905, was the company required
to file annual reports and does its failure to file a report in
1906 authorize you, thirty years later, to declare a for-
feiture of the license to do business in this state?

Any possible right to declare a forfeiture at this time un-
der the above mentioned circumstances should be and is
considered to be barred by the great lapse of time, espe-
cially in the absence of any showing of detriment to the
state.

(2) Is the Great Northern Railway Company subject to
the provisions of sec. 226.02, Stats.?
Since sec. 226.01 exempts railroad corporations from the
provisions of ch. 226, sec. 226.02 obviously does not apply
to this company.

It may be pointed out that the attorneys for the Great
Northern Railway Company are offering this amendment in
order to keep up the records of the secretary of state, and
in the event that you do not care to receive the amendment
for filing, they are willing to drop the matter entirely. In
such circumstances, we feel that the questions become moot.
There seems to be no real dispute between your department
and the railroad company. In fact you are both agreed that your department is not required to file the amendments in question.

In conclusion may we say we see no good reason why such papers should not be accepted for filing, although we expressly refrain from going into any detailed discussion of the legal effects, if any, of such filing, since that is not a question of concern for your office? We are concerned here merely with the duties of the secretary of state in connection with the filing of corporate records. Since this railway company is not insisting that you file these papers, there is no question to be answered.

JEF

Intoxicating Liquors — Duty of determining whether applicant for “Class A” or “Class B” intoxicating liquor license is acting as agent for or is in employ of another rests primarily upon local licensing authorities.

Under sec. 176.05, subsec. (13), Stats., state treasurer is limited to determination that character, record and reputation of proposed agent of applicant for liquor license is satisfactory.

June 8, 1936.

ROBERT K. HENRY,
State Treasurer.

You quote the following portion of sec. 176.05 subsec. (3), Stats.:

“Not more than two retail ‘Class A’ or ‘Class B’ licenses shall be issued in the state to any one corporation or person, except in case of hotels or clubs, and in each application for a retail ‘Class A’ or ‘Class B’ license the applicant shall state that he has not made application for more than one
other retail 'Class A' or 'Class B' license for any other location in the state. No such license shall be issued to any person acting as agent for or in the employ of another.

* * *

You then state:

"The particular facts I call to your attention are as follows. The X Drug Company is a Wisconsin corporation. It operates a large number of retail drug stores throughout the state of Wisconsin. Our statute provides that no more than two licenses for the sale of intoxicating liquor shall be issued to the same corporation. The X Company has organized two other corporations for the ostensible purpose of obtaining additional licenses for its stores in other sections of the state. For instance, The X Wisconsin Company, as we are informed, obtained licenses for stores in ______ and ______, and another corporation, The X Company, Inc., obtained licenses for stores in ______ —— and ______. Its advertising in local and state newspapers throughout Wisconsin is uniformly conducted under the name 'X Drug Stores.'"

"Under authority of sec. 176.05 (13) all corporations applying for a license to sell intoxicating liquor must appoint an agent who has vested in him by properly authorized and executed written delegation, full authority and control of the premises described in the license. Such appointment is subject to my approval.

"The question has been raised as to whether or not I am authorized to refuse approval of the appointment of an agent for a corporation such as the X Drug Company and which operates as that company is alleged to operate, upon the theory that it has formed the other corporations referred to as a subterfuge to avoid the restrictions found in the sec. 176.05 (3).

"The further question arises, of course, as to whether or not I am, in a similar manner, authorized to refuse approval of the appointment of agents designated by corporations such as the 'X Wisconsin Company' and the 'X Company, Inc.' on the theory that they have been formed as a subterfuge to avoid the restrictions referred to."

To these questions a categorical answer cannot be given. Sec. 176.05 (13) provides as follows:

"No corporation organized under the laws of this state or of any other state or foreign country, shall be given a
license to sell in any manner any intoxicating liquor unless such corporation shall have first appointed, in such manner as the state treasurer shall by regulation prescribe, as agent, a citizen of the United States and shall have vested in him by properly authorized and executed written delegation full authority and control of the premises, described in the license of such corporation, and of the conduct of all business therein relative to intoxicating liquors as the licensee itself could in any way have and exercise if it were a natural person resident in the state, nor unless such agent is, with respect to his character, record, and reputation, satisfactory to the state treasurer."

It is to be noted here that your approval of the agent of the corporation making application to the local licensing authorities for either a "Class A" or "Class B" license is limited to approval with respect to the character, record and reputation of the agent. The statute does not directly grant authority to you to approve or disapprove the character, record or reputation of the corporation itself. The character, record or reputation of a corporation cannot be imputed to the agent. That portion of sec. 176.05 (3) which provides that no "Class A" or "Class B" license shall be issued to any person acting as agent for or in the employ of another would ordinarily be construed as a prohibition upon the governing body of the city, town or village which is the agency actually issuing the license and upon whom would devolve a duty to determine whether the applicant for a license was acting as agent for or was in the employ of another. If, as a matter of law, the word "person" as used in the last sentence of that portion of sec. 176.05 (3) quoted above were held to include a corporation and if it were further determined by the local licensing body that the applicant for license was acting as agent for or was in the employ of another, such local licensing body should refuse to grant such license. It is not before us in this opinion and we do not pass upon the question of whether the word "person" as used in this sentence includes a corporation. Reference may be had, however, to the case of State ex rel. Torres v. Krawczak, 217 Wis. 593, 600, where it was stated with reference to the fermented malt beverage law:
It is a matter of common knowledge that the purpose of limiting the number of Class ‘B’ beer licenses to two was to prevent a brewer from establishing a chain of licensed places as was commonly done in pre-prohibition days, the management of which the brewer controlled and in which sales of beer were limited to the brewer’s own product. This purpose is accomplished by the provision of par. (c) 2 of sec. 66.05 (10) for operation of a Class ‘B’ beer license on the brewery premises; by the provision of said par. (c) 1 that no brewer ‘shall supply, furnish, lease, give, pay for, or take any chattel mortgage on any furniture, fixtures, fittings or equipment used in or about’ any Class ‘B’ licensed place, except one on the brewery premises; and by the provision of said par. (g) 1 limiting the number of licenses issued to any person to two, and providing that no license shall be issued to any person as ‘agent’ except in the case of hotels, restaurants, and bona fide clubs and societies which have been in existence for six months prior to date of filing application for such license. Unless the number of Class ‘B’ licenses be limited to two, brewers might evade this purpose by establishing a chain of restaurants, and other corporations and individuals for that matter might evade it by establishing such a chain.”

The statute prohibiting the issuance of a “Class A” or “Class B” liquor license to an agent or employee of another is identical in language to the statute prohibiting the issuance of a fermented malt beverage license to an agent or employee of another.

We do not have before us the facts as to the interrelationship between the various corporations mentioned in your request as to management and control, ownership, stockholders, disposition of profits, etc. These matters together with the statement of facts as to method of advertising might all be considered in determining the question of fact as to whether the auxiliary corporations were acting as agents, assuming that a corporation could act as an agent. As stated previously, however, this is a determination which the statute contemplates should ordinarily be made by the local body which issues the “Class A” or “Class B” license.

As hereinbefore mentioned, also under sec. 176.05 (13) the state treasurer is limited to approving the character, record and reputation of the agent and does not have authority to approve the character, record and reputation of
the corporation itself. Moreover, it would appear that under sec. 176.05 (13) the approval of the agent is a condition precedent to the issuance of the license. It does not definitely appear from this section whether the state treasurer is actually aware of the name of the corporation for which the agent proposes to act. If the state treasurer were aware that the agent whom he has asked to approve proposed to act for a corporation which was organized as the X Drug Company or its auxiliaries are organized and if the state treasurer further determined upon investigation that in his opinion such auxiliary corporations were acting as agent for or were in the employ of another, namely the X Drug Company itself, it may be that the state treasurer could refuse to approve the agent on the ground that the agent's character and reputation were not satisfactory because the agent was in effect conspiring to accomplish a violation of the state liquor laws. We are not at all sure however, that the courts would sustain such refusal.

JEF

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**Intoxicating Liquors** — In absence of referendum election city council may by ordinance determine that intoxicating liquor licenses issued by city shall be of "Class B" only.

June 8, 1936.

**JOHN P. MCEVOY,**  
*District Attorney,*  
Kenosha, Wisconsin.

It appears that the city of A has granted "Class A" and "Class B" retail liquor licenses. The city council of A now proposes to eliminate all "Class A" licenses as a matter of policy and restrict the retailing of intoxicating liquors entirely to taverns operating under a "Class B" license. You
inquire whether the city council has this power. You do not state whether a referendum on the question of issuing licenses has been held and this opinion is written upon the assumption that there has been no referendum.

It is our opinion that the city council has authority to restrict the retailing of intoxicating liquors entirely to taverns operating under a "Class B" license. This, of course, should be done, however, by the passage of an ordinance or ordinances which provide that no "Class A" retail licenses shall be issued, because if an ordinance authorizing the issuance of "Class A" licenses were in effect it would then be necessary to pass upon the qualifications of the individual applicant for a "Class A" license as well as upon the premises where the applicant proposed to operate.

Under sec. 176.05, subsec. (1), Stats., each town board, village board and common council has authority, but is not compelled, to grant licenses for the sale of intoxicating liquors. That said statute is permissive rather than compulsory was also held by our supreme court in State ex rel. Higgins v. City of Racine, et al., 264 N. W. 490, 491, where it was said:

"Our statute, section 176.05 (1), permits, but does not require officials situated as are respondents [representative officers of city of Racine] to grant, in any and all cases, licenses for the sale of intoxicating liquors. * * *"

It is the plan of the present state liquor law that there shall be local option as to the sale or nonsale of intoxicating liquors. In the absence of a referendum determination of this question the determination rests with the local governing body. The statutes do not require that where the local governing body decides to issue any intoxicating liquor licenses it must issue both "Class A" and "Class B" licenses. To compel a city to issue either both or none would in a sense deprive it of some of the option which we believe the legislature intended the governing body to have. Sec. 176.43, Stats., authorizes municipalities by ordinances to prescribe additional regulations in or upon the sale of intoxicating liquor not in conflict with the provisions of ch. 176. We do not believe that a restriction by the governing body limiting
sales to such sales as are authorized under a "Class B" license is in any way in conflict with the provisions of ch. 176.

Sec. 62.11 (5), moreover, provides as follows:

"Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language."

In *Hack v. Mineral Point*, 203 Wis. 215, it was held, p. 219:

"* * * A city operating under the general charter, finding no limitations in express language, has under the provisions of this chapter [62] all the powers that the legislature could by any possibility confer upon it. * * *"

It is our opinion that if the city council determines that it is for the best interests of the city to grant "Class B" retail liquor licenses only it may do so.

JEF
Constitutional Law — School Districts — Provision in sec. 40.775, subsec. (1), Stats., which reads “no questions of any nature or form shall be asked applicants for teaching positions in the public schools relative to their race, nationality either by public school officials or placement bureaus,” does not violate any constitutional provisions.

June 9, 1936.

JAMES L. McGINNIS,
District Attorney,
Amery, Wisconsin.

You refer to sec. 40.775, subsec. (2), Stats. containing the provision which probably places the enforcement of this section under the duties of the district attorney.

The last half of subsec. (1) of this section reads as follows:

“* * * no questions of any nature or form shall be asked applicants for teaching positions in the public schools relative to their race, nationality or political or religious affiliations, either by public school officials or employes or by teachers’ agencies and placement bureaus.”

You inquire whether this statute is a violation of the constitutional provisions in the federal constitution and the constitution of the state of Wisconsin, guaranteeing to the citizens of this state and nation the right of free speech.

This statute cannot be a violation of the federal constitution prohibiting congress from abridging the freedom of speech or of the press as contained in art. I of the amendments to the United States constitution, as it is well settled that the first ten amendments to the United States constitution do not apply to the state governments but only to the federal government. *Kentucky F. Corp. v. Paramount A. E. Corp., 171 Wis. 586.*

Our court in the case of *State ex rel. Schmidt v. Gehrz, 178 Wis. 130, 137-138,* said:
"* * * The right of free speech is held dear by every American citizen, and it should be suppressed with great caution, and then only to the extent that seems absolutely necessary to prevent an interference with the course of justice. Likewise, as was said by the federal supreme court in Gompers v. Bucks S. & R. Co. 221 U. S. 418, 450, 31 Sup. Ct. 492, the power to punish for contempt 'is sparingly to be used.' While courts are necessarily clothed with broad powers in order to enable them to properly discharge their function, such powers should be exercised with wisdom and discrimination and only for the accomplishment of the purposes which call them into existence. They should not be used arbitrarily, capriciously, or oppressively. * * *"

The court declined to interfere in that case.

We have not found any ruling by any court which would justify us in holding that this statute is in violation of either the federal or the state constitution.

JEF

Criminal Law — Sentences — Under sec. 353.25, Stats., court may commit defendant to county jail for not to exceed six months, until fine imposed is paid and discharged, but he cannot commit him to state prison for such purpose.

June 11, 1936.

CLARENCE J. DORschel,

District Attorney,

Green Bay, Wisconsin.

You direct our attention to sec. 176.051, Stats., which provides:

"Any person who shall sell, manufacture or rectify any intoxicating liquor within the state without first obtaining a permit from the state treasurer as required by this chapter, shall be guilty of a felony and shall upon conviction be
punished by a fine of not less than one thousand dollars nor more than five thousand dollars or by imprisonment in the state prison for not less than one year nor more than ten years or by both such fine and imprisonment. A second or subsequent conviction shall be punished by both such fine and imprisonment. Any person aiding or abetting in such illicit sale, manufacture or rectifying of intoxicating liquor shall be guilty in the same degree as the principal offender.”

You also quote sec. 353.25, Stats., as follows:

“When a fine is imposed as the whole or any part of the punishment for any offense by any law the court shall also sentence the defendant to pay the costs of the prosecution and the costs incurred by the county at request of the defendant, and to be committed to the county jail until the fine and costs are paid or discharged; but the court shall limit the time of such imprisonment in each case, in addition to any other imprisonment, in its discretion, in no case, however, to exceed six months; and the court may also issue an execution against the property of the defendant for said fine and costs. In all criminal cases when the costs cannot be collected from the defendant on his or her conviction or when the defendant shall be acquitted such costs shall be paid from the county treasury.”

You state that considering the above quoted statutes, it is your opinion that sentence for violation of sec. 176.051 directing defendant to pay a fine of one thousand dollars and the costs of prosecution, and, in default, to serve up to six months in the county jail, is proper, and you ask to be advised as to whether your conclusion is correct.

This question must be answered in the affirmative. We direct your attention, however, to the opinion of this department in XIV Op. Atty. Gen. 384, where it is held that a court has no power to add to the maximum of an indeterminate sentence imprisonment in state prison for failure to pay the fine and costs. Under sec. 353.25, Stats., the court may commit the defendant to the county jail not to exceed six months, until the fine and costs are paid or discharged, but he cannot add to the sentence in state prison for such purpose.

JEF
Appropriations and Expenditures — Counties — County Board — County Forest Reserves — Parks — County has only such powers as are given by statute and cannot purchase lands for purpose of avoiding cost of providing bridges, highways, etc., to such lands.

County may purchase land for park purposes under sec. 27.065, Stats., and may borrow money therefor under sec. 67.04, subsec. (1), par. (h), subject to limitations of sec. 67.03.

It may also acquire lands for forest reserves under sec. 59.98.

June 12, 1936.

Aloysius W. Galvin,
District Attorney,
Menomonie, Wisconsin.

You state that there are two islands located in the Chippewa river in Dunn county, all of the land on these islands being privately owned. The larger island has about nine sets of farm buildings on it. Because of the high cost of maintaining bridges or ferry service to these islands, the following questions have been raised.

"1. Has the Dunn county board of supervisors the legal power to levy a tax on the taxpayers of Dunn county for the purpose of purchasing said islands solely for the purpose of avoiding the necessity of maintaining bridges and ferries to the islands?"

The answer is, No.

The county board has only such powers as are expressly given by statute, and such additional powers as are necessarily implied from the powers expressly given. Fredericks v. Douglas County, et al., 96 Wis. 411; Spaulding v. Wood County, 218 Wis. 224. See, also, XXI Op. Atty. Gen. 531; XXIII Op. Atty. Gen. 86 and 832, and opinions therein cited.
It is clear that the county board or other municipality may issue bonds or borrow money only for purposes authorized by statute. Op. Atty. Gen. XI 489 and 712, XVII 23, XX 121 and 437, XXII 385.

We do not find that the statutes either expressly or by implication empower the county board to levy a tax for the purpose of purchasing lands so as to avoid the expense of maintaining bridges or highways to such lands.

"2. If the county has such power, can it levy the tax for the same against all the property of Dunn county, including property in cities and villages that maintain their own bridges?"

The answer to the first question makes unnecessary any answer to this question.

"3. Has the county board any power to levy back against the towns in which the islands lie, any part of the cost of such islands under the above circumstances?"

This question is also answered in the answer to the first question.

"4. Has the county board authority to borrow money to consummate such a purchase, and if so, under what provisions of the statutes?"

This question is likewise answered above.

"5. The islands in question are adaptable for game refuge purposes. Has the county board of Dunn county authority to condemn and purchase said islands as game refuge parks?

The county board is without direct statutory power to condemn and purchase lands for game refuge purposes. However, it may acquire land by tax deed or otherwise for the purpose of establishing a county forest reserve under sec. 59.98, Stats. Subsec. (2), par. (e), thereof authorizes the establishment of a wild life refuge on such reserve. Also the county board has authority under sec. 27.065 to provide for a county system of parks and can borrow money to acquire lands for such purpose under sec. 67.04, subsec. (1), par. (h). It might be that the circumstances are such that your problem could be satisfactorily solved under the provisions of secs. 27.065 or 59.98.
"6. If so, can it borrow money for that purpose, and what limit is there on the amount of money that may be raised for that purpose in any one year?"

We have already indicated that money can be borrowed for park purposes by virtue of sec. 67.04 (1) (h), and the limitations as to amounts applicable in such cases are specified in sec. 67.03, Stats.

JEF

Courts — Estates — Social Security Law — Old-age Assistance — Three per cent interest upon old-age assistance paid to beneficiary which must be deducted from beneficiary’s estate under sec. 49.25, Stats., shall be computed from date of payment of assistance to date of repayment thereof from beneficiary’s estate.

June 12, 1936.

PENSION DEPARTMENT.

You state that sec. 49.25, Stats., provides that the total amount of old-age assistance, together with simple interest at three per cent per annum, which has been paid to any person, shall be allowed and deducted from the estate of such person by the court administering such estate. You ask us to advise you as to the time that the interest on assistance payments begins and ceases to accrue.

Sec. 49.25 provides in part:

"On the death of a person who has been assisted under sections 49.21 to 49.39, or of the survivor of a married couple, both of whom were so assisted, the total amount paid together with simple interest at three per cent annually shall be allowed and deducted from the estate of such person or persons by the court having jurisdiction to settle the estate. * * *"
You indicate in your communication that the statute in question might mean that the interest item shall be computed from the date of death upon the total amount of assistance paid to the deceased prior to his death. We believe such an interpretation ascribes to the wording of the provision involved a strained and unnatural meaning. The ordinary meaning of the language used provides, in effect, that all assistance which has been paid to a person, together with three per cent simple interest on all such assistance shall be deducted and allowed from the beneficiary's estate. The interest accrues from the time the assistance was paid. If the assistance has been paid in monthly instalments, the interest accrues on each instalment from the date of payment.

In XV Op. Atty. Gen. 187 it was held that this statute, by implication, requires that a claim be filed against the estate of a deceased assistance beneficiary. As a general rule the interest on a claim filed against an estate is computed at the rate specified in the obligation until a judgment on claims has been entered by the court; thereafter, the amount allowed in such judgment bears interest at the statutory interest rate on judgments. Jameson v. Baber, 56 Wis. 630. As sec. 49.25, Stats., definitely provides that the amount of assistance, together with only three per cent simple interest shall be allowed and deducted from the deceased's estate, we are of the opinion that such rate should continue to prevail after the entry of judgment on claims and until the claim has been paid.

JEF
Opinions of the Attorney General

Appropriations and Expenditures — Workmen’s Compensation — State authorities having power under federal rules and regulations to purchase compensation insurance covering persons working on survey financed by federal government may purchase such insurance out of federal moneys, particularly in view of secs. 84.01 and 82.02, subsec. (6), Stats.

June 13, 1936.

HIGHWAY COMMISSION.

You state that there is a state-wide highway planning survey now in progress. This survey is being conducted under the supervision and in accordance with the rules and regulations of the United States bureau of public roads. It is being financed with federal funds from various sources, which funds are matched in part with state funds. You state that the salaries and expenses of the employees are paid from a federal trust fund of which the state treasurer is trustee. As the work progresses the cost thereof is requisitioned from the federal government and the reimbursement check is deposited in the trust fund, thus replenishing the trust fund.

You state that a compensation insurance policy was ordered from the Employers Mutual Insurance Company. A question arose as to whether or not the state authorities having the power to expend moneys from the trust fund could purchase this compensation insurance.

Since the rules of the federal government under which this money is secured provide for the payment of premiums for compensation insurance, we hold that the state officers disbursing these federal moneys could pay for premiums for such compensation insurance, particularly in view of the fact that our legislature has in sec. 84.01 declared in the broadest language that it pledges the good faith of this state to co-operate in the fullest manner with the United States bureau of public roads. Furthermore, sec. 82.02, subsec. (6), provides that the highway commission shall have power to receive gifts to be spent as requested by the donor. These two sections are ample authority to warrant
the expenditure of these federal moneys for the payment of premiums of compensation insurance.

In addition to the special endorsement entitled "governmental function endorsement" on the sample premium submitted with the request, we would suggest that the following endorsement be used:

"In further consideration of said premium, it is hereby expressly understood and agreed that the company assumes the same liability hereunder as if it were the employer of the persons insured."

JEF

Public Officers — Coroner — Sheriff — Undersheriff — Vacancies — Where sheriff has been convicted of fourth degree manslaughter and sentenced to state prison for one year or longer, office becomes vacant under sec. 17.03, sub-sec. (5), Stats.; undersheriff is to execute his duties under sec. 59.21 (7) until vacancy is filled.

Coroner is keeper of jail during time sheriff is prisoner therein, under sec. 59.34 (2).

June 13, 1936.

JOHN M. PETERSON,

District Attorney,

Neillsville, Wisconsin.

You have telephoned us for an opinion covering the following situation:

The sheriff of your county was convicted of fourth degree manslaughter and given an indeterminate sentence to the state's prison, the minimum of which sentence was one year. You inquire whether the undersheriff or the coroner succeeds to his duties.
It is our opinion that the undersheriff is the proper person to execute the duties of the sheriff until the vacancy is filled.

A vacancy arises in the present instance by virtue of sec. 17.08, subsec. (5), Stats., which provides that an office becomes vacant upon the conviction of the incumbent "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 *

Sec. 59.21, subsec. (7), Stats., which governs the answer to your question, provides:

"In case of a vacancy in the office of sheriff the undersheriff shall in all things and with like liabilities and penalties execute the duties of such office until the vacancy is filled as provided by law."

This is clear and express. The only possible duties of the coroner in such a case would arise under sec. 59.34 subsec. (2), which provides that the coroner shall,

"When there is no sheriff or undersheriff in any county organized for judicial purposes, exercise all the powers and duties of sheriff of his county until a sheriff is elected or appointed and qualified; and when the sheriff for any cause is committed to the jail of his county, be keeper thereof during the time the sheriff remains a prisoner therein."

We take it that the italicized portion of the section last quoted would apply even though there were an undersheriff.

As to filling the vacancy, sec. 17.21, subsec. (1), provides that this may be done by appointment by the governor for the residue of the unexpired term.

JEF
Indigent, Insane, etc. — Social Security Law — Old-age Assistance — Proviso clause in sec. 49.28, Stats., which gives county board power to reduce and discontinue old-age assistance grants, was impliedly repealed by ch. 554, Laws 1935.

June 15, 1936.

PENSION DEPARTMENT.

You state that the county board of supervisors of X county, apparently relying upon sec. 49.28, Stats., has passed a resolution to the effect that the county judge shall discontinue all old-age pensions which have been allowed to any persons who have not resided continuously in Green Lake county for at least a year preceding the filing of applications for pensions.

You call our attention to our opinion reported in XXIV Op. Atty. Gen. 711, holding that the cost of old-age assistance must be borne by the county in which the applicant resides and ask whether the above resolution is valid.

Sec. 49.28, Stats., provides:

"The county judge shall promptly make or cause to be made such investigation as he may deem necessary. The county judge shall decide upon the application, and fix the amount of the old-age assistance, if any, and such decision shall be final; provided that the county board may at any time reduce or discontinue entirely such assistance granted to any beneficiary. An applicant whose application for old-age assistance has been rejected or whose allowance has been stopped, may not again apply until the expiration of twelve months from the date of his previous application."

The old-age assistance, aid to dependent children and blind pension laws of this state were greatly revised by ch. 554, Laws 1935. This revision law was rushed through the legislature virtually in the last hours before sine die adjournment. The completed product, after last moment amendments and changes, naturally contains many conflicting and ambiguous provisions and repeatedly has been referred to this department for interpretation. Fortunately,
many of the inconsistencies in the law clearly are the result of inadvertence and are impliedly repealed or may be readily explained when the purpose and the intent of the revision enactment is considered.

It is our opinion that the proviso clause in sec. 49.28, italicized above, was impliedly repealed by ch. 554, Laws 1935. Although the rule of implied repeal is not favored by the courts (Pabst Corp. v. City of Milwaukee, 190 Wis. 349), it will be applied when the clear intent of a statute demands the application of the rule. State ex rel. Thompson v. Beloit City School District, 215 Wis. 409. Sec. 49.28, Stats., became law in 1925; the proviso clause above referred to was inserted in 1929. This section was not amended by the general revision law of 1935. Prior to said revision law our old-age assistance system applied only to those counties whose county boards elected to adopt it. Sec. 49.20 (2) Stats. 1933. Such voluntary system was administered by the county judge, but the amount of assistance allowed by the judge was subject to reduction or discontinuance by the county board. Sec. 49.28, Stats. 1933. The law provided for no appeal from the action of the county judge and county board. By ch. 554, Laws 1935, the old-age assistance laws were made compulsory. Any person eligible to receive assistance who complied with the requirements of the law became entitled to assistance as a matter of right. It became a duty of the county board to appropriate sufficient money to carry out the provisions of such assistance laws. Failure to appropriate such money rendered the board subject to mandamus proceedings. XXIV Op. Atty. Gen. 280. Administration of such laws was placed in the county judge or county pension department, subject to the supervision of a state pension department. Secs. 49.50 and 49.51. Appeal from a decision of a county administrative agency was provided by sec. 49.50 (4), Stats., such appeal to be taken to the state pension department and not to the county board. The county was afforded an opportunity to be heard on such appeal before the state department by sec. 49.50 (4). Thus the new law left the county board without any discretion in the matter of adopting an old-age assistance system, gave a qualified applicant a right to assistance, im-
posed a duty upon the county board to provide the funds for such assistance, created a state pension department with the power to supervise county administration, and provided for a review of the action of a county administrative agency by the state pension department and not by the county board. The effect of these changes is wholly inconsistent with the proviso clause of sec. 49.28, which gives the county board the power to reduce or discontinue assistance, and we unhesitatingly hold that such proviso clause was impliedly repealed. This result is supported by our opinion reported in XXIV Op. Atty. Gen. 709 holding that sec. 47.09, relating to appeals in the administration of the blind pension law was impliedly repealed by sec. 49.50 (4), Stats. 1935.

In view of our conclusion the county board was without power to pass the resolution in question. Such resolution further conflicts with the old-age assistance laws in that it requires a certain residence as a prerequisite to receiving assistance. XXIV Op. Atty. Gen. 711.

JEF

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June 17, 1936.

Board of Control.

We received a letter from the Honorable James Wickham, circuit judge, Eau Claire, Wisconsin, referring to the sentence imposed on one, Elmer Gilseth, on the 27th day of September, 1935, and concerning which we wrote an official opinion in XXV Op. Atty. Gen. 108, in which he said:

"* * * I am writing you because you have apparently been misinformed as to the wording of the sentence. The
The defendant was convicted on four counts, each charging forgery. He was a second offender. In imposing sentence, I intended to add an additional year imprisonment because of the fact that he was a second offender and because he denied all evidence against himself when it was apparent he was not telling the truth and showed no evidence of reformation. It was my intention that he should serve not less than two nor more than four years.

He quotes from our letter to you of May 11, 1936:

"* * * He was given four indeterminate sentences of from one to three years each, the minimum terms to run consecutively."

He states further:

"Of course, if the judgment was worded in this way, the total time of the sentences would be one year on each count, or four years for the minimum sentences, before they would start running concurrently, making the total sentence six years. The judgment, however, was not worded in that way, but provided that the sentences should run consecutively only 'for the first year of imprisonment.' This makes the total maximum sentence four years instead of six. Undoubtedly your opinion was based on the fact that you were not correctly informed as to the language of the judgment."

The judgment on file contains the following language:

"It is ordered and adjudged that Elmer Gilseth, the above named defendant be punished by imprisonment in the Wisconsin state prison at Waupun, Wisconsin, at hard labor for a general indeterminate term of not less than one (1) year and not more than three (3) years on each of the four counts of the information and for the first year of imprisonment the sentences run consecutively and after that concurrently, beginning at twelve o'clock noon this date."

After careful consideration of this matter and reading the judge's explanation of his judgment, we are of the opinion that the judgment imposed will justify a conclusion that he should serve not less than two nor more than four years as stated by the judge, although the sentence might have
been worded in such a way as to make it clear and unambiguous had the court said that the sentence on the first count was to begin on the date when the judgment was rendered and that the sentences on the second, third and fourth counts were to begin at the end of the first year and thereafter all sentences should run consecutively. Our opinion of February 20, 1936, found in XXV Op. Atty. Gen. 108, is therefore modified as above indicated.

JEF

Automobiles — Law of Road — Registration — License plates and license fee can be applied to new car when old car is destroyed by fire under sec. 85.01, subsec. (4), par. (hm), Stats.

June 17, 1936.

JAMES P. RILEY,

District Attorney,

Wausau, Wisconsin.

Under date of June 5 you submitted the following: A wrecking company which has purchased a car that has been burned up or destroyed beyond repair submits the question whether the license plates from this demolished car can be transferred to another car by paying the difference, if there is any, in the fees.

Sec. 85.01, subsec. (4), par. (hm), Stats., reads as follows:

“If any motor vehicle, trailer or semitrailer is permanently removed from the highways of the state by reason of fire, collision or other accident, which is the direct cause of such permanent removal, and replaced by another motor vehicle, trailer or semitrailer, such replacement vehicle, trailer or semitrailer shall be registered by the secretary of state upon payment of only the excess registration fee, if
any, of such replacement vehicle over the vehicle so removed. Such registration shall be conditioned on the filing of proof, satisfactory to the secretary of state, that such permanent removal occurred as provided by this subsection. Such proof may be by affidavit, in a form prescribed by the secretary of state, setting forth the facts and circumstances of the accident which caused the permanent removal of the vehicle, including the time, the place, and the disposition of the vehicle, and such other facts as the secretary of state may require."

This statute requires an affirmative answer to your question.
You also state that you would appreciate it if you could receive a form of the affidavit referred to in the statute. We have no form of affidavit in our possession and you would have to make application to the secretary of state for such form.

JEF
Courts — Sentences — Criminal Law — Adultery — Court who sentences person for adultery under sec. 351.01, Stats., to pay fine of two hundred dollars and costs may include also in said judgment provision that if fine and costs are not paid defendant shall be imprisoned in county jail until they are paid, such imprisonment not to exceed six months.

June 18, 1936.

LYALL T. BEGGS,
District Attorney,
Madison, Wisconsin.

Attention Elliot N. Walstead, Assistant District Attorney.

You state that A plead guilty to the charge of adultery under sec. 351.01, Stats., which provides for imprisonment in the state prison not more than three years nor less than one year or by fine not exceeding one thousand dollars; that the district attorney’s office is disposed to recommend a fine of two hundred dollars, but understands that the man will be unable to raise the money. In view of his inability to pay the fine, you ask if the court may sentence him to the county prison for a period not to exceed six months under sec. 353.25, Stats.

The exact wording of said section concerning the penalty is as follows: "* * * shall be punished by imprisonment in the state prison not more than three years nor less than one year, or by fine not exceeding one thousand dollars nor less than two hundred dollars; * * *." Sec. 353.25 reads thus:

"When a fine is imposed as the whole or any part of the punishment for any offense by any law the court shall also sentence the defendant to pay the costs of the prosecution and the costs incurred by the county at the request of the defendant, and to be committed to the county jail until the fine and costs are paid or discharged; but the court shall limit the time of such imprisonment in each case, in addition to any other imprisonment, in its discretion, in no case, however, to exceed six months; * * *

"
Under this statute the court is expressly authorized to fine the defendant two hundred dollars and commit the defendant to the county jail until the fine and costs are paid, such imprisonment, however, not to exceed six months.

JEF

Public Officers — Alderman — Malfeasance — Under given circumstances city alderman cannot accept insurance commissions on insurance contracts sold to city.

June 19, 1936.

J. A. FESSLER,

District Attorney,

Sheboygan, Wisconsin.

You state that an alderman of City X is also a member of a board of unincorporated fire insurance underwriters and that such board frequently sells insurance to City X. You ask whether the alderman may receive his proper share of the commission on such insurance sold to the city.

Sec. 348.28, Stats., provides that no public officer shall have or acquire any pecuniary interest, directly or indirectly, in any purchase or sale of personal property or in relation to any public service by, to or with him in his official capacity or employment.

This statute has been construed in State v. Bennett, 213 Wis. 456, as not making it an offense for an officer to have a pecuniary interest in the purchase or sale of property unless the purchase or sale is made by, to or with him in his official capacity or employment, or in some public or official service. From the facts submitted we assume it is part of the alderman's duties to contract for insurance on behalf of the city. Therefore, the insurance contracts in question are made by, to or with the alderman in his official capacity. Under the
rule of the *Bennett* case, we are of the opinion that such officer can have no pecuniary interest therein. The acceptance of the commission mentioned clearly would be a pecuniary interest, forbidden by the statute.

JEF

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**Dogs** — Under sec. 174.07, subsec. (4), Stats., in cities of first, second and third class and in villages located in counties having population of five hundred thousand or more and having police department, all dogs over six months of age are required to be licensed.

June 20, 1936.

**JACOB A. FESSLER,**

*District Attorney,*

Sheboygan, Wisconsin.

You ask whether the statutes, as applying to municipalities mentioned in sec. 174.07, subsec. (4), require a license for a dog when it becomes six months of age, but which was not six months of age on January 1 of any license year.

Under sec. 174.07, subsec. (4), Stats., in cities of the first, second and third class and in villages located in counties having a population of 500,000 or more and having a police department, all dogs over six months of age are required to be licensed.

Sec. 174.05 (1), (2) and 174.07 (4) Stats. provide in part:

174.05 (1) "Every owner of a dog more than six months of age on January first of any year (the word ‘owner’ when used in chapter 174 of the statutes in relation to property in, or possession of, dogs shall include every person who owns, harbors or keeps a dog) shall annually, before the first day of February, obtain a license therefor, * * *"
"(2) The license year shall commence on the first day of January and end on the thirty-first day of the following December. The current license year shall expire December 31, 1921. Every owner of a dog for which a license is required shall make application for and shall obtain such license before the first of February each year. *

174.07 (4) "In cities of the first, second and third class, and in villages located in counties having a population of five hundred thousand or more and having a police department, the duties imposed by sections 174.05 to 174.12, of the statutes, upon local assessors shall be performed by the police force under the direction of the chief of police. In every such city and village, a license shall be necessary for the keeping of any dog over six months of age, and in every such city or such village the chief of police and the police force shall on February first of each year and from time to time thereafter check the dogs therein and cause to be disposed of as provided by law all unlicensed dogs which are required to be licensed; *

Sec. 174.05 is a general statute and clearly means that only dogs six months of age on January 1 of any license year need be licensed. XIX Op. Atty. Gen. 411. Sec. 174.07 (4) is a special statute applying only to the municipalities therein named. XIX Op. Atty. Gen. 486. Does that part of sec. 174.07 (4) which reads: "A license shall be necessary for the keeping of any dog over six months of age" mean that dogs which were not of such age on January 1 of the license year must be licensed? Considering only the quoted words it seems clear that "any dog" over such age must be licensed regardless of the time that such age was attained. However, as the first sentence of said subsection charges police officers with the duties imposed upon assessors under sec. 174.05, some doubt is cast upon the otherwise clear meaning of the provision in question.

Our present dog license law was first enacted by ch. 527, Laws 1919. As first enacted, all dogs over six months of age were required to be licensed, although the owner was given a sixty-day period after such age was attained to secure a license. Sec. 1623, subsec. 1 and 2, Stats. 1919, ch. 527, Laws 1919. No special provision was made in said law for the municipalities named in the present sec. 174.07 (4).
In 1921, by ch. 438, the legislature amended said laws by requiring that only dogs six months of age on January 1 of any license year need be licensed. In the same act, sec. 1625, now sec. 174.07, was created. Said section provided, as it does now, a special law for certain named municipalities, and required that in such municipalities any dog over six months of age shall be licensed. Thus in one part of the same enactment the legislature repealed the general provision requiring that all dogs of the age of six months shall be licensed and limited the general license law to dogs of six months of age on January 1; and in another part of said enactment provided that in certain municipalities any dog of said age shall be licensed. In other words, by said revision law the legislature confined the previous more drastic provision to the more populous districts of the state. Had the legislature intended the general licensing law to apply to the named municipalities it would have been unnecessary to add the above quoted words appearing in 174.07 (4). That the legislature intended that all dogs of such age in the given municipalities must be licensed further is evidenced by the direction to police officers to check dogs “on February first of each year and from time to time thereafter.” In view of the inferences which may be drawn from this historical development of the law in question, we are of the opinion that sec. 174.07 (4) means exactly what it says—that in the named municipalities a license shall be necessary for the keeping of any dog over six months of age.

JEF
Constitutional Law — Counties — County Board — Claims — Taxation — Tax Collection — Tax Certificates — Sec. 74.455, Stats., created by ch. 281, Laws 1935, appears to be valid and constitutional.

County board may compromise claims or judgments in favor of county.

June 20, 1936.

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

You inquire whether sec. 74.455 of the statutes has been passed upon by the courts as to constitutionality, and if not, what our opinion is as to its validity.

We do not find that this section has been passed upon by the supreme court, and it is our opinion that the same is valid and constitutional.

Sec. 74.455 was created by ch. 281, Laws 1935, and reads as follows:

"Any tax certificate held by a county containing an incorrect real estate description may be corrected by an action brought in the circuit court in the same manner as actions for the reformation of instruments. Such certificates so corrected shall be valid as of the date first issued."

You do not suggest any possible objections to this statute as far as constitutionality is concerned, and no objections suggest themselves from a reading of the statute.

The statute provides in cases of incorrect descriptions in tax certificates for a circuit court action in the nature of a reformation action to correct the same. This would be an equitable action, and the court would have jurisdiction to determine both equitable and legal questions, and, of course, would have to observe the constitutional rights of all parties.

It is well established that a statute should not be considered unconstitutional unless its invalidity is clear beyond
reasonable doubt, or, as was said in *Brodhead v. Milwaukee*, 19 Wis. 624, a statute will not be declared invalid unless its unconstitutionality is "so clear and palpable as to be perceptible by every mind at the first blush."

In the absence of any specific question as to constitutionality, we do not feel called upon to engage in further speculation on this point.

You also inquire whether the county board has a right to compromise with sureties who have guaranteed the county's deposits in a bank that is closed, and whether the county board has the right to compromise such a claim which has been reduced to judgment.

We believe these questions should be answered in the affirmative, and refer you particularly to the case of *Washburn County v. Thompson, et al.*, 99 Wis. 585, where Justice Marshall has considered the question at some length and goes into the reasons for holding that the county should have such power.

Other Wisconsin cases which may be of interest to you in this connection are the cases of *Quale v. Bayfield County*, 114 Wis. 115; *Schneider v. Menasha*, 118 Wis. 305; *Dekorra v. Wisconsin River Power Co.*, 188 Wis. 506.

An interesting note on the subject also appears in 19 L. R. A. (N. S.) p. 321. It is stated there that the right of a public corporation to compromise claims or judgments in its favor is usually sustained in the absence of fraud or collusion, unless the compromise is made for the purpose of making a gift or donation to the other party thereto, rather than for purposes which, as to private individuals, are recognized as lawful and valid objects for compromise or settlement.

JEF
Building and Loan Associations — Wisconsin Statutes — Sec. 215.15, Stats., is impliedly repealed by sec. 215.07, subsec. (10), sec. 219.01 (2) and 219.03 in so far as sec. 215.15 may have prohibited building and loan associations from assigning federal housing administration mortgage loans without recourse.

June 23, 1936.

Banking Department.

You state that since the creation of the federal housing administration many Wisconsin building and loan associations have been making mortgages insured by this corporation.

The federal housing administration act provides that mortgages insured by it are negotiable, and the question arises as to whether such mortgages accepted by building and loan associations may be assigned or sold without recourse.

This question is answered in the affirmative.

Sec. 215.15, Stats., standing alone, would require a negative answer, as this section provides for the making of loans to members on "a nonnegotiable note or bond."

In view of this statute, our office held in IV Op. Atty. Gen. 3, that a building and loan association had no right to sell or assign mortgages which it holds. To the same effect see IV Op. Atty. Gen. 736 and XIX Op. Atty. Gen. 474.

However, the 1935 legislature by sec. 215.07, subsec. (10), empowered a building and loan association

"To make loans to its members as provided for in the national housing act approved June 27, 1934, and to issue shares of stock as provided in the federal home owners’ loan act of 1933, as amended."

This same legislature by sec. 219.01, subsec. (2), enabled building and loan associations and certain other agencies

"To make such loans, secured by real property or leasehold, as the federal housing administrator insures or makes
a commitment to insure pursuant to Title II of the national housing act, and to obtain such insurance."

Furthermore, sec. 219.03, also passed in 1935, provides:

“No law of this state requiring security upon which loans or investments may be made, or limiting the amount of loan to any stated proportion of the value of the security, or prescribing the nature, amount or form of such security, or prescribing or limiting interest rates upon loans or investments, or prescribing or limiting the period for which loans or investments may be made, or prescribing or limiting periodical instalment payments upon loans or securities, shall be deemed to apply to loans or investments made pursuant to this chapter.”

It seems clear that secs. 215.07 (10), 219.01 (2) and 219.03, taken together, evidence a legislative intent to abrogate the restrictions of sec. 215.15 with reference to negotiability as far as federal housing administration loans are concerned, and that such provisions of sec. 215.15 as are in conflict with the above sections are impliedly repealed by these later enactments under the doctrine that where two statutes conflict the later supersedes the earlier in so far as full effect cannot be given to both. *State ex rel. M. A. Hanna Dock Co. v. Willcuts*, 143 Wis. 449.

JEF
Opinions of the Attorney General

Courts — Taxation — State Tax — Home Owners Loan Corporation is not subject to state tax of one dollar provided by sec. 271.21, Wis. Stats., for commencement of action in court of record having civil jurisdiction.

June 24, 1936.

Oliver L. O’Boyle, Corporation Counsel,
Milwaukee County,
Milwaukee, Wisconsin.

You have inquired whether the Home Owners Loan Corporation is subject to the state tax of one dollar provided by sec. 271.21, Stats., in connection with the commencement of mortgage foreclosure actions in the circuit court of Milwaukee county.

This question is answered in the negative.

Sec. 271.21, Stats., reads as follows:

“In each action in a court of record having civil jurisdiction there shall be levied a tax of one dollar which shall be paid to the clerk at the time of the commencement thereof, which tax on suits in the circuit court shall be paid into the state treasury and form a separate fund to be applied to the payment of the salaries of the circuit judges; and which tax in other courts of record the salaries of the judges of which are wholly paid by the counties or by any county and city jointly shall be paid to the county treasurer to create a fund to be applied to the payment of the salaries of such judges.”

This section clearly provides for the collection of a tax of one dollar on each suit commenced in a court of record in this state.

The statute specifically uses the word “tax” in three places. It is in no sense a clerk’s fee, or service charge, and the money goes into the state treasury for payment of judges’ salaries.

The Home Owners’ Loan Act of 1933, provides in part:

“* * * The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheri-
tance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed. * * *." 12 U. S. C. A. sec. 1463, (c).

As to federal agencies, the general rule seems to be well established that a state cannot tax the means or instrumentalities employed by congress to carry into execution powers conferred upon it by the constitution. A state cannot by taxation, no matter how reasonable or how universal and undiscriminatory, interfere with an instrumentality of the United States. Johnson v. Maryland, 254 U. S. 51.

In the case of Jaybird Mining Co. v. Weir, 271 U. S. 609, it was held that without congressional consent, no federal agency or instrumentality can be taxed by state authorities.

In the case of Indian Motorcycle Co. v. United States, 283 U. S. 570, 575 (1931), the court said:

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states, and that the instrumentalities, means and operations whereby the states exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. * * *.”


The Home Owners Loan Corporation is made an instrumentality of the United States by the express language of
the statute creating it. Furthermore, the stock of this corporation is to be subscribed by the secretary of the treasury on behalf of the United States and the interest and principal payments on its bonds are guaranteed by the federal government. In Commonwealth ex rel. Kelley v. Rouse, 178 S. E. 37, 163 Va. 841, it was pointed out that the Home Owners Loan Corporation was an instrumentality of the United States created for the purpose of providing direct relief to home owners and therefore an attorney employed by the corporation held an employment under the United States within the meaning of the Virginia statutes.

In view of this decision and the actual set-up of the Home Owners Loan Corporation, it would seem that said corporation would be considered an instrumentality of the United States and therefore come within the rule of the Indian Motorcycle case, supra. Thus the Home Owners Loan Corporation would not have to pay the one dollar state unit tax imposed under the provisions of sec. 271.21, Stats.

JEF
Indians — Whether state has criminal jurisdiction over Indian depends upon nature of crime, status of Indian and locus of crime. Ordinarily, tribal Indians residing on reservation are not subject to state's criminal jurisdiction.

July 3, 1936.

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

You have requested an opinion from this department covering the question of jurisdiction of Indians where criminal offenses are committed upon Indian reservations, and particularly on the question of nonsupport or abandonment in the case of a marriage in accordance with Indian custom.

As to the general question of criminal jurisdiction over Indians, the situation in any particular case must depend upon the facts in that case. The nature of the crime, the status of the Indian, and the locus of the crime must be considered.

The United States has exclusive jurisdiction over the eight crimes mentioned in sec. 328 of the United States criminal code, when committed by Indians. These crimes are murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary and larceny.

Apparently congress intended to leave other crimes or misdemeanors not covered by the above section to the Indian tribes themselves. The problem is exhaustively treated in the opinion of Judge Nelson in the case of State v. Rufus, 205 Wis. 317, See, also, 18 U. S. C. A. 548 and notations for a comprehensive collection of cases on the subject.

If an Indian has severed his tribal relations he may be prosecuted in the courts of the state, whether the crime was committed within or without the reservation. State v. Williams, 13 Wash. 335, 43 Pac. 15.

The importance of the locus of the crime, as far as tribal Indians is concerned, is stressed in the case of State v. Johnson, 212 Wis. 301, in another able opinion written by Jus-
tice Nelson. It is there pointed out that the jurisdiction of a state to try in its courts an Indian charged with an offense committed outside of territory of the United States, even though the offender be a ward of the federal government, has never been seriously questioned. In this case the offense had been committed upon fully patented lands located within the exterior boundaries of an Indian reservation, and the court held that state jurisdiction attached.

On the question of nonsupport as applicable to Indians, this office has rendered two opinions:

In VII Op. Atty. Gen. 523, the opinion was expressed that an Indian on a reservation charged with desertion and non-support, was not subject to the criminal laws of this state, where he had not received his allotment under the Dawes act (24 U. S. Stats. at Large 388).

In XX Op. Atty. Gen. 813, the question was again raised and it was ruled that nontribal Indians are subject to state criminal laws the same as other residents.

In addition to the Rufus and Johnson cases, and the opinions above mentioned, we would also call your attention to the following opinions of this office relating to various phases of the problems of criminal jurisdiction over Indians: I Op. Atty. Gen. 296; IV 42, 44, 731, 798; X 154, 931, 941; XVI 472; XIX 266, 359; XX 319, 982, 1133; XXI 681; XXII 54, 273.

We trust these opinions and authorities therein cited will be useful to you in connection with the general question you have asked, and, in the absence of a statement of specific facts, in some particular case that you have in mind, we are unable to express an opinion sufficiently broad to cover all phases of criminal jurisdiction over Indians. This could hardly be done within the usual space limitations of an official opinion, as the material on the subject is sufficiently voluminous to require a paper of considerable length.

JEF
Public Officers — City attorney may not be paid, in addition to his salary, compensation for services rendered municipally owned public utility.

July 3, 1936.

PUBLIC SERVICE COMMISSION.

You inquire whether a city attorney, during his term of office, may be paid compensation for services rendered the municipally owned public utility in addition to his regular compensation as city attorney.

Under sec. 62.09, subsec. (1), Stats., the city attorney is a public officer of the municipality.

Sec. 62.09 (6) (d), Stats., reads thus:

“No officer receiving a salary shall receive for services of any kind rendered the city any other compensation, but he may receive moneys from a pension fund, or for services rendered the school board of the city in any night school, social center, summer school or other extension activity. The council may assign various duties or officers to one individual and may fix compensation covering these consolidated functions, but no member of the council shall be eligible for such a position.”

A municipally owned public utility is an arm of the city government and in our opinion is covered by this statute as services rendered to such public utility are rendered to the city. It is our opinion that your question must be answered in the negative.

JEF
Public Officers — Mayor — Menasha owns municipal light and water plant operated by five-man commission. A, hardware and electric dealer of city of Menasha, was elected mayor and, in view of sec. 62.09, subsec. (6), par. (d), Stats., cannot be paid by commission to solicit business for commission while mayor and drawing salary.

Commission cannot make contracts with residents of city of Menasha if applications are submitted by A, under above conditions.

A cannot act as agent of commission in selling merchandise.

A, elected mayor, cannot bid for or sell board of education any equipment or wiring jobs on new high school that board plans building this year.

July 7, 1936.

R. C. Laus,
District Attorney,
Oshkosh, Wisconsin.

You state that the city of Menasha owns a municipal light and water plant which is operated by a five-man commission elected by the city council under a charter ordinance requested by virtue of a referendum held some six years ago. The water and light commission keeps its own funds in a separate account and pays from its funds with checks signed by the president and secretary of the commission and countersigned by the city treasurer.

You state that for the past four years the commission sold electric stoves and water heaters to residents of the city for actual cost to the commission, plus a sum ranging in amount with the style of the unit sold, said sum being paid to the dealer soliciting the buyer. Out of said sum the dealer who solicited the order must install said stove or water heater. Payment of the dealer’s commission is advanced to the dealer when the unit is installed, but said sum plus the cost of the stove is paid to the commission by the buyer of the unit in equal instalments over a period of sixty months. You also state that any hardware, electrical,
furniture or plumbing dealer having a place of business in the city of Menasha is allowed to solicit buyers of stoves under the same arrangement outlined above.

You say that A, a hardware and electrical dealer of the city of Menasha, having solicited such business for the past four years in sizable amounts, was elected mayor of the city of Menasha and took office April 21, 1936. You inquire:

"(a) Can A continue to solicit business under the existing arrangement?"

The answer to this question, we believe, should be no.
Sec. 62.09, subsec. (6), par. (d), Stats., provides:

"No officer receiving a salary shall receive for services of any kind rendered the city any other compensation, but he may receive moneys from a pension fund, or for services rendered the school board of the city in any night school, social center, summer school or other extension activity. The council may assign various duties or offices to one individual and may fix compensation covering these consolidated functions, but no member of the council shall be eligible for such a position."

Under your statement of facts the mayor, in acting as dealer for the commission and receiving pay for such services, is violating this statute, for it is apparent from your statement of facts that his activities are as agent for the commission instead of agent for the buyer. He therefore comes directly under the purview of the statute quoted, assuming that he receives compensation as mayor.

Your second question reads:

"(b) Can the water and light commission continue to make contracts with residents of the city of Menasha, if said application for contracts are submitted by A?"

This question must be answered in the negative.

Your third question reads thus:
"(c) Can the water and light commission contract for stoves or heaters with,
"(1) All city officers?"

This question must be answered in the negative.

Your fourth question reads:

"(c) Can the water and light commission contract for stoves or heaters with,
"(2) All city officers except water and light commission-ers and employees of said water and light commission?"

This question must also be answered in the negative, in view of the provisions of the above quoted statute.

Your fifth question reads:

"Can A bid and sell the board of education any equipment or wiring jobs on the new high school, which the board ant-icipates building this year? The board of education in this city is appointed by the council."

This question must also be answered in the negative. See XXIV Op. Atty. Gen. 260.

JEF
Minors — School Districts — Child placed in home by board of control after being committed to state public school at Sparta has residence for school purposes in municipality in which such home is located and has such residence even prior to expiration of usual probationary period.

July 8, 1936.

ALEXANDER L. SIMPSON,
District Attorney,
Fond du Lac, Wisconsin.

You state that on April 2, 1930, one A, who was then a minor and still is a minor, was committed to the state public school at Sparta from Vilas county, Wisconsin. Shortly afterwards he was placed for adoption with a family in the town of Metomen, Fond du Lac county, Wisconsin, for the usual probationary period. Some time afterward the mother in this family died and the father moved to another locality. Thereupon the child was placed with a brother of the wife of family number one and left there and no attempt has been made since that time to complete the adoption. The child is now attending the high school in Ripon and the charge for his attendance at this school is being made against the town of Metomen. The bus conveyance is taken care of by the state.

You inquire whether, in 1930, when the child was placed in the state public school at Sparta, the charge for his care, maintenance and education was not a direct charge, and remains a direct charge, against the town, city or village in the county in which his parents had a legal settlement.

You are correct in your conclusion, except in so far as part of it is paid by the state under sec. 40.47, Stats. as amended.

You ask also:

“In the event that that is a fact, how can the status of the child, being a minor, be changed by the adoptive proceedings that were inaugurated by the state board of control but never completed?”
This question is definitely passed upon in XXII Op. Atty. Gen. 149. It is well settled that children of school age may, for school purposes, have residences apart from those of their parents and it has been held that the municipalities in which they so reside must pay tuition to the high school district in which the high school is located. We believe that the ruling of the court and this department is justified by the statute and that as long as this child has made its home with the family, not for the purpose of a schooling but for the purpose of a home, the town in which he has this home is liable for his schooling.

You have submitted another question, which does not need to be answered in view of the answer given to your first question.

JEF

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School Districts — Referendum election abolishing particular teaching position does not invalidate contract previously entered into between school board and teacher under sec. 40.19, Stats.

School board has power, under sec. 40.16, subsec. (10), to raise sufficient funds for operation of school regardless of whether electors have provided sufficient funds.

July 10, 1936.

JOHN CALLAHAN, State Superintendent, Department of Public Instruction.

You have called to our attention a certain petition to the school board of a joint high school district. The petition asks the board to provide a referendum ballot for the purpose of voting on the following questions:

"2. * * * shall we suspend the manual arts department for the coming year?"
"3. * * * shall we abolish the position as supervising principal with the present salary of $2,500 per year and make one of the present high school teachers a supervising teacher with an increase in salary not to exceed $300 per school year?

"4. * * * shall we limit the amount of money to be raised by taxation within the school district to not to exceed $14,000 for the coming school year?"

You inquire what effect an affirmative vote on question No. 2 would have upon the contract heretofore made for the ensuing year by the school board with the teacher of the manual arts department.

It is our opinion that if a valid contract has heretofore been made by the school board with a qualified teacher the same will not be invalidated by an affirmative vote on the question of suspending the manual arts department.

Under the statutes it is the school board and not the school district which makes the contract with the teacher. Sec. 40.19, Stats. Leahy v. Joint School District, 194 Wis. 530.

As was said in XXII Op. Atty. Gen. 979, 981:

"There is nothing that need be added from this office to the decision in the Leahy case concerning the fact that the electors of a school district cannot, by their action, bind the district in the matter of contracting with a teacher. * * *"

The same reasoning applies to the third proposition to be voted upon.

You also inquire, in connection with the fourth question, as to the effect of the referendum election upon the amount of taxes which a district may raise.

This question is answered by sec. 40.16, subsec. (10), Stats., which provides:

"If any district shall not have voted a tax sufficient to maintain its school for the term of eight months during the ensuing year, the board shall, on the third Monday of November, determine the sum necessary to be raised to maintain such school, and the clerk shall forthwith certify to the
municipal clerk the amount so fixed, and he shall assess the
same and enter it in the tax roll as other district taxes are
assessed and entered.”

In XIII Op. Atty. Gen. 380, we held that the board is
given power, under the provisions of the section above
quoted, to operate and maintain a school, regardless of
whether the electors provided sufficient funds for such op-
eration and maintenance.

JEF

Indigent, Insane, etc. — School Districts — Tuition —
Under sec. 40.21, subsec. (2), Stats., person of school age
maintained as public charge has free access to public school
district in which he resides but such district is entitled to
compensation for pro rata cost of such school from
county if county system of poor relief is in operation. This
rule obtains although school district is in legal settlement of
public charge.

July 10, 1936.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

You state that B, a person of school age and maintained
as a county charge under the county system of poor relief,
has a legal settlement in your school district and is attend-
ing school in said district. You ask whether the school dis-
trict is entitled to compensation from the county under the
provisions of sec. 40.21, subsec. (2), Stats.

Sec. 40.21 (2) provides:

“Every person of school age maintained as a public
charge shall for school purposes be deemed a resident of the
school district in which he resides, except that such school
district shall be compensated by the municipality or by the
county in case the county system of poor relief is in effect in such municipality in which such person of legal school age has a legal settlement as defined in section 49.02 with an amount equal to the pro rata share of the year's expense of maintaining such school, based upon the total enrollment and year's expense of the maintenance of such school. In case such person maintained by the county has his legal settlement outside the county then the county shall pay such school district's pro rata share and such county may recover such sums paid, from any municipality in the state where the legal settlement may be established."

The above section was repealed and recreated by ch. 430, Laws 1935. Although the only purpose of such revision may have been to bring the section in harmony with our relief laws (XXV Op. Atty. Gen. 290) the wording has been changed to such an extent that the former opinions of this department construing said section may be of limited value.

Sec. 40.21 (2) provides:

"Every person of school age maintained as a public charge shall for school purposes be deemed a resident of the school district in which he resides, * * *

This is in accordance with the general rule that a person may have a school residence separate from his legal settlement. Such school residence carries with it the privileges of the public school (State ex rel. School District v. Thayer, 74 Wis. 48), and the statutes do not allow any tuition or pro rata school costs to be charged to the pupil's legal settlement municipality. Sec. 40.21 (2), which relates only to persons maintained as public charges, provides an exception to this general rule. The purpose of the statute is twofold: to guarantee indigent persons equal opportunities in our public school system and to recompense the district obliged to school the indigents. Thus the section provides, in effect, that a person maintained as a public charge shall have free access to the schools in the district in which he resides but such school district shall receive as compensation therefor a prorata share of the school's expense from the pupil's legal settlement municipality.

With the purpose of the statute in mind it is obvious that the school district in which B, a public charge, is attending
school is entitled to the financial compensation provided by sec. 40.21 (2), although such district may be in the legal settlement of said pupil. As your county is operating on a county system of relief the county is liable for such compensation.

JEF

Fish and Game — Indians — Tribal Indians hunting and fishing on navigable waters on reservation are probably not subject to state fish and game laws.

July 10, 1936.

CONSERVATION DEPARTMENT.

You inquire whether the conservation commission may enforce the fish and game laws on the navigable meandered lakes and navigable streams within Indian reservations as against tribal Indians living on such reservations.

The question of criminal jurisdiction over Indians has been a vexatious one from earliest times, and divergent results have been reached by various courts.

In an opinion to Edmund H. Drager July 3, 1936,* an attempt was made by this department to call attention to the recent Wisconsin cases and earlier opinions of this office relating to the subject, as well as to the respective jurisdictions of state, federal and tribal courts. It was suggested that whether the state has criminal jurisdiction over Indians depends upon the nature of the crime, the status of the Indian, and the locus of the crime. As to crimes committed on reservations by tribal Indians, the majority view is that the federal authority is exclusive. 39 Yale Law Journal 307, 310.

*Page 404 of this volume.
As to violations of the fish and game laws, the question of the Indian’s status is further complicated by various treaty provisions between the United States and the Indian tribes.

This problem was given consideration in the case of *State v. Johnson*, 212 Wis. 301. One of the counts in the information there charged the defendant with unlawfully hunting deer during the closed season. After discussing treaty provisions between the Chippewa Indians and the United States, the court said, p. 311:

"* * * The lands upon which the defendant hunted deer during the closed season therefor were not within the area ceded by the treaties mentioned, but were lands within the boundaries of the Bad River (La Pointe) Reservation retained by them in the treaty of 1854 to which they retired as their permanent abode. While the treaty entered into did not specifically reserve to the Indians such hunting and fishing rights as they had theretofore enjoyed, we think it reasonably appears that there was no necessity for specifically mentioning such hunting and fishing rights with respect to lands reserved by them. At the time the treaty of 1854 was entered into there was not a ‘shadow of impediment upon the hunting rights of the Indians’ on the lands retained by them. ‘The treaty was not a grant of rights to the Indians but a grant of rights from them—a reservation of those not granted.’ *United States v. Winans*, 198 U. S. 371, 25 Sup. Ct. 662, 664. *We entertain no doubt that the rights of the Indians to hunt and fish upon their own lands continued. If the lands here involved were not fully patented we should have no difficulty in concluding that as to such lands the fish and game laws of this state are without force and effect." (Italics ours.)

The court then proceeds to point out that as to fully patented lands the privileges of hunting and fishing are subject to regulation by the state. Reference, however, is made by the court to the case of *United States v. Winans*, 198 U. S. 371, wherein it was held that certain fishing rights reserved to the Yakima Indians imposed a servitude on the lands relinquished, as against the United States, the state, and their grantees. This illustrates the importance of the treaty provisions in each particular case.

While the question of fishing in navigable waters was not before our court in the *Johnson* case, the language which we
have quoted and italicized from that case indicates that the court has no doubt as to the right of Indians to hunt and fish upon their own lands, and that the court would have no difficulty in concluding that as to such lands the state fishing and game laws would be of no effect.

The case of In re Blackbird, 109 Fed. 139, held that the authorities of the state of Wisconsin had no jurisdiction to enforce fish and game laws against members of the Chippewa Indian tribe residing on the Bad River reservation. It was held in this case that by the act of March 3, 1885, U. S. Criminal Code, sec. 328, 18 U. S. C. A. 548, congress had prescribed what acts should constitute crimes when committed by tribal Indians on a reservation within a state, and by what courts they should be tried therefor; that the jurisdiction so conferred was exclusive, a state having no power to add to the number of crimes defined by such act, nor its courts any jurisdiction to try or punish an Indian for any act done on his reservation. Moreover, the court held that by the terms of the treaty of September 30, 1854, by which the Chippewas ceded their lands to the United States, and which reserved certain lands which were afterwards formed into reservations occupied by them, they were given the right to hunt and fish thereon until otherwise ordered by the president.

The underlying reason for federal rather than state jurisdiction is pointed out by the court at p. 143, as follows:

"* * * The true and unimpeachable ground of federal jurisdiction in such a case as this is that the Indians placed upon these reservations in the states are the wards of the government, and under its tutelage and superintendence, and that, congress having assumed jurisdiction to punish for criminal offenses, that jurisdiction is exclusive.
* * *

In the case of State v. Rufus, 205 Wis. 317, our court, in holding the state courts to be without jurisdiction as to prosecution of tribal Indians residing on a reservation, quoted extensively from the Blackbird case with apparent approval.

The holdings of the Rufus and Johnson cases are in accord with earlier opinions of this office.
In XXII Op. Atty. Gen. 54, we expressed the opinion that state courts have no jurisdiction over misdemeanors committed on Indian reservations by members of the tribe. In the same volume, at p. 273, we held that a tribal Indian was not liable under the state law for hunting grouse on the highway in an Indian reservation nor for having a loaded gun in his possession.

In XI Op. Atty. Gen. 681, we ruled that state courts have no jurisdiction to try tribal Indians who are wards of the United States government for any offenses committed on a reservation by one Indian upon another.

XX Op. Atty. Gen. 319 is to the effect that state courts have jurisdiction to try Indians on the Lac du Flambeau reservation if they have received their allotments under the Dawes act, and at p. 813, the attorney general said that nontribal Indians are subject to state criminal laws the same as any other person.

At page 982, XX Op. Atty. Gen., the attorney general ruled that Indians are not liable, under state laws, for hunting deer on the reservation, but that they have no right to transport deer outside the reservation, and that a white man has no right to purchase deer from an Indian nor to have in his possession a deer purchased from an Indian, either on or off the reservation. At page 1133 of the same volume is an opinion holding that federal courts have jurisdiction to try Indians for crimes committed against another Indian on the reservation.

In XIX Op. Atty. Gen. 266, it was said that whether a state court had jurisdiction to prosecute an Indian for spearing fish on a lake within the Lac Court Oreilles Indian reservation depends upon whether such Indian was an allottee under the treaty of 1854 or under the act of 1887.

In X Op. Atty. Gen. 154, the opinion is expressed that Indians committing violations of fish and game laws upon lands owned by the United States in common for the use of said Indians are not amenable to the fish and game laws of Wisconsin, although at page 931 of that volume there is a ruling that an Indian who sells fish off a reservation which were caught on the reservation, violates the fish and game laws and may be prosecuted. Also at page 941 of that vol-
It was ruled that a white person who purchases fish on a reservation during the closed season thereof, violates sec. 29.52, Stats.

In VII Op. Atty. Gen. 523, this department held that an Indian who has not received his allotment under the Dawes act is not subject to the criminal laws of this state.

In IV Op. Atty. Gen. 731, after reviewing authorities on the subject, the attorney general said, p. 736:

"From the above authorities it is apparent that the federal court will grant a release on habeas corpus to any Indian allottee under the treaty of 1854, who still maintains his tribal relations, notwithstanding he be a citizen, when such Indian is held by the state for offense against the state law, committed on the reservation. Therefore, an Indian so circumstanced is not amenable to the game laws of the state of Wisconsin."

In IV Op. Atty. Gen. 798, the opinion was expressed that the state has no jurisdiction over crimes committed on the reservation by a tribal Indian who is not a voter, and that if he is a voter, a distinction is made depending upon the nature of the allotment. In I Op. Atty. Gen. 296, it was said that allotted Indians are amenable to the fish and game laws of this state.

We cannot here take the space to review cases from other jurisdictions, but suffice it to say that nowhere have we found any distinction made between fishing on navigable and fishing on nonnavigable waters, which distinction is suggested by your request. You call our attention to Wisconsin cases such as Doemel v. Jantz, 180 Wis. 225, holding that title to the soil under water in inland navigable meandered lakes is held by the state in trust for the benefit of the public for navigation purposes and its various incidents, such as hunting and fishing.

It is a fair assumption that some, if not many of the cases and opinions heretofore considered in this opinion were based on fishing in navigable waters, and in view of the rather sweeping language in cases such as the Blackbird and Johnson cases, we are reluctant to lay down a distinction which would appear to be at variance with the well established trend of authority in this state.
However, the distinction which you have raised can only be placed at rest by a court adjudication, and if it is considered desirable, we would suggest that an arrest be made in order to have this point determined. If the state lacks the power in question, a court decision might at least point to the desirability of further federal regulations on the subject, in view of its increasing importance because of the rapidly diminishing supply of fish and game.

Otherwise, on the basis of the authorities herein discussed, we are inclined to conclude that the fish and game laws of Wisconsin are probably not applicable to tribal Indians hunting and fishing on navigable waters within Indian reservations.

JEF

Banks and Banking — Escheat of Bank Deposits —
Trust company holding unclaimed funds deposited more than ten years ago, for payment of interest on bonds, must file report with secretary of state, under sec. 220.25, sub-sec. (3), par. (c), Stats., even though identity of some of bond holders is known.

July 10, 1936.

THEODORE DAMMANN,
Secretary of State.

You have requested the opinion of this department relative to the application of sec. 220.25, Stats., to deposits of unclaimed funds with a trust company as trustee of certain first mortgage bonds, where the deposits were made in 1922, and for deposits made in 1933. You say that some of the bondholders have not presented their coupons for interest payments for the years 1922 and 1923, although the officers of the trust company have ascertained the identity of some of these bondholders who have not received payment.
Sec. 220.25, subsec. (3), par. (c), Stats., as created by ch. 294, Laws 1935, reads as follows:

"The cashier or managing officer of every banking institution shall, within thirty days after the first day of January, every five years commencing January 1, 1936, return to the secretary of state, a sworn statement showing the names of persons who have left on deposit or otherwise any fund, funds or property of the value of ten dollars, or more, and have not dealt with respect thereto for a period of ten years by adding to or withdrawing therefrom, or asserting any claim to such fund, funds or property for such period. Such statement shall show the amount of such deposit, including interest, or the value and nature of such property and the depositor's or owner's last known place of residence or business; such subscribing officer shall certify that said report is a complete and correct statement of all such unclaimed funds and property to the best of his knowledge, after diligent inquiry."

The statute includes such unclaimed funds deposited with a trust company, since sec. 220.25 (1) defines the term "banking institution" to include "every banker, bank, branch bank or trust company within the state."

It is our opinion that the trust company should file with the secretary of state the report required by sec. 220.25 (3) (c) regarding the funds deposited in 1922, and it should also give the notice and publication required by sec. 220.25 (3) (e). The fact that the identity of some of the bondholders has been ascertained is immaterial, since sec. 220.25 (3) (c) makes no exception where such persons are known. XXV Op. Atty. Gen. 61.

After this report has been made the trust company shall pay the interest due for 1922 and 1923 to the bondholders upon presentment of the coupons, without further communication with the secretary of state. However, if certain of the funds remain unclaimed after the passage of twenty years from the time of deposit and the owners are unknown such funds may be escheated to the state by the provisions of sec. 220.25.

No report is required as to the funds deposited in 1933 under sec. 220.25 (3) (c), since ten years have not yet relapsed from the time of deposit.

JEF
Municipal Corporations — Cities — Housing — Cities other than those of first class, under necessary facts, probably have authority to engage in housing activities.

July 10, 1936.

HONORABLE PHILIP F. LA FOLLETTE,
Governor.

You have inquired whether cities other than cities of the first class have power to engage in housing activities.

The legislature, by ch. 525, Laws 1935, authorized the creation of housing authorities in cities of the first class. Bills 565, A., 889, A., and 330, S., introduced in the same session and designed to authorize other municipalities to engage in housing activities, were not passed by the legislature and no specific authority for such purpose appears in the statutes. If such authority exists it must be found (1) in the inherent powers of cities, (2) in the so-called home rule amendment (art. XI, sec. 3) or (3) in the statutory grants of powers to cities.

(1) Inherent power. It appears to be the settled rule that in the absence of constitutional provisions cities do not have inherent powers and are merely departments of the state and the state may withhold, grant, or withdraw powers and privileges as it sees fit. Van Gilder v. Madison, 267 N. W. 25, —— Wis. ——.

(2) Home rule. Art. XI, sec. 3 of the state constitution provides in part:

"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 method of such determination shall be prescribed by the legislature."

The above provision was extensively considered by our supreme court in the Van Gilder case, supra. That opinion
apparently holds: (a) that the home rule amendment does not apply to "matters of state-wide concern"; the legislature's power relating to such matters was not impaired by the home rule amendment; (b) when the legislature deals with "local affairs" of state-wide concern, if its act is not to be subordinate to a charter ordinance, the act must affect with uniformity every city; (c) local affairs which are not of state-wide concern are reserved to the cities unimpaired by any act of the legislature.

Although "housing" and "housing conditions" may in time become matters of "state-wide" concern, it is our opinion that the courts would hold that they are not so at this time. The fact that the legislature did not deem it necessary to enact housing legislation for other than first class cities substantiates this view. As housing and housing conditions presumably are related to the public health, morals, and safety, they probably would be considered "local affairs of state-wide concern," and within the ruling set forth in (b) above. As the act relating to housing which was passed by the legislature does not with uniformity affect every city, such act is subordinate to the will of the local governing bodies. It would appear, therefore, that the action of the legislature does not, in itself, preclude other cities from engaging in housing activities.

(3) Statutory grants. Sec. 62.11, subsec. (5), Stats., provides:

"Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language."

Sec. 62.23 (3) provides in part:
"(a) Cities may acquire by gift, lease, purchase, or condemnation * * * (b) any lands adjoining or near to such city for use, sublease or sale for any of the following purposes:

"1. To relieve congested sections by providing housing facilities suitable to the needs of such city;

"* * *

"(c) The acquisition and convenience of lands for such purpose is a public purpose and is for public health and welfare."

Not only is the language of sec. 62.11 (5) very broad but the legislature has stated specifically that it shall be liberally construed in favor of the rights and powers of cities. Sec. 62.04, Stats. Following this broad language and expression of the intent of the legislature, the court has held that the power of a city with respect to its internal affairs, is as broad as it is possible for the legislature to grant, except in those cases where the legislature has placed restrictions thereon. * * *

Hack v. Mineral Point, 203 Wis. 215, 219; Wadhams Oil Co. v. Delavan, 208 Wis. 578, 580, 581; Janesville v. Hizer, 210 Wis. 526; Burlington v. Industrial Commission, 195 Wis. 536. The legislature not only has not placed restrictions on housing activities but has given specific authority to cities to acquire land adjoining or near to cities for use, sublease, or sale to relieve congested sections by providing housing facilities suitable to the needs of such cities. Although we do not find state court decisions to fortify our conclusion, it appears that the home rule amendment and the statutes of this state contain ample authority for cities other than cities of the first class to engage in housing activities.

Such grant of authority, assuming that it does exist, is always subject to the rule that private property cannot be taken, either by taxation or condemnation, for other than a public use or purpose. Soens v. City of Racine, 10 Wis. 214; Brodhead v. Milwaukee, 19 Wis. 658; Curtis's, Administrator v. Whipple, 24 Wis. 350; State ex rel. McCurdy v. Tappen, 29 Wis. 664; Attorney General v. City of Eau Claire, 37 Wis. 400; Wisconsin Keeley Institute Co. v. Milwaukee, 95 Wis. 153; Wisconsin Industrial School for Girls v. Clark Co., 103 Wis. 651; State ex rel. City of New Rich-
Sec. 62.23 (3), Stats., declares the acquisition of land for housing facilities to be a public purpose. Such declaration, while given great weight by the courts, is not binding upon the courts. Whether or not housing activities are matters of public use or purpose is largely a question of fact. "Public purpose" is a relative term and its meaning will change with the times.

As "housing activities" are comparatively new in this country, we have the benefit of very few court decisions relation thereto. In New York City Housing Authority v. Muller, 270 N. Y. 333, 1 N. E. (2d) 153, housing activities were held to be a public purpose. The court recognized the existence of the slum and tenement districts in that city and that such districts were a matter of public concern because of the relation to the public health, crime and safety. In holding valid a similar law relating to the city of Los Angeles the supreme court of California in Willmon v. Powell, 266 Pac. 1029, said, p. 1031:

"* * * it may be said that an enterprise * * * which has for its purpose the elimination of overcrowded tenements, unhealthy slums and congested areas, thereby tending to ward off epidemics of disease and preserve the health of all of the inhabitants of the cities is a public purpose.

"* * * And, since the conditions sought to be remedied are those peculiar to a large city, we think that the business of providing such remedy * * * is a municipal affair."

In Lowell v. Boston, 111 Mass. 454, the court held invalid an act authorizing the city of Boston to issue bonds for the purpose of rendering aid by way of loans in rebuilding that part of the city which was destroyed in the fire of 1872. The court said that this was taking private property for other than a public purpose. In Opinion of Justices, 211 Mass. 624, the same court held that the legislature has no
power to authorize the use of money to purchase land and develop, build upon, rent, manage, sell and repurchase it for the purpose of "providing homes for mechanics, laborers, or other wage-earners or for the purpose of improving the public health by providing homes in the more thinly populated areas for those who might otherwise live in the more congested areas of the state." In *United States v. Certain Land in the City of Louisville, Kentucky*, the circuit court of appeals of the sixth district held that taxation for housing projects would be the taking of private property for a private and not a public use. On the other hand, a North Dakota law authorizing manufacturing, banking, and housing activities by the state was upheld by the United States supreme court in *Green v. Frazier*, 253 U. S. 233.

From such decisions it appears that the answer to your inquiry depends greatly upon questions of fact. It is doubtful that the courts would uphold the right of every city to engage in housing activities. If, however, a city contains congested areas which are a serious menace to public health, morals or safety, and the housing activities engaged in are reasonably and fairly calculated to eradicate such menace, such city probably has the power to engage in such housing activities.

It must be noted that this opinion is general in nature and does not pass upon any particular plan or form of housing activity.

JEF
Bridges and Highways — Trunk Highways — Relocations — Where county board makes appropriation for acquiring right-of-way on federal aid relocation project under allotments provided by sec. 84.03, subsec. (5), Stats., and state highway commission is induced thereby to proceed with relocation at considerable expense county board cannot thereafter lawfully rescind appropriation.

July 13, 1936.

JOHN H. MATHESON,
District Attorney,
Janesville, Wisconsin.

You state that in November, 1934, your county board passed a resolution appropriating $32,000 for the purchase of right-of-way necessary to the relocation of highway No. 51, and that the January 1935 session of the county board rescinded this action although, in the meantime, the state highway commission had expended considerable money in making surveys and other preparations for the relocation.

In November, 1935, the county board passed a resolution making various appropriations for highway work, including the following language: "The sum of thirty-two thousand dollars for the improvement by said construction as previously allotted." Later, at the same session of the board, a resolution was passed requesting the state highway commission to transfer the sum of $32,000 to the construction of state highway No. 51 between Beloit and Janesville. No action was taken upon this request. The county highway committee purchased and paid for the right-of-way necessary to the relocation, and the question has arisen as to whether the money has been properly appropriated for such purchase.

It seems to us that inasmuch as the state highway commission proceeded with the relocation in reliance upon the original county board appropriation for the purchase of a right-of-way, and since the money has actually been expended for that purpose, the attempt to rescind the appropriation was ineffectual.
Apparently the state highway commission in good faith relied upon the conduct of the county board in making the appropriation originally, and was led thereby to incur considerable expense in connection with carrying on the relocation work. We understand this was a federal aid project, and that federal funds could not be used to pay for the cost of the right-of-way.

We see no good reason why the principle of equitable estoppel should not apply in this instance as against the county. This doctrine is based upon the grounds of public policy and good faith and is interposed to prevent injustice and to guard against fraud by denying to a person the right to repudiate his acts, admissions, or representations, when they have been relied on by persons to whom they were directed and whose conduct they were intended to and did influence. 21 C. J. 1117.

It is clear that the original resolution making the appropriation was intended to influence the conduct of the state highway commission as the following language of the resolution indicates:

"WHEREAS, the state highway commission had indicated a willingness to allocate a federal aid project on that highway provided the necessary funds can be made available to meet the federal allotment in accordance with the federal regulations and to pay the cost of right-of-way and other items in which the federal funds cannot participate;

"NOW, THEREFORE, BE IT RESOLVED that this county board petition the state highway commission to undertake the construction of U. S. Highway No. 51 between Janesville and Edgerton, with federal aid by advancing the sum of $32,000.00 under authority of section 84.08 (5) of the statutes to pay the cost of right of way and other items in which the federal funds cannot participate, with the understanding that such advance will be deducted from the allotment to Rock county for state trunk highway construction to become available in the fiscal year 1936."

The doctrine of estoppel applies to municipal corporations as well as to private individuals. 21 C. J. 1186, and following.

In the case of House v. Town of Fulton, 34 Wis. 608, the court held that it is now well settled that, as to matters
within the scope of their powers and the powers of their officers, towns and other municipal corporations may be estopped upon the same principles and under the same circumstances as natural persons. See, also, State ex rel. Knapp v. Pohle, 185 Wis. 610.

JEF

Indigent, Insane, etc. — County judge may authorize necessary glasses for indigent patients.

July 14, 1936.

G. Arthur Johnson,
District Attorney,
Ashland, Wisconsin.

You have submitted the following question:
Under ch. 142, Stats., may the county judge authorize necessary glasses for indigent patients, either with or without medical or surgical treatment?

Sec. 142.03, subsec. (3), par. (b), Stats., reads thus:

“A crippled person for the purpose of this chapter means one who has some physical defect such as affections of the joints, affections of the bones, disturbances of the neuromuscular mechanism, congenital deformities, static and other acquired deformities, that may be corrected or improved by orthopedic surgery or other special surgical and medical care.”

We note that you limit your question to indigent patients. We believe that your question should be answered in the affirmative so long as the order is limited to indigent patients and when the court can make a finding that the glasses are a necessity for such person. Defects or deformity of the eye may be cured by special surgical or medical care. If glasses
are needed for such persons, we believe the county judge is authorized to make such order. The judge must, however, make a finding that such glasses are a necessity for the person and that he is indigent.

JEF

Indigent, Insane, etc. — Minors — Legal Settlement — Minor daughter of divorced husband living with him has same legal settlement as her father. After death of father her legal settlement immediately becomes that of mother.

Married woman cannot acquire separate legal settlement in this state if her husband has legal settlement in this state.

July 14, 1936.

ALEX L. SIMPSON,
District Attorney,
Fond du Lac, Wisconsin.

You state that a man and wife had a legal settlement in A township about five years ago. They were then divorced. The mother continued to live in A township with all her children except one, who went with the father. The husband moved to Ripon, Wisconsin, and resided there until last October, when he died. The daughter who went with the father is now applying to your county court to be sent to Sunnyview Tubercular Sanitarium at the expense of your county. A township is outside of your county. The mother has a legal settlement in A township and the father undoubtedly had a legal settlement in Ripon, Fond du Lac county, at the time of his death.

You inquire whether the daughter who resided with her father continues to have a legal settlement in Ripon (she being a minor) during this time or whether her legal settlement immediately reverts to that of her mother as soon as her father dies.
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."

Our answer to your question is, in view of the above provision of the statute, that as soon as the father died the legal settlement of the minor child immediately reverted to that of her mother.

You state that it has always been your impression that the wife would continue to follow the legal settlement of her husband as long as they were married, even though they had lived apart for a great number of years.

You inquire whether it is possible for a woman to gain a legal settlement apart from her husband as long as he has one within the state.

This question must be answered in the negative. Sec. 49.02 (1) provides:

"A married woman shall always follow and have the settlement of her husband if he have any within the state; otherwise her own at the time of marriage, and if she then had any settlement it shall not be lost or suspended by the marriage; and in case the wife shall be removed to the place of her settlement and the husband shall want relief he shall receive it in the place where his wife shall have her settlement."

This statute settles the question. If they are still married then the legal settlement of the woman is that of her husband, as her husband has a legal settlement in this state.

JEF
Minors — Child Protection — Industrial School for Girls — Erroneous commitment to industrial school for girls should be corrected by court who issued it if it can legally be done, otherwise commitment should be carried out as made.

July 16, 1936.

Board of Control.

You state that the Wisconsin industrial school for girls has advised you that a recent commitment made to that institution has been amended as follows:

The words, "21 years" in the blank commitment used in such cases were crossed out and "18" written in in ink, thereby, according to the order, changing the age at which this girl is to be released from the institution.

You correctly state that the present laws provide that all commitments to the Wisconsin industrial school for girls shall be until the age of twenty-one years. Sec. 48.15, Stats.

You inquire whether your board should disregard the order as received or whether it should follow the provisions of the statute.

There is no intimation as to how this change was made—whether the change in the form of the commitment was made prior to the signature of the court or subsequently, by some other person. I would suggest that you get in touch with the judge who made the commitment and if the court term in which it was made has not yet expired, the judge can change the same to conform to the statute. If, however, the commitment cannot be changed, I would suggest that you comply with the commitment as you find it in its present form. A commitment to an institution by a court should be complied with but if it is erroneous, it should be changed if it can legally be done.

JEF
Indigent, Insane, etc. — Poor Relief — Person who is not committed to but is living at and paying for his keep at county home is not inmate of such home within meaning of sec. 47.08, subsec. (2), par. (b), Stats. County home is not authorized to house paying guests.

July 16, 1936.

Pension Department.

You state that A, of X county, has been granted a blind pension. A, of his own choice, has preferred to live at and pay for his keep in the county home maintained by Y county, which adjoins X county. A was not committed to the Y county home. You ask: In view of the provisions of sec. 47.08, subsec. (2), par. (b), Stats., is A eligible to receive a blind pension?

Sec. 47.08 (2) (b) provides in part:

“(2) In order for any person to receive such pension he must:

“(b) He must not be an inmate of any state, county or municipally-owned charitable, reformatory or penal institution in this state * * *”

This provision clearly forbids the allowance of a blind pension to any person who is an inmate of a county home. This question immediately presents itself: Is A, who is not committed but pays for his keep, an inmate of the Y county home? A similar question was presented in XII Op. Atty. Gen. 270. It was there held that a person who was not committed to a county home but who was staying there and paying for his keep at such home was not an "inmate" and consequently was not barred from receiving a blind pension. The pertinent parts of sec. 47.08 (2) (b) have not been revised since that opinion was rendered. Applying the rule of said opinion to the facts in question, A is not an "inmate" of the Y county home.

Conceding that A technically is not an inmate of such home, we find no statutory provision which authorizes county homes to keep "boarders." The county home is a
county institution and is in existence solely by virtue of legislative authorization. Such institution may be established for the “relief and support of the county poor.” Sec. 49.14, Stats. The only persons entitled to live at the home, excepting, of course, necessary personnel for administration, are persons “committed” by the county judge under sec. 49.07. If the person is so committed he is an inmate and barred from the benefits of the blind pension law. Sec. 47.08 (2) (b).

Your statement of facts presents a further question under the blind pension law. Sec. 47.08 (1) provides:

“Any needy person * * * shall be entitled to receive from the county of which he or she is a resident an annual pension * * *.”

You state that A, of his own volition, prefers to live at the Y county home. Upon such facts it seems doubtful that A is a resident of X county.

JEF

Bridges and Highways — Public Officers — Malfeasance — Town Officers — Expenditure of public money by town officers upon resolution passed at town board meeting to expend money on private right-of-way is unlawful and prosecution under sec. 348.28, Stats., will lie against such officers. If right-of-way is first converted into public right-of-way, then expenditure of public money for improvement of such public highway is authorized.

July 16, 1936.

Earl E. Schumacher,
District Attorney,
Beaver Dam, Wisconsin.

You state that in one or two instances in Dodge county, in respective townships, at the regular town meeting thereof, this spring it has been apparently duly voted and acted
upon by resolution to instruct or require the town board to gravel certain alleged highways. It develops that said alleged highways consisted of all or nearly all of the various roadways leading from admitted public highways to the farm homes of one or more farmers along said apparently private roadway. In other words, the roadways in question would lead from an admitted public highway to the farm home of a single farmer or in some cases to the farm homes of two or more farmers. It further appears that various roadways in question are private roadways and they have not, by any means, been made public highways.

You inquire: (1) Whether prosecution should be instituted in case such graveling was done by township officers without creating the roadways in question public highways; and, (2) whether prosecution should be instituted in case statutory procedure of either chapter 80 or 81 was first followed in an attempt to create the roadways in question public highways and such roadways were then graveled by the action of the township officers.

You direct our attention to sec. 348.28, Stats., which contains the following:

"Any officer * * * of any * * * town * * * 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; * * *"

You will note that there is no minimum penalty provided. The court before whom the case is tried is permitted to make the minimum as small as he chooses, in some cases merely nominal. In the case of State v. Cleveland, 161 Wis. 457, our court held that township officers could be prosecuted under this section when they paid one of the officers one dollar and fifty cents for conveyance to a town board meeting. The question confronting you is: Can the town board or the town meeting expend money for improving a private right-of-way?
You state that you have come to the conclusion that it cannot be done, and cite *State ex rel. New Richmond v. Davidson*, 114 Wis. 563. We agree with your conclusion. You have also cited *State ex rel. Lightfoot v. McCabe*, 74 Wis. 481 and *Cunningham v. Hendricks*, 89 Wis. 632. You quote from annotations to sec. 80.01 as follows:

“A private way can be converted into a public highway by only two methods: By dedication by the owner to the public use and the acceptance by the public; by user and working the locus in quo as a public highway for ten years. If there has been no dedication, the expenditure of highway taxes upon a private way by the unauthorized acts of town officers will not make it a public highway. If a way was private in its inception nothing less than a clear, unmistakable user will operate to enlarge the private easement to a public one.”

You are advised that your first question should be answered in the affirmative. We know of no authority for a town board meeting to expend money on a private highway. The offense may be considered a minor one, as the expenditure of only a dollar and a half in the *Cleveland* case; still if it is unlawful expenditure, the statute applies.

Your second question should be answered in the negative. If the private right-of-way is first converted into a public highway, then, of course, the expenditure of money for the improvement of such highway is authorized and the town board meeting has the right to authorize such expenditure. JEF
Counties — County Board — County Highway Committee — Soldiers and Sailors Relief Committee — Members of highway committee who are members of county board cannot receive their increase in per diem until their next term as members of county board.

Members of soldiers and sailors relief committee who are not members of county board receive increase in pay as soon as any member of county board receives his increase.

July 20, 1936.

Wendell McHenry,
District Attorney,
Waupaca, Wisconsin.

You state that at the regular November session of the county board the members adopted a resolution increasing their pay to the sum of five dollars per day. There has been considerable question raised as to when this raise in pay takes effect and you would appreciate an opinion on the following questions:

"1. Do the members of the highway committee receive their increase in pay commencing with January 1, 1936, or do they have to wait for this increase until after their re-election to the county board?"

You are advised that it is our opinion that the increase will not take place until after the re-election of the members to the county board. Sec. 59.03, subsec. (2), par. (f), Stats., contains the following, which is decisive of this question:

"* * * but any county board may at its annual meeting, by resolution, fix the compensation of the members of such board to be elected at the next ensuing election, at any sum not exceeding five dollars per day * * *.”

Members of the county board who are also members of the highway committee receive the same per diem as they do for other services on the county board. See Henry v. Dolen, 186 Wis. 622.
You also inquire:

"2. When does the increase in pay go into effect in regard to the members of the soldiers and sailors relief committee who are not members of the county board but draw the same pay as county board members?"

We are of the opinion that this pay commences as soon as the resolution becomes effective concerning the increase of salaries. If there are any members of the county board who are receiving the increase, then of course they as members of the soldiers and sailors relief committee are entitled to such increase.

Your interpretation of the statutes, that this increase did not become effective as to the members of the county board until their re-election and that then the increase would become effective immediately upon their qualifications to this office is in our opinion correct. The fact that your ruling may result in some members of the committee receiving higher pay than others is not an unusual case where the salary is increased not to take effect until the next term of office.

JEF

Appropriations and Expenditures — Bridges and Highways — Street Improvement — Town is not authorized to expend gasoline tax money received from state for maintenance of private roads.

July 20, 1936.

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

You ask for an opinion on the following:

In Town A, at the regular town meeting, the people voted to expend the gasoline tax received from the state on pri-
You inquire whether the gasoline tax can be spent for the maintenance of private roads.
You state that it is your opinion that the gasoline tax, being distributed by the state and being distributed on the basis of the number of public roads in the town, cannot be spent on any but public roads.
You are advised that your conclusion is correct. Sec. 20.49, subsec. (8), Stats., does not authorize the expenditure of money for private roads. In XXI Op. Atty. Gen. 801 it was held that the town board has no authority to use gasoline tax money under the provisions of subsec. (8), sec. 20.49, Stats., to build new roads; such money can be used only for improvement of roads that are "open and used for travel."

JEF

Automobiles — State is not liable for torts of its officers or agents. Driver of truck for state may, however, be personally liable for negligence in operation of such truck.

July 20, 1936.

E. J. O'MEARA,
Highway Commission.

You inquire as to liability in case of an accident in which a state-owned vehicle is involved. You state that a privately-owned truck collided with one of your trucks and the question arises as to whether the state is liable and also whether the operator of your truck is personally liable.
You have not informed us as to what line of work the truck was used for. It is a general proposition, well established by law, that the state is not liable for the tortious acts
of its agents and officers while engaged in the discharge of a governmental function. *Apfelbacher v. State*, 160 Wis. 565. In said case it was held:

"The doctrine of *respondeat superior* has by courts been applied to public subdivisions of the state only in those cases where the municipality has been engaged in a proprietary enterprise which may or does result in a financial benefit, although the legislature has from time to time made exceptions to this rule." (Syllabus.)

If the operator of the truck was negligent, he may be personally liable for the damages caused by such negligence. The state is not liable unless it is made so by statute. I know of no statute which makes the state liable when the truck is used in the performance of a governmental function.

JEF
Social Security Law — Poor Relief — It is function of county board to determine whether assistance grants shall be reduced in accordance with sec. 49.51, subsec. (4), Stats.

If assistance is reduced under sec. 49.51 (4) reduction shall apply pro rata to all beneficiaries.

Formula for reduction of assistance as specified by sec. 49.51 (4) shall prevail over formula specified by sec. 49.38 (2).

County does not have power to reduce assistance in excess of amount specified by sec. 49.51 (4) but may reduce assistance in lesser amount.

Calculations for reduction of assistance must be made upon basis of payments made in and aid received for immediately preceding quarterly period.

If state has paid its full share of aid for any quarter county may not reduce amount of assistance paid during such quarter in succeeding quarter. On other hand, county need not increase assistance allowance paid during preceding quarter until such time as state has paid its full amount of aid for all previous periods.

July 20, 1936.

Pension Department.

In your communication of June 30 you ask several questions relating to the interpretation of sec. 49.51, subsec. (4), Stats. We shall answer the same seriatim.

Secs. 49.51 (4) and 49.38 (2) provide:

49.51 (4) “Whenever the state shall prorate the appropriations for state aid for old-age assistance, aid to dependent children, and blind pensions among the counties entitled thereto, the counties may reduce the amounts allowed to the beneficiaries in the following quarter, by the amount of the state and federal aid unpaid. Such reduction shall be made on a prorata basis and shall apply until the state and federal aid is paid in full. The amount unpaid by the state shall remain as a charge against the state. Whenever the state shall reimburse the counties for this unpaid amount, the counties shall in turn pay the full amount to the beneficiaries entitled thereto.”
49.38 (2) "On or before the twentieth day of January, April, July and October the secretary of state shall draw his warrant for reimbursement to the respective counties of eighty per cent of the amounts paid by them as old-age assistance during the preceding quarterly period; provided that if the total amount payable to all counties under this section shall exceed the amount available for such quarterly period under the appropriation made in subsection (5) of section 20.18, the secretary of state shall prorate the amount available among the various counties according to the amount paid out by them respectively. Whenever the secretary of state shall prorate the amount available to the various counties, the counties in the next following quarter shall prorate to the recipients of old-age assistance such proportion of the amount allowed as the amount paid by the state bears to the full amount due from the state."

1. Is it the function of the county board or the county agency administering assistance to determine whether or not the amounts allowed to beneficiaries shall be reduced in accordance with sec. 49.51 (4), Stats.?

Answer: As the statutes specifically provide that it is the duty of the county board to raise and appropriate moneys for the payment of assistance (secs. 47.08 (10), 48.33 (9) and 49.37 (1)), it is our opinion that it is the function of the county board and not the county administering agency to determine whether or not assistance shall be reduced in accordance with sec. 49.51 (4). The purpose of sec. 49.51 (4) was to give relief to counties which do not have sufficient funds to pay aids without receipt of full state and federal aid. The county board is in a position to know the financial resources of the county. As sec. 49.51 (4) provides that counties "may" reduce such assistance, such reduction requires affirmative action by the board. See also XXV Op. Atty. Gen. 68.

2. Under sec. 49.51 (4) it is provided that reduction of assistance shall be made on a prorata basis. Shall such reduction apply to (a) only beneficiaries on the rolls during the quarter for which the state reimbursement falls short, or (b) all beneficiaries irrespective of the time applications and grants were made.
Answer: The reduction shall apply to all beneficiaries. The statute does not confine the reduction to any class of beneficiary. As the purpose of the statute is to relieve the counties which, in the absence of full aid, may be short of funds, there is no logical reason for classifying beneficiaries. In addition it would lead to an inequitable result to so classify.

3. If a county in a preceding quarter spent $10,000 for old-age assistance, the county is entitled to reimbursement to the extent of 80 per cent of that amount or $8,000. Assuming that reimbursement was in the amount of $7,000 with $1,000 deficiency, does the word “amount” mean that the reduction for the next quarter shall be on the basis of the $1,000 deficiency as related to the $10,000 total expenditure or 10 per cent, or does it mean $1,000 as related to $8,000 or 12½ per cent?

Answer: Sec. 49.51 (4), which relates to all three forms of public assistance and sec. 49.38 (2), which relates only to old-age assistance, specify inconsistent formulas for computing the reduction of assistance.

Sec. 49.51 (4) specifies that the county may reduce “by the amount of state and federal aid unpaid.” On the facts presented the reduction would amount to $1,000 or 10 per cent of the total aid allowed. Sec. 49.38 (2) provides that the county may reduce the assistance by paying only such part of the total aid allowed as “the amount paid by the state bears to the full amount due from the state.” Under this rule on the facts presented the county would pay only seven-eighths of the total allowance, or a reduction of 12½ per cent. As a general rule, a specific provision supersedes a general law; if this rule were applied old-age assistance should be reduced 12½ per cent and aid to dependent children and blind pensions 10 per cent under the given facts. However, we are of the opinion that the rule specified in sec. 49.51 (4) should obtain in all cases. Sec. 370.02 (3) provides:

“If conflicting provisions be found in different sections of the same chapter the provisions of the section which is last in numerical order shall prevail unless such construction be inconsistent with the meaning of such chapter.”
By virtue of this statute, sec. 49.51 (4) prevails over the inconsistent provisions of sec. 49.38 (2).

4. Has a county power: (a) to reduce claims in excess of the amount of the state and federal aid unpaid, (b) to reduce claims by an amount that is less than the state and federal aid unpaid?

Answer: Sec. 49.51 (4) provides that counties may reduce assistance "by the amount of the state and federal aid unpaid." This clearly does not give counties power to reduce assistance in excess of the amount of aid unpaid. On the other hand, as counties may reduce by the amount of aid unpaid, we are of the opinion that they have power to reduce less than that amount.

5. Sec. 49.51 (4) provides that counties may reduce the amounts allowed to beneficiaries "in the following quarter." Does the right to make a pro rata reduction lapse with the end of the following quarter?

Answer: All provisions of the statutes relating to reimbursement of counties by the state and the subsequent reduction of benefits to individuals contemplate that calculations of aid and reduction of allowances shall be based upon a quarter period basis. Both secs. 49.51 (4) and 49.38 (2), by express language or strong inference, provide that a reduction in any quarter shall be based upon the aid received for the previous quarter and the amount of the assistance paid or allowed in the previous quarter. Therefore, it is our opinion that no reduction may be made that is not based upon the immediately preceding quarter period.

6. If it be assumed that for any quarter the state is able to reimburse the counties to the full extent of 80 per cent of their expenditures for assistance but not to make up the deficiency for a preceding quarter, may counties continue the reduction in grants to beneficiaries?

Answer: Subject to the terms of the law the reduction of grants is optional with the counties. XXV Op. Atty. Gen. 68. As above stated, computations for reductions are based upon the immediately preceding quarterly period. If the
state has paid its full aid for such period the county may not by virtue of sec. 49.51 (4) decrease the assistance allowance paid during the preceding period. On the other hand the county need not increase the assistance allowance paid during the preceding period (which allowance may have been a "reduced allowance" as compared with the original allowance) until such time as all state aid for all previous periods is paid in full. Although this conclusion may work a hardship upon beneficiaries it cannot be avoided and at the same time give effect to the explicit language of sec. 49.51 (4). The legislature changed the public assistance plan in this state from a county or unit plan to a federal-state-county or unit plan. Although the county sought to have the federal and state governments finance the plan 100 per cent, it was finally provided that 20 per cent of its cost should be borne by the counties or lesser political units. It is well known that secs. 49.51 (4) and 49.38 (2) were enacted for the protection of the counties or political units of the state. With such provisions in our law it is obvious that the success of the present plan depends upon the receipt of federal and state aid.

JEF
University — President of university has right to vote on university budget at meeting of board of regents where there is tie vote, under sec. 36.02, Stats., even though his salary and appointment are included in budget, and this right cannot be denied by president of board of regents.

Where president of university breaks tie and his vote is recorded in favor of motion, motion is carried even though president of board of regents denies university president's right to vote and declares motion lost.

July 22, 1936.

President Glenn Frank,

University of Wisconsin.

You have requested the opinion of this department regarding a vote on the university budget by the board of regents. You say that at the meeting on June 16 a vote was taken on the university budget for 1936-1937; that the vote was tied 7 for and 7 against its adoption, and that as president of the university you cast your vote in favor of the budget, thereby breaking the tie. The president of the board of regents then ruled that this deciding vote was invalid on the ground that your name and your salary were contained in the budget, so that you had a personal interest in the budget. A motion was made and seconded to overrule this decision, the vote again being 7 for and 7 against overruling the decision, whereupon you cast your vote for the motion; and again the president of the board of regents ruled your deciding vote invalid.

It was then moved and seconded to divide the question so that a vote be taken on the adoption of the budget with your appointment and salary segregated from the rest of the budget for separate vote. The vote on this motion stood 7 for and 7 against dividing the question. You cast a deciding vote in favor of the motion, but the president of the board of regents ruled that your deciding vote was invalid on the ground that you had an indirect interest in the result of the vote.

Sec. 36.02, Stats., provides as follows:
"The government of the university shall be vested in a board of regents, to consist of one member from each congressional district and four from the state at large, of whom at least two shall be women, two shall be farmers, and two shall be engaged in the manual trades, to be appointed by the governor; the state superintendent and the president of the university shall be ex officio members of said board; said president shall be a member of all the standing committees of the board, but shall have the right to vote only in case of a tie. * * *"

You ask whether the denial of the right of the president of the university to cast the vote breaking the tie vote on the adoption of the 1936-37 budget is in conformity to or in violation of sec. 36.02 of the Wisconsin statutes.

The statute expressly provides that the president of the university is an ex officio member of the board of regents and in the event that the board of regents becomes deadlocked on a question the president of the university has the right to break the deadlock by his deciding vote. The courts have held that the legislature can provide such a method for breaking deadlocks where the board has been created by the legislature. Kirchdorfer v. Tincher, 204 Ky. 366, 264 S. W. 766, 40 A. L. R. 801 (1924).

No limitation was placed upon this casting vote to any particular kind or class of business, so that it may be presumed that the legislature, when it passed this act, intended that the right to break the tie should exist at all times when the board of regents should become deadlocked. The legislature well knew that one of the important duties of the board of regents is the adoption of the budget for the university so that that institution might "accomplish the objects and perform the duties prescribed by law," which power is vested in the board of regents by sec. 36.03, Stats. Therefore, it would seem that the right of the president of the university to vote when there is a deadlock exists when the board is passing upon the budget as well as in other matters.

You state that the reason that the president of the board of regents held your deciding vote invalid on the adoption of the budget was because you had a personal interest in the budget, since your salary and name were contained therein.
If that reason were sound, the same objection might be raised to the approval of budgets by the governor or legislators where their own salaries are included; but it is a matter of general knowledge and acceptance that such bodies may approve such appropriations even though their salaries are included therein.

In *Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208, the court points out that by the general rule members of a legislative body or municipal board are disqualified to vote on propositions in which they have a direct pecuniary interest adverse to the state or municipality which they represent. But the court went on to state that here is an exception to this rule where the body or board fixes its own compensation, on grounds of necessity. See *Galey v. Montgomery County*, 174 Ind. 181, 91 N. E. 593 (1910); 39 A. L. R. 1478n; 19 R. C. L. 891, sec. 191.

It is clear that you are concerned with the passage of the budget for the purpose of maintaining and operating the university and not with the remuneration which you might receive for your own services. Your good faith in this respect is shown by your suggestion that your appointment and salary be divorced from the rest of the budget and voted on separately. Thus, it does not appear that there was any interest which was adverse to the state, but rather that your only interest was to aid the state by supporting a budget which you believed would give to the state a better university. There was to be no increase in your salary over that provided in the budget for the past biennium, so that you were not to receive any new benefits from the passage of the new budget.

It is true that sec. 348.28, Stats., makes it a felony for "any officer, * * * of the state * * * or any officer, regent, treasurer, secretary, superintendent, clerk or agent of any * * * educational * * * institution instituted by or in pursuance of law within this state, or any member of any body or board having charge or supervision of such institution 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 * * * contract, proposal or bid in relation
to the same or in relation to any public service, * * * 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; * * *. Any contract, to which the state * * * is a party, entered into in violation of the provisions of this section, shall be absolutely null and void and the state, * * * shall incur no liability whatever thereon.”

However, it is the opinion of this department that this statute does not apply to this situation in view of the clear language of sec. 36.02, providing that the president of the university may vote in case of a tie, and which makes no exceptions as to the use of that right. Further, it appears that sec. 348.28, Stats., was not intended to affect this case, since on grounds of necessity, it is the duty of the board of regents to pass on the university budget in the course of maintaining and operating the university, and since no other body is authorized to do so, it must be done in the same manner as other business of the board is carried on. The same situation exists where the legislature, the governor, and other boards must approve appropriations, though salaries to the members may be included therein.

You further inquire:

“In terms of your opinion on the above question, what is the present legal status of the 1936-37 university budget—did it fail of adoption by the ruling of the president of the board of regents on June 16 or was it adopted when the tie was broken making a vote of 8 for and 7 against adoption?

“If the denial of the right to cast a vote to break the tie, on the grounds stated, was in violation of 36.02 of the statutes, is the 1936-37 university budget now legally in effect unless and until reconsidered by proper procedure?”

In view of the above opinion and in view of the opinion stated in State ex rel. Burdick v. Tyrrell, 158 Wis. 425 (1914), it is our belief that the budget for 1936-37 was adopted at the meeting of the board of regents on June 16, since your vote was recorded in the minutes.

In the case of State ex rel. Burdick v. Tyrrell, 158 Wis. 425, the question arose as to the appointment of a city’s attorney by the city council. In that case there were six
members of the city council, and on the vote to appoint the city attorney three of the council members voted for the relator, two voted against him, one member not voting. The members of the council did not believe this vote sufficient to elect the relator, since they thought a majority of the members present was required to elect, so that the presiding officer (the mayor) did not declare the relator to be elected and a motion was adopted to defer election of the city attorney until the next meeting. The court held that the relator was elected even though the presiding officer made no declaration of his election and even though the council had subsequently voted to defer the election, in the belief that relator had not been elected. The court said, p. 433:

"* * * The result of the formal ballot declared and recorded was that the relator received three votes. This result could not be changed by declaration of the mayor. * * *"

By analogy it appears that the motion to adopt the budget for 1936-37 was adopted by the vote on June 16, even though the president of the board of regents did not declare it adopted and even though he refused to recognize your vote. Sec. 36.02, Stats., gives the president of the university the right to vote when there is a tie vote, and the president of the board of regents cannot arbitrarily deny or ignore this right. Your vote was recorded in the minutes, and should have been given effect.
JEF
Corporations — Criminal Law — Criminal prosecution may be brought against corporation by serving of verified information on corporation and judgment may be taken if corporation does not appear within twenty days.

July 23, 1936.

SIDNEY J. HANSON,
District Attorney,
Richland Center, Wisconsin.

You state that the public service commission has requested a prosecution of a certain corporation under sec. 194.34, subsec. (4), Stats. 1933. You inquire whether a prosecution should be instituted by the filing of a complaint before a justice of the peace or police justice and the case should then be transmitted to either the circuit court or county court without any further proceedings and then an information should be filed in that court and a copy thereof served upon the proper officer of the corporation, or whether the complaint can be filed in the justice or police court and then an information filed in the justice or police court which would be served on the corporation and the matter disposed of in justice or police court.

The procedural steps are practically given in sec. 359.10, where it is stated:

"Whenever any corporation, private or municipal, which shall have been indicted or informed against under the common law or under any statute of this state shall fail to appear after notice of such indictment or information, given and served by leaving a true copy of such indictment or information with the officers or persons upon whom a summons in a civil action against such corporation may be served, and twenty days shall have elapsed thereafter, the default of such corporation may be recorded, and the charges in such indictment or information shall be taken as true and judgment shall be rendered accordingly."

In an official opinion in X Op. Atty. Gen. 47 it was held that the district attorney may file any information against a corporation without a preliminary examination having
been had. It is not necessary in prosecuting a corporation to file a criminal complaint in justice court or police court. The information may be prepared, verified and served on the corporation. See IV Op. Atty. Gen. 240. There would be no purpose in filing a complaint in justice court and issuing a warrant for the arrest of the defendant when the defendant is a corporation, as the corporation cannot be arrested and imprisoned. The statute provides for the issuing of an information by the district attorney and that the same be served on the corporation. The procedural steps should be taken as provided in sec. 359.10.

Sec. 355.18 provides that an information may be filed without a preliminary examination against a corporation. The information should generally be filed in the circuit court. See sec. 355.04.

JEF

Indigent, Insane, etc. — Poor Relief — Public Health — Chiropractors — Medical Relief — Term "medical relief” as used in sec. 49.18, subsec. (1), Stats., includes relief given by chiropractor.

July 24, 1936.

BOARD OF EXAMINERS IN CHIROPRACTIC,
Madison, Wisconsin.

You desire to know whether the term “medical relief” as used in sec. 49.18, Stats., includes chiropractic treatment. Sec. 49.18, subsec. (1), requires a municipality liable for the relief of an indigent to provide temporary medical relief when reason therefor exists. This department has held that chiropractors are not physicians. XVII Op. Atty. Gen. 318; XVI Op. Atty. Gen. 95; XIV Op. Atty. Gen. 442, 449, 482.
Our supreme court in *Corsten v. Industrial Comm.*, 207 Wis. 147, held that the charges of a registered chiropractor for treatment of injuries sustained by an injured workman covered by the compensation act were not allowable by the industrial commission. This case was based upon the proposition that the legislature intended to allow the expense of treatment only when given by a physician. Sec. 102.09 (1), Stats. 1927, provided that the expense of medical, surgical and hospital treatment was recoverable, but the court pointed out that other sections of the compensation act, such as secs. 102.13 and 102.09 (2), referred to treatment by physicians and accordingly held that sec. 102.09 (1) meant that the treatment would be given by physicians rather than chiropractors. Accordingly this case and the opinions cited are not authority in the present instance since sec. 49.18 provides for medical relief but does not require that such relief be given by a physician.

In *People ex rel. Fred W. Gage v. John Siman et al.*, 278 Ill. 256, 115 N. E. 817, the court said, p. 257:

"* * * The term 'medicine' is not limited to substances supposed to possess curative or remedial properties, but has also the meaning of the healing art,—the science of preserving health and treating disease for the purpose of cure,—whether such treatment involves the use of medical substances or not. * * *"

In *State v. Morrison*, 127 S. E. 75, the West Virginia court stated, pp. 78-79, quoting from *Commonwealth v. Zimmerman*, 221 Mass. 184:

"" 'Medicine' relates to the prevention, cure, and alleviation of disease, the repair of injury, or treatment of abnormal or unusual states of the body and their restoration to a healthful condition. * * * It is not confined to the administering of medicinal substances or the use of surgical or other instruments. * * *"

The practice of chiropractic is generally recognized as a healing art designed to repair abnormal states of the body. The laws of this state regulating chiropractic are a part of ch. 147, entitled "Treating the sick." Our supreme court in
the Corsten case stated that for the purposes of that chapter "their treatment [chiropractors'] is 'medical treatment.'" (P. 148.) Accordingly we hold that the term "medical relief" as used in sec. 49.18 (1) includes relief given by chiropractors.

JEF

School Districts — Tuition — Under sec. 40.21, subsec. (2), Stats., or any other statute district obligated to furnish schooling to its residents cannot recover tuition from any other municipality if pupil has no legal settlement anywhere.

July 24, 1936.

L. A. Buckley.

District Attorney,

Hartford, Wisconsin.

You state that one of the school districts has filed a claim against the county for the tuition of one of the pupils attending the school. The parents of this pupil reside within the school district but do not have a legal settlement therein. The parents are on relief and are receiving aid as a county-at-large case for the reason that they have no established legal settlement.

This claim is based on sec. 40.21, subsec. (2), Stats., which provides:

"Every person of school age maintained as a public charge shall for school purposes be deemed a resident of the school district in which he resides, except that such school district shall be compensated by the municipality or by the county in case the county system of poor relief is in effect in such municipality in which such person of legal school age has a legal settlement as defined in section 49.02 with an
amount equal to the pro rata share of the year’s expense of maintaining such school, based upon the total enrollment and year’s expense of the maintenance of such school. In case such person maintained by the county has his legal settlement outside the county then the county shall pay such school district’s pro rata share and such county may recover such sums paid, from any municipality in the state where the legal settlement may be established.”

You say there is some question in your mind as to whether or not the county is liable to the school district for tuition under such circumstances and you would like a ruling on this matter.

The county is required to support the persons who are residing in the county when the county system of poor relief is in force under sec. 49.04 and the school district is required to give those residing in the school district the opportunity of attendance at school. There is no provision by which this school district can be reimbursed for tuition except sec. 40.21 (2), above. The school district can be reimbursed only from the municipality in which the person has a legal settlement. As this person has no legal settlement, the district cannot be reimbursed for tuition.

JEF
456  OPINIONS OF THE ATTORNEY GENERAL

Automobiles — Criminal Law — Law of Road — Sentence to state prison under sec. 85.141, subsec. (1), par. (b), Stats., which provides for imprisonment without designating place of imprisonment, is unauthorized.

Violation of sec. 85.141 (1) (b) does not constitute felony.

Cases under 85.141 (1) (b) are triable in courts that have no jurisdiction to try felonies.

July 25, 1936.

WALTER B. MURAT,
District Attorney,
Stevens Point, Wisconsin.

You state that prior to August 1, 1935, the so-called "hit and run" statute, sec. 343.181, specifically provided that a violation of the same constituted a felony. Said section was replaced by sec. 85.141 by ch. 427, Laws 1935. Sec. 85.141, subsec. (1), par. (b), provides:

"Any person failing to stop or to comply with said requirements under such circumstances shall upon conviction be punished by imprisonment for not less than ten days nor more than one year or by fine of not less than five dollars nor more than five thousand dollars, or by both such fine and imprisonment."

You state that the statute is silent as to whether the imprisonment should be in the county jail, house of correction, workhouse or state prison. Your question is: What court has jurisdiction? Does this statute charge a felony?

-Sec. 353.31, Stats., provides:

"The term 'felony,' when used in any statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by imprisonment in a state prison."

The statute in question provides the penalty of imprisonment without giving the place of imprisonment. In 16 C. J.
1376 we find the general rule laid down concerning statutes prescribing imprisonment without specifying the place, as follows:

"Generally, when a statute prescribes the punishment of imprisonment without specifying the place thereof, it implies imprisonment in the common jail or prison of the county, and, if there is no jail in the county, it is the duty of the sheriff to see that the prisoner is confined in the nearest sufficient jail. But a statute which provides that a crime shall be a felony, punishable by imprisonment, by implication will be held to mean imprisonment in the state prison, *
* * *"

In *Horner v. State*, 1 Ore. 267, it was held that where the statute was silent as to the place of punishment and the crime was punishable only by a short term, the court would construe it to be a misdemeanor, punishable by imprisonment in the county jail, rather than as a felony, punishable by imprisonment in the state prison.

In *Commonwealth v. Francies*, 250 Pa. 350, 352, 95 A. 798, the court ruled that imprisonment in the statute means confinement in the county jail. We find no authority in Wisconsin contrary to the general rule laid down by the authorities. We must hold that the crime in question is not a felony and the imprisonment was not intended to be in the state prison but rather in the county jail. You suggest that since sec. 85.141, Stats., was created to replace the former sec. 343.181, which latter section clearly made the violation of said statute a felony, undoubtedly it was the intent and purpose of the legislature that a violation of sec. 85.141 should also be a felony and that you proceed upon that theory. We believe that the contrary conclusion would be the proper one. The fact that the legislature replaced the former statute, which made it a felony, by a statute which does not definitely make it a felony would indicate an intent that it should not be a felony. It is our conclusion, therefore, that the crime in question is not a felony and imprisonment for its violation in the state prison is improper.

JEF
Public Officers — Justice of the Peace — School District Attorney — Office of justice of peace of village in Milwaukee county and that of attorney for school district located in same village are not incompatible.

July 27, 1936.

WILLIAM A. ZABEL,
District Attorney,
Milwaukee, Wisconsin.

You inquire whether the office of justice of the peace of a village located in Milwaukee county is incompatible with the office of attorney for the school district located in the same village in which the justice of the peace functions, the office of the justice being an elective one under salary, while the position of attorney for the school district is appointive with remuneration of a salary and per diem.

Justices of the peace in Milwaukee county no longer have any jurisdiction in civil cases and hear cases only involving misdemeanors.

Careful examination of the statutes has failed to show that the duties of a justice of the peace and attorney for a school board in the same village might conflict. The only situation which might arise making these two offices incompatible is that where the attorney for the school board would have to bring civil action on behalf of the district, said suit being tried in the justice court in the same village. However, it does not appear that this contingency could ever occur in Milwaukee county, in view of the fact that justices of the peace in that county have no jurisdiction in civil cases.

The rule as to incompatibility of offices is well stated in XXIII Op. Atty. Gen. 605, where it was said:

"* * * 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 in-
cumbent, 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."

This rule was again quoted and approved by this office in XXIV Op. Atty. Gen. 344.

From the discussion given above, it appears that the two offices in question may be held by the same man.

JEF

Public Health — Basic Science Law — Board of Medical Examiners — State board of medical examiners cannot delegate its powers to national board of medical examiners as to setting standards and giving examinations to applicants under secs. 147.15 to 147.18, Stats.

State board of medical examiners has broad discretion in determining reputability of professional schools, and where it is impossible for board to determine whether college is reputable, burden is upon applicant to prove its reputability.

July 28, 1936.

ROBERT E. FYNNE,

Board of Medical Examiners,

La Crosse, Wisconsin.

In your two letters you inquire whether the board of medical examiners has the power under secs. 147.15 to 147.18, Stats., inclusive, to license by endorsement (without further inquiry or examination) persons who have passed the examination of the national board of medical examiners, which is an independent body with its office in Philadelphia, Pennsylvania; and also whether your board may refuse to admit to examination or to license applicants who present diplomas from colleges whose reputability you have been unable to determine.

Sec. 147.16, Stats., provides:
"Having complied with section 147.15, the applicant shall be examined in anatomy, physiology, general diagnosis, pathology, histology, chemistry, hygiene and sanitation. All applicants shall be given the same examination in the foregoing subjects, so far as practicable. Applicants for license to practice medicine and surgery, or osteopathy and surgery, shall be further examined in the branches usually taught in reputable professional colleges."

Sec. 147.17, subsec. (1), then provides that if six members of the state board of medical examiners find the applicant qualified, he shall be issued a license to practice medicine or surgery, or osteopathy and surgery.

The provisions of sec. 147.15 pertain to the qualifications of the applicant, the time and place of application, and the fee.

There is nothing in these sections which prescribes the manner in which the examination is to be conducted. The only requirement is that it shall include the studies of anatomy, physiology, general diagnosis, pathology, histology, chemistry, hygiene and sanitation; and that applicants for license to practice medicine and surgery, or osteopathy and surgery, shall be further examined in the branches usually taught in reputable professional schools. Sec. 147.16.

The statutes have made it the duty of your board to determine whether an applicant is qualified to receive a license. It is the duty of your board to exercise its judgment, following the dictates of the statutes above referred to, and this determination must be in accordance with the terms of the statute.

This duty of the board cannot be delegated to any other person or body. The board may not accept the judgment of others.

The board may use the examination questions of the national board of medical examiners in whole or in part as part of its examination provided the board determines that they are in accordance with the standards set by the board. The duty of passing upon the qualifications of each applicant is by statute placed upon the board. It is the judgment of the board and not the judgment of any other person or body that the statute requires must be exercised. The appli-
cant has the right to the judgment of the board and not of others as to whether he is qualified.

You further state that you have difficulty in determining whether certain foreign professional colleges are reputable and ask whether your board may refuse to admit to examination or refuse to license applicants who have diplomas from such colleges.

Sec. 147.15 provides that applicants for license to practice medicine and surgery shall have "a diploma from a reputable professional college approved and recognized by the board."

The provision in sec. 147.17 (1) is as follows:

"* * * 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 approved and recognized by the board, * * *:"

The statutes do not define "a reputable professional college."

In State ex rel. Coffey v. Chittenden, 112 Wis. 569 (1902), involving the question of the denial of a license by the board of dental examiners because they believed the school was not reputable, the court, pp. 584-585, said:

"* * * The burden in such a case is on the candidate to demonstrate to the satisfaction of the board the reputability of his alma mater, not on the board to establish or disprove it. * * * To say that the board, of its own motion, under all circumstances, on every occasion of an application by a graduate of a dental college for license to practice his profession, is bound to make an investigation of the question of the reputability of the school, is to advance a proposition that has no support either in the letter or the spirit of the law or any principle governing such bodies. * * *"

The court pointed out that where, as here, the statute places no limit upon the methods by which the board shall gather information as to the "reputability of the school," "it [the board] may proceed in any reasonable way, and the
candidates for licenses must submit to its judgments unless they transgress the boundaries of reason and common sense" (p. 586). See also XIX Op. Atty. Gen. 537.

The court in *State ex rel. Blank v. Gramling*, 219 Wis. 196 (1935), approves the earlier case and says that unless the action of the board of medical examiners is "wholly arbitrary and unwarranted," the decision of the board is final (p. 204).

From these cases it can be seen that the discretionary power of the board of medical examiners is very broad with respect to determining the reputability of the college from which the applicant has received his diploma. The board may of its own motion, or on petition of the college, determine its status, but where it is impossible for the board to gain such knowledge, the burden rests upon the applicant to show that the college is reputable. In such cases, where the applicant in the judgment of the board fails to sustain this burden, the board may deny the examination or license.

However, a college which previously has been considered reputable by the board of examiners cannot arbitrarily be considered not reputable without giving to the college an opportunity for hearing on the matter, since this is violation of due process of law. *State ex rel. Milwaukee Medical College v. Chittenden*, 127 Wis. 468 (1906).

JEF
Taxation — Tax Collection — County board may, by resolution pursuant to chs. 128 and 330, Laws 1935, provide, for waiving of interest and penalties upon tax certificates on homes and farms held by such county where such certificates have not been previously pledged as security.

July 28, 1936.

J. C. Raineri, Jr.,
District Attorney,
Hurley, Wisconsin.

You have submitted the following question: May a county board adopt a resolution pursuant to chs. 128 and 330, Laws 1935, providing, in effect, that such county will waive the penalties and interest on delinquent taxes on homes and farms only, all other owners of real estate to pay the full tax with all penalties added.

Ch. 330, Laws 1935, which is substantially the same as ch. 128, Laws 1935, provides as follows:

"SECTION 1. The governing body of any county, or city of the first class, may, but is not required to, waive the payment of all or any part of the interest, penalty, publication, redemption or other fees, upon the original amount of delinquent real estate taxes, other than special assessments, for the years 1931, 1932, 1933 and 1934, for which such county or city holds tax certificates not pledged as security.

"SECTION 2. The governing body of any county, or city of the first class, may, but is not required to, cancel all unpaid interest, penalties, or fees on taxes on real estate, except special assessments for the years 1931 and 1933, where the original amount of such taxes has been paid and the property subject to the lien of said unpaid interest, penalties and fees has not been sold at tax sale for such interest, penalties and fees. This is emergency legislation and shall terminate on October 1, 1936.

"SECTION 3. This act shall take effect upon passage and publication."

You will note that sec. 1 of ch. 330 relates to and is concerned only with delinquent real estate tax certificates of the years 1931 to 1934, inclusive, which are held by the
county or city of the first class, as the case may be. Sec. 2 of ch. 330 relates to those cases where the original amount of the taxes on the property have been paid but where such property is still subject to the lien for unpaid interest, penalties or fees. We are unable to ascertain the precise question which you have in mind as you do not state that the county holds delinquent tax certificates on real estate property in your county. Under sec. 1 it seems clear that the county may waive the interest, penalties and publication fees where such county holds the tax certificates. If Iron county does not hold the tax certificates, then, of course, sec. 1 is apparently not applicable.

Assuming that these delinquent tax certificates on real estate in Iron county for the years 1931 to 1934, inclusive, are held by such county, you inquire whether the county board may provide for waiving of penalties and interest on homes and farms only. Although there may be some question as to constitutionality of chs. 128 and 330, Laws 1935, we do not inquire into it but assume their legality. By the very terms of ch. 330 this is emergency legislation designed to aid and assist certain classes.

In XXIV Op. Atty. Gen. 627 it was held that the county was authorized by ch. 128, Laws 1935, to waive interest and penalties upon a portion of tax certificates owned by the county which were formerly pledged as security in a case where it appeared that at the time the resolution was passed such tax certificates had been released as security by the creditor. Likewise, in that opinion the following pertinent language is found, pp. 627-628:

"** It is manifest from an examination of the act that the intention of the legislature was to authorize the county to waive interest and penalties upon any or all tax certificates owned by the county and where such certificates were not, at the time pledged as security. * * *"
As those above quoted portions of the attorney general's opinion (XXIV Op. Atty. Gen. 627) indicate, ch. 128, Laws 1935, was intended to permit the county to waive interest and penalties upon any or a portion of tax certificates owned by it. The classification you seek to establish by county resolution is waiver of principal and interest on tax certificates held by the county on farms and homes. Much emergency legislation wherein similar classifications were established has been sustained in recent years. See Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 54 Sup. Ct. 231 (1933), and cases cited; Suring State Bank v. Giese, 210 Wis. 489; W. B. Worthen Co. v. Thomas, 292 U. S. 426, 54 Sup. Ct. 816.

The waiving of interest and penalty upon tax certificates on homes and farms would be exercising the authority conferred upon such county board by chs. 128 and 330, Laws 1935, as to a portion of tax certificates held by the county.

In XXI Op. Atty. Gen. 745, at a time prior to the enactment of the present chapters of the laws of 1935 now under consideration, it was held that the county board had no power to cancel statutory penalties and interest charges. However, this was upon the express holding that there was no empowering or authorizing statute under which the county might proceed to cancel or remit such penalties or interest. Local boards or officers may remit tax penalties, if so authorized by law, 37 Cyc. 1545. Since the legislature has by chs. 128 and 330, Laws 1935, conferred authority upon counties to waive the payment of interest, penalties or fees upon delinquent tax certificates held by it and since the classification here sought to be established does not seem to be unreasonable under the authorities, we are of the opinion that the county may, by resolution regularly passed, provide for such waiver of interest and penalties on tax certificates on homes and farms only. However, your attention is again invited to the fact that this opinion is predicated upon the assumption that chs. 128 and 330, Laws 1935, are valid and constitutional enactments of the legislature.

JEF
Elections — Nominations — Under sec. 5.26, Stats., each of twelve independent or nonpartisan candidates for presidential elector may obtain one thousand signatures necessary for his nomination paper from any place within state rather than from any particular district.

Each nonpartisan candidate for presidential elector must file separate nomination paper containing at least one thousand signatures.

July 30, 1936.

Theodore Dammann,
Secretary of State.

It appears that you have received a request to secure an opinion from this department as to whether independent candidates for presidential electors must secure signatures wholly within the districts of the state or whether they may secure these signatures anywhere in the state regardless of whether the candidate is a candidate for presidential elector from a congressional district or for the state-at-large. You have forwarded the letter which prompts this inquiry, from which letter it appears that the interested party states:

“I have been told that the opinion is held in your office that presidential electors when named for the independent column, are to be nominated as other state officers, each to have at least 1,000 signatures on his nominating petition, but that the ten electors selected from the ten congressional districts, must have their nomination papers signed solely within their respective districts. This requires a total of 10,000 signatures, involving an immense amount of work and expense.”

Art. II, sec. 1 of the United States constitution provides in part:

“* * *

“Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; * * *”
It is to be noted that although the number of presidential electors coincides with the total number of senators and representatives to which the state is entitled in the congress, the presidential electors are appointed by the state rather than by districts. This is true even though, under sec. 5.20, subsec. (1), Wis. Stats., "in the years in which presidential elections are held the convention shall nominate, by a majority vote, one elector for president and vice president from each congressional district, and two such electors from the state at large." Whether the presidential electors are nominated under sec. 5.20, subsec. (1), or under sec. 5.26, which will be subsequently discussed, the twelve electors (one from each of the ten congressional districts and two from the state at large) are well voted upon throughout the state.

Sec. 5.26 provides as follows:

"(1) Independent or nonpartisan nominations may be made for any office to be voted for at any general, judicial, or special election.

"(2) Except as otherwise provided in subsection (8) such nominations shall be made by nomination papers, containing the name of the candidate, the office for which he is nominated, his business or vocation, residence, post-office address, and except as otherwise provided by law the party or principle he represents, if any, expressed in not more than five words.

"(3) To each separate nomination paper shall be appended the affidavit of a qualified elector to the effect that he is personally acquainted with all the persons who have signed the foregoing nomination paper, that they are electors and that their residence, post-office address and date of signing are truly stated therein. But such affidavit shall not be made by the candidate named therein.

"(4) Such nomination papers shall be signed, if for a candidate to be voted for throughout the state, by at least one thousand voters thereof; *

"(5) Each voter shall sign for but one candidate for the same office, and shall add his residence, post-office address and the date of signing."

The word "thereof" as found in that portion of sec. 5.26, subsec. (4) given above must refer to the word "state." In as much, therefore, as each of the twelve presidential elec-
tors is voted for throughout the state, his nomination papers need be signed only by one thousand voters of the state. It is not necessary that the nomination papers of an independent or nonpartisan candidate for presidential elector be signed by one thousand voters of any particular district regardless of whether he is running for presidential elector from a congressional district or as one of the two presidential electors for the state at large.

It would appear that the foregoing has answered the principal question raised as contended for by the person requesting the opinion. In view of the specific reference in the letter to the immense amount of work and expense involved in obtaining ten thousand signatures, it would seem advisable to continue the discussion a little further. In Op. Atty. Gen. for 1910, on page 309, it was held that several candidates might be nominated on the same nonpartisan nomination paper. The paper submitted in that opinion contained the names of candidates for several state offices and for the two presidential electors at large. Upon the basis of this opinion it was held in I Op. Atty. Gen. 235 that all presidential electors, including those from the congressional districts, might be nominated on one nomination paper. In IX Op. Atty. Gen. 436, which opinion did not specifically refer to the opinion in Op. Atty. Gen. for 1910, p. 309 or the opinion in I Op. Atty. Gen. 235, it was held that a separate nomination paper must be filed on behalf of each presidential elector seeking a nonpartisan nomination. This opinion in IX Op. Atty. Gen. 436 was affirmed in XXI Op. Atty. Gen. 492, where it was held that separate nomination papers must be employed in nominating independent presidential electors.

Consequently, although each of the twelve candidates seeking a nonpartisan nomination as presidential elector may obtain the one thousand signatures to the nomination paper anywhere in the state, each of said twelve candidates must have a separate nomination paper, to which must be attached at least one thousand signatures. Thus, for the twelve candidates for nonpartisan presidential elector it will be necessary to obtain a total of twelve thousand signa-
tures although it may be that the same person may sign his name to the nomination papers of several of the twelve candidates. Sec. 5.26 (5), which provides:

"Each voter shall sign for but one candidate for the same office, * * *"  

is not violated when one elector signs the nonpartisan nomination paper of several candidates, in as much as it was held in I Op. Atty. Gen. 235-236:

"* * * The persons sought to be nominated as electors are obviously not candidates for the 'same office,' i. e. they are not in competition with each other, but each is a candidate for one of thirteen offices. * * *"

The statutes at the time of the opinion in I Op. Atty. Gen. 235 contained a provision limiting each voter to signing for but one candidate for the same office although the redistricting of the state has now given Wisconsin twelve presidential electors instead of the thirteen which Wisconsin had at that time.

JEF
Mothers’ Pensions — Social Security Law — Legal Settlement — Application for aid to dependent child must be filed in county in which child has legal settlement.

Sec. 48.33, subsec. (5), par. (c), Stats., relating to state-at-large cases, applies only in event that child has no legal settlement in this state.

Child cannot gain settlement for such aid purposes if parent has settlement in this state. If parent has no settlement in this state child may gain settlement for such purposes in accordance with rules prescribed by sec. 49.02, excepting that receipt of public aid by parent shall not bar child from gaining such settlement.

Such aid may be granted although incapacitated father is living with family, but family budget allowed shall not include allowance for care of such father.

For such aid purposes settlement of child follows that of father although he is in prison, tuberculosis sanatorium, insane institution, and although father and mother are divorced and custody of child is given to mother.

For such aid purposes child’s settlement follows that of mother if father is deceased.

July 30, 1936.

Pension Department.

You have submitted a series of questions calling for interpretation of the state laws relating to aid to dependent children. We shall answer the same in the order submitted.

1. If a child lives outside the county in which he has a legal settlement must application for aid be made in the county of legal settlement, or may the case become a state-at-large case under sec. 48.33 (5) (c)?

Answer: Sec. 48.33, subsec. (1), Stats., provides that if any person shall have knowledge that any dependent child is dependent upon the public for support, such person may bring such fact to the notice of the court of the county “in which such child has a legal settlement.”

Sec. 48.33 (5) (b) and (c) provides:
"(b) Such child must have a legal settlement in the county in which application is made for aid; but such child may, with the approval of the court, reside and be cared for outside of the county while receiving aid. For the purposes of this section, the receipt of public aid during the year next preceding by the family of any child shall not bar such child from having a legal settlement in the county.

"(c) In cases in which all other conditions for granting aid shall be satisfied but in which the child does not have a legal settlement in the county in which application for aid is made, such aid shall be granted, nevertheless, but only with the approval of the state pension department; provided, that the person having the care of said child has lived in this state for a period of one year next preceding the application for such aid. The entire amount paid from county funds as aid in such case shall be recoverable from the state out of the appropriation made by law. Such aid shall not operate to prevent the gaining of a legal settlement within the county, and shall be chargeable to the state only until the child shall have acquired such legal settlement and in no event longer than one year from the date of the first payment."

You suggest that sec. 48.33 (5) (c) is contrary to sec. 48.33 (1) and (5) (b) in that it seems to permit the filing of an application in a county other than that of legal settlement. We are of the opinion that an application for aid to dependent children must be filed in the county where the child has a legal settlement, and that sec. 48.33 (5) (c) applies only in the event that a child has no legal settlement in this state. We are mindful of our opinions reported in XVIII Op. Atty. Gen. 711, XIX Op. Atty. Gen. 150, and XX Op. Atty. Gen. 1167, and so far as such opinions hold that an application may be made in a county other than that of legal settlement, the same are overruled.

Because of the apparent confusion that has prevailed we deem it necessary to review various provisions of the aid to dependent children law. Sec. 48.33 (1) and (5) (b) definitely and clearly provides that application for aid must be made in the county of legal settlement. If a child’s parent has a legal settlement in this state the child’s settlement follows that of his parent. Sec. 49.02 (2), Stats. If, however, a parent has no settlement in this state a child may gain a
settlement of his own. Sec. 49.02 (5), Stats. Ordinarily a child cannot gain a settlement if he or his parent is receiving public aid. Sec. 49.02 (4), Stats. As an exception to this rule, sec. 48.33 (5) (b) prescribes that "the receipt of public aid during the year next preceding by the family of any child shall not bar such child [for the purposes of aid to dependent children] from having a legal settlement in the county." In other words, if a parent of a child has no settlement in this state a child may gain a settlement for the purposes of aid to dependent children, although the parent is receiving public aid. It is to be noted that sec. 48.33 (5) (b) does not provide that a child may gain a settlement for the purposes of sec. 48.33 although a parent has a settlement in the state; said paragraph merely provides that public aid by the family of the child shall not bar such child from obtaining a settlement. As a child can gain his own settlement only when his parent has none in the state, a child cannot gain a settlement, even for the purposes of sec. 48.33, that is separate and distinct from the parent's settlement in this state. On the other hand, a child, for both relief and aid to dependent children purposes, may have a settlement in this state if the parent has none, and for the purposes of aid to dependent children such settlement may be obtained although the family receives public aid.

Thus the statutes provide that after residing for a year in any city, village or town, a child may obtain a settlement for such aid purposes. To insure a child its needed care during the year that such settlement is being gained, sec. 48.33 (5) (c) provides that the child shall be cared for as a state-at-large case. By the same section it is stipulated that in no event shall a child be supported as a state-at-large case for more than one year or until such time as the child gains a settlement. The various sections considered, therefore, form a plan that predicates liability for aid to dependent children upon legal settlement. If a child has a legal settlement application for aid must be made in the county of settlement. If a child has no settlement (which would occur only if a parent has none in this state) the child will gain a settlement for such aid purposes by the rules prescribed by ch. 49, excepting that receipt of public
aid by the child's family shall not bar the gaining of a settlement. If a child has no settlement the state will pay such aid, but for a period not exceeding one year, while the child resides in any town, village or city. As sec. 48.83 places the burden of the cost of such aid upon a legal settlement whenever such settlement exists, it is obvious that application may not be made in a county other than that of legal settlement. To allow such an application would result in a state-at-large case, although the beneficiary has a settlement in this state. It must be noted also that the law makes no provision for "charging back" to the county of legal settlement as does the blind pension law; on the contrary, the law expressly states that application shall be made in the county in which the child has a legal settlement.

2. May aid to dependent children be granted to a mother whose husband is incapacitated and living as a member of the family? If such aid may be granted, shall the amount of aid allowed include a sum sufficient to care for the incapacitated father?

Answer: Sec. 48.33 (5) (d), (6) and (7) provides:

"(5) (d) Aid shall be granted to the mother or stepmother of a dependent child who is dependent upon the public for proper support if such mother or stepmother is 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 if the mother or stepmother has been 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."

"(6) The aid granted shall be sufficient to enable the person having the care and custody of such children to care properly for the children. The amount to be granted shall be determined by a budget for each family in which all possible income as well as expenses shall be considered. Such family budget shall be based on a standard budget, includ-
ing the mother or stepmother or other person who may be found eligible to receive aid under subsection (7), which shall be worked out annually by the judge of the court administering such aid and the county board or a committee of the board designated by it; provided, that if the county board shall not take action in such matter such standard budget shall be worked out by the judge alone. Medical and dental aid may be granted to minor children, the mother or the incapacitated father, as necessary. In the case of the death of a minor child, not to exceed one hundred dollars shall be allowed to cover the burial expenses of such child. Aid pursuant to this section shall be the only form of public assistance granted to the family for the benefit of such child, except medical and dental aid, and no aid shall continue longer than one year without reinvestigation. This subsection shall not be construed to prohibit such forms of public assistance as may legitimately accrue directly to persons other than the beneficiaries of this section who may reside in the same household.

“(7) Aid may be granted to a woman relative of the degrees of kinship specified in subsection (12), (other than the mother or stepmother) who cares for a child dependent upon the public for proper support, living with such woman in a family home under an arrangement which is likely to continue for at least one year, and also to a father or other male relative of the specified degrees of kinship who is physically incapacitated for gainful employment but capable of caring for a dependent child in his home. Such aid shall be granted in the same manner, in the same amounts and under the same conditions as to a mother or stepmother. Whenever better provisions, public or private, can be made for the care of such dependent child, aid shall not be granted under the provisions of this section, and, if previously granted, shall be discontinued.”

Par. (d), above quoted, specifically provides that aid shall be granted to a mother whose husband 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." The statute makes no exception if the incapacitated father is living with the family and unquestionably aid may be granted under such circumstances.

Whether or not the family budget allowed shall include an amount necessary to care for the father presents a more difficult question. Sec. 48.33 is designed to insure the dependent children of this state adequate care in a "home at-
mosphere." Aid is granted for the benefit of dependent children and not for the benefit of dependent adults. Dependent adults are provided for by other assistance laws. The amount of aid granted under sec. 48.33 includes an amount sufficient to care for an adult only because adult supervision is necessary to accomplish the objects of the law. The express wording and the tenor of this section clearly indicate that the aid allowed shall include an amount for maintenance of only one parent or of one relative acting in lieu of the parent. Subsec. (6) provides that the family budget shall include the mother or stepmother or other person found eligible to receive aid under subsec. (7); subsec. (7) clearly provides that only the one person (other than mother or stepmother) who is charged with the care of a child is eligible for aid. Subsec. (6) foresees that adults other than the supervising adult included in the family budget may need public assistance and specifically states:

"* * * This subsection shall not be construed to prohibit such forms of public assistance as may legitimately accrue directly to persons other than the beneficiaries of this section who may reside in the same household."

Said section further stipulates that the aid received thereunder shall be the only form of public assistance granted to the family for the benefit of the child. It is our opinion that sec. 48.33 not only does not authorize the inclusion of an amount for the maintenance of an incapacitated father in the family budget but that such inclusion would be contrary to the language and intent of the statute.

3. You present various statements of fact relating to legal settlements. They may be summarized as follows: A father has a legal settlement in X county when (a) he is sent to prison, (b) he is committed to an insane institution, (c) he becomes a patient at a tuberculosis sanatorium, (d) the father and mother have been divorced and the custody of the children has been given to the mother. If the mother and children, after the happening of the events enumerated, have moved to and lived for more than one year in Y county,
do the children, for the purposes of aid to dependent children, gain a settlement in Y county?

Answer: As stated in our answer to your first question the provisions of sec. 49.02 obtain in determining legal settlements for the purpose of aid to dependent children, excepting that a child may gain a settlement although the family has received public aid. As a child can gain a settlement of his own only in the event that a parent has no settlement in this state (XXII Op. Atty. Gen. 977), the children have gained no settlement in Y county. For opinions governing the various facts submitted, see: (a) XVII Op. Atty. Gen. 391; (b) VII 350; (c) XIX 150; (d) XXI 1095, XXII 592.

4. The father of the children in question is deceased; the mother is working in and has a settlement in X county; the children for more than one year have lived with their grandmother in Y county. Do the children, for the purposes of aid to dependent children, have a settlement in Y county?

Answer: The children have such settlement in X county. As a parent has a settlement in this state, the settlement of the children follows the parent; if a father has no settlement in the state the children’s settlement follows that of the mother. Sec. 49.02 (2), XXII Op. Atty. Gen. 225.

5. A question arises concerning the following case: A mother and children have lived two years in X county, where they have been cared for by outdoor relief. The father has been confined in a sanatorium in Y county, where he has his legal settlement. The cost of relief for the mother and children has been charged back by X county to Y county. The father dies. What effect does the father’s death have as regards the eligibility of the children for aid to dependent children?

At the time of the death of the father the settlement of the mother and children was in Y county. The settlement of the children thereafter follows that of the mother. The mother could not gain a settlement in X county for at least one year after the father’s death. See XXI Op. Atty. Gen. 709, XXII Op. Atty. Gen. 593.

JEF
Appropriations and Expenditures — Department of Agriculture and Markets — State Fair — Department of agriculture and markets (state fair division) has power to contract for rain insurance to cover expenses of state fair.

July 31, 1936.

RALPH E. AMMON, Manager Wisconsin State Fair,
State Fair Park,
Milwaukee, Wisconsin.

You ask whether you are authorized to contract for rain insurance to cover expenses of the state fair.

Sec. 20.60, subsec. (6), Stats., provides in part:

“For the operation and conduct of the state fair, the state fair park and exhibits and fairs thereon:

“(a) State fair receipts. Annually, beginning July 1, 1935, twenty-five thousand dollars for the conduct and operation of the state fair, the state fair park and of exhibits and fairs thereon. Contracts and obligations on account of the state fair may be incurred and paid from the appropriation available for the year in which the fair is held prior to the year in which said appropriation becomes available.

“(b) Receipts reappropriated for state fair. All receipts received for or on account of the operation of the state fair, the concessions or the rent or lease of the state fair park, or buildings thereon, except as provided by paragraphs (g) and (j) of this subsection, shall be deposited immediately in the general fund and reappropriated therefrom to the department of agriculture and markets for the payment of necessary expenses incurred in the operation of the state fair.”

The above section is the only existing statutory provision which authorizes or directs your department to conduct a state fair. Under said section you are authorized to “operate and conduct” a state fair. Does such language authorize you to contract for rain insurance? We are of the opinion that it does. The words “operate and conduct” are very broad and would appear to include the doing of any act that is reasonably necessary to accomplish the object sought.
Such words have been construed by our court to be “broad and sweeping terms.” *State ex rel. Blaine v. Wisconsin Telephone Company*, 169 Wis. 198. The primary object of a state fair is educational. By custom the conduct of the state fair has involved a very extensive program and a considerable financial investment. The 1925 statutes appropriated $230,000 annually to your department for the operation and conduct of the fair, the 1927 and 1929 statutes, $255,000, and the 1931 statutes, $240,000. At the time such appropriations were effective all receipts of the fair became part of the general fund and as a result the state would show either a profit or a loss on the fair enterprise. The records show that the state seldom, if ever, received back an amount equal to the appropriation made. It is well known that as a result of this net financial outlay there was strong sentiment in favor of discontinuing the fair, and that as a compromise the legislature reduced the direct appropriation to almost a nominal sum providing, however, that such sum should be supplemented by the receipts of the fair. The 1933 and 1935 statutes made a direct appropriation of $25,000 as contrasted with the former amounts, exceeding $200,000. Thus, the fair itself now is practically its own “keeper” and cannot rely upon the state treasury as a “buffer” between profit and loss.

Under the present plan for the conduct of the state fair rain insurance coverage may well be reasonably necessary to the successful conduct and operation of the fair. It is our understanding that rain insurance coverage is now customary in enterprises such as fairs, carnivals, circuses, and similar enterprises that are so dependent upon weather for success. It is our opinion that you have power to contract for such insurance.

JEF
Aliens — Deportation — Prisons — Prisoners — Pardon
— Upon facts stated it is doubtful whether or not governor's pardon would prevent deportation.

July 31, 1936.

PARDON BOARD,
Executive Office,
Madison, Wisconsin.

You make inquiry as to whether or not, if your board grants a pardon to a certain alien, the granting of such pardon will prevent deportation under the federal statutes.

The facts are that the alien is thirty-nine years of age; that he has lived in the state of Wisconsin for eleven years; that he came to the United States in 1912; that in 1925 he was convicted under a city ordinance on a charge of keeping a disorderly house; that the same thing occurred in 1926; that again in 1926 he was convicted of carrying concealed weapons in violation of sec. 340.69, Wis. Stats.; that on April 5, 1932, he was convicted in the federal court on a charge of sale and possession of intoxicating liquor and sentenced to serve six months in prison.

Your question is whether or not the granting of a pardon by your board will prevent deportation.

The federal statute under which he may be deported, is 8 U. S. C. A., sec. 155, which reads as follows:

"* * * any alien who shall be found an inmate of or connected with the management of a house of prostitution * * * any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. * * * The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, * * *. The provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespec-
tive of the time of their entry into the United States; * * * *. In every case where any person is ordered deported from the United States under the provisions of this subchapter, or of any law or treaty, the decision of the Secretary of Labor shall be final."

It is our opinion that the facts connected with the two convictions on the charge of keeping a disorderly house are sufficient to bring this case within the terms of the federal statute above quoted. Strench v. Pedarias, 55 Fed. (2d) 597; Lucchesi v. Weedin, 61 Fed. (2d) 656, 289 U. S. 728; Ex Parte Garcia, 2 Fed. Supp. 966.

The man was found to be connected with the business of prostitution sufficiently in our opinion to come within the terms of the above-quoted statute, and that in a civil action rather than a criminal action. Prosecutions under city ordinances are not criminal proceedings and consequently the governor’s pardon would not amount to a pardon for a federal offense. Nor could a pardon delete the facts found in those civil actions.

The governor has power to grant pardons after convictions of “offenses.” Wisconsin constitution, art. V, sec. 6. The pardoning power does not give the governor the power to change findings in civil actions.

The crime of carrying concealed weapons does not involve moral turpitude. United States ex rel. Andreacchi v. Curran, 38 Fed. (2d) 498. Under the federal statute above quoted, this conviction alone is not ground for deportation.

As to the conviction by the federal court above mentioned, there is a conflict of opinions as to whether or not it is a ground for deportation. United States ex rel. Iorio v. Day, 34 Fed. (2d) 920; Riley v. Howes, 17 Fed. (2d) 647; Riley v. Howes, 24 Fed. (2d) 685. Of course, a pardon by the governor would not have the effect of pardoning the alien of a federal offense.

Reviewing the above observations, we conclude that the secretary of labor would have the right to decide that the alien had offended against the terms of the federal statute above quoted from even though the governor granted him a pardon and that the governor’s pardon would not necessarily prevent his deportation.

JEF
Taxation — Tax Collection — It is duty of county treasurer to omit from delinquent tax list lands owned by federal government.

August 1, 1936.

G. Arthur Johnson,
District Attorney,
Ashland, Wisconsin.

You inquire whether a county treasurer has the right to omit from tax sale certain lands returned as delinquent where the United States government has the record title thereto. You say that the land was sold to the United States by a lumber company on April 29, 1934, and that the deed was recorded on the same date. The lands were omitted from the tax roll for the year 1934, but in assessing for the year 1935, the assessor placed them on the tax roll and assessed them for the years 1934 and 1935. You state that the town officials claim that title did not pass to the United States government because the land was not paid for and, since the tax on the land is considerable, the town is anxious to recover 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; * * *".

By sec. 70.11, subsec. (1), Stats., property owned exclusively by the United States is exempt from taxation. Legal title to the land passed to the United States upon delivery and acceptance of the deed, and the fact that the federal
government has not paid for the land does not keep the title from passing. Thus, these lands are owned by the United States and cannot be taxed by the state under this section of the statutes. XXIII Op. Atty. Gen. 670.

Although sec. 74.33 (1) seems to make the duties of the county treasurer purely ministerial, still certain discretionary powers are vested in him, which make it possible for him to omit lands returned delinquent from tax sale where the assessment appears to be irregular or illegal.

Sec. 74.39 provides:

"* * * if the treasurer shall discover before the sale that on account of irregular assessment or for any other error any of said lands ought not to be sold, he shall not offer the same for 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. 75.60 further provides:

"If it shall appear from any tax roll or tax proceeding that any sum of money is due from any person or is charged against any lands or other property, and such taxes have been returned as delinquent to the county treasurer of the proper county, and such person or the owner of the lands or property so charged with such taxes shall claim such taxes to be illegal for any cause the county treasurer, county clerk and district attorney of such county may, if they shall deem that there is reasonable cause to believe such taxes illegal, compromise with such person or owner and receive in lieu of the whole tax so appearing due or charged as aforesaid such part thereof as the said county treasurer, county clerk and district attorney, or a majority of them, shall determine to be equitable and for the best interest of such county."

From these sections it is clear that the county treasurer may withhold lands from tax sale if he discovers some irregularity in assessment or other error; and the county treasurer, county clerk and district attorney may compromise taxes returned as delinquent where the owner claims illegality of the tax. You state that the agent of the United States with whom you have talked is opposed to advertisement of these lands for tax sale, so that sec. 75.60 may be applied.
It is true that in *Town of Crandon v. Forest County*, 91 Wis. 239, the court stated that the county treasurer is required to advertise and sell the lands returned as delinquent, where the assessment is *legal*, and even the county board cannot relieve him of this duty. But the court points out that if the tax is illegal or invalid this rule does not apply, and at p. 244 said:

"We have considered the case, it will be seen, upon the basis of the plaintiff’s assumption that the part of the town tax remitted was legal. If it was not valid, the plaintiff clearly would have no ground of recovery. * * *"

In conclusion, it is our opinion that under these circumstances the county treasurer need not advertise nor sell the lands owned by the federal government, and may omit such lands from the delinquent tax list, in view of the discretion placed in him by sec. 74.39 and by sec. 75.60 (if the district attorney and county clerk agree with him that the tax appears illegal).

This situation is distinguishable from that discussed in XXIII Op. Atty. Gen. 841, since in that case there was no question of illegality or irregularity in the assessment.

JEF
Hotels and Restaurants — Enlargement of restaurant in same building or extending it into new building is not, in contemplation of subsec. (2), sec. 160.02, Stats., new business, requiring special partitioning, but is simply enlargement of old business.

Dr. C. A. Harper, Health Officer,
Board of Health.

You state that a company which operated a state licensed restaurant in conjunction with other business prior to March 1, 1936, now extends this restaurant and its other business, increasing its capacity by taking on a building adjacent and adding on to the present building. The address will remain the same. The rear wall of the present building will be almost completely removed, so as to make the part adjacent thereto an extension of the original building. A certain portion of the new space will be used for restaurant purposes in addition to the restaurant facilities now existing.

You ask:

"(1) Does the increase of present basement restaurant facilities, by extending the same ** become a new business under subsection (2) of section 160.02 requiring special partitioning?"

Under the facts stated, this is not a new business under said statute but is simply the enlargement of an old business in contemplation of law.

Your second question reads:

"(2) Licensed restaurant facilities now exist on the first floor of the building. Can additional restaurant facilities be given on this floor, but at the opposite side of the same building, said facilities to extend into the addition which has become a part of the original building, without complying with subsection (2) of section 160.02 requiring special partitioning?"

This question must also be answered in the affirmative, as it is apparent that it is not a new business but simply an enlargement of the old business.

JEF

August 3, 1936.
Social Security Law — Old-age Assistance — County board may take affirmative action to charge cost of old-age assistance to town, city or village in which beneficiary has residence. Old-age assistance laws are based upon residence and not upon legal settlement.

PENSION DEPARTMENT,
Madison, Wisconsin.

You state that in XXIV Op. Atty. Gen. 764 this office held that the county board must take affirmative action to charge the cost of old-age assistance to cities, towns, and villages; and that in XXIV Op. Atty. Gen. 711, p. 717, it was held that the cost of such assistance may be charged back to the town, city, or village of residence although the beneficiary has no settlement in such municipality. You now ask whether the county board may provide that the cost of such assistance be charged back to the town, city or village of settlement of the beneficiary if he has one in the county.

The county board may take affirmative action to charge the cost of old-age assistance to a town, city or village in which the beneficiary has a residence. The old-age assistance laws are based upon residence and not legal settlement.

Sec. 49.27, Stats., provides that an applicant for old-age assistance shall file his application in the county in which he resides.

Sec. 49.37, subsec. (2), Stats., provides in part:

"The county board of each county may cause each city, town and village to reimburse the county for all amounts of money paid in old-age assistance to its residents, * * * ."

This quotation, which is the only statutory basis for "charging back" old-age assistance costs, clearly specifies that such costs shall be charged back to the municipality of residence. Under familiar rules of construction it is our opinion that the specified method of shifting such costs is the exclusive method that can be exercised by the county board. This
ruling is in accordance with the apparent intent of the old-age assistance laws, which are based upon residence and not upon legal settlement as are the laws governing aid to dependent children.

JEF

Public Health and Safety — Explosives — Town is not required to have license in order to purchase and use blasting material for town road purposes.

Town is required to store explosives and powder purchased for town road purposes in accordance with secs. 167.01 to 167.06, Stats.

In using blasting materials purchased for town road purposes town is required to comply with industrial commission general orders on explosives.

August 10, 1936.

JAMES P. RILEY,
District Attorney, Wausau, Wisconsin.

You desire to know if a town can buy and use blasting material for town road purposes without a license therefor. This question is answered in the affirmative. We can find no statute which requires anyone to have a license to buy and use blasting materials.

You also desire to know what regulations, if any, govern the purchase and use of such materials.

The following statutes and rules and regulations govern the purchase and use of materials. Secs. 167.01 to 167.06, Stats., regulate the storage of explosives and powder. The penalty for violation of these sections is found in sec. 340.65, Stats.

The industrial commission's general orders on explosives, effective March 27, 1933, a copy of which is enclosed, also
contain rules and regulations governing the handling, transporting and using of explosives. These orders of the commission, promulgated under sec. 101.10, subsecs. (3) and (4), Stats., are prima facie lawful. Sec. 101.13. Any employer, employee, owner or other person violating any lawful order of the commission shall forfeit not less than ten dollars nor more than one hundred dollars for each offense. Sec. 101.28. Every day during which any person violates any order of the commission constitutes a separate and distinct violation of such order. Sec. 101.18. Furthermore, any violation of lawful orders of the commission which causes injury to workmen increases by fifteen per cent the compensation award payable by the employer. Sec. 102.57. Towns are employers under the workmen's compensation act. Sec. 102.04 (1).

Order 651 reads as follows:

“Failure on part of superintendent, foremen, bosses and other persons having control of any place of employment, or of any employee and of any operations, to carry out any duty prescribed in these orders, is violation of such order by the employer.”

Order 663 reads:

“Within one year of the effective date of this code no person shall prepare explosive charges or conduct blasting operations unless such person holds a certificate of competency issued by the Industrial Commission.

“Before issuing such certificate of competency the commission will determine the fitness of the candidate.”

Consequently the town must conduct its blasting operations under the supervision of a blaster holding a certificate of competency issued by the commission. It must also handle the blasting material in accordance with law and the orders referred to. Failure to comply with the laws and the orders referred to by the town and by the individuals working for the town subjects them to the penalties mentioned.

JEF
Prisons — Prisoners — Medical Aid — Board of control may furnish medical care to paroled prisoners under certain circumstances.

August 13, 1936.

Board of Control.

You submit the following facts for our opinion:

One X was convicted of a felony in La Crosse county and sentenced to the Wisconsin state prison for a term of twelve to eighteen months. He arrived at the prison on January 2, 1935. He was released on parole on March 3, 1936, and placed to work on a farm in Jefferson county.

While employed on this farm he suffered a double fracture of the leg caused by the cave-in of an old cement wall in a small building on the farm, which he was wrecking. He was taken to the hospital at Palmyra, Wisconsin, on April 10, 1936, and released on or about May 24, 1936. His term expired April 21, 1936.

The department of outdoor relief of Jefferson county has referred the bill for hospitalization and medical services to the outdoor relief of La Crosse county. It appears from the facts at hand that this means that legal settlement was in La Crosse county. The relief department of La Crosse county questions this bill and inquires whether it is not the obligation of the state board of control.

Upon such facts you ask whether it is proper for the board of control to pay the bill in question.

In considering the propriety of paying for medical services rendered to an escaped convict this department in XXIV Op. Atty. Gen. 492 said in part:

"There are no statutory requirements in Wisconsin in relation to care of the injured in the state prison although hospital services are rendered. However, this is limited to prisoners in custody. * * *"

"Although it may be conceded that even in the absence of statutory provisions medical services should be rendered prisoners at the state prison, yet the rule should not be extended to cover escaped prisoners, especially where services are rendered to them as private citizens."
Your present inquiry involves a prisoner on parole. Persons sentenced to our state prison are largely in the care and subject to the rules and regulations of the state board of control. The warden of the state prison under the direction of said board shall have custody of the prison and shall enforce the regulations of said board relating to the governing of convicts. Sec. 53.02, subsec. (1), Stats. A paroled prisoner “remains in the legal custody of the state board of control and may at any time, on the order of the board, be re-imprisoned in said prison * * *.” Sec. 57.06 (3), Stats. As stated in the cited opinion of this department, the board has provided for the medical care of prisoners in the state prison. Although there is no direct statutory authority for furnishing such care and although the general rule appears to be that the public is not liable to a physician or surgeon for services rendered prisoners, our courts undoubtedly would hold that the board by the very nature of its duties is authorized to furnish such care. See 21 R. C. L. 1174, 1175 and XXIV Op. Atty. Gen. 402: The question now is: May such care be furnished to paroled prisoners? If in the present case Mr. X had contracted some physical ailment which rendered him unable to perform the work secured for him the board undoubtedly would have taken him to the prison hospital for care. Sec. 57.06 (2) provides that no prisoner shall be paroled until suitable employment is secured for him. It probably would not be disputed that the board could furnish insulin to a paroled prisoner if he had not the means to secure the same himself. A prisoner on parole is constructively in prison and we believe the board may properly render him such medical care as may reasonably be necessary for his welfare.

Although the board may furnish a paroled prisoner medical care it does not follow that the board is liable for all medical care furnished such prisoner. The board has a right to determine whether or not the facts in a case warrant such care. As a general rule, such medical care of a paroled prisoner would be furnished at the prison hospital. If, on the other hand, circumstances are such that a prisoner cannot be moved to said hospital, we believe the board is authorized to contract for the care wherever circumstances
dictate that it should be rendered. If an emergency case arises and the board has not had opportunity to order or direct medical care, the board, in its discretion, may pay for such services. We believe the present case is in the nature of an emergency; under the facts presented immediate care was necessary and time did not allow action on the part of the board. If the board feels that the services were necessary it may pay for such services as were rendered during the time the prisoner was in their custody.

JEF

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Public Officers — Fire and police commissioners of city are not now required to be residents of city.

August 13, 1936.

L. A. Buckley,
District Attorney,
Hartford, Wisconsin.

You refer us to sec. 62.13, subsec. (1), Stats., which provides in part:

"Each city shall have a board of police and fire commissioners consisting of five citizens, three of whom shall constitute a quorum. * * *"

You state that the question has been presented to you as to whether or not it is material that the members of the fire and police commission be residents of the particular city.

Under sec. 62.09 (2) (a), Stats. 1933, it was provided:

"No person shall be eligible to a city office who is not at the time of his election or appointment a citizen of the United States and of this state, and, except as to engineer in all cities and city attorney in cities of the fourth class, an elector of the city, and in case of a ward office, of the ward, and actually residing therein."
This statute was changed by ch. 421, Laws 1935, to its present form contained in sec. 62.09 (2) (a) to read as follows:

"No person shall be elected by the people to a city office who is not at the time of his election a citizen of the United States and of this state, and an elector of the city, and in case of a ward office, of the ward, and actually residing therein."

Only officers who are elected are now required to be electors of the city. While sec. 62.09 (1) (a) enumerates the officers of the city, and the board of police and fire commissioners are city officers, still only those that are elected by the people are now required to be electors or residents. I find no other provision in the statute which modifies these statutes. You are therefore advised that fire and police commissioners are not required to be residents of the city.

JEF

School Districts — Tuition — Provisions of sec. 66.03, subsec. (3), par. (b), Stats., respecting tuition charges, are inapplicable where territory has been detached from school district pursuant to sec. 40.85 and original district continues to provide school facilities for detached territory; such charges are governed by sec. 40.21, subsec. (5), Stats.

August 13, 1936.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

You state that certain territory has been detached from a school district, pursuant to sec. 40.85, Stats., and organized into another school district. This newly organized school district has never maintained a school, as the original district has continued to receive and adequately provide
school facilities for grade and high school pupils from the detached territory on a tuition basis. Consequently, there has been no distribution, transfer or assignment of the assets of the district from which the territory was detached.

A question has arisen relative to the tuition basis for the grade pupils. Under sec. 66.03, subsec. (3), par. (b), Stats., provision is made for charging tuition on the basis of the per capita cost of instruction. In sec. 40.21, subsec. (5), it is provided that the per capita cost of instruction below the ninth grade shall be determined by dividing the total salaries paid to the grade teachers by the total enrolment for the time.

You inquire whether it is lawful for the parent district to include in the bill for tuition of grade pupils a number of items other than teachers' salaries, such as janitor service, fuel, supplies, etc.

This question is answered in the negative.

We consider the situation to be controlled by sec. 40.21 (5) rather than by sec. 66.03, (3) (b).

Sec. 40.21 (5) (a) provides:

"In the absence of action upon the subject by the last annual district meeting, the school board shall determine whether nonresident children shall be admitted to the school, and shall fix the rate of tuition therefor, provided the tuition below the ninth grade shall not exceed the per capita cost of instruction in said school for the time for which tuition is charged, said cost to be determined by dividing the total salaries paid to the grade teachers by the total enrollment for the time."

Sec. 66.03 (3 (b) provides in part:

"* * * The municipality annexing the territory shall provide school facilities for the children residing in the remainder of the school district pending the adjustment of assets and liabilities on payment of tuition based on the per capita cost of instruction."

It is apparent from your statement of the facts that there is no adjustment of assets and liabilities pending, and that the situation in this particular is governed by sec. 40.85, (5) (e), which provides in part:
“No distribution, transfer or assignment of the assets of the district from which territory is detached, shall be made, so long as said district continues to receive and adequately provide school facilities for both grade and high school pupils from the detached territory on the legal tuition basis. * * *.”

Furthermore, as we read that portion of sec. 66.03, (3) (b) above quoted, we do not understand it to be intended to apply to a situation of the sort here under discussion.

It does not appear from your statement of facts that this is a case of a “municipality annexing * * * territory,” and, even if it were, the statute provides that it is the municipality to which the territory is annexed that receives the tuition upon furnishing the necessary school facilities for the children residing in the remainder of the district. The facts here are just the reverse. The school district from which the territory has been detached is receiving tuition from the district newly created out of the detached territory. Hence sec. 66.03 (3) (b) is clearly inapplicable to the situation.

This view of the matter makes it unnecessary for us to consider here what items may be included under the words “per capita cost of instruction” in a case properly falling within the purview of sec. 66.03 (3), (b).

You are therefore advised that the tuition statute properly applicable here is sec. 40.21 (5), and that this statute specifically limits the tuition charged below the ninth grade to the cost of instruction as determined by dividing the total salaries paid to the grade teachers by the total enrolment for the time.

JEF
Public Officers — Register of deeds must charge filing fees prescribed by Wisconsin statutes rather than fee schedules prepared by persons or agencies presenting instruments to be recorded.

August 13, 1936.

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

You state that certain offices of the federal government have been filing documents in the office of the register of deeds, and have been submitting therewith their own set of fees or charges for the filing of such papers.

You inquire whether the register of deeds is to accept these figures or whether he should follow the Wisconsin statutes as to fees for filing documents in his office.

The answer is obviously that the register of deeds must follow the Wisconsin statutes rather than the fee schedules prepared by federal officers.

It is scarcely necessary to cite authorities upon such a proposition.

In XXIV Op. Atty. Gen. 429, we expressed the opinion that the county board could not change the fees fixed by statute for the register of deeds, and we know of no authority by which the federal government could change such fees. In XII Op. Atty. Gen. 202 we pointed out that the register of deeds may charge only the rate provided by statute for recording mortgages to federal land banks. See also VI Op. Atty. Gen. 89.

We might add that fees prescribed to be paid to public officers for services rendered are ordinarily not taxes. 61 C. J. 73. Hence no question arises here as to the exemption from taxation of an instrumentality of the federal government such as was discussed in XXV Op. Atty. Gen. 401.

JEF
Federal land banks and Federal Farm Mortgage Corporation are not subject to state tax of one dollar provided by sec. 271.21, Stats., for commencement of actions in courts of record having civil jurisdiction.

August 13, 1936.

William M. Gleiss,
District Attorney,
Sparta, Wisconsin.

You have referred to our opinion in XXV Op. Atty. Gen. 401, to the effect that the Home Owners' Loan Corporation is not subject to the state tax of one dollar provided by sec. 271.21, Stats., for commencement of an action in a court of record having civil jurisdiction, and you inquire whether the same ruling is applicable to cases commenced by the Federal Land Bank of St. Paul, and the Federal Farm Mortgage Corporation.

We believe your inquiry should be answered in the affirmative, upon the basis of the opinion referred to, and upon the rather comprehensive collection of authorities to which you have called our attention and from which we will borrow extensively in the writing of this opinion. At the outset we wish to commend you for your research on the problem. The attorney general is always greatly assisted in the preparation of opinions by such study as the district attorney may have made on the subject, and it is to be regretted that your example is not more generally followed.

We will discuss first the case of the Federal Land Bank of St. Paul.

The federal statutes provide certain tax exemptions for federal land banks. 12 U. S. C. A. 931, provides:

"Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank or association under the provisions of sections 761 and 781 of this chapter. First mortgages executed to Federal
land banks, or to joint stock land banks, and farm loan bonds issued under the provisions of this chapter shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation. (July 17, 1916, c. 245, sec. 26, 39 Stat. 380.)"

The federal land banks have been judicially determined to be instrumentalities of the federal government. *Smith v. Kansas City Title and Trust Company*, 255 U. S. 180, and *Federal Land Bank of St. Louis v. Priddy*, 295 U. S. 229.

Mortgages executed to federal land banks have been held under the above quoted statute to be exempt from taxation. *Federal Land Bank of New Orleans v. Crosland*, 261 U. S. 374.

As pointed out in our opinion to Mr. O'Boyle, in XXV Op. Atty. Gen. 401, the instrumentalities, means, and operations whereby the United States exercises its governmental powers, are exempt from taxation by the states. *Indian Motorcycle Co. v. United States*, 283 U. S. 570.

Consequently, we believe actions commenced by federal land banks to be in the same category as those commenced by the Home Owners' Loan Corporation, as far as exemption from the tax provided by sec. 271.21, is concerned.

Similarly, the federal statutes make the following provisions with reference to exemptions from taxation in the case of the Federal Farm Mortgage Corporation. 12 U. S. C. A. 1020f, provides:

“(a) The corporation, including its franchise, its capital, reserves, and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.

“(b) Mortgages executed to the Land Bank Commissioner and mortgages held by the Corporation, and the credit instruments secured thereby, and bonds issued by the Corporation under the provisions of this subchapter, shall be deemed and held to be instrumentalities of the Govern-
ment of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal, and local taxation (except surtaxes, estate, inheritance, and gift taxes). (Jan. 31, 1934, c. 7, sec. 12, 48 Stats. 347, as amended Feb. 26, 1934, c. 33, 48 Stats. 360.)"

Without here taking the space to go into any extended analysis of the legal nature of the Federal Farm Mortgage Corporation, suffice it to say that under 12 U. S. C. A. 1020, it would appear to be as much an instrumentality or agency of the federal government as is the Home Owners' Loan Corporation or the Federal Land Bank. Its directors consist of the secretary of the treasury, or an officer of the treasury designated by him, the governor of the farm credit administration, and the land bank commissioner; its stock is subscribed by the United States and the farm mortgages owned and held by such corporation are those which have been made by, and in the name of, the land bank commissioner (formerly known as the farm loan commissioner, and who is an official of the United States), under and pursuant to the provisions of Part III of the emergency farm mortgage act of 1933, as amended (12 U. S. C. A., secs. 1016-1019).

Consequently, as an instrumentality of the federal government, the Federal Farm Mortgage Corporation would seem to stand on the same footing as the Home Owners' Loan Corporation and federal land banks, as far as exemption from the tax provided by secs. 271.21 is concerned.

JEF
Peddlers — Driver of truck with miniature store carrying complete line of groceries, following established routes and having written list of customers to call upon, is peddler within state peddling law.

August 13, 1936.

John P. McEvoy,
District Attorney,
Kenosha, Wisconsin.

Your office has submitted the following statement of facts: Two men, both residents of the city of Kenosha but having no central store or headquarters from which they operate, have outfitted a truck to represent a miniature store carrying a complete line of groceries and following established routes regularly. They have a written list of customers upon whom they call after notifying such customers on what dates they will call.

You inquire whether these men are peddlers within contemplation of our statute.

Our present peddlers' law has not attempted to enumerate persons or businesses that come within its purview. The meaning of the word "peddler" is rather left to the courts for determination. In XXI Op. Atty. Gen. 158, in which the question was carefully considered by this department and a conclusion arrived at which slightly modified opinions theretofore rendered by the department, it was held that the method of doing business and not the fact that the baker has established regular routes for sale of his goods is the deciding factor in determining whether or not he should secure a peddler's license.

We refer you to said opinion without repeating the arguments presented therein. We believe that under the ruling of said opinion an affirmative answer should be rendered, i. e., that under the method of operating the business it constitutes peddling. In addition to said opinion, we would refer you to others which are instructive on this point raised. XXIII Op. Atty. Gen. 545; XXII 880; XIX 405; XV 100 and 537.

JEF
Courts — Taxation — State Tax — Refunds — State tax provided by sec. 271.21, Stats., for action commenced in court of record, may not be refunded to Home Owners' Loan Corporation in absence of statute for such refund, unless action is successfully brought for such recovery.

August 13, 1936.

JAMES L. McGINNIS,
District Attorney,
Amery, Wisconsin.

You have referred to XXV Op. Atty. Gen. 401 to the effect that the Home Owners' Loan Corporation is not subject to the state tax of one dollar provided by sec. 271.21, Stats., for commencement of an action in a court of record having civil jurisdiction.

In this connection you call attention to the fact that requests have been made to the clerk of the court for reimbursement of this tax paid in cases commenced prior to the issuance of the above opinion. In the meantime the clerk of the court has paid over most of the tax so collected to the state treasurer.

You have advised the clerk of the court, and properly so, not to refund any tax already collected until further advice from this office.

We are of the opinion that such taxes heretofore paid may not be refunded unless an action for such recovery is successfully prosecuted.


Sec. 20.06, subsec. (2), Stats., makes provision for refund of moneys paid into the state treasury in error, but we do not consider this section applicable to taxes, since there are specific provisions for refund of certain taxes in subsecs. (3), (4) and (8), sec. 20.06.

The legislature having made specific provision for the refund of certain taxes, and no provision for the refund of taxes paid under sec. 271.21, the doctrine of expressio unius est exclusio alterius would seem to apply.

JEF
Bridges and Highways — Law of Road — Operator of bicycle does not come within terms of sec. 85.141, subsec. (6), par. (a), Stats., requiring driver to forward within forty-eight hours after certain accidents written report of such accident to state highway commission.

August 14, 1936.

John R. Cashman,
District Attorney,
Manitowoc, Wisconsin.

You refer us to sec. 85.141 (6) of the statutes and inquire whether the driver of a bicycle comes under the terms of this statute.

Said statute reads in part as follows:

"The driver of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent of fifty dollars or more shall, as soon as reasonably possible, report such accident to the local authorities and within forty-eight hours after such accident, forward a written report of such accident to the state highway commission."

Sec. 85.141, subsecs. (2) and (3), reads thus:

"(2) The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled the requirements of subsection (3) of this section. Every such stop shall be made without obstructing traffic more than is necessary. Any such person failing to stop or comply with said requirements under such circumstances shall be guilty of a misdemeanor.

"(3) The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address, and the registration number of the vehicle he is driving and shall upon request and if available exhibit his driver's license to the person struck or the driver or occupant of or person attending any vehicle collided with
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and shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such a person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.”

Said sec. 85.141 (1) (c) reads:

“The court shall revoke the driver's license of the person so convicted.”

We do not generally speak of the operator of a bicycle as a driver of a vehicle. We generally use the term “rider of a bicycle.” It is also true that bicycles and tricycles are often operated by very small children and they would be incapable of carrying out the requirements of the above quoted statute. It is also true that the person who operates a bicycle is not required to have a driver's or other license.

In State ex rel. Shinners v. Grossman, 213 Wis. 135, it was held:

“While criminal statutes, like any other, should be liberally construed to effect the obvious legislative purpose, they should be strictly construed to exclude from their penalties those acts which are not clearly within the legislative purpose.” (Syllabus.)

I have not overlooked the provisions of sec. 85.10 (1), which reads thus:

“Every device in, upon or by which any person or property is or may be transported or drawn upon a public highway, excepting vehicles used exclusively upon stationary rails or tracks.”

I am of the opinion that it is apparent that the legislature did not intend to refer to the rider of a bicycle in the above quoted statutes.

JEF
Building and Loan Associations — Associations do not, acting under sec. 215.07, subsec. (6), Stats., have power to borrow for more than one year or in excess of two fifths of assets of land.

August 14, 1936.

Peter A. Cleary, Banking Commission.

You desire to know whether a building and loan association should be permitted to borrow money for a longer period than one year from either a bank or an insurance company. You discuss the provisions of sec. 215.07, Stats., and the history thereof which is applicable to the question under discussion.

In 1931 there were but five subsections of sec. 215.07, subsec. (2) thereof reading as follows:

“To borrow money for temporary purposes, not inconsistent with the objects of the association, and issue its evidences of indebtedness therefor, but for no longer term than one year and not exceeding in the aggregate amount one-fifth of the assets on hand.”

In the Special Session 1931-32, the legislature, by ch. 31 created subsecs. (6) and (7). Subsec. (6) was amended by ch. 466, Laws 1935, which amendment is immaterial here. Subsec. (8) was created by ch. 372, Laws 1933, which subsection reads as follows:

“With the approval of the commissioner, any association may borrow money from the federal home loan bank upon such terms and for such time as the laws and rules of such federal home loan bank may prescribe, the provision in subsection (2) of section 215.07 as to the one-year time limit and as to the amount that may be borrowed, to the contrary notwithstanding.”

It must be noted that subsec. (7) gives to the building and loan association the power to borrow from certain corporations without expressly negating subsec. (2). In XXI Op. Atty. Gen. 392 and 669 this department construed sub-
sec. (7), holding, in effect, that the loans there provided for could be made without reference to the one year limitation provided in subsec. (2). Subsec. (2) gives the building and loan associations power to borrow for temporary purposes but for no longer term than one year. Subsec. (6) gives the building and loan associations power to invest and to assign its securities as collateral. This subsection expressly negatives subsec. (2), in part, by permitting associations to borrow up to two-fifths of the assets on hand.

Subsec. (8), giving the associations power to borrow money, expressly negatives the one-year limit and the limitation as to amount provided for in subsec. (2). Since the legislature has seen fit to expressly negative the effect of subsec. (2) on subsec. (8) and has seen fit to partially do so in reference to subsec. (6), we conclude that subsec. (2) is meant to apply to subsec. (6), except as subsec. (2) is expressly negatived.

Accordingly, associations do not, acting under sec. 215.07, subsec. (6), have power to borrow for more than one year or in excess of two-fifths of assets on hand.

JEF

Building and Loan Associations — Association may not use its assets for purchase of real estate generally but only to protect its securities.

Association may take deeds to mortgaged property in settlement of foreclosure.

August 14, 1936.

Peter A. Cleary,

Banking Commission.

In reference to subsec. (3), sec. 215.07, Stats., you ask three questions: (1) Does this subsection give a building and loan association the right to use assets for the purchase of
real estate generally? (1) Does it allow the association to acquire deeds to real estate in settlement of possible foreclosures? (3) Does it permit the associations to exchange stock and securities for real estate?

(1) The association may not use its assets for the purchase of real estate generally but may use it only when it is necessary to protect its securities.

(2) An association may acquire deeds to real estate in settlement of possible foreclosures since this is a method of investment and protection of its security and the collection of claims and debts due to it. XIX Op. Atty. Gen. 578.

(3) If the exchange of stock and securities for real estate is a method of protection of such security, the association has the power to make such exchanges. What constitutes protection of securities is not here defined, but it does not include purchase of realty for speculative purposes.

JEF

Courts — Illegitimacy — Filiation Actions — Filiation action may be brought in Wisconsin although illegitimate child of defendant was born and lives in Minnesota.

August 14, 1936.

JAMES L. McGINNIS,
District Attorney,
Amery, Wisconsin.

You state that the board of control of Wisconsin has asked you to commence a filiation proceeding in Polk county, to establish paternity of an illegitimate male child born to one A, who lives in Chisago county, Minnesota. You state that you have serious doubt as to whether an illegitimacy action could be maintained in Wisconsin, and you ask to be
advised if in our opinion an illegitimacy action could be maintained in Polk county relative to the child which is now in Chisago county, Minnesota.

In an official opinion in IV Op. Atty. Gen. 117, it was held that the residence of complainant is not a material element in bastardy prosecutions. In State ex rel. Reynolds v. Flynn, 180 Wis. 556, our court held that a nonresident female may prosecute a statutory action for bastardy against a resident of the state.

You are therefore advised that a filiation action may be maintained in Polk county relative to a child which was born and is now in Minnesota.

JEF

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**Mothers' Pensions — Social Security Law — State pension board may review denial of aid provided by sec. 48.33, Stats., to minor child over sixteen years of age, but reviewing power of board in such case is very limited.**

August 14, 1936.

**PENSION DEPARTMENT.**

You ask whether the state pension department may review a refusal of a county judge or county pension department to allow in the aid to dependent children family budget an amount to care for children over sixteen years of age.

Sec. 48.33, subsecs. (1) and (5), par. (a), and subsec. (12), provides in part:

“(1) If any person shall have knowledge that any dependent child as defined in this section is dependent upon the public for proper support or that the interest of the public requires that such child be granted aid, such person
may bring any such fact to the notice of a judge of a juvenile court or of a county court of the county in which such child has a legal settlement.

"*(5) Such aid shall be granted only upon the following conditions:

"(a) There must be one or more dependent children living with the person charged with their care and custody and dependent upon the public for proper support and who are under the age of sixteen; provided, that the court in its discretion may also grant aid for the support of minor children over sixteen, but in such cases the county shall not be entitled to any federal aid.

"*(12) A 'dependent child' as this term is used in this section is a child under the age of sixteen * * *"

Sec. 49.50 (4) provides that an applicant for aid to dependent children may appeal to the state pension department for a review of the denial of assistance. The word "denial" does not necessarily mean an absolute denial of assistance. XXV Op. Atty. Gen. 202.

Sec. 48.33, relating to aid to dependent children, is expressly designed to assist children under sixteen years of age. The section applies to dependent children. A "dependent child" is defined to be a child living under certain circumstances who is under sixteen years of age. Dependent children are given the right to assistance if certain specified circumstances exist. By subsec. (5) (a) of said section the court in its discretion may also grant aid to minor children over sixteen years of age, but if aid is granted to such children no federal aid will be received. Note that this clause refers to "minor children over sixteen" and not to dependent children. This emphasizes the fact that children over sixteen are not dependent children and within the primary scope of the law.

Thus it appears that sec. 48.33 does not bestow upon children over sixteen any right to assistance. Assistance will be granted them only in the event that the court in its discretion deems it proper. As no rule is prescribed to guide the court in exercising such discretion the court's power in this respect is very broad. Of course, such discretion may not be exercised solely upon the basis of whim, fancy, or
caprice. In giving this discretion the law presumes that the court will do what its judgment and conscience dictates. Thus the court may allow aid to minors over sixteen if it feels that under the circumstances such allowance would be right and proper. Whether or not an allowance would be proper might involve a question of policy, that is, the court's judgment might be that all children over sixteen should be cared for through regular relief channels. The fact that no federal aid is forthcoming might influence the court in its decision.

It is our opinion that a denial of assistance to a minor over sixteen is reviewable by the state pension department but obviously its scope of review is very limited. Such board might be of the opinion that it would have been very proper to grant aid in a given case, but it has not the power to substitute its judgment for that of the court. To set aside a ruling of the court it must clearly appear that the court's action was the result of whim or fancy. The question before such board would not be similar to the question involved in the denial of aid to a dependent child, that is, a child under sixteen. In such case the child has a right to such assistance as the law gives under the particular circumstances. The question involved is whether the child was granted the aid to which it was entitled under the law. But a minor child over sixteen is entitled to no aid under sec. 48.33, Stats. Our statutes provide other means for caring for such minors. The pension board, on an appeal in such a case, cannot determine that a child is entitled to a certain amount of aid, because the law does not provide for it; neither can the board consider whether it would be more conducive to the welfare of the child to grant aid under said section than under some other statute.

We conclude that a denial of assistance to a minor over sixteen is reviewable by the state pension board but that the reviewing power of such board is extremely limited.

JEF
Elections — Nominations — Corrupt Practices — Words and Phrases — Candidate for precinct committeeman must file nomination papers and financial statements in accordance with sec. 5.05, subsec. (5), par. (b) and sec. 12.09, Stats.

August 15, 1936.

WILLIAM H. FREYTAG,
District Attorney,
Elkhorn, Wisconsin.

In your recent communication you ask:

"Is a candidate for precinct committeeman who files nomination papers under sec. 5.19 (2), a 'candidate' within the contemplation of the law as that term is used in sec. 5.05 (5) (b) and sec. 12.09 of the Wisconsin statutes?"

Secs. 5.19, subsec. (2), and 12.01, subsec. (2), Stats., provide:

5.19 (2). "In counties containing a city of the first class there shall be elected at the September primary one committeeman for each political party from each ward, town and village and in all other counties one committeeman for each party from each precinct. Such committeemen shall be nominated by nomination papers to be signed by not less than three per cent and not more than ten per cent of the party vote for governor at the last preceding election in such precinct, ward, town or village. Nomination papers shall be in substantially the same form as provided in section 5.05 of the statutes and shall be filed with the county clerk at least thirty days before the primary. The county clerk shall arrange the names of candidates for such committeemen, as provided in section 5.11 of the statutes, and place the names so arranged in the proper party columns as candidates for such ward, town and village committeemen."

12.01 (2). "The term 'candidate' shall mean and include every person for whom it is contemplated or desired that votes may be cast at any election or primary, and who either tacitly or expressly consents to be so considered, except candidates for president and vice president of the United States."
Sec. 5.05 (5) (b), Stats., provides that the nomination papers of each candidate shall have appended thereto a prescribed affidavit; that such affidavit shall be signed by an elector other than the candidate; and that the candidate shall file a declaration stating that if elected he will qualify for the office named. Sec. 12.09 requires each candidate to file a financial statement setting forth receipts and disbursements in a specified manner.

For the purposes of ch. 12, a "candidate" includes every person, excepting candidates for vice president and president, for whom it is desired that votes may be cast at any election or primary and who either tacitly or expressly consents to be so considered. Title II of our statutes entitled "Elections" includes chs. 5 to 12, inclusive. State ex rel. Oaks v. Brown, 211 Wis. 571. All such chapters obviously are very closely interrelated. A person seeking votes for committeeman clearly appears to be within the meaning of the word "candidate" as above defined and, therefore, subject to the provisions of sec. 12.09. In the past this department has held that candidates for delegates to a party national convention (XIII Op. Atty. Gen. 101), presidential electors (XIII Op. Atty. Gen. 507, I Op. Atty. Gen. 252), are subject to said section. See also I Op. Atty. Gen. 266, Op. Atty. Gen. for 1912, 315, V Op. Atty. Gen. 230.

It is further our opinion that a candidate for such committeeman must file nomination papers in accordance with sec. 5.05 (5) (b). Note that sec. 5.19 (2) specifically provides that such candidate's nomination papers shall be in substantially the form prescribed by sec. 5.05.

JEF
Public Officers — Clerk of Circuit Court — Sec. 59.89, Stats., regarding disposition of unclaimed funds by clerks of courts of record is to be followed by clerk of circuit court rather than sec. 59.90, general statute on unclaimed funds in public treasury.

August 17, 1936.

Lyall T. Beggs,
District Attorney,
Madison, Wisconsin.

You call our attention to sec. 59.89, Stats., which provides for the filing of biennial reports with the county treasurer by the clerks of courts of record reporting all funds concerning which no action has been taken or claim made for a period of four years or more. Subsec. (2) provides that two years after such report is made such funds are to be turned over to the county treasurer unless sooner demanded by the owner.

You also call our attention to sec. 59.90, Stats., which provides that certain officials, including clerks of court, shall file a biennial report with the county treasurer and secretary of state concerning funds which have not been claimed for at least one year. This section also provides for publication by the county treasurer of notice containing the names and last known addresses of the owners of such unclaimed funds to the effect that six months after the completed publication the county treasurer will take possession of such money or security.

Inquiry is made as to whether the clerk of the circuit court should file reports under each of these sections, or if only one report is necessary.

It is our opinion that the clerk of the court should follow sec. 59.89 rather than sec. 59.90.

Sec. 59.89 is a specific statute relating only to clerks of court, whereas sec. 59.90 is a general statute covering several funds. Our court has held that, where an existing statute specifically deals with a subject and another statute is later enacted covering the same matter in a general way, the former will be held to prevail if such a result can

This rule would seem to apply here as sec. 59.89 is an earlier statute, having first been enacted as ch. 209, Laws 1911, whereas sec. 59.90 was created by ch. 324, Laws 1923, and since the latter statute is a general one as far as clerks of court are concerned, and the former is specifically limited to clerks of court.

Consequently, since the information in the report called for by sec. 59.90 would be included in the more comprehensive report required only of clerks of court by sec. 59.89, and since there would be a conflict in the matter of time in the making of the reports and turning over of the money to the county treasurer if the clerk of the court were to attempt to comply with both sections, we would advise the clerk of the court to file the report required by sec. 59.89.

This would mean that the report would cover only funds unclaimed for a period of four years or more and that the county treasurer would not take possession of such funds until two years after the filing of the report.

JEF

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Elections — Nominations — Affidavit to nomination paper may be amended subsequently to filing so as to conform to facts where such paper has been circulated by county and sworn to by precinct.

August 17, 1936.

**THEODORE DAMMANN,**

*Secretary of State.*

You state that a certain candidate for congress offered nomination papers for filing in your office. An assortment of nomination blanks were used. On some papers the affidavits were for circulation by precincts and papers were so
circulated and so sworn to. Others were circulated by county, and so sworn to. Still others were circulated by county, and sworn to by precincts. These were not accepted for filing in your office, and the candidate has asked permission to correct the affidavits so as to comply with the statutory requirement.

It is your opinion that nomination papers may be so corrected and accepted, in view of our opinion in XXIII Op. Atty. Gen. p. 596.

You are correct in this opinion.

In XXIII Op. Atty. Gen. 596, we expressed the opinion that an affidavit to a nomination paper which does not recite that the affiant knows that an elector lived in the precinct stated may be amended to conform to the fact, if such be a fact.

Election laws are to be liberally construed and there would appear to be no good reason why the affidavit should not be amended to conform to the facts, since the purpose of any affidavit is to state facts correctly.

Furthermore, it would seem to us that where a certain nomination paper under the statute may have county-wide circulation but is sworn to by precincts, official notice should be taken of the fact that the precinct or precincts in question are within the county, if such be the fact.

JEF
Elections — Nominations — Where there is similarity between given names and surname of two candidates for election both given names and surname of each candidate should be used on ballots.

August 19, 1936.

OLIVER L. O'BOYLE, Corporation Counsel,
Milwaukee County,
Milwaukee, Wisconsin.

In your recent communication you state the following facts relating to the election of a coroner for Milwaukee county:

"The incumbent, Frank J. Schultz, who is the endorsed candidate of the Democratic Party for re-election, is opposed by one who filed his nomination papers as G. Frank Schultz, 1803 West Wells Street.

"The city directory, telephone directory, vote register at the city election commission, and records in the office of the register of deeds for Milwaukee county and the county clerk's office, disclose that Mr. Schultz of West Wells Street has always been known as George F. Schultz."

You ask: (1) Whether the filing of the nomination papers by George F. Schultz as G. Frank Schultz is in violation of the provisions of ch. 284, Laws 1933, and (2) Whether or not, if George F. Schultz's nomination papers were filed properly, they should not be certified on the ballot as George F. Schultz or George Frank Schultz, pursuant to the provisions of sec. 5.10, subsec. (1), and sec. 6.23, subsecs. (1) and (4), Stats.

Ch. 284, Laws 1933, was obviously passed for the purpose of assisting voters to identify candidates for office. The act provided that nomination papers, the secretary of state's certified list of candidates, the clerk's notice of election, and the election ballots shall include the "given and surname" of each candidate. This act has been construed in XXIII Op. Atty. Gen. 516 and 722. In the first opinion cited it was held that if only the initials of a candidate's given name appear on the nomination papers such error may be corrected. Said opinion further held that all given names
should appear on papers unless they are too numerous. In the present case it is our opinion that as Mr. George Frank Schultz is commonly known as "George" such name should appear on his papers. The papers may be corrected accordingly.

In view of the similarity of names in the present case we advise that the intent of the election laws will best be served by printing on the ballots both given names and the surname of each candidate.

JEF

Public Health — Communicable Diseases — Quarantine — Under sec. 143.05, subsec. (10), Stats., expense for care of quarantined indigent under county system of relief, is proper charge against county only where sworn statement of expense is sent to proper officer within thirty days after quarantine. Loss of profits or extra expense incurred by individuals because of quarantine are not compensable.

August 21, 1936.

Harold M. Dakin,
District Attorney,
Watertown, Wisconsin.

You state that a certain farmer has filed a claim against the county for expense incurred and loss sustained when his home was quarantined.

While he was away from home for a time last spring he hired a man and woman to do his farm work. They were quarantined for scarlet fever and had to remain at his home. He took care of them and furnished fuel, food supplies and the like, and figured the cost of this at six dollars per week. He had to travel back and forth from a neighbor's house to look after the stock for a period of eight weeks and has filed his claim for the expenses incurred. His milk was taken off the market and he sustained a loss of
twenty-nine dollars therefor. His total claim amounts to one hundred two dollars.

You inquire whether the county is liable or, if not actually obligated, whether it would be permissible for the county board to pay the claim.

It is our opinion that the county is not liable on this claim and may not lawfully pay the same.

Counties have only such powers as are clearly and unmistakably granted by charter, statutes or acts of the legislature. *Becker v. La Crosse*, 99 Wis. 414; *City of Superior v. Roemer*, 154 Wis. 345.

We find no authority granted to counties whereby they may pay claims of this sort.

Sec. 148.05, subsec. (7), Stats., provides that 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.

This undoubtedly covers only the direct expense to the public of maintaining the quarantine, and does not cover food, fuel, etc., for individuals quarantined or for losses which individuals might sustain by the quarantine.

Sec. 143.05 (10) provides:

"Expenses for necessary nurses, medical attention, food and other articles needed for the comfort of the afflicted person, shall be charged against him or whoever is liable for his support. Indigent cases shall be cared for at municipal expense. In any county having a population of five hundred thousand or more, said county shall provide hospitalization and shall charge the cost thereof against the afflicted person or whoever is liable for his support, but the cost of indigent cases shall be charged to and paid by the municipality in which the communicable disease is suspected or diagnosed as such. If he is a legal resident of another municipality of this state, the expense of care shall be paid by such municipality, or by the county where the county system for the care of the poor has been adopted, when a sworn statement of such expense is sent to the proper officers within thirty days after quarantine."

If the individuals quarantined were indigents it would thus be necessary to have a sworn statement of such ex-
pense filed within thirty days after quarantine to bind the county, where the county system for care of the poor has been adopted. We do not understand from your statement of the facts that this was done, nor do we find that loss of profits or extra expense which individuals may sustain by reason of quarantine are compensable. The law provides no remedy for such losses.

JEF

Courts — Witness Fees — Elections — Corrupt Practices — Under sec. 325.07, Stats., witness fees can be paid by state only when affidavit of witnesses is countersigned by attorney general, district attorney or duly appointed and acting state’s attorney.

State is not liable for witness fees under sec. 12.22, Stats.

August 21, 1936.

THEODORE DAMMANN,
Secretary of State.

Attention C. A. Nickerson, Auditor.

You have forwarded to us claims for witness fees by several witnesses in the case of State ex rel. Wilkins v. Hass, presented for payment by the state under sec. 325.07, Stats. You desire to know whether or not these claims can be paid by the state.

Payment of these bills cannot be justified under sec. 325.07, Stats., since it does not appear that any duly appointed and acting state’s attorney, any district attorney or the attorney general countersigned the claimant’s affidavits as required by that section. Although it appears on the affidavits that a certain attorney was acting state’s attorney, we are unable to ascertain who appointed him as such. Under these facts payment of these claims cannot be made by virtue of sec. 325.07, Stats.
The contention is made, however, that payment is justified under sec. 12.22, Stats. However, it does not appear that the action referred to was started and prosecuted under sec. 12.22. Even if it should appear that the proceedings were instituted under that section, this office has previously ruled that in an action started under that section, expenses thereof, including witness fees, sheriff's fees, etc., are not payable by the state. X Op. Atty. Gen. 636.

That opinion did not expressly consider sec. 325.07, then sec. 4059, but the reasoning in that case is applicable to the present case. Since that opinion, sec. 325.07 has been amended by a reviser's bill wherein the revisor pointed out that the changes proposed were verbal changes only. Accordingly, sec. 325.07 must be given the same effect now as at the time of the previous opinion.

JEF

Automobiles — Privately owned automobile of assistant fire chief of voluntary fire department is not authorized emergency vehicle within meaning of sec. 85.67, subsec. (3), and sec. 85.10, subsec. (14), Stats.

August 21, 1936.

JOHN P. MCEVOY,
District Attorney,
Kenosha, Wisconsin.

You state that a township in your county has appointed three men assistant fire chiefs. The department is on a voluntary basis, and the men receive no pay. These men might use their own individual automobiles in responding to fire calls and the question arises as to whether such cars may be lawfully equipped with sirens.

We concur in your opinion that it would not be lawful to equip these cars with sirens.
Sec. 85.67, subsec. (3), Stats., provides:

"An authorized emergency vehicle shall be equipped with a siren."

Sec. 85.10 (14) defines authorized emergency vehicles:

"Vehicles of the fire department, fire patrol, police vehicles, such emergency vehicles of municipal, county or state department or public service corporations and such ambulances as are so designated or authorized by local authorities.

It seems apparent that these definitions cover publicly-owned vehicles or vehicles which have been specifically designated or authorized by local authorities as emergency vehicles.

In the present instance we do not understand from your statement of the facts that the vehicles in question are either publicly-owned or that they have been officially designated or authorized to operate as emergency vehicles within the meaning of the statute.

JEF

Elections — Corrupt Practices — Distribution of blotters bearing campaign material is probably not in violation of sec. 12.01, subsec. (3), and sec. 12.07, Stats.

August 21, 1936.

JOHN P. McEVOY,
District Attorney,
Kenosha, Wisconsin.

You state that a candidate for office is contemplating the use of a printed blotter as a campaign card, and you inquire whether this would be a legal disbursement under sec. 12.07,
You are advised that the use of a printed blotter as a campaign card probably does not constitute a violation of law. The elements involved in determining whether or not campaign material is in violation of the corrupt practices act are discussed in XXIII Op. Atty. Gen. 666.

There the attorney general considered the question of the distribution of book matches bearing campaign material, although we might mention here, incidently, that the law as to the use of matches for campaign purposes was changed by ch. 308, Laws 1935.

In the opinion referred to the attorney general considered the distribution of matches to constitute a technical violation of the statute, since matches constitute a "thing of value" within the meaning of sec. 12.01 (3). It was pointed out that while the matches were of slight value, the statute made no exception in this respect.

However, the attorney general went on to explain that whether the distribution of matches constitutes an infraction of the law which would subject the distributor to a penalty would be a question for the jury, and that the legislature merely meant to forbid the distribution of articles which would tend to interfere with a voter's choice of candidate. We feel that this is a reasonable interpretation to place on the statute, and that there would be a very weak case against a candidate distributing campaign cards in the form of blotters as compared to a case against a candidate distributing matches under the old law. Nearly every person purchases matches at some time or other. Paper matches are on sale at most cigar stands, although they are frequently given away for advertising purposes. On the other hand, the average person does not purchase a blotter during the course of a lifetime, since blotters are so widely distributed without charge for advertising purposes. Many firms send out advertising blotters with their monthly statements, and, except for large offices using great quantities of blotters, it is almost never necessary for one to buy them.

Furthermore, sec. 12.06 (1) (e) and sec. 12.07 (3) authorize the furnishing and printing of badges, banners and other insignia, the printing and posting of handbills, post-
ers, lithographs and other campaign literature, and the distribution thereof through the mails or otherwise.

We are unable to read into this law any intention on the part of the legislature to limit the printing of campaign literature to papers or cards of a texture or weight unsuitable for blotting purposes, and we might add, without going into details, that it would be impossible for a candidate to select a type of paper or card which could not be devoted to some useful purpose.

JEF

Real Estate — Platting Lands — Plots of land containing five or more lots where each lot has dimensions greater than one and one-half acres are not subject to provisions of ch. 236, Stats.

August 21, 1936.

JOHN P. McEVOY,
District Attorney,
Kenosha, Wisconsin.

You have inquired whether or not plots of land containing five or more lots having dimensions greater than one and one-half acres each are subject to ch. 236, Stats. as adopted in 1935, relating to the platting of lands.

Sec. 236.16, subsec. (1), Stats., provides:

“Whenever any owner, subdivider or his agent has divided land into five or more lots of one and one-half acres each or less in area, or shall in any calendar year have divided any tract of land into five or more parts of one and one-half acres each or less in area, for the purpose of sale, such owner, subdivider or his agent shall cause to be recorded in the office of the register of deeds of the county in which any portion of said land is located, a final plat thereof in all respects in full compliance with this chapter.”
You have suggested that in view of the fact that this section applies only to such plats of land containing lots of one and one-half acres or less you believe that ch. 236 can have no application to subdivisions of five or more lots having dimensions of more than one and one-half acres.

It is our opinion that you are correct.

Sec. 236.03 (1) provides:

“Any owner of land wishing to make a land-division thereof into parcels, lots, or lots and blocks, for the purpose of sale or assessment, or wishing to dedicate streets, alleys, parks or other lands for public use, shall cause the same to be surveyed, and divided in accordance with this chapter.”

And sec. 236.04 (1) provides:

“When the survey and land-division is completed the owner shall cause a final plat thereof to be made, which plat must comply with the requirements of this section.”

By themselves these two sections appear to require all lands which are divided into parcels, lots, or lots and blocks to be surveyed and platted in accordance with ch. 236, Stats.

However, to find the legislative intent it is necessary to look at the act as a whole. Wisconsin Industrial School v. Clark County, 103 Wis. 651; Price v. State, 168 Wis. 603; Oconto County v. Union Mfg. Co., 190 Wis. 44. Furthermore, the specific provisions of a statute relating to a particular subject are controlling over and are exceptions to general provisions. Kollock v. Dodge, 105 Wis. 187, 195; State ex rel. Donnelly v. Hobe, 106 Wis. 411, 423; Hite v. Keene, 137 Wis. 625, 627; Wisconsin Gas and Electric Co. v. Fort Atkinson, 193 Wis. 232, 241; Fox v. Milwaukee Mechanics’ Ins. Co., 210 Wis. 213, 216. And see sec. 370.02 (3), which provides:

“If conflicting provisions be found in different sections of the same chapter the provisions of the section which is last in numerical order shall prevail unless such construction be inconsistent with the meaning of such chapter.”

Upon considering these rules in connection with ch. 236, it is our opinion that the legislature intended that this chap-
ter should apply to plots of land of five or more lots where each of the lots is one and one-half acres or less. The provision of sec. 236.16 (1) is a specific provision which qualifies the general language of secs. 236.03 (1) and 236.04 (1), thereby making the act apply only to such subdivisions where the lots are one and one-half acres or less.

As there is no provision regarding subdivisions of five or more lots where the lots are greater in dimension than one and one-half acres, such subdivisions are excepted from the operation of ch. 236 by virtue of sec. 236.16 (1).

JEF

Public Lands — Forest Protection — Taxation — Tax Collection — State has power to comply with requirements of Fulmer act (49 Stats. at Large 963, Public No. 395, 74th congress) and may enter into co-operative agreements therein mentioned.

August 21, 1936.

H. W. MACKENZIE,

Conservation Department.

You desire to know if the statutes of this state are adequate to permit compliance by the state with the provisions of the Fulmer act (Public No. 395, 74th congress).

We will consider the requirements of the Fulmer act separately and as we understand those requirements.

1. The act requires that the state statutes provide for reversion of title of tax delinquent lands to the state or a political subdivision thereof. Our statutes do not create a reversion of title to the state but do create in certain instances a fee simple title in the county. Lands on which taxes have not been paid are "sold" for the taxes, sec. 74.39, Stats., to the bidder offering to pay the taxes, interest and penalties for the smallest parcel of the tract to be sold. Sec. 74.40.
If no bidder appears the county shall bid, sec. 74.42. The county board may direct the county treasurer to bid in and become the purchaser of land, regardless of the presence of other bidders. Sec. 74.44, subsec. (1); XX Op. Atty. Gen. 432. The person so “buying” the land is entitled to a tax certificate covering such land. Sec. 74.46 (1). This certificate may be assigned. Sec. 74.46 (1). The owner or occupant of the land may at any time within five years (three years prior to 1933) redeem the tax certificate by payment of taxes and lawful charges. If land sold for nonpayment of taxes be not redeemed, the holder of the certificate will get a tax deed after the expiration of the period of redemption. Sec. 75.14 (1).

Our statutes, then, permit the counties to secure title to land for nonpayment of taxes if proper steps are taken. Of course, the holder of one certificate must continue buying up all subsequent certificates until the redemption period has run, since the holder of a later certificate can secure a later tax deed, which will cut off an earlier tax deed. XX Op. Atty. Gen. 409, 1067.

2. The act requires that state statutes provide for blocking of state or public forest areas which are more suitable for public than private purposes.

If by this is meant that forest areas must be zoned for that purpose, then the county, not the state, has such power, and our statutes are not sufficient. Sec. 59.97 (1). If it means that the state must have the power to block out areas by acquisition, then our statutes are sufficient. Sec. 23.09 (7) (d), (e) and 28.15.

3. The act requires state employment of a trained forester of recognized standing. Your commission can hire such a person. Sec. 23.09 (6).

4. The act requires the state to enter into co-operative agreements with the secretary of agriculture defining forest areas within the state which can be most effectively and economically administered by the state.

Your commission has such power to enter into such agreements for the state. Secs. 23.09 (7) (h) and (d).
5. The act requires the state to prepare standards of forest administration, development and management as shall be necessary to secure maximum feasible utility for timber production and watershed protection applying to lands under the jurisdiction of the state, which standards shall be acceptable to the secretary of agriculture.

Your commission has power to prepare such standards. Secs. 28.02 and 23.09 (7) (h), Stats.

6. Except for aid by way of federal unemployment relief funds, the act provides that the state alone shall pay the entire future cost of administering, developing and managing forest lands, jurisdiction of which it will secure under the act.

We are in no position to determine whether the state can comply with this provision. Co-operation in this respect depends on the amount of the appropriation to the commission and the amount of such future costs.

However, art. VIII, sec. 10, Const., permits the legislature to appropriate an amount in any one year not exceeding two-tenths of one mill of the taxable property of the state as determined by the last preceding state assessment. Secs. 20.20 (6), (14) and (26), 70.58 (2), 25.30 and 28.02 (4) Stats., appropriate money acquired by taxation or otherwise to the conservation commission. The money so appropriated would be available for the purposes outlined.

7. The act requires the state to furnish annual, periodic and special reports to the secretary of agriculture as required. Your commission has this power. Sec. 23.09 (7) Stats.

JEF
Opinions of the Attorney General 525

Bridges and Highways — Law of Road — Municipal Corporations — Traffic Ordinances — To establish arterial highway it is necessary for municipality to enact ordinance declaring highway to be artery for through traffic.

City can designate as arterial highways only those streets which are under its exclusive jurisdiction. It does not have exclusive jurisdiction over United States, state or county roads and their designated connecting streets.

August 21, 1936.

William H. Stevenson,
District Attorney,
La Crosse, Wisconsin.

You desire to know whether stop signs erected at certain street intersections pursuant to an order of the city council are legal. You do not state that the council ever adopted an ordinance declaring the highways on which these stop signs are to be erected or any portion thereof to be arteries for through traffic. This declaration is necessary. Secs. 85.68, subsec. (3), and 85.70, Stats. None of the ordinances presented show that this has been done.

You also ask whether the resolution of the common council can be enforced against the traveling public upon state trunk highways upon which certain signs are erected.

This must be answered in the negative. The city has authority to declare highways to be arteries for through traffic only when such highways are under its exclusive jurisdiction. Sec. 85.68 (3). Sec. 85.68 (1) and (2) gives the state and counties certain jurisdiction over United States, state and county highways and designated connecting roads. Accordingly, the city would not have exclusive jurisdiction over such highways and could not make them arteries for through traffic. See XIX Op. Atty. Gen. 296; XXII Op. Atty. Gen. 495.

I would suggest that the city adopt an ordinance declaring such portions of the highway under its exclusive jurisdiction and which are necessary to carry out the proposed plan to be arteries for through traffic. The traveling public could
then be forced to stop at the stop signs located on the highways which are under exclusive jurisdiction of the city. See XX Op. Atty. Gen. 987. JEF

_{Taxation — Income Taxes — Delinquent income tax warrant should be issued and docketed in name of state of Wisconsin._

Procedure for issuance of executions on judgment in so far as applicable should be followed in issuance of execution on delinquent income tax warrant.

Execution issued on delinquent income tax warrant may be directed to agent of tax commission.

Ch. 519, Laws 1935, is presently effective and permits of issuance of transcripts on delinquent income tax warrants.

Filing of transcript of delinquent income tax warrants with proper officer operates as quasi-garnishment of wages of public employee.

Return on delinquent income tax warrant should be made to both clerk of court and tax commission.

Principal amount of delinquent income tax continues to bear interest after docketing at rate provided by sec. 71.10, subsec. (3), par. (f), Stats.

In foreclosing mortgage against debtor in delinquent income tax warrant state of Wisconsin should be made party defendant rather than Wisconsin tax commission.

August 21, 1936.

TAX COMMISSION.

You have asked a large number of questions concerning the interpretation of sec. 71.36, Stats., which we will attempt to answer here briefly so as to keep this opinion within reasonable limits as to length. To do this it will be necessary for us to forego setting forth any extended reasons for our answers.
1. You refer first to sec. 71.36, subsec. (4), giving the tax commission the same remedies on income tax warrants as if "the people of the state had recovered a judgment against the taxpayer for the amount of the tax."

You inquire if the wording "the people of the state," is synonymous with the words "state of Wisconsin," so as to properly entitle proceedings taken in this connection under the name of the state of Wisconsin as the party plaintiff.

This question is answered in the affirmative.

The tax is owing the state of Wisconsin, and it has long been the practice to commence actions to recover money owing the state in the name of the state of Wisconsin as plaintiff, rather than in the name of the people of the state of Wisconsin.

2. You state that in the delinquent income tax warrant docket, a column is provided for the insertion of the name of the judgment or warrant creditor, and you inquire whether the words "state of Wisconsin" should be entered here.

The answer is, Yes, for the same reason.

3. You inquire whether, in issuing an execution upon a delinquent income tax warrant, it is proper to follow the same procedure as provided for the issuance of an execution upon a judgment.

This question is answered in the affirmative in so far as the procedure on issuance of execution upon judgments is applicable.

Sec. 71.36 (2) provides that the amount of the docketed income tax warrant shall become a lien upon the real estate of the debtor in the same manner as a judgment duly docketed in the office of the clerk of court, and that the sheriff shall "proceed upon the same in all respects, with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments."

4. You inquire whether it is proper for an execution issued by a clerk of circuit court upon a delinquent income tax warrant to be directed to an agent of the tax commission authorized to collect income taxes in accordance with sec. 71.36 (3) and sec. 71.10 (3) (f).
This question is answered in the affirmative upon the basis of the sections to which you refer.

Sec. 71.36 (3) provides:

“In the discretion of the tax commission a warrant of like terms, force and effect may be issued and directed to any agent authorized to collect income taxes, and in the execution thereof such agent shall have all the powers conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of actual expenses paid in the performance of such duty.”

Sec. 71.10 (3), (f) provides:

“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.”

5. You inquire whether ch. 519, Laws 1935, relating to the issuance of transcripts by clerks of circuit courts with whom delinquent income tax warrants are filed, is presently effective so as to permit the issuance of such transcripts by the clerk.

This question is answered in the affirmative upon the basis of the legislative intent as disclosed by sec. 71.36 (4), which provides:

“If a warrant be returned not satisfied in full, the tax commission shall have the same remedies to enforce the claim for taxes against the taxpayer as if the people of the state had recovered judgment against the taxpayer for the amount of the tax.”

6. You inquire whether the filing of a transcript of a delinquent income tax warrant in the same manner as provided for the filing of a transcript of a judgment under the provisions of sec. 304.21 has the same effect as the filing of a transcript of judgment in so far as the quasi-garnishment of the wages of public employees is concerned.
This question is also answered in the affirmative for the same reason.

7. You inquire whether it is necessary that a delinquent income tax warrant issued pursuant to the provisions of sec. 71.36 be returned to the clerk of the circuit court within sixty days after its issuance.

This question is answered in the affirmative upon the basis of that portion of sec. 71.36 (2), which reads:

"* * * The said sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner prescribed by law in respect to executions * * *"

8. You ask whether it is necessary that such warrant be returned within sixty days to the Wisconsin tax commission.

This question is answered in the affirmative upon the basis of sec. 71.36 (1), which provides:

"If any income tax or any portion of such tax be not paid within thirty days after the same becomes delinquent, the tax commission shall issue a warrant directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the person owing such delinquent tax, found within his county, and to apply the proceeds of the sale to the payment of the amount of such delinquent tax, with the added penalties, interest and cost of executing the warrant, and to return such warrant to the tax commission and to pay to it the money collected by virtue thereof, or such part thereof as may be necessary to pay such tax, penalties, interest and costs, within sixty days after the receipt of such warrant."

9. You state:

"Assuming that it is necessary to return such warrant to both the Wisconsin tax commission and to the clerk of circuit court, is it proper for the officer to whom such warrant is directed to deliver a copy or duplicate original of such warrant to either of such places where such warrant is returnable?"

This question is answered in the affirmative.
Since the statutes apparently require returns to be made to both the clerk of the circuit court and the tax commission, one of the warrants must obviously be a duplicate or copy.

10. You ask:

"Is the amount of taxes, penalty and interest and costs included in a delinquent income tax warrant when docketed with the clerk of circuit court subject to interest at the rate of six per cent per annum or at the rate of one per cent per month, as provided by section 71.10 (3) (f) ?"

This matter is governed by sec. 71.10 (3) (f), hereinafter quoted in the answer to your fourth question.

As explained in the answer to the next question, only the principal amount of the tax bears interest and at the rate of one per cent per month.

11. You ask:

"In computing interest upon a delinquent income tax warrant docketed with the clerk of circuit court, should the amount of interest which in your opinion is properly chargeable thereon be computed upon the total amount of said warrant including the penalty, interest, and costs included therein at the time of docketing, or only upon the principal amount of the taxes involved in said warrant?"

It is our opinion that the interest should be computed upon the principal amount of the tax only. Sec. 71.10 (3) (f) provides that the tax is subject to interest, but does not provide that the penalty and other costs incurred at the time of docketing the warrant shall bear interest.

12. You inquire:

"Is it proper and permissible for a mortgagee, in an action to foreclose his mortgage, to join the state of Wisconsin as a party defendant for the purpose of removing the lien of a delinquent income tax warrant, or for the purpose of determining the rights and priorities as between the state of Wisconsin and the mortgagee, with respect to the mortgage and the delinquent income tax warrant involved?"
This question is answered in the affirmative. Nearly every day this office is served with papers in one or more foreclosure actions where this practice is followed, and we know of no other way in which the lien of the state, subsequent to a mortgage, could be removed in a mortgage foreclosure action.

It is true that no statute specifically authorizes this procedure. On the other hand, if the state cannot be so foreclosed of its lien as against a specific piece of real estate, the effect of a foreclosure without making the state a party would be such as to make what was formerly a second and subordinate lien now a first lien and prior to the mortgage under foreclosure.

No one would feel safe in lending money on real estate security, since the borrower might subsequently have an income tax warrant filed against him which, in the course of events, could make the mortgage worthless.

We can discover no such violent and revolutionary intent in the income tax warrant statute, and do not believe that under well established rules of statutory construction, the statute should be so construed as to result in an absurdity. *Price v. State*, 168 Wis. 603.

13. You ask:

"Assuming that it is proper and permissible to join the state of Wisconsin as a party defendant in such proceedings, is it necessary and permissible that the Wisconsin tax commission also be joined as a party defendant in such proceedings?"

This question is answered in the negative. The real party in interest is the state of Wisconsin, the Wisconsin tax commission being merely an arm or agency of the state, for the purposes of collecting the tax. We might add that the practice of most attorneys in these foreclosure actions is to name the state as a defendant, rather than the Wisconsin tax commission. A few attorneys have made both the state and the Wisconsin tax commission defendants, although we consider this to be unnecessary.

JEF
Appropriations and Expenditures — Counties — Workmen's Compensation — Counties have only such powers as statute gives them; in absence of statutory authority they may not assist towns in paying for board and transportation of fire fighters. Counties cannot require towns to furnish compensation insurance for county employees.

JAMES P. RILEY,
District Attorney,
Wausau, Wisconsin.

You state that during the recent drought there were several bad fires in different towns in your county, which have given rise to a number of questions, and you have telephoned us for an immediate opinion in view of the fact that your county board meets tomorrow.

The WPA and other organizations assisted in putting out the fires during the emergency, and the question arises as to whether the county may assist the towns in paying the bills for board and transportation of the fire fighters. Also, it appears that one town was guilty of negligence in putting out its fire, and the fire spread to an adjoining town, which feels that the first town should pay the entire cost incurred in fighting the fire.

We know of no authority by which the county may assist in paying the bills owed by the towns. It is well settled that counties have only such powers as the statute gives them. See the following opinions: XXIV Op. Atty. Gen. 424, 429, XXV 92, 316, 379.

The question of liability as between two towns where one has been negligent in fighting a fire is a question that this office may not properly answer. Under the statute, sec. 14.53, the attorney general is authorized to render opinions to district attorneys only when required by them in matters pertaining to the duties of their office, and disputes between towns do not come within the duties of the district attorney's office unless the county is involved. We have frequently found it necessary to refrain from expressing opinions on town questions. See the following opinions: XIII Op. Atty. Gen. 251, 252, 634, XIX 190.

August 25, 1936.
You also state that the county proposes to have the towns furnish compensation insurance in the case of labor allotted by the county to the towns for town drought relief projects, and you inquire if this may be done.

We are not sure that you have furnished us with enough facts to answer your question correctly. We assume that the men in question have been hired by the county and are county employees. If such is the case, we know of no way whereby the county may shift the cost of their compensation insurance to the towns. On the other hand, if the men were hired by the towns, the county would be under no obligation to furnish insurance.

JEF

Counties — County Board — Indigent, Insane, etc. — Question of adoption or abandonment of county system of poor relief cannot be submitted to referendum vote, although county board may take action one way or other making effectiveness of such action contingent upon result of referendum vote.

Publication of notice of such referendum can be made in accordance with sec. 10.48, Stats., so far as applicable.

Provisions of sec. 10.48, subsec. (6), Stats., are not applicable on question of revocation within two years.

Lyall T. Beggs,
District Attorney,
Madison, Wisconsin.

You state that more than fifteen per cent of the electors of Dane county have signed a petition requesting the county board to adopt a resolution which reads as follows:

August 28, 1936.
"Resolved, By the county board of Dane county that Dane county continue on and after the thirty-first day of December, 1936, to maintain and administer relief as a county system as provided in chapter 49 of the Wisconsin statutes of 1935, and that the resolution of the county board dated the seventh day of May, 1936, wherein it was determined to administer relief on the unit system be and the same hereby is repealed."

The petition provides that, in the alternative, the resolution, without alteration, be referred to a vote of the electors. The petition was filed August 15, 1936.

Several questions have arisen as a result of the filing of this petition, and you inquire first, whether the proposed referendum may be lawfully submitted to a vote of the electors, in view of certain earlier opinions of this office, and Wisconsin cases to which you call our attention.

Your first question is answered in the negative, upon the basis of the authorities which you have cited, including the following: Meade v. Dane County, 155 Wis. 632; XXI Op. Atty. Gen. 146, 207, 317 and 760; XXII 785.

As pointed out in a number of opinions above cited, the determination of questions which rest with the county board are not subject to the statutory referendum provided by secs. 59.02, subsec. (2), and 10.43, Stats., since powers which the constitution provides the legislature may confer upon county boards cannot be lawfully delegated to the electors.

However, as is suggested in a number of the above opinions and other opinions therein cited, the county board with respect to powers entrusted to it may take action one way or the other and at the same time make such action contingent upon a result of a referendum vote.

You also ask whether in the event the county board should adopt a resolution repealing the unit system of public relief with the proviso that such resolution should become effective only if approved by a majority of the electors in a referendum, the provisions of sec. 10.43 would govern the publication of notice of such referendum.

This question is answered in the affirmative, upon the basis of sec. 59.02, subsec. (2), which makes sec. 10.43 applicable to counties, although, as has been previously indi-
cated by this office, sec. 59.02, subsec. (2), is considered to be unconstitutional, in so far as it authorizes direct legislation by the electors on legislative and administrative matters in counties. XI Op. Atty. Gen. 106. However, there is no reason why the statute should not be followed to the extent that it is valid, and, as has been already suggested in this opinion, it would be perfectly proper for the county board to make the effectiveness of a resolution contingent upon the result of a referendum vote.

Lastly, you inquire whether such a resolution is revocable by the county board within the two years following.

This question is answered in the affirmative.

Secs. 49.15 and 49.16 cover the adoption and abandonment of the county system of poor relief and provide that such system may be either adopted or abandoned at any annual meeting or at a special meeting called for that purpose.

We take it that your question was prompted by sec. 10.43, subsec. (6), Stats., which provides that direct legislation shall be neither repealed nor amended within two years after its adoption, except by vote of the people.

We do not consider this section applicable on the question of adoption or abandonment of the county system of relief by popular vote, for the reasons already indicated.

JEF
Elections — Nominations — Public Officers — Election Officials — Precinct Committeemen — Words and Phrases — Candidates — Persons who seek election as party precinct committeemen are “candidates” within meaning of election statutes and may not serve as election officials under sec. 6.32, subsec. (1), Stats.

August 29, 1936.

John P. McEvoy,
District Attorney,
Kenosha, Wisconsin.

In your letter of August 28 you say that the 1935 legislature added to sec. 5.19, subsec. (2), Stats., the words “and in all other counties one committeeman for each party from each precinct.” This makes it necessary that anyone desiring to be a party precinct committeeman shall file nomination papers and raises the question whether such persons are “candidates” within the meaning of the election laws.

We are of the opinion that the individuals in question are “candidates” within the meaning of that term as used in the election statutes.

Under date of August 15, 1936, we issued an opinion to Mr. William H. Freytag, district attorney of Walworth county,* in which we stated that a candidate for precinct committeeman must file nomination papers and financial statements in accordance with sec. 5.05, subsec. (5), par. (b) and 12.09, Stats. We enclose a copy of that opinion, as the discussion of the meaning of the word “candidate” in that opinion will be helpful to you on your present question.

Election officials are provided for by sec. 6.32 (1). In fixing the qualification of those serving on election boards, this section provides:

“Except as otherwise provided, there shall be three inspectors, two clerks of election and two ballot clerks at each poll at every election held under the provisions of this title, each of whom shall be a qualified elector in the election district, except for election boards serving more than one precinct pursuant to section 6.045, and said electors shall be

*Page 508 of this volume.
able to read and write the English language understandingly and not a candidate to be voted for at such election.

It will be noted that no person who is a candidate for office may serve on an election board. This construction has been given sec. 6.32 (1) by this department in IX Op. Atty. Gen. 426, where it was held that a candidate for county treasurer may not act as an election clerk. In discussing the purpose of the statute, it was said, p. 427:

"* * * I am satisfied, that the provisions in subsec. (1), that a ballot clerk shall not be a candidate to be voted for at such election is applicable to all ballot clerks, including those who are town clerks. This is a wise provision in our statute, and is intended to protect the elections from fraud, or the suspicion of fraud."

This provision was again construed in XII Op. Atty. Gen. 146, where this office said, p. 149:

"* * * Construction of the statute, were it open to construction, must be such as to effectuate that purpose and intent. * * *"

These opinions were followed and approved in XIII Op. Atty. Gen. 138, XIV 134, XVI 60, XVII 318, XVIII 218. In XXI Op. Atty Gen. 414, it was stated that any person violating the provisions of sec. 6.32 (1), by serving on an election board when a candidate for office violates the provisions of sec. 348.24, and would, therefore, be subject to criminal prosecution. As a precinct committeeman would have his name on a ballot and would have a part in the canvassing of any votes cast for him by virtue of being an election official it would seem that the provisions of sec. 6.32 (1) and the language used in the opinion quoted above would apply to him. Therefore, we are constrained to hold that a precinct committeeman who has his name printed on the ballot might not serve on an election board.

JEF
Banks and Banking — Trust Company Banks — Where trust company has deposited securities with state treasurer in amount equal to fifty per cent of its capital stock pursuant to sec. 223.02, subsec. (1), Stats., and subsequently reduced its capital stock, amount of securities so deposited may be decreased and withdrawn accordingly.

August 31, 1936.

BANKING DEPARTMENT.

You state that a trust company with a capitalization of $150,000 has deposited with the state treasurer, trust fund securities in an amount of $75,000, pursuant to sec. 223.02, subsec. (1), Stats., and that the company subsequently reduced its capital to $100,000. It has applied to the banking commission for permission to withdraw securities in excess of the fifty per cent statutory minimum, and you inquire if this may be done.

Your question is answered in the affirmative.

The release of securities in excess of the statutory requirement is governed by sec. 223.02, subsec. (1), which reads in part:

"* * * such corporation may from time to time withdraw the said securities as well as the cash, or any part thereof; provided that securities or cash of the amount and value required by this section shall, at all times during the existence of such corporation remain in the possession of the state treasurer for the purpose aforesaid and until otherwise ordered by a court of competent jurisdiction, unless released pursuant to subsec (2) of this section. * * * in case the capital stock shall be increased or diminished the amount of such deposit shall be increased or diminished to comply herewith and a new certificate of such fact shall be issued accordingly."

Consequently the trust company should be permitted to withdraw $25,000 of its securities, and the state treasurer may issue a new certificate of fact respecting the diminished deposit and its approval by the commissioners of banking.

JEF
Courts — Sentences — Prisons — Prisoners — When a person is convicted of one offense and placed on probation and subsequently sentence is imposed for another offense committed prior to probation, sentence and probation run concurrently.

August 31, 1936.

A. W. Bayley, Secretary,
Board of Control.

In your communication of July 28, you state that on September 21, 1934, one F. B. was placed on probation for a term of three years by the county court of Chippewa county. Two years later, on March 23, 1936, said F. B. was convicted of assault and sentenced to the state prison for three years by the circuit court of Eau Claire county. However, this offense of assault had occurred prior to September 21, 1934, when F. B. was placed on probation, and thus does not constitute a violation of the conditions of his probation.

The question is whether or not the remaining year and one-half of F. B.'s probation and his three-year prison sentence run concurrently or consecutively.

As you state in your letter, it is settled in Wisconsin that when a sentence has been imposed but stayed and the offender placed upon probation and he has been subsequently imprisoned for a second offense, the convict is still considered to be in the legal custody of the board of control at all times and the two sentences run concurrently. Application of McDonald, 178 Wis. 167, 171; XVI Op. Atty. Gen. 502; XXIII Op. Atty. Gen. 464.

Concurrent rather than consecutive sentences are in keeping with the legislature's humanitarian intent in passing sec. 57.01, subsec. (1), Stats., making possible judicial leniency where the public good permits. Indiana's probation statute, article 22, paragraph 2360, Ind. Stats., is substantially the same as ours. A recent decision brings out the reformative nature of these statutes. Rode v. Baird, 148 N. E. 406.

It is our opinion that F. B. did not break the conditions of his probation, and that the subsequent prison sentence for a prior crime and the probation period run concurrently. The
case which you mention differs from the more extreme cases cited, supra, in that F. B. is innocent of any violation of his probation. Consequently, upon the expiration of F. B.'s present prison sentence he is entitled to a discharge from the state prison per sec. 53.15, subsecs. (1) and (2), and discharge from probation per sec. 57.01, subsec. (2). It is not necessary to return him to the Chippewa county court.

JEF

Municipal Corporations — Ordinances — Public Officers — City Sealer of Weights and Measures — Under general city charter law (ch. 62, Stats.) city of less than five thousand may enact valid ordinances establishing duties of city sealer of weights and measures.

Sec. 98.04, Stats., provides for creation, powers and duties of city sealers of weights and measures in cities of more than five thousand population only and has no application to smaller cities.

August 31, 1936.

Louis W. Cattau,
District Attorney,
Shawano, Wisconsin.

You have submitted two ordinances of the city of Shawano outlining the duties of the city sealer. You desire to know if the ordinances comply with sec. 98.04, Stats. The answer is no.

In the first place, sec. 98.04, Stats., applies to cities having a population of over five thousand. Shawano has less than five thousand. Secondly, the ordinance requires the payment to the sealer of fees for weighing. This the law prohibits. Sec. 98.04, subsec. (1), Stats. See II Op. Atty. Gen. 851. Third, no power is given in that statute to a city the size of Shawano to impose fines for violation of the ordi-
nance. Fourth, the ordinance restricts the sealer's duties to inspection of weights of combustible materials used for heating purposes; the statute requires the sealer to test all types of weighing or measuring devices.

You also desire to know whether the ordinance can be enforced under sec. 98.04 or any other statute relative to the establishment of a city sealer.

Interpreting the power of cities since the enactment of ch. 242, Laws 1921 (a revisor's bill), our court has said:

"Since the revision in 1921 the power of a city with respect to its internal affairs is as broad as it is possible for the legislature to grant except in those cases where the legislature has placed restrictions thereon, * * *." Wadham's Oil Co. v. Delavan, 208 Wis. 578, 579-580 (1932).

Sec. 62.11, subsec. (5), Stats., apparently gives the city sufficient power to pass ordinances such as these. However, we express no opinion whatever on the validity of such ordinances for the reason that you are not called upon as district attorney to enforce such local ordinances (XXIV Op. Atty. Gen. 39), and we do not advise district attorneys except as to matters pertaining to the duties of their office. See sec. 14.53, subsec. (3), Stats.
Fish and Game — Fishing and Hunting Licenses — Public Officers — County Clerk — Under sec. 29.09, subsec. (7), Stats., county clerk is entitled only to ten per cent of amount of fees received from sale of fishing and hunting licenses and may not make additional deduction of two per cent to cover board of deposits insurance fund charge.

August 31, 1936.

Conservation Commission.

You state that a county clerk has requested your department to pay a two per cent board of deposits insurance fund charge, on funds collected by the clerk from the sale of fishing and hunting licenses. You desire to know if you have the power to make such payment.

Sec. 29.09, subsec. (7), Stats., provides that a county clerk shall be entitled to retain from out of the fees collected from the sale of hunting and fishing licenses ten per cent as compensation for his services. The remainder is to be returned to the conservation commission.

It appears, therefore, that the legislature considered ten per cent of the amount of the fees collected sufficient to pay the clerk for his time and expenses necessarily incurred in collecting and protecting the collection of these fees. Since the legislature provided a ten per cent remuneration to the clerks and no more, we are unable to see how your commission would have power to increase the amount. A public officer takes his office cum onere, and is entitled to no salary or fees except those which the statute provides. Henry v. Dolen, 186 Wis. 622 (1925).

JEF
Elections — Residence — Recovery Act — Civilian Conservation Corps — As general rule persons enrolled in CCC camps do not gain voting residence in place where they are stationed as members of such camps.

August 31, 1936.

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

You ask whether one who enrolls as a CCC worker gains a voting residence in the municipality in which he is stationed.

Whether or not a person has a voting residence in a particular place depends upon the particular facts of each case. The fact that a person is a member of a CCC camp does not, in itself, determine the question of voting residence. However, we assume that you have in mind a person who has ordinarily lived in a place other than the place where he is stationed in a CCC camp, and that such person has gone to the CCC camp merely for the purposes of his enrolment. You inform us that a CCC member enrolls for a period of six months.

Sec. 6.51, Stats., defines a voting residence. Subsec. (4) of said section 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.”

It appears to us that generally speaking a member CCC camp does not have a voting residence in the place where he is stationed because he has come there for temporary purposes within the meaning of said subsection. A somewhat similar question was presented to our supreme court in State ex rel. Small v. Bosacki, 154 Wis. 475. There the court decided that persons working in a lumber camp, persons popularly known as “lumber jacks,” did not gain a voting residence in the place where the camp was located because they came to the camp for temporary purposes only. As emphasized by the court in the cited case, if the lumber
jacks (or members of CCC camps) were allowed to vote, they could control the local policies of government and override the will of the permanent taxpaying residents.

This opinion, of course, is not meant to rule all cases involving CCC enrolment; as above stated, the facts in each case are governing.

You state in your communication that you are informed that we have previously held in XXV Op. Atty. Gen. 10 that CCC members gain a voting residence. You have been incorrectly informed, as a reading of that opinion will testify.

JEF

Public Printing — Newspapers — Change of name of newspaper otherwise complying with sec. 331.20, Stats., does not create disqualification as organ for publication of legal notices.

Change of location of paper from village to city in same county does not disqualify paper otherwise qualified under sec. 331.20.

August 31, 1936.

Helmar A. Lewis,
District Attorney,
Lancaster, Wisconsin.

You desire to know whether the Grant County Independent, a newspaper of general circulation located in your county, complies with sec. 331.20, Stats., sufficiently to entitle it to charge and collect for publication of legal notices. You have stated facts sufficient to show that the paper complies with the statute in all respects, except one, viz., that it has not been regularly and continuously published in the same city and county for two years. Such lack of compliance, if any, is based upon the fact that prior to August 29, 1935, the paper was called the Muscoda Leader-Press and
upon the further fact that prior to October 24, 1935, it was published in the village of Muscoda whereas it has since that date been published at Lancaster.

This department has previously ruled that the changing of a name of a newspaper by the owner does not affect its eligibility as an organ for publication of legal notices. See XXII Op. Atty. Gen. 207. Sec 331.22, Stats., apparently contemplates that the changing of the name will not affect the eligibility of the paper.

Does the change of location affect the eligibility of the paper?

From the enactment of sec. 331.20, Stats., by ch. 319, Laws 1899, down to 1931, the phrase now in question, namely, “that such newspaper shall have been regularly and continuously published in such city and county for at least two years” used the word “or” in place of the underlined “and.” The continuous history shows, therefore, that the legislature until 1931 was satisfied to require that the location of the paper be in the county, at least. We find no evidence showing that the substitution of the word “and” in the 1931 revision was a mistake. However, if that clause is to be strictly construed it should read “in such village or city and county.” As it presently stands, strictly construed, a paper published in a village could not comply.

Since a strict reading of the statute would lead to such a result, we hold that the word “or” may be read in the place of “and.” State ex rel. Wis. Dry Milk Corp. v. Circuit Court, 176 Wis. 198, 186 N. W. 732.

We therefore conclude that the paper in question substantially complies with the requirements of sec. 331.20, Stats.

JEF
Taxation — Tax Sales — Single tax certificate containing several lots should be divided to permit redemption of individual lots.

August 31, 1936.

ALEX SIMPSON,
District Attorney,
Fond du Lac, Wisconsin.

You state that in many instances in your county a single tax certificate is so drawn as to contain four or five different lots. Several individuals have requested that such a tax certificate be divided so that a person can redeem a portion of the certificate, i.e., redeem one lot of the four or five contained therein. As these lots are assessed under one valuation, it would be difficult to ascertain the valuation of any one lot.

You ask whether said tax certificate should be divided to provide for such partial redemption.

The question is answered in the affirmative.

Sec. 75.01, Stats. 1935, specifically provides for the redemption of a part or portion of land, less than the whole, sold under a tax certificate, thereby necessitating the division of said tax certificate.

Sec. 75.01 provides in part as follows:

"* * * May * * * redeem * * * any part thereof or interest therein by paying to the county treasurer * * * such portion thereof as the part or interest redeemed shall amount to * * *"

That the intent of the legislature was to permit the redemptioner to redeem a portion of the land is further manifested in sec. 74.32, where it is stated:

"Any person may discharge the taxes on any parcel of land returned to the county treasurer as delinquent or any part thereof or undivided share therein, * * *"


The principles enunciated in XVI Op. Atty. Gen. 419, sanctioning the redemption of an undivided interest in land
less than the whole, are also applicable to the instant statement of facts. The extreme difficulty in ascertaining the valuation of any one lot because of the assessment in toto does not permit the county treasurer to counteract the express statutory provisions of sec. 75.01.

JEF

Intoxicating Liquors — Posted Persons — Name of alleged drunkard who has been posted for one year pursuant to sec. 176.26, Stats., may not be removed from banned list before expiration of required year.

Words "intoxicating liquors" in sec. 176.26 do not mean beer alcoholic content of which is less than five per cent by weight.

August 31, 1936.

ROBERT P. STEBBINS,
District Attorney,
Berlin, Wisconsin.

In your communication of August 5, 1936, you ask whether the wife of an alleged drunkard, or any other person authorized by sec. 176.26, Stats., to post an habitual drunkard, may have the offender's name stricken from the banned list before the expiration of the required year. You also inquire whether beer is to be considered as included in the phrase "intoxicating liquor" in sec. 176.26.

Sec. 176.26 provides for the posting of drunkards when the general welfare of the community or the individual's own good indicates a ban on the sale of intoxicating liquors to him for one year is advisable. The statutes do not provide any way in which the name of one already posted may be removed from the "black list." It has been held that

Consequently, it is our opinion that such a name may not be removed from a banned list before the expiration of the required year.

The phrase "intoxicating liquors" is defined by sec. 176.01, subsec. (2), for purposes of interpreting ch. 176, as follows:

"'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."

Sec. 66.05, subsec. (10), defines "fermented malt beverages," beer, especially its preparation, properties and alcoholic content. Sec. 176.01, subsec. (2), further qualifies the exclusion and limits it to beer the alcoholic content of which is less than five per centum by weight. It is our opinion, therefore, that the sale of beer whose alcoholic content is less than five per centum by weight to a person banned pursuant to sec. 176.26, Stats., is not in violation of that section.

JEF
To District Attorneys of Wisconsin:

(1) At a recent meeting of the district attorneys I was asked to get out a paper in relation to the duties and responsibilities of district attorneys. This request seemed to me to be well timed because of the many recent changes in the law on the subject. I have accordingly done so and am hereby publishing the results in the form of an attorney general's opinion, feeling that its publication will be of value to district attorneys and to state and county officers and officials.

(2) We shall first consider the general duties of the district attorney as provided by sec. 59.47, Stats., with a review of court interpretations and opinions rendered by this department as to the requirements of this section. Following this discussion, we shall set forth the sections which specifically mention the district attorney, placing some duty upon him, as they are found scattered about in the Wisconsin statutes. We shall not include the various laws which by implication from the general provisions of sec. 59.47, Stats., it is his duty to enforce, but only those where he is particularly mentioned.

I. GENERAL DUTIES OF THE DISTRICT ATTORNEY

(3) 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."

(4) Until 1923 this section required the district attorney to prosecute or defend all actions, applications or motions, civil or criminal in the circuit court of his county in which the state or county is interested or a party. But in that year the section was amended so that the district attorney's duties under this section were extended to such actions, applications or motions "in the courts of his county." Under the section, as it now stands, the district attorney is to rep-
resent the county or state in all courts of the county, including the circuit court. This change should be remembered when reference is made to opinions and decisions rendered prior to the amendment.

(5) The present section is very broad and all-inclusive. The district attorney is not only the criminal prosecutor for the state and county, but he is also the representative of the state and county in civil matters in which either of these municipalities is interested or a party.

(6) However, some courts have held under similar statutes that civil suits in behalf of the county can be instituted only by authorization of the county board, especially where there is involved the recovery or collection of money for the county. *Hughes County v. Ward*, 81 Fed. 314; *Kerby v. Commissioners of Clay County*, 81 Pac. 503 (Kan.); *Rice v. Swartz*, 215 Pac. 605 (Okla). Although the Wisconsin court has not passed directly on this question, in *Board of Supervisors of Milwaukee County v. Hackett*, 21 Wis. 613, the court impliedly accepted the rule that the district attorney could not start a civil action for the recovery of misapplied funds from a county treasurer, without authorization of the county board.


(8) The basis for this rule lies in the fact that the county under sec. 59.01, Stats. is a body corporate, empowered to sue or be sued, and sec. 59.02, subsec. (1), Stats., provides that the powers of a county as a body corporate can be exercised only by the county board thereof, or in pursuance of a resolution or ordinance adopted by such board. *Washburn County v. Thompson*, 99 Wis. 585; *VI Op. Atty. Gen.* 558.

(9) The fact the district attorney has no authority is a matter in abatement and must be brought before the trial court by answer or motion. *Board of Supervisors of Mil-
Opinions of the Attorney General

Milwaukee County v. Hackett, 21 Wis. 613; XV Op. Atty. Gen. 219. And his authority is sufficient if there is ratification by the county board after the suit has been started. Hughes County v. Ward, 81 Fed. 314; III Op. Atty. Gen. 688. The courts hold that there is a presumption of the prosecuting attorney's authority to bring civil suits in behalf of the county until proven otherwise. McKay v. Rogers, 82 F. (2d) 795; Jerauld County v. Williams, 63 N. W. 905 (S. D.).

(10) However, the fact that the district attorney cannot prosecute civil suits in the name of the county without the consent and authority of the county board does not prevent him from taking the initiative in civil suits in which the county is interested, since he can bring such actions in the name of the state or on the relation of the attorney general without authority from the county board. Dolezal v. Bostick, 139 Pac. 964 (Okla.); State ex rel. Griffith v. Bradbury, 256 Pac. 149 (Kans.); XII Op. Atty. Gen. 128. This power is important to the district attorney where the county board may, for political or other reasons, refuse to authorize a civil suit in behalf of the county. And it is the duty of district attorney to bring civil actions in behalf of the county, in the name of the state or on the relation of the attorney general when it clearly appears to be in the interests of the county, even though the county board may refuse to authorize suit in the county's name.

(11) Of course, where the statutes specifically provide that the district attorney shall institute civil proceedings in certain instances, in the name of the county, it is his duty to prosecute such proceedings whether or not the county board authorizes him so to do, and the board has no power to prohibit him from starting such an action.

(12) The question is often raised whether, under sec. 59.47, subsec. (1), Stats., it is the duty of the district attorney to appear at various hearings, such as hearings for the determination of insanity, sec. 51.02, appointments of guardians for the mentally incompetent or aged, sec. 49.31 (2), juvenile delinquency hearings, sec. 48.06, matters concerning indigents, sec. 49.11, and similar proceedings.

(13) In proceedings of this sort the county or state, and often both, are interested. In many of these matters they
are interested directly since the financial burden for support may fall on either or both of these governments. Aside from the financial interest there is also the general public interest to insure proper and fair treatment of those persons who have become or may become public charges in whole or in part. And often it is important that the state and county be represented in proceedings which may not be criminal to show why certain persons should be confined to institutions or otherwise cared for as a protection to the rest of the citizens.

(14) In VII Op. Atty. Gen. 625, this department was asked whether it was the duty of the district attorney to appear in juvenile court proceedings, sec. 48.06, regarding the delinquency of children, where the financial burden of maintaining delinquent children who are sent to institutions falls upon the county. It was held that though this was not a criminal proceeding, still upon the request of the juvenile court it was the district attorney's duty to appear. At pages 627-628 we stated:

"* * * In a broad sense the district attorney is the legal adviser of the county. He is the county's attorney. The county is his client, and while the statutes prescribing his specific duties, sec. 752 [now sec. 59.47, Stats.] may not directly point to any duty devolving upon him in such a proceeding, yet a liberal, comprehensive view of all the statutes governing his powers and duties naturally results in the conclusion that so far as may be necessary or advisable it would be the privilege and duty of the district attorney to see that the interests of the county in such matter, both from a financial standpoint and the broader interest of the welfare of the child and the general public, were properly taken care of and represented by him.

"I conclude, therefore, that in case the juvenile court desired the services of the district attorney to assist in such juvenile hearing it would be the duty of the district attorney to render such assistance in such matter as he might be able, and in case the district attorney was of the opinion that the county might be improperly burdened with expense in such a matter, it would then be his duty to interest himself in such a proceeding and prevent such improper results, and also in case he thought that some child was being improperly taken from his parent or guardian, it would then be his duty, acting in the interests of the general public, to interest himself in such matter and prevent such undesirable results."
(15) This statement well expresses the view of this department regarding the duties of the district attorney in proceedings of this nature. Sec. 59.47, subsec. (1), Stats., makes it the duty of the district attorney to 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. It is our opinion that this statute is sufficiently broad to require the district attorney to attend to all matters in his county in which the state or county has an interest, though that interest may be direct or indirect, and where there appears to be a probability of such interest at some future time, though there may be none at the time of the proceeding.

(16) From these general statements the following rule is set forth regarding such proceedings: It is the duty of the district attorney to attend to, and represent the state and county in these matters where he is so requested by some officer or official body of the state or county; or if he has notice that such a proceeding is to take place, and he is of the opinion that the interests of the state or county, whether financial or the broader interests of the public welfare, require his attention to the matter, it is his duty to attend thereto, even though there has been no request by state or county officers.

(17) In accordance with this rule it is our opinion that it is the duty of the district attorney, upon request of the county court, to appear at hearings for the determination of insanity, sec. 51.02. XXV Op. Atty. Gen. 614. The county is directly interested, since a finding of insanity may result in a financial burden upon the county. Further, it is of public interest that all the facts in the case be presented and considered by someone who is not prejudiced. If the district attorney, after investigation into the matter, believes that it would be error to find the individual insane, he should present these facts to the court. On the other hand, if he believes from the facts that commitment of the individual is better for the general public it is his duty to so inform the court.
(18) In 1910 Op. Atty. Gen. 664, we stated that it was not necessary for the district attorney to appear at insanity hearings. However, at that time the statute provided that the district attorney prosecute or defend actions, applications or motions in the circuit court of his county. But as stated above, sec. 59.47, subsec. (1), Stats., has been amended so as to make it his duty to prosecute or defend these proceedings "in the courts of his county." Thus, the legislature by this amendment clearly intended that the district attorney shall appear in all the courts of the county. There is also an indication in XXIV Op. Atty. Gen. 524, that it is not his duty to attend insanity hearings. However, after further consideration we have concluded that it is the duty of the district attorney to appear at hearings for determination of insanity, if so requested by the county court, or he may appear of his own initiative if he believes his appearance is for the best interests of the county or state.

(19) Furthermore, it is the duty of the district attorney to initiate proceedings for the annulment of a marriage, upon request of the state board of control, where one of the parties to the marriage is feeble-minded and was married in another state to evade the Wisconsin statutes relating to marriage of feeble-minded persons. XXV Op. Atty. Gen. 609. Here again there is a definite public interest in preventing the mental degeneration of the citizens of the state by prohibiting persons of unsound or feeble minds to be married and to bear children. In such cases there is also the probability of requiring financial assistance from the county or state, both at the present time and in the future.

(20) In the administration of the old-age and blind pension law, sec. 49.26 (3), where there is a requirement for the appointment of guardians for incompetents or imbeciles, it is the duty of the district attorney to appear and aid the county court in whatever way possible, upon the request of the court, or where it appears to be in the public interest. The county and state are interested both in the financial aspects of the problem and also in the proper care and treatment of the pensioners. XXV Op. Atty. Gen. 609.
It is also the duty of the district attorney to represent the county in the enforcement of liability of legally responsible relatives of persons receiving poor relief, in accordance with secs. 49.11 and 49.12. VII Op. Atty. Gen. 75.

(21) Although the district attorney cannot direct the county court to decide an application or proceeding in a certain manner, where the court is acting in a judicial capacity (XX Op. Atty. Gen. 926, 933, 937), still it is the duty of the district attorney to appear before and assist the court in behalf of the county and state, either at the court's request or where the district attorney deems his appearance necessary to the public welfare. It is his duty to present such facts as he may have gathered regarding the case, thereby aiding the court to make a proper and fair decision.

(22) In *State v. Helmann*, 163 Wis. 639, it was held that the district attorney had authority, and that it was his duty, under sec. 752 1 (now sec. 59.47, subsec. (1), Stats.) to prosecute to recover for breach of a liquor license bond, since the state was interested in the recovery of such bond. See III Op. Atty. Gen. 456. Sec. 360.31, Stats.

(23) This department stated in V Op. Atty. Gen. 777, that the district attorney must appear on an application for aid under the mothers' pension law, sec. 48.33, Stats., when so requested by the county board. It is our view that this opinion should be expanded so that it is the duty of the district attorney to appear upon request of the judge having the application under consideration, or where the district attorney believes that the interests of the public require his attendance.

(24) In 1906 Op. Atty. Gen. 659 we held that under sec. 752 1 (now sec. 59.47, subsec. (1), Stats.) it was the duty of the district attorney to institute proceedings and act as attorney for the county sheriff where a town treasurer failed to file bonds and refused to deliver the tax roll to the sheriff, since the county is interested in the collection of the taxes.

(25) In 1912 Op. Atty. Gen. 412, under the same provision of the statute, it was held to be the district attorney's duty to defend a state game warden in a replevin action for the recovery of hides, the title to such hides being in the
state. It was held in I Op. Atty. Gen. 447 that it is the duty of the district attorney to institute replevin proceedings at the request of the state game warden where the state is interested in the action. At page 447, we said:

"* * * it is considered to be part of the official duties of the district attorney to represent any department of the state government in actions in which the state is a party or in which state officials are interested in their official capacity."


(27) The district attorney is not required to proceed in probate court in another state to recover income taxes, though if he is directed to do so he may recover his actual expenses. XX Op. Atty. Gen. 225. Sec. 74.30 (2).

(28) Where a county normal school board and a county are joined as defendants, and their interests are not identical, it is proper for the county normal school board to hire its own counsel, while the district attorney represents the county, because of the different interests of the defendants. Though ordinarily it is the duty of the district attorney to represent the county normal school board, since it is the agency of the county, and the latter having an interest in the operation of the county normal school. XXI Op. Atty. Gen. 89. Sec. 41.37.

(29) Whether an indigent defendant should be permitted to call certain witnesses at the county's expense is a matter for the magistrate to determine under sec. 325.10. It is not the duty of the district attorney to pass on this question. XXII Op. Atty. Gen. 387.

(30) In connection with the district attorney's duties in prosecuting criminal actions under sec. 59.47, subsec. (1), it is necessary to consider subsec. (2) of the same section.
Sec. 59.47, subsec. (2), provides:

"The district attorney shall prosecute all criminal actions, except for common assault and battery or for the use of language intended or naturally intended 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."

(31) From the statutes above it might seem that the district attorney's duties in prosecution begin after a complaint is filed or other preliminary steps taken, sec. 355.17; but both public opinion and the courts have made it clear that it is the duty of the district attorney to instigate action upon his own knowledge as well as to prosecute after the indictment or complaint is filed.

(32) In Speer v. State, 198 S. W. 113 (Ark.), the court said, at page 115:

"While the law does not impose the duties of a detective upon the prosecuting attorney, it does impose upon him ordinary diligence in discovering and abating crime."


(34) In VII Op. Atty. Gen. 176 at page 177, it was said:

"* * * I believe it is part of the district attorney's duty to make a complaint for the violation of those crimes which come to his knowledge when no one else is willing to make the same."

(35) The district attorney is a quasi-judicial officer and may exercise discretion as to what course shall be pursued in view of the facts. State v. Peterson, 195 Wis. 351, XIX
Op. Atty. Gen. 388. However, abuse of that discretion, by refusing to prosecute a criminal action, where he has knowledge of facts which are clear as to the guilt of an individual, are sufficient to cause his removal from office. Speer v. State, 198 S. W. 113 (Ark.); State v. Eberhart, 133 N. W. 857 (Minn.). As a quasi-judicial officer it is his duty to see that a fair prosecution is held and to take no unfair advantage of the defendant. Koenig v. State, 215 Wis. 658.

(36) In cases where the statute specifically provides that the district attorney be notified of a wrong by another official he is not required to institute an action until he receives such notice. Wilson v. Trustees of Village of Omro, 52 Wis. 131; State v. Duff, 83 Wis. 291.

(37) In I Op. Atty. Gen. 614, it was held the duty of the district attorney to prosecute violations of the weights and measures law, by virtue of sec. 752 2 (now 59.47, subsec. (2), Stats.), even though the city officers were largely responsible for the administration of the law. And it is his duty to prosecute violations of the corrupt practices act. Sec. 348.226. I Op. Atty. Gen. 232. Unlawful operation of an insurance business, sec. 348.488, should be prosecuted by him, and he should notify the insurance commissioner of such unlawful acts. VIII Op. Atty. Gen. 162, 188.

(38) It is the duty of the district attorney to prosecute a criminal action where he has reasonable grounds to believe defendant guilty, even though the defendant may have obtained judgment in a civil suit concerning the same facts, and even though the plaintiff to the civil action has advised against the criminal action. XIV Op. Atty. Gen. 317.

(39) At the preliminary examination it is necessary for the district attorney to produce enough evidence to satisfy the presiding magistrate that a crime has been committed and that there is probable cause to believe defendant guilty. However, the district attorney need not produce all the evidence in his possession. XXIV Op. Atty. Gen. 258. Sec. 355.17.

(40) Furthermore, after a judgment has been obtained in favor of the state or county it is the duty of the district attorney to issue all process necessary to carry into execu-
tion such judgment, and his failure to do so will subject him to removal. *State v. Baird*, 231 Pac. 1021; 22 R. C. L. 102, sec. 11.

(41) Sec. 59.47, subsec. (3), provides that it is the duty of the district attorney to give advice to the county board and other officers of his county, when requested, in all matters in which the county or state is interested or relating to the discharge of official duties of the county board or officers. And he is to examine all claims which have been presented to the county board against the county for fees of officers, interpreters, witnesses, and jurors in criminal actions and examinations, and report the liability of the county as to such claims.

(42) Under this subsection it is the duty of the district attorney "to attend upon the county board or any committee thereof when requested to do so and advise them or render any professional service required by them concerning any matter within the scope of their official duties." III Op. Atty. Gen. 684, at 685. See XIX Op. Atty. Gen. 388.

(43) It is not the duty of the district attorney to advise school district officers, since such officers are not officers of the county. However, the district attorney has the duty of advising the county superintendent, who, in turn, has the duty of advising the officers of the school districts in the county. XX Op. Atty. Gen. 1066; XXII Op. Atty. Gen. 733. Sec. 37.01 (1) and sec. 59.47 (3).

(44) Nor is it the duty of the district attorney to defend former members of a county highway committee in an action for misapplication of funds brought by the taxpayers, since it may become his duty to prosecute such defendants in behalf of the county. XIV Op. Atty. Gen. 602.

(45) The district attorney is not required to defend a police officer in a civil action brought against him for false arrest and malicious prosecution; and it is not the district attorney's duty to defend a sheriff in a civil action brought against the sheriff for shooting a person engaged in picketing. XXI Op. Atty. Gen. 430; XXIII Op. Atty. Gen. 56.

(46) Subsec. (4) of sec. 59.47 makes it the duty of the district attorney to attend the grand jury when requested, for the purpose of examining witnesses in the presence of
the grand jury and advise them in a legal matter. It is also specifically provided that he shall draw bills of indictment and information, and issue subpoenas and other processes to enforce attendance of witnesses.

(47) By subsec. (5) of sec. 59.47 the district attorney is required to file with the county clerk, on or before the eighth day of November of each year, a verified account of all moneys received by him during the year for fines recognizances, forfeitures, penalties or costs, specifying the names of persons so paying, the amount received from each person, and the cause for which it was paid. At the same time he is to pay such money to the county treasurer. On every neglect or failure to render such an account or pay in the money to the treasurer, the district attorney shall forfeit not less than fifty nor more than two hundred dollars.

(48) Sec. 59.47, subsec. (6), places upon the district attorney the duty of attending to the settlement of bills of exceptions in cases he has tried during his term of office after his term of office has expired. For this service he is allowed compensation from the county where elected, not to exceed twenty-five dollars per day for time actually expended.

(49) And by subsec. (7) of sec. 59.47, Stats., upon request and under the supervision of the attorney general, he is to brief and argue all criminal cases brought by appeal or writ of error or certified from his county to the supreme court.

(50) The district attorney is the proper official to invoke the jurisdiction of the supreme court by writ of error, writ of certiorari, or otherwise, to review in behalf of the state the proceedings of trial courts in criminal actions. State ex rel. Zabel v. Municipal Court, 179 Wis. 195. However, in civil actions the district attorney cannot carry appeals to the supreme court without the consent of the county board, and the board may, if it so desires, employ private counsel to conduct civil proceedings in behalf of the county in the supreme court. Town of Eagle River v. Oneida Co., 86 Wis. 266; Duluth, South Shore & Atlantic R. Co. v. Douglas County, 103 Wis. 75; XVIII Op. Atty. Gen. 188.
(51) Sec. 59.47, subsec. (8), Stats., requires the district attorney to be the legal adviser of the county highway commissioner, to draw all papers required in the performance of the commissioner's duties, and to attend to all legal matters in and out of court when the commissioner is a party.

(52) Subsec. (9) of sec. 59.47, Stats., makes it the district attorney's duty to enforce the provisions of secs. 100.22 and 100.23, Stats., by appropriate actions in courts of competent jurisdiction. Sec. 100.22, Stats., forbids and declares unlawful unfair discrimination in the purchase of dairy products. Sec. 100.23, Stats., provides that all contracts made in violation of sec. 100.22, Stats., shall be void.

(53) This concludes the discussion of sec. 59.47, Stats., specifying the duties of the district attorney. As has been seen, subsecs. (1) and (2) are very general provisions, while subsecs. (3) to (9), inclusive, are much more specific as to his duties.

II. STATUTES SPECIFICALLY STATING DUTIES.

(54) It is our purpose here to cite the various sections of the statutes which specifically place some duty or requirement upon the district attorney. It will be noted that in almost all of these provisions particularizing his duties the district attorney has no discretion in the matter but he has a positive duty to perform. Furthermore, in most cases there is no addition to his duties or powers, in view of the general requirements of subsecs. (1) and (2) of sec. 59.47, Stats.; but the specific sections do make it more clear that the district attorney has violated his oath of office if he fails to perform the particular duty in question.

(55) Although we do not profess to have found every provision placing duties upon the district attorney, we do feel that after painstaking perusal of the statutes we have missed very few of these requirements. The provisions have been arranged in sequence under statutory section numbers in the hope that they will be more useful and accessible for future reference. Useful citations and annotations have been added in many instances.
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59.47 See pars. (2), (12), (53) *District attorney*; duties in general.

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59.47 (9) See pars. (52), (53) Unfair competition, dairy products.

59.73 Money received by district attorney in discharge of his office must be accounted for and records kept. Further requirements under sec. 59.47 (5).


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68.11 Clerks and assessors of all political subdivisions to make required reports required by Ch. 68 (vital statistics) or suffer prosecution and forfeitures to be recovered by district attorney.
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256.28 (14) Same; where judgment against defendant in disbarment proceedings, duty of district attorney to collect fine, if any, and pay into state treasury.

256.33 District attorney's partner may not act as justice of peace or as a court commissioner, etc., in any case in which state is a party nor may he appear in court against district attorney. XXI Op. Atty. Gen. 7; Richards v. State, 82 Wis. 172, 177.

280.10 Bawdy houses declared to be public nuisances may be abated by district attorney or citizen's suit. XXIII Op. Atty. Gen. 599.

288.05 Forfeitures; where portion of forfeiture is payable to any person, action not to be started (before justice of peace) except by direction of district attorney, attorney general, mayor, etc. (except as provided in sec. 288.04); and such actions not to be appealed to circuit or supreme court unless directed by district attorney or attorney general.
288.10 Same; forfeitures due a municipality may be recovered by district attorney (when justice of peace does not have jurisdiction) in a suit in municipality's name; money paid to county treasurer. XX Op. Atty. Gen. 256.


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351.31 (2) Abandonment of wife or child; duty of district attorney to file information where accused held over for trial.

352.48 (4) “Walkathons” and similar endurance contests declared to be public nuisances and it is the duty of the district attorney to abate them. XXIV Op. Atty. Gen. 760.


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355.20 | Examinations; second examination to be conducted by district attorney even though accused had been discharged on preliminary examination; if new incriminating evidence discovered. *Campbell v. State*, 111 Wis. 152, 86 N. W. 855; *Dreps v. State*, 262 N. W. 696; XXI Op. Atty. Gen. 1017.
356.04 | **Venue**; the district attorney of the county where the indictment or information filed to prosecute where venue is changed.
357.20 | **Arraignment** of minor offender; duty of district attorney to file information in office of the clerk of court within five days after request for arraignment, and deliver a copy to prisoner.
357.22 | *Same*; duty of district attorney to attend upon such arraignment.
359.15 | **Investigations of prisoners** by district attorney to determine whether or not they have been previously convicted of any other crime; if so prisoner may be accordingly charged by district attorney.
359.16 | *Same*; in counties containing a city of 150,000 or more, duty of district attorney to amend charge where offender is a repeater and has been sentenced to county house of correction on three or more occasions.
360.31 | **Intoxicating liquor** sales in violation of state law pertaining thereto brought in justice court must be reported to district attorney who shall appear on behalf of the state.
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364.04 | **Extradition** of alleged criminals now in Wisconsin; governor may request district attorney for all information on circumstances of case and whether extradition advisable.
Section number  Duties of District Attorney

Opinions of the Attorney General

Minors — Child Protection — Illegitimate child may be returned to mother when she is competent to care for such child and its best interests would thereby be promoted in case where child has been committed to state public school and mother has subsequently asked that he be returned to her.

September 3, 1936.

Board of Control.

You state that in 1933 a certain child was brought into juvenile court and found to be illegitimate and dependent. The mother appeared in court and waived further notice. The child was committed to the temporary care, custody and control of a foster mother. About two years later it was committed to the permanent care, custody and control of the state public school, and the judgment committing the child to the temporary care and custody of the foster mother was terminated. At the same time the parental rights of the mother were terminated.

The mother now asks that the child be returned to her. You inquire whether the permanent commitment and the termination of parental rights may be vacated and, if so, on what grounds.

It is our opinion that such commitment of the child and termination of parental rights may be vacated upon proper showing by the mother that she is competent to fulfill toward the child the duties which have been assumed by the state.

The welfare of the child is the primary consideration of the juvenile court in administering sec. 48.07, Stats., relating to the care of delinquent, neglected or dependent children.

This is clearly evidenced in the wording of the statute.

Sec. (1), par. (c), sec. 48.07, empowers the court to

"Make such further disposition as the court may deem to be for the best interests of the child."

Subsec. (2a) provides:

"Upon the discovery of additional evidence which raises a question as to the advisability of the commitment made in
any case in any juvenile court, the parent, guardian or next friend of the child so committed may at any time petition the court for a rehearing and if the court deems such rehearing advisable, it may again hear the case and make such disposition thereof as is in the best interests of the child."

We believe that what the court said in Milwaukee Industrial School v. Supervisors of Milwaukee County, 40 Wis. 328, 339-340, in construing ch. 325, Laws 1875, relating to the commitment of minors to industrial schools, is appropriate here. The court said:

"* * * We cannot think that it [ch. 325] was intended to foreclose the right of a parent, when competent, to resume the custody and care of his child. * * * The statute * * * operates, so to speak, upon the child in personam, without citing the parent or guardian, without any color of intent to bind the parent or guardian by the proceeding or by the commitment. It appears to us quite obvious, upon familiar principles, that the parent or guardian is not precluded by the commitment from asserting any right to the custody and care of the child, which he may be afterwards able to establish. When a parent or other proper guardian should be able to show that the disability or default on which the child's commitment proceeded was accidental or temporary, and no longer exists, and that he is, * * * not otherwise unsuitable for the custody of the child, his right to the custody should prevail over the commitment to which he was not a party. In such a case, if the officers of a school should refuse to surrender a child, no court would hesitate to restore the child to the care of the parent or guardian. The commitment during minority binds the child only; not the parent or guardian, when competent to fulfill towards the child the duties assumed by the state. It is conclusive as between the school and the child; but not as between the school and the parent or guardian. The statute is a humane one, and should not be bent to a construction inconsistent with one of the dearest rights of humanity. * * *"

We also refer to the case of Guardianship of Knoll, 167 Wis. 461, in which the court held that where children were committed to the state public school on the ground that their father had abandoned them and their mother was not a fit and proper person to have their care, custody and control, the county court had jurisdiction afterwards, upon a
proper petition by the mother stating the facts and alleging her present ability to support and care for the children, and that because of reformation or for some other reason she is now a fit and proper person to have their care and custody, to determine the question whether such care and custody should be awarded to her and to make an order accordingly.

We are mindful of the fact that in the cases above mentioned the court was not construing the precise statute here under consideration, but, nevertheless, we believe the principles there enunciated by the court should be controlling here, and that the statute should be humanely construed to the end that a mother who is presently able to give proper care to her child should not be permanently deprived of this natural and precious right because of earlier misfortune which made it impossible for her to discharge her parental duty in the past.

It is also to be noted that sec. 48.22, subsec. (2), gives the state board of control, independently of the juvenile court, wide powers in the placing of children permanently committed to the state public school, and that there would appear to be no good reason why the board in its discretion should not place the child in question with its mother upon being satisfied of her ability to care for it.

JEF
Minors — Child Protection — Child whose mother has been legally deprived of its custody but whose father refuses to relinquish his parental rights may be placed in exclusive control of county juvenile court under sec. 48.07, Stats., where father is imprisoned for life. However, father is not to be considered as having abandoned child.

September 3, 1936.

L. A. Koenig,
District Attorney,
Phillips, Wisconsin.

You ask whether the juvenile court of a county may, against his wishes, terminate the parental rights of a father serving a life sentence. The mother has been found to have neglected the child and has agreed to an order depriving her of its custody.

Sec. 48.07, subsec. (7), par. (a), Stats., provides for the termination of parental rights in cases of abandonment, and in certain other instances not coming within your statement of facts.

As you state, the father of the child about whom you inquire is not guilty of abandonment as contemplated by sec. 48.07, subsec. (7), par. (a), because of his lack of intention to voluntarily desert his child and because of his insistence upon retaining his parental status. Words and Phrases (First Series) pp. 6-7; In re Cozza, 126 P. 161, 167, 163 Cal. 514; In re Green, 221 Pac. 903, 192 Cal. 714; In re Cordy, 146 Pac. 532, 169 Cal. 150.

Consequently it is our opinion that the juvenile court is not empowered by statute to terminate the parental rights of this father.

However, ch. 48 of the statutes has as its purpose the protection and aid of unfortunate children. Sec. 48.07, subsec. (4), reads as follows:

“It is declared to be the intent of this chapter that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interests of the state; and when such child is removed from his own family, to secure for him custody, care and
discipline as nearly as possible equivalent to that which should have been given by his parents."

The juvenile court, by sec. 48.01, subsec. (2), is given jurisdiction over children who are neglected, dependent, or delinquent. Sec. 48.01 (1), pars. (a), (b), and (c), defines children who are to be considered neglected, dependent or delinquent. This child falls within the category of a dependent child, as therein defined, and may be dealt with pursuant to sec. 48.07, with the previously mentioned reservation that the father is not to be considered as having abandoned this child, and as having forfeited his status as a parent. This disposition of the matter allows the juvenile court to provide for the child's education and general welfare, matters which are obviously beyond the father's control, and yet at the same time preserves to the father his nominal parenthood.

JEF

Fish and Game — Public Lands — Wild life refuges may be established for limited periods of time pursuant to sec. 29.57, Stats., on lands coming under school fund, art. X, sec. 2, Wis. Const., where such procedure will enhance value of lands and not interfere with their sale.

September 3, 1936.

Land Department.

You inquire whether lands coming under the school fund as provided in art. X, sec. 2, Wisconsin constitution, may be placed for certain definite periods of time within wild life refuge areas established under sec. 29.57, Stats.

This question is answered in the affirmative.

Sec. 29.57 provides for the establishment of wild life refuges upon application of the land owner to the conservation commission, and that such lands shall remain wild life ref-
uges for a period of not less than five years. Hunting and trapping are then forbidden on such lands during the existence of the refuge.

Sec. 23.08, among other things, provides that the commissioners of public lands and the conservation commission, so far as may be found practicable "shall mutually co-operate in order to make economical use of their respective employees, equipments and facilities, and to enhance the value of the public lands."

If, as a matter of policy, it is determined that the establishment of wild life refuges on trust fund lands will enhance their value, we believe any reasonable means employed to secure that end are within the scope of art. X, sec. 2, Const., and the above mentioned provisions of sec. 23.08.

It should be pointed out, however, that the land commissioners could not make a permanent state park or wild life preserve, or take such other action as might restrict the sale of said lands and thus prevent the proceeds from being devoted to school purposes. State ex rel. Sweet v. Cunningham, 88 Wis. 81, XVI Op. Atty. Gen. 426.

JEF

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**Taxation — Forest Crop Lands** — Method of apportionment of forest crop income provided by sec. 77.04, subsec. (3), Stats., is to be followed regardless of amount received.

September 3, 1936.

THOMAS E. MCDougAL,

*District Attorney,*

Antigo, Wisconsin.

You call our attention to sec. 77.04, subsec. (3), Stats., which provides:

"Out of all moneys received by any town from any source on account of forest crop lands in such town, the town treas-
urer shall first pay twenty per cent to the county treasurer, retain forty per cent for the town and apportion the remainder to the various common school districts or parts of such districts in which the said forest crop lands are located, in proportion to the acreage which the said lands within each school district or part thereof bears to the total acreage of the said lands in the town."

You state that this year the towns have not received their full quota of taxes from the state under the forest crop law, and you inquire how the money that has been received is to be apportioned among the school districts.

We believe the statute is clear and express and calls for very little construction or interpretation.

Note that the statute begins with the words "out of all moneys received." Thus it is clear that the method of apportionment set up in the statute is the same, regardless of the amount received and irrespective of whether or not the full quota has been paid by the state.

Any other construction would do violence to the plain command of the statutes.

JEF.

Counties — County has no power to lend money to municipalities within county.

John H. Matheson,
District Attorney,
Janesville, Wisconsin.

You call our attention to a recent county board resolution providing that Rock county will advance $10,000 to a certain township in the county for highway purposes, with the provision that the money is to be repaid at the rate of $1500.00 per year.

September 3, 1936.
You state that you can find no authority in the statutes for a county to lend money to any of its constituent municipalities and that you doubt very much that it has such power. Our opinion on this question is requested.

We concur in your view that the county board is without power to lend money to its constituent municipalities.


We do not find that the statutes either expressly or by implication grant the power in question to counties. It is true that statutory provision is made for county aid in highway construction or improvement in secs. 83.03, subsec. (6) and 83.14, but it does not appear that the resolution in question purports to be an attempt to proceed under either of these statutes.

JEF

Taxation — Tax Collection — Tax levied on road construction machinery kept within municipality by nonresident owner and stored therein for considerable period of time is valid tax under sec. 70.13, subsec. (1), Stats.

Action of attachment by town to recover valid 1933 delinquent personal property tax is permissible under sec. 74.19, subsec. (4), par. (b), Stats.

T. W. AndreSEN,
District Attorney,
Medford, Wisconsin.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts: Certain paving machinery, belonging to a highway
contractor having his domicil in the city of Milwaukee, was brought into the town of Cleveland in 1932 or 1933; said machinery was assessed in the town as of May 1, 1933 and a tax of $200.00 was levied. The tax was not paid and in the course of time was charged back to the town of Cleveland. The machinery has not been used for the past two or three years but has remained in storage on a farm in the town of Cleveland. The owner has stated that he is paying taxes on this machinery to the taxing authorities in the city of Milwaukee. Upon the foregoing statement of facts you ask the following questions:

1. Is the tax levied in 1933 a valid tax?
2. May an attachment action be had by the town of Cleveland for the 1933 tax under sec. 74.19 (4) (b), Stats.?

1. It is the opinion of this department that the tax levied in 1933 is a valid tax. This machinery was assessed under sec. 70.13, subsec. (1), Stats., and consequently must come within one of the three classifications enumerated therein. The construction of said section is found in Wisconsin Transportation Co. v. Williams Bay (1932), 207 Wis. 265, 240 N. W. 136.

This machinery comes within the classification of property "customarily kept" in a certain assessment district, i.e., town of Cleveland, and therefore assessable by said municipality. A statement is contained in Wisconsin Transportation Co. v. Williams Bay, supra, at p. 269, defining property "customarily kept":

"* * * As to the property which is taxed where customarily kept, it seems clear that the legislature had in mind a large amount of personal property within this state which has no fixed location, which is moved about from place to place for much of the time but which is brought back at some regular interval or intervals to a given place where it reposes for a time in a state of rest, repose, or non-use. * * *"

This statement governs the instant statement of facts, i.e., the machinery brought into the municipality in 1932 or 1933 and kept in storage for the past two or three years. Middleton v. Lathers, 213 Wis. 117, 250 N. W. 755, is not
applicable to the statement of facts presented because the highway machinery in that case did not have the degree of permanency found herein.

2. An action of attachment may be had by the town of Cleveland under sec. 74.19 (4) (b), to acquire said 1933 tax. Sec. 74.19 (4) (b), Stats., specifically provides:

"Subsequent to the charging back of the delinquent personal property taxes pursuant to section 74.31, any town * * * may proceed to collect such delinquent taxes under sections * * * 74.12 * * *"

Sec. 74.12, Stats., states:

"* * * an action of attachment shall lie in the name of the town, * * *"

Although sec. 74.19 (4) (b) was enacted in 1935, nevertheless, it is applicable to this delinquent personal property tax of 1933. As the legislature intended to provide a new remedy, it may be presumed the legislature also intended that said section should be retroactive in its effect. 59 C. J. 1173; 25 R. C. L. 791. The general rule that statutes conferring new rights have no retroactive effect unless such intention is fairly expressed or clearly implied does not apply to statutes relating to remedies and such statutes have a retroactive effect. Read v. City of Madison, 162 Wis. 94, 155 N. W. 954; Pawlowski v. Eskofski, 209 Wis. 189, 244 N. W. 611; State ex rel. Davis & S. L. Co. v. Pors, 107 Wis. 420, 83 N. W. 706; Stone v. Little Yellow D. Dist., 118 Wis. 388, 95 N. W. 405.

That the owner is paying taxes on this machinery to the taxing authorities in the city of Milwaukee does not in any way destroy the right of the town of Cleveland to levy and collect this valid tax.

JEF
Counties — Taxation — Tax Collection — County and city may, in compromising excess of delinquent real estate taxes under sec. 59.07, subsec. (21), Stats., include value of tax deeds for years other than those years from which excess is computed.

September 8, 1936.

Lyall T. Beggs,
District Attorney,
Madison, Wisconsin.

Attention Elliot N. Walstead, Assistant District Attorney.

You submit for the consideration of this department, with a request for an opinion thereon, the following statement of facts: The city of Madison has an excess of delinquent real estate taxes to its credit for the years 1932 and 1933. It was contemplated that Dane county will deed certain of its county-owned lands to the city, the city paying for such lands by deducting from such credit under sec. 59.07 (21), Stats. The certificates covering the particular property extend over a period of four or five years. Upon the foregoing statement of facts the following question is asked:

May the value of tax certificates for years other than 1932 and 1933 be deducted from the excess roll under sec. 59.07 (21), Stats.?

In order to answer the question proposed it should be pointed out that a county may only transfer tax deeds and not tax certificates under sec. 59.07 (21), and, consequently, the value only of such deeds as computed by the face value of the certificates covering such lands is deductible. XXII Op. Atty. Gen. 984.

It is the opinion of this department that the value of tax deeds for years other than 1932 and 1933 may be deducted.

Sec. 59.07 (21) specifically provides:

“To authorize the county treasurer to deed county-owned lands to towns, cities or villages having an excess of delinquent real estate taxes to their credit in exchange for such part of the interest of such city, village or town for one or more years as shall be agreed upon by the county board and the governing body of the city, village or town. * * *.”
It is common knowledge that at the time of its enactment a great acreage of land was held by the counties of the state under tax deeds; that it was most difficult for the counties to sell the same and obtain money with which to pay the towns, cities, and villages the amounts due to them on delinquent real estate taxes. The legislature enacted this section to furnish a method of remedying this situation. Therefore it may be presumed that the legislature intended that the county may transfer to the city such "county-owned" lands as are represented by deeds for tax certificates covering years other than those of 1932 and 1933 with a correlative deduction from the excess roll. Retroactivity may be predicated to sec. 59.07 (21), Stats., for the reasons enumerated above.

Moreover, no legislative restriction has been placed in said statute upon the "county-owned" lands that may be deeded to the municipalities. The statute provides solely "to deed county-owned lands," so that the wording of the statute itself sanctions the deducting of the values of tax deeds for years other than those of 1932 and 1933.

JEF

Charitable and Penal Institutions — Wisconsin General Hospital — Words "any state institution" contained in sec. 46.10, subsec. (7), Stats., include state of Wisconsin general hospital; collections made on its behalf in which county has some amount due may be credited against state tax next accruing from said county under sec. 46.10, subsec. (3).

Theodore Dammann,
Secretary of State.

You inquire whether in the absence of specific mention of the state of Wisconsin general hospital in sec. 46.10, subsec. (7), Stats., the collections made by the state board of con-
trol on account of the hospital can be credited by the secre-
tary of state, upon the certification of the board of control, against future charges to the counties, as provided in sec. 46.10, subsec. (3), Stats., in the case of other institutions.

Your question is answered in the affirmative.

The mere fact that the state of Wisconsin general hospi-
tal is not specifically mentioned in sec. 46.10, subsec. (7), Stats., is immaterial, since the words "any state institu-
tion" contained in that section are clearly broad enough to cover the state of Wisconsin general hospital, which is ob-
viously a state institution.

We will not here take the space to fully set forth the pro-
visions of sec. 46.10 (3), to which you refer, but merely quote the last sentence thereof, which reads:

"* * * The said board shall give proper credit of the amount due the county for any recovery of maintenance and, when approved, the president and secretary of the board shall certify said statement to the secretary of state, who shall credit the aggregate amount found due on the state tax next accruing from said county."

This authorizes the crediting of collections made on be-
half of the hospital, in which collections the county has some amount due, against the amount due "on the state tax next accruing from said county."

JEF
Appropriations and Expenditures — Travel Expense — Public Officers — County soldiers' relief commission may not furnish travel allowance to veteran engaged on WPA project requiring travel, but if WPA wage is insufficient to cover both travel and subsistence, commission may, under sec. 45.11, Stats., provide necessary relief for such veteran.

September 8, 1936.

Ralph M. Immell,
Adjutant General.

Our opinion is requested as to whether or not the soldiers' and sailors' relief commissions of the various counties of the state have authority to allot funds for travel allowance to veterans who are employed by the works progress administration in obtaining a complete record of the burial places of all soldiers, sailors, marines and nurses who are buried in the state of Wisconsin.

No allowance for travel is available from WPA funds, and the veterans employed are receiving only the security wage which is allowed by the WPA.

Soldiers' relief commissions are provided for by ch. 45, Stats. The words "relief" and "assistance" are used throughout this statute, and this office has construed sec. 45.10 as a relief statute, holding that a veteran receiving relief under that section cannot gain a legal settlement in the town where he resides. XXII Op. Atty. Gen. 147.

Consequently, the question to be determined is whether or not travel allowance may be construed to be "relief" as that term is commonly known and understood.

While "relief" is a relative term, Coffeen v. Preble, 142 Wis. 183, nevertheless the term, as commonly understood, would probably be limited to the ordinary necessities of life, the means of existence. This would hardly include traveling costs. However, if the veteran is compelled to use a part of his subsistence wage from the WPA for traveling expenses, and the result is that he is short of funds with which to purchase the necessities of life, the soldiers' relief commission, under sec. 45.11, could arrange to furnish such necessities or the funds with which to purchase them.

JEF
Public Officers — Deputy Sheriff — Undersheriff — Under sec. 59.21, subsec. (4), Stats., deputy sheriff or undersheriff holding over until his successor is appointed and qualified is entitled to collect fees of his office.

September 8, 1936.

Charles L. Larson,
District Attorney,
Port Washington, Wisconsin.

You call our attention to sec. 59.21, subsec. (4), Stats., which provides:

“A person appointed undersheriff or deputy for a regular term or to fill a vacancy or otherwise shall hold office during the pleasure of the sheriff.”

You inquire first:

“In the event a sheriff has been elected to succeed himself, does a deputy who has served during the first term and has duly qualified for this first term, hold over during the pleasure of the sheriff for the second term, or is it necessary that he be reappointed and requalify?”

The answer to this question depends upon the conditions of the appointment in each particular case.

You will note under the statute that the appointment may be for a regular term, or to fill a vacancy, “or otherwise.”

If the individual was appointed for the term of the sheriff he would be in the same position as the sheriff himself upon expiration of the term, and would need to be reappointed and requalified after the sheriff was qualified for his second term. Furthermore, such appointments are during the pleasure of the sheriff, and if the sheriff has indicated his pleasure in the matter by fixing the term of the deputy or undersheriff in advance, then after the expiration of such term the employee would no longer be holding office at the pleasure of the sheriff.

On the other hand, if nothing was said as to the term at the time of the appointment, the employee would not be
holding for a definite term and would continue to hold office until the sheriff should indicate his pleasure to be otherwise.

Your second question reads as follows:

"In the event my first question is answered 'No,' will such persons as have continued in the capacity of deputy sheriffs without attending to the necessary technicalities involved in qualifying be able to collect fees from the county for services rendered as deputy sheriffs?"

This question is answered in the affirmative.

The general rule is that in the absence of an express or implied constitutional or statutory provision to the contrary an officer is entitled to hold his office until his successor is appointed or chosen and has qualified. 46 C. J. 968. This being true, an officer holding over would be entitled to the fees of the office, even though he had failed to comply with the technical requirements of reappointment and requalification.

The answer to the second question makes unnecessary an answer to your third question relating to the possibility of recovery by the county of fees paid to such officer holding over.

JEF
Elections — Residence — Recovery Act — Transient Camps — Members of "transient" camp do not acquire residence for voting purposes in voting district where camp is located under rules for determining voter's residence provided by sec. 6.51, Stats.

September 8, 1936.

W. A. McNown,

District Attorney,

Mauston, Wisconsin.

You have inquired as to the voting rights of members of "transient" camps within the voting district where the camp is located.

We believe this question is pretty well covered by an opinion which you will find in XXIII Op. Atty. Gen. 610, wherein this office expressed the view that members of a civilian conservation corps camp do not acquire residence for voting purposes in the town where such camp is located.

We will not take the space here to repeat what was said in that opinion but will merely emphasize the fact that persons in a transient camp would ordinarily be considered as being there for "temporary purposes merely" within the meaning of sec. 6.51, subsec. (4), Stats.

The meaning of the word "transient" as here used according to Webster's New International Dictionary is "Staying for a short time; not regular or permanent; as, a transient guest; transient borders."

To consider a transient to be a permanent resident would involve a contradiction of terms. Presumably such transients are being taken care of temporarily at camps as an emergency measure, and they will be returned to private employment at the first opportunity.

The mere fact that some of these men have brought their families to the camp or near the camp grounds does not in our opinion change their status so as to entitle them to vote, since sec. 6.51, subsec. (7), Stats., provides:

"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"
Under the view of the facts which we take here the place where such a married man's family resides must be considered a place "of temporary establishment for his family" and "for transient objects" within the meaning of the above quoted statute.

In order to avoid possible misconstruction of this opinion we wish to state that what has heretofore been said is not intended to apply to administrative employees regularly employed at such a camp. Their status for voting purposes is quite different from that of the transient who is at the camp for temporary purposes merely and only until such time as he can be absorbed in normal employment.

JEF

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Unemployment Compensation — University — Students regularly attending university of Wisconsin and employed by it are not eligible for unemployment compensation benefits and these student employees are not included in defined pay roll on which contributions are made under ch. 108, Stats.

September 8, 1936.

J. D. Phillips, Business Manager,

University of Wisconsin.

You inquire whether students regularly attending the university of Wisconsin and employed by it are eligible to unemployment compensation benefits, and whether these student employees are included in the defined pay roll on which contributions are made.

Students regularly attending the university of Wisconsin and employed by it are not eligible for unemployment compensation benefits and these student employees are not included in the defined pay roll on which contributions are made.

Subsec. (1), sec. 108.18, Stats., provides in part:
"Each employer shall regularly make contributions to his account in the fund at the 'standard rate' of two per cent on his defined 'pay roll,' * * *.”

Subsec. (j), sec. 108.02, Stats., provides in part:

"'Pay roll' shall include all wages payable by an employer to his employees. * * *”

Subsec. (c), sec. 108.02, defines an employee as "any person employed by an employer and in an employment both subject to this chapter."

The question to determine, therefore, is whether students regularly attending the university and employed by it are employees within the meaning of ch. 108, Stats.

The purpose of the act is recited in the public policy declaration of the unemployment compensation act (sec. 108.01):

"* * * To assure somewhat steadier work and wages to its own employees, a company can reasonably be required to build up a limited reserve for unemployment, and out of this to pay unemployment benefits to its workers, based on their wages and lengths of service."

It is significant that the legislature expressly indicated a direct relation between the building up of a reserve by the employer out of which benefits are to be paid and the actual payment of benefits to his own employees in the event of unemployment. This general theme runs throughout the law. Subsec. (e), sec. 108.02 enumerates certain exempt employments which expressly disqualify an employee engaged in such employment from receiving benefits. In such case, the employer need not contribute on the basis of the pay roll of this excluded employment. This, of course, is in conformity with the purpose of the law in that where the employee is disqualified from receiving benefits in the first instance because of his employment no contributions are made by the employer on the basis of his salary since the employee is not and never can become eligible for benefits.

Par. (f), subsec. (4m), sec. 108.04 provides that an employee shall not be eligible for any benefits based on his past
weeks of employment by the given employer if he is employed (while a student regularly attending an established school, college, or university) by the educational institution which he is thus attending. The fact that this exemption appears under a subsection heading "Benefits barred" is not controlling. Pulis v. Dearing, 7 Wis. 191, 192. A student employed by a school he is attending is not merely barred from benefits, as is the case in pars. (a), (b), (c), (g), sub-sec. (4m) sec. 108.04, but the student so employed was never eligible for benefits. Since the purpose of the act is to compensate employees in event of unemployment and contributions are made on the basis of the pay roll of employees eligible to receive compensation, it follows that no contributions can be exacted where employees in the first instance are ineligible to receive benefits and will never become eligible.

Although the exemption from the payment of contributions is not apparently expressly provided for it is of necessity implied therein. A thing which is within the intention of the law makers and by rules of construction can be read out of it is as much within the statute as if it were within the letter. Pfingsten v. Pfingsten, 164 Wis. 308. An established school, for example, employing regularly attending students only would, under any other conclusion, be compelled to contribute on the basis of the student pay roll, although the students were not eligible for benefits and would never receive any from the school. Statutes are not to be so construed as to result in absurdity. Price v. State, 168 Wis. 608. It is manifestly illogical and absurd to require an employer to build up a reserve for employees who are ineligible for benefits and who will never become eligible as regards the particular employer. Assuming the school had a number of eligible employees, grave doubts exist as to the constitutionality of an arrangement whereby an assessment is made on the entire pay roll of an employer employing both eligible and ineligible employees for the sole benefit of eligible employees. Collecting the intent of the legislature from the general view of the whole act (see State ex rel. City C. Co. v. Kotecki, 156 Wis. 278, 282), it is apparent that assessments must be made on the basis of the pay roll of those
employees who are eligible for benefits in the event of unemployment.

You are advised, therefore, that students regularly attending the university of Wisconsin and employed by it are not eligible for unemployment compensation benefits and these student employees are not included in the defined pay roll on which contributions are made.

JEF

Corporations — Municipal Corporations — Public Utilities — Municipality owning public utility property may extend facilities thereof beyond city limits without submitting question of such extension to referendum vote.

Except for requirement of referendum upon question of construction or acquisition by municipality of public utility property and inclusion of proposed method of financing such construction or acquisition in such referendum, mortgage bonds authorized by subsec. (9), sec. 66.06, Stats., may be issued without referendum vote.

September 8, 1936.

PUBLIC SERVICE COMMISSION.

You request an opinion upon the following two questions:

1. Must there be a referendum in order that a municipally-owned utility may extend its lines beyond the municipal limits?

2. Must there be a referendum in order that mortgage bonds may be issued against the property of the utility, as distinguished from the general obligation bonds of the municipality?

The answers to both questions are in the negative, with certain exceptions as to the second question which will be more fully explained later in this opinion.

The power and authority of any municipality of this state to own and operate public utility property is created by the statutes. (Sec. 197.01 and sec. 66.06, Stats.) The opera-
tion of such utilities is “under the general control and supervision of the board or council” (sec. 66.06 (10) (a) ) of the municipality which owns such utility property. The practice by municipal utilities of serving customers outside the municipal boundary limits is general throughout this state, as well as in other states of the Union. As far as we are able to ascertain the right and authority of municipalities to do this thing has never been denied by any court.

In the ownership and operation of public utility property a municipality is exercising proprietary powers as distinguished from the strictly governmental powers delegated to it by the state. Generally speaking, all the powers which any municipality is authorized to exercise are vested in the governing body of the municipality. In accordance with the representative principle which pervades the entire structure of government in this country, we think it is generally established as a fundamental principle that the governing body of any municipality may exercise the power vested in such municipality without submitting any action to a referendum, unless such referendum is expressly required by statute. Inasmuch as the statutes of this state make no provision for submitting to the voters of any municipality the question of whether such municipality shall extend its utility facilities to customers and consumers outside the city limits, we conclude that by proper action of the governing body of any such municipality its utility facilities may be so extended without submitting the question of such extension to a referendum vote.

The provisions for the issuance of mortgage bonds against the public utility property of municipalities is governed by par. (b), subsec. (9), sec. 66.06, Stats. These provisions are set forth in several separate paragraphs, from an examination of which we conclude that it was the intention of the legislature to vest full and complete power and authority in the governing body of the municipality to issue and cause the execution of such mortgage bonds whenever it was deemed necessary by such governing body to do so, in connection with “purchasing, acquiring, leasing, constructing, extending, adding to, improving, conducting, controlling, operating or managing a public utility” (sec. 66.06 (9) (a) ). The only provision of the statutes which re-
quires a referendum with respect to the mortgage bonds authorized under sec. 66.06 relates to a situation where the municipality acquires public utility property and desires or proposes to provide for payment thereof by the issuance of such mortgage bonds. The question of whether the municipality shall acquire or construct such utility property must be submitted to a referendum vote as required by par. (b), subsec. (8) of said sec. 66.06. The essential question upon which such referendum is required is the question of the acquisition or construction of the property. But the section of the statutes just cited also provides that the question of acquisition, or construction, as submitted at such referendum, shall also include "a general statement of the plant equipment or part thereof it is proposed to acquire or construct, and of the manner of payment" (sec. 66.06 (8) (c) ). Also, the resolution of the common council submitting the question to a referendum must likewise specify the method of payment.

In so far as the acquisition or construction of public utility property by a municipality requires the consent or approval of the electorate at a referendum, there must be a compliance with such requirements as are set forth in subsec. (8), sec. 66.06, and in compliance with such requirements, if it is proposed to finance the acquisition or construction by means of mortgage bonds, such proposed method of payment of the acquisition or construction must be included in the question submitted to the referendum.

But outside of that requirement, or once it has been complied with, there is no provision of the statutes requiring any other or further referendum with respect to the issuance and execution of such mortgage bonds. No such requirement having been made by the legislature, it cannot be implied, and it is therefore our opinion that, except for the requirement above noted, there is no necessity for a referendum with respect to the issuance or execution of mortgage bonds by a municipality of this state for the "purchasing, acquiring, leasing, constructing, extending, adding to, improving, conducting, controlling, operating or managing" of public utility property owned by such municipality.

JEF
Minors — Child Protection — Adoption — Sec. 322.04, subsec. (4), Stats., does not apply to child born in lawful wedlock even though husband of mother is not father of such child.

Board of Control.

You inquire whether sec. 322.04, subsec. (4), Stats., is applicable in the following situation:

A and B were married in 1931. In 1935 the wife, A, left her husband. She signed a complaint in a divorce action, but apparently the papers were never served or filed.

On June 8, 1936, A gave birth to a child. Paternity was admitted by a man not her husband in a filiation proceeding, and a settlement agreement was prepared by the district attorney and approved by the court on June 24, 1936.

The board of control is now asked to give consent to the adoption of this child pursuant to sec. 322.04, subsec. (4), Stats.

It is our opinion that sec. 322.04 is not applicable. This section reads:

“In the case of a child not born in lawful wedlock, the consent of the father shall not be necessary but in such case adoption shall not be permitted without the consent of the licensed child welfare agency, if any, to which the care and custody of such child has been committed or transferred by a court of competent jurisdiction, or if there be no such child welfare agency, then by the state board of control.”

The statute does not apply for the reason that the child was born in lawful wedlock.

In 3 R. C. L. 722, it is stated that children born within lawful wedlock are bastards if the fruit not of the marriage but of adulterous intercourse. However, sec. 322.04 (4) does not include such cases, and applies only where the child is not born in lawful wedlock.

JEF
Public Officers — State Employees — Vacations — When state has adopted policy of duplicating union scales of pay for skilled craftsmen paid on hourly basis, such policy does not include three weeks of vacation with pay under sec. 14.59, Stats., in absence of similar provisions in prevailing contracts.

September 14, 1936.

Bureau of Personnel.

You inquire whether employees of the university engaged in the skilled trades and employed on an hourly basis are entitled to a noncumulative leave of absence without loss of pay at the rate of three weeks for a full year's service, as provided by sec. 14.59, Stats.

Your inquiry is answered in the negative. Throughout the state service we understand that skilled craftsmen are hired at the prevailing scale of wages on an hourly basis so as to comply, as far as possible, with union rates. In that way union labor is not discriminated against. So far as we know the union contracts do not call for three weeks' vacation with pay, and the state would, in effect, be granting more than the prevailing wage scale if it were to allow three weeks' vacation with pay, in addition to the pay provided by the union scale. This would result in unfair discrimination entirely out of harmony with the prevailing policy of equalizing in public employment the union scales which apply to private employment.

While sec. 14.59 permits department heads, in their discretion, to grant employees noncumulative leaves of absence without loss of pay at the rate of three weeks for a full year's service, it would seem improper for a department head to disrupt the policy above discussed by permitting skilled tradesmen in state employment to enjoy an unfair advantage over union labor by receiving pay for a three weeks' period each year without work.

Aside from the policy in question, it might be added that to offset the vacation leave usually granted to employees hired on a monthly basis, the skilled employees working on an hourly basis receive time and one-half for overtime work and double time for working on Sundays and holidays,
where this is provided in the union scales, whereas other state employees are frequently required to work over time and on Sundays and holidays without any compensation for such extra work.

JEF

Public Officers — School Districts — School District Clerk — Clerk of school district holds over under sec. 40.07, subsec. (1), Stats., when annual school district meeting, because of tie vote, fails to elect successor under sec. 40.04, subsec. (3).

September 14, 1936.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

Our attention is called to a situation arising out of an annual school district meeting wherein there was a tie vote on the election of school district clerk.

Y, who was the clerk at the time of the election, received 14 votes, and X, another candidate, received 14 votes. Y was chairman of the meeting and, after the vote, proceeded to leave the meeting, taking all the records with him. The voters took no further action, although the treasurer of the school board challenged three voters who had voted for Y, and Y, the school clerk, acting as chairman, failed to follow the provisions of sec. 40.03, subsec. (6), Stats.

Shortly after the annual meeting the treasurer and the other director of the board together appointed a clerk, who qualified for the position, but Y refuses to turn over to the appointed clerk the records belonging to the school district. The newly appointed clerk has filed an annual report with the county superintendent of schools and is proceeding to serve as school district clerk.

You inquire which of these persons is the legal school district clerk of the district.
It is our opinion that Y is still the school district clerk. Sec. 40.04, subsec. (3), Stats., provides that the annual common school district meeting shall have power to choose a director, treasurer and clerk by ballot, and a majority of the votes shall be necessary for a choice.

No one received a majority of the votes. Sec. 40.07, subsec. (1), provides in part:

"The officers of the common school district shall be a director, treasurer and clerk, who shall be electors of the district, and shall hold their respective offices for three years and until their successors shall have been elected or appointed and qualified. * * *"

No vacancy arose, because of the failure of the meeting to elect a successor to Y. Hence there was no occasion for the director and treasurer to appoint a clerk to succeed Y under sec. 17.26, which provides that this may be done in case of a vacancy.

Since there was no lawful election or appointment of a successor to Y, he holds over by force of the statute, sec. 40.07 (1), and is still the lawful clerk of the district. See State ex. rel. Schroeder v. Feuerstein, 159 Wis. 356.

JEF

Taxation — Inheritance taxes imposed by ch. 72, Stats., must be paid within one year of decedent's death, including date thereof, to obtain five per cent discount.

September 14, 1936.

ROBERT K. HENRY,

State Treasurer.

You request an opinion upon the following question: Is the date of the death of the decedent excluded in computing interest on inheritance taxes or is such decedent's death con-
sidered an event, so that interest on such inheritance taxes is figured from the date of the death of the deceased?

In computing interest on inheritance taxes the date of the decedent's death is considered an event, from which the computation of time under sec. 72.06, Stats., is to be made.

Sec. 72.06 provides in part:

"If such tax is paid within one year from the accruing thereof, a discount of five per centum shall be allowed and deducted therefrom. * * *"

It is apparent that whatever construction may be given this portion of sec. 72.06 the time when the tax accrues is important.

Sec. 72.05 (1) provides in part:

"All taxes imposed by this section shall be due and payable at the time of decedent's death, * * *"

Clearly any inheritance tax due and owing was owing at the time of decedent's death.

Under familiar rules of construction if it is determined that decedent's death is an event from which the computation of time under sec. 72.06 is to be made, the date of such an event is included, and that where time limitations are from a given date the date of the day should be excluded. North Shore Material Company v. Frank Blodgett, Inc., 213 Wis. 70, 250 N. W. 841; DeForest Lumber Co. v. Potter, 213 Wis. 288, 251 N. W. 442.

The foregoing rule is stated by the Wisconsin supreme court in Siebert v. Jacob Dudenhofer, 178 Wis. 191, 194, 188 N. W. 610:

"* * * The rule is well settled on an issue of limitation where the time is to be computed from a certain date, that in the computation the day of the date is to be excluded, and where the computation is from a certain event the date of that event must be included. * * *"

The rule was applied in Milwaukee County v. Pabst, 64 Wis. 244, 25 N. W. 11; Bennett v. Keehn, 67 Wis. 154, 29 N. W. 207; Whittlesey v. Hoppenyan, 72 Wis. 140, 39 N. W.
Opinions of the Attorney General

355; Williams v. Lane, 87 Wis. 152, 58 N. W. 77; Ellison v. Straw, 119 Wis. 502, 504, 505, 97 N. W. 168.

Since the supreme court of this state has never construed sec. 72.06 with reference to the question here raised (construed and considered as being workable, State v. Pabst and others, 139 Wis. 561) we must invoke rules in aid of construction of statutes.

"It is a familiar rule that, if a statute adopted from another state has received an interpretation there, it is to have the same interpretation here. * * *" Pomeroy v. Pomeroy, 93 Wis. 262, 266, 67 N. W. 430.

See also Estate of Schranck, 202 Wis. 107, 110.

Sec. 72.06 is substantially the same now as when created by sec. 4, ch. 355, Laws 1899. It appears that that portion of sec. 72.06 hereinbefore set out was copied verbatim from sec. 225, ch. 908, Laws of New York of 1896. Sec. 4, ch. 355, Laws 1899, provides in part:

"If such tax is paid within six months from the accruing thereof, a discount of five per centum shall be allowed and deducted therefrom. * * *"

Sec. 223, ch. 908, Laws of New York of 1896 provides in part:

"If such tax is paid within six months from the accruing thereof, a discount of five per centum shall be allowed and deducted therefrom. * * *"

Sec. 4, ch. 483, Laws of New York of 1885, which was substantially the same as sec. 223, ch. 908, Laws of New York of 1896 was before the surrogate's court of New York county for a construction in the case of In re Prout's Estate, 3 N. Y. S. 834. The language in that case and in succeeding New York decisions construing that portion of the inheritance tax act laid down the rule that inheritance taxes must be paid within one year from the time of decedent's death. In other words, decedent's death is considered an event, from which the computation of time under that portion of the New York inheritance tax act is to be made. People ex
rel. Lown v. Cook, 142 N. Y. S. 692 and 158 App. Div. 74, order affirmed, 103 N. E. 1130, 209 N. Y. 578; In re Fayerweather, 143 N. Y. 114, 38 N. E. 278; Jacob v. Gilchrist, 206 N. Y. S. 812, 211 App. Div. 62. It is therefore apparent, following the rule of construction announced in Estate of Schranck, supra, that sec. 72.06 should be and is construed as requiring that inheritance taxes imposed must be paid within one year of decedent's death, including the date thereof, to obtain the five per cent discount.

JEF

Elections — Nominations — Progressive Party — Nominees of Progressive party need not comply with subsec. (1), sec. 5.17, Stats., to entitle them to places on ballot as candidates of that party.

Where new party has participated in one general election it is advisable to use vote cast for its nominee for governor as basis in determining required number of votes.

September 17, 1936.

THEODORE DAMMANN,
Secretary of State.

Sec. 5.17, subsec. (1), Stats., provides that candidates for any one office on a party ballot must secure five per cent or more of the average vote cast for the nominee of such party for governor at the last two general elections. As the Progressive party has only participated in one general election it is asked whether the vote cast for its nominee for governor at the last general election may be used as the basis for determining whether its nominees have received the required number of votes making them eligible for a place on the Progressive ticket.

In considering the applicability of this section to new political groups our supreme court in State ex rel. Ekern v. Dammann, 215 Wis. 394, 402, said:
Plaintiffs contend that the section [sec. 5.17 (1)] applies only to political organizations that have been in existence long enough to have had candidates at two previous elections for governor. The section contains internal evidence that the legislative intent was not that claimed by the defendant. 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 sec. 5.17. In other words, such a party can never pass the test prescribed by sec. 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 sec. 5.17 has no application to new political groups.

In this case the court clearly held that no political party could qualify under subsec. (1), sec. 5.17, Stats., until it has had a place on the official ballot for two successive elections for governor and until that has taken place this section will not apply to such new political party. As the Progressive party has had a place on the ballot for only one election for governor, its nominees would not have to comply with the provisions of subsec. (1), sec. 5.17 before they are entitled to a place on the Progressive ticket.

However the court might well hold that where a party has had a nominee for governor at one general election the vote cast for such nominee shall be used as a basis in determining the eligibility of its candidates to a place on the party ticket. It would therefore be advisable to use the vote cast for the Progressive gubernatorial candidate at the last general election as a basis in determining whether a particular candidate has received the required number of votes to qualify under sec. 5.17 (1). This should be done to protect any candidate in case of court proceedings.

JEF
Municipal Corporations — Beer Licenses — Whether sale of beer on land of CCC camp owned by federal government is subject to local control depends upon whether or not state has relinquished jurisdiction over land in question.

September 17, 1936.

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

You have inquired whether beer may be sold in a CCC camp without a town license. The lands on which the camps are located are owned by the federal government.

The answer to your question depends upon whether or not the state has relinquished jurisdiction over the lands in question.

In XXII Op. Atty. Gen. 758, we ruled that an ordinance of a town board regulating sale of malt beverages was not applicable to Camp Williams. A similar ruling on the question of jurisdiction is found in XVI Op. Atty. Gen. 671, in the case of Camp McCoy.

These rulings were based on the fact that under the United States constitution and the Wisconsin statutes (secs. 1.01, 1.02 and 1.03), this state had consented to the acquisition by the United States government of these properties and had relinquished all jurisdiction with respect thereto, except for the purpose of serving process.

In XXIII Op. Atty. Gen. 254, we ruled that the sale of beer in a CCC camp located on property leased by the federal government was subject to the control of local authorities.

It may, therefore, be helpful in the present instance, to discuss the general principles of law involved in this situation, in order that you can decide for yourself what result should be reached under the facts in your case, since these facts are not set forth sufficiently for a ruling from this office.

One of the rights of sovereignty reserved under our form of government to each of the states is the power to define by legislation what acts shall be crimes and to try all persons within its territory for such crimes in its own courts.
The federal government may not encroach on this exclusive jurisdiction. It may, of course, make criminal laws for the protection and in aid of the functions delegated to it by the constitution, and these laws will apply to all persons in the United States. The violators thereof are tried in the federal courts. However, such federal criminal jurisdiction does not impair the criminal jurisdiction of the state. The two jurisdictions, federal and state, are concomitant and in a case such as an assault on a mail carrier, both the federal and the state authorities have the power to try and to punish the guilty person, the state for an assault and the federal government for an interference with the mails.

However, there is an exception to the general principle that a state has jurisdiction over all violators of its laws within its borders. The state may divest itself of its criminal jurisdiction in favor of the federal government under certain circumstances. The fundamental law allowing a state to strip itself of such jurisdiction is contained in art. I, sec. 8 of the United States constitution, which provides that congress shall have power to exercise exclusive legislation in all cases whatsoever "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings."

In order for the federal jurisdiction to attach to property acquired for the specified purposes, there must be an acquisition or purchase of the land by the federal authorities. If the land itself is state property and is ceded to the national government by the state legislature, such conveyance in itself carries exclusive jurisdiction to the federal government. But if the land is otherwise acquired or bought, then the state legislature must pass an act expressly consenting to the purchase or expressly ceding jurisdiction to the federal government after the acquisition. The element of voluntary cession of jurisdiction is absolutely necessary, as was pointed out by the court in *People v. Godfrey*, 17 Johns. 225 (N. Y. 1819), and *United States v. Cornell*, 2 Mason (U. S. Cir. Ct.) 60, and *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 538.

JEF
Municipal Corporations — Public Officers — Fire and Police Commissioners — Fireman — Pensioned fireman is not eligible to membership on board of police and fire commissioners provided for by sec. 62.13, Stats.

September 17, 1936.

G. Arthur Johnson,
District Attorney,
Ashland, Wisconsin.

You inquire whether a pensioned fireman is eligible to become a member of the police and fire commission of a city. This question is answered in the negative.

As pointed out in your letter, the board of police and fire commissioners may, on the recommendation of the chief, assign any retired pensioner to light duty in the department. Sec. 62.13, subsec. (9), par. 4, Stats.

This results in incompatibility in that there might be a duty on the part of the individual in question as a member of such board to act under the above statute in assigning himself to light duty, whereas, his private interests in the matter might be entirely opposed to such procedure.

Thus his personal interests and his interests as a subordinate officer would be in opposition to his interests as a superior officer and member of the board of police and fire commissioners.

As is pointed out in 46 C. J. 942, one of the tests of incompatibility is whether there is a conflict of interests such as arises where one office or employment is subordinate to the other, and subject in some degree to the supervisory power of its incumbent.

JEF
Education — Vocational Education — Residence — Minor

who is placed in school district not primarily for purpose of
attending school in that district has residence for school
purposes in such district; this rule applies to vocational
schools.

September 18, 1936.

GEO. P. HAMBRECHT, Director,

Board of Vocational Education.

In your communication of September 9 you state that the
local board of vocational education of Beloit, at its recent
meeting, desires to have a definition of the word "resident"
and the word "nonresident" as used in secs. 41.18 and 41.19,
Stats. Specifically the Beloit vocational board would like to
know what constitutes "residence in Beloit" for the purpose
of vocational school attendance.

Our supreme court has held that, where a child of school
age is sent or goes into a certain school district with the
primary purpose of securing a home as distinguished from
the primary purpose of locating in such district to partici-
pate in the advantages which the public schools therein af-
ford, he is a resident of the district for school purposes and
entitled to admission to the public school therein. This is
true even though the parents of the child have a legal resi-
dence in another district. State ex rel. School District No. 1
v. Thayer, 74 Wis. 48; State ex rel. Smith v. Board of Edu-
cation, 96 Wis. 95, 100.

See also, XXII Op. Atty. Gen. 149, where you will find a
full discussion of the question.

JEF
Marriage — Public Officers — District Attorney — Marriage illegally contracted by paroled inmate of southern Wisconsin colony and training school should be annulled by proceedings in court; board of control may ask district attorney in county where such person has legal settlement to bring proceedings to annul such marriage.

September 21, 1936.

Board of Control.

You state that a patient at the southern Wisconsin colony and training school, on parole, who has been legally found to be a mentally deficient person, contracted marriage by going into the state of Michigan, thereby evading the Wisconsin statutes relative to the marriage of a feeble-minded person.

You inquire:

"Assuming that an annulment of this marriage should be had, is it the duty or obligation of this board, or of the officials of the southern Wisconsin colony and training school to initiate proceedings for such an annulment, or is it the duty solely of this board to recite the facts in this matter to the district attorney of the county in which this patient has a legal settlement?"

I am informed that the person in question has been taken back into the institution and is no longer on parole. It is of course very proper and necessary that this illegal marriage be annulled at the time when evidence can be secured and presented to the court upon which to base the annulment. If the marriage is not annulled serious result might follow in determining property left by either party in case of death. I find no provision in the law anywhere which requires you to initiate proceedings for such annulment, but the board has access to the facts in the case and I believe it is proper for the members to bring the facts in the matter to the district attorney of the county in which this patient has a legal settlement.

It is also proper for the board to ask the district attorney to bring the proceedings to annul the marriage. It is apparent that the state and also the county where such person
has a legal settlement is interested in having this illegal marriage set aside. In sec. 59.47, Stats., where the duties of the district attorney are prescribed, it is provided:

"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."

This is broad enough in my opinion to require the district attorney to appear and take part in a motion or proceeding to annul the marriage of the person here in question. If, after the matter has been brought to his attention, the district attorney should refuse to take part in such proceeding when he really should do so, the only remedy which you have is to bring the matter to the attention of the governor, who has the power to remove a district attorney for neglect of duty.

JEF

Elections — Nominations — Presidential Electors — Political group that has not heretofore participated in election in state may have its presidential electors nominated by petition pursuant to sec. 5.26, Stats., or such electors may be nominated at convention of political party pursuant to sec. 5.20, Stats.

John R. Brown,
District Attorney,
Racine, Wisconsin.

You have asked for an opinion upon the following question: Can presidential electors be nominated by petition un-
It is our opinion that they may be nominated under certain circumstances under either one of the above sections of the statutes.

Sec. 5.20, subsec. (1), Stats., provides for the holding of a convention for each political party participating in the September primary, said convention being held at the state capitol on the second Tuesday after such primary. At this convention the party shall formulate its state platform and elect a state central committee. The statute then provides:

"* * * In the years in which presidential elections are held the convention shall nominate, by a majority vote, one elector for president and vice president from each congressional district, and two such electors from the state at large. The names of such nominees shall be immediately certified by the chairman and secretary of the meeting to the secretary of state."

Subsecs. (1) and (2) of sec. 5.26, Stats., read as follows:

"(1) Independent or nonpartisan nominations may be made for any office to be voted for at any general, judicial, or special election.

"(2) Except as otherwise provided in subsection (8) such nominations shall be made by nomination papers, containing the name of the candidate, the office for which he is nominated, his business or vocation, residence, post-office address, and except as otherwise provided by law the party or principle he represents, if any, expressed in not more than five words."

It will be noted that sec. 5.20, quoted above, does not provide that the method of nominating presidential electors under its provisions shall be exclusive. In the absence of such a restriction any available method for nominating presidential electors might be used by a political group that does not come within the provisions of sec. 5.20 of the statutes. State ex rel. Ekern v. Dammann, 215 Wis. 394, 400.

In view of the discussion given above, it is held that presidential electors of a political group that has not heretofore participated in an election may be nominated by petition under sec. 5.26, Stats.
It might also be pointed out that any such group may secure the endorsement of a party which has had a place on the Wisconsin ballot and have said party nominate its presidential electors pursuant to the provisions of sec. 5.20.

JEF

_Bonds — Municipal Corporations — Public Utilities —_ Bonds purchased by municipal utility pursuant to sec. 66.06, subsec. (11), par. (c), Stats., should be deposited with city treasurer for safe keeping.

September 21, 1936.

**Public Service Commission.**

Our opinion is requested upon the following question:

“If a municipal utility purchases bonds, must it turn these over to the custody of the city treasurer or may the local utility commission retain the bonds in its own possession?”

It is our opinion that such bonds should be turned over to the city treasurer for safe keeping.

Sec. 66.06, subsec. (10), Stats., provides for the management of municipal utilities. In par. (d) thereof it is provided that the commission may make provision that utility receipts be paid to a bonded cashier or cashiers appointed by the commission, to be turned over to the city treasurer at least once a month. In the absence of provision for a bonded cashier it would seem, from reading the balance of this paragraph (d), that such receipts would be paid directly to the city treasurer.

Furthermore, sec. 66.06, subsec. (11), par. (a), provides:

“The council or board of any town, village or city operating a public utility may, by ordinance, fix the initial rates and provide for this collection monthly, quarterly or semi-
annually in advance or otherwise. The rates shall be uniform for like service in all parts of the municipality. *The charges shall be collected by the treasurer.*

Paragraph (c), subsec. (11), provides:

"The income of a public utility owned by a municipality, shall first be used to meet operation, maintenance, depreciation, interest, and sinking fund requirements, additions and improvements, and other necessary disbursements or indebtedness. Income in excess of these requirements may be used to purchase and hold interest bearing bonds, issued for the acquisition of the utility, or bonds issued by the United States or any municipal corporation of this state, or insurance upon the life of an officer or manager of such utility, or may be paid into the general fund."

This latter paragraph is the one which authorizes the purchase of bonds, although it is silent as to who shall hold such bonds.

However, in view of the fact that the income of the utility comes either directly to the hands of the treasurer or at least indirectly once a month through a bonded cashier, it is plain that the legislature intended the city treasurer's office to be the repository of funds of a public utility.

We see no good reason for holding that while the income from the utility should be handled by the treasurer, the bonds purchased from such income should not. Presumably, the money with which the bonds are purchased comes from the city treasurer after he has collected the utility receipts, and it would seem that the bonds so purchased from such funds should be delivered to and be held by him for safe keeping pending disposition thereof by the commission or council.

It might be added further that the city treasurer is under bond, whereas the public would not have this protection if the securities were held by the commission itself.

JEF
Indigent, Insane, etc. — Insanity — Public Officers —
District Attorney — Upon notice of county court to district
attorney that hearing is to be held to determine sanity of
person under sec. 51.11, Stats., in which inquiry county is
interested, it is duty of district attorney to appear.

September 21, 1936.

EARL E. SCHUMACHER,
District Attorney,
Beaver Dam, Wisconsin.

You state that you have received a notice from the county
court that a hearing will be held pursuant to sec. 51.11,
Stats., relative to whether one, S, is sane or insane. You
refer to an official opinion of this department in Op. Atty.
Gen. for 1910, 664, where it was held that the district attor-
ney is not required to appear at an examination of an insane
person. You would like to know whether it is your duty to
attend such hearing and to act as a sort of prosecutor on the
theory that the person involved is insane, leaving defense
and allegations of sanity to such person or petitioner.

You refer to sec. 59.47, subsec. (1), which provides:

"The district attorney shall:

"(1) Prosecute or defend all actions, applications or mo-
tions, 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."

At the time the opinion was rendered in Op. Atty. Gen.
for 1910, 664, to which you referred, the statute required
his appearance only in the circuit court. This has been
amended since to read as above quoted. You will note it
covers hearings "in the courts of his county," which lan-
guage is broad enough to include any actions, applications,
or motions, either civil or criminal in the county court.

In view of the fact that the court has notified you of this
hearing and in view of the fact that the county and state are
interested in the determination of the question involved,
especially where the person whose sanity in question is in-
Public Officers — Taxation — Board of Review — Membership on board of review is governed by sec. 70.46, subsec. (1), Stats., and city officers who draw salaries in other official capacities are not entitled to special compensation as members of board of review.

September 21, 1936.

TAX COMMISSION.

You have referred to this office a request for an interpretation of sec. 70.46, Stats., relating to the board of review.

Inquiry is made as to whether the city mayor, city clerk and city assessor are entitled to compensation for their services as members of the board of review.

This question is answered in the negative.

In IV Op. Atty. Gen. 877, it was held that members of the board of review in cities, who draw salaries in other official capacities, are not entitled to special compensation as members of the board of review. That opinion was based on sec. 925-31c, Stats. 1915. This section has since been amended, and is now sec. 62.09, subsec. (6), par. (d), although the amendments in no way affect the question involved here.

Sec. 62.09, subsec. (6), par. (d), Stats. reads:

"No officer receiving a salary shall receive for services of any kind rendered the city any other compensation, but he may receive moneys from a pension fund, or for services rendered the school board of the city in any night school, social center, summer school or other extension activity. The council may assign various duties or offices to one individual and may fix compensation covering these consolidated functions, but no member of the council shall be eligible for such a position."
See also *Anderson v. Milwaukee*, 113 Wis. 1.

Consequently, sec. 70.46, subsec. (5), governing compensation of members of the board of review must be read with the exceptions above noted.

Inquiry is also made as to who may sit on the board of review.

This is governed by sec. 70.46, subsec. (1), Stats., which reads:

"The supervisors and clerk of each town, the mayor, clerk, and such other officer or officers, other than assessors, as the common council of each city shall, by ordinance determine, the president, clerk, and such other officer or officers, other than the assessor, as the board of trustees of each village shall, by ordinance determine, shall constitute a board of review for such town, city or village. In cities of the first class the board of review shall consist of five residents of said city, none of whom shall occupy any public office or be publicly employed. Said members shall be appointed by the mayor of said city with the approval of the common council and shall hold office as members of said board for five years and until their successors are appointed and qualified, the first appointments to be for one, two, three, four and five years respectively. In cities the common council shall fix, by ordinance, the salaries of the members of the board of review."

This statute is plain and unambiguous and, in the absence of any statement of facts setting up some special situation, we are unable to further amplify the statute.

JEF
Municipal Corporations — Public Officers — School Districts — Board of Education — Board of Public Works — City Council — Board of education may request council to order informative referendum election on selection of school site.

Common council, with or without request from board of education, may order informative referendum election on school site and building plans.

In city operating under city school plan site for school must be selected by board of education but purchase must have approval of council.

In city operating under city school plan plans for school building must be adopted by board of education, but construction work should be supervised by board of public works.

Common council may refuse to appropriate money for school building in city operating under city school plan, after request for such money has been made by board of education.

If common council refuses to appropriate money for school site and school building as requested by board of education, such refused appropriations may be forced to mandatory referendum election upon petition.

City operating under city school plan may purchase land outside city limits but adjacent thereto, for school site.

September 23, 1936.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

You have requested our opinion upon a number of questions propounded by the board of education of the city of Appleton, which city is operating under the city school plan as provided for in the Wisconsin statutes. The questions will be stated and answered seriatim.

"1. The board of education at a legally constituted meeting passed a resolution * * * requesting the mayor and common council to order an informative referendum election on the selection of a site for a senior high school. "Was such action legal?"
The board of education could pass such a resolution without violating any law.

"2. The mayor and common council on receipt of above request, approved same and ordered a referendum election * * *.

"Was such action legal?"

It is our opinion that the mayor and common council had the right to order an informative referendum on this question. No opinion is expressed, however, as to the effect of the referendum beyond that of apprising the mayor and common council as to the attitude of the voters.

"3. The mayor and common council passed an additional resolution at their own initiative to the effect that a second referendum election would be ordered at which second referendum the two sites receiving the highest number of votes in the first referendum would be placed again before the people for a final vote.

"Is such action legal inasmuch as this action was not initiated by board of education?"

The fact that the action was not initiated by the board of education does not make it illegal. Again, however, no opinion is expressed as to the effect of the referendum beyond that of giving information to the mayor and council as to the attitude of the voters.

"4. Upon receipt of official returns from the first referendum the board of education proposes to act as follows:

"A. The board of education will pass a resolution requesting the mayor and common council to appropriate money to buy such a site or sites as the board of education designates.

"B. The board of education will pass also a resolution requesting the mayor and common council to appropriate money to cover the cost of a senior high school building. Building to be planned by, contracts let by, and construction supervised by the board of education acting in lieu of the board of public works.

"Is such proposed action legal and within the rights, duties and obligations of the board of education?"

The proposed action of the board of education in passing a resolution requesting the mayor and common council to
appropriate money to buy such a site or sites as the board of education designates is within the rights, duties and obligations of the board. Under sec. 40.53, subsec. (6), Stats., it is provided that it is one of the duties of the city school board,

"To select and acquire sites and adopt plans for school buildings, * * *.*"

Sec. 40.53, subsec. (11), however, provides that it is one of the duties of the city school board

"To estimate the expenses of the city schools and prepare a budget, which shall be submitted to the common council for its approval. Approval of the council shall also be necessary before the board may purchase any site for a school building or other school uses, or construct school buildings or additions thereto."

It will thus be seen that in the matter of selecting and purchasing a site for a school building, in a city operating under the city school plan, authority is divided. That is, while it is the duty of the board of education to select the site, the purchase of such site must have the approval of the council. As pointed out in the case of State ex rel. Board of Education v. Racine, 205 Wis. 389, the members of the board of education in a city operating under the city school plan are city officers, and the board of education is an arm of the city government. While the board of education has immediate supervision of the schools, the city council holds the purse strings so far as appropriations and budget are concerned. Sec. 40.53, subsec. (6), in addition to providing that it is the duty of the board of education to select the site, also provides that it is the duty of the board of education to adopt plans for the school building.

Sec. 40.53, subsec. (11) provides, however, that approval of the council shall be necessary before the board may construct school buildings.

Sec. 62.14, subsec. (6), par. (a), provides as to the board of public works:

"It shall be the duty of the board, under the direction of the council, to superintend all public works * * *.*"

Sec. 62.15 provides for the method of letting contracts for public work, etc.
It is our opinion, therefore, that although the plans for the school building must be adopted by, and be satisfactory to the board of education, the actual construction of the school building, that is, the letting of the contract and supervision, should be handled by the board of public works. We believe the statutes contemplate that the board of public works and the board of education should work together in planning and constructing school buildings.

“5. A. In event that proposed resolutions of the board of education are passed, can the mayor and common council refuse to appropriate money for such projects as a site and building for senior high school?

Answer. Yes.

“5. B. Can the mayor and common council order referendum elections on school sites and building plans other than those proposed by the board of education?”

We presume that you refer to informative referendum elections: If so, the answer is yes; but the result of such informative referendum election does not remove the necessity for approval of the site and plans by the board of education.

“6. If the mayor and common council refuse to appropriate money for requested site and new building, can such request of the board of education for such refused appropriations be forced to a mandatory referendum election upon a petition presented by sufficient number of citizens?

Answer. Yes.

“7. When conditions are such that the board of education can present strong proof that the present high school building is inadequate, physically overcrowded, hazardous, etc., what recourse has the board of education in procuring funds to correct such inadequate facilities?”

In the event that the council is unwilling to recognize what the board of education believes to be the necessity for funds, recourse could be had to a referendum election upon petition as suggested in your question No. 6.
“B. In case of serious injuries resulting from fire, stampedes, epidemics, or other personal damages to students or teachers, what action, if any, can be taken against the city, the mayor and common council, or the board of education for maintaining conditions for which strong evidence can be brought to prove inadequacy of present school building?”

This office cannot undertake to pass upon liability under a question of such a general nature. It would be necessary to pass upon a specific case in which we had at hand all of the pertinent facts.

“8. Can the city of Appleton purchase, for public school purposes, land outside the city limits, but which land is immediately adjacent to the city limits and within the same county?”

We have been unable to find any statute which would prevent the city of Appleton from purchasing land outside of the city limits for public school purposes, and in the absence of a prohibiting statute, we believe that the city has such power.

JEF

Elections — Nominations — Precinct Committeemen — Officers of party county committee need not be duly elected precinct party committeemen.

September 25, 1936.

J. C. Davis,
District Attorney,
Hayward, Wisconsin.

You ask whether the party county precinct committee may select as officers persons who are not duly elected and qualified precinct committeemen.

Sec. 5.19, subsec. (8), Stats., providing for the election of party county precinct committee officers, reads as follows:
"The county committee shall at such meeting elect a chairman, secretary and treasurer of the county committee, and such other officers or subcommittees as they may deem necessary, and two persons from each assembly district in the county to be members of the congressional district committee, but where an assembly district comprises two or more counties, then there shall be one member from each county. In counties constituting one or more assembly or senatorial districts the members of the county committee residing within the territory of such assembly or senatorial districts shall constitute the party committee for such assembly or senatorial district and they may, at such meeting of the county committee, elect a chairman, secretary and treasurer and such other officers as they may deem necessary."

This section does not specify that the officers of the committee must be selected from the committee itself. In fact no statutory qualification for such officers is set out. The argument that local representation would apply to restrict such officers to duly elected committeemen is not applicable, as such officers act for and represent a body rather than a district, as is true in the case of each party precinct committeeman. This department in IV Op. Atty. Gen. 1140, held that a county party committee, in the absence of a statute, has power to adopt its own rules and regulations when conducting its affairs. In view of this opinion and in the absence of a statutory provision to the contrary, we are constrained to hold that a county party committee may select as officers persons who are not duly elected party precinct committeemen.

JEF
Criminal Law — Gambling — Lotteries — Plan entitled “suit club” constitutes lottery within meaning of sec. 348.01, Stats.

September 29, 1936.

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

You ask whether the plan submitted called a “suit club” is a violation of the Wisconsin antilottery law, sec. 348.01, Stats. One hundred persons join the so-called suit club. Each person participating agrees to pay one dollar a week for twenty-five weeks until a twenty-five dollar suit is paid for. On payment of one dollar each person is given a number between the numbers of one and one hundred. Each week one of these numbers is drawn by lot and the holder thereof is entitled to a suit without making any further payment.

Sec. 348.01 provides:

“Any person who shall set up or promote any lottery for money, or shall dispose of any property of value, real or personal, by way of a lottery, * * * shall be punished by imprisonment in the county jail not more than six months or by fine not exceeding one hundred dollars.”

Before any scheme or plan constitutes a lottery within the meaning of the statute the three following elements must be present:

1. The purchase of a right;
2. The right must be a contingent one, that is, the purchaser is to receive something greater than that which is purchased, and
3. The contingent right must depend upon a lot or chance. * * *

Demer v. Fruneau, 39 Colo. 20, 88 Pac. 389; Lohman v. State, 81 Ind. 15.

When considering sec. 348.01, this office has repeatedly held that any scheme whereby any consideration is given for the right to secure a prize, the right to such prize being determined by chance, constitutes a lottery and is therefore

It appears that the plan submitted comes within the prohibition of the statutes because:

1. Only those persons who pay in the sum of one dollar are entitled to participate in the “suit club”;
2. Each person has an opportunity to secure something that is greater in value than what is purchased;
3. The right to such additional value is determined by chance.

As the necessary elements are present, the so-called “suit club” would constitute a lottery within the meaning of sec. 348.01.

JEF

Public Officers — Taxation — Board of Review — Sec. 62.09 subsec. (6), par. (d), Stats., prohibiting additional compensation to salaried city officers, and sec. 70.46, subsec. (5), fixing maximum compensation for members of board of review, may not be abrogated by charter ordinance.

September 29, 1936.

WALTER B. MURAT,
District Attorney,
Stevens Point, Wisconsin.

You have inquired whether members of the city council are entitled to additional compensation for services in acting upon the board of review, and also whether the city council may fix compensation for members of the board of review in excess of the maximum provided by sec. 70.46, subsec. (5), Stats.

Both of these inquiries are answered in the negative.
The first of these questions was specifically passed upon in an opinion from this office to the tax commission under date of September 21, 1936.*

Sec. 70.46, subsec. (5), is plain and unambiguous as to the maximum compensation which may be fixed for services on the board of review, and we see no room for construction.

We do not consider that a city may, by charter ordinance, such as you have called our attention to here, disregard the express provisions of sec. 62.09, subsec. (6), par. (d), which prohibits additional compensation to salaried city officers and sec. 70.46, subsec. (5), fixing a maximum of three dollars per day as compensation for services on the board of review.

It is true that cities have wide powers under the municipal home rule amendment, art. XI, sec. 3, Wis. Const., which provides in part:

"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. * * *.*"

As we see it, sec. 62.09, subsec. (6), par. (d), and sec. 70.46, subsec. (5), are of state-wide concern and with uniformity affect every city or every village with the exceptions therein specified. To the effect that the matter of compensation of city officers is of state-wide concern, see Van Gilder v. City of Madison, 267 N. W. 25 and 268 N. W. 108.

We would also call attention to the case of Hack v. Mineral Point, 203 Wis. 215, in which the court said at p. 219:

"That sec. 62.11 confers power far beyond that conferred in the so-called general welfare clause of the general charter as it stood prior to 1921 is plain, and a city operating under the general charter, finding no limitations in express language, has under the provisions of this chapter all the powers that the legislature could by any possibility confer upon it."

*Page 615 of this volume.
It seems clear that secs. 62.09, subsec. (6), par. (d), and 70.46, subsec. (5), do constitute "limitations in express language." We are therefore constrained to rule that the express provisions of the above statutes may not be changed by charter ordinance.

JEF
Elections — Nominations — Public Officers — Precinct Committeeman — Person who is not elector of precinct cannot be appointed party precinct committeeman.

Present chairman of party county committee can fill vacancies in committee offices, including that of precinct committeeman elected September 15.

Party precinct committeeman appointed by chairman may vote for officers of committee in absence of contrary rule adopted by party county committee.

October 2, 1936.

VAUGHN CONWAY,
District Attorney,
Baraboo, Wisconsin.

You ask the opinion of this department on three questions relating to party precinct committeemen. Your questions will be answered seriatim.

1. Can a person not an elector of the precinct be appointed party precinct committeeman?

In considering the powers of the state central committee of a political party, it was pointed out that there were few statutes regulating the powers and duties of party committees. IV Op. Atty. Gen. 1140. This opinion then held that each party, as a purely voluntary organization, has the power to make its own rules and regulations providing for the filling of vacancies. It then quoted subsec. 10, sec. 11-21, Stats.—now sec. 5.19, subsec. (10)—, which provides:

"Each committee and its officers shall have the powers usually exercised by such committees, and by the officers thereof, in so far as is consistent with this act."

In discussing that provision, the opinion said:

"In the absence of legislation, the same rule must be applicable to the state central committee, and the method of filling vacancies and voting by proxy may be determined by the platform convention of the party or by the state central committee itself. In the absence of a rule adopted by either of such bodies, the long standing custom or practice in the party, if any such exists, would probably control."
The rule stated above might well be applied to all party committees and, therefore, except as otherwise provided for in the statutes, the party committee has power to adopt rules and regulations governing the filling of vacancies. However, in making provision for the election of party precinct committeemen, sec. 5.19 (1) (a), Stats., provides that, except in counties containing cities of the first class, each elector may vote for "one qualified elector of the precinct" for such office. Thus only a qualified elector of the precinct may be elected a precinct committeeman of a particular precinct. This qualification was undoubtedly placed in the statutes in recognition of the fact that such committeeman is a representative of the people in his precinct. Therefore, such qualifications should be considered in filling a vacancy in any such office, even though the statute does not specifically require it, as failure to do so would defeat the evident purpose of the legislature to permit local representation. In view of the discussion given above, it is the opinion of this department that the person appointed as a party precinct committeeman must be a qualified elector of the precinct of which he is appointed.

2. May the present chairman of the party county commit- tee fill vacancies in the office of party precinct committeemen who were elected Tuesday, September 15?

Sec. 5.19 (7), 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."

At this meeting the officers of the committee, including the chairman, are elected. The chairman referred to in sec. 5.19 (7) must therefore be the chairman who was elected by the prior county committee. Under sec. 5.19 (11) the duty of filling a vacancy in "any committee office" ultimately falls upon the county committee but "the chairman of the county committee may temporarily fill any vacancy." Prior to the meeting of the party county committee held
after the September primary and before the election of officers by it, the chairman of the prior party county committee has the right to fill a vacancy in a committee office. Some question has been raised as to whether or not the "committee office" referred to in sec. 5.19, subsec. (11), refers only to the officers of the party county committee or whether it includes the party precinct committeemen. Inasmuch as sec. 5.19, subsec. (4), refers to "the term of office of each party committeeman," and each committeeman is a member of the party county committee, it appears that the legislature considered a party precinct committeeman as holding a committee office, as those words are used in sec. 5.19, subsec. (11). Your question is answered "yes."

3. If question two is answered in the affirmative, do precinct committeemen appointed prior to the election of officers have the right to vote at said election?

It is one of the privileges of a party precinct committeeman to participate in the election of the officers of the party county committee. A vacancy in an office is filled in order that there may be some one to discharge the duties of that office. In the absence of specific action by the party county committee forbidding it, a person appointed by the chairman to fill a vacancy has a right to vote for election of officers.

It might be pointed out that the party county committee could by rule deprive any such appointee of his right to vote for officers of the party county committee.

JEF
Taxation — Taxes — Mineral Rights — Where ownership of surface of lands and ownership of minerals underneath are in different persons, these interests should not be separately assessed for tax purposes, with exceptions noted in sec. 70.33, Stats.

October 2, 1936.

THOMAS W. FOLEY,
District Attorney,
Superior, Wisconsin.

You have inquired whether separate assessments for taxation of the ownership of the surface of lands and the ownership of undeveloped mineral rights in such lands must be made where the ownership of the surface is in one person and the ownership of the mineral in another.

This question is answered in the negative.
Sec. 70.32, subsec. (1), Stats., provides:

"Real property shall be valued by the assessor from the actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale. In determining the value the assessor shall consider, as to each piece, its advantage or disadvantage of location, quality of soil, quantity of standing timber, water privileges, mines, minerals, quarries, or other valuable deposits known to be available therein, and their value. But the fact that the extent and value of minerals or other valuable deposits in any parcel of land are unascertained shall not preclude the assessor from affixing to such parcel the value which could ordinarily be obtained therefor at private sale."

In construing this section in the case of Schmidt v. Almon, 181 Wis. 244, the court held that in case where the land is owned by one person and standing timber thereon by another, the land and the standing timber should be treated as a unit, and assessed against the owner of the land.

While the court was there concerned with timber rights rather than mineral rights, the reasoning would seem to be equally applicable in both instances.

In considering sec. 70.32 (1), above quoted, the court said at p. 247:
Sec. 70.32 prescribes the method to be followed by the assessor in the valuation of the real estate and the elements of value to be taken into consideration in arriving at the assessment. Among such elements is the existence of standing timber upon the land. When such valuation shall be fixed as a result of a compliance with the provisions of sec. 70.32, the assessment must be levied as a unit against the real estate, and the timber itself constitutes but an element of value of the real estate proper, namely, the land. So that under the two sections above quoted a legislative intent is made manifest for the assessment of the land as a unit, and not for a separate assessment against the owner of the standing timber.

Sec. 1042j as enacted by ch. 361, Laws 1903, did authorize the separate assessment of mineral rights. This law was amended by ch. 367, Laws 1913, which added certain provisions held to be unconstitutional in the case of State ex rel. Owen v. Donald, 160 Wis. 21. If the matter had ended there it might be considered that the decision covered the amendment only and that sec. 1042j as originally enacted was still operative. However, in the 1915 session of the legislature, after the decision in the Donald case, sec. 1042j was repealed by sec. 49, ch. 604, Laws 1915. There is, therefore, no present law specifically authorizing the separate assessment of mineral rights, except as otherwise provided in the case of lead and zinc bearing lands by sec. 70.33. Consequently it is very doubtful that the general law permits such separate assessment.

We might add that we are informed that the construction here made is in accordance with the administrative interpretation placed upon the assessment statutes by the Wisconsin tax commission. We mention this, since it is well settled that the practical construction placed upon a statute by state officers is of great weight and often decisive. See XXIII Op. Atty. Gen. 306 and cases therein cited.

However, as was pointed out in the case of Schmidt v. Almon, the matter of the payment of the taxes may be made the subject of agreement between the parties, and provision should be made for an assumption on the part of the purchaser of the minerals of a reasonable share of the taxes.

JEF
Elections — Nominations — Incorrect nomination date in declaration filed pursuant to sec. 5.17, subsec. (3), Stats., does not invalidate same.

Charles L. Larson,
District Attorney,
Port Washington, Wisconsin.

You submit a copy of the declaration required by sec. 5.17, subsec. (3), Stats., filed by a person who was nominated for the office of county clerk at the September primary. This declaration is correct in form except that it states that the nomination took place September 7 when, as a matter of fact, all nominations took place on September 15.

You ask if this declaration is sufficient to entitle the candidate to a place on the ballot at the November election.

Sec. 5.17 (3), providing for the filing of a declaration by candidates nominated for office, was enacted to make certain that a candidate when nominated will serve if elected so that a vacancy will not occur after the November election by reason of the candidate's refusal to take office. XXI Op. Atty. Gen. 956, 958. The candidate in question has complied with this provision by filing a definite statement that he will qualify if elected to the office of county clerk. The error you mention is so immaterial that it would not invalidate the declaration. Furthermore it is well settled that election statutes are liberally construed to permit the elector an opportunity to express this opinion. XXV Op. Atty. Gen. 511; State ex rel. Oaks v. Brown, 211 Wis. 571; State ex rel. Ekern v. Dammann, 215 Wis. 394.

In view of the rule stated above and the fact that the candidate has substantially complied with sec. 5.17 (3), Stats., the declaration submitted would not be invalid despite the mistake as to the time of the candidate's nomination. As the declaration is sufficient, the candidate is entitled to a place on the ballot at the November election.

JEF

October 2, 1936.
Prisons — Prisoners — Public Officers — Governor — After prison sentence has expired governor has no further jurisdiction over convict who was out on conditional pardon and did not live up to all conditions of that pardon.

October 2, 1936.

Earl H. Munson, Secretary,
State Pardon Board,
Executive Office.

Under date of September 18 you state that your board is in receipt of a complaint concerning a person who was granted a conditional pardon by former Governor Schmedeman. Under the terms of the conditional pardon this person was required to make full restitution in the amount of four hundred fifty dollars. This person has failed to comply with the provisions of this conditional pardon, and his sentence has since terminated. You say you are of the opinion that the governor has lost all jurisdiction in this matter and that the conditional pardon cannot be revoked at this time.

It is our opinion that you have arrived at the correct conclusion. The sentence having expired, the governor has no further jurisdiction over him. In an official opinion in VI Op. Atty. Gen. 238 it was held:

"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."

Under this opinion this man has served his term. If it was intended to compel him to pay the four hundred fifty dollars restitution, it should have been attended to prior to the time when his sentence expired.

JEF
Elections — Recount Proceedings — Where senatorial district is comprised of three counties, candidate for office of senator may file petition for recount, pursuant to sec. 6.66, Stats., not later than three days after last board of canvassers has completed its canvass.

Failure to file proof of service of petition on opposing candidate is not fatal if statute is otherwise complied with.

October 5, 1936.

JOHN PETERSON,
District Attorney,
Neillsville, Wisconsin.

You present the following statement of facts:

A petition for a recount for the office of state senator has been filed. The senatorial district involved is comprised of Clark, Wood and Taylor counties. The board of canvassers of Clark county completed their work September 19, Wood county, September 19, and Taylor county, September 22. The petition for a recount was filed with the county clerk of Taylor county September 25. You ask whether the petition is valid, even though filed more than three days after the board of canvassers for Clark county had completed their canvass.

Sec. 6.66, Stats., provides:

“(1) Whenever any candidate, or any elector who voted upon any constitutional amendment or upon any proposition, voted for at any election, within three days after the last day of the meeting of the board of county canvassers, or, in case of an annual, special or referendum election in any city, town or village, within ten days after the result of such election is declared, shall file with the county clerk or with the city, town or village clerk, as the case may be, a verified petition setting forth that he was a candidate for a specified office * * * and that he is informed and believes that a mistake or fraud has been committed in specified precincts in the counting or return of the votes cast for the office for which he was a candidate, or upon the matter voted upon, or specifying any other defect, irregularity or illegality in the conduct of said election, said board of county, city, town or village canvassers, as the case may be, shall reconvene on the day following the filing of such petition and proceed to ascertain and determine the facts al-
leged in said petition and make correction accordingly and recount the ballots in every precinct so specified in accordance therewith. Such petition shall first be served, as a summons is served in a court of record, upon all opposing candidates and if such petition pertains to a constitutional amendment or proposition voted upon, the petition need be served upon no one other than the said clerk. Such petition and proof of service thereof shall be filed with the said clerk, together with a fee of two dollars for each precinct in which a recount of the ballots is demanded in such petition. * * *

Under the express wording of this statute a petition for recount proceedings must be filed not more than three days after the board of canvassers has completed its canvass. This department has held that that provision of the statute must be strictly complied with. XI Op. Atty. Gen. 795; XIX Op. Atty. Gen. 523. However, it is to be noted that these opinions considered only a situation where a county office was involved, and, therefore, would not be applicable in the present instance.

The clear intent of the legislature in enacting sec. 6.66 was to give candidates an opportunity to correct possible errors which might have occurred. In the present case neither candidate had an opportunity to determine whether he was one of the successful nominees until reports had been made by the board of canvassers of the three counties comprising the senatorial district. As a defeated candidate would not know of that fact until all three boards had reported, it would seem that the three days’ limitation fixed by sec. 6.66 would not start to run until the last board of canvassers had reported. As Taylor county’s board of canvassers completed its canvass on September 22, the petition was filed in time, even though filed in Clark county where the board had completed its work on the 19th. This construction is in conformity with the rule that election statutes are liberally construed to carry out the intent of the electors. State ex rel. Oaks v. Brown, 211 Wis. 571; State ex rel. Ekern v. Dammann, 215 Wis. 394.

You also state that the petitioner failed to file proof of service of the petition on his opponent at the time he filed the petition, and ask whether such failure invalidates the petition.
This department has held that a petition is not invalid where the candidate has substantially complied with sec. 6.66, XIII Op. Atty. Gen. 606. If it can be shown that the petitioner did in fact serve a copy of the petition on his opponent but by inadvertence failed to file proof of service of his petition, such failure should not invalidate his petition. This would be true where he has otherwise complied with the statutes.

In other words, the filing of the proof of service of the petition is not a condition precedent to the right of recount. It is not jurisdictional, but merely goes to the matter of proof of having taken the steps required by law to entitle the petitioner to a recount. Whether there has been the required service on opposing candidates or not is a question of fact. If this has been done, neither the filing of the proof of service nor the failure to file it can alter the facts as to such service.

This is in line with the rules as to proof of service of process generally. For instance, it has been held that if personal service of a summons is in fact made the court acquires jurisdiction even though the officer does not return it until after judgment. Kneeland v. Cowles, 4 Chand. 46, 3 Pin. 316, 320. We therefore construe the statute as being directory rather than mandatory and that consequently the proof of service may be filed afterwards.

JEF
Elections — Under sec. 6.31, Stats., each political party is entitled to two watchers at polls; they are not prohibited from keeping their own lists of electors, checking off names from such lists as voting progresses or from passing on this information to others, who will use it in inducing tardy electors to vote.

October 5, 1936.

Earl E. Schumacher,
District Attorney,
Beaver Dam, Wisconsin.

In connection with sec. 6.31, Stats., respecting party representatives at polling places, you inquire whether only two such representatives may be present, and if it is permissible for such representatives to bring lists of the electors in the precinct with them and to check off the names of electors voting, relaying the information to committees or other interested persons, who, in turn, telephone or otherwise reach persons who have not voted, and persuade them to vote.

It is our opinion that each political party may have two party agents or representatives at a polling place, and that it was not the legislative intent to limit the total number of such representatives from all parties to only two persons.

Sec. 6.31, Stats., reads:

"Two party agents or representatives, and a substitute or alternate for each, may be appointed for each polling place to act as challengers for each political party and its candidates and to observe the proceedings of election officers. Such appointments may be made by the county or other proper local committee of the party making such nominations. Candidates nominated by nomination papers and candidates for city offices may themselves make such appointments. Each such appointment shall be in writing under the hand of the person making it, specifying the name and residence of the appointee, election district for which he is appointed, and the name of some substitute to be appointed in case of his failure to serve or absence from the polling place, and be filed with the clerk of the city, town or village at least three days before election. The clerk shall thereupon issue a permit, upon a printed slip or card, to such appointee, which shall be his warrant of authority to be present during the election and to be inside the railed inclosure
during the counting of the ballots. If any person so appointed as agent fails to serve or shall be absent for any part of election day, the clerk may issue a permit to the substitute or alternate, who may act instead of such absentee or person failing to serve."

We believe that the wording of this statute is reasonably clear and unambiguous as to the number of party watchers at the polls. If there is any room for construction at all the statute should not be so construed as to reach an unreasonable result. Price v. State, 168 Wis. 603. The evident purpose of the statute is to give each political party an opportunity to have observers at the polls so as to insure regularity in the election proceedings and to the end that no unfairness in the conduct of the election will result as to any political party. There are some four or five or more parties on the ballot in this state at the present time and to say that there could only be two watchers at the polls would deny most of these parties of any representative and, consequently, the apparent legislative purpose of the statute would be defeated.

It is unnecessary, however, to do any violence to the plain wording of the statute in order to reach the above result, since the statute clearly says that two party agents or representatives may be appointed for each polling place to act as challenger for each political party.

In answering your second question, we would say that sec. 6.31 does not prohibit the party watchers from keeping their own lists of electors so as to check off names as the voting progresses, and from passing on this information to others, even though the statute was not designed for the purpose of providing parties with convenient machinery for getting out the party vote. We know of no law which this practice violates nor rights of any person or party which are in any way invaded. Consequently, we fail to see how anything may properly be done to prevent such practices under the statute as it now stands. Certainly no public policy is contravened by using such methods to induce laggard voters to fulfill their duty as citizens, and we understand that the practice has been widely followed in this state for years.

JEF
Elections — Nominations — Sample primary ballot shall be in substantially same form as official ballots in so far as arrangement of names thereon is concerned.

October 9, 1936.

Wm. H. Freytag,

District Attorney,

Elkhorn, Wisconsin.

You ask whether the sample primary ballot must conform identically with the official primary ballot as to the arrangement of names of candidates in each particular precinct.

Sec. 5.11, subsec. (1), Stats., providing for the printing of sample ballots, reads as follows:

"Not later than twenty-two days before the September primary each county clerk shall prepare sample official ballots in substantially the annexed form which sample ballots shall be printed upon tinted or colored paper, and shall contain no blank indorsement or certificate. Said clerk shall place thereon, under the appropriate title of each office and party designation, the names of all candidates to be voted for in the precincts of his county. The names certified by the secretary of state shall be arranged in the order in which they were certified."

It will be noted that such sample ballot shall be prepared "in substantially the annexed form" (said form being used to prepare the official primary ballot) but shall be printed on tinted paper and shall contain no blank indorsement or certificate. Subsec. (3), sec. 5.11, Stats., then provides how the names of all candidates shall be arranged on the ballot. The term "ballot" as used in this section seems broad enough to include both the sample and official primary ballots.

The sample primary ballot should be in substantially the same form as the official ballot, in so far as arrangement of names is concerned, in view of sec. 6.29 (6), Stats., which provides:

"If from any cause the ballots are not ready for distribution at any polling place as provided by law, or if the supply shall be exhausted before the polls are closed, facsimile un-
official ballots may be used, but the voter using it must, before voting, present it unmarked to the ballot clerks, have their signatures or initials indorsed thereon, and then he shall prepare it for voting."

Under this section sample ballots may be used by the election officials if the regular ballots are not ready for distribution or the supply thereof is exhausted before the polls close. IX Op. Atty. Gen. 412. Furthermore, any elector may take a marked sample ballot with him into the polling booth and vote the official ballot the same way the sample ballot is marked. This is authorized by sec. 5.13 (5), which makes sec. 6.37 applicable to primary elections.

Sec. 6.37 provides:

"On receiving his ballot the elector shall forthwith, and without leaving the polling place, retire alone to one of the booths or compartments to prepare the same. An elector may use or copy an unofficial sample ballot which may have been marked in advance of his entering the polling place, but he shall not use or bring into such place any such ballot printed upon paper of the color or quality required to be used for printing official ballots. After preparing his ballot, the elector shall fold it so that its face will be concealed and so that the printed indorsement and signatures or initials of the ballot clerks thereon may be seen. He shall then vote forthwith and before leaving the polling place.

See also sec. 6.22 (1) and (3), Stats.

However, the fact that sample ballots do not conform substantially with official ballots will not in itself invalidate any election. IX Op. Atty. Gen. 464. Any irregularity in the form of ballot used at an election will not invalidate an election if such irregularity is not material. XXIV Op. Atty. Gen. 348; State ex rel. Oaks v. Brown, 211 Wis. 571.

JEF
Opinions of the Attorney General 641

Intoxicating Liquors — Posted Persons — Sec. 176.26, subsec. (1), Stats., does not prohibit sale of fermented malt beverages containing less than five per centum of alcohol by weight to persons posted for excessive drinking of intoxicating liquors.

October 13, 1936.

Buchanan Johnson,

District Attorney,

Plainfield, Wisconsin.

You refer to sec. 176.26 subsec. (1), Stats., relating to the posting of names of persons addicted to excessive drinking of intoxicating liquors, and you inquire whether this covers the sale of beer as defined by sec. 66.05 (10) 10.

We concur in the view expressed in your letter that sec. 176.26 (1), does not apply to the sale of beer.

Sec. 176.26 (1), prohibits the sale of intoxicating liquor to posted persons, but it makes no mention of fermented malt beverages. The definition of intoxicating liquor in ch. 176 specifically excludes fermented malt beverages which contain less than five per centum of alcohol by weight. Sec. 176.01, (2), Stats. XXIV Op. Atty. Gen. 411, 413, 414; XXV Op. Atty. Gen. 547.

This is in accordance with the state treasury department rulings on the subject, which rulings are important for the reason that the practical construction given a statute by officers who administer it is of great weight and often decisive. XXIII Op. Atty. Gen. 305, 306; XXIV Op. Atty. Gen. 516, 518.

JEF
Courts — Garnishment — Quasi-garnishment — Public Officers — Secretary of State — State Employees — Where dispute exists between judgment creditor and debtor in quasi-garnishment proceedings under sec. 304.21, Stats., as to whether debt is retail liquor debt not subject to garnishment and there is further dispute as to whether sec. 267.01, subsec. (5), applies to sec. 304.21, as matter of law, secretary of state should withhold payment to either party until controversy has been judicially determined.

October 19, 1936.

Theodore Dammann,
Secretary of State.

You state that a transcript of a judgment against a university employee has been filed with your office and that the employee in question contends that sec. 304.21, Stats., relating to quasi-garnishment of public employees does not apply for the reason that the judgment was rendered in an action to collect a debt contracted for the retail purchase of liquor within the meaning of sec. 267.01, subsec. (5), Stats., and that consequently no garnishment proceedings may be maintained for the collection of the same.

The creditor's attorney claims that the action was to collect on a note, and the debtor has filed an affidavit stating that the note was given in payment for liquor purchased at retail.

You therefore inquire whether sec. 267.01, subsec. (5), which provides that no garnishee action shall be brought to recover the price of liquors sold at retail, also applies to quasi-garnishment proceedings under sec. 304.21, Stats.

It is our advice that you withhold payment of the money garnisheed until the controversy has been settled in court.

We have frequently pointed out that a public officer in a quasi-garnishment case may be held personally liable if he pays to the wrong party prior to a judicial settlement of the controversy. Consequently you should not feel obliged to pass upon the merits of this dispute, either as to the law or the facts in the case, at your peril.

The following opinions support the view we are taking here: XXII Op. Atty. Gen. 661, 663; XXI 259; XVI 795; XIII 449; VII 82.
In the light of the foregoing, it becomes unnecessary for us to pass upon the specific point of law raised by your question, and we consider that this may be done more appropriately in such judicial proceedings as the parties to the dispute may decide to bring.

JEF

October 19, 1936.

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

You state that the state board of health has been requested by X, chairman of the board of health of the township of B to state specifically his authority as chairman of the board to enter local premises (outside of the house) in opposition to the wishes of the owner where complaint has been made for violating the local building or zoning ordinance. Such building ordinance was duly passed by the board of health in the town of B and subsequently approved by the town board and posted as the law required. It provides that orders be executed subject to the approval of the local board of health. No specific member of the board of health was designated to enforce the orders.

Our constitution provides in art. I, sec. 11:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; * * *."
The statute does not specifically require or permit the chairman of the local board of health to individually assume the functions of the board or act as an enforcing agent of its orders. Sec. 141.01, subsec. (4), Stats., provides:

"The [local] board shall elect a chairman, a clerk, and a health officer, who shall be ex officio a member of such board and its executive officer. *

Under this provision the health officer is the executive officer of the board. The last clause of this sentence does not refer back to chairman and clerk but modifies "health officer" only. While under sec. 143.03 (2) of the statutes the local boards of health are authorized to do what is necessary and reasonable in the prevention of diseases, I find nowhere in the statutes a provision that would authorize the chairman of the local board of health to trespass upon the property of a private person for the purpose of ascertaining whether that person is violating some law or regulation. We have a great many officers that are authorized to inspect buildings and read meters, etc., but their right to enter is generally predicated upon the consent of the owner. If the owner objects to an officer's investigating his premises to ascertain violations of law, it should be done under the protection of an order of court authorizing such investigation. A case where unauthorized acts of health officers were considered by our supreme court is that of Lowe v. Conroy, 120 Wis. 151. In that case the officer was held liable for damages for destroying cattle that were claimed to have a malignant and contagious disease, such as anthrax, which in its nature is a menace to the public health, where it was shown that the cattle in fact did not have such disease. A determination by the officer that a nuisance or a malignant disease exists when in fact it does not exist makes him liable for damages if he is acting on his own discretion. He is protected only when the nuisance or disease actually exists or when he acts in pursuance to an order of court.

"He [the owner] cannot be deprived of the right, either before or after such taking of his property, to have a judicial inquiry whether in fact he has forfeited the right to his property by coming within the condemnation of the law.

"
In such cases, where a board of health has summarily destroyed property, the owner may bring his action to recover the damages sustained, if it be found he has been unjustifiably deprived of it. In the absence of judicial inquiry wherein the owner is given full opportunity to establish that no nuisance or cause of sickness exists as claimed, the board of health cannot declare a thing a nuisance or source of danger to public health which is not so in fact. * * *

_Lowe v. Conroy_, 120 Wis. 151, 157.

Sec. 146.14, subsec. (3), Stats., provides:

"If the local board of health be refused entry to any building or vessel to examine into and abate, remove or prevent a nuisance, any member may complain under oath to a justice of the peace, whether or not such justice be a member of the board, stating the facts in his knowledge and the justice shall issue a warrant commanding the sheriff or any constable of the county to take sufficient aid, and being accompanied by two or more of the board of health, and under their direction, between sunrise and sunset, abate, remove or prevent the nuisance."

But an officer of the board of health is acting at his peril when he assumes to abate a nuisance or carry out an order of the board when in fact no nuisance exists.

I understand that X was not acting under an order of court. When he was asked to leave the premises he complied but was assaulted by the owner while he was in the act of leaving.

We believe that the owner of the premises was not justified in assaulting X if he was actually leaving at his request and the owner could undoubtedly be prosecuted for assault.

JEF
Eminent Domain — Condemnation — Under sec. 32.19, Stats., when owner of land which is subject to condemnation takes appeal from finding of appraisal board, county may dismiss proceeding even after jury has fixed award.

Plaintiff, or county in this case, has right to take legal possession only as authorized by court under sec. 32.15.

We do not believe it is customary for persons seeking to acquire property by condemnation to use or improve same prior to completion of final negotiations.

October 19, 1936.

M. W. Torkelson, Administrator,
Works Progress Administration,
Madison, Wisconsin.

In your communication of October 14 you state that the works progress administration has approved a project sponsored by the La Crosse county board for making certain improvements to the airport situated near the city of La-Crosse and leased and operated by La Crosse county. Federal regulations lay down the rule that this project is ineligible for prosecution until the field is publicly owned. You state that in order to comply with these regulations La Crosse county has instituted condemnation proceedings to acquire title to the land. You say you are informed that the county court has held hearings and has rendered a decision in the case. You ask for an opinion on the following points:

"1. In the event the owner appeals to a higher court claiming that the price fixed by the appraisal board is too low, will the county be able to withdraw its suit or is it committed to purchase the land, once the county court has made an award, regardless of what ultimate price set by the higher court may be?"

In answer to this question we refer you to sec. 32.19, Stats., which reads thus:

"If any person instituting condemnation proceedings, shall deem it inadvisable to take the real estate at the price fixed by the commissioners or by a jury upon appeal, it may, within sixty days after filing the award of the commission-
ers or within sixty days after assessment of damages by the jury, discontinue the proceedings upon such terms as to the court shall seem just."

The proceedings are brought under the provisions of ch. 32 of the statutes, dealing with the subject of eminent domain. See also Brown v. County State Road and Bridge Committee, 182 Wis. 480. Under the above authorities your question is answered in the affirmative. The county has the right to dismiss or withdraw the proceedings.

"2. Does the county have the legal right to take possession of the property after an award has been made even though the owner gives notice of his intent to appeal to a higher court?"

Sec. 32.14 of the Wisconsin statutes provides for the perfecting of the title when no appeal is taken. Sec. 32.15 provides that prior to the perfecting of the title and "at any stage of such proceedings the court in which they are pending or the judge thereof may authorize such person, if in possession, to continue in possession, and if not in possession, to take possession and have and use such lands during the pendency of such proceedings and may stay all actions or proceedings against such person on account thereof on the paying in court of a sufficient sum or the giving of such securities as such court or judge may direct to pay the compensation therefor when finally ascertained."

Your second question is therefore answered that the county has not the legal right to take possession of the property after an award has been granted, when an appeal is pending, unless permission is granted by the court under the provisions of the above statute.

"3. In cases of this kind where an award has been made, is it customary for the agency seeking to acquire property through condemnation to proceed with the use of and improvement of such property before final negotiations are completed?"

We do not know what is customary in this regard but it is our impression that it is not customary for the person seek-
ing to acquire property through condemnation to proceed with the use or improvement of such property before negotiations are finally completed.

JEF

Elections — Municipal Corporations — Villages — Village of Mt. Sterling, incorporated by order of circuit court September 8, 1936, should hold its general election in town from which territory of village was taken, since there was not sufficient time to serve necessary notice in village by village officers.

October 23, 1936.

JAMES P. CULLEN,
District Attorney,
Prairie du Chien, Wisconsin.

In your letter of October 20 you state that the village of Mt. Sterling was incorporated by order of the circuit court of Crawford county on September 8, 1936, and the election upon the question of incorporation following the court order resulted in a very large majority for incorporation, so that the village became a completed corporation on the 30th day of September, 1936. After that the regular notices of general election were posted in the village of Mt. Sterling by the election inspectors who had been appointed by the court in the order of incorporation. You also say that on October 24 the village will elect its regular village officers and they will qualify at once.

You inquire whether the voters of this village can vote in their village at the general election or whether they will have to vote in the town of Utica, the village having been taken entirely from the town.

Sec. 6.11, Stats., provides:
“(1) The county clerk thereupon shall forthwith prepare under his signature and seal a notice containing so much of the notice of the secretary of state as may be applicable to his county, including constitutional amendments or other questions, together with a statement of the several county officers to be elected by the voters of his county and cause the same to be published as provided in section 6.82. Commencing not later than the last Friday of September, such notice shall be published once each week until election.

“(2) The county clerk shall also cause said notices to be printed on heavy paper suitable for posting, and, not later than the first day of October, shall transmit by mail to each town, city and village clerk a sufficient number of copies for the purposes hereinafter specified. At the bottom of such notices shall be printed a form for use of the local clerks in notifying the electors of the place where the election will be held and at what hours the poll will be opened and closed; provided, that this provision shall not apply to cities having a population of over two hundred thousand.”

Sec. 6.12, provides:

“Every such town, city and village clerk immediately upon receiving said printed notices shall complete the same and cause copies to be posted in five conspicuous places in every election precinct or district within his town, city or village, and shall also file or post another copy in his office. Upon request of the city clerk police officers shall post said notices as he shall direct. It shall be the duty of the town, city or village clerk to see that said notices are received and correctly posted.”

In view of the fact that there was no officer in the village that could post or give the necessary notice of the election required, it is our opinion that the election in November should be held in the town from which the village was incorporated instead of in the village. There may be some doubt as to the correct procedure to follow in this case, but we are satisfied that the court will approve the election if held in the town as herein indicated.

JEF
Elections — Citizenship — Prisons — Prisoners — Rule and regulation that no restoration of civil rights will be granted until one year after expiration of sentence, except where party is on parole, when parole period shall be counted as part of year, applies to probation also but only if one of conditions of probation is that party is out on parole.

October 23, 1936.

EARL H. MUNSON, Secretary,
State Pardon Board,
Executive Office.

You have requested that we answer the question with respect to making application for restoration of civil rights submitted by Mr. William Oldigs, chief probation officer, Public Safety Building, Milwaukee. Mr. Oldigs says:

“When probationers are discharged from probation here we advise them that they have lost their civil rights through the conviction of which they were placed on probation and that such rights cannot be restored except through pardon action by the governor; suggesting to them the advisability of applying for restoration of their civil rights.

“Some questions have arisen in connection with the procedure in the restoration of civil rights. I note the attorney general has ruled that civil rights may be restored by the governor without having complied with the regular procedural steps as provided by statute. In the 1936 edition of laws of Wisconsin relating to charitable, curative, reformatory and penal institutions and agencies, a hand book and directory issued by the state board of control, mention is made * * * that pardons to restore rights of citizenship will not be granted until one year after expiration of sentence except where on parole the parole period shall be counted as part of the year. If this is a correct statement, do the same conditions apply to probation, especially, would the term served on probation be considered as part of the one year waiting period after the expiration of the term of sentence? But does that permit a person who has completed his probation successfully and has been discharged from probation to apply for restoration of his civil rights immediately or at any time after his discharge from probation? Have you any other rules or regulations applicable to the restoration of civil rights other than are mentioned in the pardon rules and regulations mentioned above?”
Under sec. 2, art. III of the Wisconsin constitution it is provided:

"* * * nor shall any person convicted of treason or felony be qualified to vote at any election unless restored to civil rights."

The legislature was also authorized to exclude from the right of suffrage persons who had been convicted of bribery, larceny or of any infamous crime, or those directly or indirectly interested in any bet or wager depending upon the result of any election, from the right to vote at such election. See sec. 6.01 (2) and (3) and XXIII Op. Atty. Gen. 849.

In an official opinion in XIII Op. Atty. Gen. 141 it was held that the term "felony" as used in art. III, sec. 2, above quoted, should be given the same meaning as the word "felony" used in sec. 15, art. IV of the Wisconsin constitution. In the case of State ex rel. Isenring v. Polachek, 101 Wis. 427, 431, the court held, concerning this provision:

"* * * 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. 131; Klein v. Valerius, 87 Wis. 60, 61. * * *

It follows that no one will lose his rights who commits a felony that was not a felony at the time of the adoption of the constitution.

Sec. 57.08 provides:

"All applications for pardon of any convict serving sentence of one year or more, except for pardons to be granted within ten days next before the time when the convict would be otherwise entitled to discharge pursuant to law, shall be made and conducted in the manner hereinafter prescribed, and according to such additional regulations as may from time to time be prescribed by the governor."

The rules and regulations adopted governing applications for pardon contain the following in par. 5:

"Pardons to restore rights of citizenship will not be granted until one year after the expiration of the term of
sentence and then only upon a petition endorsed by reputable citizens where the convict has resided since his release, setting forth that he has been of good behavior and is worthy, except in cases where a person has been on parole, or at large on conditional pardon, in which case the parole period or the conditional pardon period shall be counted as part of the year first above mentioned in this paragraph:

* * *

In answer to your question whether the same conditions apply to probation periods as do to periods of parole in making up the year after expiration of sentence when restoration of civil rights may be made, I will say that if a condition of the probation is that the person is out on parole, as is generally the case, then of course it comes within the letter of the regulation. If he is not out on parole, it does not come within the regulation. We have no other rules or regulations applicable to the restoration of civil rights except those given in the statutes and the rules and regulations of the executive office, of which a copy is herewith enclosed.

JEF

Fish and Game — Searches — Under sec. 29.05, subsec. (6), Stats., conservation wardens may board boats on waters of Great Lakes over which Wisconsin has jurisdiction and search for contraband fish, inspect for illegal fishing gear and make arrests. This does not conflict with federal authority.

October 26, 1936.

H. W. MACKENZIE, Conservation Director,
Conservation Commission.

You ask for an opinion on the following:

"1. The right of our conservation wardens to board boats on the waters of the Great Lakes over which Wisconsin has jurisdiction, and search for contraband fish, inspect for illegal fishing gear and make arrests."
"2. Do the activities above enumerated in any manner conflict with the federal authority?"

Sec. 29.05, subsec. (6), Stats., provides:

"They shall seize and confiscate in the name of the state any wild animal, or carcass or part thereof, caught, killed, taken, had in possession or under control, sold or transported in violation of this chapter; and any such officer may, with or without warrant, open, enter and examine all buildings, camps, vessels or boats in inland or outlying waters, wagons, automobiles or other vehicles, cars, stages, tents, suit cases, valises, packages, and other receptacles and places where he has reason to believe that wild animals, taken or held in violation of this chapter, are to be found; but no dwelling house or sealed railroad cars shall be searched for the above purposes without a warrant."

We believe that this provision gives the conservation wardens the right to search for contraband fish on boats on the Great Lakes over which Wisconsin has jurisdiction. We do not understand that these activities above enumerated are in conflict with federal authority.

JEF

Bonds — Municipal Corporations — Municipal Borrowing — Under sec. 67.11, Stats., municipality may not place money derived from sale of bonds issued for specified purpose in general fund to be used for other purposes.

October 29, 1936.

JOHN R. CASHMAN,
District Attorney,
Manitowoc, Wisconsin.

You inquire whether a municipality which has issued and sold bonds for a certain purpose and thereafter finds that only a portion of the money so raised is needed for such
purpose may place the balance in the general fund to be used for purposes other than those for which the bonds were issued, or whether the money must be placed in a sinking fund for retiring the bonds.

It is our opinion that the money derived from the sale of the bonds may be used only for the purpose for which the bonds were issued and that any unneeded balance must go into the sinking fund for retiring the bonds rather than into the general fund.

The statutes governing this problem are very clear and express, and leave no room for construction.

Sec. 67.10, subsec. (3), provides:

“All borrowed money shall be paid into the treasury of the municipality borrowing it, be entered in an account separate and distinct from all other funds, disbursements charged thereon shall be for the purpose for which it was borrowed and for no other purpose, except as provided by section 67.11 and such disbursements shall be only upon orders or warrants charged to said fund and expressing the purpose for which they are drawn.”

Sec. 67.11, subsec. (1), provides, in part:

“Every county, town, city, or village indebted on account of outstanding municipal bonds shall immediately after the issue of such bonds establish in its treasury a fund separate and distinct from every other fund, designate it as the sinking fund for the particular bond issue, describing it, upon which the indebtedness arose, and shall maintain such fund until such indebtedness is fully paid or otherwise extinguished. The sources of said fund shall be:

“First. All moneys accruing to the borrowed money fund prescribed by subsection (3) of section 67.10 which at any stage are not needed and which obviously thereafter cannot be needed for the purpose for which the money was borrowed.”

Sec. 67.11, subsec. (4), provides:

“Money shall not be withdrawn from a sinking fund and appropriated to any purpose whatever other than the purpose for which the fund was instituted until that purpose has been accomplished.”
Sec. 67.11, subsec. (5), provides:

"Any surplus in the sinking fund after all of the bonds for the payment of which the fund was instituted have been paid and canceled, and after all investments of the second or third class have been finally disposed of or realized upon, shall be carried into the general fund of the municipal treasury."

It would be difficult to state the procedure which must be followed in such matters any more clearly than the legislature itself has done in the above quoted statutes.

For one suggestion as to what to do with the surplus money we call your attention to sec. 67.11, subsec. (2), which authorizes the uses of such money for the purchase of outstanding bonds and outlines the procedure to be followed. See, also, XXI Op. Atty. Gen. 717.

JEF

Counties — Forest Reserves — Taxation — Forest Crop Lands — Provisions of sec. 77.03, Stats., whereby owner of forest crop lands consents that public may hunt and fish thereon, subject to regulation by conservation commission, apply to county forest crop lands included in county forest reserve, regardless of provisions of sec. 59.98, subsec. (2), par. (e).

October 29, 1936.

CONServation Department.

You inquire whether power given to county boards to prohibit hunting and fishing on county forest lands under sec. 59.98, subsec. (2), par. (e), Stats., extends to county-owned forest crop lands, in view of the provisions of sec. 77.03, whereby the owners of such lands consent that the public may hunt and fish thereon, subject to such regulations as the conservation commission may prescribe.

It is our opinion that as to forest crop lands entered as such under the provisions of ch. 77, sec. 77.03 is control-
ling on the question of regulation of hunting and fishing irrespective of whether such lands are county-owned or privately owned.


Also it should be pointed out that sec. 59.98 (3) provides that the county board of any county establishing and maintaining a county forest reserve shall co-operate with the state conservation commission in all ways possible. It would hardly be consistent with the provisions of this section for a county board to make different regulations concerning hunting and fishing other than those promulgated by the conservation commission.

Furthermore, as pointed out in your letter, under ch. 77 the state contributes money annually to the towns in which forest crop lands are situated, which contributions are in lieu of the taxes that would otherwise be assessed against these lands by the towns, and under sec. 59.98 (5) the state pays an additional ten cents per acre to the counties for forest crop lands in a county forest reserve, which money must be used for forestry purposes. The state receives nothing in return except the right of the public to hunt and fish on such lands, and this right is in the nature of a contract right under sec. 77.03, in which it is provided in part:

"* * * The passage of this act, petition by the owner, the making and recording of the order hereinbefore mentioned shall constitute a contract between the state and the owner, running with said lands, * * *. 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."

No exception to such contract is set up in ch. 77 in favor of counties as contrasted with individuals except in the matter of tax liability from which counties are specifically ex-
empted. As to county-owned lands, particularly where acquired by tax deeds, the county stands on pretty much the same footing as a private individual. For instance, see XXIV Op. Atty. Gen. 398, as to the giving of notice by a county on application for a tax deed, and XXI Op. Atty. Gen. 934, holding that the provisions of sec. 90.03, Stats., requiring partition fences to be built between adjoining land owners in certain instances, applies to counties.

We are therefore constrained to rule that a county, by virtue of having entered into a contract with the state under sec. 77.03, is bound by the provisions thereof, including the one providing that consent is given to the public to hunt and fish, subject to conservation commission regulations.

JEF

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Taxation — Exemption — Under facts stated title has not passed from Racine county to First National Bank and Trust Company of Racine and land is therefore exempt from taxation under sec. 70.11, subsec. (2), Stats.

October 29, 1936.

O. M. Edwards,
Assistant District Attorney,
Racine, Wisconsin.

In your communication of October 6 you state that on November 29, 1932, the county of Racine entered into an agreement to sell a certain piece of land to the First National Bank and Trust Company of Racine. Since the contract was entered into the city of Racine has assessed the property for taxation. The sole question involved is whether under the circumstances the property is subject to taxation.

You state that the county of Racine has contended that under sec. 70.11 (2), Stats., this land is exempt from taxation. The foregoing statute is applicable. It provides as follows:
“The property in this section described is exempt from taxation, to wit:

“(2) Lands owned or occupied free of rental exclusively by any county, city, village, town, school district or free public library of this state and lands in this state belonging to cities of any other state used for public parks.”

You state that it is the position of Racine county that since the contract entered into provides that the title to the property shall remain in Racine county until the full purchase price has been paid and that a warranty deed is to be delivered and actual physical possession delivered only after the full purchase price has been paid, the land falls within the terms of subsec. (2), sec. 70.11, Stats.

We believe that your position is well taken. A somewhat similar question is discussed in XXIII Op. Atty. Gen. 670. See also as to when title to land passes under our decision. City of Milwaukee v. Milwaukee County, 95 Wis. 424; Aberg v. Moe, 198 Wis. 349. We believe the land is still exempt from taxation as the title has not passed.

JEF

Bonds — Bridges and Highways — Trunk Highways — Allotment of funds to cities and villages for construction of connecting streets and other purposes under sec. 84.10, subsec. (1), par. (b), Stats., may be used to retire bonds issued for construction of connecting streets.

October 29, 1936.

HIGHWAY COMMISSION.

You inquire whether the state highway commission may authorize a city or village to use a portion of its allotment under sec. 84.10, subsec. (1), par. (b), Stats., for the purpose of paying the principal on bonds maturing the proceeds of which were used in constructing connecting streets in said city or village.

Your question is answered in the affirmative.
Sec. 84.10 (1) (b) provides:

"There shall be allotted to each city and village for the maintenance of streets within its limits selected by the state highway commission, not a part of the state trunk highway system, but forming connections through said city between portions thereof, or between such system and the highway systems of adjoining states, the following amounts per mile of street corresponding to the classification of highways stated: Primary federal aid, five hundred dollars; secondary federal aid, four hundred dollars; other state trunk highways, three hundred dollars. Said allotments may be used for maintenance, repair, construction, snow removal and traffic regulation on said connecting streets, and may be cumulated for any such purpose."

You point out that sec. 84.07, subsec. (2), Stats. 1929, specifically included bonds, and say:

"In 1931 when the statutes were amended, discontinuing the allocation of state trunk highway maintenance funds to counties on a mileage basis, section 84.07 was repealed and recreated omitting the authority to use the maintenance allotments for other purposes. The repeal of that section also repealed the authority for cities and villages to use for other purposes the allotments made to them for maintenance of connecting streets. It is probable that the 1931 legislature did not intend to deny cities and villages the privilege which they previously had, with the approval of the state highway commission, to use for other purposes the portion of their allotments for maintenance of connecting streets not required for that purpose. In 1935, however, chapter 299 was enacted amending section 84.10 (1) (b), by adding the following sentence: 'Said allotments may be used for maintenance, repair, construction, snow removal, and traffic regulation on said connecting streets and may be cumulated for any such purpose.'"

It is true that as a general rule if a statute is amended and part left out, the portion so omitted is deemed to be repealed. However, under the authorities here discussed, it seems perfectly possible in this instance to reach the same result, irrespective of any specific mention of bonds in the statute.

We have checked the digest of cases in this country for the past twenty years or more, and find only one case spe-
cifically dealing with the problem of applying funds allotted for highway construction to retirement of bonds, issued for such purpose. That is the case of Bridges v. State, —— Ind. —— (1934), 190 N. E. 758.

The statute in that case provided:

“All moneys so distributed to the several counties of the state shall constitute a special road fund for each of the respective counties and may be used by the board of commissioners of any county in the construction, maintenance or repair of any county highways or bridges within such county.”

The court said at pp. 759-760:

“If the cost of the construction of the highways in the first instance might have been paid out of funds derived from the gasoline tax and automobile license fees, we see no good reason why the unpaid balance of the indebtedness incurred for their construction might not now be paid out of any surplus revenue in the fund. Such a disposition of the fund is clearly within the legislative intention as to the use to which it might be put. * * *

“* * * We agree that the clear legislative intention was to lift as much as possible of the burden of road construction, maintenance, and repair from the shoulders of property. The use of these surplus funds for the purpose of paying bond maturities, rather than requiring a property tax levy for that purpose, is consistent with the legislative intention. The whole history of recent legislation indicates a persistent legislative desire for economy in government, and relief from the excessive burden of taxation upon property. This is entirely inconsistent with the levy of a tax to pay highway bonds while there are excess funds intended for the payment of the expenses of construction, maintenance, or repair of highways. * * *”

It was also held in the case of Hastings v. Pfeiffer, 43 S. W. (2) 1073, Ark. 1931, that the expenditure of a road fund allotted to counties was not restricted to improvements made after the passage of the allotting act, so as to preclude warrant for expenditures before its passage. It should be pointed out that the question of retiring bonds was not considered in that case, although it does illustrate the attitude
of one of our courts, at least, on the problem of applying such allotments to expenditures previously incurred.

We favor the reasoning quoted in the Indiana case above, and believe that a contrary conclusion would result in injustice to an unfair discrimination against communities which have issued bonds for constructing connecting streets—a result which the legislature could hardly have intended. In other words, there is no good reason why the local taxpayers should pay for the construction of connecting streets in one community while at the same time the taxpayers in another community are relieved of such a burden and receive the necessary funds for that work from the state.

JEF
Courts — Erroneous Judgment — Judgment of municipal court of Winnebago county amending commitment so as to comply with statute should be considered as valid until found otherwise by court having jurisdiction.

November 4, 1936.

Board of Control.

You have submitted an amended commitment of Judge Hughes of the municipal court of the city of Oshkosh, dated September 28, 1936, correcting an error in the judgment dated July 16, 1936, rendered in this same court.

It does not appear whether the amended order changing the judgment was made at the same term of the court but it purports to correct an error by sentencing the defendant to the county jail in Winnebago county for a term of one year instead of to the state prison, as the commitment which is amended provides. It does not appear whether the amendment was made on motion of the defendant or by stipulation, but as it is simply an order correcting an error in a former judgment, I believe it should be considered as valid until a contrary ruling is made by the court. It is apparent from the amended commitment that the former judgment was erroneous, as a violation of sec. 343.401 of the Wisconsin statutes is not a felony, as the former judgment adjudged.

It is our advice that you consider the amended commitment as valid until the contrary is adjudicated by some court that has jurisdiction.

JEF
Bridges and Highways — Town Highways — Town boards of two adjoining towns have no power to bind towns by contract dividing line between towns and apportioning part of cost to each town, except as part of order laying out and constructing town line highway.

November 4, 1936.

L. W. Bruemmer,
District Attorney,
Kewaunee, Wisconsin.

In your letter of October 1 you ask to be advised as to whether or not a town board is authorized to enter into a contract with an adjoining town covering the prospective construction of a town line road over a period of four or five years. You ask:

"Specifically, is it within the power of the town board in office to bind the town to abide by such contract conceding that a portion of it constituting the first and second years' construction has in fact been carried out."

Town boards are empowered to make apportionment of the cost of construction and maintenance of a town line highway only in and by the order laying out the highway under which the portion assigned to a particular town becomes a highway of such town to the same extent as any other highway within the town. See sec. 80.11, Stats. Town of Whitewater v. Richmond, 204 Wis. 388, 392.

Your question must, therefore, be answered in the negative unless the agreement is part of the division of the laying out and maintenance of a road on the boundary between two towns.

JEF
Public Officers — City Council — Malfeasance — Overseer of City Dump — Member of city council appointed by street commissioner to position as overseer of city dump, where he works for city by hour, violates sec. 348.28, Stats.

November 4, 1936.

LOUIS W. CATTAU,
District Attorney,
Shawano, Wisconsin.

You submit the following for an opinion:

"A is a duly elected member of the city council. The city council appoints a street commissioner. The street commissioner then appoints A to a position as overseer of the city dump, where A works for the city by the hour."

You inquire whether this is in violation of sec. 348.28, Stats.

Sec. 348.28 provides:

"Any officer, agent or clerk of the state * * * or city therein, or in the employment thereof, * * * who shall have, reserve or acquire any pecuniary interest, directly or indirectly, present or prospective, absolute or conditional, in any way or manner, * * * in relation to any public service, * * * or in any public or official service, * * * 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; * * *"

Then there are exceptions noted which are not relevant here.

You are advised that the above is a violation of said sec. 348.28, Stats.

JEF
Automobiles — Law of Road — Municipal Corporations — Traffic Ordinances — Whether municipal ordinance which prescribes same penalty and imprisonment as state law for its violation by automobile driver is valid when there is no provision in ordinance which requires revocation of license for its violation although there is such provision for violation of state law, is not here determined.

November 4, 1936.

Theodore Dammann,
Secretary of State.

In your letter of October 7 you refer us to sec. 85.84, Stats., which permits municipalities to enact and enforce traffic regulations and which provides that such regulations must conform to the statutes of the state and impose the same penalties as are prescribed in ch. 85 of the statutes. You refer to an opinion by this department under date of October 20, 1931, in which we advised your office that conviction of violating a municipal ordinance would not work a suspension of the license of the person so convicted. XX Op. Atty. Gen. 931. You state further that if conviction of violating a municipal ordinance will not work a suspension of the driver’s license it would seem to you that the ordinance is incapable of imposing the same penalty prescribed by state statute and for this reason, wherever a state law exists that will permit a suspension of a driver’s license for conviction of its violation, a county or municipal law pertaining to the same subject would be invalid because of the inability to invoke the same penalty. You also state that it is your understanding that suspension or revocation of a driver’s license is part of the penalty that can be imposed for violating certain state traffic laws (see sec. 85.08 (10) and sec. 85.91 (2) and (3), Stats.).

This department has not been asked whether certain municipal regulations are in conformity to the state law in the above quoted sections of the statute or whether they are void and we will not pass upon the validity of any unless we have before us a specific ordinance which we can compare with the provisions of the state statute.
Under our statutes the secretary of state may revoke the license for violation of some laws and under other provisions the court may do so. On whether the supreme court would consider the suspension of the license as a part of the penalty so as to make it necessary to have the same provision in a city ordinance as there is in the state law, we will not express any opinion. That may be a question that cannot be determined until the courts have passed on the question and until the courts have passed on it I believe we should consider the ordinance valid even though it does not require the revocation of the license for a violation of the ordinance.

I direct your attention to XVIII Op. Atty. Gen. 616. It has been held that prosecution for the violation of a municipal ordinance is a civil action. Olson v. Hawkins, 135 Wis. 394; Ogden v. City of Madison, 111 Wis. 413; State v. Grove, 77 Wis. 448.

The violation of a city ordinance is not an offense against the state. See State v. Hawley, 137 Wis. 458. Oshkosh v. Schwartz, 55 Wis. 483; Orland v. Woldenberg, 185 Wis. 510.

Counties — County Board — Taxation — County board resolution under ch. 330, Laws 1935, waiving payment of interest on face of tax certificates for delinquent real estate taxes for year 1931, does not authorize any change of amount of face of certificate.

November 4, 1936.

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

You state that the tax on a certain piece of real estate in the city of Chilton in 1931 amounted to $64.50. A tax certificate was issued thereon on June 14, 1932, the face of the
tax certificate being $70.09. The county treasurer at that
time did not discover that there was an illegal description
and in November, 1934, the present county treasurer re-
turned the tax to the city of Chilton for reassessment, due to
illegal description. The city of Chilton returned the tax de-
linquent on March 22, 1935, in the amount of $84.09. On
December 3, 1935, a tax certificate was issued, the face of
the certificate being in the sum of $102.02.

The county board of Calumet county in their January,
1936, session, by resolution, waived the interest and penalty
on all 1932 certificates for 1931 taxes. On April 8, 1936, a
certain person paid the sum of $104.99, being the face of the
certificate, plus $2.67 interest, and 30 cents redemption fee.
This payment was made under protest, and the claim is as-
serted that the only amount the county is entitled to collect
is $70.09, the face of the tax certificate issued June 14, 1932.

We concur in your opinion that the face of the tax certifi-
cate is $102.02, and that the purchaser is entitled under the
county board resolution to a refund of $2.67.

The resolution of the county board, a copy of which you
have sent us, specifically waives the payment of interest on
the face of tax certificates for the delinquent real estate
taxes for the year 1931.

Nothing is said in the resolution about going back of the
fact of the certificate to determine what the face of the cer-
tificate should have been, and it is elementary that the
county board resolution must be followed according to its
wording and terms.

JEF
Corporations — State Historical Society — Wisconsin Statutes — Ten thousand dollar property limitation as to holdings of state historical society of Wisconsin provided for in sec. 4, ch. 17, Laws 1853, is no longer operative by reason of its implied repeal by subsequent legislation.

November 4, 1936.

HISTORICAL SOCIETY OF WISCONSIN,
Madison, Wisconsin.
Attention Marshall Cousins, President.

The question has been raised as to whether the limitations of sec. 4, ch. 17, General Acts of Wisconsin for 1853, which was an act to incorporate the state historical society of Wisconsin, are still operative.

Sec. 4, provides:

"Said society may receive, hold, purchase and enjoy books, papers and other articles forming its library and collections to any extent, and may acquire and hold, and at pleasure alienate, any other personal and real estate, and may acquire the same by devise, or bequest, or otherwise, not exceeding ten thousand dollars in value, but all its funds shall ever be faithfully appropriated to promote the objects of this formation."

The particular part of sec. 4 with which we are here concerned is the limitation on acquiring real estate exceeding $10,000 in value.

It is our opinion that this limitation is no longer operative.

The society, as a body corporate, is a creation of the legislature by special act, it never having been incorporated under the general corporation laws. The legislature has frequently seen fit to change the powers of the society, although at an early date it constituted the society a trustee for the state, this being first provided in sec. 3, ch. 81 of the revised statutes of 1858.

Ch. 24, sec. 374, Rev. Stats., 1878, provided:

"The state historical society of Wisconsin, organized under an act of the legislature, approved on the fourth day of

The $10,000 property limitation appears to have been repealed by ch. 185, Laws 1919.
March, in the year one thousand eight hundred and fifty-three, shall continue to possess the powers and privileges thereby conferred, subject to the limitations of this chapter and such laws as shall hereafter be enacted, and its acceptance of the benefits herein granted and received shall be conclusively deemed its complete acquiescence therein. Said society shall be the trustee of the state; and as such, shall faithfully expend and apply all money received from the state to the uses and purposes directed by law, and shall hold all its present and future collections and property for the state; * * *.”

Perhaps the most important matter to note in the above statute is that for the first time the legislature made the society the trustee of the state, not merely as to money received from the state, but as to all its present and future property.

The significance of this phraseology is that it is inconsistent with the $10,000 limitation previously mentioned, since the legislature could not very well have intended to limit the holdings of the state without having specifically mentioned the state. It is well settled that general statutes are not to be construed to include, to its hurt, the state. Sullivan v. School Dist., 179 Wis. 502, 507; Milwaukee v. McGregor, 140 Wis. 35, 38; Sandberg v. State, 113 Wis. 578, 589.

Since the society holds all of its property for the state, it cannot be said that the rights of the state are in any way restricted or diminished by the $10,000 restriction, which was never specifically or even impliedly directed towards the state.

Ch. 252, Laws 1897, provided in part:

“The state historical society of Wisconsin, is hereby authorized to sell for such price, and upon conditions as its finance committee may deem best for the interests of said society, and to convey real estate acquired by it, by gift or bequest, or through foreclosure of any mortgage, now or hereafter owned by the society.”

It is to be noted that there are no restrictions as to amount in this language. By this time the property of the society, or, more properly speaking, the property of the state held in trust by the society, had greatly exceeded
$10,000 in value, of which the legislature was undoubtedly well aware, since in 1895, by ch. 298, it had provided for the construction of the valuable building now occupied by the society. To pay for this building, the legislature had provided for a tax of one-tenth of a mill for each dollar of the assessed valuation of the taxable property in the state to be levied and collected annually for three years, beginning in the year 1897. Ch. 298 also authorized the commissioners of public lands to loan not to exceed $180,000 for the construction of the building, which loan was to be repaid with interest out of the above appropriation.

The statutory powers of the society, as they now appear in sec. 44.01, Stats., were first set up by sec. 374, Stats. 1898. Sec. 44.01, reads as follows:

"The state historical society of Wisconsin, organized under an act of the legislature approved on the fourth of March, one thousand eight hundred and fifty-three, shall continue to possess the powers and privileges thereby conferred, subject to the limitations of this chapter and such laws as shall hereafter be enacted, and its acceptance of the benefits herein granted and renewed shall be conclusively deemed its complete acquiescence therein. Said society shall be the trustee of the state, and as such shall faithfully expend and apply all money received from the state to the uses and purposes directed by law, and shall hold all its present and future collections and property for the state; * * *. The society may sell for such price and upon such conditions as its finance committee may deem best for its interests, and convey real estate acquired by it by gift or bequest or through the foreclosure of any mortgage.

Again, there is no restriction stated as to the amount of property which the society might acquire or sell.

It seems reasonably clear that, in view of all of the circumstances, the provision of ch. 17, General Acts of Wisconsin for 1853, which limited the property holdings of the society to $10,000, must be considered to have been impliedly repealed by virtue of subsequent legislation setting forth the powers of the society without the restriction in question. This is in line with the general rule of law that a statute covering the subject matter of a former statute repeals it. City of Madison v. Southern Wis. R. Co., 156 Wis. 352, affirmed 240 U. S. 457.

JEF
Counts — County Board — Public Officers — Examiner of Blind and Deaf — Social Security Law — Blind Relief — County board, under sec. 59.15, subsec. (1), par. (e), Stats., may allow examiner of blind and deaf more than fee fixed by sec. 47.08, subsec. (4).

November 4, 1936.

Pension Department.

You call our attention to sec. 47.08, subsec. (4), Stats., providing for the appointment of an examiner of the blind and deaf and which states that such examiner shall receive a fee of two dollars for each applicant examined. You ask whether this two-dollar fee is the maximum allowed by law or whether the county board may fix a larger fee if it is deemed necessary in order to secure adequate examinations.

It is well settled that a public officer takes his office cum onere and is entitled only to the fees or compensation fixed by law. Henry v. Dolen, 186 Wis. 622; Outagamie County v. Zuehlke, 165 Wis. 32, 40; State v. Cleveland, 161 Wis. 457; XXIII Op. Atty. Gen. 778.

Thus, it would seem that the examiner of the blind and deaf appointed pursuant to sec. 47.08 (4) would be entitled only to the fee fixed therein. However, sec. 59.15, (1), (e), gives the county board broad powers to fix the compensation of incumbents of county offices or positions with certain exceptions not material here. XXII Op. Atty. Gen. 744. This section reads as follows:

"The county board, at its annual meeting, shall fix the salary or compensation for any office or position (other than the county officers designated by section 59.12 of the statutes, judicial officers and the county superintendent of schools), created by any special or general provision of the statutes and the salary or compensation of which is paid in whole or in part, by the county and the jurisdiction and duties of which lie wholly within the county or any portion thereof, and such salary or compensation may be fixed from time to time at any annual meeting of the county board for the ensuing year; and such power is hereby granted to the county board notwithstanding the provisions of any special or general law to the contrary."
It is clear that the examiner of the blind and deaf holds a position within the meaning of sec. 59.15 (1) (e), Stats., as his compensation is paid by the county and his duties lie wholly within the county. Sec. 47.08 (4) does provide that he shall receive two dollars for each examination but this section is not controlling where the county board has acted, in view of that portion of sec. 59.15 (1) (e), which provides:

"* * * such power is hereby granted to the county board notwithstanding the provisions of any special or general law to the contrary."

The county board may, therefore, under this section, fix the compensation of the examiner of the blind and deaf at an amount greater than that prescribed in sec. 47.08 (4), Stats.

JEF

Public Officers — Attorney General — School District Clerk — Clerk of school district, although irregularly elected, is de facto clerk and proper holder of office until removed by judicial proceedings instituted by one showing superior right to office.

Attorney general lacks authority to legally determine disputes between claimants to office.

November 6, 1936.

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

You have referred to us for an opinion a request coming from a county superintendent of schools wherein he points out that the clerk of a certain district resigned last year and that a new clerk whom we will call "X" was appointed to take his place. The school board decided to hold their annual school meeting on July 7, 1936, instead of July 13, 1936, as required by law, and at this meeting X was elected to complete the unexpired term.
Some time in August, 1936, the town clerk, believing that a vacancy existed because of the illegal meeting, appointed Y as clerk. X refuses to give up all of the records and continues to write orders on the school district. We are asked to determine which of these persons is legally entitled to act as clerk.

It is our opinion that X, although irregularly elected, is the de facto clerk and proper holder of the office until removed by judicial proceedings instituted by one showing a superior right to the title.

We refer you to XXIV Op. Atty. Gen. 561, where mention of this principle is made.

It seems to us that no useful purpose is served by the growing practice of submitting to this department disputes between individuals, each claiming to be the lawfully elected or appointed incumbent of an office. The attorney general is neither a court nor a jury. This office has no opportunity to examine the records involved, and frequently important facts are omitted in the requests for opinions, either inadvertently or otherwise, depending upon the source of the statement of facts. No opinion from this office can alter the rights of the respective claimants either one way or the other, and the only proper way to determine such rights is by appropriate court action.

JEF

Indigent, Insane, etc. — Poor Relief — Money earned by wife and another in family, which family was on relief, may not be credited by county to relief granted.

November 6, 1936.

HAROLD M. DAKIN.

District Attorney,

Watertown, Wisconsin.

You state that during August, September, October and November, 1935, the Jefferson county outdoor relief furnished relief to an entire family, which we will designate as
A, the family consisting of a man and his wife and an infant child. Relief was charged to Mr. and Mrs. A. A sister of Mrs. A was taken sick and quarantined; the supervisor of the ward in the city of Watertown in which the sister lived hired Mrs. A to care for her sister during the illness. She submitted a bill to the board of trustees for forty-eight dollars. The board of trustees of the outdoor relief department allowed the bill with the understanding that it was to be credited on the account of Mr. and Mrs. A. You state that Mr. and Mrs. A maintain that Jefferson county will have to pay them this amount and you contend that Jefferson county is entitled to credit for forty-eight dollars on the bill owing Jefferson county by Mr. and Mrs. A.

You inquire whether the Jefferson county outdoor relief department is justified in withholding payment of this sum which Mrs. A claims is due her and crediting their outdoor relief with that.

In a subsequent letter you state, in answer to an inquiry of ours for more details, that the rule of the relief department is that any money due a person receiving relief may be withheld by the county and credited towards the relief account. In other words, whenever any person in the county is furnished relief of any kind an account is set up wherein he is charged with the amount of relief furnished so that, in the event the person afterwards acquires property or has sufficient earnings, collection of the money expended for relief purposes may be effected.

Under sec. 49.10, Stats., it is provided that the municipality can recover money paid for relief when subsequently the person who was relieved acquires property. It was held, however, in an official opinion in XXI Op. Atty. Gen. 596 that a county may not require a needy person, as a condition of relief, to contract to reimburse the county and to convey present and future property as security therefor. Sec. 49.10, Stats., provides for the recovery of property of a person relieved when it is shown that such person had the property when relief was given. The statute contains the following:

"* * * but the court may, in its discretion, refuse to render judgment or allow the claim in favor of the claimant in any case where a parent, wife or child is dependent on such property for future support. * * *"
We believe that the board of trustees of the outdoor relief department had no right to give relief on the condition that her bill of forty-eight dollars should be subtracted from it. This ruling does not militate, however, against the position that the county may recover from the party relieved the money expended for relief if the party thereafter acquires property. But whether that can be done must be passed upon by the court in exercising the discretion given to the court under sec. 49.10, Stats.

JEF

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*Bridges and Highways — State Highways — Counties —* County may not properly grant highway aid to village for construction of curbs and sidewalks along highways by reason of limitations in sec. 83.05, subsec. (3), Stats.

November 9, 1936

LYALL T. BEGGS,

*District Attorney,*

Madison, Wisconsin.

You inquire whether a county may grant highway aid to a village in the construction of curbs and sidewalks along a highway under construction or along a highway already constructed.

It is our opinion that this inquiry should be answered in the negative.

Sec. 83.05, subsec. (3), Stats., provides:

"Whenever it shall have been determined to improve a part of the system of prospective state highways or the state trunk highway system in a village, the village board may determine to improve the same to a greater width of
pavement, and may pay the additional cost out of the general funds of the village, or assess a part or all of such costs to the abutting property as provided by sections 61.40 and 61.41. Joint contract covering the whole work may be entered into between the state, county and village officials and the contractor, and the general procedure in regard to such improvement shall be the same as if the improvement had been made in the usual way and the village was not a party to the contract, except that the amount due to the contractor for the additional width of pavement shall be paid by the village. The village board shall determine in what manner the special assessments shall be paid, whether in one, three or five years, and the rate of interest on deferred payments."

The additional width of pavement referred to in the above section relates to widths greater than eighteen feet, this figure being used in subsecs. (1) and (2), and the entire section being entitled "Roadways over eighteen feet wide, extra expense paid by city and village."

Subsec. (3), above, makes it clear that payment for paving in excess of the standard width of eighteen feet shall be borne by the village. This provision, coupled with the provision for special assessments, leads us to believe that the legislature intended to limit county aid in such matters in the case of villages to the eighteen-foot pavement and possibly such grading, draining and appertaining structures as might be necessary to properly drain and preserve the highway.

In other words, it seems reasonable to conclude from the language of the statute, taken as a whole, that the intention was to restrict the use of the money of the taxpayers of the county to such expenditures in villages as might benefit through traffic and thus be of county-wide importance, whereas distinctly local improvements in the nature of curbs and sidewalks should be carried by special assessments against the property benefited.

You call our attention to VI Op. Atty. Gen. 16, wherein it is pointed out that the planting of trees and the building of sidewalks are highway improvements.

The attorney general was not there considering the matter of highway aid within a village but was asked, rather,
whether the county could aid a town in planting trees and building a side path in and upon a certain highway.

It is true that, in considering general statutes relating to highways, the word "highway" is a very inclusive term, and would cover sidewalks which are such portions of the highway as are set apart by dedication, ordinance, or otherwise for the use of pedestrians. *City of Ord v. Nash*, 15 Neb. 335, 69 N. W. 964, 965. The same would apparently be true as to curbing constituting a part of the highway.

However, it is equally true that where the legislature has provided a statute specifically dealing with a certain subject, its provisions are controlling over any general statutes or principles of law which might otherwise be applicable.

Furthermore, in construing the powers of counties it must be remembered that they have only such powers as are expressly granted or necessarily implied from the statute. *Spaulding v. Wood County*, 218 Wis. 224, XXIV Op. Atty. Gen. 424, 429; XXV Op. Atty. Gen. 92, 316, 379.

In view of these considerations it is our conclusion that the county may not properly grant highway aid to a village for the construction of curbs and sidewalks along the highway, whether such highway is under construction or has been already constructed.

JEF
Public Health — Basic Science Law — Applicant for license to practice medicine and surgery in this state under sec. 147.17, subsec. (1), Stats., without examination may not be licensed on basis of his license in another state where he has permitted such license to lapse for nonpayment of annual registration fees.

November 12, 1936.

DR. HENRY J. GRAMLING, Secretary,
Board of Medical Examiners,
Milwaukee, Wisconsin.

You have requested a formal opinion upon the following matter:

An applicant for a license to practice medicine and surgery in this state submits his application under that portion of sec. 147.17, subsec. (1), Stats., which provides:

"* * * The board may license without examination a person holding a license to practice medicine and surgery, or osteopathy and surgery, in another state, * * * *"

It so happens that the applicant, who is from Iowa, has allowed his license there to lapse for nonpayment of the annual registration fee.

You inquire whether a license may properly be granted to him in this state in accordance with the above quoted statutory provision.

It is our opinion that your inquiry must be answered in the negative.

The statute is clear and express and under familiar rules it does not permit of any construction.

Either the applicant holds a license to practice medicine and surgery in another state, or he does not. In this case he does not and that ends the matter until such time as the foreign license is properly reinstated.

JEF
Corporations — Municipal Power Districts — General managers of power districts are required to publish reports as to business and financial status of such districts, although district has incurred only organization expenses.

November 12, 1936.

PUBLIC SERVICE COMMISSION.

You ask whether the general manager of a power district is required to publish a financial report pursuant to the provisions of sec. 198.16, subsec. (3), Stats., while the district is still in the organization stage and has started no operations and incurred no expenses other than organization expenses.

The answer is in the affirmative.

By the provisions of subsec. (2), sec. 198.16 the general manager of a power district is not only given “full charge and control of the construction of the works of said district and of their maintenance and operation,” but “also of the administration of the business affairs of said district.”

Subsection (3), sec. 198.16 makes it the duty of the general manager to “cause to be published a financial report showing the result of operations for the preceding fiscal year and the financial status of the district on the last day thereof.”

It seems clear that in enacting the provisions relating to the publication of reports by general managers of power districts the legislature recognized the fact that the portion of the public residing within the power district had an interest in knowing the financial status of all such power districts, and that the intent of the legislature was to give to the public a right to receive that knowledge.

We are unable to perceive anything in the statutes above referred to which indicates either that that public had no interest in or that it was given no right to know what the financial status of any such power district might be, even though the district may not as yet have acquired any utility property or may not have conducted any business consisting of the operation of that property.

Also, we are unable to perceive why the expenses incurred in the organization of the district or in connection with any
other matters preliminary to the operation of a utility business by the district forms any exception to the clear provi-
sion of the statute requiring the general manager to make
reports relating not only to the business operations of the
district, but to its financial status as well. We think that
to construe the language of sec. 198.16 (3) to make such an
exception to the application of that statute would amount, in
effect, to a reading into the statute of words which the legis-
lature did not insert and which it would presumably have
inserted if it had intended that any such exception should
be made.

Also, we are unable to perceive how a power district can
be in what you term the “organization stage” when it al-
ready is so organized as to have any such officer as a gen-
eral manager. It seems to us that a power district is created
either by a favorable vote of the electorate in all of the mu-
icipalities comprised within the district as originally pro-
posed in the petitions or resolutions therefor or by the ap-
proval of the public service commission in those cases where
some of the municipalities comprised within the proposed
district do not indicate, by the vote of their electorates, that
they desire to become a part of such district (sec. 198.06
(5) ). We think that any power district so created be-
comes organized by the selection of the board of directors as
provided in secs. 198.07 and 198.08, and by the appointment
of the officers specified in sec. 198.145, among which is the
general manager of the district.

The foregoing opinion is based upon the assumption that
the power district in question has been validly created. We
are aware of a decision of the circuit court for Dane county
to the effect that no power district can be validly created
unless all of the municipalities within the district as origin-
ally proposed vote to become a part of such district. The
question of whether any officer of a power district has any
statutory duties in case the district of which he is such of-

icer has not been validly created is not included in your
question and is not intended to be answered in this opinion.

JEF
Taxation — Exemption — Lands occupied free of rental exclusively by county for purpose of construction of dam are exempt from taxation under sec. 70.11, subsec. (2), Stats.

Victor O. Tronsdal,
District Attorney,
Eau Claire, Wisconsin.

You state that the county of Eau Claire contemplates building a dam on the Eau Claire river with federal aid. In order to build the dam it is necessary for the county to acquire certain lands and flowage easements which are owned and controlled by certain companies. These companies are willing to lease the lands to the county upon payment of a nominal sum. One of the conditions of the proposed lease would be that the companies would not have to pay taxes on these lands, and they are also requiring the county to include an agreement that no power will be produced or developed at the dam.

You inquire whether the lands, which will be occupied by the county of Eau Claire free of rental, are tax exempt.

We agree with your conclusion that the lands in question are exempt from taxation by virtue of the provisions of sec. 70.11, subsecs. (2), Stats., which exempts:

"Lands owned or occupied free of rental exclusively by any county, city, village, town, school district or free public library of this state and lands in this state belonging to cities of any other state used for public parks."

If the lands are occupied free of rental exclusively by the county, the statute clearly applies, and such lands should not be taxed.

The mere fact that the real consideration for the lease may be the exemption of the lands from taxation in no way affects the situation, since the same result would be reached by leasing the land free of rental. It is the substance of the transaction rather than the words employed which should govern the result, since the law looks to the substance rather than the form. XXIV Op. Atty. Gen. 323, 324.
Neither should the covenant on the part of the county not to develop water power at the dam in any way affect the situation as far as rental is concerned, since this merely amounts to a restriction as to the use to which the property may be put rather than a form of compensation for the lease of the land.

JEF

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School Districts — Taxation — Tuition — Under facts stated high school district tuition claim cannot be placed on next tax roll in order to collect deficiency arising from failure of collections based on previous tax roll.

November 20, 1936.

JOHN Callahan, State Superintendent,
Department of Public Instruction.

You state that the high school district A has a claim of $1,000 against township B. Township B placed a claim of $1,000 for high school tuition on the tax roll. It collected $800 and turned that amount over to the high school district. You inquire whether the high school may bill the town for the amount of $200 uncollected and returned as delinquent and whether the town must place the $200 on its tax roll for the next year.

The answer is "no." Sec. 40.47, subsec. (5), Stats., requires the high school clerk to file with the town clerk a verified claim of the sum due the district for tuition from the town. The town clerk enters for collection on the next tax roll the sum due by the town to the district, which sum is to be collected in the manner provided for other taxes and paid over to the school district. Sec. 40.47 (6).

Sec. 74.15 (2) provides for the order of payment of the amount realized from the collection of taxes. From your statement it appears that there was not enough money collected by the town treasurer to pay the high school tuition tax.
Secs. 74.19 (3), 74.28 and 59.07 (21) provide for the payment or credit of taxes collected by the county treasurer to the town treasurer. The town clerk must apply the moneys so paid over by the county treasurer in the order provided in sec. 74.15 (2) and must remit all collections of taxes for schools collected to the school district treasurer on demand. Sec. 60.49 (4) and (6).

For failure to perform these duties, mandamus or an action of debt would lie against the town treasurer or county treasurer and their sureties. There can be no reassessment or charge over for the $200 still unpaid. Secs. 70.74 and 75.25.

JEF

Automobiles — Taxation — Motor Fuel Tax — Federal Land Bank of St. Paul is instrumentality of United States and is exempt from Wisconsin motor fuel tax upon making of proper claim for such exemption at time of purchasing gas on form furnished by comptroller general of United States which has been approved and is required by state treasurer's department.

November 20, 1936.

ROBERT K. HENRY,

State Treasurer.

You inquire whether the Federal Land Bank of St. Paul is an instrumentality of the United States so as to be exempt from the Wisconsin gasoline tax and, if so, whether it must comply with the rules and regulations of the state treasury department as to allowance of exemptions and in respect to such matters as filling out required forms, there being a uniform exemption certificate known as No. 1094 printed and furnished by the comptroller general of the United States, which form is acceptable to you although objected to by the Federal Land Bank of St. Paul.
Both parts of your question are answered in the affirmative.

Sec. 78.02, subsec. (1), par. (b), Stats., exempts from taxation:

"The sale of motor fuel to the United States of America or any of its agencies, except to the extent now or hereafter permitted by the constitution and laws thereof."

12 U. S. C. A. 931, provides that every federal land bank and the income derived therefrom shall be exempt from federal, state, municipal and local taxation except taxes upon real estate held, purchased or taken by said bank.

This statute has been held to be a constitutional exercise of power by congress. Smith v Kansas City Title and Trust Co., 255 U. S. 180. Federal Land Bank automobiles used in the conduct of its business have been held not subject to state automobile license fees. Federal Land Bank of Columbia v. State Highway Dept., 172 S. C. 174, 173 S. E. 284.

It is well established that a state has no power to and may not tax an instrumentality of the federal government beyond the consent so to do expressly given by congress. Jaybird Mining Co. v. Weir, 271 U. S. 609; Indiana Motorcycle Co. v. United States, 283 U. S. 570; Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466.


The United States supreme court in Panhandle Oil Co. v. State of Mississippi ex rel. Knox, 277 U. S. 218, held that a gasoline tax may not be imposed upon an agency of the federal government. This case was a five to four decision, and has been sharply criticised when reviewed by various legal periodicals. 42 Harvard Law Review 128, 27 Michigan Law Review 225, 13 Marquette Law Review 117, 23 Illinois Law Review 707.

However, whether sound or not, the Panhandle case is authority for the proposition that gasoline sold to the United States or its instrumentalities is exempt from state taxation. This is in harmony with earlier opinions from this office.

The second part of your question, concerning the use of form No. 1094, relates to a matter of administration and apparently arises out of a lack of harmony between the Federal Land Bank of St. Paul and the office of the comptroller general of the United States, the bank claiming not to be subject to the jurisdiction of that federal department.

We do not feel called upon to go into the merits of this controversy, as it is possible to answer your question without doing so, and for the further reason that it would be improper for us to attempt to settle disputes between different departments of the federal government.

When an agent or employee of the Federal Land Bank of St. Paul purchases gasoline from a dealer in Wisconsin it is his duty to furnish such proof as may be reasonably required to establish the right to exemption. Exemptions are never presumed, and the burden is on the claimant to establish clearly his right to exemption. 61 C. J. 391. If the form designated as No. 1094 is a reasonable one, under all the circumstances, we see no reason why you may not insist upon its use whether such form was drafted by the comptroller general of the United States or drafted by your own department.

JEF
Indigent, Insane, etc. — Poor Relief — Minors — Legal Settlement — Settlement of minor child of divorced parents follows settlement of father in this state, although custody of child has been given to mother.

Under removal statute, sec. 49.03, subsec. (9), Stats., only question that can be decided by county judge is whether or not removal will be against best interests of poor person.

November 20, 1936.

WALTER B. MURAT,
District Attorney,
Stevens Point, Wisconsin.

You have submitted the following facts for our opinion: A, a divorced woman, was divorced from her husband B, in 1928. The custody of their minor child, C, aged three years, was at that time by decree granted to the mother. Both A and B at that time resided in the city of X. B, the husband, was ordered to pay alimony and support money.

Shortly after the divorce, B moved to the city of Y, where he established a residence and has resided ever since 1928. He continued to make alimony and support payments according to the judgment of the divorce court, except for the period of about one year last past, during which his finances have been such that he has been unable to make the payments.

The city of X furnished relief to C in April, 1936, after obtaining the sworn statement of A, who has all times continued to be a resident of X.

You say the question is: Does the settlement of the child follow that of the father, even though the legal custody was awarded to the mother in 1928?

You ask. If the settlement of the child follows the settlement of the father, regardless of the divorce decree and regardless of the fact that the mother established a separate residence, is the city of Y entitled to proceed under 49.03 (9) to procure an order requiring the return of such indigent minor child to the city of Y despite the provisions of the divorce decree awarding custody to the mother who resides at the city of X?
Upon facts similar to those presented above this office has held that the settlement of the child C follows that of the divorced husband. See XXI Op. Atty. Gen. 1095; XXII Op. Atty. Gen. 592. We do not hesitate to reaffirm these opinions. Although this rule may seem somewhat harsh, it is in accordance with the plain language of sec. 49.02, subsec. (2), Stats. It must be remembered that although the father and mother are divorced, the father is still the father of the child, although custody may be temporarily or permanently taken from him.

It is further our opinion in answer to your second question that the city of Y would be entitled to proceed under sec. 49.03 (9) to secure an order requiring the removal of C to Y. Petition for such removal, of course, is optional (XXI Op. Atty. Gen. 893) and the judge is not bound to grant the removal. "* * * the only question that a judge can or need determine is whether such removal will be against the best interests of the poor person. * * *" City of Two Rivers v. Wabeno (Wis. 1936), 266 N. W. 178, 181. For further opinions that relate to this removal statute, see XXIII Op. Atty. Gen. 730; XXII Op. Atty. Gen. 424, 435 and 771.

JEF

Criminal Law — Worthless Checks — Under facts stated, criminal charge may be brought against defendant under sec. 343.401, Stats.

November 20, 1936.

ROBERT A. NIXON,
District Attorney,
Washburn, Wisconsin.

You state that one A, a resident of your county, sold some live stock to one B, a resident of Rice Lake. B gave A a check in payment for the live stock, which check was drawn on a bank at Rice Lake in the amount of $308.00. B loaded
the cattle on his truck at the time he gave A the check and marketed them at the wholesale markets at St. Paul. B immediately returned to Rice Lake after making this purchase and stopped payment on the check. He then offered to settle with A for the sum of $219.32.

You inquire whether a criminal charge may be brought against B. You also state that you are convinced that B intended at the time he made and delivered the check to stop payment on it.

Sec. 343.401, Stats., provides as follows:

“(1) Any person who, with intent to defraud, shall make or draw, or utter or deliver, any checks, drafts, or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer, has not sufficient funds in, or credit with, such bank or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of a misdemeanor, and punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or both fine and imprisonment.

“(2) As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in, or credit with, such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within five days after receiving notice that such check, draft or order has not been paid by the drawee.

“(3) The word 'credit' as used herein, shall be construed to mean an arrangement or understanding with the bank or depository, for the payment of such check, draft or order.”

In Merkel v. State, 167 Wis. 512, it was held concerning the above quoted statute as follows:

"The offense made punishable by sec. 4438a, Stats. 1917 (Laws 1917, ch. 164), is complete when, with knowledge of an insufficiency of funds or credit as there stated, a bank check is made, drawn, or uttered with intent to defraud. The provision in sub. 2 of said section relating to nonpayment by the maker or drawer within five days after notice of the drawee's refusal to pay, is a rule of evidence only.” (Syllabus.)
I believe that all the elements of the crime described in the above quoted section of the statute are present in this case and that a prosecution will lie. It is probably true that the crime of obtaining money or property under false pretenses as described in sec. 343.25, Stats., cannot be predicated under the facts in this case. See Corscot v. State, 178 Wis. 661; Clawson v. State, 129 Wis. 650; State v. Green, 7 Wis. 571.

You are therefore advised that a criminal charge may be brought against the defendant under sec. 343.401, Stats.

JEF

Counties — Public Lands — Public Officers — County Board of Commissioners — County operating under sec. 59.95, Stats. 1933, is not liable for unauthorized acts of commissioner who attempts to sell county owned lands.

November 20, 1936.

CLIVE J. STRANG,
District Attorney,
Grantsburg, Wisconsin.

You state that Burnett county operated under the provisions of sec. 59.95, Stats. 1933, providing for a commission form of county government, before that statute was declared unconstitutional (State ex rel. Adams v. Radcliffe, 216 Wis. 356, later repealed by ch. 214, L. 1935). While so operating, one of the commissioners is reported to have sold certain property which he believed belonged to the county. The purchaser of this property tore down a certain building located thereon. Now the actual owner has filed a claim for $3500 against the county for this act. No action was taken by the county board of commissioners as a body to sell this land, nor does it appear that the commissioner was authorized to do so by the board. It is asked whether the county is liable for this claim.
A county board operating under the commission form of county government has the same powers and duties of a county board operating under ch. 59, Stats., by virtue of sec. 59.95, subsec. (24), Stats. 1933, which provides:

“When the commissioners shall have been elected and shall have qualified and organized as provided in section 59.95, all duties, liabilities, authority, powers and privileges theretofore imposed or conferred by law upon the county board of supervisors shall apply to and shall be imposed and conferred upon the county board provided for in said section 59.95, and any such authority, powers or privileges may be exercised by the county board by a majority vote of the commissioners, and all laws relating to the county board of supervisors in force at the time of the taking effect of said section 59.95 or hereafter enacted, shall apply to and be deemed to relate and refer to the county board of commissioners.”

The powers of the county were exercised by the county board pursuant to the above quoted section. See also sec. 59.02 (1), Stats. Thus, the county board alone may sell land owned by the county.

It does not appear that the county board, as a body, sold the land in question but that the sale, if any, was made by one of the commissioners. If that is the case, the well settled rule that a county officer not authorized to act may not bind the county by his unauthorized transactions, would apply. *Marathon County v. Industrial Commission*, 218 Wis. 275, 281.

Thus the county is not bound by the alleged acts of the commissioner as it does not appear he was ever authorized to make the sale under discussion. The claim may be disallowed by the county board.

JEF
Taxation — Refunds — Surtax — Refund of old-age pension surtax under ch. 505, Laws 1935, may be made only where tax is paid under protest and claim for refund is filed within one year.

November 20, 1936.

TAX COMMISSION.

You inquire whether it is necessary in allowing a refund for old age pension surtax that the tax be paid under protest and the claim for refund be made within one year of the date on which the tax was due.

This question is answered in the affirmative upon the basis of par. (f), subsec. (1), sec. 1, ch. 505, Laws 1935, the old-age pension surtax law which provides:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due and if paid under protest at any time within one year may file a claim for the refund thereof in the manner provided by section 71.17."

The way this statute is worded, payment under protest and filing of the claim within one year are conditions precedent to the allowance of a claim for refund. Otherwise, the words "if paid under protest" and "at any time within one year" would be meaningless, and this would conflict with the well known rule that in construing statutes effect must be given, if possible, to every word, clause and sentence thereof. State v. Columbian National Life Ins. Co., 141 Wis. 557.

You also inquire whether it is necessary that the tax be paid under protest and the audit be made within one year of the date on which the tax was due, where a refund of old age pension surtax is granted upon corrections made by an office or field audit.

This question is likewise answered in the affirmative.

The only provisions for refunds under ch. 505, Laws 1935, which you refer to as the old age pension surtax law, are those contained in par. (f), subsec. (1), sec. 1, above quoted.
It is impossible to incorporate in the statutes by construction or interpretation any other method of review or refund than that provided by the statutes, and if the terms of the statute impose too heavy a burden upon the taxpayer, the remedy lies only with the legislature. *Whitbeck v. Wisconsin Tax Comm.*, 207 Wis. 58.

While it is true that whether paid under protest or not, refunds of normal income taxes may be allowed pursuant to secs. 71.17 and 71.115, Stats., where a claim for same is made within six years after the close of the period covered by the income tax returns, these provisions must be considered to be superseded by ch. 505, Laws 1935, in so far as refunds of old age pension surtaxes are concerned, and to the extent that ch. 505 is inconsistent with secs. 71.17 and 71.115. Although par. (f), subsec. (1), sec. 1, ch. 505, above quoted, mentions the filing of a claim for refund in the manner provided by sec. 71.17, it is to be noted that this provision is preceded by the limitation that the tax must be paid under protest and the claim filed within one year. Hence the subsequent procedure under sec. 71.17 is predicated upon and may be followed only where these precedent conditions have been met.

JEF
Counties — Dance Hall Ordinances — Where dance hall supervisor is hired by tavern keeper who permits dancing but has no license under sec. 351.57, Stats., he lacks police powers given him under sec. 59.08, subsec. (9), which he would have at licensed public dance.

Criminal Law — Gambling — Lotteries — Giving of tickets or numbers with sale of gasoline and subsequent award of gasoline free to holder of lucky ticket is unlawful.

James P. Riley,
District Attorney,
Wausau, Wisconsin.

You have requested our opinion on two questions.
The first question relates to a tavern in a rural community. There is a small room annexed to the tavern where music is played for the entertainment of tavern patrons. Dancing is occasionally permitted, and on Saturday evenings the crowds are larger and more disorderly than on other evenings. The proprietor wishes to engage a dance hall supervisor to keep peace and order, although no fee is charged for dancing and the place is not licensed as a dance hall.

You inquire as to the powers of a dance hall supervisor hired under such circumstances.

It is our opinion that a supervisor hired under these conditions would be entirely lacking in the powers granted to dance supervisors under sec. 59.08, subsec. (9), Stats., which gives such supervisors the powers of deputy sheriffs while engaged in supervising public dances or places of amusement.

Sec. 351.57, subsec. (1), Stats., provides:

“No person shall conduct any dance to which the public is admitted, or conduct, establish or manage any public dance hall or pavilion, amusement park, carnival, street fair, bathing beach or other like place of amusement in any county in which the board of supervisors has adopted an ordinance or resolution or enacted by-laws in accordance with the provisions of subsection (9) of section 59.08 without first securing a license therefor from the county board. No person re-
quired to have such a license shall conduct a dance to which
the public is admitted except in the presence and under the
supervision of a county dance supervisor.”

Secs. 351.57, subsec. (1), and 59.08, subsec. (9) must be
construed together, and it is our opinion that if the pro-
prietor of the place in question desires the protection of
such a supervisor, he should comply with the license provi-
sions of sec. 351.57, subsec. (1), or make arrangements for
the presence of a regular deputy sheriff on occasions when
he feels that the presence of some peace officer is desirable.

Your second question relates to the gambling or lottery
feature of an arrangement whereby the owner of a gasoline
station gives tickets with each one dollar purchase of gaso-
line. Weekly drawings are held and the holder of the lucky
ticket or number receives five gallons of gasoline free.

It is our opinion that this transaction is unlawful. See
V Op. Atty Gen. 380; IX 9; X 770; XI 396, 630 and 737;
XII 21, 135, 455 and 459; XVI 594; XVII 457; XIX 547,
558; XXV 623.
JEF

Criminal Law — Carrying Weapons — Public Officers —
Highway Patrolman — It is very doubtful whether patrol
officer of highway is authorized to carry concealed weapon.
If he deems it necessary to do so it is advisable that he be
appointed deputy sheriff, in which case he will come under
express provision of statute.

November 30, 1936.

Lyall T. Beggs,
District Attorney,
Madison, Wisconsin.

You refer us to sec. 82.07, Stats., which provides the man-
ner in which special highway patrolmen can be appointed.
You inquire whether such patrolmen have authority to
Opinions of the Attorney General 695

carry arms both on duty and off duty and whether the county has the right to furnish them with the necessary arms and ammunition. You state you have in mind the situation where these patrolmen are not appointed as deputy sheriffs but merely are appointed by the highway committee to enforce highway traffic laws.

Sec. 340.69 contains the following:

"Any person who shall go armed with any concealed and dangerous weapon shall be punished by imprisonment in the county jail not more than three hundred sixty-four days or by fine not exceeding five hundred dollars; provided, that the foregoing shall not apply to any policeman or officer authorized to serve process. * * *"

Sec. 82.07 provides:

"The county highway committee shall have authority to appoint special highway patrolmen for the enforcement of laws relating to the public highway or their use or the maintenance of order upon or near the public highways."

It further provides:

"* * * Such special highway patrolmen may arrest at any place in the state, with or without warrant, any persons who, in their presence, shall violate any law relating to the public highways or their use or the maintenance of order upon or near the public highways. Any such special highway patrolmen, sheriff, constable or other police officer may make such arrest without warrant on the request of any other such special highway patrolmen, sheriff, constable or other police officer in whose presence any such offense may have been committed. * * *"

In 68 C. J. 36, we find under section 30 (2):

"In accordance with the general rule, officers and persons aiding them, unless excepted by the statute, are subject like other persons to statutes prohibiting the carrying or possession of weapons. The exception must be found in the statute itself, and cannot be imported from the common law in derogation of the statute. Thus, in the absence of an exception in the statute, a prohibition against the carrying
of concealed weapons applies to peace officers as well as to persons summoned to their aid."

You will note that under sec. 340.69, Stats., prohibiting the carrying of concealed weapons, an officer authorized to serve process is exempted from its provision. The question arises whether a patrolman under the powers given him by statute is authorized to serve process within contemplation of this statute. There has been no direct ruling on this question by our court so far as we have been able to find. It has been held that an officer who carries a concealed weapon in a place beyond his jurisdiction is not exempt from the penalty of the statute. Corley v. State, 33 S. W. 975. Here the patrolman has not been given the general power to serve process as the sheriff has and he may make an arrest under the statute without process only when the offense is committed in his presence or when he has information from another officer in whose presence the offense was committed. So that the process which he is authorized to serve is very limited and does not give him any power which he does not possess without the powers given him under this statute. Here he can only serve warrants for an offense committed in his presence.

I therefore doubt whether a patrol officer has the power to serve process as that term is used in the above statute exempting such officer from the statute prohibiting the carrying of concealed weapons. If a patrol officer deems it necessary to carry concealed weapons while performing the duties of his office I would advise, as a safety measure, to have him appointed a deputy sheriff, in which case he will have the power to carry concealed weapons and there will be no question that he is within the law.

JEF
Criminal Law — Gambling — Lotteries — Plan entitled "suit club," whereby skill rather than chance determines who is entitled to secure suit of clothes for less than twenty-five dollars violates sec. 348.085, Stats.

Helmar A. Lewis,
District Attorney,
Boscobel, Wisconsin.

You ask whether the following plan would be a violation of the Wisconsin statutes. One hundred persons joined a so-called "suit club," each person agreeing to pay one dollar a week for twenty-five weeks until a twenty-five dollar suit is paid for. On payment of this one dollar each member is given a card on which are listed various reasons why the suits being sold are so popular. Each contestant lists them in the order of their importance. The cards are then compared with a master copy and the person having the card most nearly corresponding to the master card is entitled to a suit for the money he has paid in, regardless of amount. In this manner certain individuals will receive a suit of clothes for less than twenty-five dollars, the regular price of such suits, since awards are made weekly beginning with the first weekly payment of one dollar.

In XXV Op. Atty. Gen. 623 this department held that a "suit club" similar to that submitted was a lottery within the meaning of sec. 348.01, Stats. However, under that plan each person participating received a number from one to one hundred. Each week one of these numbers was drawn by lot and the holder thereof was entitled to receive a suit without any additional payment. As the feature whereby numbers are drawn has been eliminated, it is claimed that XXV Op. Atty. Gen. 623 would not be applicable.

Assuming this plan can be said to be a game of skill rather than one of chance, it would still constitute a violation of the Wisconsin gambling statute, in view of sec. 348.085, Stats., which provides:

“All devices or things whatever, whereby any person shall or may be induced to believe that he will or may receive any
money, thing or consideration whatever as the result, in
whole or part, of any contest of skill, speed or power of en-
durance of man or beast, are hereby declared to be gambling
devices and to be public nuisances. The so-called ‘contribution
and refund’ system and any and all variations thereof,
whereby any person is or may be induced to believe that
upon his paying to, or depositing with, any other person,
any money, token or thing of value, he may as the result in
whole or in part of any contest of skill, speed or power of
endurance of man or beast receive as a refund or otherwise
any money, token or think of value, is hereby declared to be
gambling and to be unlawful and to constitute a public
nuisance.”

It seems clear that the “suit club” violates the above-quoted
section, as each participant is induced to believe that he will
receive something of value (a suit) as a result of his skill
in selecting the proper combination. A similar ruling was
given in XXII Op. Atty. Gen. 136, where this department
held that a pin ball machine would be a gambling device
even though it was a game of skill. As the plan submitted
violates sec. 348.085, Stats., its operation is illegal. See

JEF

Public Officers — Alderman — County Park Commission
— Alderman may be member of county park commission.

November 30, 1936.

WALTER B. MURAT,

District Attorney,

Stevens Point, Wisconsin.

You inquire whether an alderman may also be a member
of the county park commission.

Your question is answered in the affirmative, as we see no
incompatibility of any consequence in these offices.

In the case of State v. Jones, 130 Wis. 572, 575, 576, the
court said:
"* * * 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. * * *."

Here the position of alderman is neither superior nor inferior to that of park commissioner. Rather each is independent of the other.

The duties of the park commission are to buy, hold, lease and care for property acquired for park purposes. True, there may be times when the city and the county park commission both desire the same tract of land for the same or different purposes. Therein a conflict of duty might arise, but there is no more conflict than would be the case where the county board and city council both desire the same tracts, although in this latter situation, it is clear that an alderman may also be a member of the county board. Sec. 59.03, subsec. (3), Stats.

Nor, for the same or similar reason, does the holding of these two offices by one person have the effect of diminishing the number of offices by one, as was true in the Jones case, supra, where the court held that the office of county judge and justice of the peace were incompatible in that preliminary examinations in criminal cases might be held before a justice of the peace or county judge and that, consequently (p. 575),

"* * * The consolidation in one person of the offices of county judge and justice of the peace diminishes the number of examining magistrates by one."

For citations on compatibility of offices generally, we refer you to XXIV Op. Atty. Gen. 344.

Therefore, it is our conclusion that an alderman may be a member of a county park commission, created under sec. 27.02, Stats.

JEF
Public Officers — Town Supervisor — Superintendent of WPA Project — Town supervisor is not entitled to compensation for promoting WPA project in absence of any duty to perform such service and may not act as "sponsor" or superintendent of such project where such position is created by town board.

WALTER B. MURAT,

District Attorney,

Stevens Point, Wisconsin.

You inquire whether a town chairman or other town supervisor is entitled to compensation for services in promoting a W. P. A. project.

The answer is, No.

In XXIII Op. Atty. Gen. 770, we ruled that members of town boards were not entitled to compensation for services in connection with promoting C. W. A. projects, and we see no reason for reaching a different result in the case of W. P. A. projects, in the absence of any showing that it is the duty of town supervisors to promote such projects.

You state further that before such a project is undertaken the town board appoints a "sponsor" to oversee the job, and you inquire whether a town supervisor is eligible for this position.

The answer is, No.

Sec. 66.11, subsec. (2), Stats., to which you call our attention, apparently governs this matter. It 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, provided that the governing body may be represented on city or village boards and commissions where no additional remuneration is paid such representatives."

See also XXIV Op. Atty. Gen. 422, 698, and 762 for general discussions of the problem.

JEF

November 30, 1936.
Public Lands — Taxation — Privately owned cottages located on lands belonging to county may be assessed and taxed as personal property.

November 30, 1936.

WALTER B. MURAT,
District Attorney,
Stevens Point, Wisconsin.

You state that Portage county holds and has held for a number of years past, the title in fee simple to lands abutting on Lake Emily in Portage county. The county has permitted cottages to be built upon this land in accordance with certain rules and regulations established by the county through the Portage county park commission.

You further state that the county receives a yearly rental fee for the use of the lands upon which such cottages are built. The county makes no claim of ownership to the cottages upon said lands, the same being deemed to be personal property, and owned by the persons to whom the land is rented.

You further state that it is the opinion of the Portage county park commission that such county lands, as well as the cottages on said lands, are tax exempt. You inquire if the opinion of the park commission is correct in this situation.

This question must be answered in the negative. The land, of course, is real property and, belonging to the county, it cannot be taxed but the buildings on the real estate are personal property and are subject to taxation. See XXIV Op. Atty. Gen. 401.

JEF
Bridges and Highways — County may not take over or maintain town roads without making them part of county trunk system of highways.

November 30, 1936.

WILLIAM H. STEVENSON,

District Attorney,

La Crosse, Wisconsin.

You have requested our opinion on the legality of the following resolution introduced at a meeting of the county board in your county:

“Be it resolved: That all petitions that come before the board to add town roads to the county trunk system, if accepted, be not accepted as county trunk highways, but be maintained by the county highway department as town roads — thereby receiving fifty dollars per mile from the state, which we would not receive if the road became added as county trunk mileage.”

It is our opinion that such a resolution cannot legally bring about the result apparently contemplated.

There is no such thing as a highway being a town highway for the purposes of receiving state aid of fifty dollars per mile, and at the same time being a county highway for other purposes. It is either one or the other, and cannot be both.

Perhaps your request can best be answered by stating that the county board has only such powers as the statutes provide. XXIV Op. Atty. Gen. 424 and 429; XXV 92, 316, 379 and 532. Nowhere do we find authority in the statutes, either express or by implication, whereby the county may take over or maintain town roads but at the same time refrain from adding such roads to the county trunk system of highways.

However, nothing stated herein should be construed as tending to limit the power of the county board under sec. 83.03, subsec. (6), Stats., to “construct or improve or aid in constructing or improving any road or bridge in the county.”
It is one thing to "construct" or "improve" and quite a different thing to "maintain." See, for instance, XXII Op. Atty. Gen. 22, where it was ruled that snow removal constituted "maintenance" as distinguished from "construction" or "improvement" within the purview of sec. 83.03, subsec. (6). In so far as the resolution in question calls for "maintenance" by the county of roads not constituting part of the county trunk system of highways, it is clearly ineffective.

JEF

Automobiles — Law of Road — Tractors — Words and Phrases — Place of Employment — Farmer who has employees on his farm has place of employment as defined by sec. 101.01, subsec. (1), Stats., and industrial commission has power to require drive wheels of tractor used thereon to be provided with suitable fenders.

November 30, 1936.

VOYTA WRABETZ,

Industrial Commission.

In your communication of October 28 you direct our attention to sec. 85.61 of the Wisconsin traffic code which provides:

"No vehicle of the tractor type shall be operated unless the driving wheels are protected by suitable fenders."

Sec. 85.10, Stats., defines tractors as follows:

"(6) TRUCK TRACTOR. Every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn.

"(7) ROAD TRACTOR. Every motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon either independently or any part of the weight of the vehicle or load so drawn."
“(8) Farm tractor. Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines and other implements of husbandry.”

Subsecs. (1) and (2), sec. 101.01, Stats., define “places of employment” and “employment” and the section defines the power of the commission with respect to places of employment.

Sec. 101.01, subsecs. (1), (2), (3) and (4), Stats., provide:

“The following terms as used in sections 101.01 to 101.29 of the statutes, shall be construed as follows:

“(1) The phrase ‘place of employment’ shall mean and include every place, whether indoors or out or underground and the premises appurtenant thereto where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade or business, is carried on, and where any person is directly or indirectly, employed by another for direct or indirect gain or profit, but shall not include any place where persons are employed in private domestic service or agricultural pursuits which do not involve the use of mechanical power.

“(2) The term ‘employment’ shall mean and include any trade, occupation or process of manufacture, or any method of carrying on such trade, occupation, or process of manufacture in which any person may be engaged, except in such private domestic service or agricultural pursuits as do not involve the use of mechanical power.

“(3) The term ‘employer’ shall mean and include every person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations as well as any agent, representative or other person having control or custody of any employment, place of employment or of any employe.

“(4) The term ‘employe’ shall mean and include every person who may be required or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, or to go or work or be at any time in any place of employment.”

Sec. 101.09 reads thus:

“The industrial commission is vested with the power and jurisdiction to have such supervision of every employment,
place of employment and public building in this state as may be necessary adequately to enforce and administer all laws and all lawful orders requiring such employment, place of employment or public building to be safe, and requiring the protection of the life, health, safety and welfare of every employe in such employment or place of employment and every frequenter of such place of employment, and the safety of the public or tenants in any such public building; provided, however, that the provisions of this section shall not apply to rural school buildings."

You inquire:

"2. Has the industrial commission any power or authority to require the drive wheels of farm tractors to be protected with suitable fenders:
   "(a) If the farm has no employees?
   "(b) If the tractor is used exclusively for farm purposes?"

Your question under subdivision (a) is answered in the negative. You will note that the phrase "place of employment" does not include places where persons are employed in "agricultural pursuits which do not involve the use of mechanical power." It does not require any argument or citation of authority to hold that the operation of a tractor involves the use of mechanical power. But in order to be a place of employment, it requires a place where any person is directly or indirectly employed by another for direct or indirect gain or profit. If the farmer has no employee the above definition necessarily requires the answer to your question to be in the negative. If, however, the agricultural pursuit involves the use of mechanical power and there are employees, then under the above definition, your question must be answered in the affirmative. This is true even if the tractor is used exclusively for farm purposes as the condition stated in subdivision (b) of your question, for even the tractors involve the use of mechanical power. But if the farmer has no employees it is not a place of employment and the same answer must be given as is given to the answer in subdivision (a). It all depends upon whether the farmer has employees on his farm.
"2. Has the commission any power or authority to prevent shipment of such tractors into the state which are not so protected?"

This question must be answered "no" as the order of the commission can affect only transactions in the state. The commissioners have been given no power to interfere with the shipments from other states.

JEF
Public Health — Barbers — Sec. 158.12, subsec. (2), par. (a), Stats., does not preclude barber from obtaining shop manager’s license where he has been temporarily incapacitated to barber during year preceding application for such license.

December 3, 1936.

Board of Health.

You call our attention to sec. 158.12, subsec. (2), par. (a), Stats., which provides that a barber shop manager’s license may be granted only to one

“Who holds an unexpired master barber’s license, and who has been actively engaged in barbering for a period of one year in this state immediately preceding the date of application for a shop manager’s license.”

You inquire whether, in administering the provisions of this statute, the holder of an unexpired barber’s license who has been actively engaged in barbering for a period of one year preceding application for a shop manager’s license is eligible for such license if during the year in question he has been incapacitated for a time on account of accident or illness.

We are not advised as to how long such incapacity continued in the case which you have in mind, and we would say that temporary incapacity of short duration would not preclude one from being considered as “actively engaged” in a particular line of work.

Most people are subject to a few days’ illness during the course of a year, and this fact is commonly recognized in public and private employment by sick leave arrangements. To state extreme cases, it could not be said on the one hand that a barber who is sick but one day during the year is thereby excluded from the classification “who has been actively engaged in barbering for a period of one year”; on the other hand, he would hardly come within such classification if he was able to work but one day out of the year. Somewhere between these extremes the dividing line may be drawn. It seems to us to be pretty much a question of de-
gree, and we do not wish to be understood as prescribing any rule which may be applied with mathematical exactitude.

A reasonable discretion should be exercised by your department in such matters, although once it is apparent that a person has not been actively engaged in barbering for the prescribed time he is ineligible for a shop license, as was pointed out in XXV Op. Atty. Gen. 367, since the statute clearly permits of no exceptions.

Someone must determine upon a given set of facts in each case whether the statutory requirements have been substantially met, and that duty devolves upon your department under the statute.

JEF

Public Health — Pharmacy — One convicted of felony may be allowed to take pharmacist’s examination under ch. 151, Stats., if qualified to do so.

December 4, 1936.

BOARD OF PHARMACY.

Attention S. H. Dretzka.

You ask whether a prisoner may be given an examination and granted a license by your board, assuming he has met all board requirements and could be examined at the prison. In other words, you wish to know just what is the status of a person who has been convicted of a felony in Wisconsin, as far as being licensed to practice pharmacy is concerned.

Generally, a person convicted of a felony loses his civil rights by virtue of art. III, sec. 2, Wis. Const., which 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.”
However, these civil rights include only the right to vote and hold office. It would not make a person so convicted civilly dead as regards the making of contracts, etc. *State v. Duket*, 90 Wis. 272, 278; 18 L. R. A. 82; 52 L. R. A. (n. s.) 320.

In XIV Op. Atty. Gen. 192 this department held that one convicted of a felony might still enter into a copartnership agreement and sue for the value of his services. Again, in XXII Op. Atty. Gen. 821 it was held that a prisoner may still be granted a hunting license, as he was not civilly dead by virtue of his conviction for a felony. The rule of these opinions and the cases cited above apparently apply to the present instance. As the prisoner in question is not civilly dead, he may be permitted to take the examination and granted a license by your board if otherwise qualified.

JEF

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*Dairy and Food — Soda Water Beverages* — Distributor of soda water to retailers is subject to provisions of sec. 97.09, Stats., regardless of fact that he is engaged in interstate commerce. Out of state manufacturer is subject to inspection and registration provisions of sec. 97.09, subsec. (9), but not to license provisions of sec. 97.09, subsec. (1).

December 4, 1936.

**DEPARTMENT OF AGRICULTURE AND MARKETS.**

You state that an Illinois distributor of soda water beverages to retailers in Wisconsin for purposes of resale claims to be exempt from the license fee requirements of sec. 97.09, Wis. Stats., regulating the soda water business. The distributor claims exemption on the ground that he is engaged in interstate commerce.

It is our opinion that the provisions of sec. 97.09, are applicable, regardless of the fact that such distributor may be engaged in interstate commerce, although we believe that
the legislature intended out of state manufacturers to be subject to the inspection provisions of sec. 97.09 (9) rather than the license provisions of sec. 97.09 (1).

The legislature, in order to insure to the public pure and unadulterated soda water, enacted sec. 97.09, Stats., which authorizes your department to make rules and regulations pertaining to the proper handling and storage of beverages, construction and sanitary conditions of buildings, and concerning the proper cleaning and sterilization of machines, bottles and containers used in the preparation of soda water. Power to prescribe standards of purity for all ingredients used in the manufacture of such beverages is also granted. Sec. 97.09, subsec. (4), contemplates an inspection of the place to be licensed prior to the granting of the license prescribed in subsec. (1), and subsec. (1) also contemplates inspection to determine whether there has been compliance with the rules and regulations. However, sec. 97.09 (9) provides:

"No soft drink or other nonalcoholic beverage, except apple cider, not manufactured in this state shall be sold or offered for sale within this state unless the same is first inspected and registered with the department. Such inspection of one sample of each such soft drink or nonalcoholic beverage and registration shall be made annually, and an inspection fee of twenty-five dollars for each such soft drink or other nonalcoholic beverage having a distinguishing flavor or name shall be paid by the manufacturer to the department for each inspection."

If the legislature had intended out of state manufacturers to be subject to the license provisions of subsec. (1) it would hardly have enacted subsec. (9) above quoted, which specifically applies to soft drinks manufactured outside this state. If such manufacturer were also subject to the provisions of subsec. (1) unfair discrimination would result against him, since he would be subject to burdens not imposed upon the domestic manufacturer. Such construction of the statutes would render it unconstitutional under the Fourteenth Amendment of the United States constitution.

Furthermore as is above pointed out the statute contemplates inspection prior to licensing. If the out of state man-
Opinions of the Attorney General

manufacturer were subject to both the license provisions of subsec. (1) and the inspection provisions of subsec. (9) there would be unnecessary duplication of inspections, which the legislature could hardly have intended.

Sec. 97.09 was enacted under the state's police power, and apparently it is not contended that the enactment constitutes an improper exercise of such power, except in so far as it interferes with interstate commerce.

It has frequently been held that a state, in the exercise of a legitimate police power, may incidentally affect interstate commerce when the object of the state regulation is not to that end but is a legitimate attempt to protect the people of the state or the welfare of intrastate business, and where the exercise of such police power is not inconsistent with, or an obstruction of, federal regulations. Smith v. Alabama, 124 U. S. 465; Sligh v. Kirkwood, 237 U. S. 52; Hall v. Geiger-Jones Co., 242 U. S. 539.

It is to be noted further that art. I, sec. 10 of the United State constitution expressly recognizes the validity of state inspection laws and allows the amounts necessary for their execution, even though interstate commerce may be thereby affected. Patapsco Guano Co. v. North Carolina, 171 U. S. 345.

JEF
Taxation — County Tax Rate — County tax maximum of one per cent should be computed on valuation for current year. Loans in form of bonds or notes either outstanding or to be issued are not included in this maximum under sec. 70.62, subsec. (2), Stats.

December 4, 1936.

JOSPEH E. HOUSNER,
District Attorney,
Oconto, Wisconsin.

You inquire first whether the assessed value approved by the tax commission for 1936, and accepted by the county board at its September equalization meeting, is correctly used in determining the one per cent tax limitation for the taxes levied by the county board in November for the 1937 purposes.

This question is answered by an opinion in XXV Op. Atty. Gen. 179, wherein it was ruled that the county tax maximum of one per cent should be computed on the valuation for the current year and not on the valuation for the preceding year, as provided by sec. 70.62, subsec. (2), of the 1935 statutes.

You inquire, secondly, whether a resolution to make a $25,000.00 loan to pay off existing indebtedness is properly included in the one per centum limitation, the resolution having been made at the November meeting of the county board prior to action taken on the tax levy.

This question is answered in the negative and is covered by the following language from sec. 70.62, subsec. (2):

"* * * provided that such limitation shall not apply to any taxes levied to pay the principal and interest upon any valid bonds or notes of the county outstanding or hereafter issued; * * *."

We assume that the $25,000.00 loan will be represented by bonds or notes issued by the county, and such items are expressly excluded in computing the one per centum maximum levy by the statutory language above quoted. Consequently, you need not count this $25,000.00 in determining the max-
imum levy. This conclusion is supported also by the provisions of sec. 67.035, Stats., which reads:

“All taxes levied or to be levied by any municipality proceeding under this chapter for the purpose of paying principal and interest on valid bonds or notes now or hereafter outstanding shall be and the same are hereby declared to be without limitation notwithstanding any legislative limitation now or heretofore existing, and all such limitations are hereby repealed in so far as they apply to taxes levied or to be levied to pay principal and interest upon such bonds or notes.”

JEF

Counties — County Board — School Districts — School Taxes — Taxation — Exemption — Under sec. 59.07, subsec. (13), Stats., county board may appropriate to school district share of school taxes which would have been paid upon farm owned by university of Wisconsin if such farm were privately owned and not tax exempt under sec. 70.11, subsec. (1), Stats.

December 4, 1936.

VICTOR O. TRONSDAL,
District Attorney,
Eau Claire, Wisconsin.

You inquire whether the county board has a right to pay a tax to a school district on a farm that belongs to the university of Wisconsin, or whether the university must pay the tax.

You are advised that such lands are exempt from taxation, but that the county board is empowered at any legal meeting to:

“Appropriate to any school district in which a county farm or a state charitable or penal institution or any state-
owned lands which are used for agricultural purposes or any part thereof is situated, an amount of money for school purposes equal to the amount that would be paid as school taxes upon such farm land or part thereof situated within such district if such land were privately owned. The valuation of such farm land shall be determined by the county board of equalization." Sec. 59.07, subsec. (13), Stats.

It is to be noted that the language of this statute is permissive rather than mandatory, and that consequently it is discretionary with the county board as to whether or not it wishes to exercise this power conferred upon it by sec. 59.07, (13).

Sec. 70.11, subsec. (1), exempts state-owned lands from taxation, and this, of course, covers lands which the state owns through the regents of the university of Wisconsin. See Aberg v. Moe, 198 Wis. 349, holding, among other things, that the property of the regents of the university is exempt from taxation under sec. 70.11, Stats. Note, also, Sullivan v. Board of Regents of Normal Schools, 209 Wis. 242, where the court held that the board of regents of normal schools was merely an arm or agency of the state. The same reasoning would apply to the regents of the university of Wisconsin.

JEF

Criminal Law — Indigent, Insane, etc. — Commitment of accused person under sec. 357.12, subsec. (3), Stats., may be made to Mendota or Winnebago state hospital.

Confinement limitation prescribed by sec. 51.04, Stats., for alleged insane does not apply to commitments under sec. 357.12 (3).

December 7, 1936.

Board of Control.

You ask whether the Mendota and Winnebago state hospitals have authority and are compelled to receive therein cases committed under sec. 357.12, subsec. (3), Stats., or
whether commitments under said section must be made to the central state hospital for the insane. You state that sec. 51.17 (1), Stats., designating the patients who shall be received in the Mendota and Winnebago hospitals, makes no reference to persons committed under sec. 357.12 (3). You further state that the purpose of said hospitals is to care for the noncriminal insane, as distinguished from the central state hospital for the insane, the purpose of which is to care for the criminal insane.

Secs. 51.17 (1) and 51.21 (2), Stats., provide:

“(1) Patients shall be admitted into said hospitals [Mendota and Winnebago hospitals] from the several counties as provided in sections 51.05, 51.08, 51.10 and 51.15.”

“(2) The said institution [central state hospital for the insane] shall be used for the custody, care, and special treatment of insane persons committed thereto pursuant to sections 51.22, 357.11 and 357.13.”

For the present inquiry little weight can be given to the fact that sec. 51.17, (1) does not refer to sec. 357.12 (3) because neither is such reference made in sec. 51.21, (2), which designates the purpose of the central state hospital. It is apparent, however, that either or both types of hospital may be designated for commitments under sec. 357.12, (3). This subsection provides:

“Whenever the existence of mental disease on the part of the accused, at the time of the trial, is suggested or becomes the subject of inquiry, the presiding judge of the court before which the accused is to be tried or is being tried may, after reasonable notice and opportunity for hearing, commit the accused to a state or county hospital or asylum for the insane to be detained there for a reasonable time, to be fixed by the court, for the purpose of observation, but the court may proceed under section 357.13. In case of commitment to a hospital the court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for the purpose of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of the said chief physi-
Secs. 357.11 and 357.13 specifically provide that certain persons shall be committed to the central state hospital. Such sections, however, relate to accused persons who have been determined to be insane. Sec. 357.12 (3) makes provision merely for the observation of accused persons and specifically provides that the accused may be committed to "a state or county hospital or asylum for the insane." We find no statutory provision which is inconsistent with this specific provision, and are of the opinion that persons may be committed under sec. 357.12 (3) to the Mendota or Winnebago hospitals, as well as to the central state hospital.

You further ask whether the thirty day confinement limitation provided by sec. 51.04 applies to commitments under sec. 357.12 (3).

Sec. 51.04 (3), Stats., provides:

"Such persons shall not be confined in any place established for the confinement of criminals or in any county home, and wherever possible shall be confined in a state or county hospital or asylum for the care of the insane. The superintendents of any state or county hospital or asylum for the insane, when requested by the judge, shall receive and care for any such person in such hospital or asylum. The period of such confinement shall not exceed thirty days for proper medical observations and ten days in cases where confinement is essential to the safety of such persons, or of any other person or to the maintenance of public peace and safety."

This subsection relates to the detention of noncriminal insane. The thirty-day confinement limitation is restricted by the wording of the statute to confinements under sec. 51.04. Sec. 357.12 (3), on the other hand, specifically provides that commitments shall be "for a reasonable time, to be fixed by the court." Clearly the limitations of sec. 51.04 do not apply to commitments under sec. 357.12 (3), Stats.

JEF
Criminal Law — Indeterminate Sentences — Sentence to state prison under sec. 343.18, Stats., must be construed as indeterminate sentence from one to five years in view of provision of sec. 359.07, which provides that minimum shall not be less than one year.

December 7, 1936.

Board of Control.

You have submitted to us a copy of a certificate of conviction and sentence imposed upon one A to the Wisconsin state prison, and it will be noted that this sentence covers a maximum term only and no minimum term is made. It will be noted further that sec. 343.18 of the Wisconsin statutes, under which this man was sentenced, does not provide a minimum sentence. You state that it is necessary, in order to determine the parole eligibility of this man, to have a minimum term of record, and you ask what minimum term can be cited in this instance.

Sec. 359.07, Stats., provides:

"The sentence of any convict found guilty of treason, murder in the first degree as defined by law, rape, kidnapping, or of any crime the minimum penalty for which is fixed by statute at twenty years or more, to imprisonment in the state prison, shall be for a certain term of time. In all other cases the sentence shall be for a term not less than one year and shall be for a general or indeterminate term not less than the minimum nor more than the maximum term of imprisonment prescribed by law for the offense. * * *"

The person in question was sentenced under sec. 343.18, Stats., and the wording of the material part of the judgment is as follows:

"* * * you [A * * *] are sentenced to the state's prison at Waupun at hard labor for a general or indeterminate term of not more than five years. * * *"

Sec. 343.18 does not provide a minimum, but it reads:

"* * * upon conviction thereof, be punished by imprisonment in the state prison not more than five years * * *"
You will note that the crime defined in sec. 343.18 is one which requires a general or indeterminate sentence, and you will also note that the court has definitely stated that the sentence was for a general or indeterminate term of not more than five years. In view of the fact that under sec. 359.07, "the sentence shall be for a term not less than one year and shall be for a general or indeterminate term not less than the minimum nor more than the maximum term of imprisonment prescribed by law for the offense," we are constrained to hold that the sentence must be construed as an indeterminate sentence of a term from one year, the minimum, to five years, the maximum, and you can determine the parole eligibility of the prisoner accordingly. See XIV Op. Atty. Gen. 384.

JEF

Indigent, Insane, etc. — Poor Relief — Receipt of books worth approximately five dollars from municipality by children of man who is above level of subsistence does not constitute "support as a pauper" within meaning of sec. 49.02, subsec. (4), Stats., so as to prevent gaining of legal settlement.

December 7, 1936.

JOHN R. CASHMAN,
District Attorney,
Manitowoc, Wisconsin.

You submit the following statement of facts:
A, having a legal settlement in the town of K, moved to the town of F, where he resided and was self-supporting for a period of more than one year. However before this period of one year had elapsed the town of F purchased school books for A's children in the amount of five dollars and seventy-two cents. It is then asked whether receipt of these
books would constitute poor relief so as to prevent the gaining of a legal settlement in the town of F.

Sec. 49.02, subsec. (4), Stats., provides that a person who has resided for a period of one year in a particular town, city or village gains a legal settlement therein, unless such person is supported as a pauper during that period. The meaning of the words "supported as a pauper" were considered by our court in *Town of Rolling v. Antigo*, 211 Wis. 220. The court said, p. 223:

"It requires no extended exposition to show that the same amount of relief might have an entirely different legal consequence depending upon the status of the person to whom it was furnished. It is not difficult to imagine that a very wealthy man, suffering from amnesia or some similar ailment, might be injured on the streets of a strange city and be accorded relief from the public treasury during the period of his disability. No one would say that such a person was a pauper merely because relief had been extended. On the other hand, there are in every community persons who exemplify the biblical adage, 'For ye have the poor with you always,' who are now above and now below the level of subsistence, that is, their status. They are never perhaps wholly dependent and never wholly self-supporting. If in the natural course of events, not as a result of accident or some unusual circumstance, such a person, being normally unable to maintain himself, is supported by the public, manifestly that is something of an entirely different character than where a self-supporting citizen who has sustained an injury or suffered an attack of typhoid or for some other reason for the time being requires aid and receives a like amount of aid. In cases such as the case at bar, therefore, the inquiry should be directed to the status of the person aided."

By this decision it is our understanding that the determining factor in deciding whether a person is a pauper is the economic status in society of such person. It cannot be said that a person is supported as a pauper by merely receiving five dollars and seventy-two cents for books for his children when such person otherwise is above the level of subsistence. In the present case A apparently was above the level of subsistence and therefore would be in the same position as a self-supporting citizen who for some reason needs temporary aid. The court in the case of *Town of Roll-
ing v. Antigo, supra, indicated that under such circumstances a person could not be said to be supported as a pauper by reason of receiving temporary aid. The reasoning in that case is applicable here and therefore it is the opinion of this office that A was self-supporting for a period of one year so as to gain a legal settlement in the town of F. Thus the town of F, rather than the town of K, is now liable for A's support.

JEF

Bridges and Highways — Town is not required to build necessary bridges or culverts along highway on right-of-way to enable abutting owners to gain access on them to center of highway, except one such bridge or culvert as provided in sec. 81.34, Stats.

December 10, 1936.

JAMES P. RILEY,
District Attorney,
Wausau, Wisconsin.

You present the following statement of facts: A prospective state highway maintained by two towns runs between the counties of Taylor and Marathon. The two towns alternate in maintaining this road, one town maintains one mile and the other town maintains the succeeding mile. Recently this roadway was graded and as a result of such grading deep ditches were left on each side of the road. These ditches are so deep that it is necessary to construct culverts so that the farmers along this road may reach the highway. It is asked: Who must install these culverts?

In an official opinion by this department in XVI Op. Atty. Gen. 678 it was held:

"County is not liable for consequential injury and damage to abutting property resulting from lawful grading, ditching and other improvements of highways made by county;
property owner must provide his own means of access to improved highway and cannot require construction of culverts and driveways for that purpose at public expense."

This is the law when the county builds the highway. The same rule applies where the town builds the highway. In neither case is the town or county required to build culverts or bridges connecting abutting farms with the highway. The rule is laid down in said opinion as follows, p. 679:

"It is a settled rule that where a change of grade or other improvement of highways is made by authority of law and with due care, there is no liability for consequential injury to abutting property unless such liability is expressly created by the statute or the constitution. There is no such provision in the constitution and no such statute in Wisconsin. * * *"

See cases cited in said opinion.

It was also held in said opinion that sec. 80.47, Stats., does not create such a liability. Shortly after the enactment of sec. 80.47, Stats., and in January 1891, the supreme court, in the case of Smith v. Eau Claire, 78 Wis. 457, 462, specifically held that it did not apply to the lawful change of grade of a highway, and that its application was limited to injury or damage caused by the closing up, use or obstruction of a highway. Such holding has not since been modified, but was followed in Colclough v. Milwaukee, 92 Wis. 182, and Walsh v. Milwaukee, 95 Wis. 16. See XVI Op. Atty. Gen. 678, 640; X Op. Atty. Gen. 590.

The rule as laid down above is, however, changed by the provision of sec. 81.34, Wis. Stats. Under said statute the rule was changed so as to require construction of only one grade or culvert which provides suitable ingress and egress to abutting premises. See XVIII Op. Atty. Gen. 507. See also sec. 80.47, Stats.

You are therefore advised that neither town is required to build the culverts which afford the abutting owner access across a ditch in the highway for the purpose of use of the driveway in the road, except one such driveway as provided in sec. 81.34, Stats.

JEF
Taxation — Exemption — Northern Wisconsin District Fair grounds under facts stated are exempt from taxation.

December 12, 1936.

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

You state that the northern Wisconsin fair grounds located at the city of Chippewa Falls are owned by a private corporation but were on November 1, 1934, sold to the Northern Wisconsin Fair Grounds, Inc., on land contract, for $15,000.00; that there has been paid to date the sum of $4,500.00 thereon and that this corporation is obligated to pay on November 1 of each year at least $1,500.00, etc., and that the purchasing corporation is using the same as a fair grounds.

You further state that the Northern Wisconsin Fair Grounds, Inc., claimed that said grounds were exempt from taxation and, in accordance with said claim, the city assessor of the city of Chippewa Falls did not place the fair grounds on the tax roll for the year 1935 but treated it as property exempt from taxation.

Sec. 70.11, Stats., contains the following provision:

"The property in this section described is exempt from taxation, to wit:
"* * *
"(5) Property owned and used exclusively by any state or county agricultural society, or by any corporation or association formed under the laws of this state for the encouragement of industry by agricultural and industrial fairs and exhibitions, necessary for fairgrounds, or for exhibition and sale of agricultural and dairy stock, products and property, while used exclusively for that purpose, not exceeding eighty acres; provided, that such corporations or associations may permit such fairgrounds or other property to be used for celebrations or as places of amusement."

The statute containing exemptions from taxation should be strictly construed and we believe that under the facts stated by you the decision of the city assessor not to place this property on the tax roll for taxation is not erroneous
for the reason that the title to the property or the ownership of it is, in view of the decision of our court in *Ritchie v. Green Bay*, 215 Wis. 433, in the Northern Wisconsin Fairgrounds, Inc. On page 437 our court said:

"While the matter is not free from difficulty, it is our conclusion that the vendee in possession under a land contract that obligates it to pay the purchase-money is an owner within the meaning of the exemption statute. Such a contract clearly contemplates that the vendee shall eventually acquire the legal title, and gives it the right by continuing its payments ultimately to demand such title from the vendor. The retention of the title by the vendor is merely a security device. The vendee assumes all of the burdens of ownership, including the duty, as between it and the vendor, of paying taxes. While statutes exempting property from taxation are to be strictly construed, 'strict construction does not mean that we are not to search for and ascertain, if possible, the true meaning of the language used in the statute.' *St. John's Military Academy v. Edwards*, 143 Wis. 551, 128 N. W. 113."

We believe that the above decision necessitates a ruling to the effect that this property is free from taxation.

JEF

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*Criminal Law — Gambling — Vending Machines* — Machine vending peanuts, candy or gum if not gambling device may be legally used.

December 15, 1936.

JOHN P. McEVOY,

*District Attorney*,

Kenosha, Wisconsin.

You state that a business firm marketing peanuts, candy and gum through vending machines handles its business in the following manner:
It sells a machine or merchandiser for a certain sum and then makes a contract with the purchaser to lease or operate the machine for a period of years, the lease providing that the company will place the merchandiser in a good location and will keep the machine filled with peanuts, candy, etc., and keep the machine in order and will collect the money deposited in the machine for the purchase of the peanuts, candy, etc. and periodically will remit to the owner a certain amount of the gross money taken in.

This in our opinion violates no law of the state of Wisconsin unless, of course, it is a gambling device within the statute discussed below. The sale of the machine is not, in our opinion, the sale of a security but the sale of merchandise and does not come within the purview of the law regulating the sale of securities. The subsequent contract of lease by the owner of the vending machine does not change the nature of the transaction.

There is no statement in your inquiry as to how this machine works. In so far as the machine is a mere vending device, it is clearly legal. Nelson v. State, 37 Okl. (Cr.) 90, 256 P. 939. The vending of merchandise by a coin machine is no more detrimental to the good order of society than is the vending of such merchandise by a salesman. However, we are not able to tell from your description whether this machine might be considered a gambling device. If it appears that the player may receive, depending on chance, something of value or a token of some kind redeemable for something of value or where there is some element which appeals to the gambling instinct, the machine may be considered a gambling device. 27 C. J. 939, 4 Words and Phrases 3029.

We call your attention also to sec. 348.085, relating to games of skill. It is true that under this statute a game of skill may be a gambling device whereby any person will be induced to believe he will receive any money, thing or consideration as a result of any contest of skill. Assuming that this machine is not a gambling device, you are advised that we see no legal objection to the use of it.

JEF
Public Health — Embalmers — Licensed funeral director or embalmer who violates provisions of sec. 156.08, subsec. (4), Stats., may be punished under sec. 156.15 and may have license revoked under sec. 156.18.

December 17, 1936.

Board of Health.

You call our attention to subsec. (4), sec. 156.03, Stats., which empowers your board and makes it its duty:

"To conduct annually, a school of instruction to apprise funeral directors and embalmers of the most recent scientific knowledge and developments affecting their profession. Qualified lecturers and demonstrators shall be employed for this purpose, who may be selected without regard to the civil service law. The board shall give notice of the time and place at which such school will be held to all licensed funeral directors and embalmers, and it shall be the duty of every funeral director or embalmer to attend at least one such school in every three years.

You state that a number of funeral directors and embalmers have failed to comply with the requirement of attending a school of instruction once in every three years pursuant to the provisions of the statute above quoted.

In this connection you inquire whether you have the power to refuse renewal of licenses to such persons under sec. 156.06, or whether the violations in question can be punished only under the penalty provisions of sec. 156.15, Stats.

It is our opinion that you may not refuse renewal of a license under sec. 156.06 to a funeral director or embalmer who is guilty of violating the provisions of sec. 156.03 (4), Stats.

The statutes do not contemplate that licenses are to be revoked by refusal to renew where the applicant for renewal is properly licensed and pays the fees required for renewal under sec. 156.06.

Revocation of licenses is governed by sec. 156.18, which provides for public hearings upon written notice in the case of revocation, and that testimony shall be taken and preserved. It should be noted, however, that sec. 156.13 (5),
makes any violation of ch. 156 or of any rule or regulation of the board, grounds for revocation or suspension of licenses.

Sec. 156.15 (1) provides that any person violating any provision of ch. 156 or any rule or regulation of the board relating to its subject matter shall be fined not less than fifty nor more than two hundred dollars, or imprisoned not less than thirty days nor more than three months.

Therefore, a violation of sec. 156.03 (4), Stats., subjects a licensed embalmer or funeral director to the penalties of sec. 156.15, and also to revocation of license under sec. 156.13, (5), Stats.

JEF

School Districts — Tuition — Payment of tuition to school district No. 6, town of Vernon, Waukesha county, in which Norris Foundation is located, under provisions of sec. 40.21, subsec. (2a), Stats., should be made, subject, however, to statutory limitations as to amount payable per child and to statutory provision limiting amount of state and county aid payable to school district to cost of maintaining and operating school.

December 18, 1936

JOHN CALLAHAN, State Superintendent,
Department of Public Instruction.

You have supplemented the statement of facts contained in your letter of July 6 with reference to school district No. 6 in the town of Vernon, Waukesha county. From the two statements which you have submitted it appears that some years prior to 1928 a philanthropist established the Norris Foundation or Norris Farm situated in the town of Vernon in Waukesha county. To this foundation were sent delinquent children, most of them through commitment, and some apparently through action of parents and guardians.
The farm consisted of approximately 768 acres and had situated thereon buildings which were adapted to and used for the housing of the children and their educational instruction.

In about the year 1928 the territory embraced in the Norris Farm was created as school district No. 6 of the town of Vernon in Waukesha county. The district embraced no territory other than that which composed the Norris farm. What had been the private school for the delinquent children in the Norris Foundation became a public school to which the children of the foundation and a few children of employees continued to go for instruction. Since the creation of this school district in 1928 it has received the regular state and county aid the same as the other common school districts in the state. This aid to the graded school has amounted to approximately $2,000.00 annually.

In 1930 this district was also organized as a high school district and since that time has been receiving regular high school aid under sec. 20.27, Stats.

By ch. 410, Laws 1935, the legislature passed what is now sec. 40.21, subsec. (2a), which provides as follows:

“All children in children’s homes, regardless of whether they were sent there by parents or guardians or by any county, shall be subject to the payment of the legal tuition whenever they attend the public schools of the locality in which the home is located. At the close of each year the school clerk of any district attended by any of such pupils shall certify under oath to the state superintendent the names of all such children who have attended the school in his district during such year, the number of months each attended, and the amount of tuition due the district. The state superintendent shall check such report, and if he finds it correct shall certify the amount due such district to the secretary of state who shall draw his warrant on the state treasurer for the amount so certified. The state treasurer shall forward said amount to the treasurer of the school district and charge the same to the appropriation made by subsection (3) of section 20.25.”

School district No. 6 of the town of Vernon, Waukesha county, has certified to your department a statement for payment of tuition under this section, the said certification covering all of the children in the institution on the Norris
farm. The question has arisen whether your department should certify to the secretary of state for payment the amounts asked for or any amounts for tuition for the children at this foundation.

In XXV Op. Atty. Gen. 46, this office rendered an opinion relative to the term "children's home" as used in sec. 40.21 (2a). It was held in that opinion that a children's home as used in this statute means a regularly established institution or agency organized for the purpose of receiving and caring for children committed there by the county or sent there by parents or guardians. In line with this opinion it was further held by this department under date of August 6, 1936 (not published), that the boys who have been committed to the Norris Foundation are in a children's home within the meaning of this statute but that the children of employees are not.

In considering the question raised the purpose of the act should be borne in mind, which purpose, according to the opinion rendered in XXV Op. Atty. Gen. 46, 47, "seems to be that children supported in an institution should not become the educational responsibility of the particular school district wherein the institution happens to be located, but rather that their education should be a state charge, since the statute goes on to provide for certifying such lists to the state superintendent with the amount of tuition due the district." The following quotation is taken from your supplemental statement:

"According to our records there are 58 children now in the children's home at Norris Farm. Since the boundary lines of Norris Farm are coterminous with the school district boundary lines, we think that the children in this district are resident children the same as children in any other school district. We also maintain that before there can be a tuition charge, children must come from outside the district, and since these children are resident children of the district, there cannot be any tuition. In other words, a nonresident student is a student living outside of the district boundary lines.

"We further maintain that since Norris Farm has been receiving its regular state and county aid because of these resident students, we cannot give state aid to this district as a children's home under section 40.21 (2a). In our judg-
ment, this district must either be a common school district or a children's home, and receive aid either as a children's home or a common school district."

Your interpretation of sec. 40.21 (2a) is based upon the assumption that the words "legal tuition" as used in this statute means tuition to be paid on the basis of residence or nonresidence of children. It is true that generally speaking the Wisconsin statutes with reference to payment of tuition have been based upon the nonresidence of the child in the school district in which he attends school. The nonresidence feature, however, is not inseparably connected with tuition. "Tuition" is defined in Webster's Dictionary as "The price or payment for instruction." See also Linton v. Lucy Cobb Institute, 117 Ga. 678, 45 S. E. 53 and Crow ex rel. Jones v. Clay County, 196 Mo. 234, 95 S. W. 369.

It certainly would be within the power of the legislature to provide for the payment of what it would call "tuition" in cases which did not involve residence or nonresidence of the pupil for whom the tuition is being paid. It appears that in the case of the statute under consideration the legislature has placed upon the state the responsibility of paying aid, which it calls tuition, for all children in children's homes who attend the schools of the locality in which the home is located regardless of whether the child is a resident or nonresident of the district in which the school that he attends is located. This construction is in line with the previously expressed opinion of this department in XXV Op. Atty. Gen. 46 to the effect that the purpose of the act seems to be that children supported in an institution should be the educational responsibility of the state rather than of the particular school district where the child attends school. This statute appears to be to a certain degree complimentary to sec. 40.21 (2), which provides that the school district to which an indigent pupil goes to school shall be compensated by paying such school district aid which is determined upon the same basis as tuition is determined and which section is entitled "Indigent pupils, tuition."

While at first blush it may appear inequitable that the state should pay to school district No. 6 of the town of Vernon, Waukesha county, aid as a common school district and
as a high school district and also tuition under sec. 40.21 (2a), for the reason that the boundaries of the school district and the boundaries of the farm which is a part of the home are identical, yet the apparent inequality is the result of the size of the district and the fact that the great preponderance of the students come from the home. It does not appear to alter the situation, legally, if it be admitted that were it not for the home the district would not have been created. Although the geographical area which composing the Norris farm of itself constitutes a school district, the children’s home is still located in the district and the children “attend the public schools of the locality in which the home is located.”

It is our opinion, therefore that, whether equitable or inequitable, sec. 40.21 (2a) requires that tuition be paid to school district No. 6, town of Vernon, Waukesha county, for the children attending the public schools in the district from the children’s home, excluding the children of employees, subject to the following qualifications as to the total amount to be paid to such district.

Under our interpretation of sec. 40.21 (2a) the words “legal tuition” mean tuition at the rate prescribed by law. (See secs. 40.21 and 40.535.) However, sec. 40.87 (4) (f) provides in part:

“* * * no district shall receive more state and county aid than the operating expense of such school.”

The legislative intent to limit state and county aid which a school district might receive to the operating expense of such school is further evidenced by sec. 76.28 (3), which, after providing for apportionment of utility taxes for school districts, states:

“* * * no such school districts shall in any event receive from this fund an amount, which when added to all other aids received from both county and state, shall exceed the actual cost of operating and maintaining its school.

It is our understanding that the bill for tuition submitted by school district No. 6, town of Vernon, Waukesha county, requests payment of amounts per child far in excess of the amounts allowed under the statute. The bill, therefore, must be corrected to correspond with the statutory provisions as
to the amount of tuition payable per child. A payment of tuition to school district No. 6, town of Vernon, Waukesha county, is moreover subject to the specific statutory requirement that in no event shall the amount of state and county aid received by a school district total more than the cost of maintaining and operating the school.

JEF

_Criminal Law — Gambling —_ Vending machine is not illegal which, in addition to merchandise, issues metal tokens of no value, where tokens are not redeemable for anything whatsoever, and can be used only in operation of amusement device incorporated in machine.

December 21, 1936.

**Earl E. Schumacher,**

_District Attorney,_

Beaver Dam, Wisconsin.

Our opinion is requested on the legality of a combined vending machine and amusement device.

In order to render an understandable opinion on the subject, it will be necessary for us to go into the various features of the device in some detail, and we will, therefore, take the liberty of repeating your statement of facts with some slight condensation.

The machines vend a standard five cent package of mints of recognized quality upon the insertion of a five cent coin and the pulling of the handle on the side of the cabinet. With the package of mints the patron receives a number of tokens as indicated in a window at the top of the machine. This number is known to the purchaser before the coin is deposited. Above the window indicating the number of tokens received by the patron are these words:

"Warning—Before you make a purchase through this vendor, look in the window and see what you can buy for
your coin. Your coin buys a package of confections and amusement tokens.

The quantity of tokens varies from 0 to 65. Located in the center of the machine toward the top are three reels which revolve when the handle is pulled and which contain various characters and comical verses. Adjoining each reel is a push button which, when properly pushed and manipulated, can, by the exercise of reasonable skill, cause the reels to line up in certain patterns and the comical sayings form comical sentences when correctly arranged. The tokens have no value, may not be redeemed for money or merchandise and are loaned to the patrons for future play. In no case will the indicator at the top of the machine indicating the number of tokens to be received move from zero unless the patron exercises sufficient skill and ingenuity in controlling the formation of the reels. Unless all three of the buttons are actually manipulated, the player receives for his coin, one, and only one, package of mints and no additional tokens can at any time be issued by the vendor.

A complete direction card is conspicuously located on the front of the machine. We will not here take the space to repeat the directions, but will merely note that, among other things, the instructions state that the player receives mints for each coin inserted, and that the token rewards are good for amusement only. Mints are vended only on insertion of a coin, and no mints can be obtained through the replaying of the tokens.

It is our opinion that the machine in question is not in violation of the Wisconsin statutes.

Sec. 348.07, Stats., prohibits the keeping or using of gaming devices.

In the case of Milwaukee v. Johnson, 192 Wis. 585, our court held that a machine whereby a player depositing a nickel in a slot was entitled to a package of mints and a chance of obtaining two to twenty trade chips on the succeeding play, was a gambling device. The court indicated that it was the chance of receiving something for nothing which made the machine illegal. It is to be noted that the machine here under consideration is distinguishable in that the tokens are redeemable neither in cash nor trade, nor are
any mints received when tokens are played. The sole attraction here beyond the purchase of mints is the amusement which may be derived from the operation of the machine. Mere amusement is quite different from the "chance of receiving something for nothing which appeals to the cupidity of human nature and to the gambling instinct possessed by human beings," as the court said in the Johnson case. It is the element of getting something of value as a result of playing the machine which makes it illegal. See XXIV Op. Atty. Gen. 536; XVI 56; XIV 96, 528; X 30; I 192.

In so far as the machine is a mere vending device, it is clearly legal. Nelson v. State, 37 Okla, (Cr.) 90, 256 Pac. 939. The vending of merchandise by a coin machine is no more detrimental to the good order of society than is the vending of such merchandise by a salesman. A slot machine is not per se a gambling device. 12 R. C. L. 729, 27 C. J. 869.

It is only when a slot machine comes within the definition of a gambling device or where the player may receive, depending on chance, something of value or a token of some kind redeemable for something of value, or where there is some other element which appeals to the gambling instinct that makes such machine a gambling device. 27 C. J. 939, 4 Words and Phrases 3029.

A machine somewhat similar to this was construed not to be a gambling device in State v. Krauss, 114 Ohio St. 342. Nor is the mere fact that the device is susceptible of being used for gambling enough to make it illegal. Ashcroft v. Healy, 23 Fed. (2) 189.

The fact that the machine indicates the number of tokens which will be received on the next play is immaterial, and if the machine is otherwise a gambling device this feature will not save it. XI Op. Atty. Gen. 23 and 759.

The company which manufactures this machine claims that the amusement feature is simply a novel but very effective method of advertising the merchandise sold through the machine and is based on the advertising principle of attracting the attention of the public and holding this attention while, at the same time, creating an interest in the merchandise by means of the instrumentality through which it is sold.
The only other section of the statutes that might be involved is sec. 348.085, relating to games of skill. It is true that this device might be held to be a game of skill, except that one essential element under the statute is lacking in that the statute provides that any device whereby any person shall be induced to believe he will receive any \textit{money, thing or consideration} as a result of any contest of skill of man or beast shall be considered a gambling device.

Since the tokens here are of no value, a person playing this machine will not be induced to believe he will receive any money, thing or consideration, since the mere amusement derived from playing the machine is hardly a "thing or consideration" within the meaning of the statute. However, we wish to state most emphatically that any attempt to redeem the tokens in cash, merchandise or other things or considerations of value would render the machine unlawful, and that this opinion is rendered upon the assumption that the facts stated in the request are correct.

JEF

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Public Officers — County Highway Commissioner — Under sec. 82.03, subsec. (2), Stats., county highway commissioner who was elected in November, 1935, to fill out unexpired term of previous commissioner, which term would have expired in January, 1937, is re-elected for term of two years when re-elected at November, 1936, meeting of county board.

December 24, 1936.

JOSEPH J. FIEDLER,

\textit{District Attorney},

Mineral Point, Wisconsin.

You state that A was county highway commissioner until November, 1935, when he resigned. B was elected to this position by the county board at its November, 1935, meeting to complete the unexpired portion of A's term, which would
have expired in January, 1937. B was also elected by the county board at its November, 1936, meeting for a two years' term.

You inquire whether, under sec. 82.03, subsec. (2), Stats., B's term is for two years or one year.

It is our opinion that B has been elected for a two-year term.

Sec. 82.03, subsec. (2), Stats., provides:

"Upon his first election the county highway commissioner shall serve until the first Monday in January of the second year succeeding the year of his election, and if re-elected it shall be for a term of two years."

B's first election to fill out the unexpired term of A conforms with the requirements of the first part of the above section.

Since A's term would expire in January, 1937, the election in November, 1935, to fill out that term would enable the person elected to "serve until the first Monday in January of the second year succeeding the year of his election."

Having met this requirement, B qualified for the two-year term provided in the second part of the above quoted section upon his re-election.

This view is in conformity with an opinion in X Op. Atty. Gen. 1191, wherein this department ruled that upon his first election a county highway commissioner serves until the second January thereof, irrespective of how the vacancy occurred. It would naturally follow, then, that the term of re-election would be for two years as the statute provides. See also X Op. Atty. Gen. 17 and XVII Op. Atty. Gen. 549.

JEF
Indigent, Insane, etc. — Poor Relief — Social Security Law — Old-age Pensions — Citizenship — Woman citizen of United States who married alien prior to March 2, 1907, is citizen within meaning of sec. 49.22, subsec. (2), Stats., relating to eligibility for old-age assistance.

December 30, 1936.

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

You request our opinion upon the following facts: A and B are husband and wife, having been married in the United States prior to March 2, 1907. At the time of the marriage A was an alien and has remained so to date. B at the time of said marriage was a citizen of the United States. Since said marriage both have continued to live in the United States. B has made application for old-age assistance. Sec. 49.22, (2), Stats., provides that only citizens of the United States may be granted such assistance. You inquire whether B is a citizen or an alien.

In view of the conflict in available authorities, the fact that B has continued to live in this country since marriage, and our prior ruling that the old-age assistance laws should be liberally construed (XV Op. Atty. Gen. 340), we are inclined to the view that B did not lose her citizenship and is now a citizen within the meaning of sec. 49.22, (2), Stats., and so hold.

JEF

Taxation — Town is not authorized by statute to devote surplus in treasury to payment of county or state taxes.

December 30, 1936.

JOHN P. MCEVOY,
District Attorney,
Kenosha, Wisconsin.

You state that a town in your county has had very little expense in the last few years and has levied no town taxes for several years. A considerable surplus has been built up from the receipts from utility taxes, tavern licenses and cigarette license money.

You inquire if such surplus can be devoted in any manner toward payment of county or state taxes.

This question is answered in the negative.

A town is a mere quasi-corporation, possessing only such powers as are provided by statute. Mulvaney v. Armstrong, 168 Wis. 476.

We do not find statutory authority whereby the above purpose could be accomplished.

JEF
Corporations — Securities Law — Excess income over expenditures of corporation without capital stock organized under general law for religious societies, which income is derived largely from pledges and contributions, is not net profit as defined in sec. 189.02, subsec. (9), par. (a), Stats., which may be used as basis for determination of whether evidence of debt of such corporation meets net profit requirement of sec. 189.08 (1) (b).

December 30, 1936.

PUBLIC SERVICE COMMISSION.

You state that on September 14, 1936, your commission received notice from a certain licensed dealer whereby you were advised that said dealer proposed to sell, subject to the provisions of sec. 189.08, evidences of debt of a certain church corporation organized and located in Illinois. The dealer represented in said notice that the securities were such as fall within par. (b), sec. 189.08, subsec. (1), Stats. You submit the following question:

"Is the excess income over expenditures (income derived largely from pledges and contributions) of a corporation without capital stock, organized under a general law for religious societies, the members of which corporation consist of the board of trustees of the religious society, a net profit as defined in section 189.02 (9) (a) which may be used as a basis for determination whether the evidences of debt of such corporation meet the next profits requirement of section 189.08 (1) (b)?"

Sec. 189.08 (1) reads as follows:

"The following securities may be sold in this state by any licensed dealer prior to the registration thereof subject to the conditions herein stated, unless because of the unsound financial condition of the issuer, decrease in earnings, or other conditions affecting the soundness of the securities the commission shall find otherwise."

Sec. 189.08 (1) (b) reads:

"Evidences of debt issued by the owner of a property, business, or industry which has been in continuous opera-
tion for not less than two years, and whose net profits for each of the last two years, or whose average annual net profits for a period of not less than the last four, nor more than the last eight years, plus interest during such years on funded debt and on such portion of the current debt which it shall be proved was incurred for net expenditures for fixed assets, and will not be outstanding after the present financing, aggregate not less than one and one-half times the annual interest charges on such debt and all other debt of equal and prior rank therewith to be presently outstanding.

Sec. (b), quoted above, mentions "evidences of debt issued by the owner of a property, business, or industry which has been in continuous operation for not less than two years, or whose average annual net profits, etc." and you submit the following observations:

"Is a church a property in operation? We think not. We think of an apartment building in operation when it is being rented by the owner to others. But a church is not usually rented. As a property, it does not produce. Instead, the members contribute towards its upkeep; others may help to do so. If no pledges or contributions are made, it cannot remain in existence. Pledges and contributions must be made to pay for its upkeep, for light, for heat. The function of the corporation in whose name the property is generally lodged for convenience, is not making profits. Its activities are the building of character, spreading the doctrine of the religion in which the society is interested, dispensing charity and doing missionary work. Such activities are not for pecuniary profits. Taxing divisions of state and federal government recognize this by exempting such societies from the payment of income and other taxes.

"Neither is a church a business or industry. It does not trade or manufacture. Its entire organization is not for profit. It is true that the contributions made by the members may be in excess of the required amount for expenditures, but such excess can hardly be called a profit in operations. It is instead an indication that members and others are in accord with its principles and are willing to support it. The excess is not distributable to the members but is always used for the specific purposes of the society. The income may be increased at will of the members by increased contributions. There is usually no fixed amount which must be contributed and the members may always pledge more or less as they see fit.

"It would seem that it is not the intent of the statute that the excess of contributions over expenditures of such insti-
tutions come within a definition of profits—sec. 189.02 (9). To give a parable which it seems is just as logical: Suppose the members of a family, for the purpose of buying their supplies and paying expenses of the household, place certain sums of money in a fund and from that fund pay all their bills. Would one say that the unused balance is a profit? If that were so, the members should be able to become wealthy by the simple process of increasing their contributions to the fund.”

You also state:

“It is true, of course, that the fund of such family (and also the net worth of a church) may become large and show an annual increase, but surely only in proportion to the contributions made to it and the amounts taken from it, but the increase in our opinion cannot be defined as profit and is not a result of the operation of a property, business, or industry.

“The statutes pave the way for the sale of securities of such a corporation, based entirely on the value of the land and buildings, as may be seen by reading paragraph (a) of section 189.08 (1) and is as follows:

‘Evidences of debt secured by mortgage or deed of trust upon land and buildings thereon if such mortgage or deed of trust is a first lien, and the total amount of such securities does not exceed fifty per cent of the then fair market value of the land and buildings included in such mortgage or deed of trust, less the amount of any special assessment taxes unpaid.’

“We have advised the dealer that the issuing corporation is not the owner of a property, business, or industry, such as in our opinion is contemplated by the statute, and that the excess of its income over expenses is not within the definition of profits.”

We have had a public hearing on this matter in which O’Meara & O’Meara of West Bend and Mr. Harriman of your department appeared and made oral argument. The O’Meara firm submitted a brief in which they argued that a religious corporation, being the owner of a property whose net profit complied with the terms of section (b) above, comes within the provisions of said subsection and is not barred therefrom by reason of its being a religious corporation, or because its profits are not distributable among the membership. They argued that there should be no discrim-
ination as such profits accrue directly to the benefit of the creditor.

Sec. 189.02 (9) (a) reads as follows:

"'Net profits,' or 'net income,' of a business, property, or industry, as used in this chapter, shall be the profits after full and adequate provision for consumption of capital, taxes, interest, and all other proper charges."

After careful consideration of this matter we hold that your conclusion as above stated is correct and we are of the opinion that your question must be answered in the negative, thus arriving at the same conclusion that you did in this matter. It is not necessary to restate the grounds which you have so well stated as quoted above.

JEF

Real Estate — Real Estate Brokers — Sale of cemetery lot conveys interest in real estate and one engaged wholly or partly in such business must have license. Whether or not one is engaged wholly or partly in such business within meaning of sec. 136.01, subsec. (2), par. (b), Stats., is question of fact depending upon all of surrounding circumstances.

December 30, 1936.

William H. Stevenson,
District Attorney,
La Crosse, Wisconsin.

You state that a certain individual has purchased a cemetery on a trustee's sale and is now selling out lots for burial purposes.

You inquire whether a real estate broker's license is required, in view of the fact that the lots are sold by the individual owner and not by agent.
Our attention is called to XI Op. Atty. Gen. 688, holding that the sale of cemetery lots cannot be conducted by unlicensed real estate brokers, which opinion you do not believe covers the present situation.

In that opinion this office construed sec. 1636-225, Stats. 1921, which required a license of any person, firm, or corporation who

"for another, and for commission, money or other thing of value:

“(a) Sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an interest or estate in real estate.”

We agree that the opinion referred to is not in point in that the individual here in question is not selling "for another," although we consider the opinion controlling to the extent that it holds that the sale of a cemetery lot conveys an interest in real estate.

The problem to be considered here is the applicability of sec. 136.01, subsec. (2), par. (b), Stats., which defines a real estate broker as one

"Who is engaged wholly or in part in the business of selling real estate, whether or not such real estate is owned by such person, firm or corporation."

It is to be noted that this provision makes immaterial the question of ownership and the test is whether or not the person “is engaged wholly or in part in the business of selling real estate.”

This raises a question of fact in each case and it is not always easy to apply the test. It can hardly be contended on the one hand that an individual engaged in some full time business other than real estate would need a real estate broker’s license because he owns a lot or two which he is trying to sell. On the other hand, a person who expects to continue over a period of time as a means of livelihood, either wholly or partly, in the enterprise of acquiring and disposing of real estate would probably need a license.

Ch. 136 provides for severe penalties for its violation. Under sec. 136.16, a fine of as much as five thousand dollars
may be imposed in addition to imprisonment up to six months. Consequently the statute should be strictly construed and ought not to be extended to doubtful cases. One cannot be said to wilfully violate a statute if he must guess what his duty is thereunder. Brown v. State, 137 Wis. 543. Statutes creating crimes are to be strictly construed in favor of the accused and must not be held to extend to persons not covered by words used. Fasulo v. United States, 272 U. S. 620, 628, and United States v. Resnick, 81 L. ed. 103.

It is not the purpose of this opinion to define with mathematical exactitude the number of sales which must be made or the amount of time which must be devoted to the selling of lots to bring one within the definition of being engaged wholly or in part in the business of selling real estate. It is a question of degree, depending upon all the surrounding facts and circumstances in each case.

JEF

Accountancy — Board of accountancy should proceed to complete registration for year 1936 and collect fees therefor although time has nearly expired in which public accountants practiced without completed registration with approval of board.

December 31, 1936.

BOARD OF ACCOUNTANCY.

Your secretary has referred us to ch. 481, Laws 1935, now ch. 135 of the Wisconsin statutes. Among other things the statute provides, in sec. 135.08, as follows:

"The board shall, in December of each year, upon application made by any holder of an unrevoked Wisconsin certificate as a certified public accountant or an unrevoked Wisconsin certificate of authority as provided for in this chapter, issue a registration card, which card shall be good until December thirty-first of the next succeeding year, unless the said certificate shall sooner be revoked."
Likewise, subsec. (3), sec. 135.09 provides:

“All persons to whom an annual registration card is issued shall pay an annual fee of five dollars therefor. All partnerships or corporations to whom an annual registration card is issued shall pay an annual fee of ten dollars. Interim registrations shall be at the full rates as above specified.”

You state that during the month of December, 1935, the board solicited and received applications for registration for the year of 1936 from those then presumed to be eligible for registration, viz., the holders of unrevoked certificates as certified public accountants. The board required that such application be accompanied by a check or money order covering the required fee. Shortly after the first of the year of 1936 and before the board took action on said applications, the constitutional and other features of the act were attacked in the circuit court of Dane county. The decision of the circuit court was favorable and the case was appealed to the supreme court. The supreme court, in turn, upheld the act in its entirety. You state that after fully considering the matter, the board decided to take no action on the applications for registration for the year 1936 while the court case was pending, and held, in its possession, the applications and accompanying checks or money orders in the form in which they had been submitted.

You state that the board is now asking for registrations for the year 1937. You inquire:

“Shall the board complete the registration for the year of 1936 and collect the fee therefor, and also proceed with registrations for 1937 and collect a fee for 1937? In other words, can it be said that there was, in fact, a registration for the year 1936 such that a fee should be collected, or shall the year of 1936 be disregarded in so far as registrations are concerned?”

We are of the opinion that the board should complete the registration for the year 1936 and collect the fee therefor and also proceed with registration for 1937 and collect the fee for 1937 as provided by this statute. The reason that the board did not fully complete the registration for the year
1936 was because it was believed that there might be a decision holding the law unconstitutional, in which case it would be necessary to refund the money paid in. This could be more easily done by not cashing the checks and issuing the registration prior to the final decision of the matter in the supreme court. You are advised that it is your duty to collect the fees for the year 1936. The fact that no registration was in fact consummated does not make any difference because the board has not waived the right to collect the fees. In fact if no fees were collected or collectible, then those accountants that were entitled to registration but were not registered could be prosecuted for not having the required authority. This would, of course, be treating the accountants unfairly so the board has not prosecuted them but has waited until it definitely knew that the law was valid.

JEF

Corporations — Indigent, Insane, etc. — Minors — Legal Settlement — St. Colletta School at Jefferson, Wisconsin, is not home, asylum or institution for care of aged, neglected or indigent persons, within meaning of sec. 49.02, subsec. (4), Stats., as amended by ch. 408, Laws 1933.

December 31, 1936.

Board of Control.

You state that certain backward minor children were sent to the St. Coletta Institute at Jefferson, Wisconsin, where they remained until their majority. During this period their parents paid for their care at the institute so that they were not supported as public charges. Now that these children have reached their majority the institute wishes to have them committed to a proper state institute and has petitioned the county court of Jefferson county for that purpose.

In reference to the above statement of facts you submit the following questions:
1. Does the St. Coletta Institute come within the purview of sec. 49.02 (4), Stats., as amended by ch. 408, Laws 1933?

2. Could the inmates described above of the St. Coletta Institute gain a legal settlement in the town where that institute is located by remaining there for a period of one year prior to the enactment of ch. 408, Laws 1933, which provides that time thus spent in certain described institutions shall not be considered as part of the year necessary to acquire a legal settlement?

The St. Colletta Institute was organized as a non-stock, nonprofit corporation under the provisions of ch. 180, Stats., on February 25, 1913. It was organized "to establish, maintain and promote a school or schools for the education and training of feeble-minded and epileptic children, and provide a home or homes for feeble-minded or epileptic adults." Its articles of incorporation were amended September 1, 1931, changing the name to "St. Coletta School" and prohibiting the admission of epileptic children and adults generally. Apparently the school is not considered a charitable organization.

The relevant portion of sec. 49.02 (4), Stats., referred to above, reads as follows:

"* * * The time spent by any person as an inmate of any home, asylum or institution for the care of aged, neglected or indigent persons, maintained by any lodge, society or corporation, or of any state or United States institution for the care of veterans of the military and naval service shall not be included as part of the year necessary to acquire a legal settlement in the town, city or village in which said home, asylum or institution is located, nor shall such time so spent be included as part of the year necessary to lose a legal settlement in any other town, city or village of this state. * * * ."

It is clear that this section only applies to a home, asylum or institution for the care of aged, neglected or indigent persons maintained by a lodge, society or corporation, or to a veteran's hospital or institution.

From the facts given above, it is clear that the St. Coletta School was not organized for the care of aged, neglected or indigent persons, but only for the education of backward or exceptional children.
It is therefore the opinion of this department that the St. Coletta School is not such an institution as is contemplated by the provisions of sec. 49.02 (4).

It is not our purpose by this opinion to attempt to determine the legal settlement of any particular child attending this school, but we merely say that the school as such is not such an institution as is described in sec. 49.02 (4).

It is unnecessary to answer your second question, as it is not material in view of the answer given to question one. However, we call your attention to XXV Op. Atty. Gen. 335, which may be of interest to you.

JEF

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Civil Service — Counties — Ordinances — Public Officers

Deputy Sheriff — Where county civil service ordinance for selection of deputy sheriffs is in conflict with provisions of sec. 59.21, subsec. (8), Stats., sheriff is not bound thereby in appointing deputies.

December 31, 1936.

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

You state that on August 12, 1936, the county board of Racine county passed an ordinance providing for civil service examinations for deputy sheriffs. This ordinance was amended in some particulars last month after examinations had been given, as we are informed.

You inquire if the sheriff is bound by the provisions of the ordinance and amendment thereto in the matter of appointing deputies.

It is our opinion that the provisions in question do not comply with the requirements of sec. 59.21, subsec. (8), Stats., and that the sheriff is, therefore, free to make appointments as otherwise provided in sec. 59.21.

The statutory authority for appointment of deputy sheriffs by civil service is found in sec. 59.21, subsec. (8) (a), Stats., which provides:

"In counties having a population of less than five hundred thousand, the county board may by ordinance fix the number of deputy sheriffs to be appointed in said county which number shall not be less than that required by paragraphs (a) and (b) of subsection (1) of this section, and fix the salary of such deputies; and may further provide that such positions shall be filled by appointment by the sheriff from a list of three persons for each position, such list to consist of the three candidates who shall receive the highest rating in a competitive examination of persons residing in such county for at least one full year prior to the date of such examination. The director of the state bureau of personnel shall upon request of the county board conduct such examination according to the methods used in examinations for the state civil service and shall certify an eligible list of three names for each position to the sheriff of such county who shall thereupon make an appointment from such list to fill such position within ten days after the receipt of such eligible list. The county for which such examination is conducted shall pay the cost thereof."

The ordinance in question makes provisions for the appointment of a civil service commission and makes it the duty of such commission to request the director of the state bureau of personnel to conduct written examinations. Originally the passing grade in such written examination was to be 70%. County physicians are to examine applicants physically. The passing grade on this examination was originally to be 70%. The commission itself is to examine as to character, reputation, morality, and general qualifications. The passing grade for this part of the examination was likewise set at 70%. The ordinance then provided that the following weights should be attached to these three examinations:
### Written examination
- 50%

### Physical examination
- 20%

### Character, etc.
- 30%

#### Total
- 100%

All competitors rated at 70% or more on each examination were to be eligible for appointment.

We understand that examinations were given pursuant to the foregoing provisions and that thereafter the ordinance was amended so as to eliminate the 70% requirement in so far as it applied to each of the three branches of the examination, and that a final average of 70% was to be sufficient according to this amendment.

When the rules are changed after the examination is given the transaction is likely to be viewed with suspicion, even though there has been no actual impropriety or thought of favoring the competitors benefited by the change. We are satisfied that the legislature intended that a county should either abide by the old system of selection of deputy sheriffs or that it should adopt a real merit system under sec. 59.21, subsec. (8), Stats., and that the rules should not be changed after an examination is given and before appointments are made, although we wish to make it clear that there is no thought of questioning the propriety of the motives prompting the amendment as far as this department is concerned.

Furthermore, it is apparent from the statute that when requested to conduct an examination the director of the state bureau of personnel is to conduct such examination according to the methods used in examinations for the state civil service. Suffice it to say that the methods used in examinations for the state civil service are not in accord with the provisions above mentioned, such as written examinations to count 50%, physical examinations 20%, and character, etc., 30%.

Also, the statute provides that appointments are to be filled from an eligible list of three, whereas the ordinance provides that any eligible who has been within reach for three separate vacancies without being appointed shall be dropped from the list with certain exceptions. This would seemingly conflict with the statutory right of an eligible
person to remain on the list, even though not appointed, subject, perhaps, to a reasonable term of eligibility.

We therefore conclude that the ordinance in question is in conflict with the provisions of sec. 59.21, subsec. (8), Stats., and hence invalid. Consequently the provisions of sec. 59.21, Stats., authorizing the sheriff to appoint his own deputies may be followed. Since the sheriff may appoint his own deputies, it follows that he may choose from the eligible list resulting from the examination, if he so desires, although he is under no legal obligation to do so.

JEF


Under sec. 14.53, subsec. (3), Stats., it is not duty of attorney general to advise district attorneys on purely city matters.

December 31, 1936.

WALTER B. MURAT,

District Attorney,

Stevens Point, Wisconsin.

You state that at the city election held in Stevens Point in April, 1936, the electors voted in favor of a charter ordinance abolishing the city manager form of government.

In view of this change, you ask quite a number of questions concerning election or appointment of city officials under the ordinance, which questions arise out of some apparent conflicts between the ordinance and the statutes, and you feel that serious consequences may arise if there is to be any possibility of illegal appointments or elections under the ordinance, since some of these officers handle assessment and collection of county and state taxes, serve on the board of review, appoint election officials, etc.
Without attempting to go into the various questions asked in detail, we believe it is sufficient to say on the question of possible illegality of the appointment or election of a city officer that if an office has been lawfully established and a person exercises the functions thereof by color of right, but his election or appointment is illegal, his official acts therein cannot be successfully attacked in collateral proceedings, but in all such proceedings his acts will be held valid and binding until he is ousted by the judgment of a court in a direct proceeding to try his title to the office. *In re Burke*, 76 Wis. 357. See also *Trogman v. Grover*, 109 Wis. 393, 395.


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